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HANDLING COMMERCIAL MATTERS  
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**VERBATIM REPORT**

## SESSION 1

So what we thought was we would start of by every one introducing themselves. I saw that most of you have got ..... over the years and in this particular session. But if you could start of with from the back please.

Good morning. ....

Good Morning

My colleague and I are from Delhi High Court. I'm Hima Kohli and this is Justice Manmohan Singh. Good Morning Ma'am.

Ah Yes! Good Morning, Good Morning.

We haven't had the occasion to meet everybody since we just about landed only this morning. So it would be a pleasure to interact and get to know all of us. Thank you.

Good.

Hello, I'm Lalit Kumar from J Sagar Associates.

One of the Speakers.

Yeah. Good Morning Everyone.

Myself Sudhir Singh from Patna High Court.

I'm A.R. Rao from Hyderabad.

Hyderabad That's good.

I'm Ramesh Dhanuka from Bombay High Court.

Nitin Jamdar from Bombay High Court

SH Vora from Gujarat High Court

Good Morning. I'm Harsha Devani from Gujarat high Court

Division Benches from the different High Courts (laughter) ...

You will find one more. Debansu Basak . Calcutta High Court

Good morning everybody. I'm Pankaj Mithal from Allahabad high Court.

Ashoke Dasadhikari from Calcutta high Court.

Good morning everybody. I'm Justice Dharam Chand Chaudhary from Himachal Pradesh High Court

Good morning ladies and gentlemen. I'm Ravindran from the High Court of Kerala. Malayalees world over are celebrating Onam this week. Happy Onam to all of you.

Oh. Thank you and same to you as well.

Good morning Ma'am and good morning to all of you. I'm Justice Rohit Arya from Madhya Pradesh High Court.

Good morning everyone. I'm Michael Zothankhuma from Gauhati High Court.

So good morning to all of you and as the objective of every session in the academy is always knowledge sharing. So we have got a very good set of extremely knowledgeable people on a topic which may seem a little abstruse to most of us. In fact judges are required to be jack or Jill of all trades and at the same time we are required to be master of a particular case. The law may be something which we have not had an occasion to deal with. The idea is to give you some background of this . Clearly it will not be as in-depth as an entire session on the topic would be. But nevertheless an overview and as

you will find over the days, everything is derived from those basic principles of contract, sale of goods and so forth. This perhaps we should have upturned the series of lectures and had it contract and sale of goods and worked towards the really complex form of contractual law and goods. So we will start off.

The first.. I would like to get something clear from all of you. Would the speakers like the questions to be asked during the session or after the session? Interaction? So then we can do that. So the speakers .. Each session is for about an hour. Mr. Vora must forgive me for having taken about 3 minutes of his time. But .. so please do feel free to ask questions, interrupt and ask questions whenever you want during the session. So we will start off. The first session is Investor Protection and Disclosure Measures through the Exchange Eco-system for the Securities Market. Have you all a copy of this? You must be.

I had a ... Where is my bag?... Yes that is it. Thank you. Now Mr. Vora is the Chief Regulatory Officer of Bombay Stock Exchange Ltd. This is Mr. Vora to my right. He has more than 18 years of rich and varied experience in the area of compliance regulation. He is the Chief regulatory officer of BSE Ltd. and heads all the regulatory functions at BSE. As a board member of Indian Clearing Corporation Ltd. he oversees the activity of the clearing corporation in a supervisory capacity especially in the areas of regulation. Other board memberships include Nation Power Exchange Ltd, United Stock Exchange Asia Index Private Ltd. and so forth. And he is also a member of the risk management review committee of SEBI. He also chairing the task force on cyber crime for the affiliate members consultative committee which is a part of IOSCO. What is that?

That is the International Organisation of Securities Commission. All the securities commission... it is a world organization where all securities commissions come together and exchange ideas on world policy on regulation.

Oh I see. Would you like to take over?

Sure Ma'am. First I would like to extend a warm welcome and a very good morning to all of you. I'm indeed deeply honoured to be here and would love to share my experiences and also learn from your experiences. So without much ado I'll just move on to my presentation. As Ma'am has mentioned please feel free to interrupt me at any point of time if you want to add or give any comment.

In terms of the exchange the Bombay Stock Exchange. I will just take a minute. BSE is the oldest exchange in India. It is celebrating its 140 years this year. It is older than the Indian National Congress. And it is kind of having the highest number of listed companies in the world at around 5500 companies. So investor protection and disclosure becomes a very important component especially when you have a large number of listed companies especially when you have a large number of investors currently at around 2.5 crore who have registered with the exchange platform and to inculcate the basic ethos of why this is important is that to inculcate a sense of confidence a sense of trust in the system so that if tomorrow something goes wrong I would have an effective and a quick redressal system to kind of address issues if any. This is notwithstanding the judicial process which is there. There are specialized courts for securities market. The hon'ble securities appellate tribunal. But given that there is an entire ecosystem which the exchange as a self regulatory organization has put in place to kind of deliver justice in the quick manner

So the first part is the companies. The entire ethos of companies which get listed on an exchange. Historically there has been a listed agreement between an exchange and a company which is intending to list on the exchange platform. So from a legal stand it becomes a pari pasu kind of structure where both are parties to a contract which is being signed between the exchange platform as well as the company. This is undergoing some changes. The company and the stock exchange which were at pari pasu is now being graduated into something which is called the listing regulations. So the Securities and Exchange Board of India SEBI which is a regulator for securities

market in India has notified listing regulations . Now the entire essence of this structure is the exchange will become a regulator for companies which are listed on a platform and graduate from being a contractual agreement. So the entire listing agreement will kind of be graduated in something called as the listing regulation. By this what is gonna happen is that companies will be regulated entities under the framework and exchanges till now which had only the power to suspend companies from trading will have powers to impose monetary penalties, have powers to impose sanctions against certain employees of the company for wrong doings. So the basic intent of moving into listing regulations is to empower the self regulatory organization into giving it more power to take speedy action against wrong doing.

So if you look at currently the listing agreement. Now an obvious question which would come is if there are 5500 companies listed, would there be 5500 different listed agreements? The answer is no. SEBI has mandated a standard listing agreement. And the exchanges though being a party to the contract and the companies being a party to the contract have no power to modify any part of that listing agreement. The intent of doing that is to bring a standardized format so that every company is subject to the same kind of rules and regulations. The main part of the listing agreement comprises of 55 clauses. The main heads under which the listing agreement is prepared is mainly disclosures. So India has moved from an approval based regulation to a disclosure based regulation. Why this has moved to that is because it is a democratic form of markets where information is provided to the prospective investors whether they should invest or not. The decision to invest lies with the investor. The decision to invest doesn't lie with the approving authority. So until the 1990s there was a controller of capital issues which was kind of a formula based approval based regulation. With the advent of SEBI coming into play in 1992 slowly around 1995-96 we move from an approval based regulation to a disclosure based regulation. So all facts and wrong doings if any of a company has to be put out in the public domain. So it is in a sense caveat emptor where the buyer is given or the prospective applicant is given

information about all the aspects of the company for him to effectively decide whether he wants to invest or not.

I have a question. Is it mandatory that anyone other company has to be listed?

Yes Ma'am. If you look at the companies act and I will go back to the 1956 companies act because I don't know the relevant provisions under the 2013 act. But section 73 which says that if you have more than 49 investors you have to be public and if you are public you have to be listed. Till now we had around 25-26 exchanges. You could get listed on any of the exchanges. But now with most of the exchanges kind of winding up or being asked to close down. They are around 3 main exchanges which remain. Out of which on the equity market there is just practically 2 exchanges. It's the Bombay Stock Exchange and the National Stock Exchange which are the exchange platforms which remain. So companies are required to list in case they want to access public funds. The reason is that there has to be free transferability. There has to be orderly price development or the price discovery of that stock and free transfer because if I am going out to the public there has to be a national platform for that applicant to dispose off his shares if he wants to.

Next part is from a disclosure stand point keeping in mind corporate governance. Corporate governance is something which has been mandated by regulation that there has to be an independence of the board of directors you have to have requisite number of independent directors which are free and able to think independently from that of the dominant shareholders. Also there has to be an audit committee. Now why is all this there. The intent of all this being there is that the shareholders should get the right information, the correct information. There should not be any faulty reports coming out because he is basing his decision to invest in the company or not to invest in the company based on the information that is coming out. So there has to be a fairness in the dealings of the company and it should also be perceived to be fair in terms of the entire framework.

The third is the setting up of corporate actions. It includes dividends, bonuses, all these actions which are being taken has to be done in an orderly manner and there are rules which are prescribed in which the company is bound to follow.

Fourth is maintenance of website. With the technology boon happening in India, website has become a very common form of public dissemination of information and therefore it has been mandated that there has to be a website in which the company gives all its relevant clauses and the relevant information for public dissemination. The other 3 or 4 are mainly investor related like transfer and transmission of shares so a company is bound to transfer shares but cannot refuse to transfer. Now one may ask that why such a clause was prescribed. There is a historical background. There have been companies who have refused transfer because if a competitor for example was buying into the shares of the company, companies in the past had been refusing transfer of such shares. Or in case of transmission of shares they would kind of refuse to transfer it to the legal heirs of the person who has died. So these have been inculcated into the regulatory system that the company is bound to do all these things.

The next three are some of the new clauses. The appointment, removal or resignation of key management personnel, change in the directors have to be informed and the process of name change. Again name change has a very interesting perspective. In the early 2000 there was a software boon which happened in India. A lot of companies started renaming themselves as software companies with the obvious intent of fraudulently selling their shares to the people at large because they were giving a halo of belief that this company is in the business of software. And there were lot of applicants which kind of applied and they were not really software companies. They had just changed the names. So there was a regulation which came into place that at least 50% of your revenue should be derived from the business in which you are name change is occurring. Now its kind of... it's the way we have functioned that sometimes we want to be as macro as possible not be very intrusive in our regulation. But the size

of the country the various types of companies which we face some times mandate us to become micro managers in certain aspects specially with respect to investor protection. So this is one of those aspects.

Then the issue of further capital. This also is a provision that had been misused a lot in the past with preferential allotment. Preferential allotment means I am a public limited company but I like to give a particular shares to only a certain category of people because they are investors into my company. Now the pricing at which this is legal and legitimate under the companies act. But the pricing is something that was misused and abused a lot. A very low price would be given to a particular category of shareholders and thereby they having a higher beneficial right into the company vis-à-vis the other shareholders. So the concept of fairness was not inculcated and that's why the rule came in that when you price a preferential allotment, you need to have an average pricing of the last 2 years sorry the last 6 months or 15 days which ever is higher. This is to ensure that the remaining shareholder do not get a raw deal.

In terms of .. we went a step further as a self regulatory organization where there was a monitoring adequacy required of the listing agreement. So for many many years there was just a requirement for companies to file the relevant clauses with the exchanges and the exchanges would disseminate it on their website in the interest of the investors at large. But there are certain critical clauses which required more .... From the 55 clauses there were certain clauses which were considered to be extremely important for a decision making for an investor. So the first is the financials of the company. Clause 31 and clause 41 talk about the annual report. Lot of companies used to not give an annual report or give a very shortened version of an annual report. There were regulations surrounding what should come into an annual report as part of the companies act and that needs to be mandatorily put out in the public domain. 41 is one of the most critical clauses which talks about quarterly financial results. Lot of companies used to not post their financial results which becomes impossible for an investor to invest into a

particular company if their financials are not out. On clause 35 & 36, is the shareholding pattern of the promoters. It's a very important clause because it is important for the investor who is investing not knowing who the company is, that what the dominant shareholders or the promoters, what is their shareholding in that company, what has been the change in the shareholding in the company and I will come to that in more detail as we go on. This clause 36 which is dealing with material events. Now this is an extremely important clause which is under high level of scrutiny by the exchanges. What all material events are mandated by regulation for a company to disclose. I will give you an example. Suppose there is a large automobile company which has had a fire in one of its main plants. The question to be asked is Is it a material event? The answer is Yes because it is going to significantly impact the production of that company. It is going to significantly impact the reputation of the company and therefore that is going to get factored in into the price of the stock. So it is important for the investor at large to know that such a material event has occurred and therefore clause 36 requires a company to disclose in a timely manner the material event which has occurred. Any significant litigations which are there which the company has been subject to because that can have a material impact on the operations on the functioning of the company or any new agreements which have been put in. Now why are these required? There is also a linkage to the insider trading regulations. Because insider trading regulations talks about that if there is any price sensitive information and it is unpublished and if I as a shareholder is in the know of that unpublished sensitive information and have acted on it, I am subject to insider trading. SO when I go through this clause 36 and I disclose this information on to the public platform then it no more remains an unpublished price sensitive information. There is corporate actions some of that is disclosure of the book, closure dates to just put it very briefly book closure is when a corporate action is occurring the register of shareholders is closed that all the shareholders will be subject to the corporate benefits which are going to be given which are dividend or a bonus. And there are details of the fixing of a record date.

I will just move on this part quickly because I want to spend a little more time on the case studies which I had prepared as a part of my presentation. So clause 49 is composition of the board. There is a report on corporate governance as to whether they have been following, descriptive text on what is the extent of corporate governance that has been followed, the details of the audit committee which is a part of the company. In terms of the information for the investors, there is an appointment of a company secretary, a registrar and transfer agent to ensure that the transfers occur quickly and a functional website with basic information on the company.

This is something which I would like to now emphasize. This is where we now move forward in 2014. Where lot of companies we found out were complying with the listing agreement in a proper manner. But there were an equally high number of companies which were not complying with them. Now the only action which the exchange could take was to suspend the company. Suspension of the company means denying the right of the investor to freely transact on the exchange platform. Now what we came to realize and that's what we thought within the regulatory fold, this was in 2009-10, that there were large number of suspended companies where the shareholders were unable to freely transact and therefore it was denting the confidence of the investors. So that is why we appealed to the regulator that you need to delegate some part of objective powers to the exchanges to financially penalize companies because what was happening was that lot of dominant shareholders would purposefully not comply with the listing agreement so that their shares would get suspended on the exchange platform. For example, if a company is due for a takeover, the easiest way to ensure that a takeover does not go through is to have my stock suspended on the platform. So it was harming the investor for a fault committed by the company and the dominant shareholders. So the cause of action was different from where the crime was being committed. And that's why we kind of went through. 55 clauses would be difficult to penalize but 4 clauses which were essentially done. One was the shareholding pattern, second is the disclosure or material events, third is financial statements and fourth is

corporate governance. These were the 4 clauses which companies if they did not file these with the exchanges there were monetary fines which were upfront disclosed. There was no principle of natural justice in a sense required because the companies knew upfront that if I do not comply within this period of time we will be penalized with this amount of penalty and if that continues for 2 quarters then the stock gets transferred into something which is called a trade for trade settlement. Its being a little technical out here. Trade for trade settlement would essentially mean is that if I have bought the stock and sold the stock on the same day. So I have bought 1000 shares of 1 stock and sold 500 shares of the same stock on the same day, under the normal settlement I would only have to pay for 500 shares. I can net off between my purchases and my sale. But when it moves in to a trade for trade, my 100 shares also I will have to settle as a buy and my 500 shares sale also I will have to settle. SO obviously the cost of doing transactions for a manipulator becomes more expensive because he will be having to settle on both the aspects. If the company yet doesn't comply then the stock is suspended. There is an early warning signal given to the market at least 6 months before the stock gets suspended. But even after the suspension of trading in order to ensure that investor protection is.. it continues, such stocks are allowed to be traded only once a week. So even if the stock is suspended the trading of the stock continues once a day. So this is the paradigm shift which is happening in terms of investor protection being the focal point on the regulation which is getting drafted.

The non-compliance never gets complied with so to speak. Non-compliance of the clauses.

No. they do get because when the non-compliance takes place, they are imposed heavy financial penalties and if they want to move back, what we have done is that the dominant shareholder's DEMAT account gets frozen and that not only in the shares which they are dealing but also the entire demat account. So before the suspension of trading occurs, the punch is given to the dominant shareholder who will then ensure

that the company complies. OS it is building pressure on the company by ensuring shareholder activism, by creating this framework. That's the basic intent in coming out with this kind of a module. It is very heartening to know because I do speak on international forums that this is kind of the unique provisions which no other jurisdiction in the world has this kind of jurisdiction law where the investor protection the suspension comes as a last phase to ensure that the investors are taken care of.

There is also a monitoring adequacy of disclosure which is again on these 4 clauses and there are more than 500 queries which have been raised by the exchanges to the companies. So this is a pro-active step which the exchanges take by questioning companies formally when there are certain discrepancies found across comparisons of various filings which they have done. The questions are then put out on the public domain websites of the stock exchange and the companies reply is also put out on the exchange website. This is to give a democratic approach that the person sitting in the market is aware that these are the discrepancies of the companies in which he or she has invested and these are the kind of responses which they are getting. This is to promote shareholder activism.

There is also the disclosure of price sensitive information which I had said so I will kind of really skip this because I would like to go on to the case study. This is a company which gives prior intimation of a Board meeting with respect to the company is to be considered. So there is just a cryptic disclosure made that a regulatory report which the company is to be considered and the company submits the outcome of the board meeting because that's required under the regulation that every critical aspect of board decision are to be disclosed to the exchanges. The outcome consists of only sentence. It's a major action being taken against a company and the outcome consists of only one sentence. Now one approach out here would be is that let me keep quiet. It's the company and the shareholders. Let the company kind of put out what ever it wants to. This was the situation till 2010. So as an exchange the question which we had before us

was should we raise further clarifications or query to the company or further clarifications be sought looking to the brevity of the disclosure for the benefit of the investors. So any views out here? What would you believe? Should it be done? Should it not be done? Because the exchange is not the shareholder of the company so there is no privity of contract but as a self regulatory organization I have a fiduciary to the investors at large. Sp this is the dilemma which an exchange faces. Any views on this?

You should ask for further disclosure and that would be for the benefit of the investor. Primary duty is to the investor and you are discharging your duties.

That's right

How to protect the investor's interest

And in the same way equation what is the internal mechanism which keeps check about the disclosures in a periodical manner.

so I think very good comments.

you have 5500 listed companies, how do you plough through all of this. One company quietly puts in a disclosure

We have a very sophisticated technology system framework which we are put in place. So its all an electronic framework. There is a team... The system throws out alerts on what are the disclosures being made and there is a team which sieves through all the disclosures, sieves through all the media reports because certain times media reports which come out, they may disclose it to the media but don't disclose it to the exchanges when the regulation requires it to disclose it to the exchanges first. So that's the time that's where we are coming into play and your question and even to your question is that we sieve through all this so that we are objective in our disclosures. Its not that to some companies we will look at the disclosures some companies we will not look at .

we treat all companies in the same line. And in terms of whatever disclosures are being made we question the companies. And you are absolutely right. Yes, we did question the company as the investors or the stakeholders need to be informed about the board's stand or clarification vis-à-vis the regulation findings. Most important thing is that the board of directors have a fiduciary relationship with the investors. So they need to give their views not just a statement of fact that a regulator is possibly taking action against the company but what is the board's view on that. Whether it is going to be a serious finding its not going to be a serious finding what's going to be the impact on the financials of the company what is going to be the forward state all these need to come out in a graduated fashion so that investors at large are aware that whether they should remain invested in the company or they should exit from the company.

..... without naming the company some issue which is relevant which would have prompted SEBI to ..... some instance without naming the company. Any particular issue which is of primary importance to the investor

sir I will put out one case which is obviously out in the public domain widely reported and the companies act got amended primarily because of that corporate fraud is satyam computers where the company ironically had been awarded this previous year the best corporate governance and within a year the same company came out the dominant shareholder Mr. Raju came out and there were misstatement of financial accounts for 3 - 4 years.

That is because of the prompt you had... in the system,

No this was because he on his own had to because he was not able to .... Ok the question you are raising is about the prompt. Yes. There was interesting case about a media company. I will not name the company where a large regulatory action by a tax authority was done. And they gave a very cryptic disclosure. The Exchange BSE went after and put out these disclosures and kept on questioning and finally it was a very

significant penalty which was imposed on the company. And they were then even penalized by the market regulator for improper disclosure of information. So like this there are umpteen number of examples but this is one of the more significant examples where the activism by the exchanges has warranted the company to disclose more. So in terms of that has had a very significant impact where companies are concerned

..... companies have to disclose the litigations.... What is the control of stock exchanges on .... litigations are concerned.

Sir the way clause 36 is worded is that the onus is on the board of directors and the company to disclose material events. So if the material is not a material litigation because for a 5000 crore company a 1 crore litigation may not be a material litigation but for a 2 crore company a 1 crore litigation is a material litigation. It's a very subjective issue for the independence and judgment is left to the board of directors to disclose what is material and what is not material

there is no guideline ..... disclosed....

Sir we have put out broad principles as a guidance note for clause 36 because material events is a very subjective terminology very difficult to frame regulation around it. But what we could frame what we have framed and what we have is a guidance note where the first principles are laid down what should be disclosed how it should be disclosed what is the extent to which it should be disclosed. Finally the decision whether to disclose or not is on the board of directors.

but stock exchange or SEBI can ask for further particulars

Absolutely not only that sometimes we receive complaints from the investors that the disclosure made is not adequate in their opinion and they give proof then we ask the company for comments why they have not disclosed and if they give us satisfactory response that is also put out on the public domain but in case they are making a further

disclosure a question is put that why you did not do it in the first instance. The entire process is in the process of being collated down because this is something new process which we have started but its showing some very interesting aspects of disclosures which are being made based on this

.... Non disclosure of this ..... but in that case an investor may quit or whatever may be but any other action to protect interest of investor.

Sir we have recommended that as I had told Ma'am that the demat account of the promoters is frozen . it's a very effective tool because when the demat account is frozen he cannot sell those shares and in case the other regulation which is in the process of getting evolved is declaring the promoter as unfit or not fit and proper so he cannot raise any further money from the securities market. The third action which could be taken is the board of directors which are there on such companies should also be declared as unfit so they cannot become board of directors with any other companies. So this is the way you kind of inculcate

Somasekhar Sundaresan ....these are measures taken by the stock exchange, the SEBI act the fourth session is on that. As a range of powers that SEBI as a regulator can intervene which .... Monetary civil penalty to directions of remedial nature... prosecution so there is a four pronged... attack under the SEBI Act which the capital market regulator can use. .... What the stock exchange does ... listed company.

one of the example that he has given is that ..... but all this supposed the prices come down in that market ..... he cannot raise any money ... but what will happen to the investor the money is already engaged .....

Somasekhar SundaresanSir that would be the subject matter of a civil suit he can raise as a tort action a regulatory body can only punish under the current scheme of the law. Restitution would necessarily have to be a tort action . in fact all of US securities law

evolved from tort action not so much from ... can disgorge but on a ... like this there not... ill gotten gains in the hands of the company so there is nothing to disgorge from the company its like a negligent action. We are in Bhopal. It's a negligence in the conduct of business..... So punitive is one measure restitution and remedy would be a matter of tort and claim for damages

I'm just going a step backwards. Just now you talked about disclosure of material or nonmaterial events now who ultimately takes a final decision at the stock exchange level because you are a regulatory authority you also have power to penalize the company. Your main object is to ensure investor is not betrayed. Under such circumstances if the disclosure is found to be material in the perception of the investor but is reverse in the perception of the company who ultimately takes a final decision.

So the way it happens Very good question I think what we can force as an exchange is force the company if an investor lodges a complaint with us that the disclosure is not proper.

that's the view point of the investor.

I'm just coming to that. So the company has to reply as to why they believe it is not a material event why they have not disclosed. That is also put out on the public domain. If yet the investor persists then the Securities exchange board of India SEBI can take action

that is beyond the purview of the exchange.

that's right but sir another point which needs to be kept in mind that while we have good investors we also have bad investors

there is possibility of manipulations.

sir there are some frivolous complaints also made so that's the way as in common parlance it is called people who blackmail the company.

So there is check and balance.

exactly.

who exercises this power

sir the public domain is the first level of check and balance where the query of the investor

that is not determinative.

yes so the next process is the Securities exchange board of India will take up this matter if the investor persists with giving proof that why this has not occurred and then penalize as I gave the example of that company which we persisted the investor also persisted and finally the company was penalized in a heavy monetary penalty for non disclosing the material event.

so that is with the SEBI

yes

sir one question this events .. litigation

Brother just before you start we have just about another 12 minutes. Now although we have a session wise but really it is going to be a flowing thing I mean you know next session is not cut and dry different from this so you can always raise the question that you have not only in this session but also in the next session. But I would like to keep to the time frame. If you think it can be raised in the next session could you please reserve it for the next session. Thank you.

So in terms of the second case study was that a complaint was received against company alleging that it has not disclosed a regulatory action impacting its financials. Company replies that it has appealed against the said action and the outcome of the litigation is awaited. So the judicial system is used to kind of delay the disclosure of that information that the matter is sub judice. Question Should the company for the benefit of the investors provide a brief summary of the ongoing litigation as the outcome would substantially impact its financials? Any views.

..... depends on whether there is a stay .... The question is simple which my brother also pointed out if there is a case of winding up by the creditors and the amount is so huge ultimately the company is wound up the investor is going to be suffering the ... therefore it has to be disclosed

absolutely

there has to be a distinction between the filing of a winding up petition and its admission. If a winding up petition stands admitted it has attained some amount of finality so to speak for the purpose of affecting an investor. If you ask for a petition detail winding up petition presented but not admitted then there will be n number of disclosures to be made by a company. In company matters if it is a frivolous litigation... but what I think the answer should be is that in .... a company which has attained some amount of finality in the judicial process must be disclosed but if it in the process of still being adjudicated whatever is the level of the adjudication then the company may not be required to disclose but that might impact its dealing with the others. I have a company who has a Danish suit filed against them a frivolous one at that and the claim for damages might exceed the entire paid up capital.

Sure. Right

in terms of percentage there should be disclosure.

what we find in the company court in Bombay high court is that the petition the company advocate normally ask for early hearing of the petition filed for winding up because many winding up petitions are filed and kept as it is just to pressurize the company. That could be one of the dangers that

Absolutely

if you talk in terms of the money in the nature of the things winding up petition is one type of litigation which is a material event and the if it has been admitted the company should disclose it to the investors to the shareholders.

YES. You are absolutely right Even if the outcome of the litigation is not yet known from a benefit of shareholders they need to put out what is the possible expected outcomes and whether that could have a material impact or not on the financials.

So I will just move on to the theory so I want to spend more time since we have only 9 minutes left. The next case study is on the shareholding pattern clause 35 . The company submitted Share holding pattern for quarters ending December , 2014 and March, 2015 on time. No fines levied as submission on time. However, the exchange did a comparison of entity XYZ listed as promoter with 10% holding in December 2014 but not shown as promoter in shareholding pattern for March, 2015. Very very innocuous way I file a shareholding pattern and don't show this promoter. Should this be scrutinized in terms of the Monitoring the Adequacy of Disclosures? The answer is yes. Clarification was sought from the company as there was no corresponding disclosure made under the Substantial acquisition and takeover regulations regarding the sale of 10% holding. The company subsequently filed the relevant disclosures so we can see that by pushing companies that there is somebody looking at you watching you analyzing what you are filing there is a higher level of compliance which has happened.

ON clause 49, on corporate governance Company ABC has group companies listed at the Exchange. The Annual General Meetings of all the group companies are scheduled on the same day at the same venue with a gap of 30 minutes. So there are 6, 5 or 6 companies I think it was reported on the media but for 5 or 6 companies which had an AGM just for 30 minutes in the same venue. Will the aforesaid trigger a query from the regulators. If you look at it objectively why should I be bothered. He is complying with the law but is it complying with the law in spirit ? the answer is no. half an hour is possibly too short a time for shareholders to raise queries.

is it meaningful

Is it meaningful?

the question he asked is was that meeting meaningful . that is what he said.

Exactly exactly. So yes we did raise a query companies ensured you hit the nail on the head had ensured that the shareholders would be enabled to discuss and raise concerns during the allotted time. So again this gave a very strong message that its not only what is required under the regulation which is being monitored but a lot of subjective assessment which is being done constantly.

it is fact wise because there may be some sort of urgency ..... what meaningful is ..... points may be there but that can ..... but that means every fact .....

whatever that is it has to be disclosed. Sir till now it used to be pushed under the carpet because no body would question them. This is the new paradigm which we are moving into. Company XYZ has initiated the process of appointment of Independent Directors because corporate governance I am required. However, regulatory clearances for the same are required. Till such time, the composition of the Board is not compliant as per the provisions of independent directors the company, therefore, is unable to approve its financial results leading to a delay in submission. Would this result in penal action

levy of fines? Because of paucity of time I will not wait for your views. In this case No Fines to be levied for late submission since it was beyond the control of the company. It has done everything in its wherewithal to ensure that it remains compliant but which is beyond its control. But a query was raised an explanation was sought it was put out in the public domain and the investors at large were known. But no penalties were levied.

I will quickly skip this its mainly the auditors report is also being looked at so we have devised it into form A and form B. Form A is a clean audit report and Form B is a qualified audit report. A qualified Audit report is an analyzed by a group of exchanges and the regulator with the institute of chartered accountants and there we find that adequate actions are not taken and we have asked the companies to restate its accounts. So 205 companies have been scrutinized and forwarded to QARC by BSE out of which 35 companies have been advised to restate accounts. This is something very unique to the world also. No where in the world you have this kind of scrutiny which is being done. Now moving to next part is about the client and broker relationship. I will move very very fast and this is just the broad framework. The printout of my presentations is there with you. If there are any questions during the next sessions I am happy to answer anyone of them. But basically you have the SEBI the securities contract regulation act and rules and the regulations issued by SEBI. You have the SEBI broker and sub broker regulation which prescribes the code of conduct and the rules by laws and regulations of the exchange and circulars that have been issued thereon which determines the client broker. So how has the entire relationship evolved. It was a model agreement so every client which enters into a broker for a dealing had to sign an agreement a standardized format. It had ... there was a meaning in doing that because if there is no change which is possible or at least the minimum clauses are required most of the time the investors like we do in banks the crosses are made you sign without reading any of that. So what we felt was from an investor protection standpoint we did away with the agreements. We said that its anyway prescribed that under the rules by laws and regulations of the exchange so the broker is required to follow that and what is given to the investor in

standard rights and obligations. So that is a one pager it is easier for a person to read and understand what are my rights and obligations and that had simplified the process. So this is to ensure fair dealing execution of instructions of clients on time and prevent misutilisation of funds and securities ensure a timely payment and provide a quick and effective remedy for redressal of the disputes. This is just a pictorial representation on how redressal happens for clients against the broker members. So if an investor has a complaint he lodges it with a portal which SEBI and exchanges have prepared called scores. That is forwarded to the exchange, the exchanges forward it to the broker member. The broker member then goes in for a conciliation process . so there is and IGRC investor grievance redressal committee. It an conciliation process where they sit face to face trying to resolve the complaint. If that fails either parties do not agree then it goes in for a formal arbitration mechanism which the exchanges have prescribed. It is also an appellate arbitration. This is where BSE was unique it was the only exchange in the country which had an appellate arbitration prescribed under its rules and by laws. SEBI like this idea and has now prescribed it for all exchanges to follow and the important thing is from the broker member a deposit is locked to the extent of the arbitration. If he loses the arbitration then the deposit is released to the client or to the broker. So this makes the entire process and the interesting thing about scores is that the investor is able to like a pattern is able to view every part where the complaint is pending. So there's lot of transparency and disclosure which is being made a part of the system. I will just go through this quickly. I wanted to go through some case studies. Ma'am I will just take 2 minutes or should I stop.

you can take 2 minutes I think and then finish.

so client A was registered with a broker and deposited securities with the broker. The broker misutilised the clients collateral securities X. investor files a complaint with the exchange. Broker fails to resolve the dispute. Exchange refers the disputes to the conciliation mechanism which is called the IGRC. Order passed by the IGRC deciding

the claim amount which the broker has to pay to client based on the order exchange sets aside the amount from the deposit of the broker. Broker does not inform about filing of arbitration reference and the exchange released the set aside amount in the favour of the client so it's a speedy judicial process which is being inculcated. A similar kind of thing but the only difference is there is a the conciliation mechanism which the exchange set aside that he Referring the matter for arbitration. He moves forward. Despite that the exchange is expected to release a part of the amount from the investor protection fund to the client for him to fight the case further. So there is some money given. If he loses the case in arbitration he can go in for further appeal he has to refund back that money. This is another process which the exchange has put into place. And the final thing which I want to say is that when a broker can be declared a defaulter if he doesn't honor his arbitration amount or the IGRC amount. So if the arbitration has a set aside and you are going to 20 lakhs he will be declared a defaulter. And the balance there is an insurance given from the investor protection fund to a ceiling of 15 lakhs per investor. It is higher than the banking insurance which only gives 1 lakh per depositor. The exchange.. the investor protection fund give 15 lakhs per investor.

Who pays the premium for that?

ma'am we have a fund which is a fairly large fund and its created out of the transaction fees which. A certain percentage which goes into that. All fines and penalties which we charge from companies get credited into the investor protection fund. So it is to ensure that whatever proceeds they don't become income of the exchange otherwise there is a conflict of interest.. so all fines and penalties go under the investor protection fund and that's how it gets. So I think I will stop out here.

you have taken 3 minutes. Very good. So now we have a tea break. I request if we can start the next one at 10.30 sharp because each session is so full of interesting facts that every minute counts. So please be back by 10.30.

## SESSION 2

Certainly familiar to me. I had met him many years ago and kept in touch for quite sometime. But he is a lawyer and heads the securities... his name is somasekhar sundaresan. Somasekhar heads the Securities Law and Financial Sector regulatory practice at JSA

J Sagar Associates

J Sagar Associates another acronym . I tell you these acronyms are going to kill me off one day. RIP . JSA is a national Indian law firm. He has been in practice for the past 16 years. He has transactional practice as well as he litigates. He has appeared before various authorities including Securities and Exchange Board of India SEBI , the Securities Appellate Tribunal as well as the Supreme Court. And he has also been part of policy and legislative drafting and been a member of the working group on foreign investment in India and that working group has submitted its report in July 2010. And also was a member of the committee which drafted the takeover regulations of the Securities Exchange Board of India and he is a consultant of the financial sector, legislative reform commission which submitted a report in 2013 which contains the draft Indian financial code which contains new financial legislation for India. He is most importantly member of the Securities and Exchange Board of India's high level committee to review and draft new regulations governing insider trading in India and he is also a member of a committee to write a new policy committee of the ministry of finance to write new policy for issuance of global depository receipts foreign currency convertible bonds and external commercial borrowings. He is a member of the committee of the reserve bank of India to review corporate governance in the Indian banking sector. At present he is serving on the task force for the ministry of finance to set up a financial sector appellate tribunal in India . he is active member of the capital

markets committee. He is a special invitee to the FICCI FICCI's Steering Committee and an active member of its Capital Markets Committee. He serves as a director of Oxfam India. Somasekhar authors a fortnightly column titled Without Contempt on investment law and policy in the Business Standard. He is also a columnist on mainstream law and justice in the Mirror newspaper. He is a guest contributor to the Indian Corporate Law Blog. Today he is going to speak. Somasekhar why don't you . would you like to take over . yes

good morning everybody. Speaking to judges I prefer to stand. I think I will take over from where nehal left and before I start I will make some broad opening remarks about the nature of securities legislation in India it's pretty much modeled in the manner that the world regulates securities laws. Having said that there are some Indian peculiarities that creep in. that we as a legislative policy approach in India have preferred a prescriptive approach rather than let society evolve on its own standards in terms of tort law or judge made law. We tend we basically follow an approach of show me a problem i will give a law. Legislative answer to social problems drives the thought process and a judges too have said that if the law makers cant make law then we will the law and that's the debate we are hearing about. So a lot of that creeps into securities regulations and you are gonna hear in the fourth session about SEBI and its scope of powers. Its very unique sort of body and the supreme court has commented on it. The 3 arms of state the legislative the executive and the enforcement the judicial functions are all rolled into one organization. So are there adequate checks and balances in that organization to segregate the quasi judicial role from the legislative role to those morph in. those are subject matter of the new draft Indian financial code where we have tried to say that today we are the 3<sup>rd</sup> largest economy in the world. Not many realized that India in power purchasing terms is the third largest economy in the world and our financial sector laws have not kept pace with that scale and size of what such an economy needs. So very often judges are called upon to fill the gaps and we are a common law country and equity drives our thinking. The gaps get filled with

interlocutory measures or the inherent powers of the court step in. so I thought I will bring everything into context a bit and before I get into a very technical subject I thought I will keep this overview at the forefront. To take it aside it reminds me of one joke there is a joke about a very naughty young boy who tell the priest that Father will you allow me to smoke when I am praying. Father says what sort of a question is this what sort of a religionist are you how can you smoke when you pray. Let me ask the question differently when I am smoking may I pray and the father says of course you must pray you must pray at all times. So what if you are smoking you must pray. So a lot of our policy formulations in the financial sector sometimes fall into this. There is a high degree of subjectivity that comes in. and if there is one line I could put across most of the questions get asked most of these questions are mixed questions of fact and law unlike some other technical areas like tax where you can really finesse things into a purely a question of law versus a question of fact. Here invariably almost every question would be a mixed question of fact and law which is why when you say should you make a disclosure or not . the pending litigation be disclosed or not. I would have thought many would say it depends. And it depends because it is a mixed question of fact and law and that really makes life very difficult both for administrators of the law and for ladies and gentlemen here who have to hear challenges to the administrative decisions. So to justice very often wrong law gets laid down and you are all very conversant with that classic relation between law and justice. So I thought I should highlight that although this may be business law and may seem abstruse and seemingly hyper technical, it all boils down to the same set of problems that we need to grapple with in determining most of the questions that arise. So in that light I am going to talk about listing and we heard from the stock exchange about life as a listed company and what happens once you list. There is one body of law that applies once you list. Listed companies that is takeover regulations. It governs acquisition of shares in listed companies. Another body of law that would apply is insider trading and fraudulent practices that is the next session that you will hear about. So there are a lot of dots to

connect across these sessions. If there are questions that are lingering from a previous session or questions that emerge from a future session just feel free to pause and ask. We talked among ourselves the four of us and we thought we need to break this down in terms of burden but essentially it is one thematic day which we will have to deal with. Also we close at 3 but 3 of us are available thereafter as well so if you want to huddle around a cup of coffee and you want to continue our conversation we could do that as well. We will stick to the same format of interrupting and asking questions. But please do give me the liberty of not answering a question at that moment and saying I will come back to it later so we will manage time as well. In a court of law I always answer a question that is immediately put to me but in this session I thought if there is something that could be a little more efficiently managed by answering a little later I would request you to allow me to say that I will come back to the question in a bit. So I will drive straight to the content

Justice Ruma Pal The first question will be asked by him because in the previous session I stopped him by asking he will be able to ask that question in this session.

right. So we heard about life as a listed company. I just wanted to put a very short slide. This began as a bilateral contract and now it is being elevated to a statutory reference. Securities contract regulation act actually refers to the listing agreement in a recent amendment and as nehal told us it is being converted into formal subordinate legislation so that it actually becomes a in rem rather than in personam. An agreement is typically bilateral but because SEBI uses a model and doesn't allow modification of the model it is a bilateral in personam contract being treated like a in rem body of law and that's problematic and that problem will be solved by converting the content into regulation. Once you are listed you have to maintain a minimum shareholding of at least 25% in public hands. Now again social reality in India is we may have listed companies but we look at them as Tata company Birla company Ruia company. We don't recognize socially that a company and a business is distinct from those who drive

it is distinct from those who own the majority of it . so we do have a social reality of promoters who still control a company with very minimal stake in it. We have real life examples. Promoters stake in Satyam was only 7% but with 7% the promoter managed the company. Tatas have controlled Tata Motors Tata Steel with 16% 17%. They have just about come to 25% now but they are promoters they call the shots they run the company. So this whole tension between the controlling shareholder and the other shareholders that defines most of our securities regulations and if you bear that theme in mind some of what you are going to hear in subsequent slides will make a lot of sense. The underlying social reality is protect the public shareholder from the controlling promoter shareholder and that rings out through and through most of our regulations. Then you have this current SBI chairman there is this lady called Arundhati Bhattacharya the first lady to be SBI chairman. She said we have this tyranny of like qayyamat se qayyamat tak. She said its like quarter se quarter tak. Once you are a listed company every quarter you have to disclose your numbers you have to report what happened in that quarter market reacts to how you performed in that quarter . your price moves on the basis of that quarter. Quarter is 3 calendar months Jan to March, April to June and therefore the tyranny of the quarterly reporting has started eating into how the company is organized. Even their business plans. So gone are the days when a listed company would boldly take a decision which will yield fruits 5 years down the line. Because they are gonna be punished for 20 quarters before. So there is a lot of literature on whether this sort of a regulatory framework has gone to a sort of overreach of trying to say that a stock market is a live glasshouse day on day hour by hour. Is it impeding the real growth of business where people are to take long term decisions and make plans which have a lifespan of 5 to 10 years. The literature is out there. And some of what you are going to hear grapples with this tension as well. So we heard a lot about material developments from nehal so I am not going to elaborate on that. So once listed we go straight to the takeover regulations. I only use these slides as an outline to navigate the discussions so its not as if I am going to talk about every single point. So

please feel free to raise your hand and ask questions if something doesn't make sense. Once a company is listed it becomes amenable to what is called the takeover regulations. Some call it the takeover code some call it the SAST regulation. This regulation governs substantial acquisition of Shares and takeovers. The essence of this regulation is that if a substantial shareholder exits a company please try and make the same terms available to all other shareholders exit. So I began by saying look at a Tata company a Birla company. Picture Tatas exiting Tata steel or Tata motors. Public shareholders are shareholders in this company. They have always believed in this company they have bought this company they held the shares because they believe it is a Tata company. Now when the controlling shareholder changes hands a 25% owner leaves and brings in a new person who now controls this company the law says its changed material enough to enable the public shareholders to tag along and sell their shares to the same person who is buying out a substantial shareholder on the same terms. this is by regulation. .... you hear of all those Hollywood movies about people a complete takeover of a company those.... India prescribed by subordinate law..... which actually lays down specific provisions when in the eyes of n law an acquisition would be considered substantial enough to mandate an exit offer to the other shareholders. That's what we are gonna talk about in this slide. So when any shareholder crosses 25% he is required to make a public announcement of an open offer to buy out shares of the minority shareholders on virtually the same terms and I say virtually as a hedge and we will talk about the price. So the law explicitly mandates the trigger points at which an acquisition of shares in a listed company would mandate an open offer by public shareholders shareholding. So the first threshold is 25%. You cross 25% make an offer to buy shares from the public shareholder. Now if you have already crossed 25% you are allowed to buy 5 % within a financial year and no further open offer is required. But if you desire to buy more than 5% within a financial year you have to make one more open offer to buy public shareholding. Here the law says the degree of control and this is popularly called creeping acquisition. Very often when we bring

these matters to supreme court, supreme court lawyer says it sounds very creepy that you have such phraseology and jargon but when you're holding creeps up from 25 and beyond the law provides for a tolerance threshold of 5 % within a financial year if you cross 5% you got to make an offer to acquire the shares from the public. Lets say you hold 27% or 30% in a company or you hold 35% in a company, chances are you will get most ordinary resolutions passed because as you know in company law resolutions are votes of those present and voting. Unless 100% shows up 35% could well be 50%. But arguably if 100% shows up 35% is 35 and you are not in control of a company. If 35 becomes 45 arguably in all practical circumstances you control an ordinary resolution because unless the last man standing is present at the AGM your vote will not be just 45 it may well be 90 show up you are still majority. Therefore the degree of increased voting power is also the subject matter of substantial acquisition. So holders who are above 25% are allowed to buy 5% in a financial year without triggering another open offer. If you have to trigger if had to buy more than 5 you would trigger 1 more open offer. The third provision is a problematic one which is about change in control and here again the whole smoking a praying sort of unruly element comes in. the provision basically says irrespective of your shareholding if you acquire control over a listed company you trigger an open offer for shares. Now control the definition worldwide is just one the right to control the management decisions and policy of a company. You take competition law you take tax law you take any provision across the globe. This is not a problem you can solve by legislation. It is necessarily a mixed question of fact and law ..... I began by saying ..... Tata steel company... so irrespective of voting and shareholding rights ..... change in control will also trigger an open offer to acquire the public shareholders shares. Now we will speak about some of the exemptions like banks when they lend you money they really say that you cant move a muscle without checking with us. If you get some payment it goes into a hypothecation account so there are specific activities in ordinary course of life which have been exempted from the mandatory obligation to make an open offer. We will talk about it. I

have got a slide on that. But the heart to the code is these 3 provisions. Acquisitions of 25% or more, acquisition of 5% or more in a financial year, acquisition of control without regard to degree of shareholding. This is the heart of the takeover regulation. One judgment I would commend to read is Swedish Match AB versus SEBI in the supreme court. It's a brilliant exposition of the law under the earlier regulation the 1997 regulation and it speaks about these 3 domains about how you could attract regulation 3 (1) in this regulation. It used to be 10(1) under the old law. 3(1) and 4 or 3(2) and 4 . but you could never attract 3(1) and 3(2) at the same time. So either you are above 25 or below 25. It can't be that you are being asked to make an open offer under both. To complicate this situation this sounds all very simple so far. The complexity comes from this . 2 fundamental complexities I need to talk about. The term acquirer is defined as any person who acquires or agrees to acquire shares. So the minute you sign a contract amenable to specific performance to acquire shares you are an acquirer in the eyes of law. The obligation to announce an open offer is triggered by that agreement. People often exchange mails saying I'm a seller of 30% at X you do a reply saying agreed. That's a contract. I mean we know that Indian contract act does not require you to put things on stamp paper. You know often the business guys have weird notions of law they say stamp paper pe nahi hai we only called it an MOU but very often you also find invariably inadvertently erroneous triggers of open offers being made because you can have a handshake and have a verbal.. circumstances demonstrate that parties have agreed. You may rule in a given case that there exists a contract and therefore that triggers an open offer. These are some of the complexities that emerges. More important one is persons acting in concert. Persons acting in concert as a class are taken together for determining these 3 thresholds. So the person acquiring would himself have acquired only 15 but he may be in concert with a person who already holds 20. The law clubs the 2. The definition of person acting in concert is 2 or more persons who have a common objective or purpose of substantial acquisition of shares voting rights or control over a target company. So to have concert you have to have an object target

company in mind and acquisition of that target company in mind. And actually I have brought a pen drive with a whole bunch of resources and case law relevant to this body of regulations. Have left it with the course co-coordinator. By the time you leave this course you will have individual pen drives or a cd you can carry these and some of these judgments really make it very clear. I have also kept in that cd 2 reports. One was under Justice Bhagwati's chairmanship and another is Mr. Achutan's chairmanship which is the basis of this new law and this new law articulates some of the thinking behind it as justice pal said some of these subjects need an entire day for individual sets of regulations so I have put those together in this cd which you will get and if you read them in the context of the presentation it would be easy and illuminating. One judgment in that pack would be one by justice pal in the case of Technic Coflexip. It's a French acquisition of a another French company which had a multiplier effect and led to a change in control over a company in India. Picture this a multinational you have a proctor and gamble and Hindustan lever. We understand these 2 companies easily so I will take them. And picture proctor and gamble buying unilever in UK each of these has a footprint in India which is also a listed company. Hindustan Unilever in a listed company. So this acquisition abroad would trigger an open offer in India. Under the earlier law it was not very clear that an indirect acquisition would necessarily trigger an open offer in a very complex matter in that Technic Coflexip judgment. You will find the ration laid down to say that the common object or purpose has to be quay a target company. If the objective of proctor and gamble in this example was to buy unilever and Hindustan unilever lets say is 1 % of the global business of the unilever you cant logically say that your objective was to buy Hindustan Unilever. Your objective was to buy something else and an incidental trigger happens in India. Under the new law this analysis has been done away with and there is an explicit provision that where there is a international acquisition which results in a change in control regardless of how material or how relevant the Indian listed company may be .... Would trigger an open offer in India .... Where the competition regulators world wide tend to take the view

that we are bothered about impact .....our jurisdiction ... law now makes it explicitly clear .....even within India you could buy a listed company which had a listed subsidiary and if you buy the first holding company you trigger 2 open offers from the company you take over and the company it already has. One of the lawyers in such a case gave an example of a cow and a calf. If you buy a cow with it comes the calf you got to do your duty to the calf as well. So the indirect acquisition is an explicit provision in regulation 5 and that need to be borne in mind that regardless of the scale and materiality of the Indian listed company to the larger transaction it would indeed trigger an open offer but the law goes on to lay down 2 parameters. if these parameters had been available in tax law we would never had the Vodafone problem. this parameter basically says that if the Indian listed company represents 80% of the deal you are doing it would be deemed to be the object of your transaction. the Vodafone deal was all about buying a Cayman company and the assessee saying this is a Cayman purchase and not a n Indian purchase. but the Indian assets were of the Cayman asset. I mean the Cayman assets meant nothing but an interest in India. so the whole debate about fiscal statues should be strictly construed that's been the norm absen gar. but the securities regulation have to be purposively construed. if 2 views are possible the view that furthers your object and suppresses the mischief or the view that supports the legislative intent is the one to be followed. again these are subordinate law . the law maker doesn't take courage to tell you what his intent is and that takes me to another joke of mine that we are a multilingual country working in English. Somebody thinks in Tamil writes in English. Somebody is thinking in Gujarati correcting in English, third guy is thinking in Haryanvi adding value. The net result comes out a product which the author struggles to clarify what was he thinking. So now of course we have pushed for explanatory notes for subordinate legislation as well and a new beginning has been made in the new insider law where every sub regulation has an intent principle stated underneath. So it is a mixture of rules and intent in the law. That is not there in the takeover code. The committee wrote it but SEBI did not adopt it because they did not

want to spell out exactly what they meant in some of these regulations. So some of these lead to litigation issues. So if it is 80% plus the law will assume that the larger intent of the transaction was to acquire the Indian listed company. If the Indian listed company was 15% of the larger trade it would be incidental but you would need to compute an explicit value and attribute value to the Indian listed company. If it is below 15% you don't need to attribute value to it but nevertheless you got to make an open offer. How we will see the subsequent slides. Offer terms ideally you would think of equitable treatment. If a promoter exits the offer should be to everybody else to sell whatever they want. That's the recommendation of the committee. But the law essentially says that you can offer for 26%. Now don't ask me why 26% what's the wisdom behind it. There is no logic available. People attribute logic saying 25+ 26 is 51 and therefore that's logic but to my mind as somebody who authored the draft which said that there should be no restriction on the size of the offer frankly it makes no sense. But earlier it used to be 20% it has been bumped up to 26%. The ideal international norm is that you offer to buy any share that comes your way. India has not gone down that path. Our promoter companies and our acquirers have the capacity to influence policy to say don't make it expensive to make open offers so we have a 26 % threshold for an open offer. So this offer is to ... 26 %.. let's say a promoter.... There is one offer possible. You don't have to buy 26% . you can walk up and say I like this company. I'm going to tell the public whoever wants to sell shares here I am as a buyer. It is a completely voluntary acquisition. Here the offer size would not be 26 it would be a minimum of 10. The law has to put some line to say let's get serious when you are doing a public transaction. So the line is drawn at 10 %. Offer to buy at least 10 if you want to make a public transaction of buying a listed company shares. Of course if you do a voluntary offer with a minimum of 10 you are not allowed to breach the 75% threshold. You saw in the first slide that the public shareholding has to be a 25% which means the non public controlling shareholder can't go beyond 75. So if you want to do a voluntary offer you are not allowed to cross 75 as a result of your offer. But if it is a

mandatorily triggered offer it may end up beyond 75 and we will talk of that problem with the law when we talk of delisting. So you could have a bit of a yoyo you agree to acquire 60% you make an open offer for 26 and assume all comes in . 60 + 26 brings you to 86. So provision of law forces you to breach another law. In 12 months you got to comply with that law and if then actually your intention is to delist you got to start all over again. And the delisting threshold is 90 and we will talk about delisting in the last part of my slide. So some of you don't even have to attribute the complexity is manmade. all laws are manmade but some of these are avoidable.....30% in Tata steel ..... it is very easy say of the .... But in the proctor and gamble if you are buying a company in which has an Indian listed subsidiary and ....you don't even have to attribute an explicit price to that stock. The law gets into regulating how to compute that price and many of you all have sat on company benches and you looked at share swap ratios and disputes around share ratios. I mean you bring in 2 experts and they can give you 10 values. The same complexities emerges in those scenarios as well. One of the judgments in your pack is GL Sultania versus SEBI a Calcutta case of 2 intimate enemies. You know when sibling fight they throw everything in the fight so these were intimate enemies so everything was thrown in. eventually the supreme court ruled on what should be borne in mind when you ascribe value to a share when the other parameters are not available and the similar rules to the Hindustan lever ratio saying court will not substitute its wisdom for an experts wisdom. All those principles have been reemphasized but remember in a share swap ratio you are only blessing relative value between 2 companies. Here you are actually blessing a positive absolute value of a price per share. And that's a nuanced difference between the 2 where you have to get into valuing the company and getting satisfied that its being done in a fair manner. So now that we have the slide back the minimum offer price is broadly broken into 2 parts. Price computation for companies whose shares are frequently traded and companies which are infrequently traded both. Frequently traded is defined as 10% of all the shares issued by the company is the traded volume in the stock market. Let's say a

company is listed but it should also be traded. There should be interest in the market for that company. If the trading or the interest that transpires from that interest in volume terms is more than 10% of the company's total number of shares the law deems it to be a frequently traded company. If it is a frequently traded company the law assumes that the market price is a fair price. The market is the best judge of value frankly. If people are willing to put real money to buy or sell a share at a particular price you would respect the market and say that's the price. But if the traded volume in the market is not even 10% of the total number of shares you question if in fact the market is a correct barometer of that fair value. If there are just 3 or 4 people who have not even traded 10% of company are they dictating price that is amenable to manipulation. Since those consideration come in the law treats frequently versus infrequently differently. So when it is infrequently traded you got to ascribe and compute the value. We spoke of Sultania's case. Also SEBI at the expense of the acquirer can commission an independent valuation to second guess and test whether the valuation that you proffer is a fair valuation or not. So that's as far as the size and price are concerned. On price there is also something that is to be borne in mind. Very often in India we attribute extraordinary ingenuity to our society. We Indians beat ourselves is my personal theory. We beat ourselves a lot more for problems that are human anyway and happen across the globe and we say only in India are we like this. So we believe Indians are far too ingenious and we find solutions for every law which is true but is equally true for all jurisdictions is my limited point. So like other jurisdictions we also have a provision to say if there is a contemporaneous transactions between the transacting parties or affiliates of the transacting parties and you let share price masquerade through that transaction you will have to the regulator will have the power to pull that value and attribute it to the share price. So take an example. You have a share purchase agreement in my example at 100 per share. In parallel you sign a land purchase from the promoter of the company or you buy a brand or you give a consulting contract or you give a non-compete relationship for which valuation is not objective. And you say I have bought

the listed company for 100 crores for paying the promoter of the listed company 50 crores for consulting that its gonna give you over the next 3 years. This can be tested. Is he capable of giving that consultation. Is he really capable of is the business something that lend protection to non compete really. Your contract law considerations on non compete will be brought to bear to see whether it's a fraud on a system or genuine ..... to make a public offer at 100 per share he may ask the 400 per share value of it in contemporaneous deals. So this is provision which lets you bust it. My favourite point is in securities law you always had GAAR . GAAR the general anti avoidance rule which had been debated in the tax context. Also section 12(a) of the SEBI Act and you will see in the SEBI Act explicitly says that any contravention or device aimed at circumventing the act or rules or regulation made there under is itself a violation of the act. So there is a source of power also to legislate in this matter and therefore any concomitant masking of share price through other means can be dragged in the price. Also shareholders who have accepted an offer will be compensated if after the open offer you do a side deal. Very often ingenuity you can say the open offer I will run 100 per share. Let the offer go through. 3 months later I will pay you 400 later. So you have to check if there is any trade after an open offer is over and then again you got to draw a line. The law draws a line at 26 weeks. Nobody would wait 26 weeks. 6 months is considered a reasonable line to draw. These are all as I said manmade. All law is manmade. So the line is drawn at 26 weeks.

.....the subsequent transaction

It will have to be a subject matter of investigation. And trust me today we lead life in a completely transparent manner. It is very easy to pick up a abnormal activity and there is a huge vigilant shareholding body which would attribute even bonafide trades to malafide trades. And there will be letters to SEBI. SEBI rejects the letter. There will be an appeal because every order is appealable. So you refusal to interfere is an appealable decision. Or there will be writ petition. So once you are in a listed space you do lead life

in a glass house. So it is becoming increasingly difficult to mask some of these and you do find that business houses have a lot more to lose today in handling these defenses because you will also see in session 4 about how the scale of penalties and the expense of a defense becomes so high. And the value you lose in being the subject matter on primetime. 9 pm every night erodes your business far more than winning a case in a court of law 20 years later. Because today also the whole social negativity towards anyone the man in uniform dislikes is enormous. It's in the business space is consuming. Therefore I do come. Maybe I'm optimistic in my approach but I do find that in about the last 7 to 10 years the era has changed as far as the listed public space is concerned. I mean it is not so easy to do a shady side deal and get away with it. The regulators talk to one another. You have the PMLA you have suspicious transactions being reported. A sudden inflow of money into your bank account gets reported by the bank confidentially to the financial intelligence unit and it would have you actually see Sahara going through what it's going through. We will talk about the law around Sahara separately in some other seminar but the ear of cynicism in my view has gone and some of these side deals get very easily picked up in the ecosystem and the regulatory powers that you see the power of investigation is huge. You can check who called who in what period of time. you can plot on a graph the number of smses I exchange over the last 12 months and see whether there is a peak and lead circumstantial evidence to say there was a flurry of activity. So it's tough to defend these. Lot of defamation that happens. You may not actually clinch a conviction but you stand to lose so much you really need to think about the cost benefit of the extra benefit that you get by doing a side deal or doing a subsequent deal. Price parameters in foreign currency to be converted these are simple. Also price adjusted for corporate action. This is a very important provision. Whenever an open offer lets say a company does a bonus a 1 is to 1 bonus. So the number of shares is doubled so the value per share has to come down. We did have a case where there was a bonus. We went to the regulator and said look suddenly this 26% has become 52 if you in value terms so allow

us to adjust the price and either let us halve the price and therefore let us double the number of shares and he said no no we are not going to allow you. The laws says 26 we will say 26. So again a classic case of not allowing a purposive interpretation. Eventually it did get resolved because a company's value is nothing but its share capital whether it is denominated in 100 shares or 2000 shares it doesn't matter. So the adjustment for corporate actions is explicitly brought into the law lest there be no doubt about the future let's say the number of share multiplies it also means that the value per share is also divided. So adjustments are provided for. Any questions on these charging provisions because I am now going into exemptions. So if there is any fundamental disconnect I'd rather address it before moving on to exemptions. Shall I proceed?

So like with tax law the charging provisions and the whole exemption series the 80 series, you have a set of exemption provisions. Any acquisitions and this is broken between acquisitions which cross 25% and acquisitions which cross 5 in a financial year. 25 is very very sacrosanct because once you cross 25 though an exempt route you can keep buying 5 and never make an open offer. The exemptions for the 25% threshold are minimal the exemptions for the 5 % threshold are manifold. These are acquisitions between qualifying parties, immediate relatives. The law has felt the need to go away from the company law definition of relative which is 22 degrees of relationship. This is basically just 1 degree husband parent sibling spouse child. So immediate relatives alone are capable of an exemption. All the principle underlying the exemptions are if it is just a rearrangement of holding right pocket to left pocket shift it should not trigger an open offer because it remains in the same hands. So transfer between siblings transfer between persons who are already promoters or persons who are already persons acting in concert holding company to subsidiary. Nothing really changes and therefore the exemption is explicitly available. There are only 2 conditions to these exemptions the parties should have held these shares for 3 years so it also brings a degree of history of holding and therefore treating people who have been in control of this company for 3 years only they are changing shares among themselves therefore it is

kosher. And number 2 in value threshold the value at which you do an exempt transaction should not be more than at a premium of 25%. If the premium is more than 25% the law will say it's not a right pocket to left pocket transfer. It's a transfer for economic value which is why there is a premium of more than 25%. You go argue why have any premium at all. That's what the law allows but the tolerance for that premium for shares changing hands is 25% . anything above that will not get you the exemption. Again we have the similar principles of law and case law saying exemption provisions should be strictly construed. All those principles have been acknowledged. I will skip acquisition of preferential rights of voting shares. I mean it needs to be stated for the exemption. Dividend not paid voting right not emerged dividend paid voting rights vanish. You cannot be making open offers when those sort of rights come in . there is also an exemption involving mergers and schemes of arrangement. If there is a merger involving the target company itself the target company transforms, the listed company becomes a new company. And therefore the law says let there be no open offer for that transaction. So in the example I gave Hindustan levers merges with proctor and gamble India. Who do you Who makes an open offer for whom. Right it's a merger of 2 listed companies the companies have undergone a change. So the law says let's not complicate life. Merger has its own checks and balances. Let company law deal with it. Equities addressed through that law. Takeover code exempts it from the considerations of the takeover code. But the complication is if it does not involve the target company, if it is merger of a company which holds shares in target company. I mean people are very smart. Instead of doing a share purchase agreement they merge the company which holds shares into yourself and say it is a merger and therefore exempt. This was the position under the old law. The new law makes a departure and says the merger between equals is exempt. How do you determine equals again is very difficult to say 5050. So the law draws a 2/3<sup>rd</sup> 1/3<sup>rd</sup> line. So if the folks who held shares pre merger continue to hold shares and represent at least 1/3<sup>rd</sup> the law will treat it as a merger of equals and therefore will not force an open offer under the takeover regulations. So this

is a new innovation in this 2011 law and it has led to a lot of good quality mergers taking place in a predictable environment where things are not uncertain. We also read in the newspaper about this whole ease of doing business and how difficult it is to do business in India. Some of these are the sources of the complexity of doing business. I know there is a whole chapter on contract enforcement where all of us particularly lawyers have a lot of blame to shoulder but it's a whole picture of the ease of doing business. Some of these provisions particularly the exemption ones where there is no material change you know holding company to subsidiary company you are a merger among equals there are means to address it to make it easier to go on with business life rather than to trigger an open offer. Now buybacks is something as you all know there is an increase in the percentage holding when a buyback takes place. To put it simplistically a company with 100 shares in its share capital 10 shares get bought back suddenly the shares is 90. So somebody who held 24 out of 100 now holds 24 out of 90 and therefore is more than 25. Does he trigger an open offer. The law says within 90 days come back to 24.99 then you don't have to make an open offer. But if you choose to hold on to the benefit you got to make an open offer because the buyback also happens in broad daylight. You know it's happening you know you are at 24.99. you know you will cross 25. You know you have 90 days to come down and still you don't come down then you got to make an open offer. But if a buyback results in you crossing 5 % in a financial year then the law gets a little more stringent. Typically a buy back is piloted by management right. I mean it's not as if the public shareholders can demand a buy back. So if the shareholder who crosses 5 % as a result of the buyback he is not allowed to vote or participate or deliberate on the buyback transaction to show distance from the transaction. That he is an involuntary impact has been occasioned on him because others are doing it the board is doing it so with those safeguards he can retain. Alternatively within 90 days he has to come back to just below the 5% and not make an open offer. If these 2 conditions are not met a buyback will also trigger an open offer. So the offer process I won't spend too much time on procedural . you make first a public

announcement. Then there are detailed timelines spelt out. If all these timelines work you can actually on paper do an open offer transaction. You can take over a listed Indian company and close it in 57 business days. But this is not reality. This is the de jure position. The defacto position is there are lot of skirmishes between the regulator and the acquirer. The regulator is supposed to give comments in 15 days. Regulator says I will start giving the comments after you give me the data I ask for. And often the data is asked for on the 14<sup>th</sup> day. So very often the regulators are right. Very often the acquirers are right. There is the usual degree of tension about the red tape over clearing the files. I must say that from the earlier history of a 2 year time frame it has come down broadly to about 6 to 9 months timeframe. If you can get an Indian listed company taken over in 6 to 9 months you have done really well in the securities market. Then the other aspects, you can make an open offer conditional on a condition to a contract and if that condition leads to the transaction being shelved. Obviously there is no change in control so why go on with an open offer. So example could be you need CCI approval. You can't.. competition authorities need to approve they don't approve you can't do the deal. Or the competition authorities says you shelve a business sell only a part of it that's not the deal you want to do. So you don't do the deal therefore you don't do the open offer. So its again a very important new provision. Earlier the provision was you ask SEBI for an approval as to whether you may withdraw. We had some really extraordinary cases where after making an open offer a non friendly hostile open offer a lender actually enforces a ledge and takes over a company. He is more than 25 makes an open offer commissions an audit and finds out a 300 crore fraud and regulators say frauds don't vitiate all acts. You should have done due diligence. One can't do due diligence on a listed company which we will talk about insider trading regulation there's a very recent reform. But be that as it may eventually the case law laid down was tough luck. You should have gone with eyes open. And the acquirer had to actually pay a price which was reflective of the fraudulent when actually the underlying value of the company was 100<sup>th</sup> of that balance sheet. But these are the conflicts between law

and justice that I alluded to in the 1<sup>st</sup> slide being true of the business world as well. There is also a protection to the target company as well as the acquirer. Sorry sir you had a question. Just as there is a protection to the public shareholders in the terms of giving an offer there is a protection to the acquirer. So once an acquirer makes an open offer what does a scotch tape policy. Somebody has come and made an open offer for a soap company I got and set up a steel plant. The law says no. once an open offer has been made no material decision can be taken by you unless you run it by shareholders through a special resolution by postal ballot. This is basically to protect the acquirer from misdeeds of the target. Very often again our sympathies are towards the target. We see the acquirer as a raider predator. You know we remember the Swaraj Paul days and the Escorts and the LIC versus Escorts which is a very famous judgment which emerged from the whole predatory mindset that we have. So this is actually to protect and adjust for the acquirer because the acquirer is seen as the predator. And our social mooring is towards saying oh protect the poor hostile target the target who is now being taken over. This now basically says that don't disrupt the ordinary course of business of the target company and its subsidiaries unless you escalate this material decision to the shareholders. The shareholders approve they are owners of the company. But let the shareholder decide whether you can make a material deviation from how you conducted business hitherto. There are certain other aspects like not to appoint directors during the pendency of a conditional offer. So if you have an offer which is conditional . but before the condition is met you start sending in directors you start actually running the company. That is not allowed so the law therefore expressly prohibits that. There is also a concept of competing offers . there is a time frame within which a competing offer is made. So if proctor and gamble makes an offer for Hindustan Unilever, Nirma may compete and say I also want to buy Hindustan Unilever but he has to decide within 15 days. If hasn't decided within 15 business days he has to hold his peace until this whole open offer. The point is the orderly conduct of competing bids for the same target company.

who has to hold his peace?

all member so of society have to hold their peace if they have not made a competing bid in 15 business days of the first bid. Otherwise you will have chaos. This actually was a problem with the public sector disinvestment. Imagine the government runs a whole bidding process sells the company. Sells VSNL to Tata right. Tatas make an open offer. And at that stage someone comes in makes an open offer as a competing bid. So a mention was made saying when it was a PSU disinvestment which has already run a process you can't come and . there is an actual ban on a competing bid in that sense. Very often again because these are subordinate law written by arms of state you will find a slant towards state owned bodies and you will come up with PILs and you will face PILs where what if a public shareholder says why is the board of the PSU not compliant with all that Nehal said. Why should only a private sector company's board have majority independent directors . why is a government company not to comply with it. These are questions that will emerge and a lot of times a subordinate law has a stated stance in favour of its boss which is the state the government. So ..

are these rules for takeover these stringent rules equally applicable to the . are the stringent rules regarding disinvestment also.

no. disinvestments for meeting the 25% minimum shareholding norm has been hugely interfered with. So much so I really question the constitutional validity. For example it says you may only sell through a public process. And you got to ensure that institutional buyers are approached for you to sell. So we have had cases of people having to sell just 2 % to come down from 77 to 75% and they have to undertake expensive public transaction to come down to 75. The law actually. Then there is a residual clause saying if nothing works c come to us. Now this case by case is a problematic area of any governance. I mean one senior counsel in Delhi told me a case by case means suitcase by suitcase. And therefore embedding in it a perverse incentive to say these are extra ordinary consequences I am gonna play god and I am gonna

allow. So we have that tension in the securities regulation system as well. But by and large substantial sale is regulated. But substantial sale to meet the 25% public shareholding is regulated. The regulatory concern driving it is they really want the shares to go into genuinely public hands and there is a presumption that if you allow private sales you will sell it to cronies and claim that these are private these are public hands. And there is an over compensation of that problem. See most of our regulatory problems are well intended but the best intentions don't justify bad policies so it's like having an iron safe door outside your house to prevent entry of mice. Some times that sort of misfit in the regulatory answer does happen. And in the disinvestment sides ... 25%. In my personal view there is a over compensation of the medicine for what is otherwise a simple ailment. Alienation of material assets after you take over is not allowed unless you explicitly say when you make an open offer that I'm gonna take this company and strip this company. So you heard about asset stripping as a jargon and people say he is not really intending to run this company he intends to strip this. He is buying the company for its land. He is buying the company for a certain molecule that is expected to do well in the pharma industry. So if you have any intention of stripping the company of its assets for the next 2 years after the offer you got to state it upfront . if you don't state it upfront you got to hold your peace. Or got to the shareholders get a special resolution. They are the bosses they will decide.

One other area that is not takeover code related but I will just mention in the context of the theme of the day is the new frontier of shareholder putting is do you prevent the substantial shareholder from voting from some of these resolutions and regulators are grappling with disenfranchising substantial shareholders and saying such decisions you should not vote on. Only the public can vote on. That's subject for a separate seminar at some point and that's creeping into the law you will see some of it in the companies act on related party transactions in the new law and a lot of it in securities regulations as well. Then there is a disclosure obligation it essentially protects the target company and those in control. The idea is not to take a company by surprise. So every 5

% . Every acquisition of the first 5% has to be disclosed and thereafter a movement of 2%. Upwards or downwards has to be disclosed . so you perpetually know that somebody is creeping up and acquiring shares. So it is an advance warning sort of signal but beyond an advance warning signal it has also become a price determinant. In that let's say you have the Ambanis buying Tata steel and they are going on buying 2 % every few quarters. It's a signal to the market to say somebody is interested in coming in and that itself can impact price. Someone will say it's great news and therefore increase the price. Someone could say horrible news. If such guys are coming in lets dump this stock . let the market decide. But this disclosure has taken on a hue beyond an early warning signal to the company to being a transparent information disseminator for price discovery in the market . therefore the consequences of failure to make these disclosures are very serious and you will see that in the 4<sup>th</sup> session. Then the penalties for violation I say I don't know if I overstated my confidence in the penal system on this law but these are the penalties I am talking about. 25 crores or 3 times the gain made whichever is higher is a monetary penalty on a civil side for the standard of proof is not beyond reasonable doubt. Its preponderance of probabilities. And therefore you can have serious consequences inflicted financially for a takeover code violation. Also you will see in the fourth session that every breach of every sub regulation under the SEBI act is a criminal offence with 10 years jail. So we have elevated most things again in the usual legislative policy of this country that we feel if we criminalize something it will solve the social problem. Every securities violation is criminalized with 10 years imprisonment no differentiation no changes and we know the consequences. I mean very often I do think that NJA should increase a dialogue between law makers and judges to perhaps impress upon the law makers that merely by increasing penalty you only have a regulated society not a well behaving society. If it is under enforced or incapable of enforcement the economic incentive that a law generates is something that is barely thought about . so these are the various directions made. They can force the shares out of you disgorge the proceeds, take over the shares,

force a belated open offer with interest for the delay etc. so wide range of interventions are possible.

Then I have just 1 slide on delisting just I thought we should cover from cradle to grave right from.. I'm on the last 60 seconds. Delisting is essentially about and this actually is my last slide and I really don't have much to say. Delisting is a very simple act of taking a company off a stock exchange. We saw about entry into a stock exchange an IPO listing agreement compliances all of that . when you decide that your business is not suited for the listed space anymore you should also have the capacity to exit. Again there is a stance of the regulatory policy towards making it very difficult to exit. It is understandable because public shareholders can't be left stranded with shares in a listed company and suddenly it is no longer listed and therefore they have no avenue to offload their shares. Therefore the stances is that lets make it very difficult . you know the hotel California example you can check in but checking out is very difficult. You can check in to a stock exchange but leaving a stock exchange is very difficult. This is the law that governs it. Again without meaning to be hyperbole it is easier to acquire land in this country with the land acquisition act without the current amendments that are being debated than to acquire shares and delist a company. You have to reach a threshold of 90% through a formal offer process where the seller dictates the price. So you got to go to the public shareholders and say I want to delist please sell me your shares so that I reach 90 and quote your price. The price at which maximum number of shares are tendered. Actually it's not just maximum number of shares are tendered. The price at which that list mile of shares are tendered which will let you cross 90 is your exit price and you got to pay that to all. Like picture this in land acquisition. I can't imagine why 2 asset classes have such an extraordinary difference in approach in our policy. But in the listed market space if you want to delist a company this is the process. The public shareholder tells you at what price he would like to sell and if you like that price and reach 90 then you delist. This is called the reverse book building process where you build a book. You build a demand and a price expectation by running this

process if you meet this you delist if you don't meet this you don't delist. That in a nutshell is a sort of high level 10 thousand feet of this subject as I said I'm available through the day post 3 so if there is anything you want to huddle around and have a chat I'm happy to take it and can we still do a couple of questions if need be

Justice Ruma Pal..... Any questions

.....mandatory. now if the company opts for delisting what is the ultimate result to the shareholders. How will the shareholder trade their stocks.

Sir actually I would like to take a step back. I'm glad you reminded me of this because really a .. is listing mandatory is a very complex question post Sahara. And I find that you have Sahara in your pack here Sahara actually lays the ratio to say that securities regulators jurisdiction extends even to unlisted public company shares securities because that's in a nutshell I'm just oversimplifying it but in a nutshell it gives the securities regulator jurisdiction to intervene if you use unlisted securities as if they were listed securities but I wouldn't connect the dots to say listing is mandatory. I mean there are 2 provisions my memory of section numbers is rather weak so bear with me. 69 of the companies act 1956 essentially says an offer to more than 49 is a public offer which requires a prospectus. 73 says if you intend to list you must say so in your prospectus and if you have said so in your prospectus and you don't get listed in the specified time the allotment is void ab initio you refund the monies picked up. Now it's a bit of a leap of faith to connect 67 to 73 to say that if you violate 67 the mandatory consequence is listing. That is a leap of faith. Sahara does not say that but invariably now everyone is connecting 67 to 73 with that leap of faith. A violation of 67 is a violation stand alone. it's in fact capable of being compounded. A violation capable of being compounded cannot be void ab initio. A violation of 73 is void ab initio. So the jurisdiction of 73 in my opinion starts if you intended to list and you used that as an incentive to take public money and therefore we do need I mean it's a very nuanced link between the 2 and sometimes the horrific nature of the dramatis personae or the perception or the imagery

of the dramatis personae overrides the inner nuance . so I wouldn't say that listing is mandatory. We do have public limited companies which are not listed. Right there are any number of companies that are not private companies.

but if there is listing agreement also then it will be mandatory.

the listing agreement comes in only when you seek listing and the exchange allows you to list you sign a listing agreement then. So it is not true to say that every public limited company mandatory has to list. That is not the law. The law is that every public limited company that raises public money and there the law draws a line at 49. If you take it from more than 49 you are deemed to be raising public money. Sahara said I was taking from more than 49.. less than 49 at a time and at a time could perhaps be per second or something. So if you say every second I was only doing 49 or less I was doing private placements every breathing hour. So those are extremes. For those who want to comply. I think it is wrong to say that every public limited company has to mandatorily list that is not the law. Every company which takes public money and that is defined by inviting more than 49 to subscribe is required to write a prospectus.

this 49 is in a financial year or is there any other time limit.

under the old law there was no time limit which enabled the Sahara debate to happen. In the 2013 act Lalit correct me 200 in a financial year... sorry.. yeah excluding institutions 200 in a financial year. So at least you have some clarity of how to do business if you don't intend to go public.

there is a capping of the time so within that time you can do it.

so if you don't really intend to go public in fact you can have a public limited company which only wants to do private placements it can pick money from less than 200 people every financial year. It will not require a prospectus therefore it will not require a mandatory listing

may I ask one question.

Article 122 Ma'am.

Pertaining to the last session my question is to Mr. Vora. Stock exchange arbitration my question is pertaining to that. If a member loses in arbitration to a constituent then out of the funds available of the member with the stock exchange amounts are released to the constituent. The grievance made before the court I'm handling arbitration matters for the last 3 years that one petition is pending under Section 34 before High Court. The view taken before supreme court while interpreting Section 34 read with 36 is that when petition is filed within time within 3 months there is automatic stay. Now when there is automatic stay how stock exchange executes the amount and release the amount from the amount of the broker to the constituent. The party rushes to the court and applies for stay that stock exchange is committing violation of Section 34 read with 36 and of the supreme court judgment. So to some extent I feel there is some inconsistency in the powers being exercised by stock exchange though there is stay and the award can't be executed you are debiting the amount to the account of the broker makes payment to the constituent so please enlighten on that.

what we have seen is that from an execution standpoint specially when an arbitration award is lost by a broker member and won by the investor there is a timeline within which he can appeal to the appellate arbitration panel with the exchange. So if it is a single bench it will go to a 3 bench. If it is a 3 bench it will go to a 5 bench. If he doesn't appeal within that timeline and there has to be a deposit made 50% of the amount which is appealed has to be predeposited. If after the arbitration he can under Section 34 also. If there is a specific stay which has been granted because otherwise what we were also seeing is that they will go to some frivolous court in a very small town and they were easily able to influence the judge in accepting the appeal but they would not be a stay order on executing the amount applicable. So there is a specific law which is . so we were faced with this kind of a position. Therefore SEBI prescribed this in terms of

the circular in terms of the arbitration which has to be followed there has to be a specific stay order which has to be given by the court that the proceeding that the broker members deposits cannot should not be released to the other party pending this proceeding and till such time it will remain with the exchange. It will not go back to the broker because if it goes back to the broker the perception at least was created that the broker may not end up paying it. So that's the difficulty which we were facing and therefore we had come to this kind of a ...

I think the question was there is

automatic stay

once it has been filed then the effect is that in certain circumstances it operates as a stay. .... There seems to be a conflict between the Supreme court's decision and the SEBI regulations

may I just make one remark. I mean its thematic of lot that you see in the securities regulatory space. This conflict between circulars and subordinate law and known general principles of law on the mainslate. And unless somebody really files a writ and challenges this it never really gets questioned in terms of this is a special over general answer is it a validly legislated provision. There was even one circular sir which said that the broker must pay below 1 lakh he must if it's he should pay upfront. The minute the arbitration claim is launched if it is below 1 lakh he should actually pay and then litigate and what did it lead to. The large companies which service brokers stopped taking on small clients. Sorry not small brokers small clients. They said if thousands of people come and make 1 lakh claims I will have to put it away. It is a business risk I can't run. So these are some of the conflicts that will keep emerging and subordinate law gets written every day and directly in conflict with some of the provisions. The other example that I can think of schemes of arrangement. SEBI has written a circular

saying bring your scheme of arrangement to me if you are a listed company. I will give comments.

listing agreement requires approval

Listing agreement requires approval for circumvention of securities laws. So there is a criteria for what is the . it's not an arbitrary provision. There is a intelligible criteria of circumventing securities law but outside of that criterion they can give comments they can say we don't like the ratio. They can say we don't think this is fair. They can say take XYZ measures as comments. Now these comments have to be tabled before the company court. Now society is such the business society nobody asserts their rights. So nobody really wants to fight the regulator. And we have had some cases of going to the court and saying fine. We are used to the .. of the regional director raising objections. Courts have dealt with those objections. Lets deal with these objections as well but invariably commercial parties they live in a glass house and they don't want to throw stones. So this conflict then continues of writing measures which do not follow the legislative track of tabling in the floor of the parliament. Regulation is tabled of the parliament for 30 days. Circulars you write sitting in your office. and you can just say this is issued under Section 11 you will see section 11 in the fourth session some of these conflicts are in the nature of the ..... and future legislations will indeed emerge from these conflicts in my view. It's my opinion it is increasing.

Yes I know. I think that the fourth session is really going to be interesting. because I think that SEBI is a beast which needs controlling.

.....

there is a Supreme Court ruling which calls it a statutory arbitration and there is a huge dispute over whether a 2 arbitrator panel

it's a part of the pack also.

it is a part of statutory arbitration and in fact it overrules some provisions of the arbitration act also.

is it substantial law

I think if someone upholds special over general later in time although subordinate I think case law will emerge if somebody really tests it.

Sir I think there is a Supreme Court . I think he is right Sandeep is right. There is a supreme court judgment which said that the rules by laws and regulations done by the exchange are published at these rules and by laws are published in the official gazette and therefore it gives a statutory flavor or a backing to the entire provision and therefore it kind of supersedes it becomes a special law with respect to the securities market. Where the arbitration provisions are taken in terms of . that's how it's kind of. There is a supreme court judgment. It may be a part of your pack.

.... Case .... Stock exchange versus Boothnaths case Supreme court has taken the view ... Jaya Shah..

Yes BSE versus Jaya Shah

the question was whether 2 arbitrators can decide. It is inconsistent with Section 10. So Bombay high court had taken a view that statutory law will prevail. Single judge had taken that view division bench had taken a different view that ultimately supreme court accepted the single judge's view that statutory by laws had precedence over.... But thereafter there was an amendment that there can't be odd numbers of arbitrators

I think what was being raised here was not the by laws and regulations but the about these executive circulars

unlike tax law which recognizes circulars as instrument of law making there is no such instrument in the statute. The government never empowered to issue a circular without

the preconsultation process post legislation tabling . so this whole body of law that emerges .

I think Som Section 11 is so wide encompassing so that's how they kind of take shelter the circulars take shelter under Section 11

the legal answer is even for using section 11 you make a regulation under 30 there is a whole procedure for it and parliament blesses it. Parliament can change it the changed regulation will take effect. The circular bypasses that completely. It simply says under section 11 and its seen as a generic superpower to do anything at all.

is there any provisions as to the subjects on which regulations can be made. If that is so then it will necessarily exclude the issue of circulars under ..... there is no...

there is no. in fact the powers on regulation are illustrative. So the generic provision saying to further the objectives and implement the act you may make regulation without prejudice to the following. So it's a very wide.

And ma'am Section 11 is also in the interest of investors because while we are seeing the misuse the possible misuse there is also sometimes requires immediate action so you know the balance also needs to be appreciated that it's a live market going on sometime.

But you know the no consultative I don't know who is sitting an issuing the circulars. One particular gentleman.

that's right. There is no process around it so does it go to the board and the board meeting approves it that's also not .. that was tested. It's all done at the chairman's level and the whole time members level. So this is a future futuristic if I were to look into ... and say where is the future litigation of securities law gonna come from. This is going to be one main area.

you can say that the circular will operate till a period of X amount of time if it is an emergency situation and then you thereafter seek .... Unless adopted by

that's a draft in the Indian financial code. Basically it says that any urgent intervention without consulting legislative process will have only a lifespan of 90 days. Within that you clean up the act or it lapses.

its similar to a president's ordinance which follows the process. Ma'am just one if you permit. I know we have .....

I know. The next session I think we need a small break of 15 minutes at least. The third session is insider trading. Very interesting. Shall we. Would you all like to have a tea break now or just go though and have an early lunch break

Early lunch break.

or maybe bring the tea in or something

Can we bring the tea here is it possible. And biscuits please.

Just one point I thought I will share with this audience. I happened to be in an international conference on the takeover code in Singapore Supreme Court and it was an interesting case study done of the jet etihad deal which was a very interesting.. which went into the Supreme court. I think there was lot of . so the interesting case study was that etihad as a policy had agreed to .....22 countries. The airline companies and the policy was that most of them had quantitative restrictions no qualitative restrictions. So the control aspect which Som mentioned was kind of not there in most of the jurisdictions and they had done a composite study that they remained below the quantitative restriction but imposed control on all these companies. So they didn't trigger an open offer. India was kind of the only jurisdiction which really stood out because it had a mixture of qualitative and quantitative restrictions. So lot of the veto

power which etihad would have otherwise enjoyed in jet was kind of neutralized unless they made an open offer. So they agreed not to make an open offer and kind of do away with the veto provision. So that was kind of an interesting case study done in terms of whether takeover regulation should only be quantitative or only qualitative or a mixture of both.

Qualitative would make sense. To be a mixture. Atlest..

because if you only have qualitative then lot of subjectivity comes in and then the regulator gets undue power so you need to have a mixture of qualitative and quantitative that was the conclusion drawn.

So shall we start. Hello.

Thank you everyone.

Excellent. It was so clear...The third session is . yes

whether by delisting is there any change in the company..... to the ... is the same effect or is there any change in the leadership.

he will have rights under Company law as any other shareholder but the regulation also says that for the next 12 months after delisting if he changes his mind and wants to sell price will be protected and you are obliged to buy. So these are the 2 otherwise the rights under Company law.

what about default when you say 25 crores they have to deposit. Suppose they fail to ... what will be the consequences.

there is criminal prosecution of that as well. Recently through these amendments that came in an ordinance and now passed by parliament SEBI has got attachment and

recovery powers very similar to the tax recovery powers. So you can go in and attach properties ... very interesting judgment recently about a civil prison so similar.

.....civil law also

those powers are now brought into the SEBI Act for receiver of those penalties.

the difficulty is the person who lodges a complaint...

are they passing orders of civil imprisonment.

they have just tested the first one.

then they have taken it out of the judiciary because quasi judicial taken off judiciary.

it's been stayed. Its pending in the Bombay High Court. That's the heart of a larger debate. As I said it's a Sahara debate. How much can you keep a man behind bars without an explicit provision of law and criminal imprisonment. It's a larger debate.

one thing that strikes you about SEBI is that it is the prosecutor, it is the legislator and it's the judge also. I mean if you talk about the separation of powers in the State in the SEBI that is completely gone. In fact that is commented on in clariant versus SEBI. It's in the pack which you will get. And this multiple roles in 1 organization without checks and balances is a problem

in the judgment of that chit fund case the clear observation of the Supreme court regulatory body like SEBI etc have failed. Find out. Even directorate of enforcement. Therefore the CBI is given the case to find out and ..... And there is clear prospect in that judgment.

well it is up to the courts ultimately to leash in SEBI. Mr. Parekh . Our third session before lunch.

### SESSION 3

He is the founder of Finsec law advisors a financial sector law firm based in Mumbai. He has worked as an executive director in the Securities SEBI where he headed the legal affair and enforcement department and has been on the faculty of Indian Institute of Management Ahmadabad. He has worked in various law firms not only in India but also in the US and he focuses on securities regulation, investment regulations, private equity corporate governance financial regulation. Distinguished academic record. And he has been a member of the cabinet secretarial task force for measuring performance in ministries and departments of the government of India. he is a former chairman and member of various SEBI and RBI committees and sub committees. He is a member of the securities commission on international law association London and he is awarded several awards for his work as a professional. Yes Mr. Parekh. We promised them an early lunch

Thank you very much Justice Pal. It is a great honour for me to be here ..... so I will start with the story of a very distinguished gentleman. His name was Charles Ponzi. Italian Emigrated to the US. 19 early 1900s. so from 1920 to 1919 he did odd jobs like washing dishes etc. till 1919 he came upon the he discovered the magic of perpetual money. So he started marketing notes on which he promised an interest of 45% in a month and 100 % in 2 months. So people asked him where are you making this money for you to give these kind of returns. He said you know. Again this is post world war 1 era. It was a time of great difficulty and governments used to make life easy for citizens by introducing various schemes. One of the schemes was like a post card which you could send across from the continent to America which was basically a postage stamp which you could exchange for money and the stamp cost 1 cent or the equivalent of 1 cent in Europe and it could be exchange for the equivalent of 6 cents. So he said I will do what I will make some money out of it. But I will buy at 1 cent and sell at 6 cents. 5 cent profit on every stamp I get. But I'm importing millions of stamps. The fact of course was that

millions of stamps were not manufactured. Anyway he sold the dream and at the peak of 1919 there was a queue outside his house outside his office which went on for 3 kilometers. People wanted to give their lifesavings to the financial wizard. Till of course newspaper the local newspaper in Boston ran an article. The police commissioner got alerted and sent 2 constables to inspect the offices of Mr. Charles Ponzi. Out of the 2 police constables, one of them ended up investing in Ponzi's scheme. People didn't believe it. He was too brilliant to be wrong. Finally an article in the same paper kind of shook people a little bit more and there was some investigation by the local prosecutor etc and finally of course it was a bubble. He was paying the people were bring in the principle today he was paying the people who brought in the principle 30 days back. So he was robbing peter to pay Paul as you say. This scheme lasted for less than a year but the size was so spectacular 8 banks collapsed with Charles Ponzi. Millions of dollars at that time so probably billions of dollars today were lost by Charles Ponzi mainly by giving from X to Y plus of course leading a very very extravagant life. He was finally jailed. He learnt law in jail defended himself. Jumped bail ran away to Florida. This was of course early 1920s you did not have communication facility so he ran to Florida where they did not know that he is facing conviction in Massachusetts and of course he was selling land underwater sight unseen 3 dollars an acre. He again kind of went to jail there without the Massachusetts state knowing about his conviction. Finally after many many years in 1933 1934 he was deported to Italy. We have seen financial frauds through the history of the world we have seen commercial frauds the most kind of big financial fraud of course has been the Satyam case and that has that always cycle of fraud followed by legislation and very often overregulation Som spoke of. As I talk about fraud I also want to talk a bit about bubble and these are important. Again this is just 100 years apart from sorry this is around 250 years before Charles Ponzi. This was Holland in the tulip mania. Again lasted for just over a year. But tulip bulbs you just could not go wrong with investment in tulips tulip bulbs in 1916. This is one of the most prized tulip bulb and costs an equivalent of half a crore rupees today. A person was

captain a ship a large ship was carrying one and by mistake he forgot to lock a lock on the inside by which this particular tulip was sitting and somebody who was just passing by saw the open locker and thought it was an onion and he cut it and ate it. The value of that bulb was actually more than the whole ship. Again the bubble burst and millions of people there was no fraudster involved unlike Charles Ponzi millions of people are buying and selling tulip bulbs at lakhs often crores of rupees. People buying houses with the collateral of tulip bulbs and the madness had become extraordinary and again this is not the madness of 5 or 10 people this is the madness of millions of people. And we have of course seen in the year 2000 2001 the technology bubble which also burst rather less spectacularly but which did indeed burst. The reason I am talking about bubbles is also because bubbles are also often connected with frauds. In times of hectic the glory days of a bubble it very easy to hide your frauds inside the bubble. So what I am gonna talk about is I'll get a bit technical today but I think this knowledge will be useful even outside of the securities domain because when you talk of fraud it all kind of comes down from the common law fraud the tort of deceit as we call it. In the financial space the same contract is there but I will explain why securities fraud is different from product you know if you go to buy a horse for instance why is that different I will come to that. First the similarities. The four types of fraud which four categories of fraud one is contract fraud you commit you get into an agreement you misrepresent something you are selling a horse which is about to die and of course don't disclose that the counter party can sue you under the contract. Here the tort of deceit which is which you are recently familiar with which is a common law right of not being deceived and anyone who you have deceived can sue you even without a contract. Then you have statutory fraud which is what we will talk about today which is both companies act and sebi act talk of statutory fraud and of course the detailed regulation which define fraud. And finally there is criminal fraud which again arises out of statutory fraud criminalizing several conducts. So here are couple of examples of financial sector frauds. One is the classic fraud that is of course misrepresentation we

will come to specific ingredients in just a few minutes. Misrepresentation or lying as people commonly call it is the classic type of fraud. Manipulation is a special type of financial fraud which we will have a short slide on that. Churning is essentially if a broker is perpetually buying and selling securities on behalf of a client because he wants to make commission. So it doesn't really benefit the client but creates commission for the broker. Front running is something that again a very specific fraud in the securities market in which if you call up your broker and say I want to buy 5000 shares of Infosys and broker says this is a good opportunity to just before my client touches the shares let me put in 100 shares of my own order into the system which obviously disadvantages the client because as a broker I have a fiduciary duty to my client so front running is a specific kind of fraud. Another example again this is not an exhaustive category just couple of examples recommendation contrary to the interest of the client you are selling so called high risk financial products to so called widows and orphans. So if you are selling high risk products to persons whose risk profile does not match that kind of investment that is also increasing considered a kind of fraud. The rule called 10(b)(5) in the US law and I am going to be talking a lot about US today because the case law is extremely well developed. The reason you already know this rule 10(b)(5) because it is exactly identical with some small changes to the common law deceit tort of deceit. There is an explicit merger of the disclosures of anti fraud rules because of nehal spoke a lot about what disclosures are required and which kind of goes back to the point of misrepresentation. If you disclose that you are going to commit something which is wrong in the horse example if you tell your counter party that my horse is very very sick you can buy it at your own risk that's not fraud. Right. Similarly in the financial markets if you disclose that there is a big litigation pending I don't think I think it is completely petty. It is done by my rival to kind of reduce the share price. So long as you disclose it it can never amount to fraud. So it's kind of I like to call it the merging of disclosure and the anti fraud rule. So whenever there is disclosure the charge of fraud vanishes. There are lot of securities which are exempted

under all the other laws all the other American securities laws but they are always covered by the law. So it's kind of the fraud rule covers exempt securities as ... then of course consequences as in administrative rules under SCC action or SEBI action civil consequence as a court of law can pass an order and penal and criminal of course the actions will follow. So what are the common law ingredients. The first is mens rea intention. Clearly it has to be of a reasonably aggravated nature of intention at least rashness. Negligence typically would not amount to fraud. So intention or rash action by a person would certainly be a would fulfill the ingredient of mens rea. Misrepresentation now misrepresentation can be of 2 types one is lying the other is keeping quiet. You can lie by keeping quiet. If you are in the horse example if you are ... to sell a horse while being quiet about the sickness of the horse clearly I am indirectly lying. So when does omission amount to misrepresentation. It amounts to it when there is a duty to speak. So classic example is listing agreement . whenever you have a material event you are to disclose it. If you keep quiet you can't say I didn't lie. Yes you did lie because the law says omission when you didn't speak amounts to misrepresentation. Materiality of the key event which is again there is a lot of case law around what is materiality. It's a very factual enquiry but at the same time lots of courts have decide how the test of magnitude and probability. So is the event is the litigation 1 crore of 5000crore company versus 2 crore company and what is the probability of it succeeding. So if a rival puts a winding up petition is it material or not maybe not. So again it's a factual enquiry but there are kind of legal methods in which to which give it an indication of how to calculate. I will come to Reliance and lost causation they are kind of more complicated concepts and in connection with purchase and sale of securities. So mens rea I have kind of discussed. Reckless or rash behavior typically would fulfill the criteria negligence typically would not. Obviously the standards of proof in a civil and in a penal proceeding are different. Much higher standards for penal proceedings. Therefore for the same cause of action you can have different consequences we have seen that in actually couple of criminal cases for instance the

very famous US criminal case in which a person was convicted was acquitted in a criminal case but was convicted in a civil case for the tort of murder which we are of course not very familiar with. But there in fact is a tort of murder and the person did not go to jail. Right OJ Simpson. They did pay an amount under the tort of murder. And there is a concept known as collateral estoppel which is ...

Mens rea is not related to negligence

for proving fraud negligence is not enough. Again we are talking in the context of fraud. For tortious standards yes negligence would satisfy the criteria for mens rea but in the context of fraud it is a much it is more for penal criminal kind of charge. The standard is high .

they both are there you see but even for tortious liability is there for .... Penal action ... civil .. there is no bar

No

That we are not doing that that is another aspect.

And of course there is another concept of collateral estoppel for example if you are convicted in the criminal case in the civil trial you can't say that I am not guilty. You are stopped from saying that. Misrepresentation I have discussed already. Omission ... there is a duty to speak. Representation straight away becomes fraud there is typically a duty to correct which means you make a false statement which you did not know was false at that time and you made it there is a duty to correct. But there is no duty to update. If prices change and what representation you made becomes inaccurate the law imposes no obligation on you to update that statement which has now become false. This also we have discussed. Its question of fact in the context and totality and the standard used is not of a reasonable person its of a reasonable investor in this context. The difference is subtle but is there and probability and magnitude test. So these are 2

concepts they come from common law which is transactional causation and loss causation. Transactional causation is nothing but A caused B B caused C and C caused D. an important part of transactional causation is reliance which is that you have to rely on the fraud rely on the misstatement. When you are selling a horse those are very straight forward transaction in which you can figure out there is reliance or not. In the financial markets it becomes extremely difficult to prove reliance because a person will have to prove that he read the 500 page prospectus on the IPO relied on the statement which is inaccurate and bought shares despite knowing the misrepresentation which is virtually an impossible standard. So again there are court rulings in the US which have short circuited this process and said when you rely on the price you rely on the misstatement. Because all statements misstatements get converted into price. So anything you put on the stock exchange website is always translated into price. If you say I have discovered a new patent which you which will be extremely profitable it will translated into price within 5 minutes or 10 minutes. So every time there is reliance on the price there is reliance on the misstatement. And loss causation basically says loss should be caused as a consequence of your misstatement. Classic example is a person who sued the bank saying you lent me money which you could not have lent because it was in excess of the margin requirements then I put that money into securities which fell in value. So since you lent me money which you otherwise could not have lent me he must compensate me for the market loss which I faced by investing that money in the market. That loss is not caused by excess loan which is given. Your loss is a consequence of making foolish investments. So loss has to come from the misrepresentation not from a THIRD SOURCE. Fraud on the market is a third concept I spoke about. Reliance is presumed and it is a rebuttable presumption which means it is there is a presumption that you relied on the misrepresentation. It can be rebutted by the company and not the person that in fact this person did rely on it and nonetheless he chose to invest in the securities which is also very difficult if not impossible standard. Types of liabilities. You have statutory liability under SEBI regulations and

other Acts. You have tortious liability which I will come to which are typically barred in the Indian context because there are 3 sections in SEBI act and securities contract regulation act which prohibit a civil court from taking cognizance of any matter in which SEBI has powers and SEBI has such vast powers it's kind of its virtually impossible for a person to file a civil suit for damages in securities market action. Then you can of course sue based on contract the share purchase agreement you can sue under that and .... Liability which we spoke about. So before we go forward let me just quickly just mention couple of SEBI actions which they typically take when they find somebody has committed fraud or other violations there can be industry punishments you cannot you can no longer sit on the boards of companies you are debarred from sitting on boards of companies. There are penalty orders which have been discussed and in the next session we will also talk about it. You can get a cease and desist order which is like an injunction of a court. SEBI can ask for damages in theory. They have never done that till now. They have sought disgorgement which is taking away ill gotten gains from the perpetrator of a fraud and given them to the victim. And they can levy penalty. There are cases in which voting rights have been frozen. Again this has been specifically provided for in the Takeover Regulations. If you acquire shares in violation of the takeover regulation you can be debarred you can at least a temporary stay if not a permanent injunction stopping you from voting on the shares. So you can continue to receive dividends you can continue to sell those shares but you can't vote on them as long as you hold them. And we have several Bombay high court rulings which which give these kind of injunctions. Before we kind of go ahead I just want to get a sense of . you know I gave the example of a horse. Misrepresentation in selling a horse versus misrepresentation in securities market. The law seems to diverge in certain directions. Can anybody if anybody have a sense of why the laws are so different in terms of not the definition of fraud but the way they are applied. How securities market differs from markets for other products for these laws to have kind of developed so specifically and in detail.

the definition of fraud is it vitiates even the most solemn act

Yes so .

Securities market is something different the fraud is actually. You are saying that fraud is can be some sort of .... You can claim it also that by fraud I have been put in such a.... SEBI can also .... But the fraud in other sense that is another aspect. Contractual fraud that is another aspect.

my question is really why do you need to have this whole different jurisprudence in the securities market as opposed to the goods market.

Exactly

..... From a state of the business.

I think that's one of the most important ....

Stock market scenario winding up ... the factor. There it depends on information. That information is with the management and it is not disseminated to the ..... not required that kind of information which is .....not shared with the general public.....

Perfect. So what is a share. It doesn't have value. In fact it is a piece of paper. It has no value. These days you don't even get the piece of paper. It's in Demat. It's just a bundle of rights. Right to get dividend if and when declared. Right to vote if and when called for. right on liquidation etc. Basically a bundle of 45 or 10 rights which are contained in that contract. The piece of paper or the piece of bits a bytes derives its value from what a third party is doing . it is not the horse buyer and seller. It's a third party factor really. What the company does what the company discloses actually determines the price of this . so you have the company which can do funny business. You have a random third party who is manipulating the stock price up or down which can impact you. Third is I am a single manipulator in the horse example I can defraud one person here I am

defrauding the entire other side of the market. It may be a small amount maybe only 3 paisa but I am defrauding the entire other side of the market. Other side is millions of investors. If I manipulate let's say 100 a million shares of Infosys I am not defrauding 1 person not the other side of the trade. I am defrauding millions of people both on the buy and the sell side. So it is a different market which requires different remedies because number 1 it is an invisible bundle of rights number 2 the source of the value comes number firstly from the value itself and secondly from other people who could be manipulating the stock. And finally which is the point of insider trading which we will talk about separately. There can be insiders who can be misusing the information they have which other people do not have. In economics it is known as the agency problem. The management and the directors and the promoters have incentives very different from the best interest of the shareholders which causes them to profit at their cost. They always for example a pharma company director knows that we discovered invented a molecule which will result in huge profits for the company. Before disclosing that fact to the stock market through his wife or relative or friend he purchases huge amount of shares. Obviously it becomes a rigged market. People will not cross that market. And really all these things put together may not be so relevant in a horse kind of example because there is a public good attached to the securities market which it's not a casino. It's a place where you raise capital. It's a place where companies get to grow. So that why you kind of have very detailed sets of regulations by exchanges SEBI. Parliament passes so many laws very intrusive sort of enforcement which you do not see in other products. And of course the capacity is much larger much higher because the nature of the product is such it attracts people who want to do misdeeds. Any questions before we move forwards any points comments.

one question we were talking about horse now coming to patents. Now what is the authority to determine that the share price is fair. Is there any authority because for example there are millions of patents in a plane. maybe there are 10 patents in a toy the price of a plane and the price of a 10 rupee toy would be very different. Now as you

said the company could also misrepresent the share price. Now is there any authority or an expert body which can say that the share price projected by them in the website is fair.

Sir. Let me answer that with a very abstract statement. I will explain it. Very famous economist Keynes the very famous economist has said this that the stock market is not a weighing machine it is a voting machine.

It's a

Voting machine. Now let's just grasp the enormity of that sentence. And the fact is there is no benchmark really which is why you see bubbles. Today as we speak you have the e-commerce bubble. Companies which have no expectation of ever making profits are being valued at 20 30 40 billion dollars. We have seen the e-commerce bubble in our own lifetime in Indian markets and we have seen various other bubbles in other markets. So there is no benchmark but there is kind of broad understanding of it may be completely fallacious but there is a broad understanding that this is how broadly this is the correct range for this. Assuming that the information which is coming from the company is accurate. The company lies you can never price an asset but you can argue that for all asset classes. How do you value gold at whatever lakhs of rupees per ounce etc. there is no benchmark which says this is the right price it fluctuates widely not just intraday but over a period time so it's there is no perfect answer people have metrics of saying ok it should be what they call P ratio that if the earning is 100 the price should be 20 times that and again that depends on the industry. Pharma high growth industries will be pretty high. In e-commerce companies which have no earnings kind of very fanciful and abstruse number. No happy answer to that. But I think.

So what you are saying is that it is a question of perception

it is

and a case of demand and supply as in gold. Perception of the company being good or bad depending on what the market thinks about it. When you said ..... doesn't weigh

So not just good and bad but also. See the stock price has 2 components. one is all the past information about the company which is easier to see .... So and so turnover so much and so profits over the last 5 years 10 years. Very easy

Track record.

very easy components track record yes. And the second is expectations which people can only I think it's that's where the weighing machine comes in that's where the voting machine comes in. everybody has a different expectation. In fact there will be no market if people don't have heterogeneous expectations. If a buyer will only buy if he thinks that the price of that stock will go up and a seller will only sell if she thinks that the price is gonna fall. So unless there are heterogeneous expectations nobody is gonna buy and sell virtually

Taking the current market the way it is swinging thanks to a lot of external factors so it is that perception that the market will go down that may make me buy a share which may be very low at this stage on the assumption that it will go up in the near future.

I mean that's the third point I think I cannot miss that you have the past performance you have the expected performance plus you have external factors. If the world's economy is going in a tailspin obviously the demand will contract for sure because people have less money to spend on buying securities.

that is why the SEBI is there. SEBI has to control it and regulate it

no SEBI's job is not let me . SEBI has no role in determining the right price of the securities their job ends with manipulation

That is true

he wants to add on

I just want to quickly supplement to the ... comment. For every seller today there is also a buyer. If somebody believes that this stock at this price is low enough to buy

there is no bottom to a market. It has only one's perception of what is bottomed out  
the competent person is the .....

so let me come back to your point. Let me give you another phrase which is very I don't know who said it but it is really beautiful. The job of a regulator is not to remove foolishness from the market only ignorance. And that captures the whole philosophy of pre 1988 period when in fact we used to do that actually that . we used to say that the price is too high we will not allow the IPO reduce the price.

regulator's duty is to make aware the consumers as to what actual problem is there .  
number 2 duty is at least the regulator must also control that what is the problems going on how our future is also weak. That you have to make aware the companies also.  
So regulator has various functions.

Nehalcan I just supplement Sandeep. Sir your point is well taken in the way the rules have been prescribed. What happens is that today if the market swings by 10 % which is a huge movement there is a cooling off. So the markets are halted and people are made to market is put on notice that market has swung either upside 10% or downside 10% within 1 hour but it resumes once again. Because the philosophy is that the market is supreme. Even where the regulator is concerned. So the market view on the pricing is superior than what the regulator thinks about that pricing. So what that regulator is just doing is that in case there is a swing which has happened suddenly I am halting let everybody know that the market has been halted. It is big news. Then you come back and price discover once again because the collective wisdom of the market or of all the

entire country is far superior than what one regulator thinks whether the market is high or low.

It is that we are pointing out. That is the duty of the market regulator.

Exactly . so there are 2 ways in which it is done. One is that there is a market halt and secondly there is a price band which exchanges impose on each stock. It does not say that the stock cannot go up or down but it will go in a graduated fashion. So I am not saying that a 10% increase is good or a 10% fall is bad but I am just saying that in a day the stock can only move by 10 % or 20% because I think that's a very high movement for that stock. Next day again it can move up or down by 10% 20%. So I am not being judgmental as a regulator by saying that this is a good stock when the price doesn't move or it's a bad stock when the price moves. I am just saying it is in a graduated fashion. Finally the collective wisdom of the markets far superior than what a regulator thinks about it and that's what the philosophy which he is trying to portray.

that's fine but at the same time the regulator has also got the duty to see that whether market is going up and what is the consequence of it. The regulator must have that.

this is the heart of the issue. The measures Nehal described just now about the 10% stop etc. Certain economist say even that is bad law. They say how can you have in any State telling you 10% is good. Who decides 10% who decides 5 is good. There are other who say we will fix a price and ..... an indication like a safety net after an IPO if the market falls SEBI has to... idea saying promoter should buy at the IPO price to protect the investor. Equity is all about risk and running the risk in an informed manner. So SEBI's job is only to make the law clear as to how do you be compliant with making enough information available. More than that it's an adult's choice whether he thinks a pig is worth a horse's price or a horse is worth a pig's price. That's an adult choice..

which is informed

you may be informed if everything points to it a horse is given to you but you choose to believe it is a pig it's a choice you are allowed to make.

If we can move on I think we can discuss this offline

I think the sentence that you said that really sums it up. It's not foolishness but ignorance

So at this point can I just I apologize I'll give 2 cases. There are 2 US cases which have been given to you. They were given quite late so I doubt if anybody has had the time to read them. I'll just very quickly talk about one of them which is basically Levinson which is a US Supreme Court case. Very interesting case. I have not given you the full one. The full one is quite long. The basic facts were that 2 companies were merging and the press obviously got the whiff of it and so they started asking the company do you have merger talks do you have merger talks do you have merger talks. The company said no we have no not having any merger talks. 3 times they lied. Lied simple as that. They were in fact having merger talks and the merger talks succeeded and at some point when the final merger occurred they disclosed it which is the correct thing to do. You are not supposed to disclose at negotiation stage. Shareholders of course sued this company saying you lied 2 months back that there were no negotiations. Had we known that we would have about these negotiation we would have bought the stock. I would not have sold the stock so. They got sued by shareholders and it went to the district court which basically said that as a matter of law negotiations is immaterial. The focus is on materiality . it was overturned in the appellate court. The court of appeals which said that in other situations this may not be material but the fact that you lied about it made it material. So negotiation ordinarily may not necessarily be material but the lying caused the materiality to put it in succinct form. The supreme court overturned that and said that lying does not cause materiality it's an independent thing which you need to investigate. Materiality the probability and magnitude test is set out in this case. And they also spoke a lot about the economic theory which we have been

discussing called the efficient capital market hypothesis which is not saying the price which the market shows is fair. Nobody can say that. No valuer in the world can say that thousand rupees for a Infosys is too low or too high. The market has to decide millions of people have to decide. But the market is sufficiently efficient for you not to be able to beat the market. And that has been statistically proved. You can't really beat the market except randomly which creates the fact that your reliance on the stock price is a reliance on the misrepresentation. So this shortcut was created by the supreme court in this case. Brilliant ruling. If you have even 10 minutes I think I will recommend reading this. So it talks of materiality what is materiality and the short cut which they have introduced.

So what happened ultimately.

It was remanded back to be decided according to the efficient. They call it the fraud in the market theory. So using the shortcut that you don't have to show reliance. It was remanded back. And materiality I think they set up the law which is currently even today everybody uses it basically even in India it has been used in cases to show how to calculate materiality. So kind of coming back to the presentation private action I mentioned that its mainly barred. It falls outside the domain of SEBI. Companies Act if it falls there is there is provision for of course not only civil suits but class action suits. But broadly SEBI I can tell you since I ... at SEBI. SEBI tried using this route once couple of times in fact but they said we don't have the power for instance to declare shares bogus shares which are issued. They wanted them to be annihilated because Demat shares unlike physical shares you can't really make out the difference between duplicate and real. In a physical shares you know it is a duplicate certificate. There are no distinctive number in the Demat format. So 1011 will look exactly like 1011. They are digital replicas of each other. So you cannot actually make out what is fraudulent share and an original share in the Demat world. So SEBI in fact tried to get a permanent injunction and getting those shares declared void. Of course they lost it initially because

civil courts had said what is SEBI's locus in this. It went up in appeal. I think it is still in appeal. That's an interesting test of the powers of civil courts. Criminal action Som mentioned it I will not talk about it. Section 24 of the SEBI and Securities Contract Regulation Act the SCRA which are the 2 parent acts talk about criminal penalty and it is a very generic statement any violation of anything including sneezing in the morning can actually technically amount to criminal violation. We have discussed parallel civil and criminal proceedings and of course all of you are familiar with the fact that double jeopardy is a criminal concept. So you can have parallel proceedings . you can have a SEBI civil proceeding you can have a criminal proceeding parallelly. There can also be a direction debarring them from sitting on boards etc. all 3 can run parallelly without being hit by the provisions of double jeopardy. In the constitution. So that's kind of the first presentation. I have got 2 other short presentations on manipulation and insider trading. They are basically.. ok so while it loads. So while it loads. Essentially manipulation is a species of fraud. Its special kind of a fraud. And all the jurisprudence actually comes everything we just discussed about common law fraud applies to manipulation with some insignificant differences. Let's talk about this. Now I don't expect you to read this. If you just look at the words in red. I will read them out you will get a sense of what prohibition against manipulation talks about. not intended to device with the object of inflating the pricing without intention without intention of . and you see so much of repetition of intention that is kind of the heart of manipulation. To give you a very simple example. I am a very large investor I'm a mutual fund let's say and I have 5000 crores which have come into my pocket today which I need to invest in the market by the end of the day. Now investing 5000 crores in the market let's say I know that will increase the price of the 20 stocks which I need to purchase. Is that manipulation obviously not. So just knowing that your sale or your purchase will increase or decrease the price does not cause manipulation. That is reasonably clear to people. The principle intention has to be you have to travel into the mind of the person who is accused of manipulation whether that person wanted to manipulate the market.

And of course that is a difficult test. It is not an easy test to meet. Unlike insider trading which we will see is much easier to prove. So the crux of the matter is intention . again courts have found it difficult to define manipulation. So they have kind of gone around and tried to define it. Here are couple of again these are US court definitions. Intention or willful conduct designed to deceive by controlling or artificially affecting the price or trade of securities. So broadly again if you club it into 2 very broad brackets you are trying to manipulate the stock price up or down or you have you want to increase or create the appearance of liquidity. So completely illiquid stock you want to show that it is very active stock you will be both on the buy and sell side. Another definition by court is any manipulation or intentional interference will the free forces of demand and supply. Except moving of surplus volume. One can interfere with demand and supply to bring price closer to value. I will come to the second case here which is very interesting. it is written by justice posner of the 7<sup>th</sup> circuit. Probably the most famous judge in America ahead of most of the supreme court judges. He is the pioneer in the field of law and economics. And this case essentially about a company which went bankrupt and it was in reorganization so all the debt holders were gonna get huge chunk of equity shares and existing shareholders would get virtually wiped out. How much time do we have.

Another 20 minutes. I'm sorry Not 20 minutes another 10 minutes.

depends on how hungry you are. Let's have a voting machine here. Ok I will wrap up in 10 minutes. Maybe 23 minutes more for questions. So the company was in bankruptcy the prices were kind of based on objective fair price . it should have been trading at 3 cents. It was flat trading at 30 cents. So a company called scattered which short sold shares which means you sell before you even have the even before the shares belong to you. So basically selling before buying without owning them and they short sold more shares than existed. This brilliant ruling of justice Posner goes into why selling more shares than existed is not manipulation. And it goes into the fact that

objectively speaking these shares were in fact priced at 30 cents. True value was only 3 cents. So any intentional attempt to reduce the price from 30 to 3 was the first point which is it was a force to bring price closer to value and that is not manipulation that is the exact opposite of manipulation that is making the markets more efficient. Manipulation is making the markets less efficient. This is the exact opposite of that. And therefore scattered company had not manipulated the market.

.....

no sir, the way . I have over simplified it. The fact is that it was in bankruptcy so on the date they were short sold there were not enough shares to deliver but on the date the new shares were issued there would be number 1 and number 2 short sellers never expect to deliver. They always expect the price to go down and sure that the counter party will settle it in cash. So this in fact all the shares were settled in cash in this case like most short selling. So price falls you get your gain and you kind of. It also helped in this case that the counter party was also a very sophisticated player who was betting that the price will temporarily go up. He was in fact on the board of the Chicago mercantile exchange. So it was a play between 2 very large elephants and one elephant lost so he was suing the other elephant. So that kind of also helped scattered winning this case. And there was also. This goes back to the sentence there in the case which says a market participant has no obligation to educate the buyer in this case. There is no fiduciary duty between a buyer and a seller. So if the buyer is being foolish I can profit from that buyer., that's kind of the summary which again goes back to the point which we were discussing a few minutes back. This is the first point that I made that t knowledge that I made during ..... Does not amount to manipulation even though I know that your trade will make prices jump around. So this also I discussed price manipulation or volume manipulation. Actual or apparent activity. Actual activity is when you are buying and your brother is selling and apparent is again when you create similar appearance of liquidity. Issue of fake shares not only in physical form we have

seen in the Demat form. 3 or 4 companies have in fact introduced bogus Demat shares which I mentioned there are no distinctive numbers in India. so the fake looks exactly like the original

it's possible or it has been done.

It has been done. It was done I think we can talk about it later. It has been done at least 4 times to my knowledge.

No sir this was in the initial era when dematerialization was taking place . now there are checks and balances being put in where there is a secretarial audit done and to be filed with the exchanges in terms of the listed capital and the issued capital. The reconciliation which is done. But this is in the initial era when the dematerialization took place is because India really forged ahead in one of the biggest reforms. France took 9 years to dematerialize all stocks. India finished it in around 2 to 3 years. So there was a huge push and it was in the initial phase where some of this because there is huge amount of fake forged and stolen certificates which was coming into the market. It was completely eliminated with the dematerialization. This was one fraud which did occur during that time where the amount of dematerialized stock was higher than the issued stock of that company.

Participants -.....

Yes yes of course. You can call it ... manipulation is a form of ... which way where you park it doesn't make a difference. So again a couple of other examples.. parking of stock again. You want to reduce the supply of stock you park it with a friend so supply goes down and the price goes up. Price rigging price hammering..... misrepresentation... this is very common in India. you spread rumours about a company. It could be insiders of a company it could be third parties. You say that company has found 5 million barrels of oil they are not disclosing it right now but they

have actually found so much of oil. Now price will go up these people will sell and exit and of course the fact is that it is not a fact it is a rumour. So evidence of manipulation again it comes from case law. Price leadership dominion and control of the market collapse of market after ceasing of activity and reduction in the floating supply. Ok I will skip the takeaways. Difference between value invest and manipulation. Knowledge that it will affect the price does not amount to manipulation.

what is this technical term ....

It is actually witchcraft. It's something known as technical. People predict prices. It's essentially witchcraft. No I am not joking. Statistically it has been proven to be completely... people see patterns they see heads and shoulders and completely debunked in statistically

to put it in a very ...

.. a stock is moved in a certain pattern then they expect it to follow the same pattern. So .... Analysis.

So it's basically ... no no this is basically trying to forecast the price by doing a past trend analysis.

it is your perception of value. You can rely on any reason. This is one of those reasons

it's not manipulation. It is stupidity

and also the element of risk. It's all theoretical.

Madam what happens is that all these things work when there is a bull market. Prices are anyway going up. So even if you are a monkey you will make money. So you think you are a very smart monkey but in fact you are just randomly picking stocks. These things don't work in a bear market ever.

Participants -.....

Depends . the large companies I would doubt it but smaller ones would be.

Sir, actually there is a very interesting anecdote that liquidity makes it difficult for the manipulator to manipulate the market because it is collective wisdom so the larger number of players.. liquidity actually is counterproductive for a manipulator. Manipulation would be easier to do in an illiquid stock. When you have liquidity you have collective wisdom coming in so the.

frequently traded versus infrequently traded. Frequently traded is less prone to manipulation.

So if you were to buy a thousand shares of Infosys so even if you are trying to manipulate it will be completely you know. It won't work. You will need probably 5000 crores to actually manipulate Infosys.

Too many minds involved.

I have 1 rhetorical question on fraud. If somebody assures you that I will take 100 rupees from you and within let's say 2 months I will give you 1000 rupees is he misrepresenting or the buyer is blinded by greed.

both. It is clearly

in misrepresentation he is taking advantage of the greed of the buyer

No it's also the fault of the person who has taken the money he is at fault in terms of the regulation. If it falls within a very broad .....of deposit taking companies act RBI and SEBI. So let's discuss it offline it's a interesting topic but the answer will be half an hour. Ok so let's quickly finish. I have 5 seconds to talk about insider trading. A very difficult subject . the devil is in the detail and the origin of insider trading comes from a

fiduciary duty. So every insider which is let's say director stock management of a company they are obliged in common law to put the interest of the company and the share holders ahead of their own interest, if ever there is a conflict. Ideally there should not be too many conflicts. But if ever there is a conflict you put the interest of the company and the share holders ahead of your own. An insider who always has better access to information. A pharma company doing inventions and discovering a new patent. Discovering a new molecule which results in a new patent. Will always have superior information compared to the shareholders and which gives them an incentive to front run the shareholder by. You have favourable news you buy larger number of shares in the market. Or even better you want more money you buy leveraged product like futures and options in the market and then when the announcement is made the price will obviously go up and you sell. So the most certain way of making money and it is also the most certain way of committing a crime. But the origin is fiduciary duty which we have slowly moved away from I will explain why. So why the prohibition. It violates fair dealing shareholders besides the fiduciary duty of insiders nobody buys in a market which is rigged. This is creating a rigged market where people frequently do insider trading.

.....

no not at all. Dabba Trading is basically off exchange trading. Its more illegal than immoral. Dabba Trading. Lets discuss that offline. Violates fair dealing reduced faith in the markets fewer people will actually invest in the market and therefore capital formation gets impacted. There is a whole school the Chicago school as they call it. They are in favour of legalizing insider trading. It's a means of management compensation makes the market more efficient. Remember manipulation reduced the efficiency of the market. Insider trading also illegal actually increases the efficiency of the market. If you look at it from an economics perspective not a legal perspective.

but in fact in that case in America that Indian gentleman

Rajat Gupta

There he did not profit. the information he gave to someone else who profited.

he did profit. He was supposed to .. his dream was to be a billionaire. He was only 100s of millionaire. His dream was to kind of . he had lots of contracts with Rajratnam which is why he got caught. That was again a brilliant case in which he got caught with circumstantial evidence.

one thing is very clear what you are saying. You are saying regarding the market position and for that purpose SEBI has been constituted by way of ordinance in 1992. What you are talking of today that is prior to ordinance of 1992. Then what is the purpose of creation of this SEBI. If everything will depend on the market then what is the purpose of creating by way of ordinance in 1992 to regulate the entire thing not depending upon the market. What is the purpose

the question is purpose is to regulate what .....

now he is saying that everything will depend upon the market. If it will depend upon the market then what is the purpose of regulatory body

If I may just say something which you can add on to. I think the object is to make information available to you. what you do with that information is entirely up to you.

No section 11 clearly says that detailed power of the board.

Yes yes. Maybe

13 powers have been listed

but the thing is .. what I have gathered from what has been said in the previous sessions is that the duty to disclose. Are you making fair disclosures but the ultimate decision is yours. That's entirely yours. As the example that was given that I have given you all the

information to say that this is a horse but despite that no one is at fault. My point of view I have given you all information this is a horse

that is not the power of the board as per Section 11. Very vast power has been give.

Sir if I may put it differently SEBI is a referee only. It doesn't determine the outcome of the match

the board has been empowered to impose penalty. It cannot be. You please go through...

if you do a foul you get a red card but you can't determine what the outcome of the match will be

SEBI is regulatory authority or controlling authority

Regulatory

if it is a regulatory authority then under what authority the power of imposing punishment and fine is with the board.

if you violate the regulation.

who will impose the penalty

SEBI so therefore you see exactly in the example you have given that if you say that I will show you a red card we are playing football and if you violate I will take action against you then these are the regulation which you have violated but I cannot determine the outcome of the match. I can tell a cricketer ... but I cannot tell who is going to win the match.

Ma'am can we take it offline . we can discuss it offline .

Sure

I think what you want to say is that the SEBI is providing a fair trading zone for the investors and the companies. You can't take it as between a teacher and the student. It's not a relation of a teacher and a student. It's rather of an umpire and a player.

Brother it is already 1 o'clock. I had promised you an early lunch so let's finish.

your hunger trumps your questions. Okay let me quickly finish .... I have simplified the text of the regulations no insider shall trade or communicate on unpublished price sensitive information. So any person who is an insider. Again the definition of an insider is extremely broad. Anybody who is connected to an insider is also an insider. Who trades or communicates. Trade means either purchases shares or other products or communicates which means gives a tip to friend. Rajat gupta gave the tip to rajratnam for example. So tipping or giving information is also illegal. Which is unpublished price sensitive. Price sensitive is exactly the same definition as materiality. Anything that can impact the price is the gauge of price sensitive. Unpublished is obviously kind of its not yet put in the stock exchange website. US Law . we have deviated from the US law of fraud. US it falls within the prohibition of fraud. There is no US law prohibiting insider trading as opposed to us. We have drafted extensive regulation on what is insider trading. Who is an insider, who is connected when does he trade what is price sensitive etc. Definition which is an insider essentially anybody who has access to inside information. Typically directors top management relatives. Intermediary law firms like us. We have access to price sensitive information. Anybody who has access to price sensitive information which is not yet in public domain. The law also creates a deeming fiction of deemed insiders so it's a rebuttable presumption that you are an insider if you are in one of those relationships. For instance husband and wife wife trades there is an assumption presumption that the wife traded on the basis of the information and then she will have to disprove that she did not trade based on the information but it was because of other situations. What is price sensitive is what is material reasonable investor would find important when the information is published or it is very clear but

there are some people who act very smart . there are insiders who are sitting on their computer and as soon as the information is disclosed they punch in the buy trade. Again they have been hauled up by regulators both in India and abroad. You can't do that you have to wait for the information to seep into the market. Price sensitive I mentioned that already. Materiality standards. They are the same standards. There is a duty to disclose . the basic rule is disclose or abstain rule. Which is either disclose the price sensitive information which you have access to but having that information itself is not a crime because there maybe business purposes. You have discovered a molecule you don't want the competitors to beat you to the market with that molecule so you will of course keep it within a small circle of people inside the company so it's either disclose if you have information if you want to trade or abstain which is don't speak and don't trade. I mentioned that . selective disclosure is not okay. Companies would find this very important because they think they can selectively speak to 5 people analysts brokers etc. they cannot do that . they have to put the information first in public domain in the exchanges website and then there is..... Make them disclose information to a selective group of people. I'm going to skip through the US theories of classical possession and misappropriation. This broad theme is classical is the fiduciary duty and insider breaches that duty in trades. Possession is anybody who has possession. Person comes across let's say you are a director of a company and you leave your papers behind somewhere you forget your papers. If I chance across them or if I am a taxi driver and you leave your papers in my taxi I read the papers and I trade that's the possession theory. Anybody in possession of information which is not freely available would be guilty of insider trading. And the misappropriation theory I'm not getting into it's a bit it will take some time. So this is . ill really end with this case. A very famous US supreme court case. Again there was a gentleman called Dirks. He was an analyst. And his job was to analyze companies. So discovered a big fraud at a blue chip company. So first thing he went to the wall street journal paper and he said massive fraud blue chip company please publish on your front page. The wall street

guys laughed at him and said you must be a crazy idiot. It's a blue chip company ala Satyam. He went twice to wall street journal they laughed him out of their offices. He went to the SEC. the SEC also laughed it off they said it's a blue chip company you must be crazy. So what he did was he was an analyst. He had client he had a newsletter which went to clients. In that he unraveled the fraud that was actually going on in the company. He did not trade. He just published this newsletter and his clients obviously sold the stock on a massive scale and the price fell. And of course when the price falls is when the regulator always wakes up. So the SEC did do investigation and indeed found the fraud but this is not that story. The parallel story was that SEC went after Dirks for insider trading.

Why did he publish

because he had access to information because he spoke to ex employees who told him about the fraud. He communicated that information. He took the information to his clients who then traded in that stock and then made a profit

but he had sought to make it public

he tried to make it public. That's not a defense. It was just a rap on his knuckles by the SEC that you shall not do this in the future.

whether Mensrea is attracted or not

mens rea. US it's a species of fraud so mens rea is applicable. So the supreme court went out of its way. He only had a rap on his knuckles but he went all the way to the supreme court and they actually said that all these things should be fulfilled. Supreme court went out of the way to protect him because he had obviously been wronged. So they created this multiple rules for tippee liability which is the person who receives the tip. Tippee has to trade.

Oh I see Tippee. Tipper and the tippee

It's a very American slang in the .. Tipper should have made a personal benefit

the informed , the recipient of the tip.

so here breach by a tipper of his fiduciary duty is not breach. Tippee should have made a personal benefit. Here there is no personal benefit and tippee has to know of the breach. Somebody is casually chatting with a friend and you know by error discloses the information, the tipper would not be at fault. Even though the tipper may face consequences. So I end that with this example . of course the Satyam case is in the public domain very interesting. There is a case which we are actually doing right now of manipulation in which foreign bond holders had these bonds which could be converted.

is it sub judice

not yet. Its going on in the London courts. It's going to London

It won't come here. Alright

so anyway it's going to London courts it's not coming here so don't worry about it . So essentially clause which would convert the debt into equity. If the price became above X 3X current price and the price very suspiciously went 5X the current price and the converted so it's not yet a final outcome right now but very interesting case of very unique case of manipulation of stock price. So with that I thank you and once again its been a very distinct privilege to be addressing you. Thank you so much

So thank you very much. Just one small thing before you go off for lunch is that we are going to give you food for thought. And I will ask Mr. Sundaresan to formulate this which you will now discuss affects your position as judges

One issue that came up in this committee when we wrote the insider law is what is the position of public servants who had possession of information which can have a serious impact on market price. Say you rule on a certain list before you. The outcome can be detrimental to one side in a material manner or excellent for one side in a material manner and ahead of the judgment being made public you dictate your judgment your stenographer shoves his stock or a relative shoves his stock and it's not only about judges public servants in particular say telecom FDI in telecom. Suppose we say we are gonna allow 100% before the government announces it if the telecom secretary's family trades. These are not insiders in the classical sense. These are outsiders. They are the manufacturer of the information. Your judgment is your judgment. Only you know it. You are hearing published information. All arguments are in open court. Your outcome is the information which will impact price. So the question was absent an explicit legislative intervention you will never be insiders. The question was whether we should bring that within the ambit. So the committee headed by justice ..... which sat . . . Punjab High Court one from Kerala. The committee did recommend that public servants be brought within the ambit but the final regulations.

what the final outcome is .. that you have to think about and when we come back we will discuss what the final outcome was.

Just before we go we will have a photo group photograph at the porch just before we have lunch .

Just before we have lunch .

## Session 4

Working hard you may not believe it but I was working hard now come to the last session today but before we come to the last session you will find at about 3:24 there is something call library reading no I was little foxed when I read this library reading I have no idea what it was and then I was told apparently this feedback forms that participants are required to fill in many of the High Court Judges would come in previous sessions had said that us High Court Judges we get very little time to read books generally on topics general interest Amartya sen's idea of Justice or chomsky or other. so they said why do you make us keep on coming at least we will get the opportunity of reading so we feel that you should keep some time this was a suggestion so it is being experimented upon so please be a part of the experiment if you think it's a good idea and that your colleagues were right we will go ahead with it but if you think no it doesn't really work then forget it then we will have to think of some other Way if you have any other suggestions in your suggestion form then to try it out it is if you find the books or not right if the idea is good but the books are not right that might be one if your responses if you feel that no but perhaps if this was done whatever it is this is facilitating processes so that it will help you in some way or the other many of your colleagues and peers help you at least delivering better justice and they would be able to read American journals or whatever Indore particulars so called time library time so do try out this and give the feedback I would love to do it but I was I doubt if I can put it to any good use after that . Let's see if you do hopefully. So now the last session 4to5 session I was also Foxed by the 4 to 5 session. computer skills training this is a this is apparently a mandate requirement that the supreme court feels that judges are not been responsive to the e Court thing . fortunately you represent the next generation out of it and they are not responsive perhaps because they are not aware of the possibilities of Computer training computer software available one of the I know that for example that particular conference that we have but I do know the Commonwealth Human Rights

initiative has prepared the software by which a judge sitting in in the High Court knows at the press off a button would know exactly which prisoner had served the mandatory period enabling him or her to be released on bail. the judge is no longer dependent on the Prisoner authorities or jail people are rotting the huge under trial so now Pisa possibilities which certainly will cut down the judges time will cut down the number of under trials deliver substantial justice so I think these are things again these are all experiments something new which is been tried out and if you have any suggestions on this after you've been through perhaps this session could have been conducted in this fashion maybe this kind of input this is what we have to do this is all part since this facility has been setup 4 judges so it is for the judges to really give the feedback saying that this is how it should be Run and we think this is what would benefit us so to be part of the process is all that is being asked 4 actually of building up this facility so I have told you as much as I know if you know anything you will have to tell me after this after being at the sessions yourself so the last session today is very interesting this I was waiting for that is SEBI Act scope of powers checks and balances which are absolutely none I'm sure please go ahead I'm sorry I should have introduced you . so keen on getting SEBI and through all that Mr. Lalit Kumar just give me a moment please now Mr. Lalit Kumar he is also oh he is with you Oh I see j sagar Associates he has active for various companies institutions wide variety of commercial corporate commercial transactions corporate restructuring joint ventures mergers and acquisitions inbound and outbound demergers also on structuring of investment vehicles this is absolutely great as far as I'm concerned he has represented clients he litigates as well as Advises on company law and on regulations framed by Sebi foreign exchange management act and foreign direct investment he also has specialised in private equity transactions active for the investor as well as target companies he has rendered legal advice structuring private equity deals aunties with due diligence yes negotiating deals providing overall transaction support including approval from rbi foreign investment

promotion board of India and SEBI he has also advised underwriters and law related matters and also laws related matters which relate to IPOs QIPOs FCCBs open offers de listing off shares and so on . all the topics that we have been we should be covering in future he writes in various Publications and speaks at conferences both National and international yes Mr. Lalit Kumar hello good afternoon to you all thank you justice Pal thanks Som and Sandeep for the sessions earlier justice Pal said is most awaited yes it is so you know when you are discussing in the morning couple of questions couple of things came up in fact justice Pal did also say it's a b beast there was a question about whether it is regulating or controlling and then in the first session nehals session even a question came up that question came up and discussion was about what stock exchanges could do the question what city will do in that situation and we sort of parked that question for this session . so the entire Idea and thought about this presentation is that we will go through the basic aspects of what is the basic outline of the act and thereafter as Som earlier said we will be there after the session I plan to take about half an hour to the basic of the provisions and so that we have a complete understanding on the law and what the act is and if you have any questions or answers then we can have a good discussion . also just to mention here it is not really a welfare legislation and here we discussed earlier about how what is the role of a referee so it's like the law which actually governs the referee how to conduct a match this is what this act and what SEBI's role as a regulator is and of course shruti will circulate the background material where there is som's video where he had spoken about this entire aspect at length for participants who were various regulators. so I think you can have a look at that video if you are interested and get more insight from this so with this let me just take you through what the law is and this is how I have provided outline of my presentation so there will be an overview of what is law is the scope of SEBI's role the regulation how it regulates intermediaries and others who are other than intermediaries or SEBI's power to issue directions I think this is what we were discussing since morning section 11

11b we will touch up on that what exactly are those powers monetary penalties and the far reaching penalties the act provides for so there are we did discuss about Som mentioned the takeover code regulation punishment being 3 times off the profit turned or 25 crores. we will go through that . briefly is the process of Adjudication enquiries offences the last is what really are the checks and balances for SEBIs power.

so starting with the overview the Preamble of the act has 2 objectives for SEBI act. firsts to protect the investors and their security and second is to motor development of the securities market let me just share one instance which I was discussing with Som also . before lunch we did mention about related party transactions the general understanding is that SEBIs regulation SEBI act and regulations it has come out from that stricter provisions for a listed company stricter provisions applies let me give you an example Companies Act 2013 was passed and there was a amendment related party transactions SRS companies are concerned some special resolution too ordinary resolution however there is an amendment so under the Companies Act that is an amendment which has come still SEBIs clause 49 still says it is going to be a special resolution not ordinary resolution disinterested shareholders there is no exemption for arms length all transactions and transactions in ordinary course what I'm trying to press up on here is that SEBI in the interest of protecting protect investors interest has regulations which are stricter there are stricter regulation which apply to listed companies that is precisely objectives. show all actions of SEBI are aligned to be aligned with these above objective in the early session also we were discussing about how it is performing the three roles or 3 arms of the state the legislature executive and judiciary anyway it is like a Mini state in itself now scope of SEBIs role this is Section 11 of SEBI act casts an obligation so the section itself uses the expression that it is the duty of SEBI to protect the investors and security and promote the development and regulation of securities market the section itself Lays down various measures how that will be achieved so what it does is through

decorating the stock exchange and other securities markets registering and regulating the market intermediaries such as share transfer agent underwriters the depositories the custodian venture capital funds so all this market intermediaries regulated through registration and the conditions of registration prescribed by SEBI prohibiting the fraudulent and unfair trade practices related to securities markets the civil measure which is in section 11 promotion of investor education and training intermediaries securities markets prohibiting insider trading as we had in sandeeps session about how SEBI has enacted the new law effective this year and this is coming from section 11 the power it has to have power it has to have regulation for insider trading regulating substantial acquisition of shares and takeover of Companies The detailed presentation that Som which which is all about acquisition of shares and control companies now calling 4 information land records. prohibition of insider trading we had in sandeeps session how SEBI had enacted a new law effective this year and this is coming from section 11 power it has to have regulations prohibiting insider trading regulation of substantial acquisition of shares and takeover of Companies detailed presentation which Som had made which is all about how the acquisition of securities and control over a company now calling for information and records while conducting enquiry and audit of Stock Exchange mutual funds and other persons other market intermediaries so this power off calling for information asking for records books of records registers maintain by these intermediaries also Falls within section 11 power the following functions and exercising pass under the securities contracts Regulation Act 1956 . undertaking inspection of books of record and documents listed company this party is not just to the market intermediaries but companies which are listed supposed to be listed on a company which is listed are going for listing if it indulges in insider trading fraudulent or unfair trade practices and SEBI believes that there is a need to have that investigation done then it can call for documents and records from that listed company there are two kinds of intermediaries or market intermediaries that SEBI

regulate the stock brokers the Merchant bankers underwriters folio managers investment Advisors FIIs ... credit rating agency these are all the market intermediaries who are working the securities so they need to have a registration from SEBI and there are provisions for registration so this regulation and this registration is done pursuant to section 11 of the SEBI Act not only the market intermediaries in person we are talking about insider person who could be designated employee of the company or connected to the company or in any other way an insider or a tippee as we were discussing so all of these are not covered as market intermediaries but any other person or any other member of the society if they are interacting in the security market and they are dealing with listed companies they are also regulated by SEBI so this is how it regulates the market intermediaries other members and other persons dealing in the securities market SEBI is power to issue directions now this is where we were discussing about the most controversial provision in section 11 and 11d which which gives immense power to SEBI to issue directions we were discussing about the circulars which come and the surplus come under the provision of section 11 and 11d so this is been widened. wide range of power act gives to SEBI that and the section says that power is given in the interest of the investors and orderly development of securities market . there are a range of Creative measures and creative directions which SEBI has given including like the freezing of the voting rights or debarring certain promoters and certain companies to access the capital market these directions are coming pursuant to the power under section 11 11d . so Courts have been favourable upholding the constitutional validity of the... legal precedent where the Court has upheld the power under section 11 11d. Som had mentioned about this is going to be the real issue perhaps one of the most controversial provisions so most of the litigation in time to come will be involving the pass and directions which SEBI gives here . this is going to be an interesting space to watch .monetary penalties under the SEBI Act now there are a couple of both there are monetary penalties as well as there is punishment by way of

imprisonment section 24 talks about we will come to that . so what all we can do if a market intermediary what a person dealing with the securities markets is in violation of the provisions of the act the act gives power to SEBI to suspend or cancel the registration after market intermediary could be a complete exemption order partial exemption partial cancellation beg your pardon then there are specific provisions which lay down different punishments and different penalties monetary penalties for violation of this act first is failure to furnish information and returns to SEBI so if SEBI asks for documents or Returns and the intermediaries and the companies failed to do that there is a penalty which range from a lakh of rupees to a crore. similarly this is with respect to non redressal of investors grievances again the penalty is I lakh rupees to a crore there are 2 or 3 penalties very very stringent the act is very very stringent on insider trading acquisition of shares and controlling in violation of the takeover code regulation range from 10 lakhs to 125 crores and up to 3 times of the profit amount earned because of that violation similarly for fraudulent and unfair trade practices the same amount of punishment monetary punishment is there . there is residual clause which says that wherever there is no specifically provided in the Act for violation its a general penalty or residual penalty lakh rupees to a crore rupees. there are huge amount of penalties in cases of violation of insider trading regulations and the takeover code indulging into fraudulent and unfair trade practices as you can see it attracts huge monetary penalties . briefly touching upon the process of adjudication so the act provides that the officers not below the rank of division chief act as adjudicators for holding enquiries for the purpose of assessing on imposing the penalty we just saw penalties are civil in nature the standard of proof is lower then in that case criminal proceeding while the act specifically Lays down what are the factors the adjudicating officer looks into while imposing or assessing the penalty and there are 3 which are listed in the Act . they are amount of disproportionate gain or unfair advantage wherever it can be quantified , the amount of lost that is caused to the investor or the investing group ,

and whether it is a first time offence or offence of a repetitive nature so while imposing monetary penalties the act requires these three factors to be looked into by the adjudicating officer . In the enquiry proceedings the market intermediaries which are listed with SEBI the stock brokers the credit rating agency the underwriters share transfer agent the SEBI intermediaries regulations provides that there will be a designated authority which will hold the enquiry and make recommendations for penalty the whole time member here's the argument in the matter and makes the recommendation the recommendation is generally the moving upward or getting modified upward without getting modified so I think there was a Supreme Court Case where it says the person to whom the notice is issued must get to know in the notice what is the amount of penalty and what will be the amount of monetary penalty imposed . and criminal offence section 24 Windows all the offence or all the actions of violations are criminal offence and provides for a term of imprisonment up to 10 years or a fine upto 25 crores or both. the offences under the act of compoundable of course offences which only have imprisonment or imprisonment and fine are not compoundable ones they are compoundable . there is a process provision for immunity also that an application could be made to the central government to seek immunity for punishment but that is not by and large the provision that section has not been very much utilized it remains more on paper .checks and balances I think justice Pal also said there aren't many I think the only provisions are of appeal . order of SEBI can be appealed in the securities appellate Tribunal SAT and appeal could be made in 45 days so SAT could pass orders either which set aside modify it uphold that so there is an Endeavour in the Act that all appeals will be disposed in 6 months time but that is just an Endeavour the order of SAT again is appealable at it can be appealed at the supreme court only on the question of law not on the question of fact and the appeal has been made in 60 days time . so this is I think the brief outline that I thought the basics that the act covers so I think we can take a further questions and have further discussions on this

I think that this act is someone should challenge the constitutionality . the idea is you know you called it a mini state and it is a mini state but any of the regulatory things that we have in the constitution well they are that you have an Alice in Wonderland the story of the cat and the mouse why the capitals the mouse I'll be the judge I'll be jury .... I will sue you Hera you and condemn you to death . now there is a cat vs. the mouse who was the prosecutor the judge and the executioner . and that is exactly what SEBI is under the act it is the prosecutor the judge and the executioner that is one aspect there is no separation of the distinct departments of the judiciary the law making authority under the SEBI and the implementing that is the prosecution the implementation authority the executive there is no such distinction and I would really like to know is that as far as the Judiciary is concerned because ultimately it ends with an appeal to the supreme court albeit question of law is that are the members judicially trained are they judges have they of what level are they magistrates or CJM Or what are they Are they lawyers at all.and whether they don't have any judicial training actually there are capacity constraints there are serious because the maintenance of judicial discipline is very important in judicial dispensation I think I will talk a little bit so we have a flavour of some of that is the question we put in the morning also..... I will address that too sir can I just

I will also like you to go through two sections and I will close with this section 20 capital A and 21. 15y does it bar a Civil Court prior to the imposition of a penalty and thereafter but Section 21 also leaves it open to the aggrieved party to go to the Civil Court what do you how do you Reconcile this 3 provisions and the role of the designated authority The Appeal lies to appellate Tribunal from the designated authority order also so this part of the presentation the designated authority power to hold enquiry make a recommendation for penalty I don't think so I am not familiar with the provisions but having gone through I think there is some confusion there please clarify .

yes one more thing penalty that is term of imprisonment but what is the mechanism for imposing that this Harsh penalty

Sir can I begin at the conceptual level the fact is this is an act that that was an outcome as with most laws there is a social occurrence and the law jumps in to address that social occurrence so this is a reaction to Harshad Mehta it is a like we have the new Companies Act it is called the Satyam act this could be called Harshad Mehta act in that sense because SEBI was formed in 88 as a body to look at statistical analysis look at Capital market economics come of it good quality policy Research etc. overtime with IMF and World Bank interventions it was felt that we need a regulatory system rather than the control system earlier we had a control system . someone in Delhi Had wisdom in his mind to say and it you could be priced at 12 rupees 13 rupees I like the point I made about case by case approval capital formation was becoming a problem so then it was felt to abolish the controller of capital issues Put in place an act which will create an organization which will write the rules of the game and overtime the game will be played gradually Harshad Mehta happened then this galloped and you will see an ordinance in fact all amendments to the act it's a very peculiar Karma the act they always come first as an ordinance without debate and it would have given life for 6 months and therefore it would get passed in the new Amendment Act with next to no debate that is not the reason Parliament was not in session oh I know all ordinances can be passed only when Parliament is not in session but it so happened that every single material amendment to this act has occurred only through an ordinance switches and executive presidential ordinance and then nobody is bothered . I have appeared before the standing committee of the Parliament and you will see the quality of debate that goes on standing committee it is pretty sad that something so material gets dealt with in this manner the standing committee is a multiparty it brings an average you know all average brings the quality down and it gets passed if you see the record of there has been next to no

debate for any amendment in this act. so what began as a developmental regulatory body then it was felt that there are no punitive powers lets gift unit of powers the initial punitive power came with a maximum penalty of five lakhs. so these 25 crore provisions which is C initially 5 lakhs of penalty. in the mid 90s I remember there was a scenario where the noticee would come to the chairman with a check and say that the maximum you can do is 5 lakhs let's cut the chase and take a penalty and let life go on so it became an expense of doing business rather than penalty and then we have the next scam which was the Ketan Parekh scam in 2001 where everyone felt that SEBI's powers are so small let us expand it the reaction was that 5 lakh penalty became 25 crore penalty 1000 per day became 100000 per day the penalties you saw. 100000 of penalty per day violation used to be 1000 per day. there was a kick up the regulator also clamours for power so whenever there is a parliamentary saying you guys are doing nothing sleeping on the job They will say I have no power and the media is ever happy to say that it is a toothless regulator. so give it more teeth so 1000 became 100000 5 lakhs picking 5 crores .... and it got another set of powers another element I would like to touch up on is check and balances the need was felt only by 95 chapter 6a and 6b the securities appellate Tribunal was brought in 95 with Chapter 6 b to say orders passed by SEBI on the adjudicating side should be appealable . the classical Indian context all sort of politics got in the way they said the Tribunal member is additional secretary level the chairman is Secretary level how can educational secretary hear appeals of a secretary. therefore the appellate jurisdiction was restricted only to monetary penalties which was 5 lakhs all the other orders by SEBI appealable do a bunch of bureaucrats in the ministry of finance it was call the appellate authority in the ministry of finance so there were 2 parallel appellate jurisdictions that came up so the need for checks and balances was felt there was a feeble one whenever the need for more power was filmed there was a strong one so that has been the history of how it came in 99 it was felt that is to parallel appellate processes are of no consequence let's actually make it one appellate body single

member SAT was converted into a three member SAT to say that this presiding officer should be a retired Supreme Court judge or chief justice of a High Court and 2 more members and therefore empower it and make it a three member SAT . appeals from SAT used to lie in the High Court that was changed to appeal to the supreme court this was around the time when people used to think that Supreme Court could even be a first Court of appeal . you remember the old CCI act it was originally drafted as appeals from the competition Commission directly in the supreme court now that was one of the grounds on which the Act was held to be unconstitutional. the last Court of appeal the first Court of appeal so in that round we also lost 1 round of appeal which was in the High Court . there is also a litigation pending as to what happens when a case which is pending in the High Court I need to move it to the supreme court what is the cut off line on that there is a writ pending it is pending for the last 15 years so it is being a little bit of a muddle track . somewhere down the line nobody sat up and said that we have and this organization very powerfully with severe powers we have armed it with very severe powers. the prosecution powers do we also need to legislate the barriers and checks and balances the whole MRTP act the investigation wing In the quasi judicial wing Versa created by statute you had the INR division and the judicial division in the MRTP act if you remember . it was also repeat the 91 so that sort of segregation nobody applied their mind into they just felt and it was also one of those we need to satisfy the world Bank that we are taking good measures for our systems so let the regulator be formed we will look at the problems later and nobody looked at problems later that is one of the Legacy of how it came .when the Tribunal also got formed I will quickly come to that 15y and the 20a provisions this has been subject matter Of great debate really . 15y says any lis over which the SAT has jurisdiction civil courts will not entertain in fact the Bombay High Court has a judgment where is judge refused to entertain saying I am bound by 20a and 15y we have another judgment of the Bombay High Court bench which is also in the Pack relating to takeovers this is this is a

dispute between Vijay Mallya and Kishore Chhabria where parties filed affidavits conferring jurisdiction to the court saying none of us have objection we are better off with you then which SEBI and the court went on to interpret takeover code in great detail overcoming the 20a by saying parties have agreed and the conferment of jurisdiction is a ground of appeal in slp I mean the party with said ok I only conferred but it is bad in law Mallya and Chhabria settled so the question never really got adjudicated in appeal in the supreme court .....

I know sir there are many basic things that statute say but people find ways around it

.... my consent cannot confirm jurisdiction when it says court shall not looking too finality of this decision courts have looked into it.

even there there is a very nuanced issue in 15 y basically says wherever the Tribunal has jurisdiction Civil Court should stay out . 20a says that anything that SEBI is capable of doing the court should not you should not call it into question in court. it was basically a protection for SEBI against lawsuits in civil courts 21 is savings clause .....

that is savings clause correct apart from the act so the point you raised in the morning 15y and 21 are read together the Civil Court has power to whatever has not been contemplated under this act in matters of tort in fact that's a matter of that is one dispute where Sandeep and I have actually lead evidence against each other in a US Court that is a fall out of Satyam . essentially in Satyam R holders American depository receipt holders sued in the United States saying you are listed in an American exchange . I represented the auditor the grievance was that the auditor slept on his job so he must have concluded so this litigation bound up in the United States similar to Bhopal if you remember the old Bhopal case Mr. palkhiwala had led the evidence about how India reacts well too

etc and the forum non conveniens was raised so question really is this that if SEBI is empowered to enable restitution of parties or award damages then and only then you could say the ouster is attracted this was our position the claimants position was SEBI's power was all encompassing look at 11 b it is so wide it can pretty much given award damages if it's ok chooses therefore civil courts have no jurisdiction in India it's an inconvenient forum New York Court please give us damages issue obviously got settled the US litigation got settled so this really wasn't pushed through but I am a subscriber of your view that's what SEBI can do punish for regulatory interventions it cannot lead evidence it cannot start it does not have inherent powers of the court to the matters concerning the jurisdiction so the Jury is out on that but essentially there are certain other developments also for example SEBI funds class action suits of investor protection groups so SEBI has got rules to say we will use our money to give Legal Aid and support Legal Aid to something which is impossible so their view is ... SEBI has different duties under section 11 it has multiple duties to make a awareness and also make discharge and also regulate the bodies . so far as we're concerned what we are discussing and also powers are there and duties also but that doesn't make ..... the Sarfaesi Act Section 17 ..... in fact in the same Satyam case we had filed the writ for the auditor in Bombay High Court in that sense it is pending in the supreme court so beyond a point I don't want to go into it. but the question really was does SEBI how to do jurisdiction to tell an auditor who is not a registered intermediary not to audit of listed companies according to SEBI it can even tell a lawyer not to appear before SEBI. the difficulty is .... that is also there ..... Law of precedent. .... not with standing anything contained this act will prevail over the other act. ultimate sir the question is as justice Pal said unless somebody really challenges in

writ Court the law as it stands and we have to deal with it unless somebody makes a constitutional challenge without adequate locus to convince a judge that it is worth its time to take interest these things will remain debated in academic level. we had one case sorry I will just deal with 11 b for 1 minute before you get there ..but the problem is that most of the people who will challenge the SEBI Act will be Crooks so the chance of succeeding is very poor cause the facts will always that's a practical reality because we are speaking to a General Body of judges I don't think you know the point I am making let's take examples so that like case studies you will see how Court have endorsed this position it is not as if this act has gone on unchallenged. it has been challenged and SEBI succeeded in getting Courts to believe that it is constitutionally valid let us just pick 2 examples one was the president of the Bombay Stock Exchange who it was found was calling up his staff and asking which broker has how much position .

That is a practical reality but we are speaking to a General Body of judges. I don't think . I am really making is let us take example so that case studies you will see how could have endorsed this position it is not as if this act has gone on unchallenged it has been challenged SEBI succeeded in getting quotes to agree that it is constitutionally valid let us Just take two examples one was the president of the Bombay Stock Exchange who it was found was calling his staff and asking about which broker has how much position the question was if you as an office bearer are getting into individual brokers position you have conducted yourself in a manner unbecoming so I as a regulator going to tell you that you are unfit to hold office in a stock exchange on this ground writ was filed C can section 11 be used in a manner to ask an individual who is not an intermediary to stay out of office in a governance capacity there is a thumping judgment on the extent and scope of power off 11 11d by a division bench of the Bombay High Court this is Anand Rathi vs. SEBI it didn't get carried further in the supreme court which was the first case off a High Court

division bench explicitly saying 11 is a very valid power and in the facts of the case they really didn't feel satisfied enough to intervene Gujarat High Court has had location 2 look at it often. lot of IPL scams took place in Gujarat SEBI said I am impounding proceeds of a transaction on a stock exchange unless and until I complete investigation I will not tell you when I will release it demanding this is frozen until further notice so the question really was that the phraseology 11b is you can issue directions to any market intermediary any person associated with the securities market the question really became who is the person associated with the securities market what is this association Can anybody who has a little finger to touch the market does he become a person associated and therefore I am unable to jurisdiction of SEBI . the Gujarat High court effectively I am para phrasing and simplifying in nutshell it says if you have traded in any share you are a person associated with the securities market any securities Karnavati Alka and Karnavati there are two judgments

this section 15 g penalty for insider trading it says that is if you share price sensitive information now this price sensitive information is not defined in the Act if I am to be punished for 25 crores I must know what information share and what not to share in fact I have been waiting to see somebody who uses this ground unconstitutional challenge to say if the parent that doesn't even define a certain crime or quasi crime can subordinate law fill in the gaps undefined that crime what has happened is Has subordinate law defined the crime it has insider trading regulations defines. separate regulations yes separate regulations it is called SEBI prohibition of insider trading regulations in that this phrase has been defined it has what is unpublished is defined what sensitive is defined again there is a problem originally the test was us too this is the point Sandeep made about the Reliance test did you rely on that information to do a trade was the test of insider

trading so people used to yes I had information but I did not rely on For trading my trip was motivated by something else that text changed in 2002 to see if the mind has possession off a certain information it is assumed to factors that information into its action so the subordinate law was changed from trading on the basis of unpublished price sensitive information do trading when in possession of unpublished price sensitive information 15g is an act of Parliament which did not get changed that still says trading on the basis of .so again courts are willing to read it down the Tribunal said ok when we apply 15g we may apply the basis test but in any case if it is in your mind we can also do that possession is the basis and there for that dichotomy has existed and people have lived with it but the fact that it is not there in the main act remains it is not in the main act it is supplied by subordinate law .the IFC which we have worked on the FSLRC under justice Srikrishna is to plug this sort of issues to say how can you have the main at giving a blank check and the delegatee supplying law which will give meaning to the main act is it not a case of excessive delegation etc. enormous jurisprudence has already developed . you will find that if an action is taken you take it to the Tribunal it's a statutory appeal the Tribunal cannot really set aside a provision after regulation do you could under Chandra Kumar you could can indeed set aside even subordinate law but Tribunals have been very hesitant and timid about setting aside subordinate law That is the distinction between courts and tribunals I know but even if it is a specialised Tribunal it cannot set aside provision of the parent statute but it's could review the subordinate law is the ratio that people propound but in practice it is nonexistent . nobody really challenges no Tribunal is willing to. Is the ratio the people Pro pound but in practice but in practice it is nonexistent nobody really challenges it nutritional is willing to Chandra Kumar case came from a Tribunal constituted under .... act exactly this is not a 51 A Tribunal this is a 323 I don't even remember the 323 b Tribunal which is

actually there for the question was this Tribunal can't even go down that path so appeal from this Tribunal when it goes to the supreme court will still be long agitated the supreme court would not suo Moto take a constitutional challenge. Nor could the Court nudge the parties to say why don't you file and article 32 I will Club the two and I will clean up the system the tunnel does not happen it is said that administrative tribunals have no power .... ok sorry I was under the impression that from Sampath Kumar the position changed in Chandra Kumar that is the leading decision it can't question the validity of the act under which it is created correct but the subordinate law . correct this is the debate that happens when I tell the tribune all member but you do have the power is it is subordinate law and we have the same agitated debate and nobody really challenges the case law gets laid down The Appeal under 15 Z get heard and the case law gets off held so there are any number of judgments the supreme court on insider trading interpreting price sensitive information which I actually got founded in subordinate law but not in the main act Udaipur to Mount a new challenge to say this dichotomy is unconstitutional is again not very fruitful because it would be a very Uphill task to convince bench to describe something that has had currency of 20years of jurisprudence to say that the original at never defined it and therefore now please set it aside and quotes have tended to be very reluctant to set aside economic legislation and I don't know why that distinction comes in quotes of are more comfortable dealing with attention matters or personal liberty Indian forcing constitutional rights but when is a businessman of particularly ...from a stock market as Sandeep said the reluctance to look at a business man as a victim of a constitutional trample is very high it is more than that I think there are several RBI rulings that get into this question they say that they are not experts it is a welfare legislation in favour of a .....

no I don't think it is a welfare legislation vs. non welfare legislation question  
.....

that is one no there is another distinction all these RBI rulings the Supreme Court rulings on RBI which get into this and the distinction is not welfare versus non welfare they are saying these economic policies policies are very difficult for Supreme Court Judges . we have specialised people whose job is only to look at these so we will not second guess what they think.  
..... it is said by Mr. Parikh all this complicated questions economic and insider trading the court says there is a specialised body go to them I will not go into this that reluctance only comes because you are not familiar with the subject . it is something which is so out there in the meantime they have not allowed the tax to go on no no tax tax is something which affects people across the board purchase share market securities you even look amongst yourself how many of us are actually interested in that in real terms. but you may be called as a judge to look into it and is very very real issues come up many many Buddha thought that this is a very esoteric strange specialised field but the fact is it involves huge constitutional issues judges of reluctant one of the reasons why Mr. Parekh says the judges have refrained from interfering with SEBI's jurisdiction and have helped the magnitude and power off 11 is because because the judges themselves don't want to go into it because of the unfamiliarity

can I supplement one other element in fact this debate is happening in Europe the European Court of human rights is an extremely vigilant body the EC HR and in fact the United Kingdom was part of it way before the Euro currency Merger happened the EC HR ruled last year in an Italian securities latest case the Italian securities regulator had similar powers sections 11 11 b it director the lawyer actually who handle the transaction I was on the board of a certain company it said you cannot sit the board of any listed company and like SEBI it was a preventive order ex Parte

followed by eventual confirmatory orders and the EC HR has ruled that this is holy violation of human rights of that individual who had every right to due notice due process etc. in India the moment you say a tie wala and human rights people laugh you out Human Rights is seen as the domain of the left economic I mean the left the economic right is seen as a perpetrator of violations of the state violating the Human Rights at the behest of economic right . so there is a deep seated economic bias as well . this will emerge when you are really affected and it becomes more widespread things move a little more slowly and as Sandeep rightly says the economic policy Arena

that will lead to inclusive growth so you mean to say that the right human right is also basically an issue can I just Nuance that a little more I will also address your point also see what is the nature of the conflict under the SEBI act who is a dramatic personae one will say it SEBI and business . it is actually seen that SEBI is the spokesman for the investor and business so it is a big business small investor and you would say small house holder you ask the question about greed earlier I think and there is no end to greet and despite greed despite having an returns of 4 % per annum you know consciously participating in Ponzi schemes. You shout scream and say I have been taken for a ride I have been cheated despite being Chartered Accountants yourself and solicitors yourself there are people to listen to your tale of woe and say oh you have cheated them the market and you have cheated innocent investors so the conflict is really then are you for the big guy or for the small guy and again the reluctance to set aside the provision off law which empowers a regulator to deliver equity and Justice to the small man otherwise does not have any voice all these factors come in I'm not really looking at a constitutional challenge seriously as a constitutional challenge as a constitutional challenge can we go back to your issue judge Jury and executioner. nobody has really attacked

the elephant in the room which is how can the same person be judge Jury and executioner I don't believe there is any ruling at all on this there is one I'll just we had a case before the SAT if you go to the the only issue that you mentioned about the balances what is your personal opinion on considering the state of the economy and the social problem it faces should we be regulating more regulating less the markets I think we should be there are two problems in regulation in fact the the Indian financial code actually deals with this you take any body of law forget financial regulation any body of law that gets written in this country is preceded by a genuine public consultation I make the strong statement very responsibly Virtually no body of law is preceded by engagement with society for the first time we saw it in the Anna Hazare movement where we set our version vs. your version what the law should be and Society started fighting with the law maker but none of these laws draft form get discussed not even and Parliament . even the subordinate law so therefore most of our regulation is intuitive you feel that if I make this crime punishable with death the crime will come down for example if I say a non crime is a crime it will help conviction so therefore society will be more careful and we will get . so that sort of approach is a serious problem. Just dwell on this for a minute . do you think that considering the state of economy India is in the social situation should be the regulating the markets more or should we be regulating them less considering the stock markets are a self regulating mechanism Indian cells what do you think what is your personal opinion will it do India good stock markets more or make them more liberal what is your view I think we need to liberalize in some areas we need to start enforcing more what we already have. Look at non securities market areas also whenever a crime takes place I forget we have the IPC which almost answers almost everything and we say we want a new law we change the law we re-define the violation and therefore we need to cut down that some of that the transaction cost in market are too high look at the reality

today all investor is it benefit in the investors. I don't know if anyone in this room actually read IPO prospectus cover to cover it is around 400 pages you check the box and say I have enforced so much disclosure . do we have a disclosure base system in reality. the answer is no. if the regulator says we don't like the quality of the ratio you're not going to approve this issue we wont to call it an approval we will not call it rejection these are only comments . but we are not going to allow this issue to go forward so there is a lot of complexity which needs to be cut down equally there's a lot of intervention that is also needed I think it so it's a question that needs a deeper analysis as to what is wrong on the over regulations side and what is wrong on the under enforcement side and in my view both are needed take a simple example I was just giving that example before you supplemented the question we came up with this evidence of Golden forest Sharda Chit Fund emu farming you know the bird emu somebody collected money saying we will bring those Australian birds plantation . by the way one small information this tree farming which was... disclosure came that many of the .... was by advocates from Supreme Court and Delhi I wouldn't be surprised there is so much money it is a possibility so what has happened is look at the knee jerk reaction override relations side last year the Act was amended to say any arrangement that involves you know there is a concept collective investment scheme and what is a collective investment scheme it has four criteria food ingredients have to be met you have to collect it from multiple people it should be pulled into one common pool there should be a manager of the pool who is distinct from the contributors and the pool should be with the object of making profits and distribution if these four ingredients are met then it is a collective investment scheme and thereby you look at the emu farming plantation . then they discovered that people are actually doing things which are not strictly falling within this Ambit so chit funds what is State Law state form of organization so what did we do as a law implemented that section 11 aa to say any arrangement that has an aggregate

value hundred crores will be Deemed to be a collective investment scheme will Deemed to be ?

collective investment scheme if many people in Bombay come together I mean it's like let's say is worth 10 crore you just pool your 10 crore together and it becomes hundred crores

forget that pooling every building in Bombay will be a collective investment scheme the cash credit facility suppliers credit that large FMCG company like a Videocon or a Hindustan Unilever that you give because you giving credit and you don't take money later if you pull it all together it is hundred crores so it is complete ambiguous law nobody knows what to do with the law. there is timeshare holidays Mahindra holidays has a Holidays scheme you pay money today and then for your lifetime or the next 20 years you can go one holiday on the basis of the money put in if this aggregate 200 crores it is a collective investment scheme this is in the main acct no they realize like the point you raised about insider trading when is felt that this is a problem the second Ordinance simply said SEBI is granted the power 2 grant exemptions some coverage of distribution so the solution has always been show me a problem I will throw a law at you show me a problem with the law I will delegate the power to solve the problem. this problem is not to be resolved in the Indian financial code which makes it a matter of law that when you write a regulation you have to publish it in draught form you have to present a cost benefit analysis what is the benefit from the law that you hope to achieve and what is the cost at this law conflict on society you have to analyze that you have to call for public debate you have to deal with the public comments and then make the law. this also has the benefit of engaging with society because society knows what you are expecting as a regulator from the subject and therefore the subject and the state are able to work in tandem. so this is sought to be made an explicit provision parliamentary statute in the Indian financial code

having said that I think that is the nuanced answer the blunt answers I think we're

pretty ok in terms of if you take out the side and under regulation the main focus has to be on better enforcement number 2 I think we're doing pretty ok frankly we have all these problems which we were discussing but to give you an international every competitor Indus ranking where India ranks very poorly overall the financial market and market regulation we are consistently on the top 15 of the world out of 180 countries few months back a world bank report show the search for the best investor grievance redressal ahead of the United States so we're doing ok we are not too bad frankly in the regulatory space there are a lot of regulatory issues which will discuss but the answer is we are ok with the regulation no more no less but whatever we have force and just to give you a context the Dodd-frank act in the US which km couple of years back introduce 27,000 new restrictions on companies and intermediaries Sandeep it's a brainstorm debate so I am glad you Raise some of these issues I personally believe the first biggest solution is to acknowledge the problem and we tend to deny a problem if it is not broken don't fix it it is how we lead life until we came to a crisis in 1991 the MRTP act worked beautifully it is fine the CCI act worked beautifully its fine but ultimately it lead to a crisis and when there is a crisis like 91 with 1 week off reserve left to pay for petrol imports you think ok breakdown all the law bring in the licensing abolish all this fetters so we do need to look 20 years down the line are we in a growth path where 10 15 years down the line have a crisis I have a more bleak view of the future unless we do some substantive changes like the Indian financial code . because there are serious problems which we need to acknowledge what happened to the west is in the last decade post Lehman crisis has exposed the under regulation in the west should have the complete laissez faire sort of approach anyone on Wall Street with wisdom running in his head when he woke up investors used to be timid to call their bluff because they would be serious and sophisticated sorry free markets but USA is a very it is a lobby driven country I mean the policies taken by whoever has the best lobbies and they regulate that too

write a law around everything and legitimacy it on the other hand we crony capitalism system which is which works on large industrial area buddy serious nobody really pens too much time on so we're over regulated at some level us was under regulated at a very low level. they are coming somewhere here but that doesn't mean we don't need to break down and continue to reform I'm a little more Pessimistic about how great things are and now the regulators upgrading themselves on exporting their policies you know I have read speculators article saying we are an exporter of our ideas because India didn't face any problem in the US faced problem therefore our model is the best in Tamil we have a phrase saying if you really want to protect your child I never get hurt tell him never to run he becomes a cripple muscles are without any strength but I will never run and it would be handicapped the truth is somewhere in between we need to strengthen them we need to strengthen our investors to learn how to lose money responsibly unconsciously and make money responsibly unconsciously the tournament if you are not compatible the Western world end of the world share this regulation doesn't mean Ad-Hoc ISM to have provisions like 11 that is adhocISM extreme I will give you another life example office 11 we have the prevention No 21 is more about civil courts no I'm sorry where you are required to places regulations before the parliament Section 30 that is 30 you don't have to do that here the circulars and ever table before the parliament only the regulations what is the flavour of Statue that we are talking about someone needs to ask that that is the point of the debate that is the point. so I will give you a flavour of the statute I was giving an example of

it is like an executive order under article 63 of the constitution and that executive order gets to override Section 34 of the arbitration and conciliation act

in that sense it is an eminent domain sort of argument that we have the right to do what we will the Parliament has empowered us. Let Us see real example so it becomes clear the prevention of money laundering act you all are conversant with it was an act made for reporting suspicious transactions India is a signatory to the FATT financial task force global conglomerate of nations to say we will resolve to attack black money. India is a signatory so we need an anti money laundering law what the law does it required every financial intermediary the loss going to be extended to lawyers and CAs by the way the bar council will also make it applicable to us idea is basically you should know your client if Dawood Ibrahim is trading on the stock market and you don't even know your client is he is money laundering he is making money on the stock market legitimately and using it to make bonds in India for example that is the p m l a law now when you make P MLA applicable to banks stock brokers all the section 12A intermediaries who is the best judge of how to help them report in a more fair manner the financial regulator so the pmla says SEBI and RBI will have a role of assisting authorities under the PMLA and one of the duties is to write a circular to see how to keep records and how to report suspicious transactions RBI wrote it for banks SEBI wrote circular for market intermediaries. so it says circulars issued under section so and so P m L A act in the last para it says this circular is issued under section 11 the SEBI Act now the question is what is the source of power and we have the trial balloon from SEBI the punisher certain broker whenever they failed to establish negligence they say but negligence is enough you should have reported under pmla. I am the author of that circular and therefore I am going to initiate adjudication. penalty 100000 per day for not reporting actually had a case like this they went to the Tribunal Tribunal was then headed by retired chief justice he initially he was reluctant not very taken with the division of powers later and he

forced SEBI to file an affidavit . adjournment after adjournment he retired eventually there were 2 bureaucrat members who upheld the action of SEBI and basically saying the circular says this is also an issue under 11 and therefore the power 11 is available it doesn't matter if he is actually an instrument under p MLA. the PM l a has its own appellate track for violation of that very circular so if you violate that circular under the P MLA there is an adjudication process similar monetary penalty there is an appellate Tribunal and there is an appeal to the supreme court . so somebody said how are you conflicting 2 ... no no there is a full track you can go in writ to any High Court even against SEBI writ jurisdiction will not be ousted. anyway the short point I am making is even when you're authoring an instrument of law under another law so long as you're tick in a line saying this is also issued under section 11 of SEBI Act Tribunals are also saying this is fine . of course if the client would have challenged it in writ we would have had a writ court looking at it. it is a 5000 rupee penalty on a small broker firm in Baroda poor chap kept coming too Bombay to appear before SAT it was so expensive he said Sahib how much more can I fight I am not here to clean up the system but but where the jurisprudence is laid down and it has gone unchallenged to Supreme Court on question of law that a circular under P MLA if the author can tuck in a line saying it's also under some other power the same circular can be action the two parallel tracks of legislation to my mind it is wholly unconstitutional so this is the nature and scope of the absence of check and balances to this instrument in a regulation for whatever it is worth You table it before parliament god knows who in Parliament read it but at least it has got a track you could complain you could meet your MPs and say look what's happening there is a subordinate law coming in they can look at it in fact the whole FDI in retail debate that happened in Parliament wasn't subordinate law it was a subordinate clause from the RBI which lead to full blown session of Parliament having to debate it all that is missing you suddenly wake up and write a circular saying claim is below 1lakh you pay the investor first and then arbitrate the net consequence is that brokers don't

want to take on small investor  
..... how much of it is strictly enforced we are trying to understand the provisions is  
it really being put to full measure  
I think so each of the provisions are under 11( 2 ) you will find a corresponding  
subordinate regulation almost everything  
separately it is there  
yes subordinate legislation the use section 13 for purposes of implementing 11 (2). so  
under that they put .  
is it issued as a regulation or  
as a regulation which is then tabled in Parliament yes to volumes of this size as of now  
my brother was asking only who is there where is the rest I said somewhere else as a  
matter of fact regulation picture frame by the board cannot be set to be subordinate  
legislation for 2 reasons board is a creation of statute if it was made by central  
government like the rules which the frame under 29 it can be said to be subordinate  
legislation but the board which self is a creation of the statute  
because some of it is delegated  
even the regulations are at best can be instructions of the board  
so the reason why ..  
anyhow this issue has been raised it is 3:17 it is time for us to go to the library thank  
you very much think about it there is no solution  
no solution is your point that there should be a challenge to it  
there is one element I can sense the judges expression  
I'm sorry food for thought was given at lunch time cause I've only interacted with  
some judges what the food for thought was should judges be subject matter of insider  
trading rules and I don't know ultimately what the answer was but the few that were  
sitting at one table decided that yes judges should be brought within the Ambit of  
insider trading there is a judgment which I know is going to impact the shares of a  
particular company I tell my son and my son goes and buys to shares at a high price

or whatever it is or sells ok whatever but then question was also raised my brother who was sitting with me at lunch time who said you can't punish a judge the only thing you can do is impeach him so then what the law did not bring the provision into effect Prevention of Corruption Act maybe you can amend that . Tippee yes. no but it takes the question without legislation it is not in insider information the judge is an outsider even the issuer of securities is an outsider but he may have had some Association with ..... That seems to be an insider information see while on the point if I may just do well on it for a minute the net position came to this if there is a tax raid and the raiding team finds price sensitive information and goes and trades they are recipients of the information from the issuer of securities therefore they would be caught by the definition of a tippee. The raiders They guys who are raiding they got it from an insider but a policy maker and the judgment writer who is an outsider who is the originator of the price sensitive information unless there is legislation making him liable he will be out of it

## SESSION 5

Very good morning to all of you. We will continue the tradition established yesterday by Hon'ble Justice Ruma Pal . I will introduce my 3 speakers before lunch . my first speaker is Mr. Rodney Ryder he's a partner at scriboard. commercial law firm with specialization and commercial law especially Technology new media and IPR laws he is presently the advisor to the ministry communication and Information Technology Government of India on the implementation of IT Act 2000 is also advisor to data security council of India on structuring of industrial data privacy and information security policies and contractual standards .his book IPR and the Internet has been referred by the supreme court on domain name he is an advisor to nixi . and a member of panel of independent neutral arbitrator with Nixi . he is also honorary legal advisor of Nepal Telecom authority computer Association of Nepal office of Attorney General Sri Lanka and many other police training centres . My second speaker Mr. Shamnad.. my second speaker is Mr. shamnad Basheer . who has not come I'm sure he will be coming .can you ring him up. he is the founder of Spicy IP . he joined n u j s Kolkata in November 2008 as the first Ministry of Human Resource Development chair professor in IPR Law. Prior to this, he was the Frank H Marks Visiting Associate Professor of Intellectual Property Law at the George Washington University law school in Washington DC. Shamnad graduated from National law school Bangalore and then joined Anand and Anand, a leading intellectual property law firm in New Delhi, and worked on a variety of contentious and non-contentious IP matters before being called upon to head the firm's Technology and Media law division. India. He went on to do his post-graduate studies at the University of Oxford. He completed the BCL and then he came back to India. He has spoken at various international symposia on intellectual property issues and has also written extensively on IP themes in internationally reputed journals.

My third speaker is Pratibha M. Singh, Senior Advocate, Delhi High Court has completed her graduation in Law and Academic Law from Bangalore and also holds a Master Degree in Law from Cambridge University, UK.. She is presently Founder Partner, Singh & Singh, Advocates and has completed 14 years within the firm. She is also a Leading litigation lawyer & counsel in intellectual property cases in India and is currently handling a large volume of trade-mark prosecutions, oppositions on infringement, passing off and, unfair competition cases. She is also appointed as Amicus Curiae by the Hon'ble Delhi High Court to assist the Court in a suo-moto action to streamline the proper administration and functioning of the Copyright Board.

My advice to our speakers is to confine their presentation to 40 minutes and thereafter invite questions from the judges on your presentation and other issues so we start with Mr. Ryder . thank you mam very much for the kind words . respected judges senior and colleagues on the panel I have selected A few slides too initiate discussion and also I will finish within 40 minutes I am quite happy and comfortable being asked questions anytime I have chosen a interesting things within this title which was given to me intellectual property and the Internet and intellectual property and new media is it work so one of the things I'm going to start with is looking at the IT Act what it does very quickly just put things in perspective I'm moving on two issues that plague a lot of businesses in India which is online marketing places counterfeit spurious goods which are being sold online . and how brand owners are taking up the issue then we are we have domain name disputes with historically one of the interesting and voluminous . . areas and of course looking at the monitoring intellectual property online if you copyright issues as well . begin with what does r information technology act 2000 do for us enough is taken from the UNCITRAL model law . which one go with the passage of the act . everything that is Electronic is equal traditional evidence that means my text message my screen shot email everything is presentable and admissible Court of law . along with the evidence act 1872 the Indian Penal Code it also means the bankers book act and model legislation . what does

focus on the medium and connect traditional law to the Internet also what is changed. In our emphasis is that modern Electronic Commerce law it low relates to the medium . and the machine is subservient second 2 the fact that enables just the medium so just like the development and evolution after radio . when I was small boy and I used to visit my grandparents my grandfather had the same normal transistor it look even more enormous when I think about it now . I used to go and settle with the knobs it is to make all those funny sound which I loved now most of us have radio as a small minor component of our phones . the machine is becoming more and more irrelevant or rather there are many ways to connect to the medium . in certain jurisdictions you have what is come to be known as computer law the law of the machine where computer manufacturers and since the beginning till date computer manufacturer manufactures every single component of the computer it is never happened in the history of computing so that had to be the series of laws arrangements development which connected hardware software vendors and suppliers intellectual property right owners and to the end user the consumer and that broadly came to be known as computer law the law of the machine . parkinsonism medium and things which are integral to the medium because there are so many offences which are incidental threat I threaten somebody I can use any mechanism to do it I can send them a black spot all five orange pips or a note I know what you did last summer I can text it in some cases the medium a certain extent is irrelevant . and of course with our IT Act we have made the connection . which sections like 65b being inserted in the in Evidence Act we have closed almost every gap there is . the information technology act 2000 look seriously at the role of intermediaries as those who are enabling this connectivity. and over the years we have seen intermediaries across the world teeth on social media like Facebook Twitter or others pink label for issues relating to contempt . I don't like someone I post things online who gets caught the owner of the bulletin board the owner of the website to an extent. so what the law has done it has given the protection or safe

house to the intermediary . saying that if the intermediary does not act upon . what does not modified not do anything more than storage transmission already in the transmission that intermediary is not liable but you have intermediary that are active some are more active than others in the promotion of content all in the promotion of online goods so what the law has done is that intermediaries must appoint grievance redressal and liability begins from the notice of knowledge . noncompliance within A period of time what mean intermediary is liable . what we are in experiencing in terms intellectual property issues online we have seen counterfeit goods unauthorized reproduction of copyrighted material and unauthorized profiles on social media . right now there are at least about 5 to 7 misleading profiles in the name of the honorable prime minister . about 15 to 20 fake pages on facebook in the name of The Reserve Bank of India . all of this mean that the intermediary is obliged to take quick steps now where it becomes interesting is most intermediaries giving there context and the fact that they look at intellectual property seriously understand issues relating to counterfeit infringement of trademark . what is the problem for us is issues relating to content content in the form of hate speech content in the form of parody content to the form that may upset anyone or someone in India you also have unauthorized applications . encouraging people to buy counterfeit goods . what's the right holders do . thanks to the information technology act and the evidence act collection of evidences is much easier like screenshots placing an order . collecting the goods issuing the relevant notice under 79 to the intermediary and of course eliciting a response E-Commerce site which could include taking down off infringing articles. sharing of the details of activities and of course if there is no cooperation then an action can be notified . show screenshot of the webpage taking care that the evidence is preserved and of course the evidence being accompanied by an affidavit as per section 65b I ideally the affidavit it must answer the questions like what was on the website is it properly reflected it is attributable to the owner of website or is it some send on the online portal Marketplace . for the collection of

evidence from ecommerce websites section 65e Lays the Foundation any information on the electronic form is Deemed to be a document and this is what I was referring to at the start so the conditions computer output should be produced by the computer the information derived was obtained and fed in independent regular course during the period the computer was I should be operating properly and it should be re production of the information after computer resource and nothing else pint that's about intermediary liability in e-commerce places now Trademark issues on the Internet and I can't resist before we actually discuss udrp which is the most fascinating case studies on online dispute resolution . what is or what makes a good trademark we know the generic and descriptive words are bad but when it comes to arbitrary words they are better when it comes to invented coined words they are among the best because the reason that they do not exist and brand owner can call up on someone and ask them as to how they came up with this name which did not exist . uniform uniform name dispute resolution policy is first ruler global online dispute resolution system and it relates to domain names . prior to 1999 when anyone went to register the domain name they would so with ..... it was and still is a First Come First serve basis . if I go online just now and a domain name is available and if I have my net banking credit card debit card details I can register a domain name within a matter of minutes and with my Internet connection if the Internet connection is better than what I have perhaps in a matter of seconds . looking at the dispute resolution system post 99 the registration agreement if any domain name has an arbitration clause . when I register a domain name I can send to arbitration so that is essential and of course there are due process safeguards. built into this udrp system so first dispute resolution system procedure is supported by an agreement that means when anyone register domain name they sign a registration agreement which includes an arbitration clause there are 3rd party facilitators for arbitration who are independent persons . both parties are given sufficient opportunity to present a case and this procedure results in the binding dispute settlement decisions which are

reasoned there is an appeal mechanism so how it works is this looks at dispute between a Trademark owner and the registrant of a domain name show The trademark owner the claimant has to prove 3 elements 1 that it has rights to the word domain name 2 the registrant does not have rights 3 there is possibly an element of bad faith off course in many cases the first and the second criteria have been established the third automatically goes . we are looking at dispute resolution system that is contractual mandatory that means it is it is built into the registration system and everyone who register the domain name have to agree to that system there is a direct enforcement that means when a complaint about this the registrar of the domain names is made a party the domain name is put on a lock that means it can either be transferred nor anything done with it . during this proceedings it is international the scope is limited to Cyber squatting unlimited 2 cases where there is one right owner aggressively someone who doesn't have rites we are not looking at situations where there are two claimants to trademark . that would have to go through a court process because there's going to be a lot more time . streamline proceedings only one set of filing allowed for either side . within a specified time frame so what are the due process safeguards neutrality . neutrality of the forum the arbitrator notice to the respondent burden of proof complainant to prove all the three factors impartiality and independence of the arbitration panel . reasoned decisions appeals payment of fees. So you have Ican policy and the service providers' policy . This is how it works Indian Oil Corporation vs. Nitin Jindal . Indian Oil Corporation came to know that someone living outside India by the name of Nitin Jindal had registered Indianoil.org it had nothing to do Indian Oil . The panels at first the complainant has been able to prove Indian Oil is identical to the complaint registered trademark except for the addition of dot o r g . Secondly the respondent did not have any legitimate business or any other registration he just had this website . Indian Oil business is well known even outside India it is a Fortune 500 company in fact the highest ranked Indian company and the panel by the

circumstances and the facts concluded that the respondent could not have been not aware the complainants business and Trademark rights that it was too well known . of course there are different forms of intellectual property have different fair use exceptions built into them and it's also well known fact that out of all the intellectual property lawyers Trademark lawyers just do not have a sense of humor . so you have people for the Ethical Treatment of animals who's website was at [peta.org](http://peta.org) discovering that there were people eating tasty animals again the arbitrator the people in question have no I am sure they had a good laugh had no hesitation in hunting this domain name to the people for the Ethical Treatment of animals . just as we came across the case new years ago where someone had registered monsterjobs and when we went on the website the caption read are you a vampire a Werewolf out of work we can get a job for you. We had a good laugh but in the end is it a violation . We have seen the trademarks and patents and of course designs have a different level of Secrets that copyright cannot aspire . yet you have many many cases which have been and there is a whole volume of cases which have been handled by Court across the country including courts in Delhi Bombay in particular which has successfully result many many domain names matters the only difference is UDRP proceedings that it is time bound . for a top level domain names you have a time frame of 45 days to resolve that dispute from the date of the complainant filing is docket all findings electronic . similarly you have the IND ERP which is for Indian domain names this operates very much like the udrp with some differences minor ones the time frame set out in this 60 days instead of 45 there are provisions on damages damages get a little difficult because many times we have seen the party is resident outside India especially the resistance of domain names how does one ensure that damages are enforced. the IND RP it's not entirely online paper filing are the norm along with electronic versions of the document these are some of the cases you have Schlumberger. oilfield technical consultant exploration company waking up one morning to discover that there was a gentleman by the name of Manoj Kumar in

Bulandshahar who registered Schlumberger the process was very fast 1 set e-filing was allowed one from the complainant none from the defendant . . this Manoj Kumar did not appear interestingly enough we have seen that over the years the domain names which were first used and brand related problems people registering the domain names to sell them back to the brand owner now what is happening is domain names are being misused in recruitment scams . There is an increasing number of cases that these domain names are not restricted to intellectual property interferences . In this particular case although there is no website we really did not come to know who Manoj Kumar is but but people all across the country started getting emails from Alex . Jordan @ [slumberger.co.in](mailto:slumberger.co.in) . Alex Jordan Global Legal head of schlumberger at that time and he was allegedly inviting people for interviews at Holiday Inn Agra out of the hundreds of people who actually received emails it people I believe actually showed up for the interview . couple of quick things about copyright had there been no Technology my understanding of perhaps we would not have copyright law in the old Times we had monasteries and gurukuls before the birth of the printing press institutions well learned men would prepare other soon to be learned men on the way things work with printing press we saw a lot of upheaval including the necessity for copyright law with the Internet of course you have ... because anybody can cut copy and paste Indian author. one of the problems or issues is digitalization digital copies being made compressing large files into smaller ones and bandwidth now much smaller files can be sent on much larger network . so they are couple of issues Napster dealt with the right to communicate right to publish under right to public violated because this website was communicating the work to the public . when you have others like Bit Torrent you have piracy preventing piracy using technical measures and this is the last point I need to make amendments to the Indian copyright act anti prohibition on the use of certain mentions use of the data bases that bypass this lock. so the theory is is if I use to protect my copyright work then I put it in PDF there is Technology that can break unlock PDF becomes violative

of copyright . so you have a number of Technology this is one of them the eBook reader where you can manage your rights so you have a work of course Aristotle's politics is on the public domain what you have the ability d to give these rights to the reader or user you may or may not copy you may or may not print you may or may not read aloud . thank you so much . any questions ? ... . I beg your pardon yes . in fact there is a lengthier version of this presentation . which has double the amount of slides that is you know will be circulated after the session that has a few additional case laws on all of these including case laws from Indian courts High Court and things like that yes regarding this evidence talking about the affidavit you said should be signed by person occupying responsible position . could you elaborate on that what do you mean by person occupying a responsible position . see when I for example take an organization where the goods are being influenced or someone is .... . ?. if you take a screenshot they must be someone who is capable distinguishing and examining that computer . it sounds very lofty but it could be anyone in the organization who is capable of making the distinction also person from the IT Department who can testify the computer was functioning and this is a normal print out which came out normally functioning machine . but don't this sometimes go through various servers maybe in some foreign country . yes but if the content is appearing on my machine right now it depends on the kind of offence . so if it is a if these are goods which are being sold in India which is visible all across the world if it is content which is Deemed to be published on my machine via the Internet then I can definitely move the court within India and I can definitely support my claim present an affidavit it which is attested by someone competent with in my organization or .. the evidence act states that if there is sufficient evidence that this was at the actual printout from a normal computer running in this course ..... but it was a printout which was taken in the normal course and an altered print out when you take it from the Internet . My question is.

can I just had a few things to what Rodney has just said there is always a problem with technology we do understand that and it is very easy temporary email ok computer printout that's a question that contributed asking according to me the only way we can satisfy is the matter is which section 65 says you can take a printout and you need to certify this was taken in the ordinary course the computer was not proper working condition . unless and until someone else comes and presents an alternative text of the email it has to be taken that what what the person is producing is correct suppose I send a email to Shamnad I present text of it I print it and say this is the email I sent to him unless he comes and shows that this was not the email at least to that extent we can . now for example in Delhi in one matter I remember the Honorable Court access to website online on the spot because Internet is available in almost all the courts they accessed the online Trademark registry . website there has been an injunction with vacated round that The trademark had been abandoned the case of the appellant was Trademark was not abandoned . it is still alive that was a mistake in some report so the honorable judges said why we need to fight about it the access The trademark registry website and on the spot The Appeal was allowed . is it a self attestation ? yes it is in self attestation 65b is a kind of self attestation and it is presumed that it is correct unless there is a opposite ..... my question is on Section 65b the computer is operating at a certain point of time nice to be certified by the person . that is ok no problem suppose there is an interruption in power it is always recorded with electricity company can it be set other system of an operating condition at that point of time because of the interruption during this period . the question is whether it was working the computer should I work during the period of time when the printout was taken I think what the speaker wanted to say if I am not wrong subject to correction you mean to say that presumption will be that the computer is working unless it is rebutted by someone who claimed that it was not in working condition the presumption will go that yes that it was working . do you mean to say so ? my specific question is about power interruption latest if there is a parent

reference for 15 minutes in that relevant period can we say that the computer was working sir if I may just take it with logical conclusion . if there was a computer power supply interruption can the computer be said to be in working condition . the purpose for which the computer has to be in working condition is that the software is working properly whether it is working on a UPS or power does not matter . so long as the document is not tampered the ultimate question is the computer has been working condition for the document to be printed in a proper fashion sometimes we take a print where a line or side or letter is deleted in the print kind of issues for which you need the computer in working condition so that there is no tampering with it . there is no tampering with the document but because of interruption of power data may be lost . the person may not have any intention to take printout of such document I want to know . then there are two different issues 1 we should make a distinction between where the evidence is on a hard disc in my computer if it's on hard disc all I need to do now take it to the forensic laboratory map it prepare multiple original copies and hand it over to the other side for examination that is one thing if it is online resource then like mum said it can be accessed at anytime and of course one of the famous judgment is Amazon vs. Toys R Us victorious claimed that Amazon wasn't displaying their products despite an agreement so the judgment online and said where are the toys on Amazon and they found that Toys R Us claim was perhaps true . it depends on what kind of things you are looking for if it is an online resource which can be accessed from anywhere . if it is on a personal computer .... in case of a personal computer of hard disc the hard disc must be checked and also checked in entirety because Dharambir vs. CBI face very clearly that hard disc Or computer resource must be printed in full so I can't Present part of it . it will be mapped the coordinates will be established and copies will be made for the other side .

I want to go back to one of the questions that the honorable judge was asking. madam let Mr. Bashir answer I want to hear about this. I think your question goes to

the heart of the something more fundamental because the section is very unhappy worded it is nonsensical to question whether the computer wasn't working condition . if a printout was taken then it is presumed that it is working. if I tamper with software or a temper with any part of it order process that will produce information that is otherwise not authentic that is a separate issue as you rightly said and you can get to the root of that by many other ways SEBI attestation for all practical purposes the machine wasn't working condition can almost always be complied with . but it will not tell you anything about integrity of the information that you publish and that's a problem . ... responsible official person ... not happily worded. normally it is the head of the company . no forget IT head . in case of companies it is the one who filed the cases on the basis of the print outs but attestation is done by it head . now we take that off machine wasn't working condition unless the other side objects . then what happens there after there is no mechanism to determine whether the machine wasn't working condition . you have to decide something that happens 6 months back file a complaint it takes 6 months to progress to the state of trial at that stage somebody comes forward and says the machine I dispute the certificate that the machine wasn't working condition . how do you prove that . so the traditional rules of evidence cannot work in this . can you explain a little more about this dispute solving mechanism can you explain a little more about this dispute resolving mechanism in the domain name quarter can you tell a little more what is its composition who selects it where is it situated can you explain it little more . the policy has been decided by I can which is the Internet Corporation for assigned names and numbers which is the Internet governing body now they have put procedures in place there are about 3 or 4 service providers . no the service providers have a list of independent neutral panelist is it part of a treaty is it a private Corporation who selects it . I can controls the domain name system including the registrars in India you have National Internet exchange which manages and controls it is a body governed by the Ministry of it it owns and controls the in domain . .... . it's a great question

because it goes to the fundamental question of who controls the Internet and I can historical if you look at it had a significant involvement of the US government and now I think the Chinese Indian Brazilian all of these countries are very anxious about I can control . that fight is ongoing but having said that Rodney is right the domain name dispute resolution by and large did not get so much talk in that politics because what he did was appoint neutral arbitrators who are experts around the world . United Nations frame the policy for dispute resolution secured enforcement by ensuring the people that authorized to register domain names would comply with it. the registrar undertook to comply with the arbitral provisions . enforcement issues were sorted this way arbitrator said this domain name should not belong to X. is the no treaty which governs this . it is by the uniform dispute resolution policy if you see page 51 materials which have justice Ruma Pal was here yesterday she is the judge of the supreme court explain the centre process in the second case and it's part of a material which has been circulated in fact this process has been in operation for both 15 years now it has faced mentor success and 99 percent of the awards are complied with . what is interesting that the Honorable judge should know only a straight forward domain name case is dealt with under the udrp if there is a dispute for example about generic domain name if there is something some other civil issue about dispute between partners those cannot be decided for example business maybe owning a trademark they may be a civil dispute on the business those kind of disputes cannot be dealt with just basically I would want to put one question while granting the domain name examine the record at all they just whatever applies they grant it. Vikrant domain name of popular figures you are aware that judgment of Mr. Arun Jaitley it was granted to someone else they don't have any search record although IPL side there's so much judgment in the Kerala case also justice Kirpal has mentioned that he must examine the record suppose tomorrow somebody will be getting the domain name from the Association under the name Narendra Modi . suppose she doesn't have any domain name so this confusion will be created

ultimately it will go to litigation so how we can improve the system . so that is a very valid question the reason why the icann doesn't put a search mechanism before registration is because the commercial interest of the registrar there are some registrars example [godaddy.com](http://godaddy.com) . almost all the illegal domain names are registered [godaddy.com](http://godaddy.com) they don't put it because they think everyone has a right to register if anyone has a grievance against that they can challenge the domain is registered for a little amount like 12 dollars 15 dollars and at that stage the registrars don't have the where with all to check . known personalities known names from across the world I felt number of times that the litigation is totally unnecessary had taken the care about all this in advance there would have been less litigation in the court that's a great question so one of the initiation said it did I don't know if it's still alive Rodney deal with much more than we do . they said that we will as we release new domain they said will give something called the sunrise period and within that period only legitimate Trademark owners can come in and apply and shows how you have an interest in the name after that it open for all . Pratibha is right to check ex-ante whether someone has a legitimate right during what is a digital process here trying to balance the ease of the digital economy where everything is moving at the speed of light and people are able to transact and you want the system to move smoothly . actually I was telling for the reason that one unknown person in a foreign country got the domain name registered Arun Jaitley he was made many request that you must transfer the domain name to Mr. Arun Jaitley he refused to ultimate the suits filed in Delhi High Court and the Order has to be passed although he has nothing to do with Arun Jaitley ultimately the court has to direct the party to transfer the domain name otherwise there is no fun to have registration of similar domain name by a person who has nothing to do with that particular party . if I can add to it that is true for Ministry of Home Affairs also very recently MHA has had a problem they are not able to register it because m h a r g is taken for today having to Resort to Ministry of Home Affairs the whole thing and elongated fashion these are genuine problems

which need to be dealt with institutionally there are couple more problems one is domain name registration will have to be integrated into every Trademark database in the world not just India second that supposing there are people who have udrp has expanded the notion the talk about legitimate interest which is a little broader than Trademark law which covers things like things like the issues relating to Mr. Arun Jaitley as the justice raised now I don't know if the famous personalities do not have Trademark rights I do not have a registered trademark even if you integrate the trademark databases worldwide into the search it will still not give you an Arun Jaitley or Priyanka Chopra therefore the solution is we make domain name easy to register this is my own thought but we make the dispute resolution waited in favour of the brand owner it is better than both ways than one. is it enough ? because our clients like Indian Oil I can assure you took more than 6 months to collect all the documents the respondent on the other hand get 15 days to respond that is not a difficulty because in all these cases the parties reside in different countries and this system is working perfectly maybe you can give examples example we got many cases in Delhi High Court. Yahoo Indian arm comes answers in court this is what we can do will take compliances and undertake to do that ultimately as it was said they don't have a role to play except as intermediaries The Suit invariably what is the past saying they will comply one of the first cases in India itself in trademarks like domain name was Bisleri which we are all drinking and this is registered by in Italian person apparently Bisleri meant something in Italian something about a young lady or something I don't remember the exact translation so the Delhi high court was able to injunct the registering authority normally submits to the jurisdiction of the court and phase whatever order you pass we will implement it to implement and get the domain name is quite easy did you implement court orders they have an in-house mechanism by which they say you send the court order we will implement it Mr. Ryder is right actually it's very easy to get it registered but it's very difficult to get it cancelled and it's just like marriage . but out of 100 cases 95 go in favour of the plaintiff .....

best way is to file of UD RP complaint and ask for transfer of the domain name itself because if the domain name is transferred we cannot move from one server to the other suppose you have a domain name registered for example Chennai High Court located in India he writes rubbish . you shutdown the server then he moved to us what do you do then the question is file a complaint with UDRP saying Chennai High Court belongs to Chennai High Court he cannot use that website at all..... just to share with you on this we have two names on Bombay High Court registered [bombayhighcourt.in](http://bombayhighcourt.in) the registered from South Africa and we are having serious trouble to get removed we thought of going to the dispute resolution panel but fees substantially high. also there is dot com which which is taken . Soviet thought of filing a suit it's the only way we can deal with it . Fees is 30000 per .... but that is the reason we opted for filing a suit Pratibha I think you need to be amicus for the Bombay High Court on this one . it was not so simple that is one of the reasons we operate for the suit we took a written opinion since it was brought about the Chennai High Court as an example what I'm saying is it has actually happened in respect of Bombay High Court . and the key issue that you will run into in international domain name dispute resolution procedure it is not meant to substitute for a Trademark infringement process and an adjudicatory framework it is only meant to Cater to a very select set of registrations called abusive registrations which is the moment somebody registers Bombay High Court for example and then puts up things about the Bombay High Court under the international arbitration system perfectly entitled to do that although they May not have as much claim on the name Bombay High Court as much as the court has .

## SESSION 6

It gives me great privilege to be here today it's such a August audience . after the first session I became a little nervous after hearing all the questions . change the format slightly and I said it's better that I I speak a little less and get more from you because I think Pharma useful for us to really get your perspective. many of these issues. so thank you very much to Shruti Ms. Oberoi and The others at NJA for inviting me . I had a gap since I've come here 3 4 years and it's always a pleasure . what I will do today is ready speak the judicial enforcement of intellectual property mainly around in junctions that's been a favourite topic of mine pardon me but a lot of the focus will be on patents I hope that is ok but I will be happy to take the discussion to copyright and Trademark because you know .... I think the spirit of discussion . as a amartya sen says we all have taken the roles argumentative Indians . hopefully we will get some answers out of it . reason I really pick patents is because that is an area closely study but we can also extend out the discussion to copyright and trademarks . mainly in terms of enforcement of patents on judicial level mainly two kinds of remedies injunctions and damages . injunction is an equitable remedy . you have both permanent and Temporary injunction . almost 90 % of cases as disposed of at interim stage . if you have got a temporary injunction then you use that to your advantage to prolong as much as possible you can hammer out a good settlement and if you by chance reach trial it takes a normally long period before the trial concludes . in terms of standards for injections this is something that I have personally been struggling with and I hope that many of you thinking through these issues much more than we have would be able to provide some guidance around what is the exact Standard for the grant of injunction . so we rely a lot on the case call American Cyanamid . and yet it is still not clear to me what is the exact standard that we use whether we were really picked up on the American Cyanamid standard because the signer might standard is a very slow threshold for establishing a prima facie case which is one of the first limbs in order to grant temporary injunction and then of course I will race the most

controversial point and leave it for questions . duvet dispense with temporary injunction complicated cases and go straight for trial . does it make any sense at all to stick with the temporary injunction especially in a complicated case where it is often impossible to find out during the short window who is right and who is wrong patent valid is it infringed and if you get the results from there then to wait for trial and to come to the correct result interim period if it's wrong result IT results in a lot of loss and you can imagine if it's a pharmaceutical drug and you grant an injunction and you prevent a competitor selling the truck at a much lower cost you put them out of the market and if you granted injunction you put him out of the market and after final trial it is established the patent was never valid . during the interim period the consumer loses out because they don't get access to the cheaper drug the generic company loses out . . that is the case imatinib mesylate was knocked out at the patent stage there is no patent on imatinib mesylate .... is a great example of how this plays out . which is another lung cancer drug and of course if I had to dispense with interim injunctions and move to trial how to be expedite at the trials because we also want to make sure that the IP owner does not suffer as a result of the fact you have taken away the interim injunction phase because the interim injunction is always meant to card safeguard the interest of the IP owner and ensure that the market does not get completely eroded and there is some value to the right so how do you expedited trial . These are the sum of the kinds of IP rights I'm sure most of us know this are familiar with we have several different kinds of IP rights and I think the lawyers generally have a tendency we have a tendency to Grab more and more into a fold so there will be some that argue that privacy is a species of it right but you can imagine that the number of subject matter in IP keeps increasing as we go along so 10 years back they might have been about 6 to 7 IP rights and now it has gone up we have about 11 different kinds of IP rights you also have the latest the latest legislation that got stuck which was all about publicly funded intellectual IP it was meant to be intellectual property that comes out of public funded institutions what's the Builder

went through that would have created another regulatory regime around intellectual property but it never went through because it was fundamentally flawed I had deposited before parliament that this bill should not go through because of scientific establishment if you impose sanctions against them for not registering that intellectual property it is meant to be a facilitating framework and not a penalizing framework . the Indian legislature when the first came up with the bill it was a very penalty oriented bill that if you didn't patent you would you would actually face fines and would not ... like that .. we are also debating whether we should have a traditional knowledge India is very strong and traditional knowledge and that again is going through process and India is arguing at the international level that we should have and international instruments on traditional knowledge primarily because we had a lot of experience with a traditional knowledge Being misappropriated abroad so that the better than other part the biodiversity act of course please in as one of the legislation that deals with IP yeah it has not found its way to the court but if you look at the kind of disputes that could arise it is very very complex and very very contentious because this regulator potentially has very wide powers . because the authority has not been to active in the past a lot of case haven't come but but disputes I assume in the next 3 -4 years , many of you will see disputes around the use of bio resources and there is an IP connection there . can you give an example ? very simply a foreign Corporation wants to work on turmeric and they want to make a certain turmeric tea and put it out in the market before they do that they have to apply for permission under the biodiversity act section 37 that any use of of bio resource for commercial use before you use the bio resource you must get clearance from NBA similarly you have come up with an invention after the use of turmeric and you have made a certain kind of tea and it's a new product and you want to patent it can you file a patent application the patent will not register it will not accrue until you got a prior clearance from the because the NDA will determine whether use of the bio resources is proper is it an endangered

resource arise from traditional knowledge . similarly if you make profit out of it have you made a benefit sharing arrangement with the community in the next 5 years you will see a lot of disputes around this . 1 interesting example which happened 5 years ago . there is a cow which is bred in India . in the south of India actually and those cows have a specific characteristic due to which they have very high milk output . that cow was exported to Brazil and they started breeding those cows as Brazilian Indian cows . these are ongole Bulls . .... it is a fact that the original breed itself lost . it's a contentious issues because we're sitting at the . you are right about that but the fact is that this is a Bio resource originating in India the act defines it as a bio . anything that originates in India if you take it and use it prior permission must be taken . moving on in terms of the IP machinery we have the patents and trademarks office copyright office which is the first level office which registers these marks . and supervises regulatory structure . at the adjudicatory level you have the court all of you are familiar with there is the specialist Tribune called the intellectual property appellate board which decide some kind of intellectual property disputes . which are on patents and trademarks but does not decide in infringement it only decides validity issues . validity of patents trademarks it decides issues of appeal from the patent and Trademark office but this body is constitutionally in firm one was the way the statue to structured it provided for a lot of Government control India appointment process and because of the r Gandhi case which Lays down the Tribunal is supposed to be independent like the rest of the judiciary and it is supposed to have people that are qualified in the real sense especially the judicial members should have qualifications which are parameter to High Court Judges . and they found that the IPA b was not compliant on several of this the government . no sir it is decided I filed the case actually challenging the constitutionality before Justice kaul some months ago . and Justice kaul very clearly laid down the appointment process vitiates the constitutional mandate and because the government has a predominantly say in these appointments . it should be the judiciary that dominates in the selection panel and

some of the members do not have the requisite qualification to be judicial members . you cannot have IAS officers sitting as judicial members on the these tribunals because they do not possess the requisite where with all . the government appeal against this judgment of the supreme court the supreme court dismissed the slp . you must challenge the requirement of members . the qualification . absolutely the qualification because it provided for ILS officers with 5 years of experience to be judicial members . as per the R Gandhi case and other judicial pronouncement for judicial member you must have qualifications High Court judge and ILS officers do not possess that . . . I believe that Pratibha share more light she deals more with a criminal side ..... so in terms interim injunction the primary purpose articulated historically if you want to preserve the rights of intellectual property owner till the suit is decided so you want to maintain some status quo because it's been interim junction is not granted and the potential infringer is allowed to have good on Market . the IP owner's right of exclusivity on the market eroded during that time period . it is very difficult for them to recover what they have lost because this is an intangible property this was a traditional understanding in terms of three factors the courts have held that you must establish as an intellectual property owner to prove that you have a prima facie case . the question is what amounts to prima facie . and that is quite contentious find the second is that you must show that without the injunction you would suffer is a parable injury that is injury which cannot be compensated images and finally that the balance of convenience lies in your favour each of these factors. Interesting and now we have one vitiate as a potential fourth factor or it can treated as within balance of convenience it came in some of her Pharmaceutical patent case before Justice Ravindra Bhat Delhi High Court which is Public Interest . it was read as factor within the balance of convenience frameworks and said when you can see the balance of convenience it is not just the convenience of the IP owner on one side and the defendant on the other side it is also the convenience of the public that is the public interest factor in all of this . . although is irreparable injury has been about

whether you can compensate . compensation by and large they have looked at only from the view of the parties but you Raise an interesting question because if you start looking at whether the public can be compensated if you grant the wrong injunction . can the member of the public agitate and say because I lost out on a cheaper drug I have to be compensated it's very interesting jurisprudential question . I really don't know what the answer would be . I assume it might be difficult to grant the iPod authorized I compensate for agitating right the tale of fully got through state machinery and law. if you got it wrong as the judiciary too bad you decided first that you will give me an injunction . later you decided that my patent is not valid but why should I have to compensate the public for a legitimate process that I followed is the question that he would ask . the flight of the individual is not taken into account when mass individual is there Public Interest will prevail over individual right . the traditional understanding of intellectual property what's the right of a person but your lordship the absolutely correct today intellectual property impacts society . there is a case on copyright in the Delhi High Court on access to educational material . you can imagine that application for students the Publishers of sued Delhi University for publishing small extracts out of books and the issue before the judges is is that a copyright infringement . is there a public interest involved therefore I would personally prefer if it is treated as a separate category . and just adjudicate it up on a separate category in my view this acts all involving a public interest and that should govern . these are balanced. patent was created with public interest in mind there has to be innovation there has to be inventions for diseases for the sake of the public so the question is how do you balance on one hand the patent policy of protecting the patent in the interest of the public in long Term and protecting the interest of the public in the short term . it is a very tough question to resolve . it is right that it's difficult to give an answer but there is an answer in the patents act the point is if someone gets a patent registered under section 48 he has rights so while considering the issue of balance convenience this Public Interest issue has been considered by the

court it is already been considered in various judgments but at the same time the question whether anybody from public can sue the patent owner for not getting the drug . there is a provision in the patents act if the government is feel the drug is not available they have got the jurisdiction to cancel the patent they have got the jurisdiction to grant a license to the third party and the government can also control the price they have the rights . that is a wonderful articulation of the scheme of the patents act patents act this kind of social bargain where we give someone a monopoly 20 years in exchange for a very tangible benefit to society that is technological invention exchange . Patent Act very different from a lot of patent acts around the world it has a very strong component of intellectual property duty it's not just about right given that we are due to this country strong duties imposed on intellectual property owners that when you given this monopoly act responsibly . you cannot overcharge

public interest is built into this the question now is can that factor to play out in an injunction case . Public Interest will come in compulsory licensing which will take another later session I don't want to influence on their territory but in terms of injunction jurisprudence it still has a valid role we are not the only country to do this in US the article public interest as of strong 4th factor and perhaps was one of the first country to articulated Indian intellectual property case involving eBay . they said that if the public interest is not integral of sin in junction we will not grant it . in that case the pattern was not actually being exploited . this is the pattern does not anyway exploited the injunction should not normally be granted ....., there is one case in the US petticoat founded patent approved Public Interest this is after the trial the patent was found valid that because the many patients using this drug there is a license which should be granted . there is a case called bard peripheral . there is a second case call Johnson and Johnson which related to contact lenses yes it is recent judgment of us Court . the US courts have been doing this since 1930 plenty of cases I can pass them on to you at the end of the day it also turns around this is irreparable injury . you will find

a lot of the patentees are monitoring that patents through licensing because they have a license fee quotes now are struggling with when you know somebody comes in infringes your patent and you already have a license fee can it be said that you are suffering irreparable injury if you don't grant injunction . it's a tricky issue . . since you have already granted the license why don't we grant that as damages the fee instead of injunction . the US cotton done this in couple of high Technology cases they have realized if you want development and things r developing so rapidly you cannot create blocks that is why USPTO is not allowing any Indian drugs to enter their country. 30 % of the drugs consumed in USA from India only after Quality Assurance they are entry . that is a regulatory part . I had an occasion to go to the US PTO office and they are saying that most of the structure not allowing especially Chinese . so there are two dimensions to this once the patent side as you are absolutely right . with Pharmaceutical drugs there are two regions that essentially operating one is the US PTU the other is food and drug regulation authority. the patent agents question are you inventive patent office does not determine if you are serious as a product that is determined by the FDA . the quality standards set by the food and drug authority , they determine if your drug is safe and effective. The standard keeps shifting. there is an apprehension that the FDA under the guise standards is favoring hits domestic companies at the cost of the Indian companies . there is one about generic drugs that I would like to clarify there are two large packets in generic drugs the first but it is of What U call generic branded drugs the first but it is what you call branded generics . there is never any issue on what you call branded generics student quality most of the Genetics going from India branded generics . they are manufactured by very well known companies like Cipla Ranbaxy . there is never any quality issue with regard to branded generics the quality issue arises in unbranded generics. ever visited us chemist you will notice prescription is never given by brand name it is given by the generic name so you will get a prescription for Paracetamol so you can buy a Crocin Ibuprofen or any other generic brand name drug . you have a

choice to buy the innovators branded drug any other Paracetamol unbranded generic taking the discussion back to injunctions prima facie let's see what that means I have had some confusion regarding this so there are two standards if you look at the jurisprudence and all the students come from the UK Court from a case called American Cyanamid 1974 1975 Lord Diplock this is a very interesting case it involves a very small Medical Company that comes up with fabulous innovation in sutures you know the stitches the stitches as many of you have noticed when you take it out in the traditional method it is often painful this kind of stitches was one that dissolved as it was organic . so after this one was killed it would automatically dissolve no need to take it out the small company what's up against large Pharmaceutical Giants it was a Ethicon which is the multinational in those days Ethicon have the biggest market for sutures after the small company introduced the suture in the market peppercorn also need to do something similar using a similar Technology American Cyanamid construction Pharmaceutical company that it was violating that patent and the patent right that the defendant introduced for the copy and the company needs to be restrained interestingly the trial Court ruled that favour The appellate Court turn it down it came to the house of Lords .

It is interesting for us as academicians to observe the judge is very alive to the realities and the party before it . it is a sort of realist jurisprudence in this case it is a small company David vs. Goliath battle and small person is the one who tried to break into the market the big person has already got the market and is the infringer Lord Diplock in previous case had said that in term injunction prima facie you have to read all the materials before you take a call on Who is most likely likely to succeed . if the same material was used and that is what is called relative assessment of the merits . it means on the material before you right now as we give it to you who is more likely to prevail . and if the plaintiff is more likely to prevail only then can it be said that the plaintiff has established a prima facie case so it means if actively you are taking out a comprehensive call on the case at that level itself based on the evidence

before you . strangely enough in this case came up he said that is not the real standards that we have to follow standard is nearly triable issue is this the triable issue . which means so long as it is not vexatious trial or frivolous litigation the triable issue threshold crossed . you don't need to go to relative assessment of matrix who is more likely to win because what Ethicon had also done was mounted a very strong attack on the patent itself and said that the patent was invalid and we don't infringe on use of one form of polymer. Lord Diplock did not want that assessment at this stage because he saw that there was injustice . that is slight dilution of standards and it was held prima facie means only if you have a triable issue . the reasons given work if you start Assessing on its merits you have converted it into a mini trial and if you have done so there is no point doing this at the interim stage what is the sense and having an interim stage when what you have done is a trial itself second is the statement has been granted regulatory body after a fairly rigorous process and we can close the patent office you have done a decent job and if it is not necessary at the court level really reopen this patent the question now is how does the supply to India can we apply the same logic to India add to our patent office . interestingly I did a survey of patent that were challenged at the intellectual property Tribunal . and we found 34 % of the patents challenge before The Tribunal granted by the Indian Patent office were not valid I I don't know if we count the number of patents invalidated by quotes what would be the number assume it would be around this range . the number of patents validated by the courts almost 90 % these are granted by the patent office opened through Attack before the court many of them are struck down however we need to be cautious one might say the patents that a fundamentally flawed are the ones that would be susceptible to invalidation . not at all patents are bad the ones that are actually taken up and challenge maybe are the ones that are slightly susceptible and therefore there will be a higher rate of invalidation there is an assessment that out of hundred patents only 15 are challenged in Court out of the 15 90 % of struck down . that is a better way of

exposition 15 % are put to challenge out of that 84 % struck down . therefore when are patents is challenged you cannot blindly rely on and the fact that the patent office has granted patent and when compared to the US patent office the Indian Patent office has lower number of resources you find that when you create a patent it's mostly different Technologies scenes so when we did a survey on the patent office many many years ago one of the things that came out that a person who specialises in textile engineering is given a patent dealing with very complicated software and typically if you look at behavioral science a person who faced the new technology but they are not comfortable with day propensity to grant patent because of you tonight patent you have to give reasons and if you granted you just tick off the boxes . if it is not contempt I would like to know how judges as disoriented persons not dealing necessary in speciality matters deal with it and what is your response as councils to how we deal with matters when they come before us in patents because there are again very speciality matters . it's a great question I will just finished doesn't move on whether the Judiciary is adept in deciding the complicated patent matters . so the bias is towards the ground because it's easy to tick the box rather than give reasons so there is an institutional reason why there is a bias in towards the grant of patent . not just in India it happens in US as well . however we are getting better and better 3S India has a better process called the opposition process. in the process of grant of patent the patent is published prior to grant and objections are fought if there is a valid objection the patent is not granted after the patents granted the rate of one year period for... saying that the patent should not have been granted .... the Indian opposition processes is better ... slightly more elaborate but you are absolutely right about the fact that should these processes be Run ... the court are conscious of that and the supreme court recently try to streamline the process a bit . saying that when a process is pending before the IP ABB .... the supreme court give a very clear guideline whichever has been instituted first first come basis that will win and the other will not. enercon matter supreme court. enercon paint from Chennai High Court . justice

khehar judgment yes . there is one more judgment of justice Muralidhar Delhi High Court which has that in one case we found out there was a pre grant opposition which was decided today so the next morning another pre grant opposition has filed so in effect the pre grant is filed the judgment is given today certificate is issued another pre grant was filed . so it was a cascading effect a sort of serial killer serial opposition the judge said that was not permissible 13 current is decided it is Deemed to be granted ..... no but there is a prescribed procedure profiling the opposition under section 25 pre grant and after post grant there is a time limit . post grant but not for pre grant post grant it is one year if I am right from the date of grant . applicant would be filed I'm just as it was about to expire another present would be filed it is just delete the whole process 24 packs the patent . justice Muralidhar came down very heavily on that this is a case called Sneha Latha Gupta so what happened was with the patent was granted by the office basically the patent used to be put in order for grant complying with all the objections on the examination report the patents placed order for grant and from that time to the date of actual grant they still used to be a backlog and the pendency the patent office it used to be 23 years so therefore this period would never end so immediately when the patent Regime came in 2005 we had a number of such cases cascade things happening . the controllers also the moment I felt there was something something very fishy about this the people of filing pre grant opposition they would not like to decide the matter so they would just put it aside attitude to keep happening so we would have a hearing and the next another oppositional filed so this is happening . login you have had to make sense of provisions which are very unhappy worded because of the fact the legislature did not provide a clear mechanism how this would operate provided the statute for how you would resolve concurrent multiple proceedings that could occur. this goes to the question that your lordship asked about what about judicial competence to decide these issues it is very interesting tattoo ask and mention this

because this goes to the heart of two issues one is how much you defer to the patent agency expertise and I don't think we have clarity on that some case law and I'm hoping we would get it in the future years if you look at administrative law cross common law jurisprudence which agency expertise there is a strong strong line of jurisprudence that is there is a regulatory agency known for its expertise then its decision can be reviewed if it is a factual error only if there is a manifest error on the face of the record . if it is a legal error you can review it denovo reagitate the entire issue. Factual finding that they have come to if there is any requirements of specialised expertise then you review it only if there is an error on the face of the records. I'm not sure if that applies to India in full force because I have not seen any consistent case law that is applied the standard . in fact I asked justice Pal that some of us have reopened the entire issue.... The capacity of the judge to test the technicality of the patent which unfortunately.... In thecae of Novartis..... it is very interesting that you mentioned the Novartis litigation because at the supreme court I found that as the case was being argued it was only in the middle of the case they brought in a section 115 to the notice of the court. And which says that you are authorized to as a court to appoint any scientific and technical advisor. If you look at most of these patent cases they are going to turn a bit on the science and technology but ultimately it is still a legal determination. As to whether something is new is inventive which is what patents are really about is ultimately a legal determination. It is based on facts and science and technology the parties will fight it out so there will be some understanding but the court also has the ability to appoint an expert to assist. Courts have started using this . infact in one case of a cancer drug justice bhat has told the parties let us not do this injunction phase at all let us move directly to trial and he appointed 2 independent experts to determine the science and technology issue. My opinion is that seeing how the courts function is the external expertise is provided I think you are well placed to make the legal determination. Because patents may look complex but it is not rocket science. There is only word of caution that I would add to this approach. If you take for example

a country like Malaysia or Thailand they do have patent judges who are qualified technically however, in patents the width of the technology can be so big you can never find a judge who is just the qualified person in the subject. What is done internationally is that the best patent judges are the ones who are not technically qualified. And the most successful patent litigation lawyers are not the technically qualified. So I don't think we should have any bias or misconception that we need technical qualification to deal with patent cases. The need for external experts is not new. For example you need an expert in relation to finger prints in criminal law. So it should be a very limited kind of assistance that you take. I don't think the judge needs to be self conscious about dealing with such cases.

Court is an expert of experts.

..... it was a slightly different fact situation because Imatinib was a slightly different molecule was actually a 1992 molecule and at that point India had not signed on the TRIPS because there was no TRIPS which was in 1995. In 1992 when Imatinib was discovered and patent was applied for India did not grant patents to pharmaceutical products. So that molecule was never patented in India in 1996-97 they came up with a polymorphic form of the salt. And that is what they sought to patent in India. and this was opened up although they applied for the patent in 1997. It was only decided in 2005 because India's patent regime changed in 2005. It was decided that as per the 2005 patent act this cannot be patented in India because we had a unique section called section 3d that if you bring forward a pharmaceutical derivative that is structurally similar to what existed before

You have to demonstrate that that particular derivative is superior in its properties or utility than what existed before. and just because imatinib mesylate was not able to fulfill that they did not get a patent here. no sir inside the supreme court is very clear that you cannot but you cannot invalidate patent grounds of pricing what is a separate issue . ?.....

now given all this background and institutional structure if you apply a tribal issues standard patent case when you're not sure the patent offices 100 % right triable issue standard simply means that cases not are not frivolous and axis you do not determinant if patent has a chance of success . can the patent be invalidated is it valid and 2 is the patent in influenced because the patent coverage is only what a claim if I have claimed Basmati in one particular strain when I write cannot extend to another strain in most cases sometimes you can make a change in the product and take it outside the claim the basic understanding as you are limited by what you claim . so the first job of judge in most patent litigation is this is a slightly and unhappy part. India first few litigation cases the judge did not construct the claims but it is getting rectified now patent litigation it is absolutely important the first point of enquiry is really what is the claim

Your chances of getting it wrong are high. Because it would well be possible that the patent is not valid and may not be infringed. And what is found what makes it worse is that in a number of patent cases and we are creating a study on this is that court in these cases are granting ex parte injunctions in these cases. And that is even more problematic because in a patent case almost always the patent is always challenged. So if the patent is almost always challenged on validity grounds and on infringement granting an ex parte injunction without even hearing the other side I think makes for grave injustice. That is my view.

That is there but courts nowadays are ... the courts power always exists sir. Someone rightly said what should the scope of judicial responsibility be to exercise that power..

But Mr. basheer in any case there are examples in patents where the courts considered the prima facie case and thought the better option would be to have the other side file an affidavit undertaking that whatever the quanification of damages would be reimbursed. So same time there is equity and a balance . so that is also one of the routes possible.. the other side can agree to the fact that we agree to be restrained right now

and we will keep an account or not be restrained so long as we keep an account and give you damages. I think it served justice much better than making a third party determination. That may not serve the cause of the parties. Wrong decisions could not only impact the patent owner but also the consumer . and this is more serious but you cannot quantify the number of people that may have missed out on a cheaper product because of the fact that competitor was treated as infringing at the prima facie stage that is why it is important in pharmaceutical case's to get to the right result.

This is another favourite point of mine. The US and Europe constantly keep telling us that we under protect IP because of Section 3d and Novartis decision and yet if you look at the fact that Indian courts are one of the few maybe the only courts that grants ex parte injunctions in patent cases. I have not found any other court granting ex parte injunctions for the simple reason that unless you hear the parties it is almost impossible and the grievous part is that these injunctions normally last for a number of years. . we have found cases in our data where ex parte injunctions still continue in its fourth year.

Sir one point we should make a provision in the statute that this injunction should be for a certain number of years. It is there in our statutes . so why not make a provision. So that ex parte injunction power is there it will be limited.

But the discretion is there with you to.. yes but there are certain statues where the notice has to go., then only ex parte injunctions are granted.

No. in most of the cases we have been noticing that no ex parte orders are being passed except in very few cases where the defendant has applied before the controller for marketing the products and that thing is pending and under those circumstances one or 2 week notice is given and only interim orders are passed in very few matters. That till the next date he may not launch the products in the country.

Sir I will share that database with you sir. We have cases where the ex parte is in its 44<sup>th</sup> month. And this is a contested patent around a process it is not even a product. Patent. I will share those examples with you.

No you see to ex parte injunctions that is provided under Order 39 Rule 3.

We are bound to dispose the order within 30 days. No no that is what is being referred to in on Order 39 rule 3 you just see the proviso to rule 3. where it is proposed to grant an injunction without giving notice of the application to the opposite party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and required to the application and therefore . so that provision is there under CPC this proviso is by way of amendment in 1987. My brother is right reason has to be given. Sir that is what the proviso provides. Sir you are trained in the art of listening to two or more counsels at the same time we don't have that ability. . you rarely get this number of judges.... Absolutely.. you have training in this you have lots of counsels appearing. I can lighten the atmosphere and say and give you one example of an instance when a judge of the Delhi high court who is retired. He came to madras high court I remember when he used to appear before him he would say 28 injunction granted,. 29 granted 30 no notice and 3 days later the defendant would come and say yes what is the ground for vacation. He will hear for 5 minutes and say ok suspended. We asked him outside of court at tea sir why do you do this he said this is all for the bench and the bar. I grant injunction the parties go the lawyers. The lawyers can make money. So the moral of the story is grant ex parte but vacate them quickly.

If I may just interject we have overrun the time so if we can give him 5 minutes to complete his presentation. And if we can have the tea here and move directly to the next session.

Yes yes that would be better. So we can allow Professor Basheer to complete. That would be better. The questions we can have later there are other sessions. We can take up the questions later.

You now switch over from this arena of judicial dispensation because that is a domain of the judges. One more request you kindly address to order 39 rule 3 a also. because I see you have a concern that once an interim injunction is granted then a party can continue it for a year 2 year 3 years so kindly you address to order 39Rule 3 which says that the injunction shall be for 30 days. Sir with all due respect it has been observed more in the breach. And in all the cases we have seen that particular section of CPC clearly says that if you are not able to dispose it off in 30 days you must provide for reasons in writing.. it is almost never done. In all the cases that we have tracked and I will make that database available to you. We have done a serious study on it. Not just order 39 Rule 3 the supreme court in 2 judgments has come up with a cautionary note on this saying ex partes must follow this. It is never followed. In fact for injunctions the supreme court in a previous case and I will go this will be my last slide that without going into the merits of the case

“Without going into the merits of the controversy, we are of the opinion that the matters relating to trademarks, copyrights and patents should be finally decided very expeditiously by the Trial Court instead of merely granting or refusing to grant injunction. Experience shows that in matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally. This is not proper.” This was Vardhaman Mills . further in the Bajaj case the supreme court applied the same logic. This case went from the Madras High Court and there they found at the interim stage had taken about 2 to 3 years. So they asked the trial court to do the trial expeditiously and they said do it within 2 months. You are right justice Katju's judgment..... it was never done 2months have gone by 4.5 years have gone by.

That's from our high court. There is a direction to dispose the suit in 3 months. Suit went for trial the issue arose who will go first plaintiff or defendant..... so they never get to the main matter. You have another case involving a diabetes drug. In the supreme court and justice Gogoi came to a similar conclusion and said look there is no point having this interims so let us just find out the ways in which we can expedite the trial and what he did was further beyond what justice katju had done is the trial judge because the evidence is to be recorded by the court commissioner it is not enough to do that you have to monitor the process and even change the court commissioner if they are not taking it up on a regular basis.

Mr. Basheer the happy note is that the schedule is adhered to. The schedule fixed by the supreme court is adhered to. Absolutely that is why when I saw after Justice Katju's judgment and the matter had gone to 4.5 years. I said is there hope as an academic when we are writing and then we saw this and said there is hope. That it can be done if the judges are very strict about time lines. Let me announce one thing that it has been reserved yesterday

This is a matter for district court. Sir any court. Just a minute. The trial is at district court. No sometimes the high court has jurisdiction. High court has jurisdiction but for trial. No sir. Is the original jurisdiction with high courts.

Supposed the matter is filed at district court and the patent is challenged the matter will automatically come to the high court. The interpretation of the supreme court judgment how judges should follow the directive all depends on the facts of each case. Therefore let us not get into matters which has some substantive directives.

Sir I beg to differ these are rules of law. These are principles of law. These are principles of law regarding grant of injunctions which is settled. No sir it is not well settled. Sir from a purely academic perspective I have not found clarity in the law on injunctions if

I have not convinced you I have done a thoroughly bad job in presenting this. Clarity of law is only required in a matter of understanding...

Excuse me I would request one by one it really can't be heard. Nobody can hear nobody can. Even when we are reporting we can't make any sense out of it. Please one by one raise your hand and raise your queries. So that everyone is audible and the presenter is able to answer. My point is the quality of understanding always gets reflected in the judgments. Now this quality of understanding varies from case to case. Now you have referred to these 3 supreme court judgments. These judgments do suggest that by putting the matter on hold by grant of injunction is not advisable. Decide the matter expeditiously. This aspect is well addressed by us also in many a matters. But it varies depending on facts of each case. whether interim injunction should be given or not. So there cannot be a debate on the issue. There can be a debate on the legal standards sir. That is what I am trying to get at. what should the legal standard be. The legal standard has to be understood in that perspective that is all. You apply it fact to fact but when I go into a classroom I have to teach it to my students and say what is the law. So what should be the standard. I need not understand what should be the prima facie case. What should be irreparable injury what should be balance of convenience. That I don't have to understand. I have to apply it only by appreciating the fact at hand. Sir unless you know what it contains how will you apply it. The understanding would be on the given set of facts not on an academic understanding. Sir there is one practical problem for judges in these orders which I want to highlight in this last case Merck versus Glenmarc. The order was passed just when supreme court went into recess 15 may I say this with greatest respect. The matter took the whole of may june on a day to day basis to be completed. It took july and the whole of august. Yesterday the judgment has been reserved. One judge of the Delhi high court was completely committed to this case everyday from 2.30 to 4.30 from 2<sup>nd</sup> july. if we divide out of 12 months 10 months are available and 4 months are taken for 1 patent case how do we allocate judicial resources to one patent litigation. There is

another fall out if I may point out the rest of the board had to be adjourned from 2 to 4.30 to adhere to the timeline since counsels on both sides were plenty all matters in other courts of the counsels had to be deferred and adjourned because they were held up at one bench. You are absolutely right. I think when the supreme court decided the Novartis case they spent almost 200 hours and they reopened every possible aspect. And it was the first patent case that the judges justice alam and justice desai were deicing in their careers.

What I have seen and correct me if I am wrong that the judges have an informal brief that the patent cases would be placed before 1 or 2 judges. Delhi is the first court to have commercial benches. Our chief justice for the time being has assigned only IPR. To those commercial benches. It so happens my colleague and myself are heading those benches. On the original side we have division benches too so only final category matters are coming to us. So you think it makes sense to have an informal specialization. No till the commercial courts take off in the real sense this is only part time. So once we are designated commercial courts and all other matters go out of our board only then

For large delays I have got my own grievance. Nowadays lawyers don't stud their briefs judge is not the only part of the judicial process. Lawyers on both sides should study their facts well apply the law to the facts iron out the points of dispute and raise the issue only on those points rather than saying that the petitioner is a citizen of India. forget that.. start with the facts. It is only when the lawyers are fully prepared that we judges can . it's not like buying something off the shelf of a supermarket. And we don't deal with one case alone as a judge we hear miscellaneous petitions I have hear 300 to 400 writ petitions a day and justice Krishna iyer criticized and I said please go and tell the old gentleman you have hear only 375 cases in a month I am hearing 375 cases today. So it is easy to criticize. If you call the pot black please look at the contribution by

the lawyers what is it that they are doing . you come to Kerala you come to my court watch me in action. You are worried about time limit only.

In fact what he is saying

In patent cases only what about partition cases what about MACT cases you are worried about only trade and commerce what about the citizen who fights for an inch of land compensation from the government service benefits. Don't blame the judges we are doing a wonderful job. It is lack of cooperation from lawyers we judges are doing a wonderful job

The data that we have

You come to Kerala don't speak in isolation

The data that we have in fact bears out this point because of the delays most of the cases that we track the delays is because of the litigant. Sir 60% of the delay is because of adjournment requests made. Which are agreed to by both parties . it is not the fault of.

Don't compare with other jurisdictions. Australia a judge only hears 200 cases during a year we hear 200 cases a day. US supreme court hears less than 100 cases our supreme court hears millions.

We are lacking infrastructure. No absolutely

Don't point fingers at judges. Point fingers at the system

It is a systemic issue. that is why we are interested in this...

You try to understand one thing

And one more thing it is a request to the judicial academy please start training lawyers also

Bar council of India's responsibility. This institution belongs to the supreme court.

The bar council consists of lawyers who are not litigating lawyers. They are politicians wearing robes of a lawyer. Nothing more nothing less.

Bar council of India has money they can open their own institution. This is institution for judiciary. State judicial academies do do that and so we will stop it over here. And we will take any systematic issues that

Madam we didn't come here to be insulted. We came here to get knowledge. Please see to it. I have hear kejriwal speak here accusing judges. We didn't come here to be accused. There are other avenues where we can be accused. We didn't come to the judicial academy to be ...

There is no one accusing you

That we are not performing. We came here to be educated.

We are all discussing. We are all on one page.

Can I just clarify one thing sir. My intention was only.. can I complete.

Not that . your whole endeavour was

Only to show a systemic issue.

Blame judiciary for delays.

No . I am so sorry if that is the way it has ..

Impression that we are ...

It is a systemic issue and the systemic issue sir in our data it bears out your point can I . just hear me out. It bears out your point.

What about decided

No it supports your point. Sir can I just finish. It supports your point . the delay in the judicial proceeding 60-70% is contributed by counsels. The data is showing what you have said.

Mr. Basheer you try to understand one thing you are coming to why the matters are pending in the courts. If you enter into that part. I think you will be entering into a debate which is never going to end. See if you confine your lecture to I suppose the subject you have been assigned. And if you see the matters pending . if you see matters under Motor vehicles act

It is a matter which is close to everyone's heart if you go to the district courts the matter is pending for last 20 years . 20 year old matters are pending we had our last workshop on this act Patna High Court anti trial courts are till the matter is pending 20 years you have no justification those persons who have lost their family members 20 years they have not been given any compensation so which matter is more urgent which is to be given more priority . I think every mother has its importance let's understand in the given situation what can be done so we are not the policy makers let's not enter into the making of law policy pendency of litigation let's come back to the subject I make best out of it I think so . may I say something let's decide to the speaker only trying to say is to show the legislative policy that governs grant of injunction sure him out if you agree with him apply it to your injunction orders if you don't agree with him sure him out the legislative policy that he says the legislative policy demands that you should not grant ex Parte injunction and if you grant you must decide early that is. it was a mistake to go into individual cases . let's not get sidetracked . understand the legislative policy behind it . we should hear the speaker let us not enter into this long debate .

## SESSION 7

May I now the 3rd session . we are distributing one hypothetical situation to you . good afternoon to all the honorable judges . I just want to start on a note by saying that . we are indeed fortunate that we always get to speak in front of you and it never happens in Reverse and today again I am speaking in front of all the honorable judges and it's good to have a discussion and shamnad and Rodney have already taken you through the Internet and the patent cases which are extremely controversial I don't know why in our country debate always generate this kind of debate and emotion it is very very emotional so I'm glad I'm not doing patents today I am going to thank shamnad for having Taken all the flack.

Prathiba you are absolutely right patents something very emotional in our country so let's do lighter in terms of passing off and designs . yes sir absolutely ... I agree with you because that is the reason why if you ... correct in fact as he said to you eBay judgment in the US Supreme Court public interest is the fourth factor so it is not just in developing countries even developed countries have faced this debate .We now have a problem for you which is being circulated. I would like to read out the problem. Then do my presentation of about 6 or 7 cases . then we will have a debate because this is a completely new jurisprudence passing off in designs . the basic is patent rights and design rights statutory nature they are rights created by statute and unlike in trademarks even without registration or foreign copyright you can protect your Trademark copyright I mean without registration under common law in passing off in trademarks in copyright it is a statutory right with which can be protected without registration . in design there is no common law right that is the traditional view but in sometimes we have seen a large number of cases originating from Calcutta Bombay and of course Delhi High Court which kind of expanded this principle and it is that principle that we are going to discuss today which may come up before you in some form or the other in design matters so let me just read this problem which has

been circulated to all of you and then we can have a debate on this . Wizpool Corporation is a company that manufactures and sells household electronic appliances including refrigerators and washing machines. Wizpool has been manufacturing these products for the past 25 years. Wizpool obtained a design registration in 2009 for a semi-automatic washing machine if you turn to page 2 the image of the washing machine has been given. At the bottom that is the machine of Wizpool which was registered.

In or about June 2012, Wizpool came across a washing machine manufactured and marketed by Veecom Industries Ltd. under the name "Veecom Star" . this is what is at the right side of the page at the bottom. The left side is the plaintiffs machine right side is the defendants machine. In very simple and brief terms. the which according to wizpool went to court and said this is violation of the plaintiffs rights design rights and also passing off rights.

Veecom came out with a very interesting defence. They said my machine is also registered under the designs act and so you cannot maintain a design infringement against another registered proprietor of a design. And then they said design is a statutory right therefore there is no common law rights in this design you either proceed under the designs act Once you have selected for design rights you have to you cannot protected under passing off . now the interesting section that is there for interpretation is Section 22 which is being circulated to all of you if you see section 22 piracy of registered design during the existence of copyright in any design it has not feel awful for any person for the purpose of sale to apply or cost to be applied 20 article in any class of articles which thread design is registered the design or an obvious imitation there of so this is . this is the basic section on piracy there is a very innovative argument what the defendant argued was in the first line of section 22 I am not any person I am another registered proprietor . I am not any person so I don't even fall under section 22 . so it was a very interesting proposition of law and the question is can a registered proprietor constitute any person under section 22 the

designs act . that is the question and then should the defendant be allowed to argue that they are no common law rights in the washing machine because the plaintiff has elected for a design and what is the consequence of recognizing common law rights in design design is granted for a period of 20 years . right ? after the design for the public domain but if you recognize common law rights it can become a perpetual right . so that is the conflict in like a patent or a design the minute the term of a now I will go through my presentation and patent of the design come to an end then it it falls into public domain anyone can use it. but why bleeding a common law right you are kind of trying perpetuate the Monopoly which is granted under designs act in perpetuity . is that permissible these are the basic 2 issues The Court had to resolve which now I will go through my presentation and this particular case is part of a reported judgment I'm going to skip the discussion on that case and then we can have a debate on what all the judges feel about it and I can then show you the actual judgment . the first kiss that I would like to bring to your notice Smith kline beecham forces Hindustan Lever you have always been a toothbrush which has a Zig Zag in between right ? so the question is they wanted to protect the zigzag under designs act . and under the law of passing off this is a very old judgment of 2000 The Plaintiffs had instituted a suit against the Defendants for infringement and passing off action with respect to the Plaintiffs' ACQUA FLEX and ACQUAFRESH FLEX N' DIRECT tooth brush designs. Although the suit eventually was not decreed in favour of the Plaintiff, the law relating to passing off in designs was established. The Hon'ble Court observed that infringement and passing off are two distinct remedies as the former accrues from a statute and the latter from Common Law. The Court held that Section 27(2) of the Trade and Merchandize Marks Act, 1958 gives a statutory recognition to the passing off rights making the said rights a statutory right as well and absence of the same in the Designs Act does not mean that the said right is not available in the case of a design. So this is as old as 200 though the case did not go in the favour of the plaintiff. The germ and the seed of the passing off in design law was kind of established in this

case. Then we come to the landmark decision of the Delhi high court. A full bench decision. Justice Singh who is present here gave the dissenting view but it is interesting justice kaul and justice shakdhar gave the majority view. In this case the question was Whether a suit for infringement of registered design is maintainable against another registered proprietor of the design under the Designs Act, 2000. Whether the remedy of passing off is available to the proprietor of a registered design in absence of express saving or preservation of common law of Designs Act, 2000 and more so when rights and remedies under the Act are statutory in nature? Whether the conception of passing off as available under the trademarks can be joined with the action under the Designs Act when the same are mutually inconsistent .With respect to the 2<sup>nd</sup> Issue, that whether the remedy of passing off is available to a registered owner of a design in absence of an express provision in the Designs Act, 2000, the Full Bench of the Delhi High Court observed that to establish a passing off action, the Plaintiff would have to establish the following ingredients. That there was goodwill or reputation attached to the goods or services which the Plaintiff. That the Defendant had employed misrepresentation which made the consumers believe that the Defendants goods were those of the Plaintiff. It was no defence in an action of passing off that the misrepresentation was unintentional or lacked fraudulent intent. That the Defendant's action had caused damage or was calculated to cause damage. The Hon'ble Delhi High Court in 2011 had observed that an action for passing off could not be initiated by a registered owner of a design as the said remedy was not available under the Designs Act. However, the Full Bench reversed the earlier observation and relying on McCarthy on Trademark and Unfair Competition noted that dual protection may exist under the two IPR regimes of design law and trademark law especially in case of a shape. The Court ruled that while simultaneous registration as a Trade Mark and design was not permitted, there was no bar on a design being used as a Trade Mark post its registration. The Court therefore held that dual protection under Design law and Trade Mark law was permitted. As the Designs Act, 200, does not contain an express

provision like that of the Trademarks Act, 1999 for passing off action, by virtue of legislative intent, the same must not be made available. In the said case, the Full Bench of the Hon'ble Delhi High Court went on to observe that an action for passing off of a design was a separate cause of action with a different remedy available and though a passing off action could be instituted by a registered design owner, the said action could not be combined with a suit for infringement of the design.

Now this is the next question while you hold that passing off can be raised for a design the full bench held that it cannot be combined. As a lawyer I don't know why it cannot be combined. Under the normal CPC rules of joinder of action you can do it pertaining to the same product you are raising 2 violations so then the question is why can you combine it under Order 2 rule 2. So this again opens up a new debate. From the full bench judgment. In infringement of a design the question is of uniqueness newness and originality of the design whereas in passing off it is the traditional principle of misrepresentation confusion goodwill and reputation. So the 2 tests are different. So the full bench held that you cannot join them in the same suit., you may have to file separate suits.. then that is another question which as judges we can always DEBATE IT and discuss whether it can be in the same suit as well..... use in passing off is relevant ... so the good will and reputation is part of that sir. The length of usage provided you have got a huge good will in that market then only you can claim passing off rights in that. The Hon'ble Judges of the Full Bench of the Delhi High Court observed The plaintiff would be entitled to institute an action of passing off in respect of a design used by him as a trade mark provided the action contains the necessary ingredients to maintain such a proceeding. The argument that such a suit could be instituted only after the expiry of the statutory period provided under Section 11 of the Designs Act, does not find favour with us. So they said even during the validity of the registration you can file for passing off. This is for the reason that in a given fact situation the plaintiff may have commenced the use of the design as a trademark after its registration. Let me stop here as a layman can we think of design shapes which

actually act as trademarks. Can you recognize , can you give me examples of shape which you can recognize without the brand being written. I will give you one that's that Puma form strip on the side of the shoes. Absolutely so even without the .. you can recognize. What Basheer is wearing. If you remember a few years ago there was a wonderful advertisement The mint with the hole Polo would never be written but you would say mint with a hole. So it is a shape and the next which I can remember is toblerone chocolates they have made those little hills triangles. Even without toblerone written on it the shape is a trademark. .... Apple trademark with a bitten apple. But it is never sold as a shape. I am talking of physical product which is sold as a shape. Liquor bottles. There is a nice judgment of the Bombay High court in the vodka case.. so the coke bottle or even the vodka bottle of the Bombay high court in the Gorbachev case which I am just going to show., so these are cases where you can recognize the physical product. Without the brand being written on it so that's fair the line between design and trademark is crossed so you can recognize the brand itself . so that's why the whole overlap between designs and trademark has started . so I am told people who are experts can even recognize the Michelin truck tyres I mean I'm not an expert but we can recognize the Michelin tires because they have a unique trading . kind of cases which we are talking about . While Section 2(d) of the Designs Act excludes from the definition of a design, any trademark which is defined as such in clause (v) of sub-Section (1) of Section 2 of the 1958 Act or property mark, as defined in Section 479 of the IPC, or any artistic work as defined in clause (c) of Section 2 of the Copyright Act the use of the design as a trademark post its registration, is not stipulated as a ground for cancellation under Section 19 of the Designs Act.

- I'm sure that women would recognize the style Ritu Kumar the way she makes her suits example they are very expensive suits the minute you see a Ritu Kumar suit you can say it is a Ritu Kumar suit . it's got a special thread work which is done on it . Orissa cases where you can recognize a product and the minute even if you register it as a design and after that you use it in such a manner and it becomes so

famous and well known across the barrier of being a trademark that is what the court has held . exclusive rights in a trade dress this is a very interesting case of the Delhi High Court if you just see anybody who has passed through the Delhi Airport you can see that is a very uniquely packet tea products . the use the traditional zardozi or Pashmina or ... material . to package the tea and they are stacked. show the manner in which city is packaged itself is entitled to a passing of action and the court recognize the right in this particular packaging though the brand the brand of the defendant was different the defendant used to different brand I think it was Bagan he was using Bagan .the plaintiff is using Sancha. but the manner in which the packing and stacking was happening of the tea they said it has acquired the right . Though normally this would be a design. yes sir but the thing is the plaintiff is also making a full variety of colours the defendant also copied all the variety of colours this is just to show the nature of packaging that is the point you are making a point there even if the colour is different the nature of packaging is such that it is required to secondary meaning because no one would remember the colour if you are passing through the airport you are quickly buying for somebody you wouldn't remember which colour you had bought you would remember it was a traditional Indian cloth without Dori on top . And the way to the package .... imperfect recollection ... . imperfect recollection absolutely . so that is a test at the court applied and said if you are walking to the airport your purchase is very instantaneous the manner of purchase you must be having 15 minutes to board and you say ok I'm eating some foreign friends I just want to buy them tea so you would just pick it up very quickly instantaneous purchase even educated customers can get confused in this kind of situation let us look at the gorbachov vodka case . In this case the court held that the passing of is there even in the shape of the bottle of vodka . he had applied for registration as a trademark the defendant obtained design registration of the bottle but then the court held in favour of the plaintiff . the logic behind it is it is a Peculiar shape suppose that is normal bottle like Bisleri normal bottle is there with new

shape and configuration then it may not be protected . so that is the logic justice Singh is absolutely correct . . the Bombay High Court held that the fact that the design defendant is obtained design registration does not implement the right of the plaintiff under passing off please see so here the passing off right been given a kind of superiority over design so according to me it is a very equitable dispensation the judge is saying have to go by the honesty of the matter the equity of the matter rather than who owns which right under which statute so if you have copied it you are later in the time that is the end of the matter the judges applying very basic and section 27 2 is a statutory recognition of the principal that the remedy of passing off lies and is founded in common law . so this is a very interesting observation I am going to skip this and come back to Bharat glass . in this case again what the supreme court held was that this was related to a kind of a glass design glass which is used in interior decoration . the defendant tried and challenged it answer this I think the the single judge in the Calcutta High Court was by justice Ruma Pal . judgment came to be upheld the division bench had reversed it . but she had passed the judgment in favour of the plaintiff as a single judge and her judgment came to be upheld in the supreme court . this came out with unique proposition that the defendant said that this design of a glass is published in a magazine internationally prior to the plaintiff design . the pattern is published not as a class so the supreme court held that even if the pattern is known the application of that pattern onto an article is unique . the first application so the supreme court held that that can still be protected because the plaintiff has a design registration and the design was up held . on this very issue I just read the text which the Supreme Court has observed . In the present case, design has been reproduced in the article like glass which is registered. This could have been registered with rexine or leather. Therefore, for registration of a particular configuration or a particular shape of thing which is sought to be reproduced on a particular article has to be applied. As in the present case, the design sought to be reproduced on a glass sheet has been registered and there is no evidence to show that

this design has been registered earlier to be reproduced in glass in India or any other part of the Country or in Germany or even for that matter, the United Kingdom, therefore, it is for the first time registered in India which is a new and original design is to be reproduced on a glass sheet. So the application is absolutely innovative. Now this is the latest decision Delhi High Court which justice Manmohan Singh delivered . To be honest I didn't know he was going to be attending this particular workshop until this morning . this is the latest judgment of Delhi High Court 29th June on an application Bharat glass Supreme Court the ratio is that even though the design is old in itself but if the same is applied to a new article to which it has never been previously applied then the set design needs to be protected. I want to highlight to judgments which we had cited before the court in this case one was from Bombay High Court where you will remember in Ramayana there is a Paducah which lord Ram used to wear and 1 footwear company came up with the design which resembles of Paducah but had a little bit of embellishment and little changes with strap and everything the Bombay High Court held that this is a modification and adaptation off the Paducah which may be known this is being done by this company for the first time . the Bombay High Court had recognize that right . and the second case which we had cited was of the Westminster Abbey . from the UK Courts where Westminster abbey picture had been applied on forks and spoons . by cutting the fork and spoon in the shape of the Westminster Abbey . the UK Court said Westminster Abbey maybe in public domain but the manner in which it has been applied to is very very unique . creative element is there ... yes absolutely it will require protection . the question is Northeast cases for example this if you see the manner in which the images were being used please see the Sarai design for example this is from the grill of humayuns Tomb the Sarai design with the modification it was from the Humayun tomb when it came to be applied on mugs the plaintiffs company was called Good Earth which sells luxury articles the applied it on cushion and various other products the defendant also played it on various products . the last one

the rose princess was from painting of the 1700s. but the manner in which it came to be applied so the Honorable Court held that the main defence of the defendant that all works of the plaintiff are not original and or inspired from artwork that is centuries old the defendant contented the Plaintiff was not the owner of the same as no one can claim an exclusive right on the Heritage/Indian Tradition/Nature. Therefore, the designs of the Plaintiff do not satisfy the requirement under the Designs Act, 2000 and are thus not entitled to protection. The Hon'ble Court was satisfied that the Plaintiff had attained reputation and goodwill in its products and that the Defendant was committing acts of misrepresentation. However, it remained to be seen if the Plaintiff was the owner of the design, i.e., were the designs by the Plaintiff new and original.

- The Hon'ble Court observed that in an action for passing it was essential that firstly the design "*be used as a mark*", and such design/mark "identified the Plaintiff as the source of goods supplied or services offered. The Court was of the opinion that the Plaintiff had sufficiently proved that the said motifs, art works, patterns and design of the plaintiff itself act as a trademark, as a brand identity of the plaintiff and people who are familiar are immediately able to identify the products of the plaintiff even without the name being depicted on it. The Court observed that it is often the hallmark of all the well known designers that they use different sources of inspiration to come up with a new collection. It is submitted that what has to be considered is the creative manner in which the inspiration is used and the manner in which such designs are applied to the products.

Citing the decision of the Supreme Court in *Bharat Glass v. Gopal Glass*, the Ld. Single Judge held that it is a well settled law that even though the design is old in itself but if the same is applied to a new article to which it has never been previously applied, then the said design needs to be protected. The law has been crystallized in a catena of judgments wherein the Courts have held that in relation designs, expression "original"

includes designs which though old in themselves but were new in their application. The most recent case is ok play India which is again on 7th August of justice Hima Kohli . and it is really unique and amazing how I captured both judgments and both the judges are sitting here and this is a case . sir luxury . suppose you applied to a completely an article..... it depends if the plaintiff is dealing in that very products or not . suppose you applied for the glass for a mug and for an Interior decoration then it may be different your lordship me say that it is very different the application is different and so there is no infringement . chilly in this case in that judgment earlier eicher Good Earth case it is mentioned that suppose it is applied to all together different class of material like Tyres and tubes it doesn't matter it can it can be used old Era painting is there it can be use supposed flight for Matchbox it can be used but it cannot be used for same goods or like goods suppose the Sarai is used on a pen I guess it could be completely different. it may be a different product . .... yes Goodwill will come but it has to be proved .... yes it will come even if it is a different product but you have to prove the goodwill otherwise you can't enjoy any protection . there is also one of those Italian designer who uses this red soles and Indigo soles . it is much celebrated where the only distinguishing mark is the red underside and not the outer . not Liberty I think it is the other one that is all nothing written except Indigo on the outer sole and the red on the under sole . that is it so on shoes as you said maybe it is used on anything else It wouldn't be a mark it is a design correct . you have to see if the article applied is cognate alike what is that a completely different class products .... I didn't extract the whole thing here ..... it is a completely different rexine it is a completely different application correct in that case actually both were making glass so that issue never a rose .... no then you would have to apply your test and see absolutely correct . now this is the latest judgment on design passing off Where a toy was protected by the Delhi High Court. so now let us come back to the simulation exercise That We gave I am considering this background would you all like to attempt to answer the question in this which is a page 3 . Whether, as a matter

of law, a suit for infringement and passing off can lie against a Defendant who is also a registered proprietor of a design?

How many of you would agree with the full bench of the Delhi High Court where it says that it can lie against the registered proprietor of design and section 22 would mean including a registered proprietor would any person including register proprietor? I have a doubt yes sir . with the definition under this act. it says features of Shape pattern ornament or composition of lines of colours applied to any article leave the rest which is the finished article appeal to and judged solely by the ICAI but does not include a mere mechanical device. correct . it is a mechanical device a washing machine will it come within the scope of the definition? ... ok that is one view . I think one of the distinctions that quotes of try to make is it a predominantly functional feature the design is addressing or is it a ornamental feature . features of Shape configuration pattern ornament of composition of lines of colours applied to any article weather in two dimension or three dimension input forms by any industrial process or means by the manual mechanical or chemical separate or combined which the finished article appeal to and I just solely by the eye but does not include any mode or principle construction anything which is a substance is a mere mechanical device . arguments accepted the no two refrigerate a manufacturers can have the same colour or apply the same colour to the refrigerator . so they will interpret near mechanical. so let's get the other views . Samsung makes a grey colour fridge with their particular logo Samsung with a temporary .. what is remove the moment the fridge leave the shop LG also manufactures. correct you mean to say the design Saturday you cannot have the same colour . on a refrigerator? colour maybe excluded . features shape configuration pattern ornament of composition of lines of colours applied to any article are we not stretching it too far ? sir let me this clarifies what that means just to clarify . as in the tea packet we do not look at the name brand or masala tea elaichi or whatever we do not look at that. We just go with the colours the visual that the product creates in our Eyes . this

definition means something else if I May just clarify . You see various shopkeepers describe there wares . you just solely by your eye . sir may I just clarify . so you are absolutely right appeals to the aid and it will be protected otherwise it will not be protected . correct my brother is absolutely right . what is Section means let me take a very simple example let us look at the spark plug . which is used in scooters and all spark plug has a specific threading we all know that threading which is there that is the shape of the product . that is judged solely by the eye . however that has a mechanical reason why it has to be threaded like that. that cannot be the subject matter of a design . when the function is defining the shape then you cannot bring it under design act only the aesthetic and the beauty of the appearance is the is what can be registered as a design if a functionality is involved that cannot be registered as a design that is the answer to your question and you have raised a very valid point . the question is in this washing machine whether the look of the washing machine is because of its mechanical reasoning functionality or is it aesthetic in appearance that is the question that you need to . my brother is absolutely right . is it basically appeals to the eye if the article appeals to the eye which is new and original which are the new configuration then it will be protected . suppose merely seeing it is not enough suppose we see almira is absolutely same chair absolutely same type writer is absolutely same if something new has come in the market . appeals to the eye under those circumstances the design can be protected . No if you look at this diagram here photograph these were the Machines at the top of the page . by the defendant said that's kind of a twin tub is known from time immemorial there is nothing new in this. but question is whether the plaintiff has the right to stop this defendant because if you see let me know highlight the features which are here because it will help you to make a decision . please look at the way the tub is designed if you look at any other semi automatic machine . you may just feel it is the same but when you go and see it you'll realize

the manner in which it is designed may be different . the panel on the machine the lid on the right side the manner of placement of the knobs . in design the originality threshold is very low . it is not a very high threshold you need not be like a Einstein . so the question is would you think if this design is registered this person consume for registering piracy of designs . going by the Delhi High Court full bench you have a higher right of a passing off now if the plaintiff is able to prove passing off then notwithstanding the registration of the design in favour of the defendant at the interim stage let's not debate at the ex parte ... we can grant in favour of the plaintiff . The Suite ultimately the trial may take its course one way of looking at it but essentially my reasoning should be that functionality of this machine design is not prescribed functionality . therefore going back to my first. other parameters of passing off is established then I could go by ... the answer to question number 1 would be yes registration would not come in the way. the court can go behind it . so you believe that section 22 any person would include a registered proprietor ? section 22 yes . ok otherwise why would there be a provision for cancellation of the registration it would not apply . correct . that would be returned it anyway . maintainability of the suit that suit about this question 1 definitely yes . On 22 have a view. 22 of design act I would read this action passing off not to apply because 22 would come into operation according to me if it is a case off design it is the passing of action which is now being pleaded. this is both this action is both design and passing off . if it is so then going by the full bench decisions you putting passing off at a higher pedestal the moment you do that then designs act will fall. is difference of 22 any person perhaps is not available so that it need not be required . enter into a combined case of passing off and design . what anyone else like to give a different view are designs registered ? yes both designs are registered . ok . I will give one example suppose what is one party who has a valid design and he's

got the registration of a design and after 15 years because the life of the design of 15 years as per the statute so after the expiry of legislation your submission is that it becomes public domain . can some party after the expiry of rights still in the right of passing off or not so that is the basic question which the full bench try to resolve and according to me the design does fall into public domain the only exception will be where the design is a attainted the status of a trademark unless the design is acquired the status of a trademark it becomes in public domain that is the rule . .... is contrary to the statute you must understand is it contrary to the statute because passing of action is an unlimited right it's a perpetual right it can go for a thousand years but basically design and patent has a 20 year life design has of 15 years life. after the expiry of patent and design then I personally feel when it has become public domain then how Party Can claim the right then everybody will say I have got goodwill and reputation it is to be protected under the passing of it means extension of rights extension of monopoly rights which are not available in the statute . elaborate on what was the dissenting opinion justice Singh this case . so that this issues now yet to be decided by Supreme Court there is no decision there are different decisions of different high courts . but calcuttahighcourt there is a decision yes view is that if there is a design which Falls into public domain can you extend the passing of right on that design ? so that can be resolved by doing two things . the proprietor has do the doctrine of election . if he decides to go in the design route then he should be happy with the position that is design Falls into public domain after 15 years so it is a quick right. you don't have to show goodwill you don't have to show reputation .

no I don't agree with you because then basically you if you say election off right then basically Section 15 of copyright act will apply because suppose something is registrable under the designs act and it is not registered then it says the design Will Go On . the question is how do you Reconcile it with shape of trademarks trademarks act shape is also registered as a trademark

the election correct me if I'm wrong is only when there are two simultaneous courses of action at the same time Verizon this case the passing of is coming up in many ways and parallelly applying at the same time . but in a case with the design registration is lapsed 15 years has gone by .

**FUNCTIONALITY** The Defendant attributed features of the Plaintiff's design to the functional requirements of the products in question, namely, the semi-automatic washing machines. The Court held that the Plaintiff was claiming that the external features of the washing machine, namely, the shape and configuration were their original design and were not claiming monopoly on any of the internal features such as the drum and/or apparatus used for washing the clothes, which were also the functional elements of the washing machine. **LACK OF NOVELTY** The Defendant claimed lack of novelty in the Plaintiff's design. The Defendant claimed that the Plaintiff's design was a combination of known designs and that there was no original, new or novel shape in the Plaintiff's design. The Court dismissed this defense raised by the Defendant for the following two reasons. The first reason given by the Court was that the factum of novelty and originality in the Plaintiff's design was established by the fact that the Defendant who is in the field of manufacturing washing machines for the last many decades had not manufactured a model with a design similar to the Plaintiff's. The second reason was that as the Defendant itself had registered a design identical to the Plaintiff's, it cannot now contend that the Plaintiff's design is not novel or original. **TWO REGISTRATIONS** The third and last defense urged by the Defendant was built on the fact that the Plaintiff had obtained, on the same day, registration of two designs which had only minor variations from each other. As their final defence, the Defendants raised the point of passing off and the requirements for establishing passing off: Goodwill attained by the Plaintiff; The acts of the Defendant must amount to misrepresentation so that the consumers mistake the product of the Defendant with that of the Plaintiff; They argued that consumers who buy washing machines do not buy them based on the external shape, configuration, colour scheme etc but based on the

brand or the manufacturer of the washing machine. The court disagreed with this contention and observed that: "persons who are not as educated/ discerning as persons purchasing top end washing machines. .... The class of purchasers of such machines will not necessarily be educated persons in the cities but also include semi-literate or persons who are not literate in villages and/ or rural areas." The Hon'ble Bombay High Court observed A potential customer for such a washing machine will also include persons who had visited houses of others and have seen or heard reports about the Plaintiff's products. These persons will more often than not only have had a fleeting glimpse or distinct view of the Plaintiff's product in another household but may have received very positive reports about the machine from the purchaser thereof without naming the brand. Such persons may have also seen the Plaintiff's machine figure in advertisements or photographs and with the passage of time may have a fleeting recollection thereof, which are largely based on its distinctive shape and appearance. If such a person were to come across the Defendant's washing machine, such a person would immediately believe that this is exactly the machine he or she saw either at the residence of somebody else or in the photographs or advertisements seen earlier. In such circumstances, such person would immediately assume that the Defendant's products were what he or she had seen and/or heard so highly spoken about. Such a person would purchase the Defendant's product on the belief that it was the Plaintiff's product or was associated with the Plaintiff. This clearly constitutes passing off.

What applies to washing machine would apply to refrigerators and suitcase also . yes that Samsonite case I am of the opinion that it should not apply otherwise it will create monopoly . we do not charge its only by the eyes Samsonite is contrary to this judgment . Ramamurthy . I am of the opinion it will not come under the term of design since it's a mechanical device . I hope there is a judgment of the supreme court then we can debate it it again if it comes to Kerala if I get the opportunity I will hold as such . so I will keep this information to myself you shouldn't have said it now

I will bring a case before you for decision you choose the party if you have a party then please take it to his lordship . keeping in mind yesterday SEBI Act whether it will fall in insider information or not . if I am not disclosing what passes through my mind I am not giving I'm not speaking my opinion I am speaking for somebody else sorry if I have spoken I've spoken from my opinion . I can't pretend to be somebody else and speak for another person so this is an internal discussion and the fact that you are able to debate it is so fertile with so manufacturing girls and issues and I think this issue will come up again and again and again before you and hopefully we have made some contribution . it is a very interesting case I can argue for both sides here . find that is sufficient warning for me actually both topics are very interesting Mr. Basheer chapter as well as your chapter . it may take more time to discuss it . . you should share your thoughts law makers to make a man means . about interim injunction being in Force for 2 years 3 years the party agreement can always move the judge. to have the order vacated sir I agree with you completely and as a lawyer I plead guilty . because I don't believe if defendant wants an injunction to be vacated it will not be heard because there are ways and means of approaching a court if it doesn't happen in 39 4 take it an appeal take it to Supreme Court there are means of doing it it is only because defendants r lethargic that these orders continue to operate . it is very rarely that I come across as a lawyer that if you want to get the intention vacated it is not heard . you are right absolutely right . the lawyer and litigant both should be vigilant . absolutely. most of the times I think litigants a very vigilant I think a lot of times we contribute to the delay in a very big way why not appearing on the right time why not filing reply sometime and this was the strangest parts that we found out of the delay 70 % was contributed by adjournment s by both parties agreeing . and I found it very strange as you rightly said the two different it at the receiving end of an injunction the lawyer I don't know if they are the defendants know exactly for the lawyer is portraying there but the business has been shut down they are at the receiving end your lawyers agree to an adjustment and I have seen this notice I'm

sorry Council is a difficulty because he has to travel to the United States US shut down my business you have got an ex Parte and now my Council is agree with you when you say you have to go to the US and it should be shifted by another 2 months . and 70 % your lordship is absolutely right 70 % contributed my own fraternity . and I think the answer ECourt project . where is the provision for appeal order 43 1 r. suppose ex-parte order is passed immediately one can file an appeal and special leave petition is there .

## SESSION 8

Very good afternoon to all of you . I think we need to wait they just outside ..... also all of you got your Performa it Centre well in advance it was sent on the day I left actually we sent to registrar general and we told registrar general that whomsoever you are nominating please forward it to the judge then we realize that it was not done in time by the registrar general office I'll give it tomorrow . yes you can give it by tomorrow but all of you got copies right .... it won't be possible some of the information required we have to collect from the registry ok ... alright maybe within 10 days the next 10 days would be fine because . statistics you want that is extremely difficult in our ... impossible ..... just a minute for myself I can tell you that I have not received any such Performa as far as the Patna High Court is concerned so I don't know not am I still having it ok we will just give you those who have not received we have sent to all RG but will give it to you now hard copy also we will give it to you and you can take 10 days and send by email National judicial Academy no problem that can be done that can be done . ok now I think everyone is here so it is not bad to start right 4 minutes before its ok ? so what is actually it is a 1 hour special what we will do actually we have 2 speakers I will tell them to introduce themselves and after that jointly ill take 40 minutes together after the 40 minute presentation then we can start the question answer fashion is that alright because in between if we interrupt the whole flow of the information that is coming to us will be interrupted as well so we go here from 2 to 240 to both experts I've lost both of you to introduce 1 minute about yourself . so very very good afternoon to all of you I'm really honoured and privileged to be standing here and speaking before this August gathering learn it judges is it ok so we had a very very stimulating morning session today and I thoroughly enjoyed it I'm sure all of you have to moving on to a very specialised topic this afternoon and both Swaraj and I we'll talk about will talk about this topic compulsory licensing in pharmaceutical patents it is a relatively new thing which has now developing into jurisprudence we don't have too many cases here suggest quickly

introduce myself first my name is Deepa Tikku . and I am a partner with the law firm KNS partners we are intellectual property attorneys and I specialize in the field of patents itself I don't have too much expertise operators in trademarks any other IP side but I focus only on patents that's predominantly to do with my background which is because I am trained to be a scientist before I join this field I have a PHD biotechnology and before that I worked with industry I filed few of my own patents from my research that's how I got introduced to this domain and I have not really looked back really enjoyed it and I really love it so I've been in the field now for about 12 years practicing patents I am a registered patent agent other patent office so that is mostly about me I read the patent practice for the life science domain in my firm and of course we are spread across the country . I'm very very keen observer off how the law is developing in the field of patents especially in the life sciences domain which includes Pharmaceutical biotechnology medicine food and Chemicals of course so I've been very very keen the following all the development that are taking place when you want something added as shamnad talked about . biodiversity issues those are some things which are coming up now and it will be very very interesting to see how we Shape Up that so now to Swaraj . hi good afternoon everyone it's a huge privilege to be speaking in front of all of you and I am very thankful to NJA for inviting me as well so I am also happy to have the person who introduced me to IP almost A decade ago Mr. shamnad Basheer and being on the inexperienced side of 30 what I'm going to do is what in experience people do is to throw up questions I'm not really going to put forth any new material so my interest in IP have led me mostly to Pharmaceutical innovation and currently I'm trying to work with shamnad for setting up Research Centre on IP and innovation policy well I think that's about it we can get going . thank you before we get into the topic per se just a very quick overview of what we understand from patents .

Patent is an award for the inventor someone said and a reward for the investor. It is Incentive for inventors to disclose their invention to general public which may

otherwise have remained secret. Somebody said that patent is for the larger interest of the public. It also stands for the fact that if we do not encourage filing of a patent the technology could remain secret. Like you have a trade secret. Nobody has been able to extract the secret formula of coke or Pepsi or for that matter KFC. In exchange you offer them a limited right to exclude any other person from practicing the invention, without due permission. This will come into play when we move ahead towards the provision part compulsory licensing and where it is all coming from just give me a brief background about the milestones in the legislative history of the patent in India. We have a history which is packed to the late 19th century the initial development where you had Monopoly under the British crown and you have the Patents and Design Protection Act but the first legislation that came in to play which brought this control of controller of patents what's the Indian Patents Design Act in 1911 which was then later amended when India got independent and Justice Bakshi Tek Chand was heading the committee and was asked to look into whether our law needs amendments based on the socio-economic kind of conditions prevailing in our country in that time then Angar Committee report 1959 which strongly recommended several amendments to the existing act. That included the provision but we're going to talk about today which is compulsory licensing working of patents revocation due to non working and then we have the Patents Act which is the current act of course it went through a number of amendments this is also the time latest ad here this is the time you had the whole liberalization the socialist kind of a movement going on in our country that time Mrs. Gandhi internationalization of banks and other public sector the addition of FERA coming in so then came the TRIPS in 1994 India became a member of TRIPS at that time. This was a treaty where we were obliged to comply with the founding principles so we became just got effective in 1995 but being a developed developing Nation we request for a transition period after 10 years to comply with all the requirements because article 27 of this treaty said that you have to allow patents in all fields of Technology and at

that time in the 1970 act excluded patents on drugs food and Agro chemical with compliance in three stages effective 1995 2000 and 2005 most of the amendments that r there relate to pharmaceuticals + chemicals what done in the second amendment last amendment there was a lot of balancing lot of thoughts that had to be done while bringing in the huge transition from the nation with only granted process patents opening the doors to the whole world for granting patents on products find login to pharmaceuticals food and Agro chemicals . so lot of pressure on the government parliamentary debates raged for days and you had a lot of acrimony of course pressure on the government to balance the rights of balance the interest of the larger Indian public not only the public the Indian manufacturing industry now gossip very commonly know it as generic pharmaceuticals industry so there interest to be safeguarded all through these years the manufacturing and they have developed market of their own now if you allow the multinational to come in and they will enforce their patents what what will happen these guys and of course the public interest at large is another concern lot of other things and we allow finally the product patent act with the number of safeguards including for example the compulsory licensing being brought in properly working of inventions being made mandatory and then you have the section 11a7 which gives Limited damage period from the date of grant in case of product patents filed within the 10 year transition period . I must also say that when we became we were doing these amendments during the 10 years transition period we create a virtual mailbox what is called a black box system when we allowed applicants to file in India inventions what applications pertaining to Pharmaceutical products and Agro chemicals however those applications good only be examined what is the product patent law would come into play so when the product patent law came into being there were 8800 application which were actually pending examination at the time so the whole transition from pure process patent to a product patent and the different technical intricacies came in to play because now you got examining chemistry experts examining molecules I

mean a lot of Technical things so so the transition taking place at the patent office now this whole debate about Pharma we have lot of debate about pharma in the country . all across the world as well but mostly in our country why is the debate around Pharma I mean all of us actually are aware of the economic realities that will even in our country where we also know that we don't have too many Healthcare facilities by the government for the million of the people that live in our country government doesn't spend as much percentage of GDP on health care is it would the reality is that we live in our country so this whole percolates in the issue to access to medicines access to I would rather like to call it Healthcare Garden access to medicines because it's not an issue of access to medicines it's also the S2 Healthcare I can give a free medicine 2 person for sometime but he would sometime need hospitalization do we have that kind of infrastructure to provide bed for each and every patient in our country we don't so those other economic and Healthcare reality that we face in our country patient access programs exist but they are not enough the companies who are actually innovating are actually running search programs and they are benefiting a certain segment of patient who are very deserving and based on some documentation they are able to get access to those medicines at lower rate or maybe free government also are not able to do enough in that segment so what do we have we do have a very deadly cocktail the largest patient pool in in the world we are number one the diabetic population we are the highest number of people who are who are suffering from on Lifestyle diseases in India right now and we don't have any insurance infact the people who have insurance Chennai today 4th medicines that is the irony of it and we Pride ourselves to be the largest generic manufacturer to the whole world this is the kind of Cocktail and that is the reason the debate around Pharma is so strong coming to the question of compulsory licensing and what it exactly means against voluntary licensing compulsory licenses license by the government to allow a third party to produce the patented product or process without the consent of the patent order . so this is nothing

new to specially India but we have actually imbibed it. from the rest of the world it was introduced in the Paris Convention 1883 which was the basis to prevent the abuse of exclusive right conferred by the patent. and this is one of the flexibility from patent protection included in the TRIPS agreement now when the TRIPS agreement seduce the law compulsory licensing any person can apply for compulsory license based on certain grounds many countries wouldn't have had the capacity to manufacture they would actually be troubled and intrigued about how they could apply the provision in their own countries so then during the Doha round we had the declaration which said that in case of exceptional circumstances all countries who don't have the capacity to manufacture a particular brand they can issue compulsory license and any person could seek a compulsory license on a patent and export the drug to a country in need . now lot of countries have granted CL over the years especially after Doha declaration lot of developing countries have issued compulsory licenses under strict conditions of they have been able to assess the need for that so this is been done by India inner classic case where we have been able to do it only recently which only 3 years back that we issued our first compulsory license we will come to that case moment it is not only the developing countries who have actually issued compulsory licenses also the developed countries have been issuing compulsory licenses over the years . although it's not a norm it rather an exception what is not as if they have not use this provision . Canada one of the prominent developed Nations who have actually granted the a lot of licenses in this particular fashion . from 1969 to 1992 if I am right around 1000 first application for filed for issue of some licenses like this from those around 600 actually allowed but most the time they using very discreet using it in a very few cases where they are able to establish those kind of circumstances.

in fact very interesting case happen in the US this year sometime back in the US the US itself was on the verge of granting a compulsory license we also had the first half about how us is not very willing happy hockey to look at compulsory licensing in the

field of Pharmaceutical licensing but of course the eBay case we're seeing that it has been softened us actually put a gun point on Bayer's head and said that look we are facing a problem of Anthrax where is the perceived threat of bioterrorism we might have an epidemic of Anthrax so if you don't give this drug at half the price we are going to issue a CL to someone for manufacture of cipro that is a drug and Bayer eventually relented the actually sold the truck at half the price of the normal to the US government they in turn channelized the drug into the country. government actually threaten the company for a compulsory license but after that we don't have too many that could be a basis for this as well lot of the innovator companies innovator parts that are coming actually coming from the west in India the situation is very different we don't have that much of innovation we haven't actually innovated any new drug in the last 5 years we don't have that kind of an innovation happening so in our country it is very easy to have a law in place it says I will safeguard you and you just kind of make it. we have millions to feed we need to look at it in a very different manner also and very cautious about it how we are actually nurturing some other aspects which need to be looked in relation as well . we find that it is OK to copy in some manner coming to the specific provisions of compulsory licensing patents in India I would start with section 92a which is at the bottom you know this is a Doha type profession that we have here unless certain exceptional circumstances in line with paragraph 6 of Doha declaration compulsory license can be granted to a country to manufacture and export patented Pharmaceutical products with insufficient or no manufacturing capacity in the Pharmaceutical sector in order to address Public Health issues . this can be done anytime after the grant of patent so far we have not exercise this kind of provision the only thing that was made by natco Pharma few years ago they finally withdrew it I have a separate slide on that you can just look at that the other is that in case of a national emergency within our country in case of a national emergency what circumstances of extreme urgency the coven can declare that this particular drug is

required and they can issue a compulsory license to interested parties who can or capable parties who can manufacture to meet the demand of that emergency. the more general provisions are there in section 84 which we will just talk about after the slide here we have to see that in comparison to the timing provided in section 92 and 92 A. this can only be invoked after 3 years of grant so the government is actually providing that kind of right exercise or to work the patent in India and make it available to the public the patents granted eventually to use it and to practice it in the market for Greater benefit of the public so there are three crowns here and we look at each ground in the next slide so reasonable requirements of the public have not been satisfied patent inventions and available to the public at a reasonably affordable price and the patented invention is not worked in the territory of India very very interesting interplay of working of invention I forget how to issue compulsory license in that case or not so the first aspect is reasonable requirements of the public not met now there are several statutory circumstances listed under section 84 7 . where it says that if licensee is refused license then the reasonable requirements of the public didn't not to have been met for example if there's a trading and manufacturing happening in India and gets jeopardized because of non issuance of that particular license the demand is not met market for export of articles is not developed when was applied establishment of commercial activities India is prejudiced the patent is not being worked commercially reasonably practicable adequate extent in the territory of India we also now of course there is no definition for these terms what constitutes reasonable what constitutes reasonably practical what is adequate what is not adequate so it is basically under debate. once the jurisprudence on a case to case basis what could be adequate may not be adequate in another matter similarly working on a commercial scale is hindered by imported from abroad by patentee or any off his collaborators not available to the public at a reasonably affordable price reasonable and affordable is there is interplay between the two what is reasonable affordability of course cannot be a standard although in the Bayer vs. natco CL that we have till now

had The council for the for the patentee argued that this has to be commensurate this has to be the standard what is reasonable affordability has to be made standard judge said that this cannot be done because what could be reasonable in one case cannot be reasonable in another case . what is affordable to you might not be affordable to another party so can a Benchmark be practically set . even the ILR Committee report send the expenses on R&D and patents have to be kept in mind when deciding reasonable royalty because the terms and conditions of the CL when they are set there is a certain amount of royalty which is being set by the government for the patent to give a reasonable remuneration also to say to the patentee and to keep his interest also in mind so whether the expenses on RND should also be kept in mind while deciding deciding this royalty and what would be the expenses because in the Bayer case we will see I think Swaraj will also discuss a little about that how to arrive how did the company arrive at the price of the drug so in the Bayer case they said well we also have 1000 failures so the cost of the failures is also included in the drug so that is something to be thought about and the last . which is the patent is not worked in the territory India so what does this mean worked in the territory of India what it mean local manufacture because if it means local manufacture then every patent must be manufactured locally in India otherwise it will be considered that it is not being worked in the territory of India however trip face without discrimination to the place where the patent is being manufactured the patent has to be granted And however sure India we of course have the statutory provision under 84 4 baby say that should be worked in the territory of India + now the Bayer Vs natco case The learned court also said that whether the it is not a question of whether it is being locally manufactured or not it will be considered working but but you have to be dealt with on a case to case basis The patentee will have to show why he has not been able to manufacturer it locally in India . why he is only imported it what are the kind of difficulties that he is having in manufacture it locally in India so this was kind of reversal of the patent office decisions so we'll just

talk about it later should not be worked in the territory of India on the commercial scale . to an adequate extent what is not being worked to the fullest extent that is reasonably practicable then the reasonable requirements of the public will not be satisfied so this not working is also be woven in in those circumstances that is given. under 84 7 where it says that reasonable requirements of the public will not be satisfied if this happens and there's also so of course a separate ground main ground which is a disjunctive ground under section 84 1 . the statutory principle which is applicable to working of patented invention is section 83 basically to encourage inventions they say that it is to encourage invention because the moment invention get disclosed in the public the Science and Technology get benefited because people can improve on it existing Technology provided better products . working in India on commercial scale make invention available at reasonable affordable prices to the public now again reasonable affordable price you will see the smattering of words throughout the the fuse sections that are focused on this compulsory licensing working will have the frequent usage of the words reasonably affordable prices to the public chit monopoly .. technological innovation and it has to be to the neutral advantage of the producers and uses so this is very important to understand that while we make get swayed sometimes keep getting on Public Interest because being Indian ourselves we have have some times suffered because of the lack of medical facilities that we get on the exorbitant prices that we have at the same time the statute says that it has to be at a mutual advantage of producers and users and it cannot be extremely skewed to one side. if you see this balance of rights and obligations social and economic welfare and then it says patents to access instruments Public Interest not to be abused by the T20 so this is very important 2 Note the whole burden Public Interest public health is being shifted to the patent or the patent holder you are responsible taking care of the making sure that you are benefiting the public and the public interest is maintained so the patent owner is a very very high onus . there is a requirement under the act that every patent have to furnish statement of working p

every year after every year after the grant and this has to be done for a full calendar year so what all you have done on the patent and the last 1 year by way of what is the quantum and value of the product sold in rupees .

..... so this is in relation to working of patent in India a product which is patented in India ..... no sir I am not implying that at all it said 8800 applications were filed in India about 80 percent of that those applications I won't have the exact figures but most of the applications filed at that time were all from abroad but even now if you see the patent office data of last year they have the annual report you will see that out of the 42000 applications that were filed in India only 80 % I mean 80 % of those applications were filed by foreigners . that is where the whole interpretation comes in that most of the inventions the drug molecules that are being patented in India actually belong to people from the west awesome other parts of the world . the real novel molecules are not being generated within India so what we are filing outside we are filing application patent applications outside India Indian applicants I mean we are filing a lot of applications under the pct and other places we are filing molecules which are of course like polymorphs derivative salts etc but we are not allowing those here because we have a higher threshold for others so that is something that we have to keep in mind . we are filing those molecules outside . across the world if you see the patent cooperation treaty pct that is the International Bureau that is the International stage where all applications can be filed internationally and they can then enter the different countries so from India we have substantial some kind of filing not very high . but you have companies who file abroad from India and I am talking about the Pharmaceutical sector not all of that talking about the Pharmaceutical sector we had some names coming up very important companies called Sun Pharma Ranbaxy and all they also file abroad what does if you see the subject matter of those they will not be the path-breaking molecules but d will be incremental innovation in a way . so what I'm trying to say is that in India this particular working is supposed to be across Technology this is not only for

pharmaceutical product this is for all the products . but in India but in India yes this requirement is in India and non-working off patent could lead to revocation. non working of a patent could also lead to compulsory license because it is one of the grounds and compulsory licensing are mostly focus on pharmaceuticals agrochemicals but we do not have any case on agrochemicals we only have the Pharmaceutical cases all the cases we have seen for CL only one of that has been granted are all compulsory licensing being applied for foreign patentees cases none of that is for an Indian applicant Or patentee so you can also file a application giving non working statement because there may be some reasons that you were not able to work your patents so your firm allows you to give the reasons and then you can say that we are making efforts to adequately work this but it can be perpetual for 20 years you will find non working statement you have to show that you are working the invention and it's just not the patent that which is just given to you as a paper to be hung on the wall of your cabin it is basically something which should reach the masses

on this note it is interesting to note that despite this being required that by the legislation very few companies actually file the form 27 and provide this information the patent office so lot of applications are actually susceptible to revocation interrogation ..... well it's just the ones that are not going to be worked . no working or not working ... just give me the number . the Pharmaceutical patent side I would say that based on study with did about a year or two ago at least 80 % if working is interpreted as ..... hundred 50 ok that's a tough question I think out of let's say if I were to take a cohort of 20 15 wouldn't be worked if working means local manufacture . no include both include manufacturer and local import why I'm asking this may not e a suite for initial adjudication. ....

your knowledge is not good enough for us at present . think it is going to come up for testing . no it has already been tested it has come up for testing when we just come to the . in fact Bombay High Court it went up to the first compulsory licensing decision

the Bombay High Court was quite categorical . but in Indian Patent Indian Patent was also subject to compulsory licensing sir not only on that when we come back come to the there is a slide which shows the few representatives cases where one of those cases was actually adjudicated by justice Singhvi here . in which the interim injunction was denied because the the judge found that the patent was not worked that's the kind of implication that this could have not only Pharmaceutical cases but across the technology base because it is one of the major ground for compulsory licensing the pharmaceutical industry really should file the working statements and this Bayer natco case actually triggered a kind of interest even in the other set them onto a path of filing the data because they have seen in the Bayer case that there was severe deficiencies. in filing of the working statements and that's the reason the court the controller also raised that has a very major ground for granting of compulsory license so in the next few cases we had couple of cases we have seen that the working statements are coming to a certain kind of terrible to give some data here where ever possible but it may still not be here but it may still not be a completely correct data because I don't know how they actually get the statistics for all of that and if they are giving the entire accurate data or not but they are now actually made a note of it that this could really have dire consequences on the working data actually we have a public interest litigation pending before the Delhi High Court where is shown that systematically the patent holders unable to file this working data . last estimate was that almost 50 % of the patents case did not file it and the greater number of patent is filed the defective form 27 because from a patent in perspective they consider this as trade secret information they don't want competitors to get access how they've used patent and India is probability only country to make this explicit mandate it's like an intellectual property duty and I think it is very wise that we got it there. the Americans are trying to knock it off a lot of them don't like this provision but it goes to the heart of the patent system and unless I see how the patent is being worked why should I be granted this Monopoly because the problems with the way the form is structured the

form 27 in the way that it calls for information and that could be rationalized a little bit more but it is a beautiful provision and its implemented well it can actually help us get a lot of good data including when injunction should be granted because somebody has really not work the patent in a meaningful way and has not helped the public in any meaningful way and has used the Monopoly simply to prevent others and compulsory licensing cases as well we think it's a very serious and grievous violation . Last estimate was that at least 50 % patentees are not filing it. and the greater number of patentees filed defective form 27c because from a patent perspective they consider this as trade secret information as they don't want competitors you know how they have used the patent and India is probably the only country to make this explicit mandate intellectual property duty and I think it's very wise that we got it there this is huge lobby abroad particular leader Americans who are trying to knock it off because a lot of them don't like this profession but it goes to the heart of patent system how to patent is being worked why should I be granted this 20 year monopoly there are problems with the way the former structured form 27 c . in the way that a call for information that could be rationalized a bit more butt it's a beautiful profession is implemented well actually help us get as you rightly said get lot of good data including when injunction should be granted because somebody is really not work the pattern in any meaningful way does not help the public in any meaningful way but I used the Monopoly simply to prevent others and it is gotten to compulsory licensing cases as well you think it's a very serious and grievous violation that they are taking the statutory mandate and it is a statutory mandate you must file working statement as to how you are worked the patent there are reasons it is not a it's not a very fast provision because if there were reasons why you couldn't you can stay there and if there are valid reasons and the courts resume presumably when they are hit with a compulsory licence application foreign injunction application undefined that the patentee has not worked because of any serious constraints policy constraints and other constraints then I'm pretty sure that it will be it will be factored in ..... yes yes

there is no discrimination there is no discrimination any patent that is recognised internationally registered in India and I she said most patents registered in India are multinational or foreign patents .... there is almost like I said 50 % non compliant with the working statement the larger number if you consider just not filing IT return at all in any year then it's almost 50 % if you consider defective filings and much more so I just had a bit over here also had some interaction with some of the companies on this issue and we know what their viewpoint is on that before nobody has taken this provision very seriously because the patent office never did any thing with this data only now that when third parties have used this particular lack of data on the record 2 attack the patents that everybody took note of it otherwise this working of patents has been there is no substitute and so that is one part. they were not very aware one the second is filing of form 27 are not filing of form 27 had less penalties failure to provide information fine upto 10 lakh supplying false information fine or imprisonment after 6 months or both . but it doesn't mean that if I don't file a form 27 I haven't worked the patent there are two things to it I'm working the patent but I haven't filed form 27 sweet question of leading evidence in the court tomorrow and if I could show that I have actually work it I haven't find the form 27 I will be fined I'll just be fined .... So the question is when we looking at non working when the case comes before adjudicating authority and third parties allege. let me explain actually it's a matter of demand and supply suppose demand is hundred and supply is 5 by the patentee but the person who seeking compulsory licence he has to basically prove before the controller where is the demand is hundred but the patent has only 5 if the controller is satisfied then he can grant the compulsory licence the controller is not satisfied because this ground is always taken by the person who is taking the licence so you should look around very very useful the patent has not worked in India so it's basically depends on the evidence absolutely but as far as infringement Part is concerned Civil Court is there Civil Court if you read the entire patent act, if

basically in a meaningful manner the court will come to a conclusion that prima facie the it is a valid patent and the defendant was guilty of infringement then the injunction would automatically follow. because there are statutory provisions under section 48 of The Patent Act these things will work like this compulsory licence or defences where the court is doubtful the patent is not valid or definitely not guilty of infringement of patent also the aspect of public Public Interest will come into play as I will . compulsory licences very hot topics in these days let me tell you how the public interest will apply when basically patent is valid defendant is guilty of infringement Public Interest may not apply suppose the patent is a .... That the patent is prima facie invalid and the defendant may not be infringing it then under the close of balance of convenience is public interest you can be taken by the court. you are right but the only thing is that compulsory licences is an action which is done by the I PO and the patent office is granted compulsory licence on the particular case based on whatever ground there was and as we have seen and the Bayer case huge Emphasis was laid on public interest in the entire judgements all the judgements that you read ranging from from the IPO order to the High Court . But Bayer is on compulsory licence and not an infringement that was a separate point. there was one company which applied for licence which is Natco and the other company which is Cipla decided to release it on product saying .... But the court decided on the basis of compulsory licence. The court has decided the compulsory licence issue was the Bombay High Court delhihighcourt is deciding the other issue which is Cipla the trial against Cipla

in the Bayer case the role of Cipla was also considered because the patent is said Cipla is already meeting the demand in the market because it is it is actually producing my product infringing my product copying my product and supplying it so the demand is already being met so that was the argument that was made and the argument was rejected buy all the benches so that was not considered I just said that because you a suit is already pending against Cipla anytime they can be injuncted Cipla could be

injunction then what would happen in that case so .. Now pending all these proceedings can section 47 applied sections 47? It can provide it's a couple doing that. Naturally here when we talk of public interest government is the frontrunner the government can do it and you can see the government doesn't invoke the power. so the only no you are right the government hasn't really used so lot of countries like India they give the power to the government the stepping on these patents during certain circumstances and India has a pretty wide provision there and even and compulsory licensing section 84 and that is Section 92 also section 84 as he said it is read a matter of right as a third party if if I find that the statutory conditions are being fulfilled I am entitled to a compulsory licence with section 92 which permits a government on its own determination to issue licence that is discretionary and that by and large becomes political and we have seen that for at least 10 cancer drugs the government was willing to do it invoke 92 huge pressure from government Agencies began fighting with each other health wanted the licence and Commerce was more suspect about it and said till we have very authentic data that that these drugs and these diseases matter a lot to the country we will not go forward in this . I'm telling you in one of the case this question came before the court that government is not taking any steps government is leaving everything with the court. government saying minister letter was there which was placed before the court he says matter is subjudice before the court it is the easiest way for the negotiating with the USA. to say that this courts outside control. we can do nothing about it and we don't want to take a call on it. there is a legal policy note it is interesting How 92 would tie in with working requirement and that we filed RTI just after the compulsory licence has been issued and it was interesting to know that imports increased drastically as soon as the licence came in to play and there actually making more revenues in India due to this compulsory licence . the import Bayer of the drug Nexavar had dramatically increased as soon as a compulsory licence was introduced to India. so this is interesting because compulsory licence is such a political hot topic and if the government is being

pressured saying the MNCs are losing out getting information from form 27s can counter the pressure the political pressure . the only reason I would see that Bayer is importing the drug is because it is disbursing more within the country. despite the compulsory licence coming in there actually importing more products from outside this section 47 is not political section 47 requires the government it's the government dispensaries. the government political pressure from outside. so they will put political pressure not to use it because it is against their patent. section 47 subject to conditions correct that's what I'm trying to get at government can invoke section 47 without even bothering about those pressures but then they have to be some . circumstances have to be exceptional otherwise section 48 loses its meaning because if the circumstances are not exceptional 10 for every disease the government can say that this disease is important so please grant compulsory licence Or Please invoke invoke 47 then the whole intent of Section 5 you know striking out section 5 from our act and introducing product patent goes away because the intent is not actually grant a compulsory licence on drugs there has to be some exceptional categories where you have an epidemic happening in the whole country example does an epidemic of malaria or dengue sure I have to say something there are not many medicines which are innovative medicines in the country which are focused on our domestic diseases. they are working on those diseases which are International and have an international market as well so for every disease you can't have that kind of a provision invoked. in this case also as Shamnad said they were about 10 anti cancer drugs . of the multinationals and the government wanted to basically they were Murmur that the government could invoke the provision saying that these are life saving drugs are very essential medicines the DIPP actually rejected proposal ... I am not aware of this pressure they would be I am sure . but the government did not find that its existence enough actually in work 92 for these drugs but you are right 47 is wide it's also narrow in one sense compare to 84 or 92 because 47 self government has to use it for its own use either the government how to manufacture it itself . No subsection 4 is

only for it's on dispensaries in case of a patent medicinal drug can be imported for nearly its own use distributed in any dispensary maintained by or owned on behalf of the government. so that. it has to be government hospitals no problem we have government hospitals everywhere in the country I'm sorry there is an exception as an addition it can be any other hospital also please read the last section which the central government may on its behalf by notification it is a question of 24 hours job is committed willing . no no I am not on all this 8492 but we have solution in section 47 the issue here is also about government channels even if the medicines available so you know we have dispensary method my father has a CGHS card she goes to dispensary it doesn't find those drugs there what stops the government from getting those drugs into the CGHS dispensary my father has to go to a private hospital and take the medicine from them .reimbursement from the CGHS card what stops the central government of getting those drugs do drugs also manufactured by the generics sir and 4 is this only imports photos on imports let's remember that which means but I have to buy from someone the government is not willing to buy and give subsidy on this the medication is coming at huge cost from the multinationals let's assume that there is no generic in production because of the validity of a patent . either the Government of manufacture and produce which does not have the capacity today. it shut down most of the PSU today we had in pharmaceuticals. and that's the limitation out of the manufacturers today most are in imports. Bangladesh manufacturing drugs now if India and Bangladesh came into some kind of agreement where both had some kind of agreement had agreement with each other no no no may be imported are made by the word is not only imported which one sub-section 1 section 47 the grant of patent under certain conditions now we have to read all this section 47 can you answer this that they going through this whole procedure correct compulsory licence . the government can do that. there is political will to do it so long as that comes in the way of our. the point also is that when we talk of. they are cutting down the government initially cut down the percentage of money they were going to

spend on public health only now they have gone back and said well because India's spending on public health one of the lowest in the world it's 1.3 % they have now said they will take it to 2.5 percent by 2020 and then Niti Ayog which is the Planning Commission and said that sorry the government cannot afford any more funding on Public Health you need to leave it to the private sector there is another reason all multinational companies are discussing the thing with the government the moment you will introduce the product in cheap prices you will invoke section 47 then basically all these drugs was smuggled to those countries where the drugs of a multinational company are all higher price that is the problem . also the thing is that differential pricing now cause there are lot of questions we can debate. This later the government has played the role of the Gladiator there is this kind of fight going on before the court between the generics and innovators so as to say the government is sits as a mute spectator without understanding

They were saying that why can't the MNC is given drug for 5 rupees what stops him from giving it at 5 rupees how can you say that I am sorry to say Allu is also not for 5 rupees the thing is the government has to have some mechanism to balance it don't need to skew it only towards the MNCs. where is the balance are we looking at a balance think we are looking at a balance here because all we are saying is that the burden is only on the MNC to take care of our Millions that is actually back fire at some point in time because you when are companies investing into R& D this is going to impact our own Indian applications and they are forgetting that because this will also backfire at some point in time . so we don't need to have a polarized review on our law we shouldn't be having polarised view on interest of MNCs it has to be without discrimination based on the facts and merits of the case speaking of government role there is a very interesting case which came out of the Delhi courts . Where a little boy rickshaw puller son was diagnosed with a life threatening disease. which basically means that excess fat is stored in the body and muscles lose function over time and that is the certainty over a period of time the only

therapy for it was sold by a corporation nobody else had to this therapy and enzyme replacement therapy at 6 lakhs a month and the question before the court was should the Delhi government pick up the tab because the kid was treated at AIIMS Delhi government said sorry we cannot foot this bill. and they came up with beautiful argument and how Delhi spends The most amount of money on Healthcare compared to any other state but what the Council for the little boy did he pulled up some data showing that in the last year alone Delhi has spent 1.4 crores on the medical bill of one MLA alone and so that swung it the court said you have an obligation we cannot let just this child to die because there is no money and I think the Delhi Bar and also collect some money the encourage the government to look at ways to raise the money reset the application was still on you to somehow find a way in which this child could be supported . So the idea is to make it beneficial for the innovator to disclose his inventions to you in the long run.

Once we have approved you you are as good as the innovators product that's why they are approving you. So from a regulatory perspective both are the same molecule. One is costing more because they have undertaken presumably a huge R & D cost the other only has a manufacturing cost. They discovered that the molecule already exists they make an exact same copy and they take it though a little less of a testing level and then they got to the regulator and say that we are the exact same molecule so if you give approval to X you must give approval to us. If toll tax can be assessed by the government why cannot this 280000 be assessed by the government. Toll tax the government is assessing on what basis. The toll incurred by the contractor and over a period of time he is being repaid. They should be asked but they refuse to give. They make this price for a particular period but then they have to come down. Also in some cases there may be a situation where. There should be some PIL on your behalf. We have to hear other resource person also what he is speaking. Because he is left out now it's 3 o'clock I think. So we are also talking about the regulatory I think somebody asked. No we are on the compulsory license. May I ask one question on compulsory

licence? Consent of the .. for grant of patent is not required..... We are of the view that the conditions mentioned in section 90 are not satisfied ...malafides on part of the controller granting compulsory license. Then what is his remedy that is one. Second is there any dispute regarding the payment of royalty and remuneration which has to be fixed by the controller. Then what is his remedy. Third s if there is any violation committed by the licensee after this compulsory license is granted then in that case can the license be reverted back to the original patentee. I will take the last question first. Wherein if there is a violation of the terms and conditions of the compulsory license of courts that can be brought to the notice of the court. And because these are the terms and conditions which were set by the granting authority and I would probably go for the 84 license because we only have 1 case right now and in which case the question did come up to some extent before the courts. Because the patentee found that Natco was exporting some amounts of this drug to china although the quantity was not very high. In the terms and conditions of the license it was clearly mentioned that it was only for local use there is no export clause included. This takes us to an entirely different zone of ..... like provision and it could probably not be we won't be able to discuss it in that detail here. The court found and there is a provision in our statute which says. Section 94. No sir the question about Natco. They said that it was only for generating data. For the regulatory authority in china and the court held that this is fine this is a separate issue and this does not fall in the terms and conditions of the . I think the whole issue is about evidence. If the patentee is able to prove violation of terms and conditions of the patent the court will definitely take cognisance. Other question was remedy of patentee in compulsory license and second was of the quantification dispute.. I think internationally the royalty fixation would start from 3% minimum and which could go up to 6% also but in this case controller gave a royalty of 6% in Bayer vs. Natco matter. The IPAB raised it by 1 more % to 7% because it was pleaded that the R& D cost the failure cost and the pipeline cost because they are researching on newer molecules they are incorporate in those costs. However they were not able to they didn't want to give

the actual calculation of how they arrived at this cost. But the royalty was raised by 1% and upheld by Bombay High court.

Just 2 quick slides on 2 other cases. We have had 3 applications for compulsory license out of which 1 was granted. One thing I wanted to ask was whether the writ jurisdiction of the high court is there for the case where there is no license granted. The first appeal resides tot eh IPAB. That is another point but whether the cause of action lies with the high court or not. Yes. So in the light of that whether there is any provision in the act ... .. sir I am just giving you a bit of contrast because there was only 1 case of Bayer vs. Natco which reached its logical conclusion. The other 2 cases which I am going to touch upon how these 2 cases were different from this one and how the learnings from the Bayer vs. Natco which both the patentee and the controller took into consideration . in these cases there was a patent on .... which is a US company... life sciences is an Indian company which filed an application for CL. It was rejected o the prima facie grounds that it does not forma valid ground because .. did not make efforts to request for voluntary license. Also in this case the company had data to defend the patent and the exercise of the patent unlike in the Bayer case.

The last is the latest one. Last week of June the application was filed by.... pharma against a diabetes drug astrazeneca. It was alleged that the drug was available to 2.3 % of the people. Also the importation cost for this drug is only about 90 or 80 paise. Whereas it is selling the drug in the market for 40 rupees.

1.23



## SESSION 9

Very good morning to all of you. Today we have Hon'ble Justice Mukundakam Sharma former judge supreme court of India with us and Mr. Anand Desai managing partner DSK legal. This is session 9 and we gave you yesterday we distributed a simulation for this session. All of you have that with you. Yeah. So sir I leave it to you know.

A very good morning to all of you. Now this exercise that you have been doing and you will be doing for the next 2 days also is really a curtain raiser because of the introduction of the commercial court bill in the Rajya Sabha and once that is passed several changes will take place not only in the procedural matters for dealing with these commercial nature matters but also there will be substantive changes as to how to deal with these matters. Now what are commercial matters will include commercial matters is also defined in that bill which you also must have gone through by now and in the international field almost all the developing and developed countries have commercial courts separately and exclusive courts so therefore of course in the USA it is called business courts but united Kingdom it is the commercial courts china also has a commercial courts the European courts they have a separate wing. So similarly with the globalization coming in focus and emphasis being on the foreign trade and investment we have to some extent go by the desire of these foreign investors who want that their matter if any on the judicial side should be disposed off as expeditiously as possible. And that is the idea as to why India is also going in that direction only to have commercial courts. Those high courts which have original side they will have the commercial courts in the high court itself to the extent of 1 crore but there is 1 problem coming up with that the pecuniary jurisdiction being 1 crore Delhi high court has recently amended their rules whereby they have adopted they have accepted 2 crores as the pecuniary jurisdiction. So there will be some difficulty and anomaly in that but once that is passed I think that will take care of after discussion. As I said that that particular act deals with the various areas that constitute commercial law. Section 2 (c) in fact

defines commercial disputes is a dispute arising out of these several subjects. One of that is the transactions of merchant bankers financiers and traders those relating to mercantile documents. And then transaction relating to aircraft aircraft engines and all that carriage of goods. We have today one session on this. Then we have construction and infrastructure contracts including tenders. We have a separate the last one today is of that nature. Then we have also here included is partnership agreement, we have a session on partnership today and then intellectual property rights. I'm told that yesterday you had that. There is one more aspect which could not be accommodated due to paucity of time which is very relevant and very important insurance and re-insurance. This could not be included but I believe the national judicial academy is also getting ready to be able to impart the necessary trainings because the act the bill envisages an extensive training and the training to be given by the national judicial academy and the state academies and the training to the judges is for 6 months. Very very extensive training that is what is envisaged and there will be some changes so far as the procedural part is concerned and the cpc is being amended and if there being any conflict between cpc and the bill act then the provisions of the act would prevail. That's the so to see that there is early disposal of the matters. That's the main idea and the thrust. So therefore with this introduction I am coming to the subject in hand today that is dealing with the sales of goods act. I am told that you have been given an exercise yesterday and you must have all gone through and coming prepared to give your views. So I am not going to say anything at this moment. So we will seek for the views

OberoiYes

SO one by one I will seek for your views. Let's have an interaction and discussion and then finally we will come to the comments or whatever we put it. So shall we start from the front or the back? Who will choose? Back benchers are always ... first. Let's have a volunteer. Let's have a volunteer. Who is going to?

Sir to be very frank.

Sir we have to make a confession

Sir one thing because just now we have been given this problem. So we need to go through it.

Session 9 yesterday it's given

Sale of Goods act was given yesterday I am told. Have you been able to go through it. First just let us know if you have been able to go through it. Alright doesn't matter. Those who have gone through should there be a volunteer who would like to give their views. Any volunteer.

what is the decision that is looked for. An award in favour of the arbitrator or in favour of the claimant.

See what we want. You are all judges. I want your views also. Now see for example.

This is a

the arbitrator has awarded it is a section 34 scenario we have to decide on a section 34 scenario.

that's right it's a section 34 scenario. The arbitrator has decided in favour of the contractor against Axiom traders. So therefore now for example you will find. Kindly go through the. You have the copy of that. I believe you have been given those facts hypothetical facts. Now there was a tender. Correct tender details. Now tender details stated that it is for sale of scrap and gross weight of each set of coil is 13.5 tonnes tentative. This word has a lot of importance in the matter of the decision. The lot was to be sold on as is where is basis. The tender was to open. Inspection was allowed. Inspection was done with open eyes. Materials were inspected they were satisfied with the material condition. Then that respondents name here respondent was declared successful but later on he collected just out of the lots he collected only 1 lot and 2 lots

he said I will collect later. So now he raised the dispute with regard to the weight of the coil of that first consignment and then he raised the dispute and said that it is not of 13.5 tonnes but less and therefore he should be given reduction of the price of the coil which he has taken delivery of. Now this is the sum and substance of the case practically. Now the arbitrator has to decide. Arbitrator said and held that since the actual weight is almost 33% less than the tentative weight therefore this decrease in the quantity is definitely of significance and would be a relevant factor and therefore he gave the benefit to the buyer. And then see that's was his decision. Now the seller has said that it was sold on a lot basis and not on quantity basis that is the first contention of seller. It was also indicated that the weight which was given was purely indicative and the owner is not liable for complaint from buyer for deficiency in quantity, quantity size etc. Next contention was that sufficient opportunity was given to examine the goods and satisfy about the specific of the goods. It was specified in the tender document that the bidder was expected to make themselves aware of the physical condition that dimension size and all those things. Then the third was third contention was the weight of the goods was only tentative and was not an essential condition of the contract. The contention of the buyer was that so far weight is concerned was of a relevant consideration and a significant. It was significant and deviation to an extent of 33% one-third is substantial. So now I will ask you for your decision on the matter.

let me volunteer.

yes please do. You are most welcome

we are at a section 34 scenario and our parameters of enquiry would be slightly restricted than that of the arbitrator. But even in a section 34 scenario. I would tend to reverse the award. Simply my reasoning would be that the arbitrator did not construe the clause which has been set out here. The 2 clauses on quality. 5.1 and 5.2. section 12 and 13 to my view will be attracted because the seller wasn't holding out an enquiry. Infact the stipulation was to the contrary. The seller is putting the buyer on notice that

here is the goods take inspection, and the balance is your funeral how you arrange it. Therefore the action of the purchaser on doing what he had done shouldn't be what should I say the arbitrator shouldn't have done that way.

alright that's your view. We accept that.

this actually the award of the arbitrator is justified because whenever there is some sort of less or weight then section 18 of the sale of goods must be ascertained in the proper quantity and quality in the sales. That is the first condition. Number 2 there is another section that 15 of the sales of good act sale by description ... corresponding. Even if ..... the quantity must be ascertained. And if it is not there it is the fault of the... so whatever is the contract. It is justifiable that it must get award. So arbitrator's award is justified.

its justified

yes

there were 2 basic conditions in the tender. That they were to be sold on lot basis inspection was permitted and as is where is basis. Now the person submitting the tender had inspected the goods. He was satisfied. He had submitted a certificate to that respect. It was relating to the quantity, quality both. So from the facts itself the award of the arbitrator has to be reversed. Because once the certificate was submitted and he had submitted the tenders then he is bound by that. Irrespective of applying the provisions of law on logical basis the award has to be reverse.

so you are setting aside the award.

as per the Ramanath shetty case the conditions given in the contract has to be adhered to and this condition what my brother has said that the moment the agreement has been entered into by floating tender and inserting certain terms and conditions and the parties fully aware of the terms and conditions that is as is where is basis. So he is

knowing the fact that whatever the quantity it's on the basis of as is where is basis. So the moment he has purchased the property whether it is less than or higher than the quantity. So in my view the whole argument is contrary to the terms and conditions of the contract of the agreement.

alright

I also want to say something

-yes.

the special condition is there 5.1 which says that goods is to be sold on as is where is basis. So far as the condition of the same is concerned it will be deemed to have made themselves aware of the physical condition including weight. Therefore the contractor has inspected the material and has certified that everything was in order. therefore the arbitrator could not have acted contrary to the terms of the contract. And taking an equitable view because he can't decide on the basis of equity. The award should be set aside.

sir and one thing in the terms of contract before .... rule. To challenge at the stage when it was floated. It was not challenged and accepted by the parties.

no he is not challenging the rules I mean the contractual terms even now. But he says that it is substantially decreased. So therefore I must get to that extent the benefit.

sir what I'm saying is the conditions of the contract is .. the rules as per the sale of goods act. It should have been challenged at the outset and not

alright. You have already said yes.

according to me the arbitrator has exceeded his jurisdiction. Because he assumes his jurisdiction from the agreement. He is a creation of the agreement. And he cannot travel beyond the scope of the agreement. The agreement is very specific as regards.

but what do you say. That is alright so far his jurisdiction is concerned about the interpretation part do you have to say anything about it.

the interpretation has to be restrictive in nature with due regard to the terms and conditions of the agreement. The powers of the arbitrator

what are the powers of the arbitrator.

it will be limited to the terms and conditions of the agreement. the scope of the enquiry will be only with reference to the merits and demerits of the award qua the conditions of the agreement. If the agreement itself stipulates that it is on a lot and a as is where is basis. There is a tentative weight given and scrap this factual matrix has to be appreciated. That under what circumstances they were also allowed to have inspection. You did inspection you assessed it. You are supposed to have knowledge of buying and selling scrap. That's why you came for bidding. You assessed it and now if you say you use this word substantively low. That is your assumption that subjectivity cannot be substituted by the arbitrator by applying the principles of equity

so far you say the decrease in the quantity that is an admitted fact. Apparently from the facts it appears. But whether that would have an effect on the main issue

that shouldn't have. An arbitrator should not have addressed that issue because its conditions are very specific as regard the assessment as regard the quantification as regards the value. So it should be reversed.

the terms are very specific and says not by unit weight. And ... jurisdiction on the basis of the agreement. Terms are specific as is where is basis and lot and not size unit

weight. He has accepted it .. responded. There is no scope to go beyond this terms of this agreement. He is to be restricted on it. Therefore arbitrator has gone beyond jurisdiction he has got.

let him complete. I will come to each one of you. So you would set aside the award

I agree with the award

you agree with the award. Why do you agree. They are giving reasons otherwise.

They are expected to state at least somewhat correctly the specification of the goods which are being sold. When they say that the weigh is 13. It should be somewhere around

33. It is one-third. One third less than

discrepancy can't be to that extent. When a person inspects the goods he is not expected to weigh the goods to see what is the exact weight. So like I said there is misrepresentation with regard to the. Misguided ..

they misdirected sort of

sir the clauses clause 5.1 talks about selling the goods on as is where is basis . 5.3 stipulates that the owner shall not entertain any complaint from the buyer for any deficiency in quantity quality size dimension etc. It does not talk of the weight. Now under section 12 of the sale of goods act weight does not appear to be a condition it is a warranty for breach of which the person can claim damages. Now under section 13 a condition can be treated as a warranty if parties agree thereto so clause 5.3 does not deal with weight what will b the number and not the weight. Since 5.3 does not deal with weight my understanding of clauses will be that it is a warranty for which the contractor can claim damages and the award to the extent it directed payment to the contractor is valid.

yes anybody else would like to volunteer.

when you see the conditions of the contract the scrap it was to be sold in lot and on the basis of as is where is so I think weight was not an issue and once this bidder he has given the bid then after inspection of the lot he could not have raised any dispute regards weight and the arbitrator also has no jurisdiction to enter into. It was beyond the terms of the contract.

so you will set aside the award.

I wouldn't set aside the award. I would support the award for the reasons given by the other speaker.

so you see if we had asked you to raise your hand I think yes would have had it because this actually a camouflage. These facts that have been given. It's really a decision which is rendered by Delhi High Court setting aside the award. And the reasons that were given were first of all in the advertisement that was made it was said that the scrap will be sold on tentative basis. The gross weight of each set coil is 13.5 tonnes within bracket tentative. Now when it says tentative it was not advertised as if it was of 13.5. it could be more it could be less . number 1 and I also told you that the entire lot was sold and he was supposed to pick up all the lot. He picked up only 1 lot and there he found there was a deficiency of about one-third but if he would have picked up the rest probably the weight would have been the same so therefore he has to blame himself. That is also one aspect which was dealt with by the judge. Now next is the judge has referred to 5.1 and 5.3 and 5.4 also. 5.4 of course is not given to you. Now 5.1 says the goods will be sold on as is where is basis. This is very relevant. As is where is basis means whatever is there. The advertisement yes the weight was given. That weight is regarding the quantity and the size. So therefore as is where is basis so far the physical condition of the tenderer shall be deemed to have made themselves aware of the physical conditions, dimensions size weight working conditions etc by inspecting the material

before submitting the tender. They inspected the materials also. Therefore they are bound by this clause. And the judge has held that the arbitrator has gone beyond his jurisdiction because he could not have interpreted and he should have read it with the contractual terms as they are. So this is what he has held. And the judge has also said that when it says that only one lot was taken he has held that part cannot be indicative of entire lot. So finally I am referring to various decisions of the supreme court also and referring to 5.4 also finally he relied on the case of Associated engineering company versus government of Andhra Pradesh reported in 1991 4 Supreme court cases page 93 regarding the jurisdiction and power of the arbitrator to ignore the express terms. He said that he could not have done so to ignore the express terms of the contract. So finally going into the principles of caveat emptor also he borrowed that principle also and discussed that and thereafter held that in accordance with that clause let the purchaser be aware and ought not to be ignorant that is purchasing the rights of another. So that was also made applicable and finally the judge of the Delhi high court set aside the award. So those who said agreed with that view probably gave the right decision. Because facts are facts always make the law . so therefore you see everything depends on the facts

may we know what is clause 5.4

5.4 I will read it out . yes that is so, it was not given that's what I found. It should have been given. But that directly is not applicable to the facts of this present case. I'm reading it out for your information. When the goods are sold by unit weight and not on the basis of lot the quantity indicated in such cases in respect to lots are purely indicative which in actual may turn out to be more or less than the indicated quantity after due lifting by the buyer the buyer shall not be entitled to claim any damages loss of interest or compensation on any other account but shall be entitled to proportionate refund. So doesn't say that he will be entitled to damage but will be entitled to the

proportionate refund only to the extent it was not to the up to the mark. So this was the decision of the Delhi High court so this was what was given.

clause 5.4 was the decisive factor.

that is the decisive factor

no no see that is so far you see not lot basis. I mean it is sold on unit basis in a case of that nature probably he would be refunded to that proportionate extent. But that is not applicable so far as the present case is concerned.

this is the tender document 5.4 ...

it is 5.4 . see the judge has said 5.4 is not applicable 5.3 is applicable. There are 2 different aspects. 5.4 is not applicable to the facts of the present case. Unit that is a sale by unit this is sale by lot. So that's the difference.

5.3 made it specific not by unit weight number basis. It quite specific.

that's what I read out. That's right. That is applicable and appears to be correct view of the court. So now I will hand over the mic to my colleague

Thank you so much it is a great privilege to be amongst the eminent judges and I'm grateful for the opportunity. Actually I was asked to come here the first time. I asked myself and I asked the director that what is my role. And one of the role was to try and translate some of the business people perceive as requirements that the judiciary should do in commercial matters. Because as justice Sharma said the expectation from a lawyer and a judges is often to go as per the law strictly follow the law the entire procedure and come to a decision. Which will take many years in appeal etc. Again the complexities have also grown as I was asking myself when I saw this particular simulation instead of arbitration had the case gone to consumer forum would it have been a different outcome.

14 . 14 of consumer

that's right. Therefore it can also depend upon which route the litigant has chosen to follow to get to the high court or to get to the supreme court. And that can have an impact fortunately or unfortunately on the case. So you have mediation. Fortunately that does not count. Then courts, arbitration, consumer forum, international arbitration a whole bunch of other options. I want to share one experience which I had in European court commercial court where interestingly the bench was a judge and a businessman. 2 on a bench. Our client was a businessman from India and the other side was a German party. Both sides filed 2 page pleadings that's it. In 20 minutes the case is over. The judges looked at the pleadings and said you pay so much and move on to the next case. For my client and for me too it was a revelation how can this be the way. No one has looked at the exhibits no one has looked at the correspondence no one has looked at evidence no witnesses have been brought forward nothing. Just a 2 pager which could be completely wrong. The lawyers had not even verified in any manner when they drafted it beyond a certain amount. Our client said let's ask for a detailed hearing . so I asked the lawyer there can we have a detailed hearing he said we can but the judgment will not change. Detailed hearing meant you filed a set of the contract and correspondence. That's it. It again took 20 minutes, the judgment came same decision. My client said can you go in appeal. The lawyer said you can it will be very unusual. We went in appeal decision did not change. The entire exercise got over in about 3 months. From beginning to end including the appeal. Had the appeal been admitted situation would have been that you would have to deposit the money in the court before we could actually argue the appeal before the. I gave a talk at the Indo German chamber of commerce in Bombay and recited this particular episode. Every single German businessman there was horrified that we had gone in appeal. And their logic was the system cannot work if appeals are entertained. It's a commercial transaction system commerce must go on. The moment you block that flow of commerce you are causing a problem. Very very different approach to Indian businessman who like to go

in appeal and like to go to supreme court. That is just to share a small episode which I was party to. Singapore has set up commercial courts several years ago and I think they are also trying to function efficiently. SIC is functioning very efficiently. I believe they were a year ago one third the cases in Singapore at the commercial arbitration had at least 1 Indian party. So coming to commercial disputes, the other issue I find in sale of goods act I was highlighting to justice Sharma earlier was we don't actually see too many simple sale and purchase contracts going into major disputes now. The entire type of commerce is changing. The bulk of people living in metros buy things online. They are no longer going to a shop to buy things. In fact stores are closing down. I was surprised to learn that even clothing stores are closing down gradually because people are buying online. And the clothes get delivered home you can try them on you can return them if you don't like them. The platform from whom you are buying it is not the manufacturer. There are so many disclaimers in the small print which nobody reads. Indian courts have held that any kind of disclaimer has to be prominently put attention must be drawn etc. In e-commerce actually once you click the button it is held to be that you have read all those terms which most people have not read. The other complexity you find is in terms of large projects where we have a purchase of a chemical plant or a factory whatever. Goods are being bought services are being given contractors are engaged sub contractors are engaged etc. And according to me add complexity as to which act you apply. Is it sale of goods act any different act. We also find and now I'm sure all of you have come across this more and more contracts are using terms which may not make sense from a commercial point of view but makes sense from a tax point of view. So in order to reduce the tax stamp duty VAT service tax etc clauses are put in. So we see very strange things happening. I have just highlighted a few in a small presentation which I have put together. And some judgments which can be distributed when we wrap up I think so. This will be really highlighting a few things. I like this quotation so I put it down first. From the time that goods are worth what they sell for its nowadays people know the price of everything and the value of

nothing. So transaction like I said disputes were of commercial nature. In recent times disputes arise as to income tax, C forms not given for sales tax VAT Excise customs etc and online sales. So today with e-commerce becoming more and more popular what is the effect. I have an interesting experience of hearing from Dell computers. How Dell computers works is they do not have a shop they do not have a ready product. You order online a custom made computer. Once you fill in your specifications your order goes 1 to the factory that is going to assemble it. The same order goes to the suppliers of all the raw materials. It also goes to the courier agency to go and pick up the raw material and take it to the factory. A day later it gets picked up from the factory and delivered to you. It's a 3 day process. There are cities now and towns making 1 part of each computer. The entire city makes that 1 part. In china in Taiwan in places like that they make 1 part 2 parts 3 parts. When it comes into India it becomes a question mark which parts are from India which are not from India which ones you can enforce your rights against which ones can you not. This is the example of how this works. The classic sale chain the supplier the PC maker distributor the retailer and final customer. With Dell its supplier Dell final customer. Dell is actually not making almost anything. It's like televisions today. The television manufacturer is making virtually nothing. He is just assembling every single piece. So the question which comes up is which point you hold liable. I think as judges you are going to find this more and more fascinating as to whom do you actually hold liable in a situation like this where a complaint is made about a product or a part of a product and where do you take it from. The trading platform does not have any ability to help you. The company behind it may have shut down when you buy a product. I spoke about projects as well involving multiple suppliers of goods and services contractors taxes etc. Many of whom are in India many of whom are outside India. Issues are also coming up more and more on we have got some judgments on shares and debentures. I don't think we have got any judgments on derivatives. You don't have judgments on many other aspects which are being created today in terms of paper which gets traded. The underlying paper will have a variety of

things behind it. So shares in Morgan Stanley supreme court had said that shares are not goods. Since they are not goods there cannot be a sale of goods. They come into existence only on allotment. Debentures again not goods. I will circulate this. I will give it to be sent around. Mobile phone connection is a service not goods. Mobile piece itself is goods but the service itself is not. The lottery tickets has been held. Now the issue arose from a sales tax law versus goods. Is it goods or not goods. Is it an actionable claim. Ultimately it was held to be an actionable claim and not goods. But this is in appeal currently in the supreme court. Sodexo passes coupons are coupons which let you buy a product of equivalent value is goods. Like I said consumer protection act while it talks of goods from sales of goods act different implications may arise because of the way the consumer protection is granted in India. Again I have put a few slides on judgments which have come on essential components of a sale. Not so relevant in the simulation now. You might be more aware of it than I am. Coming to this particular case what was really I think sought to be brought out was is a sale by lot versus sale by unit having the same conditions. If it is a condition it can be avoided. If it is warranty it can't caveat emptor of course is one part of it. But what is the condition that was put by the seller in this case as a condition of sale. He said you can come and inspect. He did not warrant he did not represent this is a fixed quantity. The arguments raised in that case was what does tentative mean. Is it 10 % is it 5 % is it 15%. Can 33% be tentative. But the real question was it a condition of sale or not. And if it was not did it give rise to any solution for the purchaser or did it not. I will just list the sections very quickly again like I said it will be circulated. There are many judgments which state that breach of warranty does not give a right to repudiate. Again some of them were given down. Another issue that is coming up is when does title of goods stand transferred. Again we know sale of goods act it says it is transferred when it is intended to stand transferred. Given the reality of how sales are happening now which I highlighted earlier. When I buy something online I am not even paying the seller. I am not even paying the portal. I am paying an intermediate payment collector. A payment gateway as it is called today.

That payment gateway periodically gives an account to the seller. When the seller meaning the portal comes to know what he has got the portal in turn pays the supplier what he feels like paying the supplier that's the reality whenever he feels like paying it. In this entire sequence of events what rights will the buyer have the questions that are going to come up much more than they have come up so far. It is going to be for the judges to decide. At what point of time did title stand transferred. If it is spoilt in the course of transit will the seller take it back. Delay in Delivery a huge issue in the past. It has been decided by the Bombay High Court and other courts that can I withhold a price claim in damages for a delay in delivery or can I not. Again this is going to be a third party delivery so we don't know how it is going to pan out in terms of argument that will happen and what judgment will come. .. some principles in sale of goods act caveat emptor we have covered. There are exceptions to doctrine of caveat emptor. Misrepresentation concealment case of sale by description sale by sample sale by description and sample fitness for a purpose and merchantable quality. These are just again some slides regarding the rights in the act. So it's a broad summary beyond the initial slides of the provisions of the act. It's just an overview but I would just like to highlight these 2 things. One is the need for speed. Unfortunately in commercial transactions and the corresponding complexity that is going to make it difficult to really speed up some of these decisions. Thank you.

so any query from anyone of you in the presentation that has been made

in a case of sample sale suppose on the net a picture of an item is shown and then we go for purchase of the item and it turns out to be a different one. Will it be a sample sale or a simpliciter sale.

it will depend on the product to a large extent is my view. Because some things you can make out from a sample like a book. The sample is the book. A car obviously you are just seeing the physical version of the car you have no idea what is in the car. What is actually happening in the e-commerce world which I am seeing more and more. Each of

the websites that offer the sale item have set up its own dispute resolution mechanism. So he doesn't actually go to the court. We have got a star system. So as I am a seller on e-bay. E-bay is a site. E-bay has got its own ranking system. I will come back to this point. It's got its own ranking system where a successful transaction system they buyer and seller can actually put a positive rank. If it has not gone well he can put a negative one. So in the example you are giving sample. Is it a sample or not is one question. Like I said to my mind it depends on the product. But let's assume the buyer finds that he is dissatisfied. He will give a negative marking he will return it. E-Bay will make efforts to return the money which is being paid. If you get more than 10 negative points you are not allowed to trade anymore on EBay. So the reason it is happening is that they are mainly cross border. And they also realize if they start going to court their entire website will shut down. Nobody is going to trade on it. So it has become like a self regulation in a way that's working. So I think the point is very valid. Just now we have an interesting situation. Somebody is offering a book signed by a celebrity. 20 queries have come how do I know the celebrities signature is genuine. Though photograph shows the celebrity's signature. But whether it is a forged signature or genuine. The website will ask for a authenticity certificate from the seller saying you certify and we will hold you liable if it is not genuine. So these things are all getting created unto themselves. And I think self regulation is going to happen more and more on the internet by its very nature of it. So I don't know if India law will even apply in many of these transactions.

please tell us about the online sale how far it will be compatible to the current legislation.

I will just read it. where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner. See the difficulty is the website or the

portal is never in possession is never the owner. Is technically not even the agent. They say I am providing a platform you offer your goods. If somebody buys them good for you. He is not an intermediary. He is only providing. It's like the stock exchange. If I buy shares on a stock exchange the stock exchange is technically not liable they say I am providing you a mechanism for buying and selling shares. That's all. The electricity exchange is also coming up. The same problem is going to be there.

the member of the stock exchange who participate in this transaction they are members of the stock exchange

and they have given a deposit to stock exchange so they are held liable.

so stock exchange is a platform only without any concern

it is a platform and it is allowing you to trade.

they are allowing the members to participate in this transactions

look at it differently. You go to a market. The market has no liability the shop has the liability.

that is right. But they are not the market they are the members of the market committee or like this. I mean here the members of the stock exchange are directly connected and concerned.

so they are liable. The stock exchange was then liable for the settlement.

which law will be applicable

to? Most of them are based god knows where. So that is another question mark as to which law will be applicable to the portal. Because the situs of the portal is unknown in most cases.

for that I believe some law will have to be framed at one point of time

it will do. But currently its self regulatory as of now. It will evolve at some stage

the purchasers have no idea about this

about the manufacturer also. He only knows the goods. So he doesn't know actually who is the manufacturer maybe genuine may not be genuine

so how legal action can be initiated if the buyer doesn't know who the seller

that s a good question

the buyer does not know the quality of the goods. He is baffled by the .. and suppose buyer wants to bring an action

he can't even describe the cause title. How would he describe the defendant. Where will the writ of summons be served.

that's correct

but let me tell you sometimes the fake ones are the better ones. It is really a fact I will tell you a case when I was in the Delhi high court as a judge you see a matter came. The matter was filed by the Levi company manufactures that jeans Levi jeans and they wanted an injunction against a person who is also manufacturing the similar type of jeans and they file the case and got eh injunction . they are well known all over the world for their jeans. So notice was issued to the respondent. The respondent came who was manufacturing the fake jeans they are from Punjab jalandhar or some nearby. So he came and showed his goods to the court also. In the process the company people also saw and they said we will try to negotiate with them and find out how we can settle this matter out of court so they sat down they discussed and they came back to the court and said we have settled the matter we are giving all our supply orders to them.

Outsourcing now. So see sometimes they are better. They found it better than what they are manufacturing.

in Delhi .....

correct

not only here Punjab and such other places you get so many fake things but very good. Chinese goods for example they look beautiful but they don't last long. So anything else you want to ask.

only one thing about the online portals that refund policy or return policy is one of their salient points that is what the competition between the online portals is based on return policy. So today the buyer is in good possession he can always switch to the other online portal

that's why it is a self regulatory mechanism currently. There is no legal recourse currently be used is because of the complexities.

That should be

recently you would have read in the news paper about this prohibited drugs which can be sold without a prescription of a doctor for example Viagra and so many other things. There was online sale and there was objection that indirectly it cannot be sold by a chemist is being sold online.

and that also you don't know who is selling. The source is not known only the mediator is known

we had a matter a long time ago we were trying to pull down a website that was deceptively similar to our clients website. We served a notice at the physical address of the registrant. On the internet you can make out who has registered a website. And the

address is there. The address happened to be somebody at Dadar in Bombay. We served a notice but by the time we filed a suit office was shut the people had gone.

what about western countries

issues are same. I think in my view to some extent the level of honesty there is higher. In terms of general trading also the general tendency is to ... the criminal prosecutions they do catch you. Finish pretty quickly and go on to jail pretty quickly.... would come under fraud. Then you have complexities. And this is not only for. You are absolutely right. Medicinal drugs even food items

somebody ... Flipkart.com.. we have to file case against them. How to find out.

their disclaimers are very clear. They say we are offering you a facility. If you want to buy you buy we are not telling you to buy anything. It's a big disclaimer. People are allowed to put up anything for sale. People are allowed to buy them. This is a platform that I am providing and the valuations are becoming so high. Because they are taking a commission on all the sales.

there is no redress

as of now except self regulation I don't know if there is any redress. If you are talking about conventions.

Participant -....

that's why I raised a point

what about tax liability. are they a registered dealer. Kerala government they have issued notices to all the e-retailers thousands of crores of rupees.

when the cases arise out of that then only the government will give out the regulations how to regulate . all these will have to be done at one point of time or the other. It can't

go on like that. ... people are getting it at the residence. Better goods also sometimes and at a discount price so therefore people are going for it.

but what about warranty to goods. I purchased this mobile online. I don't get a bill with the goods . on flipkart I get a packet .

there is a bill

it is on the packet itself.

if it is been imported

...

it doesn't show for all products only when it comes from overseas is my understanding. Because then you have to clear it through customs. So all the courier agencies clear it through customs pay bulk duty get a receipt per item sign a declaration and it comes in.

on the wrapper there is a sticker on the box and you have to take it to the service provider for servicing the mobile you have to take that cover the packet with you and shoe that. They scan it and decide whether it is genuine or not. Within warranty or no.

I will give an example.years ago all these technical plans

if it is defective which consumer forum do I go. Where I reside or

where you reside.

suppose a civil suit were to be filed. A suit in the regular court were to be filed where will it t be filed. I buy a product from Amazon or eBay or flipkart snapdeal

see now you are right. The same problem was there for the police because police had geographical jurisdiction. Now they have set up cybercrime cells of the police which do

not have geographical restrictions. So I can go to a cyber crime cell now anywhere and they have jurisdiction anywhere.

that is inside this country. Not outside. Well the information technology act also provides for outside. I don't know how they will do it. But it must provide for outside India also. The US does it what they call the ... jurisdiction. They are doing it they are pulling down sites from overseas, which have gambling etc.

There is one more thought I want to share about this online marketing . take an example of eBay where you can order productions from anywhere in the world. The self regulatory mechanism works depending on the reputation of the degree of honesty in that country. Suppose I were to order a product and it would be sent simultaneously from Japan Hong Kong or Romania or Bulgaria I will not go for any product which is from Romania or Bulgaria. So this is how the degree of honesty is perceived from the country is one of the deciding factors in an online forum worldwide. So I would much safely buy something from Japan than Romania. US has some self regulatory mechanism that works.

I don't know interesting if any of you have had the experience. I had the experience I bought something at international airport in Bangkok. The credit card company immediately cancelled my card. When I came back I got a message saying your card had been cancelled. It was used in a high risk jurisdiction so we will give you new one.

... number .. they do it as routine.

that right. So I think that is the same point. Certain countries are considered to be less safe.

in fact when I tried using once at some place I received a call from the bank saying are you using it.

now in the materials that have been supplied to you. There is a article by justice S muralidhar. This relates to a question that you just asked. You were asking about the jurisdiction of the courts to deal with intellectual property rights disputes arising out of commercial transactions on the internet. That is page 68. He has dealt with the matter very exhaustively because probably he has occasion to deal with that in the Delhi high Court. He was sitting on the original side for a very long time. And it is a very exhaustive treatment of the entire and then not only Indian aspect but also international from the international angle also. So kindly go through that and you will get some light from that also. I thought I must bring it to your notice since it is there. It's very thought provoking. Now we have a little bit of time. Can I pose a problem to you and I want your solution. See there is a manufacturer of lift. They are also in the business of manufacturing lift supply of the lift and installation of the lift and they do it as the regular course of business. In their regular course of business. Now whether there was manufacturing. So they are selling the lift also to the purchaser but they are also they are supplying it to them and also installing that . now whether it will be a sale contract or a works contract.

kone elevators Supreme court says it's a works contract.

yes is it so. You all agree. Yes it is so. Because he is right. I thought if you have not gone through it . even otherwise you might be knowing because you must be getting cases like that. There is one case in your ..

that's right page number 34.

That's right. Kone Elevator Pvt Ltd versus state of Tamil nadu it is reported in 2014 7 SCC. So kindly you can look into that judgment , this is 2014 SCC page 88. That's the case. So this is I think very important because why the supreme court has rendered that decision is what was the primary intention primary intention is that of installation of the lift and therefore that should get primacy. That is the reason why Supreme Court

held that it is works contract. So I believe time is over. Would you like to go for tea so we close it. Thank you very very much for your participation. Very active participation and we are coming back with the Carriers Act problems.

## SESSION 10

Welcome back now we have second session partnership act and this would be taken by Hon'ble justice Sanjay Kishan Kaul chief justice Madras High Court Mr. Neeraj Malhotra who is practitioner before Supreme Court Delhi High Court I would just give now the session 2 honorable justice Sanjay Kishan Kaul good morning still yes good morning to all of you I always wonder what one can say to High Court Judges . But I feel the issues to involve rather than one way traffic this is what both of us discussed. We can pick up some portion of the Partnership Act I looked into the perspective keeping in mind that often the view which comes on different subjects is different from different quotes. of course all of you I understand have been given material in the form of five recent cases there is an issue of in some ways one of the issue is more linked arbitration I find the judgment because two of them are on this issue which means position arising from institutions related to partnerships . that is one aspect that we could touch and see what is evolved on that basis difference between the partnership approach in the 1940 act + 96 act when there are couple of issues which Neeraj was mentioning to me he would like to take up so we would begin by I think Neeraj giving is used on some of the areas and then we'll put it to the house and I will try we will try to build up an interactive session as to what are the issues in the Partnership Act which may travel to some of the will really a minute from what do people feel are the areas I hope I am permitted to sit and stay or should I go and speak from there thank you so much Hon'ble justice Sanjay Kishan Kaul chief justice Madras High Court honorable judges of the High Court Dr Geeta Oberoi and Ms shruti. first of all let me say it is a privilege to be here amongst the esteemed gathering today and I will be delivering a talk on the Indian Partnership Act 1932 . this act if I made the startup and its history in 2 minutes this act basically emanates from the Indian Contract Act initially the dispute between the partners governed by certain provisions under the Indian Contract Act which provision subsequently however repealed because of the advent of trade in India and because of the non

practicality India application of those provisions . thereafter the Indian Partnership Act 1932 came into force and it also has a Genesis from the English Partnership Act so basically there is a linkage of the Indian Contract Act to some extent with the Indian Partnership Act the study material which has been given to the Honorable judges I would like to refer to that because we have picked up a topic from that which the topic which I believe is very interesting the topic we are going to pick up is section 69 of Indian Partnership Act which pertains to the effect of non registration of partnership firm there are various topics under the partnership act which are very interesting but you to the limited time which we have in our hands section 69 3 I thought was very interesting topic and and Justice call also definitely said that yes this needs to be picked up and discussed I was straight away come to the second judgment in the case history I'm sure all the Honorable judge would have read this judgment firm Ashok vs.Gurmukh Das Saluja. before I come to this judgment and state what is written I I would just like to state that section 69 basically contemplates to separate situations 1 what is sub section 1 the other is subsection 2 subsection 1 pertains to dispute between the partners because today the topic for discussion which we have specific disputes under Partnership Act . 69 1 pertains to dispute between the partners. 69 2 pertains to the dispute between the firm and the third party. Sub-clause 3 is contemplate certain exceptions section 69 2 in effect. the supreme court in the case of firm Ashok traders it is the second judgment in the case material supply to the honourable judges is essentially on Section 9 of the arbitration and conciliation act 1996 in juxtaposition with 69 . apex court judgment has Given a finding that even if a partnership firm is not registered the non registration of firm would not come within the Ambit of section 69 and the basic reasoning given for the attachment it is this kind of a order is an interlocutory order immature it is not a final order which determine the rights of the parties because the final determination is there before the arbitral Tribunal . therefore section 9 in effect would like even if the firm is an unregistered firm in this judgment references also made 2 section 20 of the old act

for reference of disputes to arbitration yeah the Court held the same judgment the bar of 69 would come in the way of filing the petition under section 20 because it is other proceedings as has been defined under section 69 3 what are the proceedings I have had to be other proceedings under section 20 . Therefore the bar would apply. again the issue that arises for determination is what would be the Fission in relation to the section 11 petition to be filed by an unregistered partnership firm under the new act section 11 of the arbitration and conciliation act 1996 incase and unregistered partnership is to file a petition do we go by the the earlier provisions of the 1940 act which is the section 20 petition how do we go by the provisions of section 9 . after 1996 arbitration act to my mind as on date there is no clarity on a section 11 petition case law by the supreme court we have a case pertaining to Section 20 under the old act . so what would be the position of an unregistered partnership if it wants to initiate a petition under section 11 arbitration and conciliation act I would invite all the honourable judges kindly Express their views on this taking into consideration the fact 2 facts weather one is the scheme of the 1996 act as compared to the scheme of the 1940 act and also taking into consideration the fact that apex court held that the order passed under section 11 is now judicial order Italy vs. rupee an administrator water keeping in view these two facts . Whether an unregistered partnership firm can maintain petition under section 11 and whether the analogy of section 20 of the 1940 act would apply or whether section 9 of the arbitration and conciliation act 1996 would have some bearing in this. I would request you to please come out with their views we are at this moment not going into the law at all because as per my knowledge there is no judgment laid down by the supreme court to this effect therefore Directorate of the supreme court to this effect so I would request yes please sir. Section 69 vis-a-vis the Companies Act had come for consideration before the Calcutta High Court . the form filing of winding up petition winding up petition filed by an unregistered firm was held to be maintainable because the petitioner what exercises a statutory right the reasoning was that an unregistered firm has a statutory

right and therefore can present a petition for winding up . Whether it is admitted or not is a different issue on merit . The right to present petition was upheld under section 69 . going by that logic if one controls section 11 to be a right conferred on somebody not agree to the arbitration the the judicial order is supplementing or enforcing the arbitration agreement . then one can say the section 69 the bar of non registered asking arbitration will not apply but I have a different scenario unregistered partnership firm can file a suit . Ben I am extremely sorry to say this conceptual level conceptually firm Ashok traders I am at a loss to stand you can't have a main petition or proceeding which is maintainable form filing a suit will that firm be entering into arbitration and asking for ordinate of a proceeding which is not maintainable . may I say these two key factors passes my mind . Why the requirement of section 69 . the basis is that unlike an individual you should individual or sole proprietorship company is a legal entity so it is capable off ... the element of registration I'm sorry I interrupted you I'm just saying the fact about registration there is no bar in an unregistered partnership carrying on business . absolutely not that there is a prohibition that comes in case of suing. so its suffers a legal embargo to sue so I look at it this way why should there be embargo to see you if there is no embargo to carry on business . the idea as I understand it is that being a legal entity unlisted firm is an entity which doesn't have a structure it is not like a company . In suing or being sued you must know as to who is suing you and that is why the philosophy behind it of the requirement of section 69 that whether it is at the time of big sued or if you succeed whom do you recover against. to prevent those complications the Partnership Act in section 69 methodology of knowing if the person is competent to do so if you keep that in mind linked with example you're giving SSC now under the 1940 act under 1940 act section 20 was not maintainable it was held to be a suit proceedings . similarity section it was held not maintainable post award when you filed in post award the ...held not to be applicable enforceable I am just thinking aloud what is the reason it is not the same reason you would apply as in that

post arbitration proceeding is applicable so pending arbitration proceeding section 9 has to be held to be capable of being saved section 11 there is no direct view of it from the supreme court . ... which one it doesn't say section 11 please read . .... terminated subsequently the application that was rejected by Bombay High Court then they say one line but I do not know I do not have to study material the issue arose this is 11 application is dismissed ..... therefore it was challenged under article 226 ..... they need not however ... reason referring to HT Patel 2005 8SCC..... so they have kept open that's what I'm saying ultimately another confusion therefore the apprehension ..... so you approached the court . as I understand this application and conciliation act basically is an alternative redressal forum procedure has been simplified Emphasis is on the parties to the agreement you read section 9 section 11 now if we see section 69 2 or 3 it talks about enforcement of any right arising out of a contract so what my understanding it meant was resolution of dispute on substantive basis substantive dispute . as against that when you come to the court appointment of an arbitrator was seeking the courts intervention for initiation of process of resolution of dispute Court itself to restriction decided therefore even if you are not registered for a party to an agreement you are asking the court to make an appointment of an arbitrator it is not required and I to my understanding this Ashok traders judgment is very much in consonants with the law and the purpose for which 96 Act was enacted . I was one of the councils in that case . this point of view in the context that even the 1940 act provided for R mechanism ultimately we looking to a full form for adjudication choosing them to do so section 20 proceedings were held as being capable of being instituted unless the partnership firm is registered Section 8 will also be held the 1940 act I have a view which is contrary to my brother over here on Section 11 Supreme Court requires section 11 court now to issue The Suite Live on or not under section 11 now if there is legal embargo on the petition . filing of main proceeding where is the live issue for the 11 Court to exercise jurisdiction . his point of view if I understand correctly the 11 court is not required to decide the issue as to

whether or not the firm is registered . therefore suffers the legal embargo to be referred to arbitration because there is an arbitration agreement go to arbitration the arbitrators to decide . imitation also section 11 the view is normally we will not get into it but something is barred by law by time just this. it will be barred. you can still throw out section 11 . live issues something which the 11 Court is require to look and section 69 doesn't say you cannot be sued unregistered form can be sued if the embargo that you cannot be the claimant the plaintiff . correct yes . therefore I can't find a suit even by pleading there is some fraud India operation agreement partnership firm can get into it but this is something which is . ok section 20 I've been different Courts I have been in Delhi I know in Delhi it is registered as a suit . Calcutta also .... with the suit and with an arbitration can distinguish it is a suit but with an arbitration it is a special suit for the Calcutta High Court . special suit it is treated as suit can we say that the way it has permeated section 20 it is treated as a suit that can be one thing the other thing is that arbitration and conciliation act 1996 26 it has to be construed . ... 1940 act .... there we have a provision ..... section 7 of the arbitration and conciliation act also have a look at section 7 and another issue would be is a I'm sorry

in terms of the arbitration act arbitration agreement means \_\_\_\_\_. now the Partnership Act says all of us are aware that 1 minute . section 5 \_\_\_\_\_ now they are the provisions of the act with say the relation between the two partners the duties and rights are also there can we say or not that this define legal relationship among the partners whether contractual or not one of them any one or more open filer 11 it is not register section 69 whether it makes a difference I am not aware of the provisions of the 1940 act . .... we should ponder over it what about the fact that pink judicial and character being administrative in character it went on for quite some time and ultimately the proceeding .....according to you would have an impact on this issue . it depends on the extent and nature of the order appointing the arbitrator whether the court addressed rightly the issue and existence of the arbitration

agreement . no I'm saying whether to come to conclusion when instituting a petition it is to be registered firm or not . my question was would the fact that it is ultimately health to be in the nature of judicial proceedings I am not administrator in character would it have an impact what's something else that . proceedings means The embargo which is there the plaintiff ..... it is a judicial proceeding but now it is no longer at that point of time . can't say never knows what is judicial proceedings Patel Engineering civil judges bench the earlier judgment of Supreme Court in ..... has been overruled and it has been taken that the proceedings which is just not administrative position at the same time the same judgment it is being held preceding chief justice not a procedure before the court . now that judgment has been father interpreted by Bombay High Court where I belong and held that the proceedings under 11 are not before court. provisions of limitation act will not be applicable to application under 11 CPC may not apply provisions of contempt may not apply as regards the issue which is being discussed we have taken a view just 2 months back that an unregistered firm section 11 is maintainable even in unregistered form for the simple reason that they should section 11 not before the court and secondly any other proceeding direction section 20 of 1940 act when proceedings A file in the nature of suit where the Supreme Court has taken a view that it comes in the category of 69 any other proceeding the Bombay High Court has taken a view that 11 before Court applying the principles of Patel Engineering before it was before chief justice it is not a court therefore 69 3 does not apply there is no party it is maintainable that is the view that we have taken just 2 months back see I was ..... Technology still not .... to be circulated .....otherwise I would have the benefit of this while I was trying to discuss this because recently I have had an opportunity to look into it also I was trying to see to get the collective opinion on my way opinion I felt also that the more important aspect is as compared to Section 51 of the CPC let's look at the definition of 21 e arbitration act . Court and then read with it where is the proceedings 2 be instituted it is no doubt judicial proceedings character but they have to be instituted

only before the chief justice it is not any other judge who can deal with it Chief Justice of the High Court or the chief justice of the supreme court is authorized to delegate that is the specific provision for delegation is not that it lies in lowest monetary value jurisdiction no District Court has power no civil judge has power High Court judge has power so what is the significance conferring it specially the reason being possibly it was thought that it should be at the level of the highest judiciary either at the state level or at the national level to deal with it so high court has also taken the view that is definition the judgment rendered under section 11 is not a Precedent ..... it is not a Precedent now once it is incapable of being a precedent and the power not being exercised by a Court but by the Chief Justice keeping in mind that this is really the UNCITRAL model which we have adopted with certain changes I last week view that there is no requirement of registration of the firm to institute proceeding. I would have had the benefit of Bombay High Court I would have possibly been further ... this is only my opinion because I think there should be larger debate and ultimately the highest court will have to rule my opinion maybe right or wrong but it is still an opinion but to my mind the crucial issue which place is this is that it is not at any Court according to its monetary jurisdiction can deal with the matter . it is only in a sense one may say that a person..... it is with the chief justice deal with this issue and keeping that in mind not the aspect as to what we can do under section 11 there is little play given normally nothing else to be done we have to see if there is a contract between the parties is there a dispute which is the dispute and you can take jurisdiction other than that there is nothing..... so I felt a real keeping the subject in mind it should not be prohibited even if it's an unregistered firm of course there were lot of other issues which arose we had a very good senior technical lawyer who put every possible technical objection to Institute the petition how to deal with each technical objection . I had asked for your consideration they will make copies and circulate the issue of right of a path to Institute proceedings just because of it not been registered form can there be deemed registration how do you define cause title in a

suit . in the petition can the cause title be the name of .... address many issues that is why I was trying to generate debate on the issue also I had a discussion in the morning I think we should also keep in mind the broad object promoting the alternate dispute resolution system and not be defeated by technicalities that is what we have taken the whole issue when you are adopting the UNCITRAL model at least the philosophy is there even if you have made some changes of the model document . you have of course had the benefit I did not fully read the new bill which is now drawn recommended by the law commission now I'm told before the cabinet approval and is likely to be placed the next session I had an opportunity to browse through it the suggestion that the court found that we could give in that sense what it is the whole concept is to get the focus shifted to arbitration forum in the matter . I personally also believe section 9 proceedings that can be at any stage of the proceedings the court really has to perform interim function this is my thinking ultimately the interlocutory relief must go before the arbitrator because the whole case opens in front of him . but sometimes before the arbitration proceeding begin let me be a problem or after conclusion that can be some issue but generally we should protect only some kind of interim interim engagement ... leave it to the arbitrator to decide the final arrangements it is in those situations that section 9 goes the idea is to for commercial transaction we have chosen a judge you once you choose the judge it will play without the circumscribed by the technicalities issues of the same . the hard fact is in our country arbitration still continue to be but unlike CPC starting from pleadings mother feeding nature of evidence LED issues framed that mindset ..... another factor that can be looked into for maintaining petition by an unregistered firm under section 11 would be which has been mentioned also in firm Ashok Kumar is that you can't leave a person or a party remedy less

you are seeing the situation where is suit is barred now what is the remedy left to end and unregistered partnership firm if you want a section 11 petition is not maintainable is there a third remedy under law where can I get its rights going by the legal

jurisprudence and can't be a situation where a person is left remedy Less . unless of course this exceptions weather limitation act steps in where the or similar eventualities find that could also perhaps be 1factor to determine a person could be left remedy less if you snort if sperm is not allowed to initiate even section 11 proceeding . and more so when the requirements Limited to a party to the arbitration . that is the point very correct sir that is the catching word . in such a scenario what is go to arbitration then when the section 69 for a partnership firm as the claimant Never kicks in at all yes it would not I think there is a different view. gauhati High Court after it was declared as a judicial proceeding that weight with the learned chief justice in holding that section 11 also 69 would be a bar . you a lot 69 you allow 11 for a unregistered firm as a petitioner when it goes to arbitration is the respondent entitled to raise the point because 11 is not a Precedent section 69 the bar gets decided where so therefore I am saying they can be two possibilities one is that by the nature of proceeding in arbitration this is not a matter to be considered at all find that is one aspect second is if section 11 does not permit under Section 21 the reference is made when the arbitrator cannot get into the issue of section 69 that is because if it has to be raised it has to be reset that day itself plus references made . you can't raise a subsequent proceedings state decides One Way Or The Other it is decided in favour of the claimant now raising that section 11 it will not apply the point you're raising is if it doesn't apply attraction 11 stage can it be raised at section 69 stage and the arbitration stage keeping in mind the object and view arbitration informality of the procedure applied . should 69 apply at all . it doesn't what is crucial is it the agreement between the parties between for Section 11 and if the party is weather are not a registered firm or unregistered firm if there is an agreement between them regarding reference arbitration touching upon the letters in dispute then the reference has to be made. section 7 would come to play and section of the arbitration act under section 69 would have no bearing at all . I would tend to agree with you because I feel the ultimately it is not barred by law as we begin by saying section 7 will come into

play arbitration act and section I would have no bearing at all . an unregistered firm is capable of doing this tell you don't let up In litigation you are fine you can continue to do business so now the litigation process of a formalize legal situation wanted to deal with the situation feel that no if you want to Institute legal proceedings you are too for the comply with this formality so that you know who's who is suing. ultimate object is that you know who's suing and provision is not there . I would say the uncitral model and the whole concept would be important I would weigh in Indian opinion that's 69 subject to whatever 69 should not be created as an impediment in decision otherwise it will be like a penal objection . it is a matter of fact so then it will go to arbitration they will be doubly unsure so is that the object which is in mind ... I succeeded in getting an adjournment. under 69 before the arbitrator the agreement was led by a senior who dumped me at the last moment .....but the issue again again will be is proceeding which are on before the arbitrator Tribune are not other proceedings to claim right under the contract if proceedings before the arbitration arbitrator is pending can it not come under 3 that it is other proceedings to Infosys site under contract can it be said that these proceedings where a person is claiming x or y amount or some kind of another decree from the other party can it be can it not be another proceedings to enforce right under a contract . I feel it should be . there are two different situations when is that at 11 stage ..... I'm so sorry we are talking about the second stage I'm coming to that the difference but I want to make is 11 stage the fish cannot be raised because it is not a proceeding before the court it doesn't come under section 69 3 take a situation where arbitrator appointed without intervention of the court and parties go to arbitration so in that situation 69 3 issue can be raised under section 69 before the arbitrator that this form is not registered you can proceed in the matter find so we'll see a situation where arbitrators appointed with the intervention of the court there also I personally feel ultimately it has to be a court proceeding at 11 stage you are not you are procured from this issue and ones arbitrator is appointed then at that stage this issue can be raised under section 16

this is not a situation where the three categories of matters ... Bukharas case Supreme Court it came to be decided by both chief justice as well as arbitrator chief justice and decided that the issue was not to be used reopen before the arbitrator this is not a situation of that type this is this can be raised before the chief justice therefore 1 Avenue should be available for arbitration under 16 this issue . any other views? what happened before the arbitrator where there is a 69 case in 69 doesn't reply to Section 11 proceedings the natural corollary will be. this has no relevance to the arbitration proceeding in the case why because SBI just discussed it's an alternative dispute redressal forum under a different concept now is it applies there is a Dichotomy. You say section 11 will not apply but it will apply to arbitrators without intervention of the quotes it will apply so such situation if appointment of arbitrator it will not apply but for starting arbitration it will apply what would be the purpose of a point in arbitrator . sir can we have another situation arbitrator is appointed without intervention of the court without intervention at all the parties have named the arbitrator. therefore there the word comes into significance party to arbitration agreement this act applies only to ..... if a firm is not allowed to initiate even a section 11 proceedings and more so when the requirements is Limited that party to the arbitration agreement .....there are provisions of section 12 13 14 15 arbitration and conciliation act where the operators can be this question whether he is competent to hear it that can be raised but whether he can pass in order ..... only the competence of the arbitrator you can decide or not the question of whether the agreement is the main is the agreement whether registered or unregistered firm that is another question . agreement will survive yes I agree man will survive and that is even a registered document so we're talking in terms of treating the arbitration clause separately from the other situations so therefore it is actually a choice of forum. I don't want to go for the court process choose a different forum for it to be decided now but the fact that you have a choice of forum defeat the right to raise an objection under the Partnership Act I'm thinking for the reverse side also if you allow me to put it

this way because I chose a forum an alternative forum do I opt out the rigors of section 69

Do I get to opt out of it because I made the choice of alternative forum to parties also look at the consequences section 11 does not raise it is referred to arbitration then what is the fun of the arbitration if it is knowing that it is and unregistered firm . it will be knocked out at the threshold should this be examined from that point of view examiner time barred claim . my concern is why I was doing that my concern is if this is an issue which is capable of knocking out the claim then it would also be capable of being examined under section 11 for the reason only that why did we why did the supreme court permit still claim to be rejected so that no time is spent unnecessarily now if 69 stop lying and you know the result of 69 if it is to be raised in section 11 if it is not raised then then it doesn't matter . what is partition assistant and it is permitted to be released at the arbitral proceedings then the only thing is that this issue is under section 11 it will go there and you know the fate of it .... it is not a complicated issue ..... so how will you react to this situation that it is capable of being victim to the arbitration proceedings should or should not be hit by section 11 proceedings . not exactly the answer to the question posed by you what is the arbitration act not not only a special act but complete set of disputes solving and that the special I can do 69 does not open with notwithstanding any of the content in any other act that would 69 would not apply to completely different methodology letter for dispute resolution that is what I . your point is since way to beating it gets support from the fact ultimately what is initial 69t it is maintainable without being registered ..... if that can be done then how can you give away interlocutory relief and some matter yeah the principal relief itself cannot be at all it is banned . so that is a valid point . and for those once you have entered an arbitration agreement then the question of raising issue regarding 69 on maintainability of claims is totally insignificant yes of course my brother given the issue which was settled issue that in situations where where is Challenge 2 ... at the stage of the award other state of

enforcement of the award it is not maintainable because they say no .. my only concern is will it not been in congress situation section 9 is maintainable section 11 is maintainable and all this is a fruitless exercise if you are able to raise this issue before the arbitrator these problems arising because of the judgment of Patel Engineering with great respect on one hand they have taken the view that on one hand the proceedings are not administrative proceedings. on the other hand it is held at it is not proceeding before the court it is creating a lot of complication it is not before a court and therefore it is not proceeding and actually .... there is a particular view which has permeated with that aspect so other than saying it is judicial in nature proceedings in all other matters practically review has been if I may say so with respect it is administrative and character ultimately it comes to that because if it is not a Precedent then the problem we're all facing Times it has no it is not a quote benefiting to ourselves why is education what is sacrosanct about it that it is judicial rather than administrative in character. you have another round to fight before Supreme Court . but fir, Ashok Kumar has said that in our opinion the term as prima facie so far as bar in section 69 is concerned . firm Ashok Kumar I am reading from that as primafacie . so to my mind it is still open for debate I think the new bill addresses one concern . which a little digression which is the fundamental problem is arising from who is the arbitrator in the sense that the government companies are wanting the persons to be arbitrator and yet they will challenge challenge every award arbitrator . that the new bill addresses irrespective of private element of interest would be so in fact interestingly one of the matters which came before me the private company the arbitrator nominated was actually the director of the company the arbitrator so nominated who is the director or 33 % shareholder so the argument made was if this application close fails it will fail as a whole. so there is no arbitration they only agreed to arbitration as the director of my company if that has to go to the arbitration clause also goes must fail I rejected the contention on the facts of the case construing the arbitration clause. that it is not in the strict sense it is not as if

the arbitration itself will go because the phraseology used is either this or the Civil Court these are all issues arising and I hope the new bill takes care of . the power of the courts daily exercise in terms of ensuring that there is an independent arbitrator I think that should take care and the next concern of course the system informally is actually the faith and the arbitrator I think that is a fundamental it works in a lot of countries .... time bound schedules a lot of institutional arbitration new act says 12 months . justice Shah was chairman of the law commission setup in Delhi arbitration centre there are rules to take care of the system the rules are based on the Singapore model the Singapore Council of arbitration I had the opportunity to do so and replicate that model in both Punjab and Haryana and in Madras now where we have created institutional arbitration centre in the same lines same pattern same rules . so the case not only goes before the arbitrator till such time the pleadings are complete and everything is done it is monitored since the arbitrator is not able to control the proceedings we should not be referring more arbitration these are only Institutions check and mechanisms if you are non institutional arbitration the only problem with respect to high dignitaries and volt I'm sure all of you have come across situations Awards of come after 2 years two and a half years 3 years ... on the lighter side I made a mistake what award would come after two and a half years . this it was an accident mistake it needs to go for a correction it took two and a half years to get the award we don't know when the correction will arise. both said that this is not what we argued we argued this two and a half years seems to have eliminated b the focus of the arguments that is a matter of concern with the partnership ..... That seems to be I don't know how The Other aspect as you said time bound schedule is there these days the disqualification have increased ... can it be something that takes care of the number of adjournments . if it is beyond this then the burden of Costco someone all these issues have been and ever to be taken care of ultimately how you run the law which is important so we hope we have a talk sometime 5 minutes should we touch up on that . .... just one of the smaller aspect since we have time the second

aspect is we hope anyway the judgment that we have hope you have a direct clear judgment from the apex court specially on on the issued whether 69 3 can be read or taken up before the arbitrator or not .... we hope your lordship still in some case render attachment to this effect and we will have the benefit of the judgment arbitrator to the decide the matter . yes leave it to the arbitrator to decide the matter we have another what we have another 4 minutes another aspect which was just touched upon by your honour is again going back to the provisions of section 69 where the power of an unregistered firm applies. whether this part would also be applicable to enforce a common law action and statutory right let me take an example just the clarity hypothetical case where there are unregistered partnership firms wants to sue a third party I'll come to the definition of a third party for passing of action . I am an unregistered partnership firm I'm using The trademark let's say Durant company which is very old famous manufacturers of compressors and air conditioners Durant and Company the partnership is using the word Durant and Company which is a trademark unregistered trademark third party tries to use that a word or something akin to that Durant and company is a unregistered partnership firm can it file a suit against a third party letting a passing of action as a common law right that is one aspect the second aspect would be in case The trademark Durant and Company is registered with the registrar of trademarks can this unregistered partnership firm also maintain a statutory right given to it for an infringement action. going by the provisions of 69 2 invite discussions on that . the answer to both queries is in the affirmative find ..... 69 2 the case of haldirams a very interesting paragraph there I would just like to bring it forth is how to interpret section 69 2 where in they say why this action would be maintainable both under the common law as well as under the statutory law as a statutory right because 69 2 doesn't define third party as only a partner or a person with whom a company is dealing or having transactions so it is not Limited or restricted only a person or a party with whom you are having a business transaction it can even go further property with which the

partnership firm is having no registration at all sorry with which the party is having no business dealings at all therefore in view of the fact falling from what the Lord ship just said it is a statutory right there 4 statutory rights or common law rights action in tort can definitely be maintainable under section 69 2 even in case of an unregistered partnership firm going into the looking into the consideration taking into consideration the fact that there is some ambiguity 69 to which is stated to be so by the honorable apex court . I would only at that this is possibly another reading between the lines but why 69 2 if it doesn't apply in such a situation innocent proceeding exclusion of 69 2 bar in arbitration even if the other provisions of partnership act apply is a plausible view taken . if it arises out of a contract it arises out of right outside the ... therefore it ... common law right it is not to be under section 69 2 strengthen the said judgment on 11. yes I think we are through. I don't know about you but I feel more enlightened having discussed this with you and having face this dilemma in the recent past it took me more than a month to do my own research and sometimes one doesn't find the full assistance you'll end up doing your own research I'm trying to find out what is to be done thank you very much .

## SESSION 11

You all have been given this problem for Session 11

Raj Roadways versus Prism Motors. I believe you have all gone through. Do you want me to give some idea about the background facts. So a consignment was sent. It was received at the destination station also but during that time there was an assassination of the prime minister and so that was burnt down. And so the plea taken was the law of frustration 56. So how far that is applicable. That was the crux of the matter. Now if you kindly. You have the papers I believe. If you kindly go to that you will find the pleadings of the Raj Roadways what was their contention. The loss of goods was caused by an act that was beyond the control of raj Roadways. Under Section 56 of the Indian Contract Act 1872, the contract has already frustrated and no decree can be passed against Raj Roadways. The plea taken was that because of the burning of the godown it has become impossible to be performed. Then Prism Motors the contention was that the court has rightly held that Raj Roadways was liable for payment on account of failure to deliver goods. In the facts of this case section 56 of the Indian contract act has no application. The case is covered under the carriers act. And the provision is section 9 apparently. If you go to section 9 which is also extracted there -In any suit brought against a common carrier for the loss, damage or non-delivery of goods including container, pallets or similar article of transport used to consolidate goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. Now in the context of that what will be the answer. would you like to give. Anybody

Yes. I will set aside the decree and dismiss the suit. 56

According to you 56 will apply

Carriers Act will not apply because Carriers Act derives . the parent contract is gone incapable of being performed for no fault of the carrier. Then

in all cases of burning down of frustration will apply

Frustration will apply. If there is a case of contract the contract not surviving the carrier is not bound to

Carriers Act also provides under what circumstances the contract could be avoided. Section 12 probably. 12 or 27. So what will be the effect of that.

in the normal course wherever there is breach of contract suit for damages would lie and if the loss are proved then the party has to compensate. Now there the doctrine of frustration will come into play because the transporter has not visualized the act of the vehicle being burnt down. The doctrine of frustration will apply and since the act had become impossible of performance section 9 of the carrier act will not come into play. Section 9 only provides that the person is not to prove the exact loss and it would be sufficient if there is a breach he will be entitled to the costs.

well see under the Carriers Act there is no willingness on the part of the claimant to prove that there us negligence on the part of the Carrier.

that is not to be proved.

as it is to be proved under the Consumer protection act alright. So therefore

Pin short the submission wherever there is section

kindly see section 27 probably

Condition limiting

Act of god. Now whether it will come under the act of god or natural event

no. But it will be covered by section 56 and wherever the contract stands frustrated section 9 of the carriers act will not apply.

only the presumption under section 9 of the Carriers Act. The negligence of the carrier ... Economic Transport Organization

you agree with them both of them

Pyes.

now any other opinion contrary. Contrary opinion. None . now this is actually a case which is decided by the Jharkhand High Court. I'm sorry Chhattisgarh High Court. And the judge has held that section 9 will apply and therefore he will be liable. That is the decision of the Chhattisgarh High Court and there is a decision of the supreme court also on similar line. Because he has decided on the basis of Patel Roadways versus Birla Yamaha. That is 2004 SCC 91. Which says carriers act will prevail. So the carriers act will prevail and therefore under section 9 he does not have to prove the negligence from the carrier and so therefore he will be entitled to. Because you see this sort of plea will be taken every time somebody. Fire in the godown every time they can take a plea that and taking out everything from there and burning down the godown. This can happen. So that is the law actually . now I have found another decision of the supreme court full bench decision sorry constitutional bench decision 5 judges. Kindly see page 233. Here it is specifically said that section 9 will apply

but here last sentence it says carrier may avoid liability by establishing that loss .. by act of god ...

that is exactly I said. He has to prove that. And what is act of god. Beyond his control is also explained. Kindly come to carrier act section.

Pbut if it is proved that there was a fire a genuine fire

then also it will not. You can't avoid the

Pnow suppose there is a person who has enmity with the carrier and on the way he sets fire to the truck what will happen.

PThat is beyond the carriers. I might pick a quarrel with the carrier and burn it off.

Pthen what will happen

Pcarrier gets him to foot the bill. Insurance may be kept aside that is a separate issue.

Psince we are talking about fires and fraud ultimately there are incidents which are perceived as a natural incident. And loss is caused. There will be various situations in which the loss can be caused.

P .....

Pnone of it can be called an act of god. It's not like lightening is coming down and striking the truck. It can be an act of god if lightning strikes down

[Participants talking among themselves.]

this judgment which was rendered by the Chhattisgarh high court now they have referred to that Supreme court order judgment in that Patel Roadways. Now it says I am reading out paragraph 9. A common carrier is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises solely form act of God or the State enemies or from the fault of the consignor, or inherent vice in the goods themselves. These are the exceptions. He is therefore liable even when he is

overwhelmed and robbed by an irresistible number of persons. He is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the Queen's enemies and, if there has been an unjustifiable deviation or negligence, or other fundamental breach of contract on his part, he will be liable for loss or injury due to the State enemies, or, it would seem, due to act of God. Therefore in view of the above legal position section 56 of the Indian contract act has no application. This is what he has held. Now so far act of god is concerned this is natural intervention. If there is a flood so that sort of situation. But if there is a human presence working act of god that principle will not apply. That is the settled law. So then that supreme court decision that I said that is also in your material. If you go through that decision the position will be clear. And they have also said. This is another aspect which the constitution bench has held that in case you see there is a conflict between them . in the consumer protection act the negligence has to be proved but here it is the reverse. So it says if it is carrier involved. Carriers case then in that event this will prevail. The particular act will prevail because that is what is applicable. This is sum and substance of the law that is settled. But anyway after decision is rendered one can have a different opinion that is always there and maybe if I was sitting at that point of time in that court really I don't know what I would have held. So therefore this is the position. Beg your pardon. From Chhattisgarh yes. I have no idea who is the author also. Can be rectified anytime unless it is settled by the supreme court or your own high court. And that is not finality.

That is an opinion . all these are opinions

now see that is what I was referring to. That decision of the constitutional bench has overruled an earlier decision of the supreme court itself. That is why it had gone to the supreme court itself. Yes 2000 volume 2.

But this constitution bench decision has ... section 14 of the consumer protection act without referring to section 56.

no it refers to section 9 also. and there it is held that if section 9 is involved then it was get primacy. And that will override section 14 because there is a conflict apparently so therefore that is the position. You would like to .

I will share a couple of practical examples which we faced. The bulk of transport are done by truckers called various things in various states. And the large courier companies. The DHLs the fedexs and the blue darts of this world. I think the issues that they typically have is the declaration by the consignor of the content of the parcel and the value of the parcel because they take a back ended insurance for all the transport that they are carrying on and we had 2-3 situations of different kinds which actually had been difficult to value so debit cards and credit cards of banks in itself it has no value but if it is misused the value could be up to the limit of each of those debit or credit card that it gives. Lost or misappropriated. So while the courier company takes insurance the bank also takes insurance. And obviously what they ask is incase in case it gets lost or something goes wrong tell us we will block the card. It's a fairly simple solution we have had situations where jewellery is misdeclared. Fake diamonds put in a parcel re declared as real diamonds actually misappropriated along the way. And then a claim is made. And given the fact that the carrier is to act as an insurer under the act they can take reinsurance . you are supposed to act as an insurer. That a problem. We also had a strange case where examination papers of a university which were being transported to various centers were found to be sold on the streets to students. and because of whatsapp and smses it went around in no time like wild fire. So police picked up 3 fellows from the office of the courier company and put them in jail and then tried to figure out if the exam paper was the same actually being transported etc. It was the same. The only thing they found in the investigation was that one of the gunny bags the stitching had come off and all that transportation movement was to be in a truck or aero plane and the center where it actually moved from the aero plane to the truck vice versa there were supposed to be cameras. In one city the camera had failed at that point of time. Again the issue was coming up of valuation of examination papers. University

cancelled the exam. University has asked for a re-exam and for costs of the re-examination. So there is a criminal element that came in because of the nature of the problem and the claim. Under the carriers act. The courier company had put its normal limit of liability clause and the question that is going to come up at some stage is that were they negligent was it actually taken from them at all or taken from the person who set the paper which is unclear. And if so how do you value the quantum given the fact that the limit of liability is actually in the contract of carriage. So again based upon what I have seen so far the contract of carriage can limit liability. They can charge extra for the insurance that they carry out for goods which have more than the basic value. but again my belief is given the complexity and the kind of things being carried. In the morning we were talking about purchases online. All these get carried by couriers. All those are given by the platform effectively or the agents not necessarily the manufacturers. And that is going to increase in terms of travelling the courier industry is going to grow in many multiples . there is one case that got carried to the supreme court but the value was very low so the supreme court thought it was not a fit case to give a decision on. How you value such cases like exam papers or credit cards. So I don't know if there are any views as to how one should approach a topic like this that if a carrier is proved to have caused the loss you don't need to prove the negligence part. And that is the defence that they have to take that they were not negligent and it is an act of god. But given the nature of goods being carried which have sometimes open ended value or open ended consequences like a credit card misuse. JUST TO THROW IT OPEN AS TO what the views are as to how one would deal with such situations. Generally all carriers put a limit of liability that is for sure. And the limit is pretty low.

liability is there

well it is declared higher but

....

correct the law of subjugation. The issue is how to value things like exam papers going missing or a credit card misuse. Is that a foreseeable event that could have taken place upon losing the consignment. They are declared to be credit cards. By the shipper. It is not that the company does not know it is a credit card. But the company does not know the value limits. Each credit card has a limit but they don't know that limit

exam papers ...

exemplary

not necessarily. Depending on the fact scenario.

in that case it has to wait till the examination is held

no the previous examination ....

that I don't think could be the appropriate answer. It has to be calculated on the basis of some criteria

... either go by the ..

Section 5. Declaration. That is the carrier act.

It is repealed long ago. but the principle is same in carriage by road act.

practically the same provisions are retained

under 12 because a common carrier shall be liable for loss or damage to any consignment in accordance with the goods forwarding note where such loss or damage has arisen on a want of criminal act of a carrier or his servants or agents.

Which provision

12.

.12 (2) is the earlier section 9

correct. 3 are addition because of customs borders excise and ...

that is right

not such a big issue normally

....

correct. This is an actual practical problem being faced and the valuations are going up and up given the ..

in any case you see evidence will have to be led what sort of a damage you have suffered. Tortious liability so therefore you have to prove the loss. So whether it is the actual expenses you have incurred or something else that could be and other factors operating.

yes naturally 73 will come in contract act. That is how it is to be assessed.

in practice the courier does not open the parcel. The parcel comes as a declaration by the consignor. They have no ability to

so they have no ability to know the value.

correct

you are referring to which section

Section 8 is relevant. It will also be relevant. That's right . this is carriage by road. Nowadays there must be many more cases coming in This is carriage by road act nowadays there must be many more cases coming in

Now a days they are multi modal

What you see the law is not settled correct but career is almost settled now carrier is settled although the act is amended I think the decisions ratio will apply in Pari materia the other issue coming in now is when goods are coming from overseas full stop that is also true full stop weather of multimodal Act will not apply because the person who takes delivery is a Trucker and the consignment note is issued overseas outside so as justice said in the morning is prohibitive product in a sent in and the courier is caught another round of liability on him so multimodal we are seeing more in fact tax issues involved full stop

So many vistas opening for us to see and this is why an interactive session so these are important aspects which will have 2 be settled in the future responsibility is

buy multi modal they should have combined all these in one act and a consolidated act should have been brought out . that would have been a better way possibly but what is amended is 2007 act and only by road . the rest of the carriage of goods by sea act that is still 1925 act this has to be updated now the procedure has changed as to how the goods are sent it is received then about the multimodal is 1993 it came in 93 this is somewhat recent

Multimodal came in 93 but the rules etc came thereafter but the rules have already come

the rules of already come the legislation etc. took place very recently and many operators decided to try and stay out of it because of the registration etc and the

complications of getting the goods inward and shipping them out because all these courier companies have delivery agent in India and pick up a agent in India DHL FedEx and all these and this has become very very common and what will happen if the delivery agent is by drone now we will get delivery by drone

that will be the next one I was telling him that possibly for carrying papers exam question papers we will have to apply the equivalent principle like you carry cash with armed guards. Because the stakes today are so high and the ability to ... more in the case of educational institutions I see these exams recruitment for jobs which are held that is where tactics will have to be followed full stop armed guards cash carrying

those are the key issues insurance if the act becomes Obligation of of the negligence being established no negligence being established by the operator other than the claimant

to my understanding section 9 of the Carriers act and+ 56 of the Contract Act can go together . and there is no conflict between the two and I say so for the reason if you read section 9 the requirement is that off negative proving by the defendant as regards negligence or criminal act of the carrier . illustrative to that aspect if you see the cleansing words Section 56 are two 1 if the act becomes impossible on such an event acers which is unlawful now the question is will that override section 17 of the Carriers act section 17 so far as the maintenance of claim is concerned -Section 17 kindly see

Carriage of goods by road

it is a different context so that will have to be attracted because you see somebody going and setting fire because somebody is dead that will not bring the incident within the Ambit of this . there has to be a riot sort of things

so those events which are defined in section 17 would come within the scope of events which are unlawful . events

-No these are also impossibility performance so here in the Act its self it is categorized that it has to be within this I know other so these are accepted categories

these are something new in addition to what is provided in Section 56 all we can say can you say that it is by specific provision being made.

-I think the proviso 2 section 17 also says still has a duty and responsibility to try and avoid it

but that doesn't exclude the otherwise you see there will be lot of adverse implications

the Prime Minister's death did 10 lead to riots .

the facts are the Prime Minister's death elsewhere. Riots did not happen. It was set fire there. There is no evidence of there being a riot. If those necessary elements comment

yes you are right then it takes it out civil commotion that Arena is always open to

it depends on the facts of each case you have to interpret It That Manner. the statement of facts given in this handout does not refer weather the Godown

owner took any care was there any security guards which is required in the proviso 2 section 17

that is also actually in the facts of the case itself it does not disclose that exercise due diligence and care the carriage of .

it is just about 4 pages he has to prove negligence

due diligence was exercised and the criminal act but anyway apparently we are more concerned with the law then the fact so law is

clear apparently . so 17 is an exception 2 section 9 so if the case can be brought within the parameters of section 17 then he gets absolved otherwise he does not . it is as

simple as that avoided that also is there that extra caution is also there because you see a person goes to a carrier with all expectation that he will exercise due diligence and not allow his property to be destroyed so therefore he must be given some protection that's why the law

I need a clarification sir earlier under the old act the position was the carrier is in the possession of an insurance the only exception is act of God king enemies and special conditions that is what Patel Roadways says special contract . does the theory of special contract survive after the amendment . it will survive it is almost Pari materia except for some addition. 17 lists out acts of God it also brings in human intervention civil commotion riots prohibitory orders by state government to that extent it brings in change in conception it still continues to be hit by the grounds available under the act what will a special contract also continue section 10 and 11 which are higher risk . the absolute liability can be deducted by a special contract which typically has an back end insurance so that is the answer what you were saying

I would like to point out that almost all carriage act like sea air multi modal have limits of time to file suit for making a claim . there is a presentation which will be circulated which has a time I am not going to it now because 1 is 1 year some its 9 months carriage by sea you have to make the complaint while taking the delivery or within 3 days off opening the delivery . so it is not like open ended claim under limitation act . it is pretty much the same multimodal it is sections . in your reading materials there is one case which deals with the law of subrogation how far is the what is the rights of the reinsurer. have you gone through that decision reading the law of subrogation anybody would like to offer any comments on that

that is supreme Court decision constitutional bench decision it also deals with the law of subrogation now kind of see the reading material page 234 the supreme court held the insurance as subrogee can file a complaint under the act either in the name of the insurer or in the joint names of the insured for the recovery of the amount due from the service provider insurer may also request to sue the wrongdoer so that means after making payment to the person claiming the damage the insurer the insurance agency can file a claim of its own in its name or in the name of the complainant the insurer as subrogee can file a claim under the act does the name of the insured under the joint name of the insured or the insurer for recovery of the amount due from the service provider the insurance also request the insured to sue the wrongdoer so he makes a payment and after making payment for recovery of the amount can file a suit and these are also held to be suits beg your pardon As a co plaintiff. but again kindly see c there is a limitation restriction the insurer cannot in its own name maintain a complaint in a consumer forum under the act even if its according to the terms of the letter of subrogation . so by this decision the oberois case in 2002 was overruled . so this is also there is a change of rule of subrogation in this concern these are developing now . anyone of you would like to give some comments on this aspect anyone has anything any view to offer no you want to say something then I think we can close . I told you ... it's a very narrow Canvas . so are you feeling hungry what do you want to stay back not hungry but we are .... so therefore if you want to put some query then its fine Let Us see instead of wasting the time you can appropriately use it provided you Raise some issue and then we can discuss about it can I put a question on the upcoming bill the commercial Court bill yes please do the scheme of the .you have the debt recovery Tribunal . that's the banking sector

and Tribunalisation recently hasn't well for itself now you have commercial bill coming in it doesn't you have the merchant banker referred to in merchant banker is there it is the first clause yes but how did it relate to a normal commercial banking transaction. wouldn't there be a dispute regarding forum. what would it lead to a settled law that a borrower can file suit except a fraud .. See I'll tell you kindly see this provision it will be section 14 clause 14 as of now and 18 a writ petition filed in the high Court you have that I think it is also called.. Compilation it's there it is also contained in the compilation see clause 14 what is contained in the compilation is the report the act is not given the bill is not given I see the bill is separately circulated you can go through now tomorrow we will go to close 14 there an appeal or writ petition filed in a high Court against the orders of the Competition Appellate Tribunal Debts Recovery Appellate Tribunal Intellectual Property Appellate Board Company Law Board or the National Company Law Tribunal Securities Appellate Tribunal Telecom Disputes Settlement and Appellate Tribunal shall be heard and disposed of by the Commercial Appellate Division of such High Court, if the subject matter of such appeal or writ petition relates to a commercial dispute.

My point is at at the original level this itself presupposes the jurisdiction of those tribunals will continue and the scrutiny from the commercial point of view is done by the forum at the first appellate stage like even for district level etc. at the appellate stage and not original Stage. There will be judges well versed with commercial side. But It is the appeal which will be heard by commercial Court. Debt recovery tribunal recovery of debts due to banks and financial institutions act doesn't provide for a appeal to the high court we entertain as a high Court judge under 226 or at times under 227 this will all go to the appellate division but sir they have used to terms appeal or writ petition

Yes

Are we talking in terms of appeal or writ petition . so if the appellate. that's right but both have different connotations and jurisdictions no suppose Let Us say the the jurisdiction under debt recovery DRT there is an appellate remedy . After the appellate remedy you used to come in a writ petition. but that writ petition as I understand the jurisdiction is exercised not by any other Court but the so called commercial division which is created. But they can... appeal and writ petition. my brother wants to say the scope of enquiry is different in an appeal and a writ jurisdiction.

therefore this is a creation of a forum only so what is done is the forum to hear appeals and forum to hear writs the forum to hear proceedings arising from different acts. so jurisdiction will be exercised in an appellate Court jurisdiction will be exercised on a writ court that particular bench ..... appeal or writ will go to the same bench

I think 1 of the positive sides that I find despite the working problems is that with Tribunal not succeeding this is at least an Endeavour which I think should be made more across the board . create specialised benches in the High Court instead creating parallel tribunals so lot of people have been asking arguing with ...., Roster .. that is being done by the chief justice through the roster system there is no specialization let us understand. But there is no specialization let us understand  
1 judge  
is expected to do everything  
the judge in this division will have 2 years tenure so that's quite a long period  
that is right  
for him to understand and to have expertise and others also getting opportunity 1  
point of time or the other because otherwise they will be heart burning once the  
other judges

Same is the position of a company judge . A company judge is notified for 2 years so that way the chief justice can notify different benches for commercial purposes . There are probably more... how it will proceed on the original side is there c the difficulty is yes Western system will look at specialised benches . then that person sits for several years he is picked up because he is a specialist in that field we are not we are doing hybrid variety between the two I think where we are trying to create the system where people who are specialised in . personally speaking I think it is necessary to pickup specialist lawyers in those subjects and slowly we will have to get over what as justice Sharma was saying this heart burn is in every jurisdiction because it is very difficult I feel in certain areas of development. For example IPR as a field unless you have had some exposure in it or least as a judge you have sat on it . Let Us say I think I feel when we were in the bar this was a very very specialised field handled by handful lawyers . today day it is a major area of litigation. mothers it may be possible but patent is connected with engineering so you have to have knowledge that also background knowledge . then only they will be able to decide you see this matters need expertise there is no doubt about that I believe everywhere all over the globe there is constitution of the special benches special divisions like the commercial Court IPR in some countries China for example Supreme Court they have a separate IPR division that is a separate from the commercial Court division so IPR they are giving lot of stress because they are in the manufacturing field today for giving focus on that so like that you know it is happening all over the world so I believe that is good beginning but only time will say whether. you know one of the greatest challenge will be the whole principle operates I feel I don't know how will when we talk of commercial Court bill I thought the relevant session I will take it up but since it has cropped up as against countries having commercial Court specialised Court where 34 5 cases are listed now if you are

going to have 50 cases each day I think the system will fail unless you are able to restrict number of cases which come the difficulty is wherever specialization is created ... the specialization off law is also .. but you have specialised lawyers specialised Court also disposal will be faster debt recovery Tribunal not really work hasn't really the family courts at least my experience and I think my two brothers will vouch for specially Tamilnadu that replacement symptoms some lawyers point of view to what used to be the land acquisition Court and the MACT motor accident claim cases complete Sham parties are operating all fee structure is based on sharing of the proceeds including sharing of jewellery and I must say there are women lawyers manning this Court and these women lawyers are equally sharing and are the bread butter and cream ..... ambulance chasers .... family court... in fact family court matter .....

now c just one moment I'm coming to you there is one aspect kindly see that same provision necessary changes will have to be brought in once this is passed. 14 I said the last one is Telecom disputes settlement appellate Tribunal. now do you get cases from this Tribunal .

Sir this is what my query was this goes to the supreme court my understanding TD sat go to the supreme court that is my understanding TD sat goes to the Supreme Court even securities appellate tribunal goes to the supreme court.

IT act specifically provides appeal to Supreme Court then one more one more national Company Law Tribunal that particular that also goes to Supreme Court all these need some sort of amendment

the recent judgment of the supreme court now saying that where specifically appeal is provided to the supreme court the Tribunal aft judgment now that means all matters will go to the supreme court directly the high court used to do so now NGT I must say I find that unless this is clarified by the supreme court even NGT provide for direct appeal . Supreme Court will have to settle if the judgment continues to hold the law in this respect I think Supreme Court filing will increase by 20 25% on this account alone because of the volume of litigation . so far as the service matters are concerned you see Central administrative Tribunal in some of those matters now an appeal from that order is provided to the supreme court but the Supreme Court has said that well that does not oust the jurisdiction the high court to exercise jurisdiction under article 226 . .... he has taken cognizance of the judgment and says that the judgment is applicable specifically ... that was decided by the supreme court in L Chandra's case . L Chandra Kumar chandrakumar case was decided and then the amendment was brought under section 14 of the central administrative act giving to the High Court under 226 the power of the high court under 226 was saved that is alright but appeal was provided but despite chandrakumar the recent decision of the supreme court is noticing Chandra Kumar judgment and then saying no . That is the view of the Delhi High Court had taken the division bench saying that Aft matters also we have a right to do so . Supreme Court has set aside the judgment March the judgment has come after the judgment now only ft matters High Court is denuded of matters now. except what is conferred to the act in question then NGT it also at some stage we were not hearing appeals but they would be lot of interlocutory proceedings where the high court used to come to position if that is there everything will go to the supreme court .these are 2 areas how they will reconcile with. with all respect I think chandrakumar and this judgment need to b reconciled

this would be to some extent overriding there has to be changes in the main act also  
 then only this will .  
 judicial pronouncement saying this is the intent of it. on the lighter side Parliament  
 has to meet first and sort its difficulties.  
 AFT is not there but all other tribunals will be.  
 that has been distinguished in AFT  
 can you say L Chandra Kumar will apply to other Tribunals. only AFT is carved out  
 how do you say the principle laid down in the recent judgment is where specific  
 Chandrakumar dealt with general propositions where Supreme Court where is the  
 specifically legislated today supreme court marriage deal with the matter then the high  
 courts must eschew in those petitions . that is the sum and substance of the judgment  
 pronounced in March cause that there is some Endeavour to a larger bench but when  
 the larger bench we meet and when it will be  
 the interpretation which was given in L Chandra's case subsequent amendment  
 which was brought to the central administrative tribunals act what is under section 14 .  
 for the same reason now your lordship will find that's under the armed forces tribunal  
 act also when these armed forces Tribunal were also  
 created under the act where all these matters under the High Court were being  
 subsequently transferred to the zonal Tribunal which was constituted under the act  
 there also the power under 226 still saved and because of that the appeal against  
 the order of the Tribunal goes to the High Court keeping in mind what was decided  
 by by the supreme court in Chandra's case  
 but how do you Reconcile with the I forget the name the last decision of Supreme  
 Court rendered in March. justice mukhopadhyaya judgment. in the middle of March  
 I think which was again to my mind there is an issue which will arise from that .  
 because humility and respect it seems to acknowledge Chandrakumar but I feel it  
 runs contrary to  
 Sir as a matter of fact these 226 and 227 are powers of Judicial review and that goes

with the basic structure  
I am in full agreement with you my own you would be that high court's powers  
cannot be the denuded therefore I think that the judgment needs ...  
that can't be tried by law. that is the Judicial review power  
Supreme Court is Supreme Court  
..... dispute between a regulator and a private party that was the  
Did you file ok. let me put it differently would you file a writ petition in that case  
what would be the remedy  
the remedy is ....  
No but here the ... 226 also comes  
Sir 226 also comes but would it take the shape commercial dispute I am only on the  
fact whether it will take the shape of a commercial dispute  
otherwise what is the subject matter with this commercial ...  
commercial actually should be between two private parties auto individuals  
companies or  
this has been amplified under section 2 what will be the commercial dispute which  
one  
2 (9)  
yes 2(9) small 9  
actually it is a very expansive definition some people are saying.  
commercial will it include a regulator . one side is a regulator would that actually be a  
commercial dispute . this is the whole issue  
but I think the intention is to include them it is a matter of interpretation  
please see explanation b commercial dispute shall not cease to be a commercial dispute  
merely because one of the contracting parties is state or any of its agencies all  
instrumentalities or a private body carrying out public functions  
they have expanded the whole definition according to them the regulator is also the  
government

yes I am aware that the original definition was narrower. and inputs for invited from different places . Each institutions for example informally from Chennai some process was done . nature of disputes which come on the commercial side shipping disputes are there sweet quote is giving its own version in the whole bargain the definition has become very very wide it is too wide sir actually . going by that . it will not be exhaustive enough See ipr lawyers wanted something shipping lawyers wanted something I am aware because I am eating your head as to what kind of suggestion we can give to the law commission so it went on trying to include as much as possible therefore how many cases will there be there is no legal impact study as yet of this with this legislation coming in that is also required the volumes are going up as your lordship said the volumes are going to increase tremendously because something which was before the supreme court will come to them something which was before a regulator is going to come to them therefore the volume is going to increase at least they have started thinking ultimately the legislation impact has to be seen you bring in a legislation are you creating enough infrastructure and judiciary two man the nature that was the tragedy of 138 of course nature of transaction changed nobody thought that leasing licencing would be an issue it is to not exist unless you know what kind of litigation it will generate .there has to be a study before you You see these all amendments are brought in at the behest of some agency example 138 was was at the behest of the financial institutions because they wanted to protect themselves so 138 was brought in this was one way of recovering the money similarly here also when you see different people working in areas they are widening the 138 the issue is at that time people would buy something they could afford. this concept of ever take loans for it was only there after when it happened that you

wanted TV the Western system of issuing loans for everything from car to TV to fridge has coming now . you issue advance cheques and then they bounce.

financial institutions being protected have started advancing money .... so these are probably

in between the judgment came then another judgment came legislatively the supreme court . so firstly the cases of shifting from one place to another to decide

whether cases will go

there is an element of tax cases also .....

insurance act envisages commercial transactions also therefore they they are for this purpose how far it could be extended is a matter of interpretation

on the lighter side my brother handles tax matters so he's worried about the consequences what will be fall I don't know whether he'll be relieved of it or added to

it

.... everything will come into this

I do think a thought process needs to be given what does it envisage getting everything into it or you want to make it more restrictive in application and if you

want everything to get into it then how you're going to manage it the purpose is lost the very purpose for which it is and thereby you are ignoring the

other cases

Sir if they specialize forums I am not able to handle the cases they are saying even the specialised forums the time period for cases is very high if one specialised forum

is not able to handle particular dispute particular law having a commercial Court with so many acts and so many

why does this happen if I may be brutally Frank it's because this tribunals only heaven for retired bureaucrats who have no expertise for the subject and judges who

know nothing about the subject sorry to say that is the reason why tribunals don't work they say what is the expertise such as require somebody who has never done

that subject matter suddenly posted there how do you expect him to move quickly

Company Law board a member who had retired from income tax now see the procedural law is also amended because of this now it will all depend on how these matters are being treated now where is the time frame at every stage as to in what period that particular process is to be disposed off now whether it will be possible to adhere to the time frame . number 1 number 2 there is a procedure here I find provision Number 2 number 2 is a provision here I find the proceedings can be disposed of in a summary manner also like a summary suit so there a lot of angles herewhich must be thought over debated then only I believe this should be resorted to matters like you know mercantile matters or commercial matters whether you should Resort to the summary proceedings Though I must say in the process of drafting this legislation very wide consultation was done that is true but ultimately finally what has come out the chairman of the law commission is also a very well versed judge in commercial matters area but I think there are areas and angles to be still possibly address I think it has been expanded too much my personal opinion instead of limiting it to commercial disputes I give an example of what has happened. In the process of legislation a very wide consultation that is alright but ultimately what is the outcome

I give an example of what has happened it was sent to different institutions the draft it was circulated two different institutions each section then Wanted commenting on the litigation wanted the subject matter to be drought in they made all kind of subjects to be brought in once that was done then it kept on adding up so the final draught is an amalgamation of this I find where was suggested include this has by and large included so

.....

I hope we don't see a situation where it takes these disputes take much longer time

than what a normal suit would have taken yes see the so many the oldest section 11 I dealt with I mean from my experience in Madras High Court was 1999 section 11 1999 2002 2005 2006 2007 section 11s pending. So case has not developed .... not instituting in a suit . its equivalent of Institute in a suit and deciding a 1999 application is that 16 years ago the suit would have been instituted today is going to be instituted now they has be some data studies has to be some ... some parts which are ailing some parts which are existing whether case will not come up we have a thing called are less than 400 final hearing cases ready for final hearing but there is no judge available to hear them unless we are able to match strength and infrastructure all this is Academics exercise I think .... that is there ..... new Must get requisite judges not only the quantum in this commercial dispute definition there is also an inclusion of tenders floated by the state government all institutions that's a major area off litigation today . writ petition writ petition all this would be concluded in this all instruments I am aware of Delhi Dr Sharma is there these are major areas of litigation And take so much of time very heavy steps involved in all these tenders matters every tender from the lowest to highest is stepping in court you need almost half a bench to handle the matters

Sir then we are looking at As Your lordship said you are looking at a case where almost half High Court judges would have to be on the commercial side. it is apparent the way it is . and they are all time committed you can't decide the tender matter .... and there can be a summary hearing. I have personally suffered for 2 and a half years I was doing this tender matters in Delhi and I know how much everybody wants it is decided as of yesterday ..... or if you don't give us stay the other side raises Hue and cry that my project is stuck ?..... for example service matters are delayed for so many years and the service matter

never gets compromised because at least some some element she wants something out of it at least alright thank you very much so we'll meet in the next session again .

## SESSION 12

You have to simulation exercise for the session Vista Airways vs. Mr. Kumar now we will be dealing with the Indian Contract Act I believe for session 12 simulation exercise has been circulated supposedly matter between Vista Airways + Mr. Kumar this is relating to the law of contract they are in the business of air transport carrier and in 2010 required latest series of Boeing 737 aircraft and then you see they recruited some persons giving them training so as to induct them as Indian pilots to fly there aircraft the respondent Mr. Kumar was elected by Vista Airways as a first officer and was offered employment the contract had certain stipulations they were supposed to give him training and advanced loan of Rupees 15 lakhs for the training indemnity bond was executed by Mr. Kumar for refunding the amount and according to the contract he was to service the airways exclusively for a minimum period 7 years during that period he was not accept employment that is negative Covenant not to accept employment of similar nature either full time or part time with any other employer the further Term was at Vista Airways was in entitled to terminate the services of Mr. Kumar without assigning any reason Mr. Kumar joined the services and under gone training and thereafter cleared the test for flight Boeing 737 aircraft he was also confirmed in service by a letter dated he resigned from the services and the reason taken resigning from the services was the adverse change in the rules of seniority so Kumar but stand of vista Airways what's that Mr. Kumar wrongfully left services in breach of the terms of employment they filed a suit seeking injunction also a temporary injunction restraining Mr. Kumar from taking up employment with any other airline from 5th October for a period of for the purpose of operating air craft no bleeding for Vista is also given in this . agree to serve for a period of 7 years negative Covenant is reiterated by him in the bond executed by him it is also stated Tata Vista Airways print large amount of money on training Mr. Kumar and then the

excuse given for leaving the company is an afterthought and this is actually a case of illegal inducement offered by a competitor airline now on the other hand written statement was filed by Mr. Kumar he had taken up pleas that there was a change in his conditions of service because his seniority was being adversely affected subsequent to his joining the Airlines and then some other conditions of service was changed to his detriment and he also took up plea that incase an injunction is granted he would be debarred from seeking employment and would have to remain idle and that issuance of injunction would amount to forcing Mr. Kumar to work with Mr. Airways also took a plea that a contract of personal service cannot be granted. he had also taken up a plea that he had paid for the training because he had to finance himself only loan was given to him and the amount was being deducted from him in installments therefore the position is that on these facts and provisions of section 67 section 14 of the Specific Relief Act you have to give your opinion so who is going to start you want to start yes please do sir first injunction shall be granted to vista Airways cannot be granted can be granted because of the reason that it is a contract for appointment an offer for appointment amounts to a contract and Mr. Kumar after knowing all the facts the ground which has been taken that seniority has been altered and he has been put in a detrimental position that is putting his name down in the seniority list that list has been published in 1999 so this is before his appointment to the Airways so that condition which he has taken change in the service condition will not coming to effect and since he entered into an agreement knowing all this fact it is betrayal and detracting from the terms of the contract of appointment . so after putting some years of service I cannot leave the service sincere executed a bond. so the injection shall be granted in favour of vista Airways restraining Mr. Kumar from joining The Other Airways

but what about the provisions of section 27 of the Contract Act and Specific Relief Act

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that is because by virtue of an agreement the offer of terms of employment the moment a person enters into service there is specific terms and conditions contained in the offer of employment both parties are supposed to go by the terms and conditions if anything will be betrayed it amounts to breach of contract what would you say if the person is restrained and the management says now you have taken me on we will give you full salary but you sit back we are not going to let you fly and he knows he will lose his license if he doesn't fly a certain number of hours how do you think he would be compensated in such a case that is all together a different cause of action. But with all due respect this is a different aspect of the matter altogether this does not pertain to the terms and conditions of the contract we agree with you . Let Us say the court injuncts says this man cannot leave I'm talking about the consequences to test the argument now he cannot leave the service the management says ok we have got you now sure we are going to give you full salary full benefits but we are not going to utilize your services as a pilot then he can make a complaint to the DGCA that is a different matter all together so therefore he lands in situation where he will possibly lose his license that is not the question I am trying to pose I am saying the consequences of an injunction order that is right he is trying to show you certain other aspect that is right but suppose I hold the contrary that Mr. Kumar is left by the Airways company then they might be in a position to Blacklist him that he is not fit to fly so I am permitting him so that's what my lord has said that the other part is also there suppose you are separated from the service of the Airways company and the Airways company make a complaint before no you see that sort of injunction if it is granted it may adversely affect him because he is going to lose his license that's got to be taken care of because so far injunction is concerned it is a equitable remedy equity would go in his favour just one moment then the principle of equity will come and it will go to the employee the equity principle only will be because it has got larger scope contrary to the statutory

provisions if the equity provisions will come section 14 will come then you will have to assess which will prevail in that circumstances ok let hear some . injunction cannot be granted the reason is that they entered an agreement between them so far as the service for 7 years the working with them for 7 years suppose you do not work and leave and do not work anywhere that will be violative of section 27 of the Contract Act because that negative Covenant itself is also one of the clause but if it cannot be..... then it is void. you see section 27 has been held to be not applicable in certain cases of this nature trade secret for example if The Secret is divulged then the company will suffer so in such cases negative Covenant has been enforced.

but if there is adequate compensatory if you can pay the compensation to the company then there is no bar for him leaving the job and going somewhere because company has made it that if you leave it that you have to pay some compensation so in that case he can be allowed to leave but he will pay the compensation and if at all anything done at his cost to the company in the current scenario there are two kinds of situation which arise with increase in complexity of the commercial employment the nature of the job you are performing there is one set of restraints which company where you say my employees should not work with the company competitor that is one aspect that was another aspect but so far as his profession is concerned that is the issue one is competitor the other situation is you seek to restrain the competitor from employer person Who may have worked with you I'm not saying reference to the facts these are two kind of largest scenarios with emerge in such situations and the incidence of this is increasing today because the kind of institutional loyalty or corporate loyalty which used to exist earlier are not the common factor of the day there was a time when you joined say at Tatas u joint with them you retired with them there was an element of great corporate loyalty today everybody looks to furtherance of their career whatever maybe see I have come across cases where not only he leaves

the particular company but leaves along with all the ..... that is available with the clients so you see should there be a restraining order or should there not be a restraining order in such cases because that will definitely adversely affect the company you are serving so in such cases where there is possibility of divulging of trade secrets you should think what has granted and upheld a negative Covenant to be enforced . Golikaris case and all . now here is a case where his you see he had a license but restaurant order is being short for restraining him from working for other in any other company or any other Airlines so did you see The Other Airlines is the competitor of this there is no doubt about that so can we obtain a restraint order or not actually in that case he may be allowed to ... unknown profession rather than seeking another competitor or Airlines. all the same he cannot be restrained totally otherwise how he will live suppose he leaves that equity will also come into play number 2 any loss that is caused to that particular company can be compensated with adequate compensation

I am just saying see training of a pilot as in this case is not a strictly speaking a expert job as is being made out because Pilots are trained by different Airlines similar training all over the world in a sense you create people specialised another scenario which doctor Sharma posed is you create a specialised information you may not be able to utilize that information do without that information you may be able to work and example I am party to the judgment where I had restraint hybrid kind of a law firm it was created out of a existing law firm and they took the client list the client list or draft I had held a material which is not capable of being used by the new form famous return it them and but nothing can prevent them from starting a law firm and doing so well maybe by memory you may remember some client you contact you can't stop it because it's the client choice where he wants to go when I leave the job he definitely has rendered some data so far as his personal knowledge is concerned that he can .. this is not what is .. on the facts it is distinguishable it is not a case of trade secret

being leaked out sure the person is been deprived for working in the new job that you want to join that is the intention so therefore what will be the effect here I would deny the injunction but look into the damages injunction because of the reasoning that is falling from his lordship and again in the second scenario which is not in the subject if you can dissect the human being from the data then you can dissect the passing of a data . that is not the allegation but here the license he has been taught to fly given a training to fly that is industry wise it is not a street secret that he gets to carry 2 The Other Airlines that is not the allegation also so therefore injunction according to me is out of the ambit forget the interim stage even in the final hearing but so far is damages are concerned notwithstanding his defence that it is actually a loan one is to look at the cost taken by expenses of the parent company the employee how much here actually paid it is actually expended and the whatever has been deducted from salary or not that would depend on the evidence LED but the damages under 73 Contract Act because damages can be compensated by injunction

so anybody else has any other view he says injunction will not be granted but damages could be granted somebody else also said the same thing anyone else who would like to give their views we have to give on the basis of the facts of this case yes on the facts of this case the employee had a grievance that he was denied seniority insert another benefits question of reciprocal application was does not arise here second is your argument under section 14 of the Specific Relief Act contract of personal service cannot be enforced specifically and thirdly he was given a load for imparting the training what is 2 lakhs for that had given some security therefore at the most airline will have a money claim against the employee and no specific performance of this type of contract can be granted no injunction will be granted the nature of the injunction sought is beyond the purview of the contract there is no

such provision under the agreement which gives the company which is not provided for in the agreement itself the agreement was that he would serve the company for 7 years and he will not serve elsewhere they try to enforce the clause of the agreement only he will only serve elsewhere if he is not in service so therefore this injunction that he will not serve any other company has had double Jeopardy . one he will lose his license after losing of license he will be good for nothing either for this purpose or otherwise

that's what you are correct he will lose his license ,..... anyone else who would like to give section 50 is it refer to here ok you are referring how would section 50 apply here in these facts ok that is your view anyone else who would like to the plaintiff has asked for 2 reliefs 1 for an injunction that he may not join any other the other is for damages no first injunction matter is concerned they would be that relief cannot be granted for tw0 reason first is section 41 h of the Specific Relief Act because damages can be the adequate remedy available and then section 27 of the Contract Act no contract can be made which is restraining a person from some future employment or trade the condition of the contract will be void in view of section 27 so therefore there is no question of grant of any interim injunction or any final injunction as far as the damages are concerned he is entitled to it because I under the terms and conditions there was a specific stipulation and it provides and the damages are also quantified . that has not to be established also . this type of matters are repeatedly coming to Bombay High Court where bonds are given by the employees and they are sent for training you are also Bond was given the question that arose was whether this will be in the nature of liquidated damages I have taken a view in number of matters that losses that are capable of calculation and

proof it has to be Pro it will not fall under section 74 of the Contract Act . and since the employer has not proved any loss he can't claim any compensation . see you earlier mentioning that we will also look to the facts of the particular case cause of something in it would it make a difference is all this had not been there let's say the company says will be permitted to fly nothing else will happen to him we will continue to have him on the same terms and conditions no service president would be caused would it make any difference our judgment on the issue if all those concerns are taken care of

let's say nothing is affected seniority is not affected he is a sure that he will continue to fly

there is no loss to him ..... the company says we will ensure him we will give him all benefits . Let us say that nothing is affected he has assured that he will continue to fly there is no loss of employment the company says we will assure him we will give him all benefit he has already resigned he has gone out so whether he could be brought back by the company saying that . good he be junction saying look they are giving you everything logo and work for them . ..... now he submitted the resignation there is no evidence whether it has been accepted are not accepted. facts do not show whether it has been accepted or not accepted . it is not accepted that is why they have gone to the court it is a preventive action to. it is hit by section 27 ..... in my humble view and as judge will discuss it is purely covered by that you can't enforce a Private service .... the position is this actually arises out judgment delivered by the Bombay High Court as he says justice nijjar was the judge. he had delivered judgment and he says in the facts of this case no injunction can be granted of course so far as damage is concerned loan was there he has to return the money but what was the reason for dinner in the injunction first of all he said it is a negative Covenant now negative Covenant can be enforced it has been made applicable but but made applicable where it was case of trade secret being divulged or confidentiality being divulged so in such cases injunction has to be granted to prevent him from doing that

but where it is a case of enforcement of service personal service such junction cannot be granted. he has referred to section 14 C 14 1 c probably just a minute he has relied on 14 1 e where it says that personal contract cannot be specifically enforced sofar personal services is concerned that is one secondly the aspect that has been taken is that he has relied upon the decision of Coca Cola . Coca Cola also the question of negative Covenant came . where it has been held that negative Covenant is unconscionable and sure also it is held that following the decision of Coca Cola it was held that it is also unconscionable . the negative Covenant is health to the unconscionable being hit by section 27 of the Contract Act so this is a judgment apparently I believe has reasons behind it and specifically we know the provisions Specific Relief act when it comes to enforcement of the personal service no injunction is granted it cannot be specifically enforced that is the settled law . in this case The Pilot is not enforcing in the contract personal service it is the other way round that is exactly the other way around also it will operate . enforcement of a contract of personal service saying we will continue to perform the job . it will operate the reverse way also if I cannot go to the court he also cannot go same thing so therefore it cannot be then. it is hit by the negative Covenant is hit by section 27. so therefore you see you will go out of his service and there will be no livelihood the person may be restrained from carrying on his trade and it also contravened ..... interestingly in the facts of the case this is Jet Airways case they also noted no it is not relevant things for determination that when you get that pilots you also get that pilot in the same fashion you took from Sahara . and now this man was moving from Jet to Sahara so they said this is part of the incidents of this is personalized service that you are seeking to enforce personalize service contract and which 10 person leaves you cannot person is in service period you can seek to put some restraint on him or restrictions . someone is willing to put his papers and leave then you can't stop this activity post the period when he has left you . it is very very rare that somebody would specially in matters of personalize service

there is also one more angle as a part of business this is a business investment made into an employee which investment has gone wrong ultimately it is the money claim that is an additional angle .

no that part they have not invested money in him that way whatever is given by them is given by loan only the training for the training he is paying they are giving a loan to him so to that extent probably I can get back the money that is of course not decided they don't come for consideration whether damages is to be paid that did not occur here . but to that extent only they may be entitled to get but you see they have not invested in him he has come he is given that loan . and then he has gone for the training has not learnt it himself . came back and joined the service there after so he has to pay back the money that he has got from them as a loan but rest of the thing there is no investment so far as he is concerned and as he has pointed out they have themselves picked him up from Sahara at one point of time so it cannot be said that I can do it and you can't so that it is not an equity at least this is an equitable relief so the court has a right to reject .... so ultimately it is also a money claim that is what . that is also there . The compensation the general principle is that wherever you will not injunct normally damages is an adequate relief that principle will apply . that it was on loan I missed I thought it was sponsored . one of the very interesting case which is a diversion from it decided by the Supreme Court was where the facts of the case there was a shift supervisor employed for training and with a restaurant close that on completion of training he will work for a period of time he will not die world the specialised information gathered during the course of the work so he somehow things did not work out and he resigned put his papers and left and the company sought an injunction the trial court granted injunction . the supreme court said there is a distinction between restraint prohibiting service from being performed and restraints in the expertise information gathered during the course of work will not be used by you for a specified period of time after that . while I was looking into it other one and in fact in case of Niranjani Golikari AIR 1967 SUPREME COURT the division

bench Govt of this distinction between why it is a distinction between the two and here and there restraining the clause voted it so that it is not actually a restaurant in trade clause but it is a clause which is protecting the interest of the company in respect of knowledge expertise acquired during that period of time . justice nijjar has referred to golikari case which is decided by the supreme court and he says golikari case the Supreme Court was dealing with the weaving process which the plaintiff was obliged under an agreement with collaborator to keep secret the German company had agreed transfer the technical know-how to the plaintiff company to be used exclusively for the plaintiff companies tyre cord plant at Kalyan . the plaintiff is obliged to enter into secrecy agreement . it was in these circumstances the defendant in that case was required to enter a negative Covenant of secrecy . Clause 9 of the agreement provided that the defendant shall keep confidential and prevent divergence of any of the information and document which may have come to his knowledge in such circumstances the supreme court held that the plaintiff is entitled to be protected with regard to their interest in the trade secret and secret process of manufacturing this protection was secured by restraining the defendant from divulging the trade secret or by putting into use of the competitor . in my view the ratio of the judgment golikari case was not applicable to the facts and circumstances of the present case . so that is how it is distinguished because there it was the case of secrecy and divulging the trade secrets and sure it was breach of contract of employment and so the principles lay down in golikari case is not applicable to the facts of this case of Jet Airways that is what is held. see the whole principal has settled there is also should not have to be made between the scenario baby I do work for the employer all he has to remain idle . this would be the principle. that is the main ... fundamentally I would put it this way you can't compare the person that either you are its me or Nobody Else that should not be the scenario . what is the position so this 2 types of Covenant affirmative and negative there are two types . affirmative covenants are generally enforced but negative

how far it could be done and that also restraint of trade and Commerce whether it is possible

negative Covenant so far as Land is concerned The Covenant running with the land the quotes of taken away you not to be enforced . that's why I said personalized service yes personalize services involved it is not to be implemented . human being comes in the picture then it is not to be implemented human being cant.. he is willing to terminate the agreement so it is like a restraint post employment with you unwilling employee being compared to work with you unwilling employee who leaves you is prevented from carrying on business. Answer the query of my friend if you have been given all the benefits if they had agreed that we are not going to affect the seniority and give all benefits we would give promotions as early as possible even if they would have said so then also no injunction can be granted because he has already resigned and said I am not working with you it is my choice. so I should be allowed to . if he feels is overall prospect is better there nobody will move for a worse prospect. there must be some factor either personal or professional that will weigh in in shifting his job . so that is his Individual perspective how he . section 42 of the Specific Relief Act intention 2 pass on the negative agreement . that is also there . Yes. Specific Relief Act . because that apart also where there is other . 41 so41 to prevent the breach of a contract the performance of which would be not specifically enforced. service contract cannot be specifically enforced that is the Law. e will apply and then age of course will apply because breach of trust in case of breach of trust . what was referred to the decision was only 41 E... is also referred to in the judgment ... my friend is also pointing out section 14 1 a the following contracts cannot be specifically enforced mainly a contract for non performance of which compensation and money is an adequate relief .... it seems that is referring to article 19 right of profession has been made as a fundamental right . yes that is more or less referring to article 19 of the constitution which is right to profession article 19 g specifies that ... it becomes a fundamental

right that cannot be taken away from . that is right the right to work cannot be prevented by showing an injunction the question of livelihood is concerned family is livelihood is concerned so that is the reason why this injunction was not granted 42 notwithstanding anything contained in clause e section 41 where the contract comprises an affirmative agreement to do a certain act coupled with negative agreement express or implied not to do a certain act the circumstances that the court is unable to compel specific performance of their affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement . ..... so far as it is binding on him ... so that is the position so far as this case is concerned . there is another judgment of the single judge of the Delhi High Court I had come across it's a case Wipro Limited the facts are interesting there was a local representative or a distributor for the period of 17 years the person was there with the company . and it had a negative Covenant that you will not during a certain period of time solicit my employees etc. at some stage he decided to set up his own firm and issued an advertisement . the court said yes Innocence you can enforce the non compete clause that they should not be doing so but if an employee decides ultimately to leave one person and come to the other you cannot in this form of injunction actually restrain that employee from going from your company to the other company . so it would amount to an injection against the employee from moving if he wants to move . so to that extent injunction cannot be granted why I said was may I reach 2 3 succinctly set out ratios. negative Covenant tied up with positive covenants during the subsistence of a contract b8 of employment partnership commerce agency or the like would not normally be regarded as being in restraint of trade business or profession under the same unconscionable or Holy one sided negative covenants between the employer and employee contract pertaining to the period post termination and restricting employees right to seek employment and to do business in the same field as the employer would be in restraint of trade and therefore the stipulation to this effect in the contract would be void in other words no employee can

be confronted with the situation where he has to either work for the present employer or be forced to idleness while constructing a restrictive for negative Covenant and for determining whether such Covenant is in restraint of trade business or profession or not the court take a stricter view in employer employee contracts than in other contracts such partnership contracts collaboration contracts franchise contracts agency distributorship contracts commercial contracts the reason being that in the latter kind of contract the parties I expected to have dealt with each other on more or less equal footing . where as in employee employer contracts the norm is that the employer has an advantage of the employee and it is quite often that the case the employees have to sign standard form contracts or not be employed at all find the question of reasonableness as also the question of whether restraints partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of contract is or is not restraint of trade business or profession . so what it culls out is in commercial dealing terms negative Covenant will be more liberally construed and maybe possibly enforcement but where it is an employer employee relationship the person wants to go out of service the almost uniform rule in all the judgments you will come across is they will not injunct . yes ..... section 27 of the Contract Act if we juxtapose in<sup>41</sup> what cannot be restraint is trade lawful profession trade of business . so according to me though under <sup>42</sup> that can be in junction of the negative Covenant but subject to the restriction in 27 . yes that's right this is how we can harmonize application of <sup>42</sup> in the matter of enforcement of negative Covenant . negative covenants can be enforced provided it doesn't touch the law ... and provided it is not within <sup>46</sup> and <sup>41</sup> . <sup>41</sup> and 27 also Contract Act . read with that I think section 27 is very much related to article 19 3 of the constitution because everybody has got the right of profession . ... subject to reasonable restriction or not . ... exceptional one . . situation is . the situation where instead of a 7 years bar suppose there was open air bar but it still be hit by section 27 . no it is applicable . section 27 will still apply because for that one year period he will not be allowed to

fly and there is every possibility of him losing the license that is one .and then for 1 year he will be out of service . so there is a direct restraint of trade . so there is one section under the Indian Partnership Act cover that please have section 36 subsection 2 of the Partnership Act . in relation to Section 27 of the Contract Act . Sir 36 (2). if you read that along with section 27 of the Contract Act . 36 2 says a partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits and notwithstanding anything contained in section 27 of the Indian Contract Act such agreement shall be valid if the restrictions imposed are reasonable . what I am saying is even if he is restricted from carrying on a similar business as that of the partnership firm that is if the partnership firm is carrying on the business of air conditioners . the profession itself is not withstanding . Sir that is correct what I'm saying is that under section 27 of the Contract Act the section is absolute there cannot be a clause you cannot read any reasonable restriction to it this is what I'm trying to say. in Contract Act whether it is a 7 year destruction or 1 year restriction it cannot be read into . . . restraint in trade then it is a problem the section talks about that that is possibly the reason that if we see them . show the wordings are identical restraint in trade even 33 (2) says restraint in trade even 27 of the Contract Act says restraint in trade . ... so whether we take a partnership to be he is doing the same business similarly you . .. pilot has to fly .... the Partnership Act is much after the Contract Act so while considering the Partnership Act quite conscious of the restraint of trade under section 27 of the Contract Act they have therefore specifically carved out when you say agreement in restraint of trade number 2 I'm reading 36(2) a partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits and notwithstanding anything contained in section 27 of the Indian Contract Act such agreement shall be valid if the restrictions imposed are reasonable So it is not for an unending clause. it says it can only be restricted to a

specified period Let Us say a breathing period . notwithstanding anything contained anything contained in law Indian Contract Act such agreement shall be valid. so reasonable time period is provided reasonable circumstance Rises . then it was hit by section 27 . let us look at a scenario with this is not there suppose we include this in partnership . in partnership the exception is carved out. not in other matters that's why I am saying . so conscious of the fact that section 27 can be a bar . we are carving out an exception notwithstanding anything contained . he cannot be a competitor afterwards going out of t company . section 27 of the Contract Act reasonable restrictions cannot be read into it . they cannot be section 27 is a complete bar. 36 which you are talking about makes 27 not applicable . in these situations . what is qua the employee relationship employer employee relationship the other is a partnership because partnership people are considered to be equal working at random together so two employers fighting among each other the employer does not have any legal entity so if you say no sense you are prevented from competing against yourself in a manner afterwards because you both work together I would put that as a reason possibly behind the rationale of having this . that having worked together at par of course partnership share may vary the breakup of partnership is not a legal entity for other purposes should not be used to setup compete against what you were earlier . That seems to be the rational that is why they exception specifically . this would show that at least till 32 they would have thought that if we don't get this enacted.... it will be hit by section 27 so let us make section 27 not applicable to it otherwise there is no need if it was not going to be covered there is no need ... after 1932 between the period the Contract Act 1872 the partner would be restrained . before this partners were covered under the contract act itself . under certain sections which were subsequently replaced taken out 239 to 266 earlier of the Contract Act governing the relationship of partnership . we don't know there was something in that which restrained them to an extent . the contract act has bits to the expertise of legislation it must be appreciated that it has

with student time period to be substantively till today . today we are faced with legislation when they drafted actually there are problems emanating from them so . one of the greatest casualties I feel the expertise of Legislative drafting a lot of time used to go into making of legislation and how you worded it and where you put a full stop or a comma and all situations ... today that expertise with respect is the government should have been it is not having adequately trained expertise and because of loose legislation also there is a lot of litigation . which arises . the land bill is an example of up and down issue non issue amended non amended something the time period and expertise required to fine tune it sometimes doesn't get spent . they have stopped discussing the draught legislation stop discussing it neither the expertise nor anybody discusses unless it goes to select committee then that process also . in the select committee also experts or not . the basis of opposition and support is something else all together . ... earlier used to be draftsman who were legislative .... you were sent for training outside also now they don't have time they have better things to do ... in fact I recollect in while doing law one of the optional subjects used to be legislative drafting another time you could take that as a paper and somebody obviously has drafted the Contract Act really knew what he was doing . now what is happening is David try to find out in some other country whether the legislation is there or not pick it up and lift and paste . not only lift they would do their own fine tuning . it may create for the litigation . amendments are being made the benefit only one person pint not for the entire community that is also creating difficulty . that is right . that started with contracts . .. in fact bureaucrat told me once I was discussing the issue of contract tenders Being floated . no more violation of tenders take place because the tenders are floated the requirements are prescribed keeping the person in mind . so they will say check Red shirt must be worn Maroon tie must be worn . show me the face and I will give you the requirement . in Tamilnadu the term the use is dosa decision oriented systematic analysis in one of my judgments I wrote I am given to understand this is

the terminology which is used 30 first decide whom you want to give it to then the terms and conditions are drawn in such a way that nobody else except him can make it it is so specific . so I like the phrase decision oriented systematic analysis it applies to .. decision oriented systematic analysis . keeping that Gentleman in mind they came out with ... they say we no longer by the terms and conditions of the tender . if you want a favour somebody in advance to make the tender in such a manner 30 alone should get it .unless there is some misunderstanding between that Concerned person and the department . that is like there's always correct mechanism somebody is to say that one particular person turnitin is not approved that is a very old example given when things settle down he can make a note not approved . that should keep on changing otherwise everybody will start buying red check shirts . it is very comforting commercial Court that we won't have so much commercial litigation . I think the quantum of litigation in India will never ... it will increase but The disturbing part actually has been that some of the studies have shown decline in civil litigation and an increased criminal litigation . because of the time factor taken in people are not resorting to Civil litigation so either the resort to criminal litigation or settle out side the court . extra legal system katta panchayat .... civil litigation ..... we have first appeals and second appeals pending since 81 painting ... in second appeals in Tamilnadu we have about 13 -14000 second appeals in Punjab and Haryana out of a total pendency of 2 lakhs 70000 35,000 were second appeals and 45000 for motor accident claims cases. between these two categories they constituted arrears of 80000 out of 270000 . Allahabad also it is the same position somebody from Allahabad here so same position . what is the situation of criminal appeals . we are dealing with 81 criminal appeals . that was what I was told . the accused are on bail . ... I think Patna High Court is 10 years ... 2007 ..... cases where I was just checking pendency chart 2008 criminal appeals are there but you are right they are not in custody . Bail is given ..... unless you give a little become infructuous practically infact lot of times I remember in Delhi I was asking a person criminal appeal come

up for suspension of sentence I said no letters we will fix it you argue the appeal itself no I don't want that . I'm willing to hear your criminal appeal you are saying spend the sentence he was very Frank he said my lord let the person be released then only instruct me how to argue the appeal . where will we create the resources for getting the appeal argued . ... we call them material instructions . in Allahabad we have 40000 second appeal spending 1000 are defective second appeals . now stay is also granted in those matters . in most .... in fact the system with different courts are different I have not heard it in Tamilnadu the system is the called the SR stage . so you are given first SR number maintainability is an issue if there is an office objection then it is placed before the court maintainability is decided it is maintainable then it is numbered at SR stage there are so many cases which are pending for years so whatever the defect would be not been cured but it would lie at the objections state itself for 4 years 5 years 6 years . 130000 criminal appeal pending in Allahabad . I have the chart . it is a big state . what about writ petitions writ petition filing is about 50,000 every year and we are disposing most of the writ petitions ..... current writs .... see in our system we have two kinds of problems what is the current position which by and large people are able to make . but because of the old system of admitting and hearing is mixed up now everybody wants hearing and disposal at the stage of admission we have classified into 3 groups ....older cases are problem . in one group about 89,000 another group 56000 and third group 96000 pending out of 250000 you have almost 9 lakhs pendency . yes overall pendencies is about 9 lakhs . .... that is never going to be filled up We Are Never cross 90 do we have sanctioned strength of .... you don't even have the infrastructure to cross 90. hundred Courts we can manage . that is what I am saying 165 is the roster strength you have about 100 if you at Lucknow and Allahabad both not more than hundred .... new courts are coming up in Lucknow that will give some that will add to the situation . Allahabad has a Peculiar situation . the main problem in your High Court that is not even half the manpower strength working . the judges it is half practically which is the quote with

goes on strike once a month or something so the bench doesn't shift or something . Mathura or some district . no .one was of Agra there was to be some creation of Jurisdiction in Agra . many of the bar councils passed resolution to go on strike . that is a significant achievement recently which we had . I recently read a newspaper item that Allahabad High Court convened full Court to deal with a situation with 7 learned advocates were ask to do certain things .....

## **SESSION 13**

very good morning to all of you we welcome Hon'ble justice Kurian Joseph who will be chairing the session along with honorable justice Sanjay Kishan Kaul. Saturday morning we have two speakers Mr. Atul Sharma and Mr. Sujit Ghosh . about Mr. Atul Sharma he's a partner in Link Legal India legal services with 32 years of experience in the area of Corporate litigation infrastructure projects business restructuring intellectual property and so on . Mr. Sujit Ghosh the partner Advaita legal . yes 18 years of experience is the national head of. this is legislation National head what have you written will leave it to sujit ok I'll leave it to him what a speciality is speciality is tax infrastructure Counsel in tax matters and it also dealt with power infrastructure aviation defence projects we have half an hour for each of the speakers Mr. Atul Sharma has already given one page simulation exercise we have distributed it yesterday so you cannot proceed with it . honorable justice Kurian Mr.

Venkat Ramani and honorable judges I must confess rather odd feeling to be standing here and addressing High Court Judges in a completely different capacity but before I proceed with what I wish to state I would just to make the situation lighter narrate a small incident when we entered the issue was who will go first that reminded me of a seminar where Mr. Nariman was supposed to speak in a particular session and in the following session Mr. Jethmalani was supposed to speak some reason Mr. Jethmalani flight got delayed Mr. Nariman session started he was just about to speak Mr. Jethmalani Walked in then Mr. Nariman in right away quipped I was feeling that I was one of the senior most lawyers in this room until gentleman called Ram Jethmalani Walked In and stole my Thunder . so I can assure you I will not steal Thunder . I have circulated PowerPoint presentation but I must confess but I'm not a PowerPoint person I get completely lost when I have to look at the slides you have requested the secretariat to circulate the presentation and of course there is only one page of a case study which will be handy as we move along . infrastructure and construction contracts we are obviously talking in the context of India globally d entire infrastructure development has been substantially been done by the state its only in India that was created the regime baby trying to involve alot of other Agencies like private sector in the development of infrastructure . insert background if you look at the regulatory regime that is involved in the last few years specially because of liberalization we have gradually moved away from a system at every infrastructure project was approved monitor operated by the government . was created a regulatory regime within statutes the electricity act The Telegraph act amendments the National Highways Authority act the Telecom quotes the amendment the AI act bringing in private participation . essentially we have created a the regime which monitors the implementation of these big ticket items . as a result of the participation the private sector is one of the keep things which we find in all these legislations is the creation of independent regulator and the most important part is the economic regulation . today for whether it is electricity tariff airport dues

port charges National Highway Section 8 a . indicator that has to be return so we have created a regime wherein Return of Investment has become the key to ensuring these projects a viable + whenever they have not been found to be viable the government has put in money by viability funding that is something which is happened wonderful you on paper but in reality it has not happened like this now what is infrastructure traditionally it is the basic physical and organizational structures and facilities that is buildings roads power supply this is simple Oxford dictionary meaning of infrastructure as I said the different modes to development of infrastructure first of course is the government which does it the PWD CPWD in the conventional days used to give contracts and invite bids. and carry out construction the second one is public private partnership it was established as a preferred mode of project implementation special in infrastructure such as Highways airport urban infrastructure what is the drivers of this the way to basic drivers if you look at the planning commission which was housing this whole thing within itself there were 2 drivers the government did not have money to find it itself and secondly they wanted private sector efficiencies now to bring in private sector efficiency obviously had to give return what was evolved was what's up concession when it comes to government itself developing the infrastructure obviously came up with standard contracts of course contracting regime has been promising we will come to that later concession agreement is a methodology where is the Asset or the service which has been traditional been provided by the government is provided by the private sector under the contract obviously there has to be a consideration private sectors are like mercenaries they would not putting any money until you have return associated with it today would get certain grant off rights and those are the rights ultimately that right could be in the form of developing an airport concession is essentially a right given to carry out certain things which hitherto are reserved for the government . airport the Government of course but exercise control not only the contract but true the statutory mechanism . and of course all the acts have to give more power to the government .

essentially if you look at it it boils down to the concession agreement . what are key to this yes of course time bound completion operation and Management in the most efficient manner and the most key factor in this is the risk allocation and risk is something who is except best handler particular risk that identification is very critical and it is to be shared between the public and private actually and then of course predetermine performance standards which to have the significant role and failure to achieve that would encourage significant consequences as I said the origin has been codified for large extent the best thing that has happened is all those decisions of the regulator today justiciable right up to the supreme court poets so as a result the interest of all the stakeholders are protected by a mechanism which is transparent and open to Judicial review . there are different forms of the PPP concession which are given and that is of course a function of the function of each project IT sector the function of what kind of risk the government wants to pass on to the private sector what kind of risk it wants to keep it to itself . we have had a bad experience in terms of implementation a large number of projects in the last few years and that has been on substantially because of the reason that the risk taken by the government which should be passed on to the concessionaire . there are different types of PPP contracts there are the build operate transfer I think now we are all used to them because they are coming to court build operate transfer design build operate transfer build lease transfer operate maintain transfer and management contract . now what kind of contract to enter into is obviously a function of the project . of course there is a complete distinction between a Greenfield and brownfield project brownfield something which is already existing Delhi Airport example of brownfield project which is given on lease under operations and management development agreement . we have other brownfield projects like existing four lane roads being handed over to the private sector for redevelopment I am converting them to 6 lanes which of course different models it could be either annuity right to collect toll . the third is a management contract where is the government develops infrastructure but I am

suitable to the private party for management purposes of course we are aware that we are following the competitive process forward contract but I will come to that a little later in terms of the Judicial review finding so many High Court Judges in this room I couldn't resist the temptation of going into the question of Judicial review in the context of a PPP project . typical project you could always have two components what is the construction and the other is the operation and maintenance so invariably in the case of an infrastructure project you would have a contract which is generally known as design and build contract . having said that Infrastructures not necessarily confined to PPP there is large amount of infrastructure that is being developed by the government itself so I will just highlight Wiki types of construction contracts because that is the contract which the PPP mode dovetails into a concession . if it is a concession you have to build operate and return the Asset to the government . that is the situation of a design and build most of the time . broadly speaking we can talk about few types of construction contracts these are fixed price lump sum cost Plus fixed percentage unit price bill of quantity of schedule cost free reimbursable alternatives. what is expected expected of the contractor . and there is an expression which is called turnkey contract what it means really not a design and build contract it could be simple turnkey contract where the design is finalized and it is handed over to the contractor for finalisation So that is technically not a contract if I lose for obligations for some reason we have not been able to institutionalize the types of contracts construction contracts that we have had unless of course ever since I started practicing we had been doing arbitration do something which is very sacrosanct with the CPWD and PWD contracts guidelines for example in the CPWD contract Muslims what we made on the guidelines for example when you say you have a claim deleted from the contract as a result of which I lost some profit from the deleted part to the contract . what would be the methodology of calculating the loss impact of the contract . we call it claim on restricted turnover in olden days we used to have the standard parts of the Year award engineers used to pass

unfortunately the whole regime has given way to complete mechanism contracting with starting that internationally we have really well recognized unstandardized system of contract the Federation International de engineers consulace is one of the most respected and adopted form of contract across the globe we have an anxiety of making it loaded heavily in favour of of the employer we have disregard this form and not something which is only for a particular purpose they have different books different kinds of contracts the new engineering contract is a Cane and internationally accepted very balance form of contract we have the joint contracts Tribunal form of contract the association of Consulting Architects Chartered Institute of building and other forms so where all other forms like so what we have done not adopted any of these in their form we have the entire contracting regime in India is a Khichdi the contractor does not know what is the risk most of these contracts are based on evaluation and identification of risk. we do have all kinds of provisions and contracts but most of them do not know what is the risk associated with soil contamination that is something which is in our bid to load it heavily in the favour of employers because I presume they going to make claims the historical reasons for that we have ended up having a big khichdi we actually do not know where we are heading in terms of a contract structure there's something called as which is essentially in most of the contracts whether by the government under consultation ok by the government itself we have what is called engineering procurement and construction contracts . the contract which will have data scope of Engineering we will design the whole thing the technical specification you lay down cost estimation preparation common standards and then procure all the equipment and you construct and erect everything and test it out . over the years and because I'm sure lot of disputes which has come before the courts and it's in relation to bank guarantees and enforcement of Parent company guarantees what has happened to us and of course Sujit will vouch for that because you are a tax lawyer for the purpose of tax purposes they have started splitting the contract find they have the epc so you have one contract so you

could have won a contract between the employer and the contractor . as a result of which and of course it is generally driven by the tax structures because you would have a service tax component and a VAT component so conventionally in sales tax we have the Regime of composites tax most the states we had a system you could say alright I'll pay sales tax on the whole of the contract 85 % OK I will pay sales tax on the equipment part of the component of the contract at a higher percentage what you call compensation schemes so you could choose then came the service tax when the service tax came it became difficult to split the supply and service component then of course the state which have octroi ..... as a result of which people started creating structures which is like a lot of dispute lot of advance rulings they started splitting the contract into small packages if they feel it is efficacious to take out the service component which is overall about 3 to 4 % 5 % tax on that structure in that manner now came the EPC contract give a contract to be b is responsible for the complete delivery but because they are different contracts you can't have a common arbitration clause so you say alright please go to your father and ask him to give Parent company guarantee the disintegration is the responsibility of that person so that I know one point person to whom I can go for the purposes enforcement of the contract and ensuring that if there is non performance home to hold responsible for it so that is something which involved as a result Bihar what is called split contract structure so you will have a guarantor at the top Parent company I am the project company and of course the Offshore and onshore because you will have to import issues like import benefits for infrastructure projects so when you look at all the structures we will find that we end up having somebody being held responsible for these are actually called as wrap contracts . so this contract be ultimately find the parent company which is given the guarantee is more of a shell rather than anything substantial but it is just the company of that group people used to take those guarantees interface value and of course it will comprise supply contract services ..... etc of course the suitability of a structure would depend on each technicality involved in a contract this body covers

the kinds of construction contracts and of course the large number of issues that you can come across but before proceeding to the case study I would only take one very critical component of a dovetail of the construction contract to the concession contract . construction contracts typically granted for 10 years 15 years 20 years 30 years and the government give the right to somebody to implement the project and take the benefit out of it and of course regulated in whatever manner . but in the event that the contractor does not perform what happens ? of course they would be ... on which the government would be entitled to terminate the contract but the termination is due during the construction phase the contractor sits down EPC contractor and that contractor is somebody who has actually no privity of contract with the construction quality but how to make sure that the government in the event of a termination during the construction phase would step into the shoes of the concession or . and that is what is called a step down provision very most of the concession and the dovetail construction contract will have step down of the obligations of the concessioner independent contract into construction contract . that is the most critical path of structuring of EPC contract in the case of a concessioner there is a second component to this if there is a termination of the contract the EPC contractor should know what are the termination payments what will happen to the project assets what will be my role with the concessional authority . is there an equivalent project relief because if there is an equivalent project relief in the contract independent contract under the concession agreement would this floor to him or not price of contract accordingly similarly you go for a huge banking Finance infrastructure projects In these situations you need to have to step down built into the financing document then the finance like the government would have a right 2 step in the lender must also have a right to step into the contract and substitute the concessionaire with

somebody he thinks is good . and that is more particular because typical in Indian context there is no securitization off the receivables under these concession . likewise

the project assets are not securitized . therefore what is secured is the project through a Limited funding by the bankers and essentially what we have in hand is a project itself and of course the equity of the promoters and then of course based on the ratio of the debt equity the lender will have the right to step into the shoes I'm substitute himself and of course there a termination payment which will depend upon what happens at the parent contract level so what does when a contract level is terminated the concessionaire the promoter what do they get is something which is defined normally if it is an event of default of the concessionaire it is 85 % of the equity . and the debt taken over . otherwise it is 115 % of the contract and the debt is taken over. this is the most critical component of a confession driven infrastructure project . now having completed this component of broad spectrum of course my presentation which we will circulate later will be much more longer and it'll have much more kinds of typical clauses that we come across . I have already dealt with the step down provisions which I thought was relevant but now I will move on to the case study . this is a case study which is actually I encountered in reality . one question you have mentioned about the difficulty ..... that means it is permitted by the central government only for construction whether this code can be followed by any other agency . absolutely and they can't specify the bed that they are floating that this is what will ultimately govern so that's entirely up to them that's what I'm saying as a government we have not done anything proactive to create standardized regime and that's actually help a lot of people to understand the risk that they will be taking in olden days you get into an arbitration and you precisely know what are the four corners in which you will be working . . so this case study is actually mix of an interpretation of of a design and build contract . and Judicial review finding so many judges here I couldn't resist dovetailing that part into the study . these are the fact these are very abridged . they have been circulated . this client of mine was tenderer for setting up a facility enough crowded area in one of the cities and I am

consciously not taking the name of the city . for carrying out certain test and experiment relating to virus and bacteria .

there were two bidders now if we look look at the description of the work it is squarely design and build so what you have to do is you have to design the facility they have only given you broad parameters if you see the side it's a 15 laboratories 4 training room 10 isolation room Storage Area research facility administrative block civil engineering design technical mechanical related works payments to be made on on milestones agreed time for completion 36 months . so when you submit the bid you don't know The detailed design of the facility you have to submit a design on your bid and then you have to build it according to the approved design . there were two bids L2 was Hundred and Fifty crores. and L1 was 70 crores . both the bids work was on completely different Technology L2 vs. steel box Technology which was the latest technology state of the art we will carry out all the test within the steel box because of safety reasons because if there is any fallout then in crowded area you could have we don't even know what kind of diseases can spread the advanced technology was a concrete box Technology and eukaryote all those test which is not considered as safe that is one part of the bid and the challenge came to the court I was appearing for the unsuccessful bidder since the only two bids this was a design and build contract and what L1 did actually attached the bill of contract along with it and he said that this is a item but I will be bringing . now if you don't know the design you don't know the detailed engineering how can you come to conclusion that how many switches we need this room . and this is precisely I was hard pressed to explain to the court that look you you give me a contract for making this room and said it should be the size and it should be able to see 300 people but if I don't know until I make a design you have approved the design that how many switches or how many doors would be required I can't give a bill of quantity what he did was he put a bill of quantity and he said alright item A rupee so much item B rupee so much c d and summed it up and it came to 70 lakh crore . the other one obviously since it's a

design and build he would load it further because there was so much of uncertainty typically what would have happened he would have got the contract I don't know what happened after that he had made huge claims because surely it could not have been done apart from the fact that you are comparing apples and oranges . you are not appreciating the fact that actually in the design and build contract you can never Assess The Bid should have been non compliant on the ground that you had given the items .... on the ground that you had given the b o q in a design and build contract . so inner design and build contract unless you are you able to submit design post the acceptance of the tender there is no design you cannot give a bill quantities . and therefore understanding of this part of construction law is so very critical and I 1st Phase 221 situation CVC L1 and that's it . sir scope of .... sorry no sir BOQ ... the description of work what is given here must be given in the tender . one thing more . where is scope of variation . what would be a parameter for judicial intervention I take it that the tenderer Opera person going in for the tender the person inviting the tender is an article 12 I take it because private dispute ..... this is a public body no issue so therefore article 12 ..... scope and extent of the judicial intervention ..... I am coming to that that is precisely I am coming to that . one question if there is no specification interior designs there is a variation as regards the technology and the design to be imported buy L1 and L2 . the cost factor is bound to vary . in that context absolutely so the standard document which only required structure to be made without further specification as regards design quality when does dispute between the two as to who should be picked up depends on what kind of Technology he is putting . precisely and therefore can there be redressal of such kind of a dispute . the situation like this one that's what I'm coming too as I said you are comparing apples and oranges if you are comparing apples then that is precisely what I want to buttress that when we now talk of a Judicial review . we need to move away from the old Regime of of saying look only the courts are supposed to look into the process and that is what I'll come to next . which is the Rogue bids . L1 might be submitting a bid

evaluated on independent . basis is completely unviable . and which is a true fact in an all day today life ..... yes public interest is one but we will find a large number of arbitration disputes where contractor says take the contract and will make the claims don't worry . because delay are rampant in public authority decision making which is very slow that is precisely what I am coming too what is the construction regime the scope of Judicial review needs to be broadened and it should not be confined only to the process as we're doing till now . very well we will brought in the scope of Judicial review what wherewithal do I have to distinguish between L1 and L2 . it's your claim of an inferior Technology vs. superior Technology L1 is not ..... with respect nothing prohibits a High Court judge BF had instances where we have it carried out study for you you can have experts submitting the reports . but the standards are not fixed standard will never be fixed in a design and build contract for the reason they simply saying I want a facility which is international is best . I have .... what he wants it is his choice as simple as that you are saying that was difference between apples and oranges but what you wanted was a fruit ..... no but then the awarding I thought it must say in the tender that we want a steel box because the it is not something which is not known . it's a risk you are taking a commercial bid. agreed . you see I'm not but pressing the case of my client I should be very very clear I am only saying that when we getting traditional review process L1 could not be the only criteria ... yes to that extent it is accepted how the courts under article 226 will decide that Apple is better or Orange is better that I don't think so that article 226 even give that power to the High Court that Apple is better or Orange is better . Point taken . contract matters yes Judicial review under article 226 . the scopes are very limited and I don't know if anything further apart from 3 4 conditions have been Incorporated because Judicial review has its own limitations. that precisely what I'm saying. there are two answers to this unless of course I say that I like apples . in this contract L2 because he submitted the quantity is not the issue it is the technical bid . technical bid if it is pass then only to go to finance bid as prescribed by the supreme

court and there ..... description of work .... see there are two components to it first of first is Judicial review when you talk of that review where you are talking of what would have happened if the concession for it .... steel box Technology and concrete box Technologies choose not to describe it now what does a Court do 1 option is that I don't think it is a fair process . the evaluation I'm not saying the court should substitute. Its judgment so far as evaluation is concerned but this is a case for only 2 tenders haven't received and therefore they should be scrapped . strike down the entire process? yes very well we do that but then again what parameters to be let down . the parameters is that the bid document should be explicitly clear..... can you participate in the bid and later on turnaround in challenge the whole process ..... at the same time would have to look forward but how many ..... Judicial review the article 326 provides that whether the BOQ also prohibited or whether all the conditions of the bid can only be tested . in all these types of contract .. are held classification of sort the terms and conditions that I could Notice from this note is that is that it's not clear it's a very cryptic . you want a lump sum contract or you want a itemized contract this is a design and build when I say design and build necessary it is a lump sum contract . you are courting one number ..... may I say something in a design and build contract actually the pit has to be split into parts the first part has to be the first tender has to be invited for submitting designs once designs are submitted by the various parties and a particular design is finalized what a particular system on which to be done. then we ask for the tenders on the design itself then that ceases to be a design and build contract it is in two parts one is a technical bid the other is the financial bid then you go for . deposit to envelopes when is technical others financial . no I'm sorry the question is can I design and build contract they would be very rare occasions where it should not be a technical bid

because what will happen is talking of the tender before that you have the stage of RFQ request for qualification that is when you filter the these are the people on the basis of the turnover we believe capable of doing it design and build contract that is

where the fallacy is the design and build contract the moment contractor give the design it ceases to be a design and build . therefore that part of the..... so design comes after the bid the design is done approved and implemented that is why I can never be sure that how many qualities of a particular thing I am going to be use. and that is where the fundamental fallacy was . this being the design and build contract is what you mean to say is L1 could not have submitted an itemized quantities L2 was your eligible person and only if contract has been accepted pay for article 14 . absolutely that is precisely I stayed in to Judicial review the fundamental point is still the same I have not moved from there I'm only saying that equipping the judge with the ability to understand what the nature of the contract is if you need assistance I think there are empowered to have experts . .... what is to be understood is design and build contract whether it is a standard practice for giving bill of quantities and pricing each item . let's assume in this illustration that he does not give a BOQ but still says 75 crores what does the court do . can the court decide firstly and if it can which is debatable how they decide which design is better whether it can no then it's a different thing all together once it is given on a design and build basis the fact that highest priced item he will never be able to complete the contract on that price so therefore what is called is not there ..... I am again saying the scope of Judicial review has to be enlarged it is not merely because he is he should get it let's assume the shell station that it does not give a b o q but still quotes 75 crores how does the court decide which is better . in that situation certainly the court has its own limitations of course the apple and orange story still available correct but how does the Court decide whether to choose an Apple or an orange the court can take the assistance of an expert . there have been instances where the court has referred matters to bodies like IITs in tenders ? yes the Delhi High Court has done it in the case of the construction of a wall next to the airport I'm only trying to say the tires things done today therefore I am purchasing the case expansion of scope of Judicial review as it stands today please see the latest decisions decisions in page 250 of the book Supreme Court frowned upon

this practice appointing committees in contractual matters since it involves a matter of subjectivity . in Public Interest Litigation we can do that but not in contractual matters ..... that is what I'm saying CVC circular is not a guiding force in evaluation of tenders mechanism we need to revisit it . CVC circular is not a principle for evaluation of bids the first sentence of the CVC circular is post tender negotiation to can often be a source of corruption it is directed that there should be no post tender negotiation . that is the CVC circular . mvc circular does not say you cannot accept L2 you cannot set aside the process if you feel that the process has not been followed properly that is precisely what my submission because CVC circular is a concept of corruption it is device only 2 quell corruption it is not a methodology of Judicial review not a methodology of not a methodology of evaluation of tenders . please come to page 250 of the compilation the latest decision of Supreme Court state of Kerala vs. MK Jose.

We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the Respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest.

No but this is a General principle this does not that's exactly what I'm saying we need to allow I'm talking about enlarge the scope of Judicial review obviously it also applies

to Supreme Court ..... that's right I am saying increase the scope of review ..... in the technical contacts which I'm saying we need to have a case infrastructure construction causes being taken up in a different Court like we have a commercial causes the third. is Judicial review the PPP regime. we all know what is the scope of Judicial review article 12 limitations of the article the allotment of scope where the public functionality is involved the only distinction and I do it with lot of the circumspection because the matter is still pending in Supreme Court that is regarding whether Mumbai Airport Bangalore airport companies ask it with an article 12 and amenable to writ jurisdiction . public function is fine I'm trying to say what is the public function why did we bring in PPP free product with an intent to bring in private sector efficiencies . I am trying to bring out position between public function qua public private function

should we really restrict enlarge the scope of procurement process in a PPP project is a question that we need to examine which is still open it has not been examined so far but there could be a case where whether tariff use of the facility qua claims of the facility user second if it's a public interface the public what is the scope of review and the same thing arises because L2 and L1 the experience shows L2 L1 have not serve the purpose . but even if the album has been given if we do an empirical analysis we will find that the large number of claim that we are paid more than the value the contract that we have awarded .... I don't think in my future there is going to be and experience ... that's alright we will cancel if it is one bit we cancel but if it is too bad we have to allow it that's right thank you so much for your attention . can we have two inside so that we can hear the second speaker . how much time do I have there is a change the session will go up till 1030 will have the session now then we'll have a short break will reduce the tea break from 30 minutes to 15 minutes .

but still will have a break for 15 minutes 1030 1045 tea break and then we have a second session from 1045 that's alright with you yes

good morning I certainly won't even dare to venture into Judicial review given the kind of enthusiasm that I notice I would like to weigh in that's what I thought I am the most junior most person here I have not more than 21 years experience and I'm a tax lawyer Indus 21 years I have seen infrastructure sector kind of growing leaps and bounds the development vs. thing is completely unknown many of us are not even exposed to what actually is happening down the stream . I have much things to speak but I will skip . the most important slide this is your environment Canvas of how the whole sector actually grappling with the number of contracts number of conditionalities that's attach to any large project in the middle you have a project which is what we're all discussing on the top left you have the sponsored those are the people who actually wanting to have the projects to happen those are the stakeholders in some sense they have two layers the deal with the lenders and so you have that lenders documents there lenders are the people who are actually Finance in the project so therefore you have the loan Agreement coming in from the lenders the project needs a blessing and support of the state government from where it is actually happening the state support agreements implementation agreements on the left hand side project need to be constructed and therefore you have the EPC contract which is what Atul was speaking about sometime back the project leads to have a very small amount of revenue items which could be necessary and therefore you have the supply contract and the deliverables from the project is where you have the of takers if it is the airport it will be the passengers that use it if it is a pipeline the group that is purchased by the parent companies and so forth and to manage the project in a lifetime you have the operational contract if you look at this whole Canvas . There are hoards of complex issues legal issues tax issues that emerge fundamentally speaking if your projects off 5000 crore + the complexities of multifold so to say I need to say in this whole milieu the fight that often happens is that the owner or

employer of the contractors are always working in cross purposes in the sense that IIT of them trying to protect the interest and they have reasons to believe that there interest or not protected if the contract is contract or not lopsided contracts are the key points that makes them to get into a lockjam . if you look at the owner he needs certainty of cost which is where you have the lump sum turnkey price single price will be no escalation beyond a certain point of time . you have a back to back obligation with regards to project in other words there called condition precedent so if I were to setup in LNG terminal . LNG terminals are very large and expensive projects Gujarat has seen several of them . the LNG terminal investment will not happen the bankers will not Finance unless there is a gas sale agreement between the gas reseller MD of the company NTPC . the back to back contracts become very very fundamental they become condition precedent. adherence to timelines for completion because time is money money is time so to say if your project is slotted for 3 years the cash flow has to be given to 3rd year onwards and the lenders have to step in If the cash flow doesn't happen . everyday delay in construction leads to a ... and therefore timeline becomes very crucial . compliance with specifications and warranties now this is very fundamental if the contractor doesn't fulfill the condition and warranty the assumptions fall through . and therefore making sure each of the warranties the warranties could be with regard to product with the work function performance timelines and so on then you have passed through of compliance risk very very fundamental I mean look at the very large projects if you're dealing with explosive the number of regulation the country has with regard to how are explosives are to be used a very very stringent so if these complaints are not met with and who is going to meet us compliances the person is actually dealing with it the contractor the suppliers . the compliance risk becomes very very fundamental interface with other contractors there is a case in hand if you talk about LNG so to say let's say you have to have the Civil works in place huge amount of investment contract to make the splint work this has to be done now those are done by people who are different from the guys you're

going to build the tank so you need coordination between the contractors . Civil contractor and the tank supplier and various other . so the intermingling and interphase becomes very crucial. one single point of contract because the employer does not want to deal with multiple agencies because he needs the project on time and then performance guarantee this is the route because if project doesn't deliver if the PPA doesn't happen if the PLF that has been planned for a power plant or whatever else so obvious the project is a duck project so performance guarantee becomes very crucial. On the other hand the contractor objections are very different he wants a rational allocation of the risk because me only because you have done a turnkey does not necessarily mean that I shall or I the contractor shall assume all the risk there has to be a sharing of risk 2 to the extent that the contract negotiated it cannot be a case that the entire risk is passed on to the contractor . pass through of taxes and other external cost I will deal with that subsequently because why taxes so very fundamental extension of time and increase cost for delay as a result of circumstances beyond the contractors control this is a big change become so very fundamental therefore if your contract does not provide or your tender does not provide for adequate mechanism for change in order the contractor is generally very reluctant to enter in tenders process because you are talking about a 10 year project 4 year projects price escalation work mans cost the bill going up and down so and so forth therefore this becomes very crucial force major protection this is standard one does not need to labour too much on that. this is very very important timely payment of course because the contractors work on a very wafer thin margin and If the cash flow get impacted by any means we will have to borrow the money Sunday Market to be able to render the services because they have to keep various vendors in their control if the guy who is actually supplying the lift all the crane etc they are not available they are not being paid work will not happen on the ground and therefore he has to be cash rich and he cannot be cash rich unless he gets paid on time if he does not get paid on time obviously ECE Project cost increases therefore this at the point which

leads to significant delay. and the contractors will always try to make show that these things are taken care of in the contract. certainty of total outside liabilities this is very very important you know third party liability is crucial for a contractors career because if something happens God forbid in a particular project some third party damage happens personal laws property laws the amount of liabilities that can ensue on the project is humongous at the end of the day it is the employer was generally responsible do anything that happens occupiers liability or whatever you may call by the contractor of this week it gets important to that particular liability and therefore the contractor will say look there is so much of Outside liability that I can take therefore contracts will necessarily have maybe hundred percent of 200 % total contract price I can Internet for you with anything beyond that I am not bothered about under certainty and escalation of permitted to address volatile market conditions we spoke about if you see these are all competing interests and therefore disputes to happen fundamentally because of no meeting of minds the lack of consensus if I may call it insofar as how these things are to operate . and the risk allocation therefore becomes very very fundamental so if you take any project there are 9 fundamental areas in which risk do terminate first it starts with the land on which the project is going to happen sociological soil conditions site conditions because if the land caves in if the land caves in the project scary games and therefore this is a huge loss it could be property loss it could be men loss life loss and so on and so forth so who basically bears this risk this risk is fundamentally Borne by the employer it is he who has to bear the risk because he is the one making the land available for construction so to say now how do you mitigate that people generally do you do appropriate soil testing and so on so forth but in the tender he inserts a clause that the contractor will inspect the site and satisfy himself with respect to the adequacy of site conditions the land on which the construction is to be done . such representation are taken essentially to mitigate a risk that tomorrow they should not say that I was not aware because you are actually aware of what the conditions are so

this is how you do the mitigation second Delhi in meeting project milestones and the scheduled completion date this is the most common area where disputes do I rise for reasons best known to people and for reasons beyond their control deference to happen delays do happen so how do you deal with that so this risk is typically Borne by the contractor to the extent of the liquidated damages in the contract epri estimated amount will be mentioned and if not mentioned it should be mentioned that if there is a delay in performance then a certain percentage of the contract price shall be paid by way of liquidated damages and the remainder so if it is like 10 % of 5 % or anything beyond that is to be Borne by the employer so it is kind of share and mitigation for the employer it is liquidated damages are the way to win then they have step in rights of employer if there is a delivery on what the owner can stand by he can say ok fine I exercise my step in rights I will now step into the contract and I will do the contract Ethan myself or by any other third party today for the stepping right or what the employers of intake and then there are stringent termination provisions because you know if the contract is not to be performed for any reason you cannot just repudiate you cannot just frustrate you cannot just suspend the contract therefore I shall for whatever reason maybe because of convenience or delay or whatever reason I can then terminate contract and move on . and for the contractor limitation of liability becomes the mitigation he will want to say that look if I have done any breach then 200 % what you kind of impose on me 100 % is what you can I impose on me for any kind of delay beyond . . loss of material on route this is very simple you have your CIF contract and FOB it will depend on what terms is used the risk is actually Born By the person concerned so to say this is not very difficult to understand failure to meet with performance standards this is basically essentially a contractors job because he has undertaken to perform deliver a particular product and therefore it is he who has to bear it how do you may take it again ...becomes relevant and for contractors it is the limitation of liability. To the extent of 100 or 200% as the case may be. defect in engineering and design this is very very crucial because when

you're putting a design that is the heart and the root of on which the project is going to stand at the time when you are designing really people don't know whether this design is going to work because it will happen after 2 years or 3 years so therefore the defect liability period becomes very very fundamental . Typically people put about 2-3years as a defect liability period . anything that happens within the DFL the contractor will have to bear it. Anything beyond that is what the owner has to live with so to say. If the design is within the contractors scope and within the liability period/ so for mitigation the employer takes warranties and indemnities which are very crucial and for contractors limitation of liability. Construction defects same liability period so to say because therefore what happens is to say from a contractors perspective if you notice or from an employer's perspective you notice in the negotiation a lot of stress a lot of time is consumed in ascertaining these liability periods or these conditionalities or when these defects will happen. These... and warranties which are often provided for before the contract can take birth. And that is where understanding appreciating all of these becomes very crucial even for lawyers who are actually reviewing these contracts for judges or for that matter arbitrators who are actually looking at it. Nuances of these contract clauses become very fundamental. The latent defects are very simple. It is again negotiated 2 to 3 years later defect is worth a look at. Increased decreased scope of work this is the changed order mechanism. This is essentially you know employers headache. Manpower accidents this is the responsibility of the project owner on whose site the accident happens contractor TDS of acetone the contractor who was actually deployed them at site . that said I will now quickly move on from all of these things I'll come speech to change in law . and why do I need to talk about change in law and this is where I am going to dovetail tax a little bit . if you take any large project or a large contract they will survive for 2 to 3 years at the minimum 4 years 5 years in some cases 5000 megawatt power plant in Assam or wherever else the fleet time to construct is humongous India is a country we have a system where every finance bill brings out new changes that tax regime . why new why every financial act for that

matter every state budget comes out with new changes so the multitude of taxes that operate in an hour country given the fact that we have contract slipping over multiple financial years change in law becomes very very important otherwise it will become very inequitable . you are all aware of sale of goods act section 64a to be precise it talks about if there is an increase or decrease in tax resume you know it will have to be equally shared if there is an increase it will have to be borne by the employer or the Buyer if there is a decrease in the seller has to bear . now section 64 a sale of goods act 1930 was made at the time when we had to pay taxes in India call sales tax and excise duty point in the context of consumption tax beyond sales tax and excise duty we have moved on to service tax we are now moving into GST . the fact is that often times sale of goods act is not appreciated even by the contractor and even if it is appreciated by the contractors the employers do not want to revisit it excise and sales tax so the question is enlarge projects when you are defining the change in law do you have to deal with service tax or do you need to really deal with GST which is around the corner that opportunity or that issue was dealt with by the Delhi High Court about a year and a half back and The learned judges made a point that the philosophy of the sale of goods act can be proved even if the contract doesn't specifically say that change in service tax will also have to be borne in the manner that excise duty and sales tax has to be borne by virtue of 64a implication it can be read into the contract point meaning there by if a contract does not make a provision for service tax up and down Earth service tax changes are to be covered by change in law by virtue 64a the courts and the judiciary can read 64a so far as this contract so concerned point 1 point 2 64a only deals with increase and decrease of rate of tax in our country the impact of this change in law and happen not merely because of increase or decrease of tax it can happen by way of a particular circular that may be issued . the state government often comes out with circulars that CBEC and the CBDT often comes with a circular that have a binding effect on the revenue department down the chain and that then becomes a .... and so far as assesseees are

concerned so the question is will such issues of circular become a change in law or for that matter a certain Tribunal decision is render that kind of changes the view that was held in in that particular aspect . it gets overwritten subsequently by the High Court + reinstated by the supreme court in the next three years that happens what will be the law for the contract to be governed so far is change in law is concerned . 3rd could be a situation where there is an advance ruling that is rendered 4th we often see that impact in change in law could happen by virtue of change in the valuation rules. today's rate can remain 5 % but 5 % of 30 becomes 5 % on 60 because of the valuation rules are also changed . so the question is that if you make a change in law contract to be read in a manner that only increase in rate of tax is taken care of how do you deal with change the valuation . that is where the contract closest will necessarily have to be wide based it necessarily has to be read in such a manner or drafted in such a manner that you define the word change in law in a manner so that it says not only increase in the rate of tax amendment etc but it also should include any change in the valuation mechanism and if you so Desire you also say any circular any clarification that may be issued as a binding effect can also be changed in law . that is a private condition between two parties however to deal with this changing milieu of the Tribunal order Bing unsettled by the High Court and the High Court order being accepted what changed by the supreme court you may put certainty to say that any declaration of law and you can decide whether it could be Supreme Court or it could be Tribunal but do say which judicial forum shall be the determining factor for exchange in law . so best course of action would be to say that any declaration of law by the apex court is the change in law . so in short the substance what I'm trying to say that is the definition change in law becomes very very critical considering the multiple parameters that goes into governing what is a change between private contract qua the parties that is the second point. third is Atul briefly spoke about I am quite passionate about this particular point. the splitting of contracts . many times one is made to feel that the splitting of contracts is a devious

means to do tax evasion . and I wanted to make this point wherever I go that it is not anything that is below the belt it's not which is something which is done too defraud the revenue . I will tell you the Genesis of why this was happening . if you had to go to 9 STC Supreme Court the Gannon dunkerly first case that was the time when the discussion was whether the state government had an appropriate proprietary to levy sales tax on any movable property India execution of work . the Supreme Court was crapping with the situation that article 360 29a was not in force therefore the power to levy sales tax was only in chatting the concept of Transfer of Property execution of goods was not there and the supreme court held that you do not have the proprietary to levy sales tax on construction contracts . and then the Constitution Amendment Bill came and the constitutional amendment happened . fact of life is at that time the second Gannon dunkerley judgment that happened and read with builders Association . Supreme Court made a very clear finding they said that disturbing section that has been broken by 360 29a does not do anything more than split the contracts . the words to be noticed is that it does nothing more Daniel estate contract into the visible components of supply and service points on the concept of splitting was understood at appreciate it by the supreme court in looking at 360 29a to say that it is a legal fiction which the splitting is happening I would go one step further to say that you do not need the legal fiction to split the contracts the contracts are per se split. nothing wrong in it and that is precisely what the supreme court said the last para the particular judgment to say that after the amendment only composite contracts are now becoming divisible and hence chargeable to sales tax. However nothing would have changed if there were two separate contracts after client services you did not need the constitution amendment to be able to levy sales tax on that in other words without or with 360 29 amendment the proprietary to have levy of sales tax on sale simpliciter and a service centre as the case may be was always there . so sleeping is not an ingenuity to defraud the revenue. Splitting is a commercial reality that is always existed and had that been the case the question is why does one

need to split contracts beyond a certain limit . are country has a very complex tax system hopefully GST will take all of that I'm hoping because unless the constitutional amendment bill doesn't happen we will all be talking into thin air . a project of any dimension and size or shape or whatever else you have will have imports imports of goods imports of Technology Import of services Import of Manpower as well . you will also have procurement of goods in the form of procurement of goods interstate with project is happening as also supply of goods from outside the state you also have local services local design services whatever else you will have civil construction Election Commission testing etc . when you have contracts which search multiple Complex supply chain almost all the indirect taxes offer country gets attracted without any ado . import will have custom duties interstate supplies will have Central sales tax local supplier will have sales tax or VAT services will have service tax there will be an octroi or an entry tax . and when you have such multiple taxes coming in and look at the contractor's plight . he has 2 put a lump sum turnkey fixed price how does he understand what fixed price will be if he doesn't even know on what base the tax will get levied because if you had to put a hundred rupees contract price he has no hope in hell to ascertain on what will custom duty apply on what CST will apply on what service tax will apply . so to be able to derisk his PNL to derisk his business so he doesn't go into the red he will want to have certainty of tax and that is to my mind the only Canon of tax is relevant in a country such as house where like English weather the tax laws change and how do you do that the only way you will be able to do that is by having ascertainable basis to say on what this is the custom duty applying what is the basis on which interstate sale will apply what is the basis on which service tax will apply . now look at the problem the treatment of imported goods treatment of imported services is different because at times on imports are exempt from custom duties subject to certain conditions . at times there is a exemption on the hardware part there is no exemption on the software part authoring tools importation of personnel could be

liable to research and development cess . today for you then say ok fine of the dollar payment that the project has to make make out on rupee payment have to go out to the domestic company who is importing it there will be a definition of what is imported supply of goods and what is imported supply of services such that from a custom value rules the services or not seen to be a condition of sale because the moment so services become a condition of sale section 14 of the customs act get attracted and they get lumped . therefore the contract will be so structured to ensure that whatever duty exemptions to the Government of India Ministry of Finance grants insofar as supply is concerned those are able to be claimed because at the end of the day any exemption that is available too goods and services effectively reduces the capex cost of the project effectively producer tariff the devil charge from the consumers . IT project is loaded by cost and tax that is unnecessary it is the common man that ends up paying more on the assumption that everything is tax pass-through so therefore they will make sure that the supply of goods and the supply of services split in such a manner so that there is a complete reduction Ore exemption that available easily available are claimed now turning back to the sales tax path much as we do it has been 1982 when the Constitution Amendment happened or 86 when the constitutional amendment happened Supreme Court has declared not once not twice or thrice more interstate supplies cannot be subject to the regime of sales tax by the state government because article 286 comes into force no state has the power to levy tax on interstate supplies yet today day n day after every state in the country the sales tax authorities are going hammer and tongs on interstate supplies on the same good old reason that the goods are used in my state I have the jurisdiction to levy sales tax on these supplies notwithstanding the Goods may have moved interstate . what really happens 5000 crore project interstate supply is being 1000 crores for example 14 and a half percent sales tax on those supplies the project is doomed . writ petitions after writ petitions will get filed in the High Court and often times at is so I noticed start the high courts are not applying using their jurisdiction . because alternate remedy comes

in. no you go back you go back to assessing authority these are questions of fact . but the fact is that the Gannon dunkerly decision itself was based on the sales tax return the challenge was on the basis of a sales tax return there was no assessment order there was no High Court order that we had gone to the Supreme Court on so jurisdiction when abused by the lower tax authorities is a reason for worry and which is why they split this contracts to say that these are the interstate supply supply that has happened from the state of Karnataka to the state of Maharashtra a project is coming into force pursuant to the condition of sale the good stuff moved interstate the state of Maharashtra has no business to levy tax on it . and there is another aspect of that section 6 (2) of the central sales tax very relevant it says if the goods are sold in transit there will be an exemption from sales tax super clear project owner will impose or issue the contractor in LNT LNT for example will go to let's see another vendor who is an OEM like BHEL. goods will move straight from BHEL factory to the site there are 2 sales involved from BHEL to LNT LNT to the project owner . the first sale is liable to 2 % CST the last sale is liable to Nil rate of CST because of Section 6(2). if you deny that exemption is the tax authorities deny this last exemption saying saying no this is not exempt the 6( 2) transaction this is liable to local Sales Tax under I am 14 and a half percent has to be imposed what happens . the project goes for a toss so therefore that's another reason why it is split to make sure the supply remains supply much as they may be used or provided in the connection of rendering of services the independent nature of the supplies are not taken away. and this has to be taxed as if they are chattel qua chattel . and the same thing happened with services as well so in short all I say therefore is divisibility of a contract is a fact of life that has to be appreciated because that is the contractual prerogative of the parties . I can understand where the divisibility is a farce it is a charade where the parties at the beginning wanted to have a single contract and there after they split it up that is a charade but from the very beginning the contract itself says I shall enter into 3 contracts with you that is a private prerogative . folding up of the contract just

because there is an allegation that there is a devious defrauding of the revenue does not hold good because there is actually no defrauding. interstate supplies cannot ever be taxed imports cannot ever be taxed services can be text only supplies cannot be taxed in the Garb of service tax . so in that case the Canon of certainty is maintained . Canon of certainty is maintained .that is the essence of contract. Absolutely. Canon of certainty will be there in the contract because the parties will very clearly mention that the deliverables for contract A is X the deliverable for contract B is Z and so on so forth so the consensus ad idem what is being purchased and what is being sold will be very clearly estopped in the contract point and I will go one step further assuming that I did not split it up assuming that I had a single contract the exception being under the single contract I had a separate element for design engineering elements of supply and the fifth element event for construction I can still come to the same tax efficiencies because if it is a design engineering there will be a dollar component and rupee component signifying the dollar component is what is imported and rupee component is what has been procured domestically assuming that line is there to the extent there is a domestic supply I can make a mention of that and clearly custom duty cannot be levied on design engineering that is done within the country it can be levied on imported design .so even with a single contract you have.....,, yes but what basis do they that is the problem that happens and I am talking about a situation where there is a lump sum single price when this splits are not available the splits are a creation by the contracting parties by either having separate purchase separate contracts or within the same document they can have separate line items . but what happens in a situation where you have 100 Rupees as the total contract . how do you therefore justify to the customs authorities that the value of the goods imported is 10 rupees because there is no basis available because in our country unlike what you have in Europe and other international countries is the first sale as the basis of import for levy of custom duties we have a last sale for import which means if the OEM outside the country has sold to X and X has sold to

Y in India the price will be between x and y as the basis for custom duty + X and Y is camouflage in those 100 rupees you have no basis between X and Y the person who is outside but that is not the basis for the custom levy . so those are the practical difficulties that happens and it is not and never amine to defraud the revenue by any means .your view is this division of contract is essentially a commercial viability . commercial viability. and has nothing to do with the apprehension of tax evasions. absolutely not because that said for a commoner for a commercial person he wants certainty of tax . the canons of certainty is what is driving him because if you say it is a tax inclusive contract and I have no basis to compute my taxes I will load my contract with unnecessary taxes and I could become unviable somebody could take a very aggressive bid and start bleeding subsequently but he will win the bid..... that is what I am saying because of revenue suspicion that runs writ large on such projects is de hors of the commercial reality of what is and interstate supply what is the essence of the contract and why the contract has been commissioned and supplied so far is this project is concerned that is where the difficulty arises everyday there are you know abysmally large amount of tax demands that are created which they don't want to appreciate because I realized that today if I have a pre deposit of 25 % my revenues are taken care of go to Supreme Court and figure it out . just one question yes what is it you want us to get at with this presentation point on the judicial side . on the judicial side I think tooth points becomes very relevant one is the manner in which state governments proceed to deal with such contracts by alleging a defrauding the revenue by by attaching properties is something that needs to be looked at very strictly in the sense that if you do not have the jurisdiction to impose the tax on the certain supply which is interstate in nature and you want to proceed by attachment that becomes that impairs my legal right and it becomes a subject of 226 . there is razorthin difference between tax avoidance and tax evasion . see how you are excessively taxed if you don't divide the contracts . to take an example let us take an example I'll make it very simple I purchase something in Maharashtra and I have a

project let's say in the state of Madhya Pradesh I bring the goods from Maharashtra and I actually do work on that goods in the state of Maharashtra in the state of Madhya Pradesh therefore those goods are subject to local VAT no doubt because it is not possible to the contract actually move from Maharashtra to Madhya Pradesh because the owner never said you go to Maharashtra you go to any other state procure the goods the owner only said I need 10 fans . and therefore it was my own volition that I went to Maharashtra and try to colour it as n and interstate supply those are interstate situations but when the project owner says I need this turbine disturbance have to be manufactured buy approved vendors X Y Z sitting in Karnataka West Bengal xyz before the goods are manufactured the design will be made available to me and I shall approve either by looking at it are going to the site the manufacturing site and then or by sending my agent only then the manufacturing will commence only then the product will get delivered the goods have got appropriated to the contract the moment the designs are finalized by the employer as the goods take birth the goods are appropriated to the contract and if that is the case they have got dovetailed to the contract which means the movement from Maharashtra from Bengal to Madhya Pradesh for the purpose of installation is an interstate supply . you are talking about a text dispute but your subject is on contract issue in a contract issue why do you bring your tax dispute . because 3 places it takes place first is when you are bidding for a contract you will have to make certain tax assumption to come to the price hundred you will have to come to our tax assumption of 90 + 10 as my tax or 90 + 5 as my tax. the inability to assume the taxes in my bid is a function of how the tenders read . if the contracts what to be split up if the tender envisaged that it will be split my ability to precisely assume what the taxes in my contract becomes easier. 1 point to is computation of the changed alot tomorrow . as you for a moment that I have given a contract and I have said 10 rupees taxes without saying what taxes and what rate tomorrow excise duty actually changes from 10 % 15 % when I go to the owner and say give me the 5 percent as differential owner first thing he will ask is

how much did you assume as your excise duty show me your bid I will say no I did not know how much was excise duty only get 15 rupees as lump sum total taxes so therefore how does the contractors or the owner come to a conclusion that is 15 rupees this five rupees increase of excise duty has to be computed on the basis of 7 rupees of taxes or 9 Rupees of base tax . that is the second place it becomes relevant 3rd become the relevant from the point of view of withholding tax state government will want the employer to with hold tax at source works contract tax sales tax at source . the employer being an agent of the government the custodian of the government will want to take a conservative view because if he doesn't withholding tax at source as appropriate obviously he will be subject to garnishee notices . the question then is that the employer how does he withhold tax only under under supply part and not under the service part and any withholding that happens which is not necessary for the project because it is not subject to tax then again will become ultra virus 265 . so those are the reasons why distance become very relevant and that is why I am trying to explain that a construction contract by its very nature is red lead with tax and this riddle can be demystified by making sure that the certainty of tax is appreciated by everybody be it the bar be it the bench be it the contractor be it the supplier and whatever else. therefore what you are saying is don't drive the assessee to alternate remedy entertain the writ petition . that was a statement made on the sly . I am happy my lord appreciated it ....., some cases wherever it is happening it is certainly good but where ever it is not happening people find it very difficult because the prolong litigation before it reaches the highest court becomes very difficult . thank you sir . we will go for a tea break now and we will come back after 15 minutes .

## SESSION 14

We can start the session. We have speaker all of you know Mr. R Venkataramani senior advocate supreme court of India and member law commission of India also person behind this commercial courts bill 2014. We have circulated copies of the bill yesterday to all of you so sir it is up to you now. And of course hon'ble justice Sanjay Kishan Kaul and Hon'ble Justice Kurian Joseph will be moderating and taking questions for this session. Thanks.

I am only partly responsible in the emergence of the commercial courts bill but that does not mean that everything is wrong with that bill. It's such a coincidence that with only 2 more days to go with the members of the law commission to come to an end but I'm here to discuss something which I consider. Autumn is coming to an end 31st of August. So, this bill I consider an out of the box thinking to put it like that. The small piece of paper which is being circulated yesterday

I thought that I should begin with Roscoe Pound. As a quote I use it to press home a point when you find that there is no final solution to hard case and to persuade a judge locate a broader contour of a dispute and to judge beyond what is normally adjudication process of resolving disputes we go by repetition precedent bound system which there is repetition element involved they do it sometimes mechanically but that does not mean that judges creativity is awesome ruled out in a precedent pound system but the generated potential of common law which is so much return about is all about stories about how judicial creativity brings about fundamental changes in perspective principles guided principally by contemporary values. What Roscoe Pound talks about is the distinction between the handmade vs. machine made product which is a very important and subtle issue philosophical but from a justice point of view which means in a machine made product the rules for the players rather limited but in a handmade product your mind is able to work with a little

more ingenuity and the freedom as is possible sweet sales in cases of standards when you ground has to be broken the handmade products is much more desirable why do I want to talk about in the context when we're discussing commercial Court bill . the two previous speakers I think as a way of concluding note on the wide range of subject you have been listening to in the past 3-4 days tell us that unlike 200 years ago the contract law history today without reference or impacts to several social circles and public impact it is no longer that Virtually every contract has a social and public dimension an impact . and they are layers and layers of dimensions contracts of contemporary contracts and each one of these layers have again there's different dimensions including tax dimensions Social Justice dimension Human Rights dimension and so on and so forth . why do you want to refer to a Social Justice and Human Rights dimension there is a wide range of emerging literature today indifferent parts of the world which talked about intellectual property and human rights you want to have a Trademark which is registered . which has an impact on public policy . opposed to public policy and morality opposed to freedom speech and expression then Court well today look at them not merely from a linear point of view but also as a right and duty Where are multilevel multi dimensional approaches because of a society is evolving and there are different demands and which now became rights interest concern and so forth you look at Salmond on jurisprudence talked about rights vs. remedies rights and duties but today if you have to extrapolate them you are not nearly 1 sector what's another sector and who's well being well being and welfare depends ... as long as we're open society free market societies depends on how the State Insurance facilitation off regulate private transactions and to promote public welfare the whole approach to contractual is not nearly .I remember an interesting title of a book..... talking about what happen in the early course early 20th century as to how the tort law in England and America was used the context of contracts to see you for any amount of damages so all these developments take us to a very important dimension and perspective which is probably to be imbued. mainly

that we no longer look at legislation which try to promote these objectives from this perspective available where we have criticism of any other legislation . what comes to mind immediately is the different kinds of experiments made in the past let's say 30 to 40 years. parliament and state government have been enacting large number of legislation on issues which are pressing concern be it the family law question or it could be a consumer question so we go on on enacting

Different sets of legislations and identifying issues which can be adjudicated by these very specialized bodies and tribunals. so and in the process find out welfare can be gleaned out of the working of these laws . as compared to what could have happened to the existing Civil Court system the whole issue of Tribunalisation special courts being set up . engaging attention not only Indian parliamentarians but throughout world post world war and Human Rights declaration and thereafter variety of international declarations conventions and covenants and human rights and particularly economic social and political rights becoming obligations that has to be discharged by the government the Tribunal and specialised Court are becoming the order of the day. if you look at what England had done it is a very rewarding experience there are good deal of Criticism about what England had done and what IT failed to do . there are broader lessons to be looked at and .. with your experiences the reason why I thought to have a global look at this is legislation such as these they fall in the long line and Shadow off undertaking experiments thought process across the globe having said that there is a criticism again which is very valid about look at the way the new legislation I setup new specialised bodies and tribunals have this really contributed to the quality administration of Justice ? have they really brought down the burden of cases in courts and if they have really brought access to just principle more closer different sections of community 3 important questions which are relevant to look at in every legislation . answers would be varied . look at family Court perhaps there is a valid criticism . that the family law has failed to work . to any extent it is not really been able to ... principle

of speedy justice .  
every piece legislation tries to convey a vision. but while we have the vision impact while trying to actually put it in practice you find the legislature looks for model compatible model . this is how legislative drafting is going on different parts of the world excluding India when you look at different models there is bound to be a good deal of error. Enforce upon it and then try to fuse the vision to it which you want to achieve. I think there is bound to be invariably a kind of failure. That's what happened in the case of a family courts issue. The design and structure of a law is something very important. I'm not talking about the problems of language which will always remain. Interpretation of legislations and words how do you really advance the meaning of a legislation is a problem which will remain with us as long as language remains what it is. Language and communication apart how best a drafter of a legislation is able to put an idea into the most perfect form. These are problems that will continue to be with us for long. But then there is always hope that we will try to eliminate those little errors and deficiencies in the course of drafting. When you try to borrow a model what appeals to us is what rights are we creating. And what new remedies are being created. How do you ensure that the rights and remedies have a certain consonance

The question of definitions which is the bedrock of a law because it will build what exactly is the jurisprudence of a court or a tribunal. On that you build the nature of the right or a scope for judicial intervention . so the definition part is a major stumbling block towards achieving precision. A good deal of time is spent on trying to understand what is exactly could be commercial dispute. After studying this bill for sharing my thoughts with you. I went on the internet and tried to understand why there is an interest in commercial disputes way back in 1990 Iraq had a commercial disputes court. I have given a book called commercial laws of east Asia which I hope will be circulated it is found that the legislation you have is part of in some form or the other .

there is some sort of a understanding of what would constitute a commercial dispute in contemporary times particularly in context of a free market economy. Given the kind of court structure and judicial structure in our country the question arises would it be desirable. As to continue to administer justice. Do we continue with it or depart from it on certain principles to facilitate some goal. So the quality of justice is going to be the centre stage for all these disputes. Is it not therefore desirable to look at the administration of justice system from a different all together. That is one important question which drove the thought process behind the drafting of this bill.

The bill has been in existence since 2009. It has gone before the rajya sabha and lok sabha on earlier occasion. Lots of comments and views were solicited and were made. In the current edition of the bill some of the criticism has been looked at dealt with and some answers have been given. The bill broadly though I would have like to have a clause by clause called first reading second reading in the parliament as they call it the reading of the bill but I think that will take a good deal of time

Like any piece of legislation the bill can be divided into what is the nature of the jurisdiction which is sought to be taken away by existing civil courts and what kind of alternate system is sought to be put in place and what kind of a procedure which will the alternate courts use for resolving the disputes. Whether there is an alternate system of procedure. Or a reasonably good enough. Or are they merely a restatement of the existing procedure fallen short of the ideals which we see in the court. These are 3 important aspects that probably we can look into.

If you look at the schedule before I come into the jurisdiction part what is really bothering me is our code of procedure is a very good code which has withstood the test of time but on the premise of ensuring that fairness and natural justice is not infringed. We have built a large edifice which is now open to abuse by litigants and the legal fraternity. So you find a provision which is capable of being used by a person for gain or for creating a certain amount of uncertainty in the dispute resolution

process why not as a paid lawyer why not engage in to that. And that has been the bane the abuse of the CPC. Particularly when high stakes monetary issues are involved. So does it not warrant the re look at the CPC and give it a complete relook . if you look at the Portuguese Civil Code French Civil Code by and large they are very exhausted codes of civil procedure in certain states in USA including the US procedural Court which are rather called slew media content the aspects of procedure come to mind a litigant come to the court and establish by way of proved pleadings and evidence how does the established case and the reason obviously 4 both parties is how is the court knows that he has the opportunity . beyond this 2 aspect I don't find any other reason why the civil procedure is called upon to discharge . today unlike days when parties and their private transaction the transaction opportunity personal law matters the contract law matters the parties were relying upon what was called the oral aspect communication that's the reason the hole contract law revolt UPTU when contract is complete so today the oral aspect of communication of contractual process is driven to the background much of the transaction is dependent upon documentary transactions today Communications which are essentially documented the need to supplement the contents of a document by way of oral evidence is by and large is coming to an end and it must come to an end except where does need for a certain amount of explanations for instance of the Contract Act they used to say that if preceding transaction leading to the conclusion of contract it will be relevant for the purposes of understanding detention other parties you know law no doubt about that . transactions conduct and activities between parties today not only in the realm of contract but Generally to large extent is driven by Science and Technology so should I not look at the principles of procedure to completely be in tune with Science and technology of methods of should should I hang onto certain systems of the past therefore keep that in mind The bill sought to look at the code of civil procedure and said let us give you a different look . I am certainly not compatible with the way the schedule has been given its present form probably one could have wished that

along with the commercial codes a separate code a procedural code should have been independently enacted would have brought about a lot of clarity the schedule to the act now so and so auto so and so section will stand amended and will read like this there is bound to be some element of interpretation injury to the lawyers relative and the judge it is likely to happen but it is what I call in articulate aspects of the schedule . but that is a different issue all together then comes a question of what exactly the commercial codes would like to do . this commercial Court it's the same is brought before lets a Civil Court in the absence again the driving framework the Civil Court would I found them extremely complex difficult just say to previous speakers tried to demonstrate to you much of contracts in contemporary Times what would be like .... insurance contract the difficulties involved intellectual transactions that is good deal of Science and Technology involved to understand how a technology expansion of Technology is the basis of the phantoms of the contract so it requires orientation of our thinking understand contract law. after all ultimately in every contract public or private the different layers or not what is important is risk allocation window application of obligations so that .. nose his obligations every contract in party like for instance I referred to everyone in 1950 there was The Economist called ..... the theory of the firm and he came about with the transaction cost principle how parties is like to freely negotiate in the course of the framing of contract and transact keeping in mind economic principles so the transaction cost is spread evenly on the authorities. he gives an example of a railway track under his truck running you know ... Railway track getting catching fire due to Railway running across the track how would a farmer and Railways owner engage inner negotiation to have the best outcome for both of them so this is economic analysis of law . this economic analysis now some very ambitious thinkers both in USA and Europe trying to say that economic analysis of law would probably be very important tool in trying to understand how we can not only ensure the contracting parties have not committed an error unless they enter into contract also ensure maximization of

cost benefit for both of them . the economic analysis enters into this dimension and says its lawyers judges and judicial administration or even to grab some kind of comprehension . then perhaps we would have taken the traditional way of looking from nearly two contracting parties trying to out with the other forgetting for a minute the outcome in general social public outcome of a contract so there are all these dimensions that are involved in r contemporary contractual and other trade and Commerce dimensions I cannot consider any interpretation even in domestic contract or public private partnership where you don't have dimensions of export and import export and import policy is revisited every year the trade policies revisited every year of course the new tax dimensions the emerging service law dimensions . that is a different issue all together what I mean to say is the the whole identification of a commercial dispute takes away from a certain understanding dispute generally in trade and Commerce and give them a certain orientation . and one to give the certain orientation of perspective approach to resolution of those issues should also I am slightly over a period of time undergo change and that's probably what this bill is probably intending to achieve I read a small interview in Bombay on two leading law firms Mr. rp Chinai leading advocate in Bombay on what exactly is the use of a new bill like this of course I want it to be circulated it looks at how locate new experiments in legislations one of the important things is are we going to add to the burden of the existing Court how do you going to looking of the question of burden sharing will the bill address that question are you creating new Court there for instance new work will accumulate and those will get repeated that's the kind of discussion which took place television interview important statistics question slow by itself does not interested question the lawyer wants to ensure the to identify commercial disputes give them the best certain different orientation and prospective and ensure they transferred in interest certain set of Court and you are expected to be probably more acquainted with the commercial and complex nature will continue over time we will be able to resolve them from multi level understanding . therefore I understand

the bill like this cannot give a call like this to the government how best you're going to in force this kind of a legislation . the number of quotes which are required the expertise required in selecting judges and appointing and the infrastructure required for instance the law commission is also the liberating on the question of additional colt which are required throughout the country it took almost a year for to collect information from where is high courts and to understand whether we can put it in a rational and scientific principle as to whether the court management additional course requirement can be looked at from the basis of a formula it was a very challenging task the court has given a report to the supreme court the Commission report the supreme court and there's some kind of a formula has been involved . the formula what to put in place that instead of the added .. government takes inserting up Court whenever and wherever they want not merely electoral promises or vision statement think like that but more honour Commission to committee and constitutional obligation so if a formula is available to work out the additional requirement why can't we envisaged . procedure to find out whether the entirely new regime why can't you find out is there a racial scientific principle setting up staffing provision of infrastructure of such courts cannot be made out at all I think it is possible with a little bit of dedicated concerned mines and investment of time and energy last one aspect I want to talk about this deal is again coming back to the procedure . this bill should be circulated a little more extensively I would Desire that every high court at the judicial Academy level call for more dialogue on how the procedural part of it can we look at little more differently there are some small little cats each I feel I find the schedule and we can probably discuss look at them . one last comment I would like to make is I think there is a need for different litigation culture to evolve in our country I'm not talking about R mechanisms they are an indispensable part of the dispensation of Justice . but now they are used in isolation. they are not in interconnected in law is got to play a pivotal role evolving a new litigation culture in our country we will have to look at the procedural codes also

from an entirely different perspective and its only if a kind initiation is made possible this kind of experimental legislation I think the relevant new litigation culture would become a little more admissible today I don't find the promise of that even the way senior lawyers or even well established law firms and given the role that bar council plays in our country in Legal education and formulation of rules etc . I think we need to break new ground there is lot of path breaking ideas and thoughts need to emerge so I think the laws course can play an important role in this area the expertise development the litigation culture development and the new ways of making the role of Science and Technology in commercial disputes development all this I think and b reasonably and to a profitable extent can be matters of sharing with some other leading Law schools where judicial Academy San Law schools can in collaboration play an important role one can probably sit and discuss . I want to share this very broad insights and I know this is this bill as it stands today would probably receive lot off considerable improvement. in course of time when it goes to the parliament . but what I want to emphasize is latest not look at the floor as merely another contractual trade related justice resolution dimension I think we might go little deeper understand how the resolution of these disputes share of cost understanding would be able to generate a good deal of social public and individual value creation. and wealth maximization that is not perceived at all . very very clearly and while individual parties tour contract will be talking individual private gain what I see is where is the sunshine dimension operates that's why I referred to the human rights dimension the Social Justice dimension etc which are part of contemporary trade and commerce regardless of whatever has happened in WTO trips you know all the problems and differences between developed and developing countries even after the Doha declaration they still not able to reach agreement on matters relating to agriculture patent medicines and things like that but on the contrary different National level Courts try to look at this the Novartis case example refer to no part of trade and Commerce and business today can see that we are free from wealth

maximization Social justice and human rights they are very intrinsically connected I think that's the way we can possibly make a difference I would like to conclude that

Sir may I make a suggestion. this bill has come about two addresses certain issues you were saying this issue according to me emanate out of the established civil courts failure to deliver justice within time frame to my mind that is my understanding of the situation is this that the right to hearing attends the maximum principles of natural justice statutory right of hearing are being misused at different levels to prolong the litigation why doesn't the bill address this issue by putting in a section or a clause saying that the right of hearing comes with the corresponding duty to avail of that hearing and you put in a time frame . let me give you an example I have to file written statements I have been sitting on the bench for more than 1 and half years. in the Calcutta High Court on the original side 1992 suit the defendant comes and says that he has the written statement please extend the time written statement I disallow the pin code is ready to love but we did this with the judicial order but can there be parameters where statutorily embedded you get a right to hearing out out for both the parties and and these are the parameters that you get no more . the schedule is... those questions address to what the schedules are what should I say I would prefer that is my personal view that the section may be added to the on this aspect where that clarity is given that you have a duty to avail of the right of hearing and it's not the duty of the forced to give you the right of hearing ad infinitum or so . I disagree with that question .... infact I was looking at order 21 the villain of the piece. section 47 . section 47 itself was enacted at a point of time where instead of driving people to another round of litigation let us resolve it at the stage but once you've let the tendency off a person to to use up tuition of Justice both as a litigant and the lawyer how much off I dig I can have at the well how much deep can I go I tend to use it that way therefore we try to Limit on Section 47 increase at order 21 I recently uploaded the matter Kerala High Court where is decree could not

be executed because the person the decree holder was in Tirupati then went over to Ernakulam and he is beyond Ernakulam jurisdiction and how do you execute the decree . the question about 47 k then the suggestion was the high court can transfer and execute the decree objections are raised High Court does not have jurisdiction to transfer the decree and execute of so what I mean to say that the wealth of .... available to exploit all this but the point is well taken . that's why I also think it is very important instead of talking about schedule by some parts is augmented in installments a separate code which is applicable to the commercial Court would increase clarity between them it would have been better ..... the questionnaire for this how do you really take care of that that is what the object of this entire .. ..... the provision of section 14 that is proposed here where appeal is to be disposed off within 6 months you have one division bench which is hearing appeals from criminal appeal drt act Cooperative Society Act and other so within 6 months you will find the cases are not listed for admission. right now the position is the appeals are not listed for admission for 6 months to 1 year and with this kind of profession that is not any adequate number of benches judges are not aware about I don't know how the purpose of this act .. its purpose is not . no doubt . this will call upon greater amount of dedication on part of the government to invest more in terms of court then there is a good answer available but you are going to stay put with the Status quo as it exists today with all kind of Ad-Hoc approaches creation of Courts increasing number of judges infrastructure justice administration the learned judges being here justice Kurian Joseph knows . what I want to say is for a long long time we have not really looked at administration of Justice as a very important integral investment as a public welfare so that's why we're talking about Judiciary having a say in allocation of ... and all that UK is trying to experiment with it so there is some kind of a financial freedom available to you so there for that is important that is not done certainly this will be another kind of a paper experiment I certainly agree with you . as a point of order this could be a ... I am just thinking loudly where any statute which fixes the period at 6

months 3 months 90 days take for example first consumer thing first consumer take the Negotiable Instruments Act 138 then come to family courts then comes the jurisdiction ..... any statute for that matter what is the main reason main reason is they were all put into existing Orkut did not create a new basket for that that is one reason according to me so the reason is actually . in Malayalam we have a beautiful saying a cow which doesn't deliver baby will be taken to the shed and then ... experiment it couldn't conceive. like that they don't provide any new infrastructure all new setup all together the existing setup is renamed or re designated in such a way let me also put in human right angle . what about those poor people who doesn't have a commercial look who doesn't have any other designation or any other what you call connection to the new statute that are coming . just waiting in the corridors for years and years brother rightly said now who takes care of his right and we are just thinking of the commercial thing off infrastructure or in terms of development whose development this is something I thought but as I said point of order that we will have justice Sanjay Kaul very apt person to speak on this commercial matters both in terms of his experience and in terms of is exposure as well so we will have the benefit of listening to brother and then as things go we will have this discussion and as things go now we have this feedback session will go on till lunch. so we will have the advantage of listening to brother and then after we will have a discussion . I feel we should begin at a positive note so let me see the first aspect positive aspect this legislation is that from a system of Tribunalisation the endeavour is being made to create specialise quotes in the given system Tribunal decision has its own problems by and large it has not been successful except I think tax area possibly and of course there are various reasons for it and I I am hoping if this comes into being those reasons to not permeate here I was mentioning yesterday because it was openly said that I think one of the things which failed the Tribunalisation is that it should not become haven for retired bureaucrats Orbit respect judges who have no specialised knowledge the subject in question that is why

I feel it is one of the reasons why a lot of specialised tribunals did not seed this is certainly an endeavour to create specialised area in the existing system best as I said one of the most important aspects will be will there be people fully familiar with the subject matter to be able to deal with it in the initial period of time summer training but when we borrow from the Western system from there the same specialised person would go on for us together doing that particular subject so in the existing structure there is a provision for a scenario where that person would probably we only doing those category of cases this is one concern I have as to who is going to handle this . secondly as it was being put we are trying to find a methodology because we say civil procedure code has not succeeded we have amendment subsequent amendments various Endeavours I do believe civil procedure code did not fail us we failed the Civil Procedure Code because it provides various eventualities various situations we don't follow it and then we say its failure . let us look at an example given of filing a written statement now it began by saying 30 days with extension then when we our self held no no exception in certain situations it can be extended and that was the end of the provision to my mind because if we say the time period is not triggered of because particular reason suppose there is lack of knowledge or lack of proper service he would say that the time period should not be key Trigger off but time period having triggered off you make it an endless exercise this provision in which brother put an example in Calcutta in Chennai I have seen suits lying no written statement filed for 3 years 4 years going on at an interlocutory stage who is bothered to file first statement you dont segregate the main case from the interlocutory saying ok if the interlocutory stage is going on let us have the main case and see the end of it the focus is only the interlocutory aspect of the matter where trials are taking place . Madras as a system of recording evidence before the master after court I am finished with the situation of more than 300 cases waiting for final hearing no judge now who is going to hear those cases 300 cases post evidence ripe for hearing no hearing taking place . why is it CPC has various solutions is that

let's take an example of something like statement of issues interrogatories I feel they are invariably followed in breach had the benefit of sitting on the original side almost 2 years in Delhi then doing appeals now doing appeals there are some very patent provisions which are not utilised I can only illustrate with some examples I think this in the context of ... summary proceedings ,..... devotion in frenchman case that came before me and the normal system commissioner was appointed he sees the goods they are identical cosmetics which were there. Trademarks were identical. a very small operator somewhere in the what is traditionally called Chandni Chowk area he was operating so the lawyer appeared it said I want to file written statement I said what return statement I want to file here your product has been seized they are identical what different would you have so I just asked is your client there he said yes yes I would like to record a statement before the court given the issue find. he came into the witness box I just asked him in the local language from where did you find out this name the name of the applicant he said I read it and I magazine so I took from the magazine the advertisement was there the magazine so I picked it up . I said are you aware that you are not entitled to do so in law he said do you think I would have done it if I knew this was not permissible in law so I said will you do it again is it now I found out why will I do it again . the suit was ended I told the other side that look he is a small operator the client profile is very different he could not have caused. Yes you have suffered some litigation he will pay you to a limited extent.he is not one of those persons who is able to give the litigation costs maybe he will compensate your court fees. The suit was an end. The lawyer would have filed a written statement he would have raised 101 objections then it would have gone to issues it would have gone to trial and then it would go onSimilarly we keep talking about R alternative method of dispute resolution mediation it has been traditionally found that one of the best time is when you record a statement of issues you call the party and at the stage of issues you cut short the issues so that you don't go into a protracted trial and you fix a date of trial that's what case management is followed everywhere else you fix

the dates of trial and say look you have a window here of 2 months in these two months I'll send you to mediation if you are able to settle it well and good now the reason is very simple because that is the stage after pleadings are complete the parties way what evidence they have in their position to produce in the court they will know whether they will be able to establish their case or not so the chances of success in a mediation process is higher what I'm saying is it is a failure to operate the Civil Procedure Code sometimes with respect I say the commercial principle which should govern the contracts as against principles in 226 in social norms of hours where issue arises present status of affected and other affected there a different approach different judicial approach is required but commercial approach requires that where there are written contracts people are well versed in commerce that should be resolved quickly and there should not be premium to litigate I feel the fundamental problem which is we face and I don't know how the bill will address is that you are why do people say that that litigate with the man. The man who pays what is due to him due from him is worse off than the person who litigates the person who litigates ultimately will say weigh this out weigh that out. do something else and in the bargain by litigating in the court his expenses on litigation is much less than what he is able to save. so unless you make it non lucrative to litigate in the court . 4 people in default this problem will remain if we look at the some of the provisions of the bill one of my main concerns is all these models which we have taken as Mr Venkat Ramani said you too have a great problem of Legislative drafting today . we possibly don't have the experts that is why every legislation very few months you keep changing it while that experiment should be done in the beginning yesterday we were discussing this and we said look you have the Contract Act 1872 it has withstood the time off hundred fifty years almost because mind went into it and those very provisions are valid even today its not that change in Times have taken care amendments are amenable so now when we look too this bill I wonder to myself have we spread the net too wide in terms of category of cases example how

many category of cases and this is as we were discussing yesterday for example in some way the bill was sent to I know lawyers and judges in the Madras High Court and we did informally consult ourselves in the Academy you will see what is the issue what happens is that the person concerned which shipping disputes he says oh this must be there the IPR will say this must be there somebody else will say this is left out . what is happened in the amalgamation I feel all over the country inputs are coming practically everything has been put into it question is what is not commercial dispute now it is not what is commercial dispute but what is not commercial dispute after this bill comes in . if it is a very large % of cases do we begin from a clean slate and she looked the pending cases free coupon in the existing system and the new cases will come into the system then at least you're not standing with starting with a backlog you are starting with 0 if you transfer all these cases which appending in different fields and transfer them to this system then how are we going to cope up with it is the legislative impact study to how much litigation would go to this if you broad lisi over the country High Court suicide we are I think moralist been able to manage the current litigation file in some way give and take a little percentage our real concern is the huge backlog we have in every system and the inability to tackle the current cases plus the backlog if you would today magic would occur and say look all past cases are gone I think there is a solution possible in the country . that appears to be the only solution . so with other wise we get completely over odd with the burden of past and we say oh how do we decide the current case because that is the case which is pending for 20 years that person must get priority if you give priority to that case we will end up in a situation where the current cases are worried that they should not end up again becoming a 20 year old case down the line so we're trying to balance trying to see that the current cases do not acquire the status of what the past cases are and how to deal with the past cases simultaneously now if all the commercial categories cases as I see it all the amendments which you propose and appreciating the requirement I do believe in some perspective this commercial court bill can do good

on a ground reality however how are we going to work it out where will all this infrastructure come from which is necessary study coming from to decide if x number of cases are pending X number of cases are filed we do not create a parallel body which is the court where from one judge it has gone to another judge only to create and arrear. this is really an aspect which is if I may say is troubling me . only as a as something you were saying about the larger issue of Legal education and other things . See as period of time I have seen to concentrate on the Prime Law schools and take input from there the fact is we don't have teachers to teach . in trichy we have . 90 percent of the lawyers come from the non Prime . and the result is even these some of the Prime Law schools like trichy which has been set up at the expense of hundred crores by the state government we have no teachers for the last 1 year I am trying to somehow get teachers of vice chancellors who can do something with it now you look at a large section of lawyers were coming in . is it I put a very large question are we creating too many lawyers I do believe yes . the country does not need so many lawyers and then they come with expectation and their expectations are not met and the problem arises that compromises are made and plus they have not been given the basic training hours . just to we do not miss the. we have that Institute of Chartered Accountants also they do not pass out they have a restricted number they will see to that this many Chartered Accountants do not come to the course every year so I think I agree with brother kaul instead despite article 19 it is high time that in the country we have some sort of regulation assessment . in fact I was going to say the same very thing chartered accountant profession is one profession which balance is the need see how do we handle case management we say in case management so many cases come so many going out automatic or not similarly how many lawyers you need to create if you are creating such a large section of lawyers with no education . today it is a fact the terror Law schools where you can get a degree sitting at home you need not even attend you know it's not even taken examination they all operate within the proximity of Chennai also . you are not sitting

at home also sitting elsewhere you are getting the degree . we had situations the staff of the High Court completing law degrees outside the state . and there after getting promotions and it came to my knowledge and I didn't feel like now taking off disciplinary action because over a period of time it has been given a go by but the fact is how how can you while working in the High Court get a lot agree from a full time course somewhere else this is only an exception there are no schools on just outside Tamilnadu boundaries who have a shop kind of issue outside the High Court small shop where you can enroll you pay x amount of money enroll somebody will take your examination someone will have your attendance and at the end of 3 years you will get a law degree so the man coming in is Holi ill-equipped to do anything forget handling commercial matters and then all the are involved in is extra legal methods so I think one of the fundamental problem is also as he said the role of BAR council you're talking about the role of senior counsel with all due respect there are members of the bar council who need disciplining and they are in charge of discipline it's a very very it troubles my mind that where are we taking the system ultimate Lee how many lawyers are we creating where does all this going to arise and all that is happening is the worrying aspect of civil litigation not really keeping pace with the population and still we are faced with the situation we are today says the growth of criminal litigation because the civil litigation is given the colour of a criminal litigation stearinerie devil take Resort to in my state it is called the Katta panchayat or informal Court procedure lawyers and police will be involved in it they will settle the dispute themselves so I am not painting a harrowing picture I am saying this to the reality now in this reality we have to see to what extent the commercial court bill can help us this is a very good objective brother also put it it is a fact when you have criminal appeals pending for years together yesterday in example of Allahabad was given you are battling with 1981 criminal appeals . in the High Court court which have criminal appeals which are pending for 4 or 5 years feel they have performed excellently I mean there is only a 5 year period of criminal appeal so

what infrastructure you can create for them what infrastructure can you create for commercial courts yes we are conscious of the fact that today with the commerce acquiring the a picture of not within the country necessarily but outside invite investment we need to do all those things we need a system which will deliver that's why somewhere I was reading a report we are almost at the tail end of the ability to do business that so now how do we in Court infrastructure make sure that the sections of society which are concerned with criminal appeals etc

are also taken care of how do we say the commerce is also taken care of is the government unless the government is willing to do and overhaul of the infrastructure system today small example is in Tamilnadu look at the weather conditions the government will say yes but we will not give air conditioners so ultimately managed to follow it up judicially otherwise . you are creating new infrastructure how are you not created today . all government offices will have it why not to court I'm just giving you an example so I think one of the necessary things for this to succeed is very strong court management systems unless we are able to bring strong Court management systems to monitor how this is let's begin with ... or something thing else it will realistically follow a prey to the systemic maladies which today proceedings under civil procedure code have fallen 2 I think and the purpose which intense to serve will not be there and I think the first beginning which will have to be made apart from the creation is are you going to shift is the proposal to shift the current cases pending . section 16 sixteen sixteen I'm saying now . where do we go from there that is the question I'm posing so you have 1 workload shifted from you are saying a single judge on original side and 2 judges on appellate side. Special court has to be recognised if district court is not there court has to be recognised. District court appeal to the commercial court of appeal.

Left leg to right leg . so you have shifted from one forum to another forum ..... they have no exposure commercial litigation . we have to train the district judges also .

and with the only hope that you are going to have experts to deal with it which in our system at the moment I feel is a big question mark whether at high court level or other because then they will be another problem which I envisage in the High Court level somebody would say this is a very prized jurisdiction go to a judge or b judge I am also going to . even the current roster we have this problem some rosters perceived to be more important some less important roster and this is by himself master face the situation as I face of people not wanting to do a particular jurisdiction wanting to do a particular jurisdiction . it's not a question of only wanting jurisdiction So many . so many of them I'm not even saying .. there's so many who feel the chief justice treated them not fairly because they are senior so they should be given a particular jurisdiction irrespective of what I would say their expertise or ability are in a particular field sometimes somebody's picked up because they can handle it well but he perceive that y this is not why should I do this somebody who gets promoted from District Court fees I have done civil law I've only want to do writs . this is the hard fact they say we have done this all . when we do a commercial Court even if you say . what was the commercial quote it will be treated as a prized jurisdiction. for example I know in Delhi because of presents on the original side the issue who handles IPR appeals and IPR cases is itself supposed to be issues in a very moderate coat I would say in today's scenario being raised that the senior George shouldn't get the appeal IPR IPR is 25 % litigation on the original side it is perceived as a cream litigation so the senior person would say that I want the I would expect the chief justice to give it to him this is another working problem that I envisage . in MP we have no roster system we have just broad divisions Civil and criminal half of the judges sit on criminal side half of them on civil side and the allocation of work is almost equal so we have no problem and there output I was telling my brother colleagues that the institution is less than the disposal today except find. now let me put a question what the problem of this is and by the system followed in most Courts it came into being the cause what was happening is parallelly

on the same subject different benches tended to take different views . the idea was at least during a period of time when the judges working adopt a consistent approach having adopted consistent approach . the next person who comes is aware of the views which have been expressed apart from the fact of course that can be now eliminated before the computerization took place it was perceived that the lawyer involved in trying to see whether a particular case should go before a particular judge because of his general approach to the matter that's how it began I would say these are the two concerns one of them of course with the process of computerisation can be done. I don't know whether Bajaj having 8 10 subjects at a time should be the most practical way I'm not saying its working there . its good if its working . it is working very successfully it is working in Himachal also it was working very successfully it was when justice Khanvilkar was our hon'ble chief justice . he has introduced it in Madhya Pradesh . Allahabad also. and it is working very effectively . because in case we are not in a position to decide a case under the arbitration act we can decide a case a civil matter we can decide a criminal case or . let me put a question why do you think this would help in better disposal what does that have to do with disposal . that you're here 15 subject matters instead of hearing 2 subject matters . atleast I just gets a variety of cases. ... get an experience of all the subjects ... that can be done by periodically . I'll give you 2 answers 1 it can be done by change of rosters periodically number 2 it goes contrary to the belief of the commercial Court bill that specialise judges should handle this commercial matters . if everybody has to do everything sir I tell you in Madhya Pradesh after computerization of of all the cases now each case in Madhya Pradesh are dated earlier what used to happen was that only fresh matters or recently filed matters what is circulation . the cases which for old and in effect Stale what down in the line could never see the light of day with this dating system all cases came and circulation as a result every Court . ok let me put on alternative system which we have tried at least I have tried it in 2 courts dedicated day to old cases . do you have a fresh matters in the morning followed by serial term cases

oldest case first and the next case next so a particular time period of working week one day in the week devoted that you will not prioritise any case it will be known prioritise told this case first which has Churned the matters now it is churning matters some of them maybe infructuous . It helped us get rid of the Dead wood sometimes we show unrealistic arrears I feel because the deadwood is not taken out because the lawyer does not come to the court and inform lawyer does not inform because the client does not want to go to him because he will have to pay something to go to him . client may not be there at all . sometime too late it does not survive so churning is necessary I feel it's a very important purpose incoming to know what are the realistic arrears. that is happening . so the target looks very large you feel this is unachievable if you read you some target in a reasonable manner then it will look as a more achievable target psychologically it is helpful to it but I think that approach is a different thing it is the approach of how to churn the matters this may be one method one method one method . let's take it on a day old matters Must churn that is fine . and in this process it has weeded out . how will you do it if you have this commercial Court bill how will you do it please so in commercial now there is a special bench now so therefore . special bench and routine matters ... how many special benches and what would be the volume of work . see that would be address first only infrastructure matters as you rightly said unless you have sufficient number of judges you cannot address of Ponds commercial bench actually what you are doing is only see you are not creating murder cases you are only only out of the existing cases you are creating a specialised feel so 1 slot 1 lifting it and putting another slot that is what is happening and at the time when we have constantly less number of judges so therefore I am saying that my biggest concern is out we just changing the slot if you put all the old cases into this system we will again be faced with the same problems we are facing it. therefore 1 food for thought lets begin with a clean slate today so that is a workable court at least and let the at least see what happens when you begin with a clean slate let us take an example of how to begin . even the tribunals have had

this problem cases 50 from high court to Tribunal then State Administrative Tribunal got abolished for example it went back to the high court wherever they were there so it is just. One more forum. like I always feel when jurisdictions are increased by High Court I used to tell them you are only shifting what you're doing is your shifting your burden to the District Court for the time being so please first see what what they can deal with see what you can deal with it doesn't help in shifting from one forum to the other because I believe so there is a drop of thirty forty thousand cases being sent to the Tribunal if the Tribunal is not there you feel you feel you are back again to another 30 40000 back so this is only shuffling off already existing material . passing on the buck . and 50 % of which you transfer to the Tribunal come back in another shape . that's right so I don't know if since you were here today if I can take the liberty I am a very small way have been endeavouring to persuade the Higher Thora tees that if we can have Ad Hoc judges not blanket charges people retiring at least till we are short of judges . depending on the suitability cases alone . constitution permits . sir I am . constitution permits therefore I took it up that so that they can be let somebody deal with only service disputes let's say we're short of judges we are not creating some employment in that sense the burden from the existing current judges to old ad hoc judges . I would certainly .. because making ad hoc judges you are actually encashing on their experience and also of the judges whom the chief justices has confidence and who has proven that is efficient . they may be made to sit only for old cases I would say no fresh matters nothing we will give them from the oldest case 2 to solve the problem of some way this thing I must confess my inability I haven't been able to persuade for the last more than one and half years I have tried unsuccessfully . I think that is a very good suggestion for the simple reason that you will be having judges on the ad hoc basis that is only half salary there will be a savings of state revenue also because as it is you will be making pension to them and if they are engaged so virtually the state is having to pay only half salary that is only for 2 years what the constitution provides . some senior advocates did take up

this issue so including I'm aware mr.datar who is practicing in Chennai Supreme Court . he mentioned to me and I said look I am already aware of this I have done successfully taken it up maybe you are able to take it up successfully I have been able to but I think as a short time measure It may help in somehow dealing with the volumes of the past which is there I don't seem to find anyway by which we can wipe out otherwise aight remember in Punjab and Haryana USA go before I joined there was a fire which took place in one section so lot of cases in that fire got destroyed . so on the lighter side everybody used to say that second appeals work pending everywhere they used to say sir the fire occurred the wrong section actually . if it at occurred in the second appeals section we would have been more fruitfully off that is the solution alternatively . I tell you which is looking . either we are able to dump the files or do what with it . sir can I have some quick reflections . many of the concerns raised by chief justice Kaul . another fire . had been with most of us and particularly when was Bill was being celebrated even otherwise the question of quality of administration of Justice and expedition these are certainly matters of concern for all of us and in the course of deliberation one suggestion was which was not part of the bill obviously it could not be that we have minimal 3 year study period where all these factors these institutional factors about staffing infrastructure the litigation culture the CPC amendments all the factors can be studied so that at the end of 3 years period you would know that how vwe really try to operate it . like it is merely a question of shifting or reallocation then suddenly the bill is not going to answer any questions at all it is not going to address any concerns so it is not like 1 pigeon hole to another pigeon hole so how can that be done it can be done only if we really have a study was called normally we have a post legislative impact study it is emerging as an important what we should have 3 legislative you know enforcement impact proposition so that they understand whether it can take off reasonably well . and I think that kind officer Jason can come only when perhaps not necessarily in parliamentary debates perhaps in some Court or the other I don't

know how it will come . judges can seize an opportunity of looking at it and saying that look don't do this and do this in a different way and about the last large number of issues which have been flagged which justice kaul and many are important but a last issue of adhoc etc look at the trade marks act in UK where the chancellor had the appointed person they are Queens Council they are lawyers who are appointed and then they dispose of Trademark registration issues and they are not even like a full fledged appointees in the sense of the term . therefore if it is possible to innovate on this and look at the amount of talent which is available in the bar and that section of the bar which is willing to co-operate and participate in the experiment I think we should look at that . if I am told there are a lot of there is a group of senior advocates who volunteered that for a certain period of times a 2 years not that Court but some other Court . one question was asked to senior advocate in Supreme Court whether they would like to serve as Ad Hoc judges for couple of years in different high courts many of them were willing I don't know why this idea was not taken forward . just to have a change . I do not . there can be a combination of competent judges who demit office today I mean 62 is the age where u you are at the peak of your career . I hundred percent agree . this people will the lawyers volunteering of course quite aware of the concern one of the concerns which is always expressed to me what's that if it becomes a routine then it is a problem I said it is not a question that everybody has an entertainment to do so but if you do it properly if you do it keeping in mind the pendency and the kind of pendency the expertise of the judge and the ability of the judge to work and the integrity of the judge. otherwise any system if you don't work it properly it will fail so that saying like if you put it across the board for everybody it will not work but if you do it selectively ... no doubt integrity capacity integrity expertise and capacity off the retired judges is the only solution according to me . now as far as high court are concerned are concerned to have the pendency being addressed. it is what it is least atleast and of course you see the advocates who are fairly senior in terms of their experience terms of their age

also who are willing to go and work as ad hoc judges in high courts couple of years . there are people who are willing to extend their service . so there is no question of age restriction there now they will be certainly able to do I am quite sure . still want to go to court which they have not . exactly not practiced yes . I have had persons who have come to me and said if given the chance we would be willing to do so long as we go to some other Court we do it for 2 years you know come back yes come back . so we're willing to do this for having having made their status money everything they would be willing to do a social service from a legal point of you for a certain specified period . there are lawyers whom we could put our confidence and trust also . it's not as if the whole.. as part of it.... all of us agree I think yes yes we all agree for adhoc appointment that is it is a good solution . 224 a article 224 a is not the experimented so quite long in the past now . I don't think that any retired judge is being . .. Honorable Supreme Court honorable justice Jaya Chandran reddy was appointed as an adhoc judge in our High Court 1 justice Venugopal was appointed as Ad Hoc judge . justice Vaidya Rangam was also appointed in the supreme court for the year. I know I know on the protesters Jayachandran ready who is acting as a . . . yes in couple of constitution benches they wanted to complete the decision . I'll give you an example one of the judges who is the demitting office in the court I was I put him for final hearing the suits alone 2 months before 2 and a half months before he demitted office he was able to take out 8200 final hearing cases in suits took out . no I was actually thinking if he this person can be an Ad Hoc judge let me put all the suits before him for a year or two years and If he's able to finish this off all the cases which are pending for final hearing judgement will be able to do . or there is another judge who is the specialist in a particular field I thought we had a lot of pendency so it's not the thought process came to me the temperature is retiring I would recommend . never never never . I thought 4 the people I thought of two people who ibfelt could be able to assist . where you have a trust deficit you can do it but . alright let me see somebody is extremely slow I know that he may otherwise be fine but he

will not serve the purpose for which it is made which is he may have reasonable output objective output and as judge put it the first requisite of any judge must be there of course . I somehow must confess my failure to be able to achieve it . no once this thought process has started something will be done in .. because we are short of judges Allahabad there are no judges to handle The Criminal Court most of the good judges working judges on the criminal side they have retired and probably they can be appointed as Ad Hoc judges for another 2 years . sometimes there are misconceptions example one of our Chief justices in Delhi thought about it for a particular judge to put him in old cases of a particular kind category suddenly the opposition came from the bar they thought if the judge comes in the appointments will not take place ok . even we try to tell them that look this has nothing to do with fresh appointments seats are there they said no if there are more judges required create more post I said it is a question of filling up the post question is not of creation of post so in the meantime they will serve your case will get decided in the bar. sometimes there is a misunderstanding what an adhoc judge is supposed to do so bar at times react but I think we need to face the situation . but look at Allahabad I am told one reason is that you are not able to find candidates Delhi is a place where you have too many candidates available but Allahabad is a place where you don't get good candidates 50 % are vacant but look around you don't find suitable and fit to be appointed . times collegium is not met and now the list of names has been sent but because of litigation pending . in any Court if you want to find hundred people for candidate as a judge you can never find you have to look you can't fill up hundred vacancies . I always feel that Delhi has an advantage people from all over the country who have come to Delhi settle down in Delhi practised in Delhi the bar fortunately is not averse at all that somebody must be from Delhi alone to be appointed as judge they are quite happy with judge a lawyer who may be practicing the supreme court on May be practicing or has a presence in the High Court. may have come from any part of the country at any stage of time . chief himself as an example chief came from

Kashmir and was in Delhi if you see all the senior judges we have judges from Andhra Pradesh Karnataka Tamilnadu originally first generation people I came from Kashmir Himachal Assam Gujarat and you name n number of them so it is healthier it has become Cosmopolitan Court it is less coloured by I would say original concept or . Delhi has been averse only to transfer. transfer somehow Delhi High Court is has not been quite happy . to be transferred in yes transferred out they were not sometimes . I was telling The deprived the local people of appointment . the local people definition there is anybody who practices in the High Court it is not confined to somebody who is from birth born in Delhi and continuous in Delhi . as long as you shift there are people who Haidar education and then shifted to Delhi and practiced . you must be enrolled as a lawyer . enrolled there as a lawyer . and it's fine so this feeling doesn't come in that you know in fact that have been couple of judges every selection process there is 1 or 2 judges practices almost exclusively in the supreme court In a ... Of 4 people 1 or 2 from Supreme Court is fine . of course sometimes depending on who the president of the bar things always get a little can get a different viewpoint . this idea Geeta this idea about this 224 a and also in the supreme court and also in the supreme court there is a provision there is no issue of point we have 3 special divisions operating now in Supreme Court 1 for tax matters 1 for commercial matters 1 for criminal matters. through the special benches operating there and I asked the judges manning the commercial bench then going to Bhopal and addressing the issue on judges handling commercial matters I asked him what could I tell them they have been telling only one thing which Mr Venkat Ramani said is not CPC approach it should have a different approach this is one thing both of them told me and other concerns they have on commercial issues . one is expertise of the judges and the integrity factor . this is going to be a major concern to me more than the expertise you can make a good judge better judge but you can't make a bad judge a good judge in commercial matters . this is to put it bluntly I dont mince words this is any idea where because the stakes are that high and the pulls are you

can't think can't think about the pulls in such commercial matters . even writ positions are sought to be taken I'm just taking an example . this is what justice raveendran said what about the writ petitions filed . you are saying commercial writ petitions I am saying the pressure with the judges I can save Delhi tender matters everyday there will be a couple of tender matters tender matters I always say is to be decided as of yesterday . and I tell you it is a herculean task in itself I told yesterday I have done this jurisdiction for 3 and half years continuously and despite requests I was somehow not eased out of it . and it is so much of pressure in every case you know the stakes running into 100 and thousands of crores at a time. there are prime National contracts or . and yet if you do not decide them quickly then you are feast with the situation that the project will get stuck so the worry is if all these cases appeals this comes in and with the past I think it would be very very difficult task . that's why I think there should be .... afresh. See one can be to start I would say experiment for the future see how it works and then see whether you would like to shift the past cases or not at least you should be able to deal with current cases then we will see what happens to the past . I just want to add another one word to that also instead of transferring the very old one transfer of the current year so the new the designated court will have one year to start with . 2 years is fine . know the current year now suppose you are going to have this bill introduced this year notified this year 2015 so all those commercial matters of 2015 will stand transferred so that you have a fresh air . even for original quote you have to introduce before because this case me not mature the 2015 case may not be maturing for trial so for original side especially we can even say for 2 years 2014 thought process started give them some work initially to do but I have great apprehension we transfer all previous matters with the current scope of work which is envisaged . that is why the family court has failed family court act actually ... all the matters that was pending transferred to the family court . all the new legislations has had the family court failed . family court actual matters that wee pending has also been transferred this is the problem you know there is a trust

deficit . trust deficit in the legal profession trust deficit amongst us also . I was telling apart from anything else time period in the family courts is an issue second is what used to at least that my time in the bar used to happen in land acquisition matters on motor accident claim cases is rampantly happening in company Court and it was horrifying to see even the jewelry exchanged and as justice said yesterday at least in the accident claim cases the lawyer make some investment in the beginning and then shares sure there is no investment even in the beginning from . one more question judges were posted in the family court are getting family problems . family problems actually entrance for posting we took a conscious decision 34 judge is posted in the family court suffers from a lot of mental imbalance because of the nature of the case . so more than 1 year we will not keep them instead put new persons in it we have taken that. in our state family courts are supposed to work on all 7 days then from the bar we reduced they are working on Saturday but not on Sunday . it has an impact on ... and there are too many cases too few quotes even 125 cases which have been tried by the judicial magistrate they have been put before the family judge. and are being decided by an officer of the District Judge level . what we should make sure it is this legislation does not see the fate of 138 Negotiable Instruments Act it should not be that the very purpose for which it has been created gets defeated and since it is a . .... no I am saying two reasons volumes lack of Legislative impact study on the ground realities are completely changed some people not borrowing except for need to people borrowing for their daily existence lease and licence we were saying yesterday who would take a fridge or a domestic appliance on a licence basis issue to advance cheques. people would say no no live within your means techno loans that used to be the philosophy in our country earlier from now today this I don't want to take it turn by turn I want everything today so I want a car I want a fridge I want this this this so these are there so I can pay installment for each thing and own it over the next three four years if something goes wrong the cheque start bouncing . what you would recover the people keep quiet not something goes

wrong something goes wrong in the very beginning itself . you don't measure your capacity to afford . the extend themselves and then . depending on the economic environment at that particular stage of time so I feel I see that that particular part of legislation is lost its meaning actually that is what my individual view is its lost its meaning because the ground reality has changed . again you need to decide what form a part of it either you create a separate mechanism for leave licence issues . about this definition of commercial disputes what is your opinion about labour disputes will it not strike affect productivity and have a consequently have a commercial angle to it . See judge if we add that then undoubtedly it will fail . this is what actually brother kaul said more important is to define what is not a commercial dispute than to define what it is in this it is widespread definition . mainly two things is don't create send past cases I feel except for except for a period of a year or two years . secondly possibly A narrower down of the definition. with all these cases nothing gets left out I think. Including immovable property . cases arising from . everything is there it is like if somebody would transfer I would say 99 % of original jurisdiction of the High Court would go there undoubtedly . maybe some few categories of cases you will find where this is some of that there will be an argument whether this is covered by that or not . this has a pecuniary effect my brother was pointing out the TRAI matters SEBI matters . they are otherwise covered India applet jurisdiction competition appellate Tribunal drt appellate Tribunal IPR Company Law board security appellate Tribunal Telecom disputes . in the supreme court now we were talking about writs to be listed there . direct appeal to the supreme court has been listed here ..... all those 2006 cases full now go to the supreme court . well Wednesday Kerala High Court said that in fact the find. now NGT also .. Supreme Court . .. the net Rapid question of this is ... .. another superior High Court ... Bombay High Court ... the initial view on AFT is that the high courts did have jurisdiction that was the initial view . I think it started with the Kerala High Court eventually the Delhi High Court ... against which the appeal went . I have 1 problem . so far is Kerala is

concerned only specified there is a crore and above . there should be a commercial division and an appellate division also single judge power is 100000 so a single judge so that cannot be a commercial division in Kerala High Court unless P high court at is amended no this is what day as I understand is when you say 1 crore jurisdiction it is keeping in mind ultimate all original jurisdiction of the High Court wherever they exist will be brought to 1 crore 1 number 2 there is unlimited jurisdiction for cases for 1 crore and above you will create some kind of a separate kind of a Court within the courts system to deal with cases . suppose subjects can handle up to a level civil judge UP to a level only cases 1 crore and above would be dealt with in this mechanism am I right . being a special legislation brother Ravindran could have some . but when I speak about the Kerala High Court where the power of the single charge is limited to 1 lakh . so that cannot be a commercial banks in the Kerala High Court single . amendment does not have original jurisdiction . it doesn't have but dealing with the appellate matters . appellate matters ok division bench is unlimited but a single judge pecuniary jurisdiction is 100000 . hearing appeals . commercial division started in the High Court we don't have original jurisdiction on the civil side . so then you will only have a commercial appellate division you will not have a commercial original division point that is not envisaged as I understand only original jurisdiction in High Court is envisaged for existing jurisdictions . it will come from the existing district court . the act contemplates both civil appellate division a civil division commercial division and the commercial appellate division in the High Court. it will be all different . there may be cases with the money component will not .... like a patent case. Valuation it will depend on valuation ultimately it is like injunctive suit in a sense see this is a problem let us say it is a suit for injunction only injunction or damages in intellectual property rights matter you for valuation see whether it is above for example the Delhi jurisdiction was 20 lakhs now in any case you valued for purpose of injunction let's say your valued at 5 lakhs for purpose of damage you estimate 15

lakhs pay Court fees and come . now this is the problem for example the High Court has increased jurisdiction to 2 crores now . now it will drop another issue according to me whether what will happen to cases between 1 crore and 2 crore. it will come back to the high court because they are not transferring all cases secondly I am quite aware of the fact what will happen is the matter will go to the district court they will move an amendment application amended pay the additional Court fees and come back to the High Court . my personal view is that it never helps in this scenario and what will having this is the saddest 1 crore now Bombay has 1 crore as I understand Calcutta is 10 lakhs but it is now proposed to be made concurrent with the City Civil Court concurrent with the City Civil Court . so that will be that will for this purpose be increased to 1 crore Himachal 25 lakhs I think 30 lakhs 30 ok but there are only I think these four high courts and I think J&K also used to have original jurisdiction I don't know what is the current position is .... at one stage it did have original jurisdiction and I don't know if it still continues ..... they have their own whole ... I have never practiced there ... other than J and K certainly only 4 Courts have additional jurisdiction ..... no whatever you pay Court fees ultimately supposed to say you are entitled to more for the future suppose your claiming damages arising from current to a certain date ... those cannot be taken into consideration so you only consideration is the valuation of the suit as made somebody values more than 1 crore suppose it is only an injunction suit he doesn't claim any damages but he says I value my injunction suit at 1 crore rupees and I paid Court fees on 1 crore it will go to the commercial Court it happened in Delhi it happened in Delhi because the judgments in Delhi are on valuation and need not be on least valuation alone you can value your damage the rest is settled position. what is the state of the bill as of now what is the state of the bill introduced . it was introduced I think in both the houses . Rajya Sabha then sent to select committee . is it still pending at the rajya sabha.. it was a proposal the select committee but now with this recommendation with the proposed amendments recommendations now it will go back to the Rajya Sabha and if they

want to refer now they will refer to a select committee it should go to select committee . we will be forwarding this unsolicited comments to them find the gist of our discussion will you be forwarding to them also to the ministry of law and Justice . will do that . submitted here only because one suggestion which has evolved now regarding the transfer of pending cases so it amounts to an amendment 2 section 16 as proposed not all existing cases but cases of the current previous year . which are otherwise ripe which alone will be transferred others will be handled by the existing system that is one 2 about the 224 A of the ad hoc judges being engaged . the annual report is submitted right right third one also just sir in the annual report they will go . annual reports placed before parliament . yes . should we send all pending cases to them or at the initial stage only send cases of the last year or 2 years to see how it works number 2 the definition clause in this commercial is very expensive it needs to be more restrictive in character third is which we are otherwise saying to whether a system of Ad Hoc judges as envisaged in the constitution can be used for specialist retired judges to be appointed and senior advocate who are willing to agree to serve for a specified period . to address the issue of existing concerns from the human rights angle because there will be a huge hue and cry from about the other people as your addressing the only those money matters and we are left with our basic issues . to address the old cases and give importance to other areas of concern including human rights and the suggestion is the senior advocates could be sent to other High Court weather do not practice for 2 years 3 years 4 years etc and they are willing also this is what we understand . so 224 A + senior advocates being sent to other high courts also . From all the discussion the others are the problem but I think 2 things relatable to the act. 3. third of course we can link it to the act it self to remove the concerns off certain people who may feel that there is importance being given RTU find and you can just qualify about those integrity expertise what was the third one ability ability integrity it will go with integrity and expertise . Integrity expertise and ability you have for adhoc judges and there are many judges available across the

country. it's a good man but not a good judge if you ask me he's a very good man who besides only 5 cases a year he's a good man but not a good judge a very honest person but he decides only 5 cases Inna Year what will you do we cannot have that category good person but not a good judge so that's why three qualities we can suggest qualifications integrity expertise and ability . He says justice offers on account of inability. that Calcutta case you said was Instituted on the counter claim. no my lord I have a written statement. Supreme Court has interpreted the new amendment in exceptional cases the exceptional cases was in order 7 rule 11 application was kept pending for some time . .... original side in our High Court .... statements are not filed the master will refer the matter to the learned single judge . he will normally grant 1 or 2 weeks time you don't file Heels set them ... . we have that system . original side rules prescribed that from the date of Institution you don't lodge the writ of summons it is to be placed in a particular list and placed before the charge for the purpose of dismissal not followed at all . see with all humanity and respect I say I think the chartered high courts have one factor in common which is the rules and norms are framed point in a given scenario they meant for a certain number of cases in a perfect way they nicely done but they could tackle 500 cases they cannot tackle 50000 cases . with the deepest of respect we had 4 hearing benches in the Calcutta high court hearing suits at a given point of time at least at least when I join the profession now I Today speaking we don't have one quote designated for the purpose of hearing a suit for the entirety of the week . what is the reason yes what is the reason . manpower point nobody is willing no one is willing to sit on the Original Side . no the number of writ matters have gone up the criminal appeals of gone up how do you what will the chief justice do . I have a judge hearing 400 500 cases . once he retires I have no one to post for final hearing case . I for 1 and half years I was sitting . Himachal I was there for 3 years I found the judges actually quite happy on the original side we put the roster . this is most interesting I have worked 2 years I volunteer at one stage when did issue of Jurisdiction came I said I am willing to set I'll give up the DB go on

the original side and work as long as you want I think it is one of the most interesting areas of point and store right original side order original suit order is most satisfying somehow I feel rather than writing an applet order because you create something out of the facts original thinking . ..... for people who think in that line it is good you think that it is a punishment it's a different thing because . it depends on the mind set . because you need extra strength . this Performa was sent to all of you by email . this one . the detailed one no not the one with your filling. the one which was sent by email that we have sent . we have filled and sent by email . I have received I have filled it up and send it by email . yes yes .. ok we have got your . then others who have not got you will be getting it now. we will distribute to you . you can after going because certain information you may need to look at your . the data has to be collected from the High Court . data has to be collected from the . yes so within next 10 days . I have received it yesterday only so I will be sending it after going back . 10 days with the next 10 days find yes yes yes points by email it can be received it would be grateful thank you so much . today's Performa question number 3 is the same as the one circulated earlier . we have to send this one within 10 days . no this one you have to the one which is just now given to you has to be given back now . yes yes I also got . Shruti you have mine . you have my Performa . you have that this is not emailed . Shruti can you clarify to justice honorable justice . can I take this opportunity thank all of you thank you so much for participating in the session . RV winding up . no no I am not winding up I'm just saying that they have been really very nice you know listening to everyone . ..... I think my lord have something to say . no I just wanted to respond to a couple of things in fact I had a couple of speech also . no doesn't matter . thinking about the limitations of article 226 I would request you to think about the scope of article 226 instead of being more worried about the limitations we are just now for the time are to think of the scope article we always say sky is the limit let us not be worried about the limitation but about the limits article 226 jurisdiction this is one wonderful observation one relevant observation I

wanted to make as far as the jurisdiction of 226 in dealing with infrastructure matters commercial matters .... positive very positive I am saying don't be worried about the limits . did we address about this 2 things the Swiss challenge method system and the bonus point method in commercial contracts . no we have not discussed . just to technical terms because when this expressions came to mind don't be surprised that even after attending such a wonderful conference on commercial well this unsolicited offers this is going to be a big realm in the contracts now a person coming to propose a person comes to looks at Himachal it's a wonderful hill state tourism potential take a serious note of this things the person comes with a new idea I have this idea about this thing I will tell a classic example medical tourism I have an idea about medical tourism it's a wonderful thing for Himachal also medical tourism the climate is good the atmosphere is good this country state is friendly potential nobody has started . so he gives a wonderful idea and he gives an unsolicited offer to the state you can afford to do these things well in unsolicited it's not a turnkey it's a different concept coming in there are two things coming in that in such unsolicited offers are being handled by the state one is you can have there are two methods 1 is a bonus point method one is a Swiss challenge method . this is called Swiss challenge system now there is bonus point method in bonus. the tender will have to be floated but in considering the tender one who made the sun solicited offer will have a certain percentage of extra points . so even if he is given also he will get the credit for his work already done so that is one method . the other is a Swiss challenge system infact into three states legislation those terms of gone and also Swiss challenge system is found a place in many state legislation on this infrastructure also that is a system where among other competitors the one who is made this unsolicited offer will have the first option match also first option to match also to they call it the refusal right to first refusal this is the technical term used in the legislation but you will be given an opportunity to match the L1 so if this is done we were thinking about so many things it is not the the idea of the judge the idea of the

legislation that the judge actually put into the judgment . everything goes wrong when the judge has so many ideas we have so many ideas we have our own personal philosophy also we have our own concepts also we have an idea of the state government also but if these things go in into the commercial contracts in the name of the Garb of Public Interest things go wrong but where as if we actually implement the idea of the legislation in the Garb of or in the name of not in the Garb of Public Interest then nobody will expect your motive things go wrong when you have your own policy your own philosophy coming in the matter of this sort of commercial contracts just make a little distinction us too we were thinking can we go INR to 226 that way just couple of things I was sharing a bench with Justice Thakur the incoming chief justice and then we had a Chhattisgarh somebody's here from Chhattisgarh we had Chhattisgarh Raipur Durg highway contract issue again this very same issue its a pending case but still I can make a little observation as to what went in our mind so the allegation was that the concessionaire had not done anything for the development off the road and the road is in a terribly bad condition I'm still here collecting toll this was the premises on which the matter went to the High Court and from there travel to the supreme court also by the time the matter was pending in the supreme court the national highway authority took over the road as such the concession agreement cease to operate now we had an occasion to see the route also the public cry was that there is no route then why should we pay toll this was the Public Interest Litigation it's the Crux of the Public Interest Litigation we found that there is a point in the same today not able to have a comfortable travel in the road why should they pay the toll also so in fact we developed a new method saying instead of 40 % toll till the road is developed you reduce the toll to 20 % and that is what the interim order we have given as far as the Chhattisgarh Durg . yesterday's newspaper carries this . so that the problem is simpler the Advocate says we don't want to pay toll it should not apply to advocates . that is called the two technical terms I wanted to be familiar with 1 is the bonus point method the other is the Swiss

challenge system and this comes under the unsolicited offers this is the technical unsolicited infrastructure proposals this is the technical term . this is codified in the Andhra Pradesh industrial development act. Andhra Pradesh also and Bihar also they have taken these two terms also unsolicited infrastructure proposal and the next two terms are . so I would only request that my brothers and sisters also it is not the exercise of jurisdiction that is very nervous it is the method or the Manner in which we approach the exercise jurisdiction that worries the apex court now why sometimes the apex court interferes is 1 we find the judges not being consistent if you are Pro landlord be consistently Pro landlord . if you are tenant let your policy be consistent on that if you are on compensation being liberal be consistent on that if you are to see the parties faces and then change your moods then there is big thing that worries us also point on this liberalized .. also I would only say in the method of exercise of jurisdiction if you are too implement the purpose for which the legislation has been introduced nobody would have any doubts but if you are going to substitute your own views on that policy there is a problem as judges we are not called to be policy makers we have a very very find area of supplementing suggesting the policies that is a very very very remote according to me we cannot substitute the policy of the state the state gets disturbed or the public also gets disturbed and it starts to suspecting our motives When we start substituting the policies of the state . that is relevant absolutely to be given to the people the People's representatives also we can only. out so this all what I wanted to suggest to you be on the policy of the state in as a public interest not your personal policy thank you . I think today we need to thank apart from all of you here we also need to thank a resource person for today Mr. R venkataramani senior advocate Supreme Court Mr. Sujit Ghosh Mr. Atul Sharma and yes we have to give a big round of applause to honorable justice s k Kaul who spend 2 days for us yesterday we did not do that . and also also to honorable justice Kurian Joseph Who really is a we will say friend of the national judicial Academy he is a one person who agrees to come travel antique time even if he is in Kochin he

travels from Kerala All The Way taking hoping flights from Bombay but to be here at Bhopal so thank you so much for being with us . not only at NJA but also regional conference of NJA . yes Of course sir is always there for help he is a guiding Angel . I will tell you frankly one reason I tell you I know there are where is you judge who come too n j a even High Court judges conference is being held also I don't think it is not a good thing . we have to show our solidarity I have to see that we are one family and we need a little bit of seriousness on this issues also unless we Express that by your action there is no point in giving all lectures this is all what I thought I cannot contribute to your Intellectual capacity but I can only contribute to say that we are all with you we are all one family that's all the thing this is just one message that I wanted to convey .

sir 1 last words I was looking into this whole issue commercial quotes out of curiosity I went into judicial training in commercial matters what's happening in the rest of the world there be taken a little more seriously structured interactive discussions which can bring lot of life into what should be done thereafter precisely what we have tried to achieve in a small way here I think it should be done in a larger scale because a lot of talent is available in the legal certainty which can reflect on how legislation can be shaped and implemented that talent is still unexplored I think Law Commission the amount of work I have done there I find it is stunt body which is on its own initiative trying to use the resources available outside so there is a need for a greater involvement of Institutions such as this and judicial Academy and the high courts in a big way so what's happening at the European side European Institute of judicial training is doing all kinds of training activities and there are the possible outcomes it is remarkable so I think your involvement of at this level a little ... Is required more visible the visibility is important . this National judicial Academy could also contribute on this legislation part as brother kaul said the quality of legislation it has the cross the country it's a very big something . one of the suggestions in the course of deliberation was you could we don't have a dedicated

Indian legal service which can effectively qualitatively contribute to drafting we have an apology of an Indian legal service. So what do you expect out of that. An independent efficient. You could give this suggestion also that independent legal service we have given it several you can repeat it. Now that we have a very cream legal personnel there. Indian judicial... no no that is different. Legal service for the purposes of creating a cadre a small cadre which is for legislative drafting. Matters in the government . in one matter I had an opportunity to look into this because I was perturbed by how things were happening. It is I'm sorry it's abysmal and the department people also concede. That we don't have trained personnel. Those people it is like finding teachers to teach in law school. Those draftsmen have gone they haven't trained new draftsmen. Nor are they utilizing the ability of whatever good draftsmen are left. New generation of legislative drafting. Everyone does his two bit you come into consultation and put it in public domain. Point is that the nature of scrutiny required somehow I feel there is much lacking in. that is why all these legislations suffer this sort of axing in the high court or supreme court. Actually may I make a small submission here. It is a question of doing a due diligence before legislation coming into being contemplated and you will be surprised there is a small outfit of just 3 some of them are just out of Bangalore law school 5 years 6 years graduates who are actually assisting the government doing a lot of spade work on the regulatory and the policy side. If outfits like that I mean they are doing a lot of work. They are something called Vidhi and they are actually there is no interfacing between the law schools the bar formally as such and the bar can be of great assistance in doing certain drafting. In some way I think they will give suggestions in terms of . Atul the only thing is there was I had an opportunity of interaction on a legislation which they wanted legislative drafting of the insolvency law some organizations which I happened to .... And there were some young people who were who talked well I would say good understanding but the point is that there must be a dedicated pool of talent to work with the government. We can outsource it for sometime but ultimately there must be an institutionalized system coupled with

outside inputs but if we have no body inside to understand. That is right. Because I think it is of utmost importance. So much litigation gets generated then you say oh read it down do this do that make it workable. If these concerns were given at the first stage all conflicts avoided so much of litigation in the courts would be saved and time saved. I think it is only a question of grooming that talent. You see because at the end of the day that talent has to come into the government machinery. If you are thinking in banking industry today taking people from outside and putting head of the whole bank certainly you can take some talent from outside who have acquired some expertise in drafting to institutionalize the talent from there but there has to be talent in house in the government I think. It is only lacking at the central and the states level. The state's law also if we find the way the acts are drafted. Drafting occurs first thinking occurs later on. Draftsmen have to actually only properly translate the thought into applied legislation yes. Now legislation first then comes the thinking . no it is done then something will say add some word here add some word there include this also include that also. then you have. Legislative drafting is still a subject in the law degree. No no. not. Only pleadings drafting. Legislative drafting is not a subject. pleadings and conveyancing . you get to draft the plaint petition or bail application. Judgment writing is also being taught in the national law schools. Where do we have this course on drafting laws.UK. There are very good courses in Mauritius south Africa Ghana Uganda all of them send students over there..... also coupled with it whether we like it or not good command of English language is necessary to be able to do that. 100%. Anything else Geeta. No sir nothing else. Sir thank you very much thank you all of you so much. If there is something please let us know because we have one more advanced course from 16 January to 23<sup>rd</sup> January if there is something specifically you want us to you know put as in our curricula please let us know. We have already written. We have given our.. ok ok thank you so much. thank you so much.