

## EXECUTIVE PROGRAMME EXAMINATION

DECEMBER 2009

### GENERAL AND COMMERCIAL LAWS

*Time allowed : 3 hours*

*Maximum marks : 100*

**NOTE :** Answer SIX questions including Question No. 1 which is **COMPULSORY**.

#### Question 1

- (a) *"The right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India is not an absolute right but subject to reasonable restrictions." Discuss. (8 marks)*
- (b) *What do you mean by double jeopardy ? (4 marks)*
- (c) *What do you mean by doctrine of waiver of rights under the Constitution of India ? (4 marks)*
- (d) *Discuss in brief the rule of colourable legislation. (4 marks)*

#### Answer 1(a)

Article 19(1), clauses (a) to (e) and (g) of the Constitution guarantees to the citizens of India six freedoms which are exercisable by them throughout and in all parts of India. As per Article 19 (1), all citizens shall have the right -

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions
- (d) to move freely, throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) (omitted)
- (g) to practise any profession, or to carry on any occupation, trade or business.

These freedoms are not absolute but subject to reasonable restrictions. Accordingly, clauses (2) to (6) of Article 19 recognize the right of the State to make laws imposing 'reasonable restrictions' on these freedoms in the interest of the general public, security of the State, public order, decency and morality, and for other reasons set out in these sub-clauses.

#### *Right to freedom of speech and expression*

It need not to be mentioned as to how important freedom of speech and expression in a democracy is. A democratic Government attaches great importance to this freedom because without freedom of speech and expression the appeal to reason which is the basis of democracy cannot be made. The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode.

The right to speech and expression includes right to make a good or bad speech and even the right of not to speak. One may express oneself even by signs. This freedom includes the freedom of press as it partakes of the same basic nature and characteristic (*Maneka Gandhi v. Union of India*, AIR 1978 S.C. 597). In *Romesh Thapar v. State of Punjab*, AIR 1950 S.C. 124, it was observed that “freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government is possible”.

The Courts have held that this right includes right to publish one’s opinion, right to circulation and propagation of one’s ideas, freedom of peaceful demonstration, dramatic performance and cinematography. It may also include any other mode of expression of one’s ideas. The Supreme Court in *Cricket Association of Bengal v. Ministry of Information & Broadcasting (Govt. of India)*, AIR 1995 SC 1236, has held that this freedom includes the right to communicate through any media - print, electronic and audio visual.

As mentioned above, clause (2) of Article 19 specifies the limits upto which the freedom of speech and expression may be restricted. It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression in the interests of :

(1) The sovereignty and integrity of India; (2) The security of the State; (3) Friendly relations with foreign States; (4) Public Order; (5) Decency or morality; or (6) In relation to contempt of court; (7) Defamation or incitement to an offence.

Reasonableness of the restriction is an ingredient common to all the clauses of Article 19. Reasonableness is an objective test to be applied by the judiciary. The following factors are usually considered to assess the reasonableness of a law:

- (i) The objective of the restriction;
- (ii) The nature, extent and urgency of the evil sought to be dealt with by the law in question;
- (iii) How far the restriction is proportion to the evil in question
- (iv) Duration of the restriction
- (v) The conditions prevailing at the time when the law was framed.

The phrase ‘reasonable restrictions’ connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. In determining the reasonableness of a statute, the Court would see both the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. The reasonableness of a restriction has to be determined in an objective manner and from the point of view of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations. The Court is called upon to ascertain the reasonableness of the restrictions and not of the law which permits the restriction. The word ‘restriction’ also includes cases of prohibition and the State can establish that a law, though purporting to deprive a person of his fundamental right, under certain circumstances amounts to a reasonable restriction only.

**Answer 1(b)****Double Jeopardy**

According to Article 20(2) of the Constitution of India no person can be prosecuted and punished for the same offence more than once. The ambit and content of the guarantee in Clause (2) of this article is however narrower than those of English or American doctrine. Article 20(2) operates as a bar to the second prosecution and punishment for the same offence whose ingredients are the same. There should be not only a prosecution but also a punishment in order to operate as a bar to not only a prosecution and punishment for the same offence. The words 'prosecuted and punished' are not to be read as 'prosecuted' or 'punished'. Both the factors must co-exist in order that the operation of clause (2) may be affected. Article 20(2) of the Constitution of India states that no person can be prosecuted and punished for the same offence more than once. It is, however, to be noted that the conjunction "and" is used between the words prosecuted and punished and therefore, if a person has been let off after prosecution without being punished, he can be prosecuted again.

**Answer 1(c)****The doctrine of waiver**

The doctrine of waiver of rights is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the State. However, the person must have the knowledge of his rights and that the waiver should be voluntary. The doctrine was discussed in *Basheshwar Nath v. I.T. Commissioner*, AIR 1959 SC 149, where the majority expressed its view against the waiver of fundamental rights. It was held that it was not open to citizens to waive any of the fundamental rights. Any person aggrieved by the consequence of the exercise of any discriminatory power, could be heard to complain against it.

**Answer 1(d)****Rule of Colourable Legislation**

The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a colour of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such legislation is called colourable piece of legislation and is invalid. To take an example in *Kameshwar Singh v. State of Bihar*, A.I.R. 1952 S.C. 252, the Bihar Land Reforms Act, 1950 provided that the unpaid rents by the tenants shall vest in the state and one half of them shall be paid back by the State to the landlord or zamindar as compensation for acquisition of unpaid rents. According to the provision in the State List under which the above law was passed, no property should be acquired without payment of compensation. The question was whether the taking of the whole unpaid rents and then returning half of them back to them who were entitled to claim, (i.e., the landlords) is a law which provides for compensation. The Supreme Court found that this was a colourable exercise of power of acquisition by the State legislature, because "the taking of the whole and returning a half means nothing more or less than taking of without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised".

The motive of the legislature is, however, irrelevant for the application of this doctrine. Therefore, if a legislature is authorised to do a particular thing directly or indirectly, then it is totally irrelevant as to with what motives — good or bad — it did that.

## Question 2

Explain **any four** of the following :

- (i) *Rule of harmonious construction*
- (ii) *Proviso*
- (iii) *Rectification of an instrument*
- (iv) *International commercial arbitration*
- (v) *Valid acknowledgement and its effect on period of limitation.* (4 marks each)

### Answer 2(i)

#### Rule of Harmonious Construction

Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both. This is what is known as the “rule of harmonious construction”.

A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid “a head on clash” between two sections of the same statute. The courts should construe provisions which appear to conflict in such a manner that they harmonise” (*Raj Krishna v. Pinod Kanungo*, A.I.R. 1954 S.C. 202 at 203).

### Answer 2(ii)

#### Proviso

When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of proviso. In the words of Lord Macmillan : “The proper function of a proviso is to except and to deal with the case which would otherwise fall within the general language of the main enactment and its effect is confined to the case”. A distinction is said to exist between the provisions worded as ‘proviso’, ‘exception’ or ‘saving clause’. ‘Exception’ is intended to restrain the enacting clause to particular cases; ‘proviso’ is used to remove special cases from the general enactment and provide for them specially; and ‘saving clause’ is used to preserve from destruction certain rights, remedies or privileges already existing. As stated by *Hidayatullah J* : “ As a general rule , a proviso is added to an enactment to qualify or create an exception to what is in the enactment , and ordinarily, a proviso is not interpreted as stating a general rule”.

### Answer 2(iii)

#### Rectification of Instruments

Section 26 of the Specific Relief Act, 1963 deals with rectification of instruments.

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Where a contract reduced into writing in pursuance of previous agreement, fails to express real intention of the parties, the court will rectify instrument in accordance with their true intention. Here, there must be an existence as between the parties, a complete and perfectly unobjectionable contract; but the writing designed to embody it, either from fraud or mutual mistake is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into conformity with the true intention. In such a case, if such instrument is enforced one party will suffer and it is rescinded altogether both the parties will suffer but if it is rectified and enforced neither party will suffer. The principle on which the Courts act in correcting instruments is that parties are to be placed in the same position as that in which they would have stood if no error had been committed (*Sudha Singh v. Munshi Ram*, A.I.R 1927 Cal.605). There must have been a complete agreement prior to the instrument. It should be in writing and there must be clear evidence of mutual mistake or fraud.

#### **Answer 2(iv)**

##### **International Commercial Arbitration**

“International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not considered as commercial under law in force in India and where at least one of the parties is:-

- (i) An individual who is a national of, or habitual resident in, any country other than India ; or
- (ii) A body corporate which is incorporated in any country other than India; or
- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) The Government of a foreign country [Section 2(1)(f).

#### **Answer 2(v)**

##### **Valid acknowledgment and its effect on period of limitation**

Section 18 of the Limitation Act, 1963 deals with the effect of the acknowledgement of liability in respect of property or right on the period of limitation. The following requirements should be present for a valid acknowledgement as per Section 18:

- (a) There must be an admission or acknowledgement;
- (b) Such acknowledgement must be in respect of any property or right;
- (c) It must be made before the expiry of period of limitation; and
- (d) It must be in writing and signed by the party against whom such property or right is claimed.

If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

**Question 3**

*Distinguish between **any four** of the following :*

- (i) 'Admission' and 'confession'.
- (ii) 'Vested interest' and 'contingent interest'.
- (iii) 'Mortgage' and 'charge'.
- (iv) 'Review' and 'revision' in civil law.
- (v) 'Lease' and 'licence'.

(4 marks each)

**Answer 3(i)****Admission**

1. An admission is a statement of fact, which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. Admissions may be oral or contained in documents.
2. An admission usually relates to a civil transaction and comprises all statements amounting to admissions.
3. An admission is not conclusive proof of matters admitted and the person admitting is deprived from taking a contradictory stand thereafter.
4. An admission may be used on behalf of the person making it under certain circumstances mentioned in Section 21 of the Evidence Act.

**Confession**

1. The word confession has not been defined anywhere in the Indian Evidence Act, 1872. A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime.
2. The statement made by the accused person is sought to be proved against him in a criminal proceeding to establish the commission of an offence by him.
3. A confession if deliberately and voluntarily made may be accepted as conclusive in itself of the matters confessed.
4. A confession always goes against a person making it.

**Answer 3(ii)****Vested interest**

1. Vested interest does not depend upon the fulfillment of any condition.
2. In vested interest, there is present immediate right though its enjoyment may be postponed to some future date.
3. Vested interest is not defeated by the death of the transferee before he obtains possession.
4. Vested interest is both transferable as well as heritable. If the transferee of a vested interest dies, the interest passes on to his heirs.

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**Contingent Interest**

1. Contingent interest depends upon the fulfillment of some condition precedent or on the happening of some event which may or may not happen.
2. In a contingent interest right of enjoyment is to accrue on the happening of an event which is uncertain.
3. Contingent interest does not take effect in the event of the transferee's death before the fulfillment of the condition.
4. Contingent interest is not transferable. Whether it is heritable or not depends on the nature of the contingency.

If the transferee of a contingent interest dies before obtaining possession, the interest fails and does not pass on to his heirs.

**Answer 3(iii)****Mortgage**

1. It is a transfer of an interest in specific immovable property made by a mortgagor as a security for the loan.
2. It is created by act of the parties.
3. It can be enforced against any transferee whether he takes it with or without notice of the mortgage.
4. In a mortgage by conditional sale or in an anomalous mortgage, the mortgagee can foreclose the mortgaged property.
5. In a mortgage, there can be security as well as personal liability.

**Charge**

1. It does not involve transfer of any interest in the property although it serves as a security for the payment of the loan.
2. It may be created by act of the parties or by operation of law.
3. It cannot be enforced against bona fide transferee for consideration having no notice of charge.
4. A charge-holder cannot foreclose the property on which he has a charge. He can however get the property sold as a simple mortgage.
5. In a charge created by act of the parties when a particular property is specified, the remedy of the charge-holder is against the property only.

**Answer 3(iv)****Review**

Any person considering himself aggrieved by the judgement of a Court may apply for a review of the judgement to the Court which passed the decree or made the order. The Court may make such order thereon as it thinks fit:

- (a) by decree or order from which an appeal is allowed by the Code, but from which no appeal has been preferred; or

- (b) by a decree or order from which no appeal is allowed by the Court, or
- (c) by a decision on a reference from a court of Small Causes.

The grounds for application for the review of a judgement are mentioned in Rule 1 of Order 47. These grounds are as follows :

- (a) discovery by the applicant of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made; or
- (b) some mistake or error apparent on the face of the record, or
- (c) any other sufficient reason.

### **Revision**

The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. It may make such order in the case as it thinks fit if such subordinate Court appears:

- (a) to have exercised a jurisdiction not vested in it by law; or
- (b) to have failed to exercise a jurisdiction so vested; or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court shall not, under Section 115, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where:

- (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings; or
- (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Further, the High Court shall not, under Section 115, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

In Section 115, the expression 'any case which has been decided, includes any order made, or any order deciding an issue in the course of a suit or other proceeding.

### **Answer 3(v)**

#### **Lease**

1. There is a transfer of an interest in the immovable property.
2. A lessee gets the exclusive possession of the property.
3. It creates an heritable estate.
4. It can be assigned or transferred.
5. It cannot be revoked.
6. It can be terminated in any of the ways provided by law.



**Licence**

1. There is no transfer of interest.
2. A licensee gets the right to use the property without exclusive possession.
3. It does not create an heritable estate.
4. It cannot be assigned as it is a personal right. A licensee, therefore, has no transferable interest in the licence.
5. It is ordinarily revocable.
6. It is terminated by death of either party, or by the alienation of property in question.

**Question 4**

- (a) *Discuss briefly the doctrine of part-performance embodied in section 53A of the Transfer of Property Act, 1882.* (6 marks)
- (b) *Discuss the doctrine of res judicata under section 11 of the Code of Civil Procedure, 1908.* (5 marks)
- (c) *Discuss the powers of various courts under the Code of Criminal Procedure, 1973.* (5 marks)

**Answer 4(a)**

**Doctrine of part-performance** : Section 53-A of the Transfer of Property Act, 1882 deals with the doctrine of part-performance. Operation of the doctrine of part-performance, according to Section 53A, depends on following conditions :

- (i) There must be a contract to transfer immovable property.
- (ii) It must be for consideration
- (iii) The contract should be in writing and signed by the transferor himself or on his behalf.
- (iv) The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
- (v) The transferee should have taken the possession of property in part performance of the contract. In case he is already in possession, he must have continued in possession and must have done something in furtherance of the contract.
- (vi) The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

If all above conditions are satisfied, then the transferor and the person claiming under him are debarred from exercising any right in relation to the property other than the rights expressly provided by the terms of the contract notwithstanding the fact that the instrument of transfer has not been registered or complete in the manner prescribed therefor by the law for time being in force. However, the doctrine of part performance cannot affect the rights, of a transferee for consideration who has no notice of the contract or of the part-performance thereof. It should be noted that Section 53A does not confer

any positive right on the transferee. It only prohibits exercise of the right of ownership in relation to the property in order to evict the transferee from the property because legal requirements have not been satisfied.

#### **Answer 4(b)**

**Doctrine of *Res-judicata*** : Section 11 of the Civil Procedure Code, 1908 deals with the doctrine of *res judicata* that is bar or restraint on repetition of litigation of the same issues.

General principle is that no one shall be twice vexed for the same cause. For the applicability of the principle of *res judicata* embodied in Section 11, the following requirements are necessary:

- (i) The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit.
- (ii) The former suit has been decided—former suit means which is decided earlier.
- (iii) The said issue has been heard and finally decided.
- (iv) Such former suit and the latter are between the same parties or litigation under the same title or persons claiming under parties above.
- (v) The Court which determined the earlier suit must be competent to try the latter suit.
- (vi) Any matter which might or ought to have been made a ground of defence or attack in such a former suit shall be deemed to have been a matter directly in issue in such suit.
- (vii) Relief claimed in the plaint but not expressly granted shall be deemed to have been refused.

#### **Answer 4(c)**

Following are different classes of Criminal Courts under the Cr.P.C., 1973 and their powers :

- (i) High Courts : High Court may pass any sentence authorized by Law.
- (ii) Courts of Session : A Session Judge or Additional Sessions Judge can pass any sentence authorized by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court.  
An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or imprisonment for a term exceeding ten years,
- (iii) The Court of Chief Judicial Magistrate or Additional Chief Judicial Magistrate may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 7 years.
- (iv) A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of a fine not exceeding Rs.5,000 or of both.
- (v) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding Rs.1,000 or of both.

- (vi) A Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate and the powers of the Court of a Magistrate of the First Class.

### Question 5

- (a) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
- (i) *Any person aggrieved by an order of Controller of Certifying Authorities or of the Adjudicator can appeal to the Cyber Regulations Appellate Tribunal within \_\_\_\_\_ days.*
  - (ii) *The period of limitation for instituting a summary suit is \_\_\_\_\_ from the date on which the debt becomes due.*
  - (iii) *Limitation of taking cognizance is \_\_\_\_\_, if the offence is punishable with fine only.*
  - (iv) *Adjudicating authority under section 43 of the Information Technology Act, 2000 can impose damages by way of compensation an amount not exceeding Rs.\_\_\_\_\_.*
  - (v) *Only the principal instrument shall be chargeable under section 4 of the Indian Stamp Act, 1899 with the duty prescribed for the conveyance, mortgage or settlement and each of other instruments shall be chargeable with the duty of Rs.\_\_\_\_\_.*
  - (vi) *If there is any appearance of inconsistency between the Schedule and a specific provision in an enactment, the \_\_\_\_\_ shall prevail.*  
(1 mark each)
- (b) *Choose the most appropriate answer from the given options in respect of the following :*
- (i) *In which of the following case, the Supreme Court made it clear that Parliament cannot alter the basic structure of the Constitution of India —*
    - (a) *I.C. Golak Nath vs. State of Punjab*
    - (b) *Kesavananda Bharati vs. State of Kerala*
    - (c) *Shankari Prasad vs. Union of India*
    - (d) *Indira Gandhi vs. Raj Narain.*
  - (ii) *Doctrine of sufficient cause under section 5 of the Limitation Act, 1963 will apply on —*
    - (a) *Suits*
    - (b) *Appeals and applications*
    - (c) *Both (a) and (b)*
    - (d) *None of the above.*
  - (iii) *Right to information is derived from the constitutional right, i.e.,—*
    - (a) *Right of freedom of speech and expression*

- (b) *Right to liberty*
  - (c) *Right of trade and commerce*
  - (d) *Right to equality.*
  - (iv) *Who may pass any sentence authorised by law —*
    - (a) *District Magistrate*
    - (b) *Chief Judicial Magistrate*
    - (c) *Sessions Judge*
    - (d) *Magistrate of the First Class.*
  - (v) *Public Information Officer for failing to provide information will be liable for fine of Rs.250 per day upto a maximum of —*
    - (a) *Rs. 25,000*
    - (b) *Rs. 50,000*
    - (c) *Rs.75,000*
    - (d) *Rs. 1,00,000.*
  - (vi) *Any person aggrieved by any decision or order of the Cyber Regulations Appellate Tribunal may appeal to the —*
    - (a) *Civil Judge*
    - (b) *District Judge*
    - (c) *District Magistrate*
    - (d) *High Court.*
- (1 mark each)
- (c) *Explain **either** of the following :*
- (i) *Doctrine of marshalling*
  - (ii) *Circumstantial evidence.*
- (4 marks)

#### Answer 5(a)

- (i) Any person aggrieved by an order of Controller of Certifying Authorities or of the Adjudicator can appeal to the Cyber Regulations Appellate Tribunal within **45** days.
- (ii) The period of limitation for instituting a summary suit is **one year** from the date on which the debt becomes due.
- (iii) Limitation of taking cognizance is **six months**, if the offence is punishable with fine only.
- (iv) Adjudicating authority under section 43 of the Information Technology Act, 2000 can impose damages by way of compensation an amount not exceeding **Rs. one crore.**
- (v) Only the principal instrument shall be chargeable under section 4 of the Indian Stamp Act, 1899 with the duty prescribed for the conveyance, mortgage or settlement and each of other instruments shall be chargeable with the duty of **Rupee One.**

- (vi) If there is any appearance of inconsistency between the Schedule and a specific provision in an enactment, the **enactment** shall prevail.

**Answer 5(b)(i)**

- (b) *Kesavananda Bharati v. State of Kerala*

**Answer 5(b)(ii)**

- (b) Appeals and applications

**Answer 5(b)(iii)**

- (a) Right to freedom of speech and expression

**Answer 5(b)(iv)**

- (c) Sessions Judge

**Answer 5(b)(v)**

- (a) Rs. 25,000

**Answer 5(b)(vi)**

- (d) High Court.

**Answer 5(c)(i)**

**Doctrine of marshalling**

According to Section 81 of the Transfer of Property Act, 1882 if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee. This is known as the doctrine of marshalling.

**Answer 5(c)(ii)**

**Circumstantial evidence**

In English law the expression direct evidence is used to signify evidence relating to the 'fact in issue' (*factum probandum*) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to "relevant fact" (*facta probandum*). However, under Section 60 of the Evidence Act, 1872 the expression "direct evidence" has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is "direct" evidence under Section 60. Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt of the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

**Question 6**

- (a) *Ragini, a singer agreed to sing at Lakshmi's theatre from January to April, 2009 and not to sing anywhere else during that period. Afterwards, she entered into a*

*contract to sing at Kamala's theatre during the said period and refused to sing at Lakshmi's theatre during that period. Lakshmi filed an injunction application to appropriate court. What relief Lakshmi is entitled to get, and for which part court may refuse to grant injunction ? Decide giving reasons. (6 marks)*

- (b) Government of Madhya Pradesh passed a law prohibiting the manufacture of bidis in the villages during the agricultural season. No person residing in the village could employ any other person nor engage himself in the manufacture of bidis during the agricultural season. The objective of the provision was to ensure adequate supply of labour for agricultural purposes. A bidi manufacturer could not even engage labour from outside the State, and so, had to suspend manufacture of bidis during the agricultural season. Even villagers incapable of engaging in agriculture, like old persons, women and children, etc., who supplemented their income by engaging themselves in manufacturing bidis were prohibited without any reason. Decide whether law passed by Government of Madhya Pradesh is constitutionally valid. (5 marks)*
- (c) A suit was instituted by the plaintiff company alleging infringement by the defendant company for using trade name of medicine and selling the same in wrapper and carton of identical designs with same colour combination, etc., as that of plaintiff company. A subsequent suit was instituted in a different court by the defendant company against the plaintiff company with similar allegations. In such a situation, advise the plaintiff company the procedure adopted by the courts. (5 marks)*

#### **Answer 6(a)**

Section 42 of the Specific Relief Act, 1963 provides that notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

The given problem is based on an English case namely *Lumley v. Wagner* (21) LJCH 898. In this case Miss W, a singer agreed to sing at L's theatre for a certain period and not to sing anywhere else during that period. Afterwards, she entered into a contract to sing at another theatre and refused to perform her contract with L.

The Court refused to enforce her positive agreement to sing at L's theatre (by specific performance) but granted an injunction restraining her from singing at any other theatre thereby preventing breach of the negative part of the agreement though the positive part of it, being a contract for the personal service, could not be specifically enforced.

#### **Answer 6(b)**

The facts of the problem are based on the leading Supreme Court case namely *Chintamana Rao v. State of M.P.*, AIR 1951 SC 118 where constitutionality of Madhya Pradesh Act which empowered the government to prohibit all persons residing in certain areas from engaging in manufacture of bidis was challenged. In this case the prohibition was held to be unreasonable because it was of excessive nature beyond what is required in the interest of public.

The prohibition infringed the fundamental right guaranteed under Article 19(1)(g) of the Constitution which provides that all citizens shall have the right to practice any profession or to carry any occupation, trade or business. At the same time, the freedom guaranteed under Article 19(1)(g) is not uncontrolled, for, clause (6) of the Article authorises legislation which (i) imposes reasonable restrictions on this freedom in the interests of the general public; (ii) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and (iii) enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

The emphasis of the courts has been on social control and social policy. The vital principle which has to be kept in mind is that the restrictive law should strike a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19. The restriction must not be of an excessive nature beyond what is required in the interests of the public.

#### **Answer 6(c)**

The problem is based on the case *M/s Wings Pharmaceuticals (P) Ltd., and another v. M/s Swan Pharmaceuticals and Others* A.I.R. (1999) Pat. 96. Section 10 of C.P.C. dealing with stay of suits contains provisions that the institution of second suit between the same parties on same fact and issues is not barred by Section 10. It merely says that the trial in subsequent suit cannot be proceeded with.

The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different courts might result in conflicting decisions as the issue involved in two suits was totally identical.

#### **Question 7**

- (a) *Four adhesive stamps were used on an instrument. First adhesive stamp had a single line drawn across the face of the stamp. On the second stamp, there were two parallel lines. The third stamp had three parallel lines, and the fourth stamp had two lines crossing each other. What are the provisions for cancellation of adhesive stamps and which adhesive stamps referred to above will be considered to have been properly cancelled ?* (6 marks)
- (b) *Anil has two properties – Property-X and Property-Y. He sells Property-Y to Sunil and puts a condition that Sunil should not construct on Property-Y more than one storey so that Anil's Property-X which he retains should have good light and free air. Is such a condition valid ? Give reasons in support of your answer.* (5 marks)
- (c) *Ajay, a Hindu, who was separated from his father, sells to Chander three fields A, B and C representing that he is authorised to transfer the same. Of these fields, Field-C does not belong to Ajay, as it was retained by his father at the time of partition, but after his father's death Ajay being the heir obtained Field-C. Chander did not rescind the contract of sale and asked Ajay to deliver Field-C to him. Whether Chander will succeed ? Decide.* (5 marks)

#### **Answer 7(a)**

Section 12(3) of the Indian Stamp Act, 1899 dealing with the mode of cancellation of stamps provides that the cancellation of an adhesive stamp may be done by the person

concerned by writing on or across the stamp his name or initials, or the name or initials of his firm with the true date of his so writing, or in any other effectual manner. Sub-section (3) merely lays down as a guidance one of the ways in which an adhesive stamp can be cancelled.

The problem is based on the facts of the case in *re Tata Iron Steel Company, AIR 1928 Bombay 80*. In this case it was held that all the four stamps must be regarded as having being cancelled in the manner so that they cannot be used again.

#### **Answer 7(b)**

Section 11 of Transfer of Property Act, 1882 embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. This section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property.

The given problem is an illustration appended to Section 11 of Transfer of Property Act. It is clear in the problem that the condition which is imposed by Anil is for the benefit of another property which he retains. Such a condition is valid.

#### **Answer 7(c)**

The given problem is an illustration appended to Section 43 of Transfer of Property Act, 1882.

Section 43 of Transfer of Property Act lays down the doctrine of feeding the grant by estoppel. As per this doctrine where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property or proposes to transfer such property for consideration, such transfer shall, at the option of transferee operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Thus, where a grantor has purported to grant an interest in land which he did not at that time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee or as it usually expressed, feeds the estoppel.

#### **Question 8**

- (a) *The managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign a document transferring her property to him. He had done so without the knowledge of his principal. Whether principal will be liable ? Give reasons.*

(6 marks)

- (b) *Aamir effects an insurance policy on his own life with the Life Insurance Corporation of India (LIC) and deposits it with a bank for securing payment of an existing debt. Aamir dies and bank claims the amount from the LIC contrary to the claims of Aamir's heirs. Decide whether the claim of the bank is maintainable.*

(5 marks)

- (c) *Gautam executed a document on 20th October, 2007 in favour of Thomas. Thereafter, Gautam executed another document on 1st December, 2007 in favour of Peter in respect of the same property. The document between Gautam and Thomas was registered on 15th January, 2008 whereas the document between*



*Gautam and Peter was registered on 15th December, 2007. Which document gets priority and why ?*  
(5 marks)

**Answer 8(a)**

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. A master is liable for the tort of his servant, principal for the tort of his agent and partners for the tort of a partner. This principle is called vicarious liability in tort.

In this case principal is liable because the fraud was committed by the managing clerk of the firm of solicitors in the course of employment. The given problem is based on the case *Lloyd v. Grace Smith & Company* (1912) AC 716.

**Answer 8(b)**

Actionable claims can be transferred by the execution of an instrument in writing signed by the transferor or his duly authorized agent. (Section 130 to 137 of Transfer of Property Act, 1882).

In this case the amount due under a policy of insurance is an actionable claim. The assignment of an actionable claim should be made in writing by the transferor. The deposit of the policy by the transferor as security without written document in favour of the bank is not a valid assignment. The bank cannot have any claim as against the heirs of Aamir.

**Answer 8(c)**

Section 47 of the Registration Act 1908 provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration.

In *K. J. Nathan v. S. V. Maruthi Rai*, AIR 1965 SC 430, the Supreme Court has laid down that as between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one.

As is evident, the date of the execution of the document is material and not the date registration, and the document executed first gets priority over the other.

In this case document executed on 20.10.2007 between Mr. Gautam and Mr. Thomas will get priority because it is executed prior to 1.12.2007.

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