

EXECUTIVE PROGRAMME EXAMINATION

DECEMBER 2010

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) Article 32 of the Constitution of India empowers the Supreme Court to enforce the fundamental rights guaranteed under Part III of the Constitution of India. Explain with the help of decided case law how the provisions of Article 32 of the Constitution of India have helped in the enforcement of fundamental rights. (8 marks)
- (b) Discuss the ordinance making powers of the President of India and of the Governor of a State as provided in the Constitution of India. (6 marks)
- (c) "Rule of ejusdem generis is merely a rule of construction to aid the courts to find out the true intention of the legislature." Explain. (6 marks)

Answer 1(a)

It is a cardinal principle of jurisprudence that where there is a right there is a remedy (*ubi jus ibi remedium*) and if rights are given without there being a remedy for their enforcement, they are of no use. While remedies are available in the Constitution and under the ordinary laws, Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right. It is remedial and not substantive in nature. It is really a far reaching provision in the sense that a person need not first exhaust the other remedies and then go to the Supreme Court. On the other hand, he can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari*, whichever may be appropriate for the enforcement of the right, the violation of which has been alleged.

The right conferred under Article 32, being a fundamental right, cannot be abrogated, abridged, or taken away by an act of the Legislator, unless the Constitution itself is amended. The powers of the Court under Article 32 are not circumscribed by any territorial limitation. It extends not merely over every authority within the territory of India but also those functioning outside, provided such authorities are under the control of the Government of India.

Where a fundamental right is also available against the private persons such as the right under Articles 17, 23 and 24, the Supreme Court can always be approached for appropriate remedy against the violation of such rights by private individuals. (*Peoples' Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473). A petitioners challenge under Article 32 extends not only to the validity of a law but also to an executive order issued under the authority of the law.

The right guaranteed by Article 32 shall not be suspended except as provided in the

Constitution. Constitution does not contemplate such suspension except by way of President's order under Article 359 when a proclamation of Emergency is in force.

Again in Article 31C the words appearing at the end of the main paragraph, namely and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy were declared to be void in Kesavananda's case.

Answer 1(b)

Ordinance-making powers of the President of India

Under the Constitution the most important legislative power conferred on the President is to promulgate Ordinances. Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say it may relate to any subject in respect of which parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.

This independent power of the executive to legislate by Ordinance has the following peculiarities:

- (i) this power is to be exercised by the President on the advice of his Council of Ministers.
- (ii) the Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.
- (iii) the Ordinance-making power will be available to the President only when both the Houses of Parliament have been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. However, Ordinance can be made even if only one House is in Session, when law cannot be made by that House in session alone. The President's Ordinance making power under the Constitution is not a co-ordinate or parallel power of legislation along with Legislature.

Ordinance-making powers of the Governor of a State

The Governor's power to make Ordinances has been stipulated under Article 213 of the Constitution of India having the force of an Act of the State legislature. It is similar to the Ordinance making power of the President of India. The Governor can make Ordinances only when the State legislature or either of the Two Houses is not in session. He must be satisfied that the circumstances exist where he must take immediate action by issuing the Ordinance with the aid and advice of the Council of Ministers. But under the following circumstances he cannot promulgate any Ordinance without prior instructions from the President:

- (i) Where the previous sanction of the President is required for such Bill.

- (ii) Where Bill is reserved for the consideration of the President.
- (iii) Where an Act of the State legislature containing the same provisions would under this Constitution have been invalid unless having been reserved for the consideration of the President, it had received the assent of the President.

The Ordinance must be laid before the State legislature (when it re-assembles) and shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

Answer 1(c)

Rule of *ejusdem generis*

The expression, '*ejusdem generis*' means 'of the same kind'. Normally, general words should be given their natural meaning like all other words unless the context requires otherwise. But when a general word follows specific words of a distinct category, the general word may be given a restricted meaning of the same category. The general expression takes its meaning from the preceding particular expressions because the legislature by using the particular words of a distinct genus has shown its intention to that effect. If the preceding specific words do not belong to a distinct genus, this rule is not applicable.

It is merely a rule of construction to aid the Courts to find out the true intention of the Legislature (*Jage Ram v. State of Haryana*, AIR 1971 SC1033). To apply the rule, the following conditions must exist:

- (1) The statute contains an enumeration by specific words,
- (2) The members of the enumeration constitute a class,
- (3) The class is not exhausted by the enumeration,
- (4) A general term follows the enumeration,
- (5) There is a distinct genus which comprises more than one species, and
- (6) There is no clearly manifested intent that the general term be given a broader meaning than the doctrine requires. (*Thakura Singh v. Revenue Minister*, AIR 1965 J & K 102)

The rule of *ejusdem generis* must be applied with great caution because, it implies a departure from the natural meaning of words, in order to give them a meaning or supposed intention of the legislature. The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished. The rule requires that specific words are all of one genus, in which case, the general words may be presumed to be restricted to that genus.

Whether the rule of *ejusdem generis* should be applied or not to a particular provision depends upon the purpose and object of the provision, which is intended to be achieved.

Question 2

Write notes on any four of the following :

- (i) *Circumstantial evidence*

- (ii) *Appointment of experts by an arbitral tribunal under the Arbitration and Conciliation Act, 1996*
 - (iii) *The rule of strict liability as laid down in Rylands vs. Fletcher*
 - (iv) *Rules relating to presumption*
 - (v) *Spes successionis.*
- (4 marks each)

Answer 2(i)**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, 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 to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

Answer 2(ii)**Appointment of experts by Arbitral Tribunal**

Section 26(1) of the Arbitration and Conciliation Act, 1996 provides for appointment of experts subject to agreement between the parties. Clause (b) of Sub-section (1) of the Section obligates the parties to provide the expert access to necessary information and documents.

The provisions stipulated under Section 26(3) imposes a duty on the expert to make available to the parties on their request the various documents etc. on which the expert has based his report.

Answer 2(iii)**Rule of Strict Liability**

The rule of strict liability in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants.

The facts of this case were as follows : B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the reservoir was filled, the water from it burst through the old shafts and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed;

“We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, *prima facie* answerable for all the damage which is the natural consequence of its escape.”

Answer 2(iv)

Rules Relating to Presumption

The Indian Evidence Act of 1872 recognises some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances.

A presumption is not in itself an evidence but only makes a *prima facie* case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved. There are three categories of presumptions:

- (i) presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances.
- (ii) presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.
- (iii) mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms “conclusive proof”, “shall presume” and “may presume”. The term “conclusive proof” specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term “shall presume” indicates rebuttable presumptions of law; the term “may presume” indicates presumptions of fact. When we see a man knocked down by a speeding car and a few yards away, there is a car going, there is a presumption of fact that the car has knocked down the man.

Answer 2(v)

Spes Successionis

Under Section 6 of the Transfer of Property Act, 1882 certain exceptions to the general rule that property of any kind may be transferred have been provided. One of such exceptions is chance of an heir apparent or ‘*spes successionis*’.

Under this clause, possibilities referred are bare or naked possibilities and not coupled with an interest such as contingent remainders or future interest-also known as right of *spes successionis* which cannot be the subject to transfer.

When a person is the owner of property, the property is in existence and it is in his possession. This he may transfer. But if property is neither in existence nor is the person the owner of the property then it cannot be transferred. For example, if a person is intending to buy certain property but, he has no interest in that property, he cannot transfer it unless the property comes to his hands, i.e., unless he becomes the owner of the property after buying it. But if a person obtains certain consideration and agrees to

sell the property of which he is not the owner, then on becoming the actual owner of the property he has to transfer the property as there was a contract between him and the person who has agreed to buy the property. This transfer operates on a contract to be performed when the property comes into the hands of the person who has agreed to transfer. But where a person wants to make a gift of the property which is to come in his hands in future, he cannot transfer it because a gift is voluntary transfer without any consideration. Thus a gift of future property is void. Similarly, the chance of a heir apparent succeeding to the estate of a deceased person cannot be transferred. Suppose A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has only a hope expectancy that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

Question 3

Distinguish between any four of the following :

- (i) 'Condition restraining alienation' and 'condition restraining enjoyment'.
- (ii) 'Mortgage' and 'charge'.
- (iii) 'Sale' and 'contract for sale'.
- (iv) 'Set-off and 'counter-claim'.
- (v) 'Electronic form' and 'electronic record'.

(4 marks each)

Answer 3(i)

Condition Restraining Alienation and Condition Restraining Enjoyment

Section 10 of the Transfer of Property Act, 1882 says that when property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. Suppose, B gives property to A and his heirs adding a condition that if the property is alienated it should revert to B. This condition is invalid and the transferee can ignore such condition. The transfer takes effect and is valid, and the condition not to alienate the property is void.

Exceptions : There are two exceptions to the rule that absolute restraints are void. Firstly, in the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such conditions are valid. The reason why such an exception is made in the case of a lease is that the lessor may have confidence in the lessee but may not have the same confidence in some other person. So, if the lessor puts a condition restraining the lessee from transferring the property to someone, the condition is valid.

The second exception is made in respect of a woman who is not a Hindu, Buddhist or Muslim. In such a case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.

Partial restraint valid

Though absolute restraints are bad in law, partial restraints are valid. If there are conditions which restrain the transferee not to alienate the property outside the family, it

has been held by the Courts that they are partial restraints. For example, whenever there are conditions in a family settlement whereby the members are not allowed to sell their shares to a stranger, such conditions are valid.

But it is not permissible to restrict the alienation to a particular time. Such a restriction is not partial but an absolute restraint and as such invalid.

Restraint on enjoyment

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The 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. As for instance, A sells his house to B and adds a condition that B only should reside in that house, the condition is invalid. This is subject to the exception that, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

Answer 3(ii)

Mortgage and Charge

The points of distinction between a mortgage and a charge are as follows:

- (a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.
- (b) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties.
- (c) A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
- (d) In certain types of mortgage (viz., mortgage by conditional sale and anomalous mortgage) the mortgagor can foreclose the mortgaged property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.
- (e) From the very nature of it, a charge as a general rule, cannot be enforced against a transferee for consideration without notice. But in a mortgage, the transferee of mortgaged property from the mortgagor, can only acquire the remaining interest of the mortgagor, and is therefore, only bound by the mortgage.
- (f) Where a charge is created by the act of parties, the specification of the particular fund or property negatives a personal liability and the remedy of the charge-holder is against the property only. While in case of a mortgage, there can be security as well as personal liability.

Answer 3(iii)

Sale and Contract for sale

“Sale” has been defined under section 54 of the Transfer of Property Act, 1882 as “a transfer of ownership in exchange for a price paid or promised or part paid and part-promised”.

Essentials

- (a) The seller must be a person competent to transfer. The buyer must be any person who is not disqualified to be the transferee under Section 6(h)(3).
- (b) The subject matter is transferable property.
- (c) There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.
- (d) It must be an exchange for a price paid or promised or part paid and part promised.
- (e) There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

Contract for sale

A contract for the sale of immoveable property differs from a contract for the sale of goods in that the Court will grant specific performance of it unless special reasons to the contrary are shown.

Answer 3(iv)**Set-off and Counter-claim**

Set-off : Order 8, Rule 6 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.

Counter-claim : A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order 8, Rule 6A)

Answer 3(v)**Electronic Form and Electronic Record**

As per the Information Technology Act, 2000 electronic form with reference to information, means "any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated micro fiche or similar device". [Section 2(1)(r)]

Electronic record means "data, recorded or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche". [Section 2(1)(t)]

Question 4

- (a) Explain with illustration the doctrine of 'damnum sine injuria' and 'injuria sine damno'. (6 marks)

(b) List any ten instruments which are chargeable with duty under the Indian Stamp Act, 1899. (5 marks)

(c) What are 'cyber offences' under the Information Technology Act, 2000 ? (5 marks)

Answer 4(a)

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Common examples are, where the damage results from an act done in the exercise of legal rights.

Injuria Sine Damno

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort.

Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus when there is an invasion of an "absolute" private right of an individual, there is an *injuria* and the plaintiff's action will succeed even if there is no *damnum* or damages. An absolute right is one, the violation of which is actionable per se, i.e., without the proof of any damage. *Injuria sine damno* covers such cases and action lies when the right is violated even though no damage has occurred. Thus the act of trespassing upon another's land is actionable even though it has not caused the plaintiff even the slightest harm.

Answer 4(b)

Instruments Chargeable with Duty under the Indian Stamp Act, 1899

Instruments chargeable with duty have been stipulated under Section 3 of the Indian Stamp Act, 1899. Apart from promissory note and bill of exchange, following instruments are chargeable with stamp duty as indicated in Schedule I annexed to the Act.

1. Mortgage deeds
2. Share warrants
3. Trust deeds
4. Instruments of partnership
5. Certificate of sale
6. A memorandum of agreement
7. Power of attorney
8. Lease agreements
9. Partition award
10. Protest of bill or note

Answer 4(c)**Cyber Offences**

Chapter 11 of the Information Technology Act, 2000 deals with offences relating to computers etc. and connected matters. The offences listed in this Chapter are as follows:

- (a) Tampering with computer source documents;
- (b) Hacking with computer systems;
- (c) Publishing of obscene information in electronic form;
- (d) Securing access to any computer, computer system or computer network declared by the appropriate Government to be a “protected system”;
- (e) Misrepresentation about a material fact to, or suppression of a material fact from, the Controller or the Certifying Authority;
- (f) Breach of confidentiality and privacy, by a person who has, in the exercise of a power conferred by the Act, secured access to electronic record, book, register etc.;
- (g) Publishing a digital signature certificate, which is false in certain particulars;
- (h) Knowing, creating, publishing etc. a Digital Signature Certificate, for any fraudulent or unlawful purpose.

Question 5

- (a) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
- (i) *A writ of _____ is issued to an inferior court preventing the latter from usurping jurisdiction which is not legally vested in it.*
 - (ii) *A decree through which the right as to any property or the legal character of a person is judicially ascertained is known as _____.*
 - (iii) *The word ‘tort’ is a French equivalent of English word _____.*
 - (iv) *All documents produced for inspection of the court are called _____.*
 - (v) *The provisions regarding use of adhesive stamps are given under section _____ of the Indian Stamp Act, 1899.*
 - (vi) *The statement given by the court on the grounds of a decree or order as defined in section 2(9) of the Code of Civil Procedure, 1908 is known as _____ .
(1 mark each)*
- (b) *Choose the most appropriate answer from the given options in respect of the following :*
- (i) *The relief of cancellation of a written instrument is available under the Specific Relief Act, 1963 —*
 - (a) *When an instrument is void or voidable at the option of plaintiff*
 - (b) *When the plaintiff may apprehend serious injury if the instrument is left outstanding*

- (c) *Where the instrument requires registration but is not registered*
 - (d) *Where the conditions (a) and (b) mentioned above are fulfilled.*
 - (ii) *An award may be challenged on the ground of —*
 - (a) *Incapacity of a party*
 - (b) *Invalidity of an arbitration agreement*
 - (c) *Both (a) and (b)*
 - (d) *None of the above.*
 - (iii) *The Parliament is empowered to make laws on the subjects enumerated in—*
 - (a) *List-I*
 - (b) *List-II*
 - (c) *Both List-I and List-II*
 - (d) *None of the above.*
 - (iv) *As per the Registration Act, 1908, a testator may deposit with any Registrar his will in a sealed cover with the name of the testator —*
 - (a) *Personally*
 - (b) *Through an agent*
 - (c) *Through any person*
 - (d) *Either (a) or (b).*
 - (v) *Where possession of the property is to be given to the mortgagee, the mortgage is called —*
 - (a) *Usufructuary mortgage*
 - (b) *Simple mortgage*
 - (c) *Anomalous mortgage*
 - (d) *None of the above.*
 - (vi) *Summary trials will apply to those offences which are not punishable with imprisonment for a term exceeding —*
 - (a) *Two years*
 - (b) *One year*
 - (c) *60 Days*
 - (d) *90 Days.*
- (1 mark each)
- (c) *Abhay's agricultural land was purchased by the government for the purpose of construction of a factory but no duty was paid for this transfer by the government. Abhay wanted to take back his land on the ground that the government has not paid the duty and, therefore, no sale deed was executed. Will Abhay succeed ? Give reasons.* (4 marks)

Answer 5(a)

- (i) A writ of **prohibition** is issued to an inferior court preventing the latter from usurping jurisdiction which is not legally vested in it.

- (ii) A decree through which the right as to any property or the legal character of a person is judicially ascertained is known as **declaratory decree**.
- (iii) The word 'tort' is a French equivalent of English word **wrong**.
- (iv) All documents produced for inspection of the court are called **documentary evidence**.
- (v) The provisions regarding use of adhesive stamps are given under **Section 11** of the Indian Stamp Act, 1899.
- (vi) The statement given by the court on the grounds of a decree or order as defined in Section 2(9) of the Code of Civil Procedure, 1908 is known as **judgement**.

Answer 5(b)(i)

- (d) Where the conditions (a) and (b) mentioned above are fulfilled.

Answer 5(b)(ii)

- (c) Both (a) and (b)

Answer 5(b)(iii)

- (c) Both List-I and List-II

Answer 5(b)(iv)

- (d) either (a) or (b)

Answer 5(b)(v)

- (a) Usufructuary mortgage

Answer 5(b)(vi)

- (a) Two years.

Answer 5(c)

Section 3 of the Indian Stamp Act, 1899 dealing with instruments chargeable with duty provides certain exceptions stating that no duty shall be chargeable in respect of any instrument executed by or on behalf of or in favour of the Government, in cases where, but for this the Government would be liable to pay the duty chargeable in respect of such instrument.

In the given case, the agricultural land of Abhay was purchased by the Government and it did not pay the duty. As per the provisions of the section it appears that the government is liable to pay duty. Therefore the instrument falls under the exception and it is not void. Abhay cannot take back his land on this ground.

Question 6

State, with reasons in brief, whether the following statements are true or false :

- (i) *Certain categories of information have been exempted from disclosure under the Right to Information Act, 2005.*
- (ii) *Article 174 of the Constitution of India empowers the Governor of a State to dissolve the State Legislature.*

- (iii) *Arbitration is the means by which the parties to a dispute get it settled through the intervention of a third person.*
- (iv) *The limitation for taking cognizance of certain offences has been prescribed by the Code of Criminal Procedure, 1973.*
- (v) *If the parties to arbitration fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators.*
- (vi) *An easement can be transferred apart from dominant heritage.*
- (vii) *The doctrine of part-performance is applicable only where the transferee has taken possession of the immovable property.*
- (viii) *A judicial proceeding under the Code of Criminal Procedure, 1973 includes inquiry, trial and investigation. (2 marks each)*

Answer 6

- (i) **Correct** : Under Section 8 of the Right to Information Act, 2005 certain categories of information have been exempted from disclosure.
- (ii) **Correct** : Article 174(2) of the Constitution expressly vests in the Governor the power of dissolving State Legislature.
- (iii) **Correct** : Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a court of law.
- (iv) **Correct** : Chapter XXXVI of the CR.P.C prescribes limitation period for taking cognizance of certain offences.
- (v) **Incorrect** : As per Section 10 of the Arbitration and Conciliation Act, 1996 if the parties failed to determine the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.
- (vi) **Incorrect** : An easement cannot be transferred as apart from the dominant heritage. It is a right ancillary to the enjoyment of the land and cannot be disannexed from it.
- (vii) **Incorrect** : All the ingredients of Section 53A of the Transfer of Property Act, 1882 should be present.
- (viii) **Incorrect** : The term judicial proceeding includes inquiry and trial but not investigation. [Section 2(i)] of the Cr.P.C]

Question 7

- (a) *A magistrate of the first class passed a sentence of imprisonment for a term of three years with a fine of Rs.4,000 and in lieu of non-payment thereof an additional imprisonment for another one year. Has the aggrieved person any right to appeal against this sentence ? (6 marks)*
- (b) *Anil prefers an appeal for setting aside the arbitral award on the ground that he was not given a proper notice of arbitral proceedings and thereby not being able to present his case. He also furnishes sufficient proof and pleads before the court that he received the arbitral award just 15 days back. Decide with reasons—*
 - (i) *whether Anil will succeed in his prayer; and*
 - (ii) *whether the law of limitation will not be a bar ? (5 marks)*

- (c) *Ram and Shyam sell rice for Rs. 25,000 to Sohan and Mohan. Sohan sells cloth worth Rs. 28,000 to Shyam. Sohan files a suit against Shyam for recovery of price of cloth. Shyam claims set-off of the cost of rice in this suit. Will he succeed ?* (5 marks)

Answer 7(a)

Section 29 of the Code of Criminal Procedure, 1973 specifies the sentencing powers of Magistrates. So far as the Magistrate of the first class is concerned, as per Section 29 of the Code, 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 five thousand rupees or of both.

Section 30 of the Code specifies the limits of Magistrate's powers. It provides that the Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law provided that the term:

- (i) is not in excess of the powers of the Magistrate under Section 29; and
- (ii) where imprisonment has been awarded as part of the substantive sentence, it should not exceed 1/4th of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

The Aggrieved person has a right to appeal against the sentence of the First Class Magistrate, as the sentence awarded by him for default of payment of fine exceeds the limit stipulated under Section 30 of the Code (i.e 1/4th).

Answer 7(b)

The grounds for setting aside an arbitral award have been envisaged under Section 34(2) of Arbitration and Conciliation Act, 1996. One of the grounds on which an arbitral award may be set aside is that the party applying was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings. [Section 34(2) (iv)]

Further, Section 34(3) of the Act prescribes a time limit of three months for making an application for setting aside the arbitral award. The prescribed period of three months could be extended to a maximum period of 30 days by the Court if it is satisfied that the applicant was prevented by sufficient cause from making the application within the said period.

If the law on the point is applied to the given problem, the ground on which the Anil (applicant) makes prayer to set aside the award is found in Section 34(2) (iv). Therefore, the court may set aside the arbitral award or may provide relief in accordance with Section 34(2) of the Act.

The law of limitation shall not create any bar, since the period of limitation has not expired in view of the provisions of Section 34(3).

Answer 7(c)

Order 8, Rule 6 of the Code of Civil Procedure, 1908 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. As per the provision, the court allows set-off when it is satisfied inter-alia, that the amount of which set-off is claimed, is legally recoverable by the defendant from the plaintiff.

In the given case, Sohan is the plaintiff while Shyam is the defendant. The amount of which set-off is claimed by the defendant Shyam is not recoverable from Mohan, who is jointly liable with Sohan to pay it. Mohan is not party to this suit.

In view of the factual situation, Shyam will not be allowed set-off of the amount claimed by him.

Question 8

- (a) *Ajay-voluntarily makes a gift of his immovable property to Bijoy. Bijoy accepts the gift. The possession of the property was given to Bijoy but the gift deed which required registration under section 123 of the Transfer of Property Act, 1882 was not registered. Whether Ajoy, the donor can revoke the gift ? Decide. (6 marks)*
- (b) *Amrit contracts Bhushan to sell a piece of land consisting of five bighas of land for Rs.5 lakh. Subsequently, it turns out that only four bighas of land belongs to Amrit. Whether specific enforcement of such part-contract may be possible on the part of either party to the contract ? Decide by referring the specific provisions of the Specific Relief Act, 1963. (5 marks)*
- (c) *Angad is charged for murder of Binod. The charge sheet is filed in the court of Chief Judicial Magistrate, who passed an order of sentence of imprisonment for life. Angad engages you as an advocate. Advise the course of action to Angad giving reasons. (5 marks)*

Answer 8(a)

Ajoy can not revoke the gift. It has been held by the Privy Council in *Kalyan Sundram v. Kumarappa*, A.I.R. 1925 P.C. 42, that after acceptance of the deed of gift and before registration, the donor cannot revoke the gift. The gift which is accepted by the donee, will take effect from the date of the execution of the document by the donor, even though it is registered at a later date.

In the present problem other than registration, the gift is complete and valid according to the provisions of Section 122 of the Transfer of Property Act, 1882. As soon as the transfer of the gift is complete, the ownership of the gifted property transfers and vests immediately in the donee. Once the donee becomes the owner of the property, the donor cannot revoke the gift for want of registration. While registration is a necessary formality for the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. The donee in such a case can ask the donor to complete the gift by registration. Thus, the most essential thing for the validity of a gift is its acceptance. If the gift is accepted but not registered it is a valid gift.

Answer 8(b)

Specific performance of part of a contract has been dealt with under Section 12 of the Specific Relief Act, 1963. The general rule is that the court normally does not grant specific performance of only a part of contract. In other words the court grants specific performance of a contract in its entirety, i.e. in accordance with the actual or exact terms of the contract. But there are certain exceptions to this general rule that have been envisaged under Section 12(2) to 12(4) of the Specific Relief Act. As per Section 12(2) of the Specific Relief Act, if the part which is left unperformed bears only

a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party direct the specific performance of so much of the contract as can be performed and award compensation for the deficiency.

In the given problem Amrit contracts Bhushan to sell a piece of land consisting of 5 bighas of land for Rs 5 lakh. It turns out that only 4 bighas of land belong to Amrit.

The one bigha is not necessary for the use or enjoyment of the 4 bighas, nor so important that loss if it may not be made good in money. Amrit may be directed at the suit of Bhushan to convey to Bhushan the 4 bighas and to compensate him for the loss of one bigha or Bhushan may be directed at the suit of Amrit to pay to Amrit, on receiving the conveyance and possession of the land, the stipulated purchase money, less the sum awarded as compensation for the deficiency.

Answer 8(c)

A Chief Judicial Magistrate as per Section 29 of the Cr.P.C can pass any sentence authorized by law except a sentence of death, or of imprisonment for life or of imprisonment for a term exceeding seven years.

As is evident the Chief Judicial Magistrate has exceeded the limit of his powers provided under Section 29 of the Code. Angad should file an appeal in the High Court against the order of the Chief Judicial Magistrate.
