

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed: 3 hours

Maximum marks: 100

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

Question 1

(a) *Hurry Burry Ltd. went into liquidation and its assets were put to sale by the court. The terms and conditions of the sale stated that the sale would be of the assets on 'as is where is and whatever there is' basis and the bidders had to satisfy themselves as to any encumbrance on the property. On 15th September, 2006, the company judge confirmed the sale of an immovable property in an auction in favour of Ravi. Later on, Ravi received a notice from the municipal corporation authorities claiming the payment of arrears of property tax for the period prior to 15th September, 2006 with interest. The municipal corporation had not filed its claim before the official liquidator. It was argued by the municipal corporation authorities that the sale was made on 'as is where is and whatever there is' basis and the buyer was deemed to have full knowledge as to the defects in the description, quality and quantity of the assets sold. Decide whether Ravi is liable to pay the arrears of property tax with interest. Support your answer with decided case law. (5 marks)*

(b) *What are the do's and don'ts which should be considered while drafting documents? (5 marks)*

(c) *Explain the following:*

(i) *Deed pool*

(ii) *Deed poll*

(iii) *Indenture*

(iv) *Cyrographum*

(v) *Deed escrow. (2 marks each)*

Answer 1(a)

The facts of the case given are similar to the case *Al Champdany Industries Ltd., v. Official Liquidator & Anr* [(2009)148 Comp Cas.641(SC)] The above Case was decided by the Supreme Court and it was held that the purchaser was not liable to pay the taxes prior to the date 15th September, 2006. The Supreme Court held:

(i) Under Section 55(1)(g) of the Transfer of Property Act, 1882, the seller is bound to pay all Public Charges due in respect of the property up to the date of sale, when the property is sold in an auction.

(ii) The fact that the company went into liquidation was given due publicity, the advertisement did not specify that all public charges have to be paid. The municipal authorities did not file their claims before the official liquidator.

(iii) Neither the company nor any other law imposed any additional obligation upon the purchaser to make any enquiry with regard to the liabilities of the company other than those which would impede its value. An encumbrance must be capable of being found out either on inspection of property or at the Registrar's office or a statutory authority.

In the light of the above decision, Mr. Ravi is not liable to pay the taxes prior to 15th September, 2006.

Answer 1(b)

Do's and Don'ts while drafting the documents

Some Do's

- 1.Reduce the group of words to single word;
- 2.Use simple verb for a group of words;
- 3.Avoid round-about construction;
- 4.Avoid unnecessary repetition;
- 5.Write shorter sentences;
- 6.Express the ideas in fewer words;
- 7.Prefer the active to the passive voice sentences;
- 8.Choose the right word;
- 9.Know exactly the meaning of the words and sentences you are writing; and
- 10.Put yourself in the place of reader, read the document and satisfy yourself about the content, interpretation and the sense it carries.

Some Don'ts

The following things should be avoided while drafting the documents:

- (a)Avoid the use of words of same sound. For example, the words "Employer" and "Employee";
- (b)When the clause in the document is numbered it is convenient to refer to any one clause by using single number for it. For example, "in clause 2 above" and so on.
- (c)Negative in successive phrases would be very carefully employed.
- (d)Draftsman should avoid the use of words "less than" or "more than", instead, he must use "not exceeding".
- (e)If the draftsman has provided for each of the two positions to happen without each other and also happen without, "either" will not be sufficient; he should write "either or both" or express the meaning of the two in other clauses.

In writing and typing the following mistakes always occur which should be avoided:

- 1."And" and "or";
- 2."Any" and "my";
- 3."Know" and "now";
- 4."Appointed" and "Applied";
- 5."Present" and "Past" tense.

Answer 1(c)

(i) Deed Pool

A deed between two or more parties where as many copies are made as there are parties, so that each may be in a possession of a copy. This arrangement is known as deed pool.

(ii) Deed Poll

A deed made and executed by a single party e.g. power of attorney, is called a deed poll, because in olden times, it was polled or cut level at the top. It had a polled or clean cut edge. It is generally used for the purpose of granting powers of attorney and for exercising powers of appointment or setting out an arbitrator's award. It is drawn in first person usually.

(iii) Indenture

Indenture are those deeds in which there are two or more parties. It was written in duplicate upon one piece of parchment and two parts were severed so as to leave an indented or vary edge, forging being then, rendered very difficult. Indentures were so called as at one time they are indented or cut with uneven edge at the top. In olden times, the practice was to make as many copies or parts as they were called, of the instruments as they were parties to it, which parts taken together formed the deed and to engross all of them of the same skin of parchment.

(iv) Cyrographum

This was another type of indenture in olden times. The word "Cyrographum" was written between two or more copies of the document and the parchment was cut in a jugged line through this word. The idea was that the difficulty of so cutting another piece of parchment that it would fit exactly into this cutting and writing constituted a safeguard against the fraudulent substitution of a different writing for one of the parts of the original. This practice of indenting deeds also has ceased long ago and indentures are really now obsolete but the practice of calling a deed executed by more than one party as an "indenture" still continues in England.

(v) Deed Escrow

A deed signed by one party and delivered to another as an "escrow" for it is not a perfect deed. It is only a mere writing (Scriptum) unless signed by all the parties and dated when the last party signs it. The deed operates from the date it is last signed. Escrow means a simple writing not to become the deed of the expressed to be bound thereby, until some condition should have been performed. (*Halsbury Laws of England*, 3rd Edn., Vol. II, p. 348).

Question 2

(a) *Mention important aspects which should be kept in mind while drafting a sale deed of an immovable property by a limited company. (5 marks)*

(b) *Alpha Industries Ltd. wishes to appoint Ram Avtar & Co., Advocates as their legal consultant on an annual retainer basis. Draft a suitable agreement assuming facts, wherever necessary. (5 marks)*

(c) *Explain the following types of guarantee:*

(i) *Contract of guarantee*

(ii) *Continuing guarantee*

(iii) *Bank guarantee. (2 marks each)*

Answer 2(a)

Before drafting the sale deed for the immovable property, it is necessary that the title of the property be investigated and it should be ensured that the title to the property is proved as good and marketable. Investigation of title should be done by an experienced person, solicitor or advocate or professional consultant who should certify having carried out searches in the concerned office that the property is free from any encumbrance i.e. charges, etc.

A company can validly acquire or dispose of an immovable property if its Memorandum and Articles of Association so provide and its Board of Directors pass the requisite resolution in conformity with the provisions of the Companies Act, 1956.

A company may acquire any immovable property by having it sold out by any other person in its favour under a document known as 'Sale Deed' executed by the vendor in its favour. A Sale Deed must be properly drafted adhering to all the principal conditions prescribed under the Transfer of Property Act to acquire a perfect title to the property being purchased by the company.

The important aspects to be kept in mind while drafting a sale deed of an immovable property are:-

- Lawful consideration and objects*: The property must be purchased as a part of legal transaction having paid the consideration as required under the provisions of the Indian Contract Act, 1872 for a valid contract. Besides, the objectives for which property is being purchased by the company should be lawful.

- Competence of person to transfer*: For a company the test of competence to enter into a transaction of sale or purchase is that its Board of Directors should authorize a person under the resolution passed in their meeting held in conformity with the Articles of Association and having objects clause to sell or purchase immovable property under Memorandum of Association.

- Transfer of all interest in the property*: All interests which a transferor is capable of passing should be explained in the document. For example, if it is transfer of lands, the easement annexed thereto, the rents of profits thereof, things attached thereto etc.

- Absolute transfers* – The transfer should be free of any conditions or limitations which may inhibit the other party to make full use of the property in exercise of legal rights.

- Justification*: Cogent reasons for transfer should be given so as to establish bonafide base for the transaction.

- Property should be free from any rights or obligations which a third party can enforce legally against transferee for enjoying any benefit.

- Protection for defective title*: Section 51 of the transfer of property Act, provides protection to the bonafide transferees acquiring properties in good faith.

- Precautions*: The property is free from any encumbrances and no litigation questioning such property or rights or Interest connected therewith is pending in any Court.

Answer 2(b)

This agreement is made on 1st day of April 1999, between Alpha Industries Limited having its Registered Office at 707, Ram Mandir Lane, Prakask Deep Chambers, Shivaji Lane, Aurangabad of the one part (herein after called the "Company") and Ram Avatar & Co. carrying on the profession of Advocates in partnership in the town of Bhopal of the other part (hereinafter called the "firm") and witnesses as under:

- (i) That the company hereby appoints the firm as its legal adviser and the firm agrees to render legal services to the company on the terms and conditions mentioned hereunder for a period of one year, which shall deemed to continue unless terminated by a notice.

- (ii) During the currency of this agreement and unless attested by mutual consent, the company shall pay Rs.1,00,000/- (Rupee one lac only) per annum in two half yearly

installments each year as remuneration for legal services rendered.

(iii) That the firm engages to attend all the legal works of the said company, to send notices of demand or otherwise for recovery of outstanding dues, correspondences and to defend such matters in the courts or before other authority in this behalf in the town of Aurangabad and to give opinion in writing on the facts stated to the said firm in writing.

(iv) That on termination of this agreement, the firm engages to return all papers, documents or other proceedings belonging to and which are expected to be returned by the company on severance of the connection with the company.

(v) The firm shall have lien on all the papers and other documents of the company in respect of arrear of remuneration and other expenditure legitimately incurred on behalf of the company by the firm.

Answer 2(c)

(i) Contract of guarantee

A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor"; and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written. (Section 126 of the Indian Contract Act, 1872)

(ii) Continuing guarantee

A guarantee which extends to a series of transactions is called a "continuing guarantee".

(iii) Bank guarantee

A "bank guarantee" is a guarantee given by a bank on behalf of its client or account-holder to another person with whom the client has entered into a contract to perform some job or to do and call upon the bank to pay the guaranteed amount in the event of the contingency, mentioned in the guarantee, happening or not happening, as the case may be.

Question 3

(a) What are the statutory provisions for appeals to the Securities Appellate Tribunal (SAT) under the Securities and Exchange Board of India Act, 1992? (4 marks)

(b) Distinguish between 'lease agreement' and 'licence agreement'. (4 marks)

(c) Draft a specimen arbitration agreement to refer a dispute to two arbitrators. (8 marks)

Answer 3(a)

Section 15 T of the SEBI Act lays down that any person aggrieved by an order of SEBI made under this Act or the Rules or Regulations made thereunder or by an order made by an adjudicating officer under this Act, may prefer an appeal to the Securities Appellate Tribunal having jurisdiction in the matter.

No appeal shall lie to the SAT from an order made by SEBI; by an Adjudicating Officer, with the Consent of the parties.

Every appeal to SAT shall be filed within a period of 45 days from the date on which a

copy of the order made by SEBI or the Adjudicating Officer is received by him and it shall be in such form and be accompanied by such fees as may be prescribed. Provided SAT may condone the delay if satisfied that there was sufficient cause. On receipt of an appeal, the SAT, may after giving the parties to appeal, an opportunity of being heard, pass such orders thereon as thinks fit, confirming, modifying or setting aside the order appealed against.

The SAT shall send a copy of every order made by it to SEBI and the parties to appeal and the concerned adjudicating officer. The appeal filed before the SAT shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

Answer 3(b)

Lease: A lease of immovable property is a transfer of a right to enjoy the property for a certain time in consideration for a price paid or promised. The price paid is called “rent”.

Licence: Licence has been defined in Section 52 of the Indian Easements Act, 1882 as under:

“where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a licence”.

Distinction between Licence and Lease

A licence and a lease is distinguished inter se with following characteristics:

<i>Licence</i>	<i>Lease</i>
1. A personal non-heritable right.	An heritable right in rem.
2. Creates no interest in the guarantee.	Interest created in the lessee.
3. Non assignable	Usually assignable.
4. Always permissive and normally revocable.	Permissive but not normally revocable.
5. Not exclusive user	Exclusive user.....
6. A positive right.	A positive right.
7. Denial of grantor's title does not necessarily result in forfeiture.	Denial of lessor's title results in forfeiture.
8. Remedy for breach is damages.	Specially enforceable.
9. No notice necessary to terminate relationship.	Notice necessary to terminate relationship.
10. Instrument granting right does not require registration.	Instrument creating right requires registration.
11. Does not entitle licensee to sue	Can sue in his own name.

strangers in his own name.

12. A licensee does not qualify for a vote. May qualify for a vote.
 13. Not liable for rents Liable.
 14. User not liable for public nuisance. Liable.
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Answer 3(c)

This agreement made and entered into between Mr..... and Mr..... on this..... day of (month) and (year) witnesseth as follows:

WHEREAS differences and disputes have arisen between the parties above-mentioned regarding the matter of..... and the parties could not mutually settle the matter. Now the parties agree that the matter as under be referred to arbitration to obtain an award:

1. For the purpose of final determination of the dispute, the matter will be referred to Mr..... nominated by one party and Mr..... nominated by the other party as arbitrators and their award shall be final and binding on both the parties.
2. If differences should arise between the said two arbitrators on the questions referred to them, the said arbitrators shall select an umpire and the award to be given by the umpire shall be final and both the parties hereby agree that the award so given by the umpire or arbitrators shall be binding on both the parties.
3. A reasonable time-limit may be fixed after consulting the arbitrators for the grant of the award by them and umpire if appointed and the said time may be extended in consultation with the arbitrators or umpire if need be.
4. The provisions of the Arbitration and Conciliation Act, 1996 so far as applicable and as are not inconsistent or repugnant to the purposes of this reference shall apply to this reference to arbitration.
5. Both the parties agree that they would co-operate and lead evidence etc. with the arbitrators so appointed as expeditiously as possible and it is an express condition of this agreement, that if any of the parties non-co-operates or is absent at the reference, the arbitrators would be at liberty to proceed with the reference ex parte.
6. The parties hereto agree that this reference to arbitration would not be revoked either by death of either party or any other cause.
7. If the arbitrators or anyone of them as chosen under this agreement become incapacitated either by death or sickness or other disability, the parties retain the right of nominating substitutes and no fresh agreement therefor would be necessary.
8. It is an express stipulation that any award passed by the said arbitrators shall be binding on the parties, their heirs, executors and legal representatives.

Having agreed to the above by both the parties, the said parties affix their signatures to this agreement this..... day of (month and year) at (place).

Signature I

Signature II

Question 4

. (a) "Articles of association of a company are public documents and have evidentiary value in matters which involve dealings of a company with its own members or third parties." Discuss the statement and also state the important aspects to be kept in view while drafting the articles of association of a company. (8 marks)

(b) Write notes on the following :

(i) Rule of adverse inference

(ii) Representative suit. (4 marks each)

Answer 4(a)

Article of Association is another equally important document for incorporation of a limited company. Articles are rules and regulations for management of internal affairs of the company. It constitutes a contract between the company and its members and members inter se. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum. Articles should be in conformity with the provisions of Memorandum and the Companies Act.

Utmost care is required to be taken to draft the Articles. It should contain strictly only relevant and necessary matters. Any person outsider, has constructive notice of the contents of Articles and expected to inspect before entering into any transaction with the company. Articles must be signed by the subscribers of the Memorandum and be registered along with the Memorandum. A private company must have its own Articles, but for public limited company it is optional. In case of drafting the articles for a public limited company limited by shares, the draftsman can follow the following alternatives:

(i) Adopt Table A in full; or

(ii) Exclude Table A wholly and register own Articles suiting its requirements; or

(iii) Register own articles and in addition thereto allow Table A to apply so far as it is not modified or excluded by the articles.

Articles shall be divided into paragraphs numbered consecutively. This will help the company to alter the articles conveniently.

Some important points which a draftsman should bear in mind while drafting the Articles are as follows:

1. Share capital, its kinds, rights attached to different kinds of shares or any special privileges attached thereto should be considered and incorporated in Articles.

2. Directors – appointment of directors, their noting rights, resignations, termination etc. should be given due consideration and their rights, powers and privileges should be incorporated in Articles. Proportional representations may also be looked into.

3. In Government Companies, Joint Sector Companies, Joint Ventures with foreign companies, joint venture with Government Companies, the main terms of their partnership in Share Capital as well as the management of the affairs of the company with power and authority delegation be relevantly discussed in the Articles with scope and limitations thereto to avoid any misinterpretation.

4. As far as possible, regulation given in Table A may be borrowed, even if it is not made applicable so that Article may conform to the intent and spirit of law.

5. Efforts should be made to make each article self explanatory and self interpretative

to avoid misleading conclusions. Coherence and sequence of the contents should be maintained at any costs.

6. Any items which are already mentioned in Memorandum and is to be mentioned in Articles, it is better that it is put in words such as "as mentioned in Memorandum of Association" which will skip the requirement of altering Articles when Memorandum is altered.

7. No provision which a company cannot do either as per Memorandum or Companies Act or any other law, should find a place in articles: e.g. expulsion of members. This is opposed to Company Jurisprudence and is *ultra vires* of the Act.

8. Where the company would require assistance from financial Institutions, provisions be made for appointment of nominee directors, conversion of loans from financial institutions into equity etc.

9. Sections 3(2)(iii), 274(3) among other sections specifies some prohibitions, limitations and restrictions in case of Pvt. Ltd. Companies should be taken care of in drafting articles.

10. After drafting a proper balancing should be done with Memorandum's contents, as to coverage, inconsistencies with it, contradictions occurred etc. to enable proper modification in time.

It is better to have an Article of an existing company in the same field of activity, either to modify it or at least to know the relevant matters which can be included in the Draft. Before printing it is better be shown to ROC and seek his informal approval.

Answer 4(b)

(i) **Rule of Adverse inference:** Its incumbent upon a party in possession of best evidence on the issue involved to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party. In the case of *Ms. Shefali Bhargava v. Indraprastha Appollo Hospital & Anr.* 2003 NCJ 787 (NC), the court had held that drawing an adverse inference against a party the court would be justified in its action. Again, it could be equally incumbent upon a party to produce evidence of some expert where the issue involved is complex or difficult one, as for instance matters pertaining to Engineering, Medical Technology etc. Since the Court cannot constitute itself into an Expert body and contradict the claim/proposition on record unless there is something contrary on record by way of expert opinion or there is any significantly acclaimed publication on which reliance could be based by the Court.

(ii) **Representative suit:** Representative suits are an exception to the general principle that all persons interested in a suit shall be parties thereto. Representative suits are the suits in which parties represent (a) others or (b) themselves and also other suits by executors, trustees, or benamis etc fall under the category of others. Examples of suits falling under the category other than the first category are suit by or against the manager of a Joint Hindu family; suit by members of the public in respect of a public charity u/s 92 of Code of Civil procedure and suits under order 1, Rule 8 of the Code of Civil procedure.

The following essential conditions must be fulfilled in a representative suit:

- The parties must be numerous
- The parties mostly have same interest in the suit
- The suit must be brought or prosecuted with the permission or under the direction of

the Court.

–Notice must be given to the parties to be represented in the suit.

Question 5

(a)“It is incumbent upon the defendant to file his defence in writing, else the court may pronounce judgment against him or make such order as it deems fit.” Examine the statement and enumerate important points while drafting the reply or a written statement. (6 marks)

(b)Discuss the contents of a trust deed. (6 marks)

(c)Explain any two types of mortgage. (4 marks)

Answer 5(a)

The defendant's written defence or pleading is called a "Written statement". The provision in this regard are found in order 8 of Code of Civil Procedure.

It is not obligatory for the defendant to file written statement because in its absence, it cannot be said that the defendant admits the claim of the plaintiff. If however, the court passes an order for filing a written statement, the defendant is bound to file it, otherwise the court may pronounce judgment against him.

While filing written statement, it is necessary to exercise highest degree of discretion. All possible defences must be taken and if the defendant does not take any plea, he may not be allowed to take it afterwards.

At the time of drafting the reply or written statement, one has to keep the following points in mind:

–The written statement should begin with the admission or denial of each fact alleged in the plaint. Each fact should be taken in the same order in which it is alleged in the plaint. One has to deny the averment of the plaint/petition which are incorrect, perverse or false. The denial has to be specific.

–One has to submit the facts which are in the nature of defence and to be presented in a concise manner.

–Attach relevant correspondence, invoice, challan, documents, extracts of relevant papers as annexures while reply is drafted to a particular para of the plaint.

–The pleadings are foundations of a case as such, no para of the plaint is to be left unattended.

–After reply, the same is to be signed by the constituted attorney of the opposite party or individual. In case of partnership, the partner authorized. In case of body corporate the Director, Vice President, Company Secretary etc duly authorized by the Board of Directors of the Company.

–The reply written statement is to be supported by an Affidavit of the opposite, party and duly notarized by an Oath Commissioner.

–The reply alongwith all annexures should be duly page numbered and be filed with the authority letter if not previously filed.

–Attach all the supporting papers, documents, documentary evidence, invoices, extracts of registers and other relevant papers.

–If any important point is omitted from being given in the reply, it would be suicidal as there is limited provision for amendment of pleadings.

-If the party is alleging a fraud, undue Influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take note, however strong the language in which they are couched may be and the same applies to undue Influence or coercion.

-It is well settled that neither party need in any pleadings allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the otherside unless the same has been first specifically denied.

-One must state specifically the relief which the party is claiming from the court or tribunal or forum. One should claim all possible relief as would be permissible under the pleadings and the law.

Answer 5(b)

A trust is defined in the Indian Trusts Act, 1882 on an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner.

The purpose of the Trust will be considered lawful, unless it is (i) forbidden by law (ii) of such a nature that, if permitted, it would defeat the provisions of any law or (iii) is fraudulent or (iv) involves or implies injury to the person or property of another or (v) the court regards it as immoral or opposed to public policy.

The Trust deed will contain the following:-

- (a) An intention to create a trust
- (b) The purpose of the Trust
- (c) The beneficiaries
- (d) Names of the Trustees
- (e) Trust Property
- (f) Unless the author is himself a trustee, transfer of the legal ownership of the property to the trustee and
- (g) Duties, rights and liability of the settler, trustee and beneficiary.

Answer 5(c)

(a) Simple Mortgage

In a simple mortgage, the mortgagor without delivering possession of the mortgaged property binds himself personally to pay the mortgage money and agrees expressly or impliedly that if he fails to pay the debt and interest in terms of the mortgage deed, the property will be sold and the proceeds applied in payment of the mortgaged money.

(b) Mortgage by Conditional Sale

In a mortgage by conditional sale, the property is sold subject to the condition that on default in payment of the mortgaged money on a certain date the sale shall become absolute or that on such payment the sale shall become void or on such payment the buyer shall transfer the property to the seller. Possession of the property shall be with the mortgagee.

(c) Usufructuary Mortgage

In this mortgage, the mortgagor delivers possession of the mortgaged property to the mortgagee who retains the possession until the satisfaction of the debt. The mortgagee will

take the usufruct in lieu of the interest or part payment of the principal or partly in payment of interest or partly in part payment of the principal. The mortgagor is not personally liable to pay the debt and the mortgagee is not entitled during the term of the mortgage to demand his mortgage money.

(d) English Mortgage

In an English mortgage, a mortgagor binds himself to repay the mortgaged money on certain date and transfers the mortgaged property absolutely to the mortgagee subject to the proviso that he will re-transfer it to the mortgagor upon payment of the mortgaged money as agreed.

(e) Mortgage by Deposit of Title Deeds

Mortgage by deposit of title deeds is called in English law as equitable mortgage. It is an oral transaction and no documents like Deed of Mortgage is required to be executed. No written acknowledgement is required for creating this mortgage. It is however, prudent to have a record of transaction to avoid difficulties to establish the creation of the mortgage. In this case, a Memorandum of Mortgage by deposit of title deeds is prepared by the mortgagee to secure the specific mortgage money.

(f) Anomalous Mortgage

Anomalous Mortgage is a combination of any of the above forms of mortgage or any mortgage other than those set out above.

[Students may write any two types]

Question 6

(a) Ultra Vision Textiles Ltd. is entering into a foreign collaboration with Omega Inc., USA for technical know-how and assistance for the proposed textile machinery manufacturing project. Draft a suitable foreign collaboration agreement. (10 marks)

(b) A contract existed between Rahul and Sahil. Sahil went to the court of law for non-performance of the contract by Rahul. During the pendency of the suit, Rahul and Sahil arrived at certain compromise and reduced the terms of compromise by signing a 'memorandum of understanding' (MOU). Whether such an MOU amounts to novation of the contract? (6 marks)

Answer 6(a)

Foreign Collaboration Agreement

This Agreement is made this _____ day of _____ 20____ between Omega Inc., a Company incorporated in the United States of America (hereinafter called "Omega"), which expressions shall include its permitted assigns and successors) of the one part.

And

Mr. S.K. Sareen, Director, Ultra Vision Textiles Ltd., having its Registered office at Bhiwadi, Rajasthan (hereinafter called Ultra Vision) including its permitted assigns and successors, of the other part.

Whereas as per an Memorandum of Understanding dated _____ executed between Omega and Ultra Vision, Omega agreed to set up a joint venture private Limited Company in India for a textile machinery manufacturing project and other incidental services.

AND; whereas, Omega, who is engaged in the manufacture of textiles is willing to provide Ultra Vision such know-how and assistance for the manufacture of aforesaid project.

Now it is hereby mutually agreed and declared as follows:

(1) In consideration of the remuneration paid by the Ultra Vision to the Omega as described hereinafter the Omega shall supply to the Ultra Vision:

- (a) technical advice and know-how for the purpose of improving or adding to the existing factories and installing additional plant and machineries if necessary for the manufacture of.....;
- (b) further the necessary plans, factory-design and layouts, charts and drawings, documentation and other forms of technical know-how for the said purpose;
- (c) render advice in the matter of purchase of the further plant and machinery suitable and necessary for the factory;
- (d) lend the services of their technicians to assist the Ultra Vision in carrying out the improvement to the factories and for installing additional plants and machinery;
- (e) provide technicians from their own staff to attend at the Ultra Vision's factory in India whenever necessary;
- (f) impart technical training to selected Indian personnel at their works in USA and or in their associated companies, to enable them to operate the machinery and plant to be installed and to exploit the imported technical know-how to the best advantage;
- (g) advise the Ultra Vision, promptly and to the best of their ability, in connection with any technical or manufacturing problems or difficulties which may be referred to it by the Ultra Vision during the continuance of this agreement.

(2) For technical know-how and data supplied by the Omega to the Ultra Vision as above, the Ultra Vision shall make a lump sum payment of Rs..... to the Omega phased as follows:

- (a) one-third on approval of the agreement by the Central Government;
- (b) one-third, on the Omega supplying the Ultra Vision necessary charts, plans, engineering drawings, documentation and other technical data and know-how, which shall be done within 15 days from the date of approval, of this agreement by the Central Government;
- (c) the balance one-third in three equal annual instalments thereafter after commencement of production.

(3) This Agreement shall be in force for a period of 5 years at the first instance, subject to extension for a further period of 5 years by mutual agreement and subject to approval by the Central Government.

(4) Technicians who may be deputed by the Omega to the Ultra Vision to advise and assist the Ultra Vision under this agreement shall be paid their salary, travelling expenses and boarding and lodging by the Ultra Vision.

(5) The Ultra Vision shall likewise bear all the expenses of the persons sent by them to the Omega for training in their works.

(6) The parties hereto mutually agree that they will each inform the other of any new

development in methods of manufacture which they respectively may discover during the continuance of this Agreement in so far as such new developments are applicable to the products manufactured by the Ultra Vision .

(7) The Ultra Vision shall maintain the utmost secrecy in connection with any technical data supplied by the Omega under this Agreement, and in particular shall keep all data concerned with the manufacturing processes under lock and key.

(8) The Ultra Vision shall not during the continuance of the Agreement refer any technical or manufacturing problems or difficulties to any one other than the Omega but shall regard and use the Omega as its sole technical consultant.

(9) On the expiry of the period prescribed herein or of extended period provided in clause 3 (supra) or upon the termination of this agreement for any reason the Ultra Vision shall return to the Omega all copies of information data or material sent to it by Omega under this Agreement and then in its possession and shall expressly refrain from communicating any such information, technical data or material received by it hereunder to any person, firm or company whatsoever.

IN WITNESS WHEREOF the parties hereto have signed this Agreement this.....
..... day of..... 20 in the presence of the following:

WITNESSES:

- 1.
- 2.

Answer 6(b)

In the given problem it amounts to novation of the contract. As per the decision of the Bombay High Court in *Lloyds Steel Industries Ltd. v. ONGC*, AIR 1997 Bom 337, MOU puts an end to the original contract.

As the contract is a outcome of the agreement between the parties, it is equally open to the parties thereto to agree to bring it to an end or to treat it as if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it can not subsist. In all these cases, the entire contract is put to an end. [*Damodar Valley Corp.v. K.K.Kar* AIR1974SC158]

Section 62 of the Indian Contract Act provides if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Question 7

(a)What is meant by 'compromise' and 'arrangement'? What is the procedure to be followed for carrying through a compromise or arrangement under the Companies Act, 1956? (6 marks)

(b)Mention the important considerations while drafting an affidavit in evidence.
(5 marks)

(c)What is meant by 'etiquette' ? What are the invitation etiquettes to be observed by a Company Secretary? (5 marks)

Answer 7(a)

Sections 390 to 396 of the Companies Act provide various methods of company reorganization or reconstruction. The various terms used for reorganization are arrangement, reconstruction, amalgamation, merger, take-over etc. They are distinct terms but they have common feature and to a great extent they overlap. Compromise means an amicable settlement of differences by mutual concessions by the parties to dispute or difference by agreeing not to try it out. In *Sneath v. Valley Gold Ltd.*, (1893), compromise was described as an agreement terminating a dispute between parties as to the rights of one or more of them or modifying the undoubted rights of a party which he has difficulty in enforcing.

“Arrangement has been defined in Section 390(b) of the Companies Act as including a reorganization of share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or by both of these methods.

Procedure

The following procedure shall be followed for carrying through a compromise or arrangement under Section 391 of the Companies Act:

1. To prepare a scheme of compromise or arrangement with the concerned parties.
2. To apply to court by summons in Form No. 33 appended to the Companies (Court) Rules, 1959 for an order to convene a meeting of the creditors and or members or any class of them, supported by an affidavit in Form No. 34 of the Rules. The court may give such directions as it may think fit in respect of holding and conducting the meeting or meetings.
3. To hold the meeting or meetings and let the result be reported to the court. The court appoints a chairman for the meeting and where there are separate meetings, for each such separate meeting. The chairman of the meeting, or of each meeting, must report the result thereof to the court within the time fixed by the court, or where no time has been fixed within seven days after the conclusion of the meeting.
4. When the proposed compromise or arrangement is agreed to, with or without modification, as provided by Section 391(2) to apply to the court for confirmation of the compromise or arrangement. The petition must be made by the company (if the company is in liquidation; by its liquidator) within seven days of the filing of the report by the chairman. The petition shall be made in Form No. 40 of the said Rules.

Where a compromise or arrangement is proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies, or for the amalgamation of any two or more companies, the petition must pray for appropriate orders and directions under Section 394 for facilitating the reconstruction or amalgamation of the company or companies.

The application under Section 391 is normally made by the company but any creditor or member also may make the application. It would, therefore, seem that a scheme could be started even if the company did not wish it, but the court will, it seems, refuse to convene the meetings if the company, either through its Board or simple majority of its members in a general meeting, has not approved the proposed scheme. This would be an exercise of the court's discretion and not a limit on its powers.

Before an application is made by a company under Section 391, it is usual for the Chairman of the Board of the company which is to be reconstructed or where an

amalgamation between two or more companies is proposed, for the Chairman of the Board of each of these companies, to send a circular letter to the members of the company or companies and when the creditors are affected, to them also, explaining the scheme of reconstruction or amalgamation, as the case may be, and the reasons which prompted the preparation of the scheme. The circular letter should specify how the scheme will affect the shareholdings of the members, and when applicable, the claims of the creditors, including debenture holders.

Answer 7(b)

Drafting of affidavit in evidence

The provisions of Sections 101, 102, 103, 106, 109, 110 and 111 of the Indian Evidence Act must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly according to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings (*Habib Khan v. Valasula Devi*, AIR 1997 A.P 52). The following must be kept in mind while preparing the affidavit-in-evidence by the parties -

(i) The best evidence is that of a person who was personally involved in the whole transaction. In case, that person is not available for any reason, then any other person who has joined in his place to make deposition by way of his affidavit.

(ii) In case, the petitioner himself was involved in the execution of a contract, he should file affidavit-in-evidence.

(iii) The allegations or charges or grounds relating to facts should be re-produced duly supported by documentary evidence.

It may be noted that in the affidavit in evidence, the position of law or legal provisions or principle of law are not reproduced because the position of law or settled principles of law are not required to be proved by any party and they are deemed to exist and any party can argue and take help of those settled position of law while arguing their case before the Court or Tribunal or Forum and need to be proved by filing an evidence. [Section 5, Indian Evidence Act.]

(iv) In case, the point or issue pertains to engineering, medical, technology, science or other complex or difficult issues, then the evidence of expert is to be filed in the form of his Affidavit. If necessary, the said witness has to appear before the Forum for the purpose of cross-examination by the counsel for the other party. For example, hand-writing or finger print experts etc.

(v) Besides the leading evidence on the points raised by the petitioner or by the opposite party in his written statement/reply, if possible, the party who is filing the affidavit-in-evidence should also file documents, papers or books or registers to demolish the defence or case set up by the opposite party.

(vi) It is also permissible for any party to bring any outside witness (other than the expert witness) in support of his case if the facts and circumstances of the case so warrant and permitted by the Court/Tribunal.

(vii) At the time of tendering affidavit-in-evidence, the party must bring alongwith it either the original of papers, documents, books, registers relied upon by it or bring with it the carbon copy of the same.

It may be noted that only photocopy of any paper or document (in the absence of its reply, original or carbon copy) can not be relied upon and tendered as an evidence.

Answer 7(c)

Etiquette is the fine art of behaving in front of others. It is a set of practices and forms which are followed in a wide variety of situations; many people consider it to be a branch of decorum, or general social behavior. Each society has its own distinct etiquette, and various cultures within a society also have their own rules and social norms.

Invitation Etiquettes:

How you respond to an invitation says volumes about your social skills. It reflects negatively on your manners if your response (or lack of response) to an invitation costs time or money for your host.

- Reply by the date given in the invitation, so that the host or hostess knows what kind of arrangements to make for the event, food is not wasted, and unnecessary expense is eliminated.
- If an RSVP card is not included, respond by calling or sending a brief note.
- If you cancel after initially accepting an invitation, phone your regrets as soon as possible. Send a note of regret following the phone conversation.
- Don't ask for permission to bring a guest unless the invitation states.
- Arrive at the event promptly, but not too early.
- Mingle and converse with the other guests.
- Don't overstay your welcome.
- Extend your thanks as you leave.

Question 8

(a) Explain the following :

(i) Habeas corpus

(ii) Mandamus. (3 marks each)

(b) What are the advocacy tips to be borne in mind by a Practising Company Secretary while appearing before a tribunal? (5 marks)

(c) What is the meaning of the term 'compounding'? What factors are to be taken into consideration for the purpose of compounding of offences under the respective statutes? (5 marks)

Answer 8(a)

(i) Habeas Corpus:

Habeas Corpus: The writ of *habeas corpus* is a remedy available to a person who is confined without legal justification. The words "habeas corpus" literally mean "to have a body". This is an order to let the court know on what ground he has been confined and to set him free if there is no legal justification for his detention. This writ has to be obeyed by the detaining authority by production of the person before the Court. Under Articles 32 and 226 of the Constitution, any person may move the Supreme Court and the High Court of competent jurisdiction respectively, for the issue of this writ.

(ii) Mandamus:

The expression "*mandamus*" means a command. The writ of *mandamus* is, thus, a command issued to direct any person, corporation, inferior court or Government authority

requiring him to do a particular thing therein specified which pertains to his or their office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction. *Mandamus* can be issued against any public authority. The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed. *Mandamus* is not issued if the public authority has a discretion. *Mandamus* can be issued by the Supreme Court and all the High Courts to all authorities.

Answer 8(b)

Advocacy Tips

Company Secretaries act as an authorized representative before various Tribunals/quasi judicial bodies. It is necessary for them to learn art of advocacy for effective delivery of results to their clients when they act as an authorized representative before any tribunal or quasi judicial body.

Though technical and legal knowledge about the area in which Company Secretaries are acting is essential, they should also bear in mind some of the tips given by legal experts while appearing before Tribunals or other quasi-judicial bodies. These tips are given herein below.

They say while pleading, a judge in your pleadings looks for:

- (i)Clarity: The judge's time is limited, so make the most of it.
- (ii)Credibility: The judge needs to believe that what you are saying is true and that you are on the right side.
- (iii)Demeanour: We don't have a phrase "hearing is believing". The human animal which includes the human judge, is far more video than audio. The way we collect most of our information is through our eyesight.
- (iv)Eye contact: While pleading, maintain eye contact with your judge.
- (v)Voice modulation: Voice modulation is equally important. Modulating your voice allows you to emphasize the points you want to emphasize. Be very careful about raising your voice. Use your anger strategically. But use is rarely. Always be in control of it.
- (vi)Psychology: Understand judge's psychology as your job is to make the judge prefer your version of the truth.
- (vii)Be likeable. At least be more likeable than your opponent. If you can convert an unfamiliar Bench into a group of people who are sympathetic to you personally, you perform a wonderful service to your client.
- (viii)Learn to listen.
- (ix)Entertain your judge. Humour will often bail you out of a tough spot.

Answer 8(c)

'Compounding' means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement and the complainant agrees not to prosecute the accused. The accused and the complainant then make a joint application to the Court that the parties have come to terms and the case may not be proceeded with.

Following factors, which are only indicative, may be taken into consideration for the purpose of compounding of offences under the respective statute:

- Whether violation is intentional.
 - Party's conduct in the investigation and disclosure of full facts.
 - Gravity of charge i.e. charge like fraud, market manipulation or insider trading
 - History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past.
 - Whether there were circumstances beyond the control of the party
 - Violation is technical and/or minor in nature and whether violation warrants penalty.
 - Consideration of the amount of investors' harm or party's gain.
 - Processes which have been introduced since the violation to minimize future violations/lapses.
 - Compliance schedule proposed by the party
 - Economic benefits accruing to a party from delayed or avoided compliance.
 - Conditions where necessary to deter future non-compliance by the same or another party.
 - Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to them.
 - Compliance of the civil enforcement action by the accused.
 - Party has undergone any other regulatory enforcement action for the same violation.
 - Any other factors necessary in the facts and circumstances of the case.
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