

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) *"Drafting of petitions, deeds and documents is an art. Even acquiring working knowledge in this demands application of skills of higher order." Discuss pinpointing the skills and tasks involved in such an exercise. (10 marks)*
- (b) *In the present litigational corporate scenario, what are the role expectations from a Company Secretary with regard to drafting and conveyancing ? (5 marks)*
- (c) *What is meant by 'recitals' as a component in a deed ? What is its evidentiary value ? (5 mark)*

Answer 1(a)

The essence of the process of drafting is synthesis of law and fact in a language. A proper understanding of drafting cannot be realised unless the nexus between the law, the facts, and the language is fully understood and accepted. Drafting of legal documents requires, as a pre-requisite, the skills of a draftsman, the knowledge of facts and law so as to put facts in a systematised sequence to give a correct presentation of legal status, privileges, rights and duties of the parties, their obligations, terms and conditions, breaches and remedies etc. in a self-contained and self-explanatory form without any patent or latent ambiguity or doubtful connotation. This requires serious thinking followed by prompt action to reduce the available information into writing with a legal meaning.

A draftsman, in the first instance, must ascertain the names, description and addresses of the parties to the instrument. He must obtain particulars about all necessary matters which are required to form part of the instrument. He must also note down with provision any particular directions or stipulations which are to be kept in view and to be incorporated in the instrument.

When the draftsman has digested the facts, he should next consider as to whether those intentions can be given effect to without offending against any provision of law. A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided.

It is also to be ensured that the format of documents adopted adheres to the customs and conventions in vogue in the business community or in the ordinary course of legal transactions. For any change in the form of such document, use of juridical and technical language should invariably be followed. The statements of negatives should generally be avoided. The order of the draft should be strictly logical. Legal language should be, to the utmost possible extent, precise and accurate. The draft must be readily intelligible to laymen. Document should be supported by the schedules, enclosures or annexures in case any reference to such material has been made in that.

Answer 1(b)

The Company Secretary is an expert professional well versed with company affairs and administration. He is supposed to act as a fulcrum for effective corporate governance. Now law is an integral part of corporate administration—both as per statutes as well as general rules of practice. So the Company Secretary must have some basic proficiency in law relating to company administration.

Besides, a Company Secretary acts as an authorized representative before various Tribunals/quasi judicial bodies. It is necessary for him to learn art of advocacy or court craft for effective delivery of results to his clients when he acts as an authorized representative before any tribunal/quasi judicial body.

For winning a case, art of advocacy is important. Advocacy/court craft is learned while entering the practising side of the profession. Apart from the legal side of the profession, advocacy is often useful and sometimes vital, in client interviewing, in negotiation and in meetings, client seminars and public lectures. It is a valuable and lifelong skill worth mastering.

Technical and legal knowledge about the area in which Company Secretaries are acting is essential. Better their knowledge, the better their advocacy skills and the greater their impact. Good advocacy or negotiating skills will not compensate for lack of appropriate knowledge.

Answer 1(c)

Recitals contain the short story of the property up to its vesting into its transferors. Care should be taken that recitals are short and intelligible. Recitals may be of two types. One, narrative recitals which relates to the past history of the property transferred and sets out the facts and instrument necessary to show the title and relation to the party to the subject matter of the deed as to how the property was originally acquired and held and in what manner it has developed upon the grantor or transferor. The extent of interest and the title of the person should be recited. It should be written in chronological order i.e. in order of occurrence. This forms part of narrative recitals. This is followed by inductive recitals, which explain the motive or intention behind execution of deed.

Recitals should be inserted with great caution because they precede the operative part and as a matter of fact contain the explanation to the operative part of the deed. If the same is ambiguous recitals operate as estoppel. Recital offers good evidence of facts recited therein. Recitals are not generally taken into evidence but are open for interpretation for the courts. If the operative part of the deed is ambiguous anything contained in the recital will help in its interpretation or meaning. In the same sense, it is necessary that where recitals contain chronological events that must be narrated in chronological order.

Recital generally begins with the words “Whereas” and when there are several recitals instead of repeating the words “Whereas” before each and every one of them, it is better to divide the recitals into numbered paragraphs for example, “Whereas” —

- 1.
- 2.
- 3.
- etc.

It has been held that Recitals carry evidentiary importance in the deed. It is an evidence against the parties to the instrument and those claiming under and it may operate as estoppel [*Ram Charan v. Girija Nandini*, 3 SCR 841 (1965)].

Question 2

(a) Explain the following :

- (i) Consent order
- (ii) Testimonium
- (iii) Counter affidavit
- (iv) Deed escrow
- (v) Author of the trust. (2 marks each)

(b) *Koncept Ltd. was under liquidation. The official liquidator sold 4.68 acres of its land to Affluent Ltd. by auction. Possession of the land was handed over to Affluent Ltd., but without any conveyance deed in their favour. Affluent Ltd. served legal notice on the official liquidator demanding conveyance deed, but in vain. After the expiry of the period prescribed under section 80 of the Code of Civil Procedure, 1908, Affluent Ltd. instituted a civil suit seeking a decree of specific performance. After due hearings, the civil court decreed the suit and directed defendant official liquidator to convey 4.68 acres of land to plaintiff Affluent Ltd. after considering any objections in response to a notice to be published in newspapers.*

The official liquidator complied with the decree and published notices in newspapers. No objections were received. Still the official liquidator did not execute conveyance deed, on the pretext that along with Koncept Ltd., Kite Co. was also under liquidation and had common boundary wall with Affluent Ltd. Kite Co.'s land had already been sold. Therefore, the official liquidator was willing to execute conveyance for 3.16 acres of land only and not 4.68 acres of land as claimed by Affluent Ltd., the judgment creditor. This plea was not pressed in written statement or hearings in the court of civil judge.

Decide the official liquidator's, liability to execute conveyance deed for the entire area. Cite case law, if any. (6 marks)

Answer 2(a)(i)

Consent Order

Consent Order means an order settling administrative or civil proceedings between the regulator and a person (party) who may prima facie be found to have violated securities laws. Here, Administrative/Civil enforcement actions include issuing directions, suspension or cancellation of certificate of registration, imposition of monetary penalty, pursuing suits and appeals in Courts and Securities Appellate Tribunal (SAT). It may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved. A Consent Order may or may not include a determination that a violation has occurred.

Consent Order provides flexibility of wider array of enforcement and remedial actions which will achieve the twin goals of an appropriate sanction, remedy and deterrence without resorting to litigation, lengthy proceedings and consequent delays.

Answer 2(a)(ii)

Testimonium

Testimonium is the clause in the last part of the deed. Testimonium signifies that the parties to the document have signed the deed. This clause marks the close of the deed and is an essential part of the deed. Thus testimonium clause can be worded according to the status and delegation of executants.

Answer 2(a)(iii)

Counter Affidavit

Pleadings filed by a defendant/respondent in answer to the claims set out by the plaintiff/petitioner, in the form of an affidavit and/or supported by an affidavit are referred to as a counter affidavit. This nomenclature is generally used while filing pleadings on behalf of a defendant/respondent before the High Court and/or certain other Tribunals and Commissions etc. The rules of pleadings as are applicable to a written statement, apply to a counter affidavit as well. Filing of a counter affidavit is obligatory when the defendant/respondent is so required by the Court. Failure of the defendant/respondent to file a counter affidavit on the day fixed by the Court, will not entitle him, as of right, thereafter to file it. It does not mean that the defendant/ respondent will be shut out once for all. He may be permitted by the Court to file it on a later date on sufficient grounds shown for not filing the same in time.

Answer 2(a)(iv)

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*).

Answer 2(a)(v)

Author of the Trust

A trust is defined in the Indian Trusts Act, 1882 as 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. (Section 3)

The person who reposes or declares the confidence is called the ‘author of the trust’. The person who accepts the confidence is called the ‘beneficiary’.

Answer 2(b)

The facts of the case are similar to *Shivarpan Engineering (P) Ltd. v. Official Liquidator, High Court of Kolkata*, [(2009) 147Comp Cas 199 (Cal)].

The point to be decided in the above mentioned case was whether the Official Liquidator is required to execute conveyance deed for the disputed area of the land.

The Calcutta High Court held that the Lower Court had already passed orders to convey 4.68 acres of land in favour of the applicant. No application for the variation or modification of the earlier order had been filed by the Official Liquidator. No person had come to claim title to any part of the land comprised of 4.68 acres of land, inspite of the publication of notice, as directed by the Court.

Therefore, Official Liquidator was bound to give effect to the earlier orders by conveying 4.68 acres of land in favour of the applicant. In the event, the Official Liquidator was unable to deliver 4.68 acres, he was at liberty to execute the conveyance for the area that he could convey and was to refund the sum accordingly to the applicant.

In view of the decision of the Calcutta High Court in the aforesaid case, the Official Liquidator in the given problem is bound to give effect to the earlier orders by conveying 4.68 acres of land in favour of Affluent Ltd.

Question 3

(a) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*

- (i) *A will is _____.*
- (ii) *Hypothecation is _____ form of pledge.*
- (iii) *A power of attorney can be executed only in favour of a _____.*
- (iv) *Registration and stamp duty is compulsory in case of mortgage value of Rs. _____ and above.*
- (v) *Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to _____.*
- (vi) *Mortgage by deposit of title deeds is called _____ mortgage in English law.*
(1 mark each)

(b) *State, with reasons in brief, whether the following statements are true or false :*

- (i) *A proxy lodged with a company under Section 176 is a power of attorney.*
- (ii) *All deeds are documents and vice-versa.*
- (iii) *Habeas corpus is a remedy available to a person who is detained with legal justification.*
- (iv) *An assignment is a form of transfer of property.*
- (v) *Non-putting of seal on an agreement may not invalidate the agreement, if it has otherwise been properly executed.*
(2 marks each)

Answer 3(a)

- (i) A will is **an Instrument** .
- (ii) Hypothecation is **an extended** form of pledge.
- (iii) A power of attorney can be executed only in favour of a **Major** .
- (iv) Registration and stamp duty is compulsory in case of mortgage value of **Rs. 100/-** and above.
- (v) Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to **Specialists** .
- (vi) Mortgage by deposit of title deeds is called **Equitable** mortgage in English law.

Answer 3(b)

- (i) **True** : The proxy lodged with the company under Section 176 of the Companies Act, 1956, is also a power of attorney. In that case a shareholder who is not able to attend the meeting authorises another person on his behalf to attend and vote at the meeting. It is a particular power of attorney.
- (ii) **False** : All deeds are documents. But it is not always that all documents are deeds.
- (iii) **False** : The writ of *habeas corpus* is a remedy available to a person who is confined without legal justification.
- (iv) **True** : An assignment is a form of transfer of property and it is commonly used to refer the transfer of an actionable claim or a debt or any beneficial interest in movable property.
- (v) **True** : The putting of seal of the company on agreements entered on behalf of the company is governed by the provisions in the Articles of Association of the company and /or by the resolution of the Board authorizing the entering of the agreement. However, non putting of seal on an agreement if it is not mandatory in terms of Articles of Association or board Resolution, may not invalidate the agreement if it has been otherwise properly executed

Question 4

- (a) *Yuvi Ltd., in a litigation, was levied a penalty by the Company Law Board on 1st February, 2009. It submitted an appeal to the High Court impugning the penalty order but after the stipulated period. Can the High Court condone the delay and allow the appeal ? Cite case law, if any.* (6 marks)
- (b) *Desire Ltd. proposed to increase its share capital. A notice calling for general meeting for considering and approving increase in share capital was issued to the shareholders. Questioning the validity of the notice, a shareholder objected that the amount of proposed increase was not specified in the notice. Is this objection legally valid ? Justify your answer.* (5 marks)

- (c) *Three partners, Aman, Bhuvan and Charaan, decided to dissolve their firm named ABC & Co., by mutual consent. However, Aman agreed to continue the business in his own name, as a sole proprietor, and all the other partners agreed to this. Draft a notice of dissolution of ABC & Co. for insertion in a national newspaper.*
(5 marks)

Answer 4(a)

The High Court can not condone the delay and allow the appeal.

In a similar case *Hetal Alpesh Muchhala v. Adityesh Educational Institute* [2009]152 Comp.Cas 75 (Bom), the issue involved was whether the High Court has power to condone the delay beyond 60 days. The Court answering in negative held that under Section 10F of the Companies Act, 1956 a party is allowed to file an appeal to the High Court within 60 days from the date of communication of the decision or order of the Company Law Board. As per the proviso to the Section 10F this period may be extended for a further period "not exceeding" 60 days, if the High Court is satisfied that the appellant was prevented by "sufficient cause" from filing the appeal within the initial period of 60 days.

The words used in the proviso to Section 10F of the Act are "not exceeding 60 days" thereby clearly prescribing the time limit of only 60 days, in addition to the initial period of 60 days allowed under Section 10F of the Act to enable a party to file an appeal. The proviso clearly shows that the power vested in the court to condone the delay on sufficient cause being shown is directory and subject to the discretion of the court. However the maximum period to the extent of which such delay is capable of being condoned is mandatorily prescribed and not open to exercise of any discretion. The words "not exceeding" cannot be given any other meaning except "not more than" or "not beyond" or "not thereafter". To hold that the court could entertain an application to set aside the decision /order passed by the Company Law Board beyond the extended period under the proviso to the Section 10F of the Act would render the phrase "not exceeding 60 days" otiose.

The court held that the Legislature has consciously restricted the right of appeal under Section 10F of the Act, only to questions of law so as to ensure that there is as far as possible an early finality to the issues and consequent redressal of grievances. All decisions on questions of fact as decided by the Company Law Board are final and conclusive.

Answer 4(b)

Section 173 of the Companies Act, 1956 requires every company to annex an explanatory statement for every special business to be transacted in the meeting of shareholders. The explanatory statement is to bring to the notice of the members all material facts concerning each item of special business. Therefore, the objection of the shareholder is valid since the details on the item to be considered are lacking. The notice is not a valid notice.

Answer 4(c)

Notice of Dissolution of Partnership for insertion in a newspaper

Notice is hereby given that the partnership lately subsisting between us the undersigned A.B.C.....& Co..... carrying on business as..... at..... under

the firm of ABC and has this day been dissolved by mutual consent. All debts due to and owing by the said late firm will be received and paid by the said A who will continue to carry on the same said business under the same style and firm.

Sd/- A,B and C

Question 5

Write notes on **any four** of the following :

- (i) *Habendum*
- (ii) *Replication*
- (iii) *Necessary clauses in a sub-lease deed*
- (iv) *Del credere agency*
- (v) *Arbitration award.*

(4 marks each)

Answer 5(i)

Habendum

Habendum is a part of deed which states the interest, the purchaser is to take in the property. Habendum clause starts with the words “THE HAVE AND TO HOLD”. Formerly in England if there was a gratuitous transfer, the transferee was not deemed to be the owner of the beneficial estate in the property, the equitable estate wherein remained with the transferor as a resulting trust for him. It was therefore, necessary to indicate in the deed that it was being transferred for the use of the transferee if it was intended to confer an equitable estate in him. It was for that reason that the *habendum* commenced with the words: “to have to hold to the use of.....”. Now it is not necessary to express it so. In the modern deeds, however, the expression “to have and” are omitted. The *habendum* limits the estate mentioned in the parcels. The transferee is mentioned again in the *habendum* for whose use the estate is conveyed. If the property conveyed is encumbered, reference thereto should be made in the *habendum*. If the parties to transfer enter into covenants, they should be entered after the *habendum*.

Answer 5(ii)

Replication

A written reply of the plaintiff by way of defense to pleas raised in the counter affidavit/written statement from the defendant, is termed as a rejoinder or replication. Such statements are subsequent pleadings as contemplated in Order 8, Rule 9 of the Civil Procedure Code. Under Rule 9, leave of the court is essential before any party can present a further pleading after the written statement has been filed. The only subsequent pleading that may be filed without the leave of the court is the written statement filed by way of defense to a set-off or a counter-claim. It should be borne in mind that while filing a rejoinder/replication, a party cannot be allowed to fill up gaps or lacuna in his pleadings. Nor again can a party introduce new material facts or different cause of action except in a case where subsequent to filing of the petition/suit, the petitioner/plaintiff discovers new matters and accordingly seeks leave of the Court to submit such further particulars in his pleadings.

Answer 5(iii)**Necessary clauses in sub-Lease deed**

A sub-lease is a demise by a lessee for lesser term than he himself has. Every lessee, however short his term may be, may make a sub-lease unless he is refrained by the contract of the tenancy from subletting. Like a lease deed, the clauses necessary for a sub lease deed are :

1. Material facts are mentioned in the operative part.
2. *Consideration* : Reserved rent is mentioned in the beginning of the Testatum: The entire consideration, including premium, etc., should be mentioned.
3. *Operative Part* : It shows clearly the sub lessor divesting himself of possession and the sub lessee coming into possession.
4. *Habendum* : The nature of the lease, commencement and duration of the term are specified here.
5. *Reddendum* : This is peculiar to a deed of lease. Here is mentioned the mode and time fixed for payment. It begins with the word rendering or paying with reference to the reserved rent. Rent is payable during the term of the lease. Place where payable and instalments are mentioned. If there is apportionment of rent that is also mentioned.
6. *Covenants* : Terms and conditions are mentioned in several paragraphs. The usual covenants are to be found in Section 108 of the Transfer of Property Act; other important covenants generally refer to payment of taxes, repairs, insurance, subletting purpose of the lease, e.g. residential purpose, renewal and forfeiture.

Answer 5(iv)**Del Credere Agency**

There is a special type of agency, which combines agency with guarantee. This is known as del credere agency. A del credere agent is one who, for an extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer. By reason of his charging a del credere commission he assumes responsibility for the solvency and performance of the contract by the vendee and thus indemnifies his principal against loss. He, therefore, gives an additional security to the seller, but he does not shift the responsibility of payment from the buyer to the seller.

Answer 5(v)**Arbitration Award**

Award means the decision of the arbitrator to whom the dispute is referred. Section 2(b) of the Arbitration and Conciliation Act, 1996 states arbitral award includes an interim award.

Section 31 of the Act lays down the requirements as to form and contents of an arbitration award. The law requires that the award shall be made in writing and signed by all the members of the arbitral tribunal or by the majority of them if the reason for any omitted signature is stated, stating its date and the place of arbitration. Such place is deemed to be place of the award. After the award is made, a signed copy is to be delivered to each party.

The arbitral award under section 31 of the Act must state the reasons, unless the parties have specifically agreed that reasons need not be given or the award is based on agreed terms. The award must state the reasons upon which it is based.

Question 6

- (a) Define the term 'deed'. Explain any seven usual clauses in a deed. (8 marks)
- (b) Whether an unburnt fresh hard disk in a computer is a 'document' within the meaning of section 3 read with section 65B of the Indian Evidence Act, 1872 ? Discuss with reference to case law. (4 marks)
- (c) What is the difference between 'mortgage' and 'lease' from the point of view of drafting of an agreement ? (4 marks)

Answer 6(a)

Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability. A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title, or interest. The most suitable and comprehensive definition has been given by Norton on 'Deeds' as follows:

A deed is a writing

- (a) on paper, vellum or parchment,
- (b) sealed, and
- (c) delivered, whereby an interest, right or property passes, or an obligation binding on some persons is created or which is in affirmance of some act whereby an interest, right or property has been passed.

The seven usual parts or clauses in a deed are as follows :

- (1) Description of the Deed Title
 - (2) Place and Date of execution of a Deed
 - (3) Description of Parties to the Deed
 - (4) Recitals
 - (5) Testatum
 - (6) Consideration
 - (7) Receipt Clause
1. *Description of the Deed Title* : The deed should contain the correct title such as "This Deed of Sale", "This Deed of Mortgage", etc. These words should be written in capital letters in the beginning of document. This part hints the nature of the deed and gives a signal to the reader about the contents of the Deed.
 2. *Place and Date of Execution of a Deed* : The date on which the document is executed comes immediately after the description of the deed. It is the date of execution which is material in a document for the purpose of application of law of

limitation, maturity of period, registration of the document and passing on the title to the property as described in the document. Date of execution of document is inscribed on the deed.

The place determines the territorial and legal jurisdiction of a document as to its registration and for claiming legal remedies for breaches committed by either parties to the document and also for stamping the document, as the stamp duty payable on document differs from State to State.

3. *Description of Parties* : The basic rule is that all the proper parties to the deed including inter-parties should be properly described in the document because inter-parties are pleaded as they take benefit under the same instrument. While describing the parties, the transferor should be mentioned first and then the transferee. Where there is a confirming party, the same may be placed next to the transferor. In the order of parties, transferee comes in the last. Full description of the parties should be given to prevent difficulty in identification.
4. *Recitals* : Recitals contain the short story of the property up to its vesting into its transferors. Care should be taken that recitals are short and intelligible. Recitals may be of two types. One, narrative recitals which relates to the past history of the property transferred and sets out the facts and instrument necessary to show the title and relation to the party to the subject matter of the deed This is followed by introductory recitals, which explain the motive or intention behind execution of deed.

Introductory recitals are placed after narrative recitals. The basic objective of doing so, is to put the events relating to change of hand in the property.
5. *Testatum* : This is the “witnessing” clause which refers to the introductory recitals of the agreement, if any, and also states the consideration, if any, and recites acknowledgement of its receipt.
6. *Consideration* : Consideration is very important in a document and must be expressed. In the absence of mention of consideration the evidentiary value of document is reduced that the document may not be adequately stamped and would attract penalty under the Stamp Act.
7. *Receipt* : Closely connected with consideration is the acknowledgement of the consideration amount by the transferor, who is supposed to acknowledge the receipt of the amount.

Answer 6(b)

The issue whether hard disc of a computer is a document within the meaning of sections 3 and 65B of the Evidence Act, 1872 was decided in the case *Dharamvir v. CBI* [148 (2008) DLT [288] .

In this case it was held that hard disc is a document. The court held that as long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. Therefore, a hard disc that is once written upon or

subjected to any change is itself an electronic record even if it does not at present contain any accessible information.

In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record. Given the wide definition of the words 'document' and 'evidence' in the amended Section 2(o) and 2(t) of IT Act, there can be no doubt that an electronic record is a document.

Answer 6(c)

Mortgage and Lease

Mortgage : A mortgage is a transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, existing or future debt or the performance of an acknowledgement, which may give rise to pecuniary liabilities (Section 58 of the Transfer of Property Act, 1882).

The transferor in the case of a mortgage is called a 'mortgagor' and the transferee as 'mortgagee', the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument, if any, by which a transfer is effected is called a "mortgage deed". Mortgage is of various types.

Lease : According to Section 105 of the Transfer of Property Act, 1882, a lease of immovable property is a transfer of a right to enjoy property. It is a sort of contractual arrangement between the two parties whereby one acquires the right to use the property called "lessee" and the other who allows the former the right to use his owned property, called the "lessor".

Leasing arrangement provides an enterprise with the use and control over assets without receiving title to them. This arrangement could be oral or written allowing the use of assets for a specified period of time. The written lease agreement is signed by both the owner of the assets i.e. the lessor and the user of the assets i.e. 'the lessee'. The lessee does not get the final ownership. In other words, leasing involves the use of an asset without assuming, or intending to assume, ownership.

Question 7

- (a) *"Practising of good professional etiquettes is necessary for professional success in the emerging business scenario." Discuss.* (6 marks)
- (b) *Write a note on 'covenants and undertakings'.* (5 marks)
- (c) *What is meant by 'pleadings' ? Explain the fundamental rules of pleadings.* (5 marks)

Answer 7(a)

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.

In today's world of business, professionals need to know how to conduct themselves within the corporate world. One of the best ways to do so is to practice good professional

etiquette. Practicing good professional etiquette is necessary for professional success in the emerging business scenario which is constantly changing and making the market place more competitive and contestable. Corporates look for those candidates who possess manners, a professional look and demeanor, and the ability to converse appropriately with business colleagues and clients. Though academic knowledge and skills of a professional may be spectacular, but not knowing proper etiquette required to be successful in the professional career could be a roadblock preventing him to achieve success in the professional life and business relationships. Good professional etiquette indicates to potential employers that the person they are hiring is a mature, responsible adult who can aptly represent their company.

Answer 7(b)**Covenants and Undertakings**

The term covenant has been defined as an agreement under seal, whereby parties stipulate for the truth of certain facts. In Whasten's Law Lexicon, a covenant has been explained as an agreement or consideration or promise by the parties, by deed in writing, signed, sealed and delivered, by which either of the parties, pledged himself to the other than something is either done or shall be done for stipulating the truth of certain facts. Covenant clause includes undertakings also. Usually, covenant is stated first. In some instances the covenants and undertakings are mixed, i.e. can not be separated in that case, they are joint together, words put for this as "The Parties aforesaid hereto hereby mutually agree with each other as follows:" Such covenants may be expressed or implied.

Answer 7(c)

The present day system of pleadings in our country is based on the provisions of the Civil Procedure Code, 1908 as amended/supplemented from time to time by Rules in that behalf by High courts of the States. There are rules of the Supreme Court and Rules by special enactments as well. Pleadings generally mean either a plaint or a written statement. The main objective behind formulating the rules of pleadings is to find out and narrow down the controversy between the parties. Provisions relating to pleadings in civil cases are meant to give each side intimation of the case of the other so that it may be met to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular cause of action must take (*Canesh Trading v. Mojiram*, AIR 1978 SC 484. The whole object of pleading is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of brining forward such evidence as may be appropriate (*Lakshmi Narayan v. State of Bihar*, AIR 1977 Patna 73.)

The fundamental rule of pleadings is contained in provisions of order 6 Rule 2 of the Civil Procedure Code, which enjoins:

1. "Every Pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.
2. Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively each allegation being, so far as is convenient, contained in a separate paragraph.

3. Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

Question 8

- (a) *Draft a specimen deed of sale of a business and assignment of goodwill.*
(8 marks)
- (b) *Make the most appropriate pairs from the following :*
- | | |
|-------------------------------|--------------------------|
| (i) <i>Company</i> | (a) <i>Prohibition</i> |
| (ii) <i>Firm</i> | (b) <i>Application</i> |
| (iii) <i>Trust</i> | (c) <i>Relief sought</i> |
| (iv) <i>Deed</i> | (d) <i>Defense</i> |
| (v) <i>Appeal</i> | (e) <i>Promoter</i> |
| (vi) <i>Written statement</i> | (f) <i>Beneficiary</i> |
| (vii) <i>Petition</i> | (g) <i>Document</i> |
| (viii) <i>Writ</i> | (h) <i>Partner</i> |
- (4 marks)
- (c) *Select the odd term out and briefly justify your answer :*
- Mandamus; certiorari; prohibition; cyrographum.*
 - Petitioner; plaintiff; rejoinder; defendant.*
 - Dilatory pleas; memorandum of appeal; grounds of appeal; relief sought for.*
 - Call on shares; liability of members; common seal; transfer of shares.*
- (1 mark each)

Answer 8(a)

A Specimen of Deed of Sale of a Business and Assignment of Goodwill

THIS SALE is made this..... day of....., between V (the vendor), of the one part and P (the purchaser) of the other part.

WHEREAS the said vendor is carrying on the business of.....;

AND WHEREAS the said purchaser has agreed with the said vendor for purchase by him of all the interest and goodwill in the said business, and the debts, stock-in-trade, effects and the premises on which the said business is being carried on, at the price of Rs..... and upon the terms and conditions hereinafter mentioned:

AND WHEREAS the said vendor has delivered to the said purchaser the books of account and other books relating to the said business, and in the said books are set forth the accounts and particulars of the debts, respectively due and owing to and from the said vendor, and also the particulars of the contracts and engagements to which he is liable in respect of the said business.

NOW THIS DEED WITNESSES:

- (1) In pursuance of the said agreement and in consideration of the sum of Rs..... (Rupees.....) paid by the said purchaser to the said vendor (the receipt whereof the said vendor hereby acknowledges), and also in consideration of the agreement hereinafter contained on the part of the said

purchaser, the said vendor does hereby convey, assign and make over to the said purchaser, all the beneficial interest and goodwill of the said vendor in the said business..... so carried on by him as aforesaid, and also all the books and other debts now due and owing to him on account of the said business and all securities for the same, and also all contracts and engagements, benefits and advantages which have been entered into with the said vendor and also all the stock-in-trade, goods, fixtures, articles and things which, at the date of this Deed belong to the said vendor on account of the said business and all the rights, title and interest of the said vendor to and in the said premises, to have and to hold the premises hereby conveyed to the said purchaser absolutely;

- (2) The said vendor does hereby agree with the said purchaser that he, the said vendor, will not at any time hereafter either by himself or in collaboration with any other person or persons, carry on the said business of..... within..... kilometers of.....;
- (3) The amounts and particulars of the debts respectively due and owing to and from the said vendor on account of the said business and the particulars of the contracts and engagements to which he is liable with respect to the said business, are correctly stated and set forth in the books of account and other books delivered by the said vendor to the said purchaser;
- (4) The said vendor will pay all the sums (if any) which may now be due and owing from the said business in excess of the amounts which in the said books appear to be so due and owing;
- (5) The said vendor has full right to sell and assign the said premises hereby sold and assigned to the said purchaser and will not at any time hereafter revoke, annul and make void the aforesaid power or authority hereby given to the said purchaser, or do or execute or knowingly or willingly suffer any act, deed or thing, whereby the said purchaser may be prevented from having and receiving the said premises or any part thereof, to and for his own use and benefit, or by means whereof the said purchaser shall be injured in the said business; and
- (6) The said vendor will, from time to time and at all times hereafter, use his best endeavours to promote the said business and to give to the purchaser full advantage of the connections and customs of the said vendor, in the said business.

AND THIS DEED ALSO WITNESSES, that in pursuance of the said agreement in this behalf and in consideration of the premises, the said purchaser does hereby agree with the said vendor that he, the said purchaser, will, from time to time and at all times hereafter, keep harmless and indemnified the said vendor and his estate and effects from and against the several sums of money which by the said books appear to be due and owing from the said vendor in respect of the said business and also from and against the contracts and engagements to which by the said books the said vendor appears to be now liable, and also interests, costs, expenses, losses, claims and demands on account of the said debts, contracts and engagements respectively.

It is further agreed that the names of the parties hereto shall, unless inconsistent with the context, include as well the heirs, administrators or assigns of the respective parties as the parties themselves.

IN WITNESS WHEREOF the said vendor and the said purchaser have hereto respectively signed on the day, month and the year above-written.

Witness :

Vendor

Witness :

Purchaser

Answer 8(b)

- | | |
|------------------------|-------------------|
| (i) Company | (e) Promoter |
| (ii) Firm | (h) Partner |
| (iii) Trust | (f) Beneficiary |
| (iv) Deed | (g) Document |
| (v) Appeal | (c) Relief Sought |
| (vi) Written Statement | (d) Defense |
| (vii) Petition | (b) Application |
| (viii) Writ | (a) Prohibition |

Answer 8(c)

- (i) **Cyrographum** : It is a deed whereas others are different types of writs.
 - (ii) **Rejoinder** : It is a statement whereas others are parties to pleadings.
 - (iii) **Dilatory Pleas** : It is a kind of defense whereas other are parts of appeal.
 - (iv) **Liability of Members** : It is a content of Memorandum whereas other are contents of Articles.
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