

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) In India, there is no law on conveyancing or interpretation of documents. Explain how disputed ambiguous formal deeds can be judicially decided then.

(8 marks)

- (b) What is meant by 'outsourcing' ? Draft a specimen of an outsourcing agreement.

(7 marks)

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

- (i) In the case where the mortgagor without delivering possession of the mortgaged property binds himself personally to pay the mortgaged 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, such a mortgage is called _____.

- (ii) Equitable mortgage is _____ by the lenders/banks/creditors as well as the commercial enterprises because of the inherent advantages.

- (iii) The term 'deed' normally refers to all the instruments by which two or more persons agree to effect any _____ or _____.

- (iv) The general requisites of an arbitration award must be consistent with the submission, certain, fair to the parties, _____ and its implementation must be possible.

- (v) The general rule, with reference to Mrs. Om Prabha Jain vs. Abnash Chand Jain, AIR 1968 SC 1083, is that no pleadings, no _____.

(1 mark each)

Answer 1(a)

Relevant principles of interpretation of deeds and documents are:

Informal Agreements : In interpretation of informal agreements, the rule to be applied is that of reasonable expectation; that is to say, the agreement is to be interpreted in the sense in which the party who used the words in question should reasonably have apprehended that the other party may apprehend them. If the intention is manifested ambiguously, the party manifesting the same in an ambiguous manner ought to have had reason to know that the manifestation may reasonably bear more than one meaning and the other party believes it to bear one of those meanings, having no reason to know that it bears another meaning that is given to it.

Formal Agreements : Where the agreement is formal and written, the following rules of interpretation may be applied:

- (1) A deed constitutes the primary evidence of the terms of a contract, or of a grant, or of any other disposition of property (Section 91 of the Evidence Act). The law forbids any contradiction of, or any addition, subtraction or variation in a written document by any extrinsic evidence, though such evidence will be admissible to explain any ambiguity (Section 92 of the Evidence Act). The document should, therefore, contain all the terms and conditions, preceded by recital of all relevant and material facts.
- (2) In cases of uncertainty, the rules embodied in provisos 2 and 6 of Section 92 of the Evidence Act can be invoked for construing a deed. The sixth proviso enables the court to examine the facts and surrounding circumstances to which the language of the document may be related, while the second proviso permits evidence of any separate oral agreement on which the document is silent and which is not inconsistent with its terms.
- (3) The cardinal rule is that clear and unambiguous words prevail over any hypothetical considerations or supposed intention. But if the words used are not clear and unambiguous the intention will have to be ascertained
- (4) In case the terms are not unambiguous it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties. The social milieu, the actual life situations and the prevailing conditions of the country are also relevant circumstances.
- (5) Sometimes a contract is completed in two parts. At first an executory contract is executed and later on an executed contract. In case of any difference between the preliminary contract and final contract the terms of the latter must prevail.
- (6) If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the latter clause is to be rejected as repugnant and the earlier clause prevails.
- (7) The court must interpret the words in their popular, natural and ordinary sense, subject to certain exceptions as,
 - (i) where the contract affords an interpretation different from the ordinary meaning of the words; or
 - (ii) where the conventional meanings are not the same with their legal sense.
- (8) Hardship to either party is not an element to be considered unless it amounts to a degree of inconvenience or absurdity so great as to afford judicial proof that such could not be the meaning of the parties.
- (9) All mercantile documents should receive a liberal construction. The governing principle must be to ascertain the intention of the parties through the words they have used. The Court should not look at technical rules of construction, it should look at the whole document and the subject matter with which the parties are dealing, take the words in their natural and ordinary meaning and look at the substance of the matter.

- (10) No clause should be regarded as superfluous, since merchants are not in the habit of inserting stipulations to which they do not attach some value and importance. The construction adopted, should, as far as possible, give a meaning to every word and every part of the document.
- (11) Construction given to mercantile documents years ago, and accepted in the mercantile world should not be departed from, because documents may have been drafted in the faith thereof.
- (12) If certain words employed in business, or in a particular locality, have been used in particular sense, they must prima facie be construed in technical sense.
- (13) The ordinary grammatical interpretation is not to be followed, if it is repugnant to the general context.
- (14) Antecedent facts or correspondence, or words deleted before the conclusion of the contract cannot be considered relevant to ascertain the meaning.
- (15) Evidence of acts done under a deed can, in case of doubt as to its true meaning, be a guide to the intention of the parties, particularly when acts are done shortly after the date of the instrument.
- (16) Unless the language of two documents is identical, and interpretation placed by courts on one document is no authority for the proposition that a document differently drafted, though using partially similar language, should be similarly interpreted.
- (17) If the main clause is clear and the contingency mentioned in the proviso does not arise, the proviso is not attracted at all and its language should not be referred to for construing the main clause in a manner contradictory to its import.
- (18) The fact that a clause in the deed is not binding on the ground that it is unauthorised cannot ipso facto render the whole deed void unless it forms such an integral part of the transaction as to render it impossible to sever the good from the bad.
- (19) As a general rule of construction of documents, the recitals are not looked into, if the terms of the deed are otherwise clear. If in a deed the operative part is clear, or the intention of the parties is clearly made out, whether consistent with the recitals or not, the recitals have to be disregarded.
- (20) Sometimes a standard form is used, particularly in contracts with government departments or big corporations. In these standard printed forms, words not applicable are deleted according to the requirements of individual transactions.

Answer 1(b)

Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. It differs from contracting in that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best - its core competencies.

Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing (BPO). BPO includes outsourcing related to accounting, human resources, benefits, payroll, and finance functions and activities. Knowledge Process outsourcing (KPO) includes outsourcing related to legal, paralegal, and other highly skilled activities.

A Specimen of Outsourcing Agreement for Converting Hard Copies of a Book in a Compact Disc (CD)

This Agreement for the conversion of the book titled Intellectual Property Protection in India is executed in on2011 by and between

The Golden Law Publishing Co. Pvt. Ltd. having their Office at..... represented by Mr. Manager, Golden Law Publishing Co. Pvt. Ltd. (hereinafter referred to as the GLP Pvt. Ltd.)

AND

M/s Bluetec Web Services Pvt. Ltd, a Company registered under the Companies Act having their office atand represented by Mr. Director, M/s Bluetec Web Services Pvt. Ltd, (hereinafter referred to as the M/s Bluetec Pvt. Ltd.)

WHEREAS the GLP Pvt. Ltd. has published the book Intellectual Property Protection in India it has decided to convert the hard copies of above mentioned book into a soft copy version by getting the book digitized and thereafter put the contents of the book in a CD (Compact Disc) along with a Search Engine. The GLP Pvt. Ltd. floated a tender for this book vide tender document with closing date2011 and after evaluating the bids of various parties, the GLP Pvt. Ltd. has decided to award the project to M/s Bluetec Pvt. Ltd. on the following terms and conditions:

- (1) M/s Bluetec Pvt. Ltd. would perform the job of digitisation (of the relevant portions marked for digitization) of the book including Data punching / Scanning, OCR Validation, Proof-reading (at an accuracy level of 99.9%), Tagging according to search parameters, Linking, Indexing etc.
- (2) M/s Bluetec Pvt. Ltd. would be developing a search engine as per the GLP's requirement. The search engine would be licensed to the GLP Pvt. Ltd. for its perpetual use. The GLP Pvt. Ltd. would further be free to use this Search Engine for any purpose and would not be liable to pay to M/s Bluetec Pvt. Ltd. any additional amount for such usage.
- (3) The copyright of the contents of the CD, marketing rights and all other rights pertaining to the said CD would solely vest with the GLP Pvt. Ltd.
- (4) M/s Bluetec Pvt. Ltd. undertakes to complete the assignment within a period of 100 days from the date of execution of this agreement.
- (5) After the completion of the job M/s Bluetec Pvt. Ltd. would give sufficient training including technical aspects relating to the features of the search engine developed by the M/s Bluetec Pvt. Ltd. to the people deputed by the GLP Pvt. Ltd. to facilitate to use the search engine independently. The training must be up to the satisfaction of the GLP Pvt. Ltd. in all aspects.
- (6) M/s Bluetec Pvt. Ltd. would hand over the digitized contents of the book to the GLP Pvt. Ltd. after the completion of the job.
- (7) The total project cost to be paid to M/s Bluetec Pvt. Ltd. would be as follows.
 - (a) Cost of developing the Search Engine – Rs. 50,000/- (Rupees fifty thousand only)

- (b) Digitization cost for each page (in hard copy) – Rs. 12/- per page
- (c) Conversion cost for each page (in soft copy) – Rs. 10/- per page
- (d) Total cost of each CD including the manual, jewel case, packing, printing and security features – Rs. 85/- per CD

It is to be noted that the original CD lot would be of 750 CDs only.

For the purpose of page count, 50% or more coverage would be treated as one full page and less than 50% would be ignored and would not be taken in counting.

- (8) M/s Bluetec Pvt. Ltd. would not be paid any advance money for undertaking the job. M/s Bluetec Web Services Pvt. Ltd. would however be paid 25% of the total project cost after the stage of completion of the Master CD and subject to the satisfaction of the GLP Pvt. Ltd.
- (9) M/s Bluetec Pvt. Ltd. agrees to keep the hard copies of the book given for digitization in good shape. M/s Bluetec Pvt. Ltd. has however been allowed to mark the relevant portions required for search taggings with special marks.
- (10) For updating the CD, the GLP Pvt. Ltd. reserves the right to either conduct the updation in part on its own or the GLP Pvt. Ltd. may assign this job to M/s Bluetec Pvt. Ltd. or any other agency. If the GLP Pvt. Ltd. decides to assign this job to M/s Bluetec Pvt. Ltd., the cost would be as follows:
 - (a) Content assimilation, Software upgradation and Annual Maintenance charges – Rs.10, 000/- per annum
 - (b) Conversion cost of each page (in soft copy) – Rs 10/- per page
 - (c) Total cost of each CD including the manual, jewel case, packing, printing and security features – Rs 85/- per CD (subject to a minimum lot of 1000 CDs)
- (11) Both the parties i.e. The GLP Pvt. Ltd. and M/s Bluetec Pvt. Ltd. agree to abide by all remaining terms and conditions of the original tender document floated by the GLP Pvt. Ltd. for the said job.
- (12) Any notice or request or communication given or required to be given under this contract shall be given to:
 - A. In case of M/s Bluetec to:

Mr., Director, M/s Bluetec Web Services Pvt. Ltd.

(Give Address).....
 - B. In case of GLP Pvt. Ltd. to:

Mr....., Manager, Golden Law Publishing Co. Pvt. Ltd.

(Give Address).....
- (13) All disputes, claims and demands arising under or pursuant to or concerning this contract shall be referred to the sole Arbitrator to be appointed by the Chief Manager, GLP Pvt. Ltd. The award of the sole Arbitrator shall be final and

binding on both the parties. The arbitration proceedings shall be held under the provisions of the Arbitration and Conciliation Act, 1996 as amended till date. The place of arbitration shall be

- (14) The Courts at (Mention the name of the place) alone shall have jurisdiction to adjudicate any dispute arising between the parties under this agreement.
- (15) Notwithstanding anything contained in this agreement, the parties agree that any terms of this agreement may be varied by way of supplementary deed/ agreement. Such supplementary agreement/deed shall be effective only if it is in writing and signed by duly authorised representatives of both the parties.

IN WITNESS WHEREOF the parties hereto have set their respective hands to the agreement on the day, month and the year mentioned herein above.

Signed and Delivered By:	On behalf of GLP Pvt. Ltd.
On behalf of M/s Bluetec Web Services Pvt. Ltd.	Name:
Name:	Designation:
Designation:	Place:
Place:	

In the presence of witnesses:

- 1.
- 2.

Answer 1(c)

- (i) In the case where the mortgagor without delivering possession of the mortgaged property binds himself personally to pay the mortgaged 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, such a mortgage is called **simple mortgage**.
- (ii) Equitable mortgage is **preferred** by the lenders / banks / creditors as well as the commercial enterprises because of the inherent advantages.
- (iii) The term 'deed' normally refers to all the instruments by which two or more persons agree to effect any **right or liability**.
- (iv) The general requisites of an arbitration award must be consistent with the submission, certain, fair to the parties, **final** and its implementation must be possible.
- (v) The general rule, with reference to Mrs. Om Prabha Jain vs. Abnash Chand Jain, AIR 1968 SC 1083, is that no pleadings, no **evidence**.

Question 2

(a) Explain the following :

- (i) Force majeure
- (ii) Debenture trust deeds.

(4 marks each)

- (b) *Discuss how section 8 of the Transfer of Property Act, 1882 regarding operation of transfer has simplified 'parcels clause' in a deed.* (8 marks)

Answer 2(a)(i)

Force Majeure

Very important provision witnessed in modern commercial contracts relates to force majeure or excuses for non-performance. This provision defines as to what particular circumstances or events beyond the control of the seller would entitle him to delay or refuse the performance of the contract, without incurring liability for damage. It is usual to list the exact circumstances or events, like strike, lockout, riot, civil commotion, Government prohibition, etc. which would provide an excuse to the seller to delay or refuse the performance. It may be further provided that events of a similar nature which are beyond the control of the seller and which could not have been avoided with due diligence would also furnish the above relief.

Answer 2(a)(ii)

Companies in the course of their normal business borrow funds by various modes, one such mode being the issue of debentures. An issue of debentures is usually secured by a trust deed, whereunder movable and immovable properties of the company are mortgaged in favour of the trustees for the benefit of the debenture holders. The trust deed so created, as in the case of a trust, should specify all the details which have been mentioned earlier.

In addition, the usual important conditions of debenture trust deeds may be stated as follows:

1. The trust deed usually gives a legal mortgage on block capital and a floating security on the other assets of the company in favour of the trustee on behalf of the debenture holders.
2. The trust deed gives in detail the conditions under which the loan is advanced.
3. The trust deed should specify in some detail the remuneration payable to the trustee, their duties and responsibilities in relation to the trust property. Section 119 of the Companies Act, 1956 specifically provides that any provision contained in a trust deed for securing an issue of debentures, which has the effect of exempting a trustee or indemnifying him against any liability for breach of trust shall be void.
4. It also gives in detail rights of debenture holders to be exercised through the trustees in case of default by the company in payment of interest and principal as agreed upon.

Answer 2(b)

The parcel clause includes words such as: Messuages, Tenements, Hereditaments, Land, Water etc. But use of these now has been rendered unnecessary in view of Section 8 of Transfer of Property Act given herein below.

"Section 8. Operation of transfer — Unless a different intention is expressed or

necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

And, where the property is machinery attached to the earth, the movable parts thereof;

And, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

And, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

And, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect."

Question 3

- (a) *In what respect, if any, pleadings in the memorandum of appeals under sections 96 to 99, Order XLI, sections 100 to 103, 104 to 106, Order XLIII, Rules 1 and 2 and Appeals to Supreme Court under the Code of Civil Procedure, 1908, differ from the pleadings in appeals under Articles 132(1), 133 and 134 of the Constitution of India ?* (6 marks)
- (b) *State, with reasons in brief, whether the following statements are true or false :*
 - (i) *Drafting is first thinking and second composing.*
 - (ii) *Registration of partnership means registration under the Income-tax Act, 1961.*
 - (iii) *In practice, 'applications' and 'petitions' are interchangeable terms.*
 - (iv) *A right of appeal is not a natural or inherent right but a creature of the statute.*
 - (v) *Dress code prescribed by the Institute of Company Secretaries of India for its members appearing before Tribunals is a bunch of guidelines only.* (2 marks each)

Answer 3(a)

The Code of Civil Procedure, 1908 provides for four kinds of appeals:

- (1) Appeals from original decrees (Sections 96 to 99 and Order XLI);
- (2) Second Appeals (Sections 100 to 103);
- (3) Appeals from Orders (Sections 104 to 106, Order XLIII, Rules 1 and 2); and
- (4) Appeals to the Supreme Court.

- (1) Appeals from original decrees may be preferred from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court on points of law as well as on facts.
- (2) Second Appeals lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

Under Section 100 to the Code, an appeal may lie from an appellate decree passed ex parte. The memorandum of appeal shall precisely state the substantial question of law involved in the appeal. The High Court, if satisfied, that a substantial question of law is involved, shall formulate that question. The appeal shall be heard on question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

In the second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal:

- (a) which has not been determined by the Lower Appellate Court or both by the Court of first instance and the Lower Appellate Court, or
 - (b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred in Section 100 of the Code (Section 103).
- (3) Appeals from, Orders under Sections 104 to 106 would lie only from the following Orders on grounds of defect or irregularity of law:
 - (a) An Order under Section 35A of the Code allowing special costs;
 - (b) An Order under Section 91 or Section 92 refusing leave to institute a suit;
 - (c) An Order under Section 95 for compensation for obtaining arrest, attachment or injunction on insufficient ground;
 - (d) An Order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree; and
 - (e) Appealable Orders as set out under Order XLIII, Rule 1.

- (4) Appeals to the Supreme Court, the highest Court of Appeal, lie in the following cases:

Section 109 of the Code of Civil Procedure, 1908 provides:

“Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court, if the High Court certifies:

- (i) that the case involves a substantial question of law of general importance; and
- (ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.”

Order 45 of the Code of Civil Procedure, 1908 provides rules of procedure in appeals to the Supreme Court.

Articles 132 to 135 of the Constitution deal with ordinary appeals to the Supreme Court:

(i) Appeals in Constitutional cases:

Clause (1) of the Article 132 of the Constitution provides that an appeal shall lie to the Supreme Court from any judgement, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceedings, if the High Court certifies under Article 134A that the case involves a substantial question of law as to interpretation of the Constitution.

(ii) Appeals in civil cases:

Article 133 deals with appeals to the Supreme Court from decisions of High Court in civil proceedings. For an appeal to the Supreme Court the conditions laid down in this article must be fulfilled.

These conditions are:

- (a) the decision appealed against must be a “judgement, decree or final order” of a High Court in the territory of India,
- (b) such judgement, decree or final order should be given in a civil proceeding, and
- (c) a certificate of the High Court to the effect that (i) the case involves a substantial question of law, and (ii) in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(iii) Appeals in criminal cases:

A limited criminal appellate jurisdiction is conferred upon the Supreme Court by Article 134. It is limited in the sense that the Supreme Court has been constituted a Court of criminal appeal in exceptional cases where the demand of justice requires interference by the highest Court of the land.

There are two modes by which a criminal appeal from any “judgement, final order or sentence” in a criminal proceeding of a High Court can be brought before the Supreme Court:

- (1) Without a certificate of the High Court.
- (2) With a certificate of the High Court.
- (3) Appeal by Special Leave.

In appeals, as a general rule, the parties to an appeal are not entitled to produce additional evidence, whether oral or documentary, but the Appellate Court has discretion to allow additional evidence in the following circumstances:

- (i) When the lower Court has refused to admit evidence which ought to have been admitted;

- (ii) When the party seeking to produce additional evidence establishes that he could not produce it in its trial Court for no fault of his;
- (iii) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement; and
- (iv) For any other substantial cause.

However, in all such cases the Appellate Court shall record its reasons for admission of additional evidence.

The appellate judgement must include the following essential factors:

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled to.

Answer 3(b)(i)

True

Drafting process is first conceptual involving thinking and then composing involving writing / dictating down.

Answer 3(b)(ii)

False

Registration of Partnership means Registration should be under the Partnership Act, 1932.

Answer 3(b)(iii)

False

Petition is normally restricted to seeking remedy under law. Application can be for routine requests like adjournment. These matters are purely discretionary and do not carry legal or juridical rights.

Answer 3(b)(iv)

True

A right of appeal is not a natural or inherent right but is a creature of a statute. It is the statute alone to which the Court must look to determine whether a right of appeal exists in a particular instance or not. Parties cannot create a right of appeal by agreement or mutual consent. The right of appeal is not a matter of procedure, but is a substantive right and can be taken away only by a subsequent enactment, if it says so expressly or by necessary intendment and not otherwise. It is for the appellant to show that the statute gives a right of appeal to him.

Answer 3(b)(v)**True**

ICSI's Professional Dress code of for CS aims at brand building, professionalism, effective turn-out in Courts, and uniformity, though persuasive is desirable in practice.

Question 4

Write notes on any four of the following :

- (i) *Underwriting contracts*
- (ii) *Compounding of offences under the Companies Act, 1956*
- (iii) *Rejoinder*
- (iv) *Art of pleadings*
- (v) *Rule of adverse inference.* (4 marks each)

Answer 4(i)**Underwriting contracts**

Underwriting is an insurance against risk. When shares or debentures of a company are issued, they are, by and large, underwritten to ensure that all the shares or debentures issued are taken up and thus the required capital is raised.

Before entering into an underwriting arrangement with a member of any recognised stock exchange, it is the duty of the directors of the concerned company to ensure that the underwriter has sufficient financial resources to meet any obligation which may devolve upon him in the event of the issue not being fully subscribed by public.

Section 76 of the Companies Act, 1956 permits a company to pay certain commissions and prohibits the payment of all other commissions, discounts etc.

Answer 4(ii)**Compounding of offences under the Companies Act, 1956**

Section 621A of the Companies Act, 1956 has given power to the Central Government to compound offences that do not invite imprisonment as penalty. The compounding will be done only after payment or credit, by the offending company or the officer concerned, as the case may be, to the Central Government of such sum as may be prescribed by the Central Government. The sum shall not exceed the maximum amount of the fine that may be imposed for the offence. Also, any additional fee paid under Section 611(2) shall have to be taken into account in specifying the sum.

Section 611 deals with fees payable to the Registrar of Companies (Schedule X of the Companies Act) and additional fee payment in certain cases enable the filing of document after the expiry of the normal period of filing. The additional fee is subject to a ceiling of ten times the normal fee. However, the facility of compounding is not available to a company or a concerned officer, if such company or the officer was allowed this facility within three years preceding the present offence.

The application for compounding is to be made to the Registrar of Companies who,

in turn, will forward the same to the Central Government together with his comments. The company, when allowed to compound, must, within seven days thereof send an intimation to the Registrar of Companies informing him of the compounding irrespective of whether any prosecution has been launched or not. On compounding, if no prosecution has already been started, no prosecution shall commence. On the other hand, if prosecution has been launched, it is the duty of the Registrar of Companies to inform the appropriate Court in writing, upon which the company or the concerned officer will stand discharged. The Central Government while considering an application for compounding of an offence requiring filing or delivery of any document/return/ account may at its/his discretion direct any officer/employee of the company to file or register the same on payment of applicable fee. Any non-compliance of this direction by the officer/employee is punishable with imprisonment up to six months or with fine up to fifty thousand rupees or with both.

Any offence punishable with imprisonment or fine or with both as alternatives is compoundable with the permission of the Court. However, an offence punishable with imprisonment or imprisonment and fine, is not compoundable under any situation.

Answer 4(iii)

A written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent, is termed as a rejoinder or replication. Such statements are subsequent pleadings as contemplated in Order of 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 4(iv)

Pleadings could be both written and oral. Mastering both the kinds of pleadings is must for effective delivery of results to the clients. Some of the important factors which may be borne in mind while making written pleadings are as under:

- Quote relevant provisions in the petition and excerpts of observations made by the Courts relevant to the point;
- Draft prayers for interim relief in such a manner which though appear to be innocuous but satisfy your requirements;
- Do not suppress facts;
- Highlight material facts, legal provisions and Court decisions, if any;
- State important points at the outset together with reference to relevant provisions/ judgements.

If you are opponent

- File your reply to the petition at the earliest opportunity;

- Take all possible preliminary contentions together with reference to relevant law point and judgements;
- Submit your reply to each paragraph of the petition.

If you are for the petitioner

- File your rejoinder upon receiving the reply at the earliest opportunity;
- Meet clearly with the specific points raised by the opponent in the reply affidavit.

Oral Pleadings

Effective oral pleadings are relevant both at the stage of preparation of the case before actual presentation and also at the stage of actual presenting a case before CLB/ NCLT or other tribunals. Following aspects could be relevant at both these stages:

- Preparation before presentation of the case—;
- Carefully read your petition, provisions of law and judgements;
- Jot down relevant points on a separate sheet of paper together with relevant pages of the compilation;
- Keep copies of judgements to be relied ready for the Court and for your opponent(s).

Answer 4(v)

Rule of Adverse Inference

It is 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. The Court will be justified in drawing an adverse inference against that party

It is equally incumbent upon a party to produce evidence of some expert where the issue involved is a complex or difficult one as for instance, issues pertaining to engineering, medical, technology or science etc. Since the court cannot constitute itself into an expert body and contradict the claim/proposition on record unless there is something contrary on the record by way of expert opinion or there is any significantly acclaimed publication or treatise on which reliance could be based.

Question 5

- (a) *Draft a specimen deed of guarantee to be provided by a bank on behalf of its client company for the execution of a contract in favour of State government.*
(10 marks)
- (b) *In the light of case law on the subject, distinguish in what respects should a lease deed be different from leave and license agreement.*
(6 marks)

Answer 5(a)

Specimen Deed of Guarantee by a Bank on behalf of a Company for the Performance of a Contract in favour of State Government

THIS DEED OF GUARANTEE made this..... day of..... Two Thousand..... between the (Bank) (hereinafter called "the Bank") of the one part and the State of..... represented by the Governor, Shri..... (hereinafter called "the State") of the other part.

WHEREAS by Acceptance of Tender No..... dated..... made between..... Ltd., a company incorporated under the Companies Act, 1956 having its Registered Office at and whereas it is agreed by the Company with the State for the supply of plant, machinery and equipment in accordance with the terms, specifications and conditions therein contained which inter alia to.....% of the total value of the contract price, such payment to be secured by a Bank guarantee;

AND WHEREAS the bank has, at the request of the Company, agreed to stand surety for and guarantee refund of the said advance in case the plant, machinery and equipment of the value of Rs..... aforesaid is not delivered to the State in accordance with the terms and conditions of the said agreement, and the State agreed to make the said advance on such bank guarantee as aforesaid:

NOW THIS DEED WITNESSES AS FOLLOWS:

1. In consideration of the State of..... having agreed to advance a sum of Rs..... to the Company, through the Bank, for the purpose hereinafter indicated, the bank, does hereby guarantee that in case the Company shall fail and/or neglect to supply the State, the plant, machinery and equipment of the value of Rs..... in accordance with the terms, specifications and conditions contained in the Acceptance of Tender dated the..... subject to any amendments or modifications thereof, if any, when made, the bank shall repay to the State such amount or amounts as the bank may be called upon to pay subject to the maximum limit of Rs.....
2. This guarantee of the Bank shall be effective immediately upon receipt of the sum of..... from the State for and on behalf of the Company and shall continue in force until the supply of plant, machinery and equipment of the value of Rs..... aforesaid is fully effected.
3. The guarantee hereinbefore contained shall not be affected by any change in the constitution of the bank or of the Company nor in the event of any winding up being made against the Company.

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals the day, month and year first above-written.

For and on behalf of the State of

1.
2.

Answer 5(b)

The cardinal distinction between a lease and a licence is that in a lease there is a transfer of interest in the premises, whereas in the case of a licence there is no transfer of interest, although the licensee acquires a right to occupy the premises. When premises are given out on lease or tenancy basis the legal possession of the premises in these cases is also deemed to be transferred to the lessee and tenant respectively.

Whether an agreement to occupy the premises between the landlord and tenant is allowed to occupy was an agreement to lease or an agreement of leave and license has been a subject of many Supreme Court & High Court rulings.

In a number of judgements various High Courts as well as the Apex Court have distinguished the lease and the license. In *Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala*, 1988 SCC 155, the Supreme Court has held:

"In order to determine whether a document creates a license or a lease the real test is to ascertain the intention of the parties i.e. whether they intended to create a license or a lease. If the document creates an interest in the property entitling the transferee to enjoyment, then it is a lease; but if it only permits another to make use of the property without exclusive possession, then it is a license."

From the judgments of various Courts, it appears that the main factors to decide whether the agreement is a lease or a license are (i) the intention of the parties and (ii) whether the agreement creates an interest in the property.

A licensee is a licensee whether the license is for occupation of the premises or for casual visits or for any other purpose. The status of a licensee cannot change or vary according to the purpose of the license. The principle "once a licensee always a licensee" would apply to all kinds of licenses.

If the premises are given under the Leave and License Agreement, the same can be terminated as per the terms of the agreement or otherwise and the licensor can demand possession, back from the licensee. The termination is easy in the Leave and License Agreement and therefore Leave and License Agreements are preferred by the parties.

In deciding whether to give out premises on leave & licence basis some of the factors to be considered are as follows:

- Possession
- Income Tax
- Municipal Tax

Question 6

- (a) *A suit for specific performance was instituted in the civil court at Delhi against Positive Energy Ltd. The managing director asked the Company Secretary to file written statement under his own signature as if he had implied authority to do so. This was done, but the plaintiff sought dismissal of the written statement for want of proper legal authority for verifying written statement. In the meantime,*

the company granted ex post facto sanction and ratification of the authority of the Company Secretary to sign pleadings on behalf of the company. Yet, the court dismissed the written statement.

On what legal grounds, should the aggrieved company prefer an appeal impugning civil court's order ? Cite case law, if any. (8 marks)

- (b) *"A Company Secretary representing his company in court proceedings is not an advocate even though he is a law graduate performing advocacy functions."*
Comment, highlighting conceptual distinction between Company Secretary and Advocate as professionals. (8 marks)

Answer 6(a)

In *Nitro Ltd. v. National Insurance Co. Ltd.* AIR 1991 Delhi 25 and *Raghuvir Paper Mills Ltd. v. India Securities Ltd.* 2000 Corporate Law Cases 1436, it was held that if the plaint / reply (Written Statement) is not filed by a duly authorised person, the petition would be liable to be dismissed.

But in *United Bank of India v. Naresh Kumar* AIR 1997 SC2, it was held that the in case of signing / filing written statement or pleadings by a person not duly authorised, the authority exercised could be ratified subsequently.

In the instant case, ex post facto ratification has been accorded, on this ground and on the basis of *United Bank of India* case appeal should be filed. Other legal / juristic grounds should also be pleaded.

Answer 6(b)

In Section 2 (1) (a) of the Advocates Act, 1961 the term 'Advocate' has been defined to mean any advocate entered in the roll under the provisions of the Advocates Act. Section 29 of the Advocates Act states that subject to the provisions of the Act and any rules made thereunder, there shall be only one class of persons entitled to practice the profession of law, namely, 'Advocates'. Section 32 of the Advocates Act provides that notwithstanding anything contained in Chapter IV, any court, authority, or person may permit any person, not enrolled as an advocate, to appear before it or him in any particular case. Section 33 of the Advocates Act states that except as otherwise provided in the Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate.

The combined reading of Section 29, 32 and 33 of the Advocates Act shows that while advocates are the only recognized class of persons entitled to practice law, the courts have been conferred powers to permit appearance of any person, not enrolled as advocate before it or him in any particular case. Similarly, Section – 33 of the Advocates Act provides that any person other than an advocate is entitled to practice in any court or before any authority or person subject to provisions contained in any other law for the time being in force. Therefore, while practice of law may be the sole domain of advocates only but the appearance before any court or authority or person is permitted to persons other than advocates.

Question 7

- (a) *Complying with the provisions of section 76 of the Companies Act, 1956, draft an underwriting agreement in a letter form between Prosperity Ltd. proposing public issue of one lakh equity shares of ₹ 100 face value each, on the one side, and Desire Company who are registered brokers.* (8 marks)
- (b) *Distinguish between the following :*
- 'Endorsements' and 'supplemental deed'.*
 - 'Revision' and 'review' applications in a High Court.* (4 marks each)

Answer 7(a)**Specimen Underwriting Agreement**

*Name and address of the firm of brokers
who agree to act as underwriters.*

(Letter form)

Ref. No.....

Date.....

The Board of Directors
(Name and address of the company
for whose public issue the firm
agrees to act as underwriter)

Dear Sir(s),

Re : Proposed Public Issue of Equity Shares

We, hereby record the terms on which we (hereinafter referred as "underwriters") have agreed to underwrite..... Equity Shares of the aggregate nominal value of Rs..... out of the total issue of..... Equity Shares to be offered to the public at Rs...../- each for cash at par.

- The prospectus as approved by the underwriters will be delivered to the Registrar of Companies..... on or before..... for registration in accordance with the provisions of Section 60 of the Companies Act, 1956. Sufficient number of copies of the prospectus and application forms shall be printed and made available to the underwriters, brokers and members of the public who intend to apply for the Equity Shares as soon as possible thereafter.
- Underwriters shall be entitled to arrange sub-underwriting with respect to their respective commitments for their own account on terms to be arranged at their discretion with their sub-underwriters.
- If by the closing date of the subscription list or such earlier date as may be agreed to by the underwriters, the Equity Shares offered to the public are not subscribed in full by the public and the application money payable in respect thereto is not received by you, you will within 14 days or such extended time as may be agreed to by the underwriters, notify the underwriters in writing as to the amount/number of Equity Shares which have not been so subscribed. The underwriters shall within 21 days after the receipt of such intimation apply for and subscribe such unsubscribed amount/number of Equity Shares and pay or procure to be paid the money payable on application in respect of such Equity

Shares in proportion that the amount underwritten by each of them bears to the total amount of the issue.

4. In determining the amount/number of Equity Shares to be taken up by the underwriters the following factors shall be taken into consideration:
 - (a) In no circumstances will the underwriters be liable to take up Equity Shares more than the amount underwritten by them.
 - (b) All applications made before the closing of the subscription list by the underwriters, or on forms of application bearing the stamp of the underwriters, and not withdrawn in the meantime shall be taken into account in pro tanto reduction of the liability of the underwriters under this underwriting agreement.
 - (c) After scrutiny of the applications received, the total shortfall shall first be allocated among all persons who have underwritten the issue and who have not fulfilled their quota, in proportion to the amount underwritten by each of them.
 - (d) Credit shall be given to each underwriter who has not fulfilled his quota in relation to applications made by members of the public independently proportionately to the amount underwritten by each underwriter, any amount or such credit being in excess of the commitment of any underwriter being similarly shared proportionately by the others.
5. Subject to the terms of the prospectus, you will allot Equity Shares for which applications have been received as soon as possible and despatch Equity Share Certificates within six months of such allotment.
6. In consideration of the underwriting you will, within 14 days from the date on which we shall have fulfilled our obligation, pay the underwriters a commission at the rate of two and a half per cent on the issue of the amount/ number of Equity Shares underwritten by the underwriters.
7. Notwithstanding anything stated above the underwriters shall have the option to be exercised by them at any time prior to the date fixed finally for publication of the "Announcement" of terminating underwriting arrangement in the event of a complete breakdown or dislocation of business in the financial markets of the cities of Kolkata, Mumbai, Chennai and Delhi due to war, insurrection, civil commotion or any other serious or sustained or political or industrial disturbances or if the whole present basis of Stock Exchange prices in any such city should undergo substantial change through the occurrences of such catastrophe or similar event at present not foreseen. In the event of underwriters exercising such option they shall be released from all obligations arising out of the underwriting agreement.
8. Our offer is valid subject to your subscription list opening on or before.....

Please acknowledge receipt of this letter and intimate to us your acceptance of the terms and conditions mentioned above.

Thanking you,

Yours faithfully,

For.....

Answer 7(b)(i)**Endorsements and Supplemental Deed**

Endorsement means to write on the back or on the face of a document wherein it is necessary in relation to the contents of that document or instrument. The term "endorsement" is used with reference to negotiable documents like cheques, bill of exchange etc. For example, on the back of the cheque to sign one's name as Payee to obtain cash is an endorsement on the cheque. Thus, to inscribe one's signatures on the cheque, bill of exchange or promissory note is endorsement within the meaning of the term with reference to the Negotiable Instruments Act, 1881. Endorsement is used to give legal significance to a particular document with reference to new facts to be added in it. Endorsement helps in putting new facts in words on such document with a view to inscribe with a title or memorandum or to make offer to another by inscribing one's name on the document or to acknowledge receipt of any sum specified by one's signatures on the document or to express definite approval to a particular document. Thus, endorsement is an act or process of endorsing something that is written in the process of endorsing when a provision is added to a document altering its, scope or application.

Supplemental deed is a document which is entered into between the parties on the same subject on which there is a prior document existing and operative for adding new facts to the document on which the parties to the document have agreed which otherwise cannot be done by way of endorsement. Thus, supplemental deed is executed to give effect to the new facts in the deed. When a deed or document is required to be supplemented by new facts in pursuance of or in relation to a prior deed this can be affected by either endorsement on the prior deed when short writing would be sufficient, or by executing a separate deed described as supplemental deed. For example, if lessee transfers his right in the lease to another person such transfer may be done by way of endorsement

In conveyancing practices endorsements which are of general use and for which no supplementary deed is necessary are those which relate to part payment or acknowledgement of a debt by a debtor.

Answer 7(b)(ii)**Revision**

Section 115 of the Code of Civil Procedure, 1908 deals with reversionary jurisdiction of the High Courts. The Section lays down:

"(1) The High Court may call for the record of any case which has been decided by any Court sub-ordinate to such High Court and in which no appeal lies thereto, and if such sub-ordinate Court appears:

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

the High Court may make such order in the case as it thinks fit:

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

- (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or
 - (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.
- (2) The High Court shall not, under this Section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto."

Review

The right of review has been conferred by Section 114 and Order XLVII (47), Rule 1 of the Code of Civil Procedure. The section provides that any person considering himself aggrieved by a decree or order, may apply for a review of judgement, to the Court which passed the decree or made the order, on any of the grounds as mentioned in Order XLVII, Rule 1, namely:

- (1) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made; or
- (2) on account of some mistake or error apparent on the face of the record; or
- (3) for any other sufficient reason; and the Court may make such order thereon as it thinks fit.

Question 8

Examine and comment on any four of the following statements :

- (i) *Where the amendment changes the character of the suit, it cannot be allowed.*
- (ii) *Pleadings cannot be construed too technically.*
- (iii) *Rejection of plaint will amount to decree.*
- (iv) *Institution of a suit in a court of higher grade is only an irregularity.*
- (v) *Where the defendant pleads set-off, he will be in the position of plaintiff.*

(4 marks each)

Answer 8(i)

Under Order 6 Rule 17 of the CPC, the court may at any stage of the proceeding allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

In the matter of amendment of a plaint, the Courts must always take lenient view to avoid multiplicity of litigation. However, at the same time, it will have to be considered in the context of the nature and character of the suit. The amendment prayed for cannot be allowed which will change the basic foundation of the suit leading to the change in nature and character of the same. [*CRP (SH) No. 8/2011 Gauhati High Court*]

Answer 8(ii)

In the case of a civil litigation the Courts in India have been always liberal in the matter of interpreting the pleadings and technicalities are not permitted to restrict the scope of the pleadings. [*L. Eswar v. E. Raghupathi Naidu And Others* on 14 January, 1992 AIR 1992 Kant 403]

Answer 8(iii)

'Rejection' of a plaint will amount to a 'decree' within the meaning of Section 2(2), Civil P.C. The disposal of a suit or an appeal amounts to a decree if there is an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit or appeal. [*Pt. Amba Shankar v. Mt. Seoti* on 14 December, 1936 AIR 1937 All 280]

Answer 8(iv)

Sections 15 to 20 of the C. P. C. regulate the forum for the institution of suits, Section 15 requires that every suit shall be instituted in the Court of the lowest grade, competent to try it. The object of the section is that the court of higher grade should not be over crowded with suits. This rule is a rule of procedure and not of jurisdiction. The institution in a court of higher grade of a suit which ought to have been instituted in the court of a lower grade is only an irregularity of procedure covered by Section 99 of the Civil Procedure Code, and does not affect the jurisdiction of the Court. It is therefore clear that where a suit which ought to have been instituted in a court of a lower grade is instituted in the court of a higher grade, the latter cannot be said to have no jurisdiction to try the suit though as a matter of procedure, the plaint ought to be returned for presentation to the proper court. [*P.B. Rammohanreddy And Anr. v. Chintal Achaiah And Ors.* on 27 February, 1973 AIR 1974 AP 185]

Answer 8(v)

A set off was originally merely a defence to an action, and it has been held that the right to plead this defence arises when the action is brought, so that it does not become barred subsequently by the statute of limitations.

The right has now become one of attack as well as of defence, and the defendant occupies the position of a plaintiff in respect of any balance claimed by him. [*Panuganti Narasimha Rao And Anr. v. Sreerajah Vellanki Srinivasa ...* on 20 March, 1919 (1919) 37 MLJ 193]
