

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) "All instruments are legal documents, but all legal documents are not instruments." Critically evaluate with reference to leading cases. (10 marks)
- (b) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :
- (i) _____ mortgage is preferred by the lenders/banks/creditors as well as by the commercial enterprises because of its inherent advantages.
 - (ii) If the mortgagee advances further sums of money to the mortgagor on the same security and on the same condition, the deed executed to secure the advance of further sums of money is called deed of _____.
 - (iii) Registration and stamp duty is compulsory in case of mortgage value of ₹ _____ and above.
 - (iv) Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to _____.
 - (v) Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, _____ the property. (1 mark each)
- (c) "Compounding is a good way of settling disputes." Comment. (5 marks)

Answer 1(a)

Section 3 of the Indian Evidence Act, 1872, defines Document as "any matter expressed or described upon any substance by means of letters, figures or marks, or more than one of these means, intended to be used or which may be used for purposes of recording that matter. Examples: writings, prints, map, a caricature, photo, video, etc.

When such document is intended to be used as evidence or is capable of being so used at the time of execution or thereafter, it becomes a legal document.

However, 'an instrument' is a specific type of legal document used or intended to be so used or capable of being used as evidence of a financial / monetary / legal right or liability or purports to be created, transferred, modified, limited, extended, suspended, extinguished or recorded those rights and liabilities.

Legal documents need not be formal or technical in format and language; nor their registration is necessary for evidentiary purposes. But they have to be proved by oral or documentary evidence in a legal proceeding. Whereas, instruments (duly executed ones),

per se, are conclusive evidence. That is why, summary suits are based on instruments and decided with due dispatch according to special procedure laid down in the CPC.

The term ‘instrument’ has been interpreted in different judgements by different courts with reference to the different enactments, for example –

Under section 2(b) of the Notaries Act, 1952, and section 2(14) of the Indian Stamp Act, 1899, the word “instrument” includes every document by which any right or liability is, or purports to be created, transferred, modified, limited, extended, suspended, extinguished or recorded.

The expression is used to signify a deed inter parties or a charter or a record or other writing of a formal nature. But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an order made under constitutional or statutory authority. Instrument includes an order made by the President in exercise of his constitutional powers (*Mohan Chowdhary v. Chief Commissioner*, AIR 1964 SC 173).

“Instrument” includes awards made by Industrial Courts (*Purshottam v. Potdar*, AIR 1996 SC 856).

“Instrument” does not include Acts of Parliament unless there is a statutory definition to that effect in any Act (*V.P. Sugar Works v. C.I. of Stamps U.P.* AIR 1968 SC 102).

A will is an instrument (*Bishun v. Suraj Mukhi*, AIR 1966 All. 563)

The word “instrument” in Section 1 of the Interest Act is wide enough to cover a decree (*Savitribai v. Radhakishna*, AIR 1948 Nag. 49)

Answer 1(b)

- (i) **Equitable** mortgage is preferred by the lenders / banks / creditors as well as by the commercial enterprises because of its inherent advantages.
- (ii) If the mortgagee advances further sums of money to the mortgagor on the same security and on the same condition, the deed executed to secure the advance of further sums of money is called deed of **further charges**.
- (iii) Registration and stamp duty is compulsory in case of mortgage value of **₹ 100** and above.
- (iv) Outsourcing is the contracting out of a company’s non-core, non-revenue producing activities to **specialist**.
- (v) Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, **in possession of** the property.

Answer 1(c)

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

Thus, in compounding, there is a compromise or agreement, while in case of imposition of fine under the provisions of an Act, there is no agreement as such.

There are various advantages of compounding under any legislation, if it is done before the trial by the court, wherein either of the parties to the dispute which is at fault willingly agrees to its fault and a compromise is done between both the parties without the matter being adjudicated by the court. Compounding saves the parties from the hassle of spending a lot of money, time and energy in lengthy legal proceedings.

Question 2

(a) Explain the following :

(i) *Fowler's five rules of drafting.*

(ii) *Legality of an arbitration agreement of the parties on the subject matter already pending in the court.* (4 marks each)

(b) *What are the general guidelines for drafting of notice for convening company meetings ?* (8 marks)

Answer 2(a)(i)

Fowlers' five rules of drafting

According to Fowler, "anyone who wishes to become a good writer should endeavour, before he allows himself to be tempted by more showy qualities, to be direct, simple, brief, vigorous and lucid."

The principle referred to above may be translated into general in the domain of vocabulary as follows:

- (a) Prefer the familiar word to the far fetched (familiar words are readily understood).
- (b) Prefer the concrete word to the abstract (concrete words make meaning more clear and precise).
- (c) Prefer the single word to the circumlocution (single word gives direct meaning avoiding adverb and adjective).
- (d) Prefer the short word to the long (short word is easily grasped).
- (e) Prefer the Saxon word to the Roman (use of Roman words may create complications to convey proper sense to an ordinary person to understand).
- (f) Always prefer active voice to the passive voice in the drafting of documents.

Answer 2(a)(ii)

Legality of an arbitration agreement of the parties on the subject matter already pending in the court

The existence of an arbitration agreement before the case is brought to the court is not essential and parties can enter into an arbitration agreement during pendency of proceeding before the court. This view was established in *P. Anand Gajapathi Raju v. PVG Raju* [2000 AIR (SC) 1886] where during the pendency of the appeal before Supreme

Court, all the parties entered into an arbitration agreement and agreed to refer their dispute to a retired Supreme Court Judge as Sole arbitrator. The agreement was in the form of an application and had been signed by all the parties. It was held that the agreement need not already be in existence; the phrase 'which is the subject of an arbitration agreement' does not necessarily require that the agreement must already be in existence before the action is brought in the Court – the phrase also connotes an arbitration agreement being brought into existence while the action is pending. The court further stated that the arbitration agreement satisfied the requirements of section 7 and that of the language of section 8 is peremptory. It is therefore obligatory for the court to refer the parties to arbitration in terms of their agreement. An application under section 8 merely brings to the court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement.

Answer 2(b)

General Guidelines for Drafting of Notices

1. Where the form of notice is prescribed by statutory rules or forms, it has necessarily to adhere to what is prescribed.
2. One has to study, the nature of the notice, the circumstances which warrant their issue or service. The language of the notice depends upon whether it is addressed generally or it is meant to an individual or a class or a Government official.
3. Notice shall be dated, signed by authorised person, mention date, place time and nature of meeting [Section 172(1)].
4. One of the important contents of the notice is to state the business to be transacted at the meeting. Either it be separately enclosed or incorporated in the notice itself [Section 172(1)].
5. Another important feature of the notice is that, it should relate to the event either taken place or which is likely to take place, the time within which any particular compliance is required to be made either by person receiving the notice, or otherwise, the authority issuing the notice and the person(s) for whom it is meant.
6. Explanatory statement (Section 173) requirement shall be complied with as regards to special business to be transacted at the meeting. It should contain material facts, such as the nature of interest; extent of shareholdings etc. of directors/Manager as required as per Section 173(2).
7. If the meeting is to accord approval to a document, the explanatory statement must also state the time and place where that document can be inspected [Section 173(3)]
8. Where the resolution is to be passed 'as a special resolution', the intention to propose the resolution as such must also be stated in the notice [Section 189(2)(a)].
9. In the case of companies having share capital, the notice should also state with reasonable prominence that a member entitled to attend and vote is entitled to

appoint a proxy to attend and vote instead of himself and the proxy need not be a member [Section 176(2)]. This must appear in the body of the notice before the signature of the authorised person.

10. If the notice is published in a newspaper mainly to satisfy the requirement of giving a deemed notice to those members who have no registered address in India and who have not supplied any address within India for the giving of notices to him, the statement of material facts need not be annexed to the notice, but it should be mentioned in the notice that the statement has been forwarded individually to the members [proviso to sub-section (2) of Section 172].
11. Notice should be clear, concise to the point which any reader can make out quickly. Use of bold letters for key aspects is ideal.
12. One has to comply with Section 190 about special notice, proper serving of notice, duty to give notice in time, and provision of statutory length of notice etc.
13. Notice if required may warrant, the receiver to act upon, and it should mention the consequences in case of failure to act.

Question 3

- (a) *"While drafting a dealership contract, care should be taken as to the legal nature and the position of the parties thereunder." Elaborate.*
(7 marks)
- (b) *State, with reasons in brief, whether the following statements are true or false :*
 - (i) *'Documentation' is just another name for drafting and/or conveyancing.*
 - (ii) *'Testatum' is the witnessing clause in a deed.*
 - (iii) *All foreign collaboration agreements shall be subject to the laws applicable to the original collaborator party and not Indian laws even if the agreement is executed in India.* (3 marks each)

Answer 3(a)

"While drafting a dealership contract, care should be taken as to the legal nature and the position of the parties thereunder."

A dealership contract must be drawn in accordance with the provisions of the Indian Contract Act, 1872. All the essential ingredients of a contract, such as, a proposal, its acceptance, its due communication to the proposer, lawful consideration, lawful purpose and competence of parties to the contract etc. must be duly satisfied and ensured while drafting such contracts.

It is essential to ascertain not only the legal position or condition of each of the parties to the contract, e.g. an individual, a firm or partnership, a company, or as the case may be, but also that each person signing the document has capacity to contract. The contract should clearly state the full names, addresses (The addresses being that to which all communications, including notices and judicial processes, should be sent), and capacities of each of the contracting parties and, in the case of firm, partnership or

company, the name or complete style of the firm, partnership or company, its legal status, the date and place of its incorporation, Registered office, and so on.

In the title (or introductory part) of the contract, care should be taken clearly to state that it is a commercial agency or dealership contract, so as to avoid any doubt as regards the legal nature of the contract and the position of the parties thereunder.

While drafting a dealership contract, care should also be taken that it should not attract any of the provisions of any other legislation in force in the country on the date of entering into the contract. And in case the contract attracts any other legislation then the relevant authority under the said legislation should be duly intimated about the contract.

Answer 3(b)(i)

True. In India, commercial houses use the term documentation for referring to the activity which symbolizes preparation of documents including finalization and execution thereof. Banks/financial institutions use the term in substitution to drafting and conveyancing.

Answer 3(b)(ii)

True. It refers to introductory recitals of the Agreement consideration for it and acknowledgement of its receipt. It is the witnessing/proving clause.

Answer 3(b)(iii)

False. All collaboration agreements shall be subject to Indian Laws.

Question 4

Write notes on any four of the following :

- (i) *Rejoinder*
 - (ii) *Creation of 'trust' in respect of immovable property*
 - (iii) *Del credere agency*
 - (iv) *Compounding of offences under FEMA*
 - (v) *Dress code.*
- (4 marks each)*

Answer 4(i)

Rejoinder

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.

Answer 4(ii)

Creation of Trust

A trust in respect of immovable property can be declared only by a non-testamentary

instrument in writing signed by the author of the trust or the trustee and registered or by the will of the author of the trust or of the trustee. A trust in respect of movable property can be made either by a declaration as above or by the transfer of the ownership of the property to the trustee (Section 5 of the Indian Trusts Act, 1882).

In places where the Indian Trusts Act, 1882 does not apply a trust of immovable property may be created orally if the author of trust is himself the trustee and consequently no transfer of the property is involved, and all that is required is only a declaration of trust (*Madanji v. Tribhuvan*, 36 B 366).

If a stranger is appointed as trustee, a transfer of property is necessary and the conveyance must be made according to the law of Transfer of Property.

The deed creating a trust should contain in reasonable certainty, among others, the following:

- (a) an intention to create a trust;
- (b) the purpose of the trust;
- (c) the beneficiaries;
- (d) names of the trustee/s;
- (e) trust property;
- (f) unless the author is himself a trustee transfer of the legal ownership of the property to the trustee; and
- (g) duties, rights and liability of the settler, trustee and the beneficiary.

The deed may also provide for re-imbursement of expenses incurred by the trustee(s) in connection with the discharge of his/their duties as a trustee(s) and also all expenses properly incurred in or about the execution of the trust for the realisation, preservation or benefit of the trust property or the protection or the support of the beneficiary.

Answer 4(iii)

Del credere Agency

Del credere is a special type of agency, which combines agency with guarantee. 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. A commission del credere is the premium or price given by the principal to the agent for guarantee, which presupposes a guarantee.

A *del credere* agent like any other agent, is to sell according to the instructions of his principal, to make such contracts as he is authorised to make for his principal and be bound, as soon as he receives the money, to hand it over to the principal. He is distinguished from other agents simply in this that he guarantees that those persons to whom he sells perform the contracts which he makes with them.

Answer 4(iv)**Compounding of Contravention under Foreign Exchange Management Act, (FEMA) 1999**

Persons who have flouted the Foreign Exchange Management Act (FEMA) will be allowed to settle the offence by paying monetary penalty and will not have to go for litigation if such a person acknowledges having committed the contravention. Section 15 of the FEMA Act dealing with power to compound contravention stipulates that:

- (1) Any contravention under Section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.
- (2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

Answer 4(v)**Dress Code**

A dress code is a set of rules governing a certain combination of clothing. Apart from the legal profession, professional dress code standards are established in major business organizations and these have become more relaxed in recent decades. Dress codes vary greatly from company to company, as different working environments demand different styles of attire. Even within companies, dress codes can vary among positions.

Getting dressed for work is to project a professional and competent image. It has been observed that the professionals who do not take the time to maintain a professional appearance or those who have never learned how to dress properly for their chosen field of work, are not being taken seriously by co-workers and present the image of not being able to perform satisfactorily on the job.

Question 5

- (a) *Draft a specimen of deed of sale by liquidator of a company in voluntary liquidation.* (10 marks)
- (b) *Briefly discuss the legal position as to duration of power of attorney with reference to case law on the subject.* (6 marks)

Answer 5(a)**A Specimen of Deed of Sale by Liquidator of a Company in Voluntary Liquidation**

THIS SALE DEED is made on the..... day of..... by voluntary liquidator of..... Co. Ltd., (in voluntary liquidation) (hereinafter called “the vendor”) of the one part, in favour of Shri....., son of Shri.....,

Occupation....., resident of..... (hereinafter called "the purchaser") of the other part, under the terms and conditions mentioned below:

WHEREAS by a special resolution passed by the shareholders of..... Co. Ltd., at an Extraordinary General Meeting held on the..... day of....., of which notice as prescribed by law had been duly given, and it was resolved that the company be wound up voluntarily;

WHEREAS the said vendor was appointed its voluntary liquidator on..... the notice whereof was duly submitted to the Registrar of Companies..... as prescribed by law, on the..... day of.....;

AND WHEREAS in a meeting of the shareholders of the said company held in accordance with the provisions of the Companies Act, 1956, it was resolved that the properties mentioned in the Schedule annexed hereto be sold by the vendor after publishing a notice for sale in..... and....., daily newspapers twice within a period of a fortnight, and pursuant to such resolution, the vendor had duly advertised the sale of the said properties in the issues of..... dated..... respectively and issues of..... dated..... respectively and pursuant thereto have received offers, the highest whereof was that of the said purchaser;

AND WHEREAS the said vendor agreed to sell and the said purchaser agreed to purchase the said properties on the terms and conditions mentioned herein and incorporated in an agreement to sell dated..... between the said vendor and the said purchaser.

NOW THIS DEED OF SALE WITNESSES AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

That pursuant to the agreement dated..... aforementioned and in consideration of the sum of Rs..... (Rupees.....) paid by the purchaser before the Sub-Registrar, on presentation of this Deed of sale for registration thereof (the receipt whereof the vendor hereby acknowledges) the vendor hereby transfers by way of sale and conveys on behalf of the said company all those items of the property mentioned more particularly in the Schedule attached hereto, unto the said purchaser, his heirs and assigns to have and to hold the same absolutely and forever.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed of Sale on the date, month and the year aforementioned.

Witness:

Vendor

Witness:

Purchaser

Schedule

Item Nos. 1.

2.

3.

4.

Answer 5(b)

Duration of Power of Attorney

Unless expressly or impliedly limited for a particular period, a general power of

attorney will continue to be in force until expressly revoked or determined by the death of either party. In the case of a company, the power of attorney executed by the directors ceases to be operative as soon as an order for winding up is made as the directors cease to function [*Fowler v. Broode P.N. Light & Co.*, (1893) 1 Ch. 724]. A special power of attorney to do an act is determined when the act is done. In case it is desired that the power should continue for a particular period or until a certain event happens, an express provision to that effect should be made in the deed itself.

Question 6

- (a) *For a proposed Smart Footwear (P) Ltd., its promoters Abhinav, Bharat and Chirag had executed a contract with New Okhla Industrial Development Authority (NOIDA), U.P. on 30th June, 2011 for purchasing an industrial plot in Sector - 1, NOIDA. The proposal was to float Smart Footwear (P) Ltd. for manufacturing footwear in the factory to be built on the said plot. Subsequently, the company was incorporated and registered with Registrar of Companies on 15th October, 2011. It decided to adopt the promoters' contract for buying the industrial plot from NOIDA. Draft a deed of novation of promoters' contract.* (8 marks)
- (b) *What is meant by 'pleadings' ? What is the objective behind formulating the rules of pleadings ? Explain the fundamental rules of pleadings.* (8 marks)

Answer 6(a)

Agreement by Company Adopting Contract made on its behalf before its Incorporation

This Agreement made at New Delhi on this..... day of..... 2011 between M/s. New Okhla Industrial Development Authority (NOIDA), U.P. of the 1st part, and Smart Footwear (P) Ltd. (hereinafter referred to as 'the company') of the second part.

Whereas after the execution of the contract on 30th June, 2011 (hereinafter referred to as "the said contract") between M/s. New Okhla Industrial Development Authority (NOIDA), U.P., the vendor, and Shri Abhinav, Shri Bharat and Shri Chirag on behalf of the company, the said company Smart Footwear (P) Ltd. has been incorporated under the Companies Act, 1956.

Now it is hereby agreed by and between the parties hereto as under:

1. The said contract dated 30th June, 2011 is hereby adopted by the company and shall be binding on the said M/s. New Okhla Industrial Development Authority (NOIDA), U.P. and on the company in the same manner and shall take effect in all respects as if the company had been in existence at the date of the agreement.
2. Shri Abhinav, Shri Bharat and Shri Chirag who actually signed on behalf of the proposed company shall be discharged from all liability under the said contract as the company had adopted and ratified the said contracts.

In witness whereof the parties hereunto have put their hands and signatures and the company has caused its common seal affixed in the presence of Shri..... and

Shri..... two directors who have set their respective hands and signatures the day and year first herein above written in terms of the Resolution passed in its Board of Directors in their meeting held on.....

Common Seal

Witnesses:

.....

(Signature)

1.....

Director

2.....

.....

(Signature)

Director

Signatures of

On behalf of M/s. New Okhla Industrial Development Authority (NOIDA)

Answer 6(b)

Pleadings

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 (*Ganesh 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 bringing 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 7

- (a) While drafting written statements, certain important considerations must be

borne in mind. Identify at least ten requirements with reference to law on the subject. (10 marks)

(b) Distinguish between the following :

(i) 'Conveyance' and 'contract'.

(ii) 'Counter guarantee' and 'performance guarantee'. (3 marks each)

Answer 7(a)

Drafting of Reply/Written Statement – Important Considerations

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

- (i) One has to deny the averment of the plaint/petition which are incorrect, perverse or false. In case, averment contained in any para of the plaint are not denied specifically, it is presumed to have been admitted by the other party by virtue of the provisions of Order 8, Rule 5 of the Code of Civil Procedure.

It must be borne in mind that the denial has to be specific and not evasive (Order 8, Rule 3 & 4 CPC)
- (ii) If the plaint has raised a point/issue which is otherwise not admitted by the opposite party in the correspondence exchanged, it is generally advisable to deny such point/issue and let the onus to prove that point be upon the complainant. In reply, one has to submit the facts which are in the nature of defence and to be presented in a concise manner.
- (iii) Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the plaint.
- (iv) The reply to each of the paras of the plaint be drafted and given in such a manner that no para of the plaint is left unattended. The pleadings are foundations of a case.
- (v) After reply, the same is to be signed by the constituted attorney of the opposite party. If the opposite party is an individual, it could be signed by him or his constituted attorney or if the opposite party is a partnership firm, the same should be signed by a partner who is duly authorised under the Partnership Deed, because no partner has an implied authority to sign pleadings on behalf of the partnership firm by virtue of Section 22 of the Indian Partnership Act, 1932. In case of a body corporate, the same could be signed by any Director, Company Secretary, Vice-President, General Manager or Manager who is duly authorised by the Board of Directors of the company because any of the aforesaid persons per se are not entitled to sign pleadings on behalf of the body corporate. [Order 29 of Code of Civil Procedure.]
- (vi) The reply/written statement is to be supported by an Affidavit of the opposite party. Likewise, the Affidavit will be sworn by any of the persons aforesaid and duly notarised by an Oath Commissioner. The Affidavit has to be properly drawn and if the affidavit is not properly drawn or attested, the same cannot be read

and the petition could be dismissed summarily. [Order 6, Rule 15 CPC]. The court is bound to see in every case that the pleadings are verified in the manner prescribed and that verifications are not mere formalities.

- (vii) The reply alongwith all annexures should be duly page numbered and be filed alongwith authority letter if not previously filed.
- (viii) At the time of filing of reply, attach all the supporting papers, documents, documentary evidence, copies of annual accounts or its relevant extracts, invoices, extracts of registers, documents and other relevant papers.
- (ix) It may be noted that if any of the important points is omitted from being given in the reply, it would be suicidal as there is a limited provision for amendment of pleadings as provided in Order 6, Rule 17 CPC, and also the same cannot be raised in the Affidavit-in-Evidence at the time of leading of evidence. Because if any point has not been pleaded in the pleadings, no evidence could be led on that point. General rule is that no pleadings, no evidence.
- (x) If a party is alleging fraud, undue influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however, strong the language in which they are couched may be, and the same applies to undue influence or coercion. While pleading against fraud or mis-representation, party must state the requisite particulars in the pleadings.
- (xi) It is well settled that neither party need in any pleadings allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. [Order 6, Rule 13 CPC; Sections 79 and 90 of Indian Evidence Act.]
- (xii) In every pleading, one must state specifically the relief which the party is claiming from the court or tribunal or forum. While framing the prayer clause, one should claim all possible relief as would be permissible under the pleadings and the law [Order 7, Rule 7 CPC]. The general principle is that the relief if not prayed for, will not be allowed.

Answer 7(b)(i)

Distinction between Conveyance and Contract

Contract remains to be performed and its specific performance may be sought but conveyance passes on the title to property to another person. Conveyance does not create any right of any action but at the same time it alters the ownership of existing right. There may be cases where the transaction may partake both contract as well as conveyance. For example, lease, whereby obligation is created while possession of the property is transferred by lessor to lessee. More so, contracts are governed by provisions of the Indian Contract Act, 1872 whereas the cases of transfer of immovable property are governed by the Transfer of Property Act, 1882 in India. A mere contract to mortgage or sale would not amount to actual transfer of interest in the property but the deed of mortgage or sale would operate as conveyance of such interest. In other words, once the document transferring immovable property has been completed and registered as required by law, the transaction becomes conveyance.

Answer 7(b)(ii)**Counter Guarantee**

A guarantee given by the principal debtor to the surety providing him continuing indemnity against any loss or damage that the surety may suffer on account of default on the part of the principal debtor is called “Counter guarantee”.

Performance Guarantee

A guarantee which ensures the contracted performance of another person and under which the surety undertakes to compensate the person in whose favour the guarantee is given in the event of failure on the part of the person on whose behalf the guarantee is given is known as “performance guarantee”.

Question 8

(a) *Examine and comment on the following :*

- (i) *Special leave petitions under Article 134A and under Article 136 of the Constitution of India are similar in formats and same in essence.*
- (ii) *A civil suit for removal of director for malfeasance is maintainable if the articles of association provide for civil suit instead of the Companies Act, 1956 provisions.* (3 marks each)

(b) *What do you mean by —*

- (i) *Inclusive deed*
- (ii) *Latent deed*
- (iii) *Pretended deed*
- (iv) *Voluntary deed*
- (v) *Warranty deed ?* (2 marks each)

Answer 8(a)(i)**Special Leave Petitions**

Article 134A of the Constitution of India lays down that every High Court, passing or making a judgement, decree, final order, or sentence, referred to in Clause (1) of Article 132 or Clause (1) of Article 133 or Clause (1) of Article 134,

- (a) may, if it deems fit so to do, on its own motion; and
- (b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgement, decree, final order or sentence, determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in Clause (1) of Article 132, or Clause (1) of Article 133 or, as the case may be, sub-clause (c) of clause (1) of Article 134, may be given in respect of that case.

Where a High Court refused to issue the required certificate to enable an aggrieved party to appeal to the Supreme Court against the judgment, order or sentence awarded by the High Court the aggrieved party may petition to the Supreme Court for grant of special leave to appeal under Article 136 of the Constitution.

Article 136 of the Constitution confers upon the Supreme Court power to grant special leave to appeal. The Article lays down:

- “(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.
- (2) Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces”.

Thus, special leave petitions under Article 134A and under Article 136 of the Constitution of India are similar in formats and same in essence.

Answer 8(a)(ii)

A civil court has no jurisdiction to entertain a suit for removal of a director since the matter relates to the internal management of the company which is governed by the Companies Act, 1956 [*Khetan Industries Pvt. Ltd. v. Manju Ravindra Prasad Khetan* (1995) 16 CLA 169 (Bom)].

Section 284 has given to the shareholders necessary powers to remove a director and thus a civil court has no jurisdiction to entertain a suit for removal of a director.

Answer 8(b)(i)

Inclusive Deed – An inclusive deed is one which contains within the designated boundaries lands which are expected from the operation of the deed.

Answer 8(b)(ii)

Latent Deed – A latent deed is a deed kept for twenty years or more in man’s escritoire or strong box.

Answer 8(b)(iii)

Pretended Deed – A pretended deed is a deed apparently or *prima facie* valid.

Answer 8(b)(iv)

Voluntary Deed – A voluntary deed is one given without any “valuable consideration”.

Answer 8(b)(v)

Warranty Deed – A warranty deed is a deed containing a covenant of warranty.
