

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed : 3 hours

Maximum marks : 100

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

Question 1

Attempt any four of the following :

- (i) Define 'document'. Explain various kinds of deeds.*
- (ii) What are the important points that should be taken into consideration while drafting contracts ?*
- (iii) What are the pre-requisites of 'arbitration' ? Draft the specimen of an arbitration agreement to refer dispute to an arbitral tribunal.*
- (iv) Define the following :*
 - (a) Contract of guarantee*
 - (b) Hypothecation agreement*
 - (c) Lease*
 - (d) Licence*
 - (e) Mortgage.*
- (v) Draft a specimen of memorandum of mortgage by deposit of title deeds.*
(5 marks each)

Answer 1(i)

Document

Document as per Section 31(18) of General Clauses Act, 1894 means any matter expressed or described upon any substance by means of letters, figures or marks, or by the more than one of those means, intended to be used, or which way be used, for the purpose of recording that matter. As for instance, a writing is a document, words printed, lithographed or photographed are documents; a map or plan is a place or stone is a document. A caricature is a document. Thus, document is a paper or other material thing affording information, proof or evidence of anything.

Various kinds of Deeds

1. A good deed is one which conveys a good title, not one which is good merely in form.
2. A good and sufficient deed is marketable deed; one that will pass a good title to the land it purports to convey.
3. An inclusive deed is one which contains within the designated boundaries lands which are expected from the operation of the deed.
4. A latent deed is a deed kept for twenty years or more in man's escritoire or strong box.
5. A lawful deed is a deed conveying a good or lawful title.
6. A pretended deed is a deed apparently or prima facie valid.

7. A voluntary deed is one given without any “valuable consideration”,
8. A warranty deed is a deed containing a covenant of warranty.

Answer 1(ii)

Important points in regard to drafting of contracts

1. *Description of Parties to the Contract* : Parties to the contract should properly be defined by giving their names, status and address.
2. *Legal Nature of the Contract* : In the title or in the introductory part of the contract, the parties should clearly indicate the legal nature of the contract as to whether it is a sale/purchase contract or a contract for technical assistance, etc. so as to avoid any doubt as regards the nature of the contract and the legal position of the parties thereunder.
3. *Licences and Permits* : Provision in international trade contracts as to which party would be responsible for obtaining export/import licences and the effects of delay, refusal or withdrawal of a license by Government authority, etc.
4. *Taxes, Duties and Charges* : A provision regarding the responsibility for payment of taxes, duties and other charges, if any, may also be included in the contract. In international contracts, it is generally provided that the seller would be responsible for taxes, duties and charges levied in the country of export and the buyer with such charges levied in the country of import.
5. *Quality, Quantity and Inspection of Goods* : Quality of the goods is very important to the buyer in a sale-purchase contract and it is in this area that a number of disputes arise and, therefore, it is necessary to include a suitable provision relating to the description and inspection of the quality and quantity of the goods in the contract.
6. *Packing* : A proper stipulation regarding packaging of the goods according to the nature of the merchandise should be included in the contract.
7. *Shipment of the Goods* : It is desirable to stipulate precise particulars regarding the rights and duties of the parties towards shipment of the goods, i.e., the time, date and port of shipment, name of the ship and other ship particulars.
8. *Insurance* : A provision regarding insurance of the merchandise is also made in the contract.
9. *Documentation* : If the goods are of scientific or technical nature, a provision in the contract may be made as to whether the technical documentation supplied by the seller will become the property of the buyer or it has to be returned to the seller after a stipulated time.
10. *Guarantee* : A guarantee clause may be provided to make the seller responsible for the defects appearing in the goods during the period of the guarantee.
11. *Passing of the Property and Passing of the Risks* : It is very important to provide for the exact point of time when the title or the property in the goods and the risk will pass from the seller to the buyer.

12. *Amount, Mode and Currency of Payment* : Provision is to be made for the amount, mode and currency in which the price for the goods has to be paid.
13. *Force Majeure* : Another 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 damages.
14. *Proper Law of Contract* : Provision stipulating the proper law of contract in international contracts.
15. *Settlement of Disputes and Arbitration* : Provision regarding settlement of disputes under the contract by arbitration or otherwise has to be stipulated. A suitable arbitration clause may be provided by the parties by mutual agreement.

Answer 1(iii)

Pre-requisites of Arbitration

Every arbitration must have the following three pre-requisites:

- (i) a dispute between parties to an agreement, requiring a settlement;
- (ii) its submission for a settlement to a third person; and
- (iii) a decision by such third person according to his own judgement based on the facts and circumstances of the dispute, which is binding on both the parties.

Specimen of an arbitration agreement to refer the dispute to an arbitral Tribunal

THIS AGREEMENT is made at..... this..... day of..... between Mr. X..... of..... residing at..... hereinafter referred to as the Party of the First Part and Mr. Y..... of..... residing at..... hereinafter referred to as the Party of the Second Part.

WHEREAS by an Agreement dated..... 2008 entered into between the parties hereto, the Party of the First Part entrusted the work of constructing a building on his plot of land situated at..... to the Party of the Second Part on the terms and conditions therein mentioned.

AND WHEREAS disputes have arisen between the parties hereto regarding the said contract and the parties could not mutually settle the matter

AND WHEREAS the said agreement provides that in the event of any dispute or difference arising between the parties the same shall be referred to arbitration if agreed upon and the Arbitration shall be governed by the provisions of the Arbitration & Conciliation Act, 1996.

AND WHEREAS the parties have agreed to refer all the disputes regarding the said contract to Mr..... Architect, as common Arbitrator and have proposed to enter into this Agreement for reference of the disputes to the sole arbitration of the said Mr.....

NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That the following points of dispute arising out of the said agreement dated... are hereby referred to the sole arbitration of the said Mr..... for his decision and award.

The points of dispute are:

- (a)
- (b)
- (c)
- (d)
- (e)
2. The said Arbitrator shall allow the parties to file their respective claims and contentions and to file documents relied upon by them within such reasonable time as the Arbitrator may direct.
3. The said Arbitrator shall give hearing to the parties either personally or through their respective Advocates but the Arbitrator will not be bound to take any oral evidence including cross examination of any party or person.
4. The said Arbitrator shall make his Award within a period of four months from the date of service of a copy of this agreement on him by any of the parties hereto provided that, the Arbitrator will have power to extend the said period from time to time with the consent of both the parties.
5. The Arbitrator will not make any interim award.
6. The award given by the Arbitrator will be binding on the parties hereto.
7. The Arbitrator will have full power to award or not to award payment of such costs of and incidental to this arbitration by one party to the other as he may think fit.
8. The Arbitration shall be governed by the provisions of the Arbitration & Conciliation Act, 1996.

IN WITNESS WHEREOF the parties herein under have set their hands the day and year hereinabove mentioned.

Signed by the within named

Signed by the within named

Mr. X in the presence of

Mr. Y..... in the presence of

Answer 1(iv)

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

- (b) **Hypothecation agreement** : Hypothecation is a form of transfer of property in goods. Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass. This form of transfer is not regulated in India by any statute. Neither the Transfer of Property Act, 1882, nor the Indian Contract Act, 1872, nor the Sale of Goods Act, 1930, recognize the non-possessory hypothecation of immovables, and the rights and remedies of the parties are regulated by the courts according to the general law of contract.

In hypothecation, there must be an intention of the parties to create a security on the property on which the money has been lent. If that intention can be established, equity gives effect to it.

- (c) **Lease** : A lease of immovable property is a transfer of a right to enjoy the property for a certain time in consideration for a price paid or promised. The price paid is called "rent".

- (d) **Licence** : Licence has been defined in Section 52 of the Indian Easements Act, 1882 as under:

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

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

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

Answer 1(v)

Memorandum of Mortgage by Deposit of Title Deeds

Memorandum that this..... day of..... 2009, 'AB' of, etc. (the mortgagor), as beneficial owner, has deposited with 'CD' of, etc. (the mortgagee), the original title deeds comprised in the Schedule A hereto, relating to the premises belonging to the said 'AB' and situate at etc., described in Schedule B with intent to create a charge thereon for securing repayment to the said 'CD' of the sum of Rs..... this day lent and advanced by the said 'CD' to the said 'AB' on demand with interest for the same from this date at the rate of Rs..... per cent per annum.

The said 'AB' do hereby undertake as and when required by the said 'CD' to execute and register at the costs of the said 'AB' a legal mortgage in such form and containing such covenants and provisions as he may reasonably require.

Dated this..... day of..... 2009.

*The Schedule A above referred to
Description of the Title Deeds deposited.
The Schedule B above referred to
Description of the Property.*

Signature of the Mortgagor.

Question 2

- (a) Write short notes on any two of the following :
- (i) *Del credere agency*
 - (ii) *Usufructuary mortgage*
 - (iii) *Power of attorney and letter of authority.* (3 marks each)
- (b) Choose the most appropriate answer from the given options in respect of the following :
- (i) *A deed kept for twenty years or more in man's escritoire or strong box is called —*
 - (a) *Pretended deed*
 - (b) *Lawful deed*
 - (c) *Warranty deed*
 - (d) *Latent deed.*
 - (ii) *A 'guarantee' guaranteeing an employer against the misconduct of an employee or to answer for the debt or default of another is called —*
 - (a) *Performance guarantee*
 - (b) *Bank guarantee*
 - (c) *Counter guarantee*
 - (d) *Fidelity guarantee.*
 - (iii) *In English law, mortgage by deposit of title deed is called as —*
 - (a) *Usufructuary mortgage*
 - (b) *English mortgage*
 - (c) *Equitable mortgage*
 - (d) *Anomalous mortgage.*
 - (iv) *Power of attorney executed for the purpose of generally representing another person or for performing more than one act is called —*
 - (a) *General power of attorney*
 - (b) *Special power of attorney*
 - (c) *Particular power of attorney*
 - (d) *Revocable power of attorney.*
 - (v) *In case of a company, mortgage of the property should be duly authorised—*
 - (a) *By objects clause of the memorandum of association and approved by a resolution of the Board*

(b) *Only by objects clause of the memorandum of association*

(c) *Only by a resolution passed in the meeting of the Board*

(d) *By articles of association.* (1 mark each)

(c) *Mention the procedure to be followed for carrying through a compromise or arrangement under section 391 of the Companies Act, 1956.* (5 marks)

Answer 2(a)(i)

Del Credere Agency

There is a special type of agency, which combines agency with guarantee. This is known as del credere agency. A del credere agent is one who, for an extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer. By reason of his charging a del credere commission he assumes responsibility for the solvency and performance of the contract by the vendee and thus indemnifies his principal against loss. He, therefore, gives an additional security to the seller, but he does not shift the responsibility of payment from the buyer to the seller. 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 2(a)(ii)

Usufructuary Mortgage

In this mortgage, the mortgagor delivers possession of the mortgaged property to the mortgagee who retains the possession until the satisfaction of the debt. The mortgagee will take the usufruct in lieu of the interest or part payment of the principal or partly in payment of interest or partly in part payment of the principal. The mortgagor is not personally liable to pay the debt and the mortgagee is not entitled during the term of the mortgage to demand his mortgage money.

Answer 2(a)(iii)

Power of Attorney and Letter of Authority

Power of Attorney : Section 2(21) of the Indian Stamp Act, 1899 defines power of attorney as follows:

“Power of Attorney” includes any instrument (not chargeable with fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it”.

In terms of Section 1A of the Powers-of-Attorney Act, 1882 as amended by the Powers-of-Attorney (Amendment) Act, 1982, a power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney.

Letter of Authority : Letter of authority is nothing but a power of attorney. They are executed on plain paper and not on stamp paper. Letters of authority are usually issued for collecting some documents or papers, dividend interest etc. on behalf of another. By and large, the law relating to the powers of attorney will apply to letters of authority.

Answer 2(b)(i)

- (d) Latent deed

Answer 2(b)(ii)

- (d) Fidelity guarantee

Answer 2(b)(iii)

- (c) Equitable mortgage

Answer 2(b)(iv)

- (a) General Power of Attorney

Answer 2(b)(v)

- (a) By objects clause of the Memorandum of Association and approved by a resolution of the Board of Directors

Answer 2(c)

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

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

Where a compromise or arrangement is proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies, or for the amalgamation of any two or more companies, the petition must pray

for appropriate orders and directions under Section 394 for facilitating the reconstruction or amalgamation of the company or companies.

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

Before an application is made by a company under Section 391, it is usual for the Chairman of the Board of the company which is to be reconstructed or where an amalgamation between two or more companies is proposed, for the Chairman of the Board of each of these companies, to send a circular letter to the members of the company or companies and when the creditors are affected, to them also, explaining the scheme of reconstruction or amalgamation, as the case may be, and the reasons which prompted the preparation of the scheme. The circular letter should specify how the scheme will affect the shareholdings of the members, and when applicable, the claims of the creditors, including debenture holders.

Question 3

(a) *Distinguish between the following :*

(i) *'Conveyance' and 'contract'.*

(ii) *'Instrument' and 'deed'.*

(iii) *'Partnership' and 'trust'.* (4 marks each)

(b) *Write a short note on 'retirement and expulsion of partners'.* (4 marks)

Answer 3(a)(i)

Conveyance and Contract

1. Contract remains to be performed and its specific performance may be sought but conveyance passes on the title of 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.
2. 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.
3. A 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. Any such transaction would be governed under the provisions of the Transfer of Property Act, 1882.

Answer 3(a)(ii)**Instrument and Deed**

Instrument : 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.

Deed : Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability.

A deed may be defined as a formal writing of a non-testamentary character, which purports and operates to create, declare, confirm, assign, limit or extinguish some right, title or interest. Deeds are in writing, signed sealed and delivered. Deeds are instruments, but all instruments are not deeds.

Answer 3(a)(iii)**Partnership and Trust**

Partnership : Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits.

Partnership is defined in Section 4 of the Indian Partnership Act, 1932 as the relation between persons who have agreed to share profits of business carried on by all or any one of them acting for all.

Trust : A trust is defined under Section 3 of the Indian Trusts Act, 1882 as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner.

Answer 3(b)**Retirement and Expulsion of Partners**

Sections 32 and 33 of the Partnership Act, 1932 make provisions for retirement and expulsion of partners.

A partner may retire from a firm with the consent of all the other partners. If the terms of the agreement so provide, a partner may retire by notice to the other partners. In a partnership at will also, a partner can retire by giving notice in writing to all the other partners of his intention to retire. A partner can be expelled from a firm by a majority of the partners where such a power is conferred by the agreement between the partners and the power is exercised in good faith.

Question 4

(a) *State, with reasons in brief, whether the following statements are correct or incorrect:*

(i) *Drafting is first thinking and second composing.*

(ii) *If a document is not properly stamped, it is rendered inadmissible in evidence.*

(iii) *Testimonium is the clause in the first part of the deed. (2 marks each)*

(b) *“Practising of good professional etiquettes is necessary for professional success in the emerging business scenario.” Discuss. (4 marks)*

(c) *Bharat requests Ajay to sell and deliver to him goods on credit. Ajay agrees to do so, provided Chandan guarantees the payment of the price of the goods. Is this a sufficient consideration for Chandan’s promise and is this arrangement a valid contract of guarantee ? Discuss. (6 marks)*

Answer 4(a)(i)

Correct : The process of drafting operates in two planes: the conceptual and the verbal. Besides seeking the right words, the draftsman seeks the right concepts. Drafting, therefore, is first thinking and second composing.

Answer 4(a)(ii)

Correct : The draft of document is required to be approved by the parties. The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per the Indian Stamp Act. If a document is not properly stamped, it is rendered inadmissible in evidence nor it will be registered with the Registrar of Assurances.

Answer 4(a)(iii)

Incorrect : Testimonium is the clause in the last part of the deed. Testimonium signifies that the parties to the document have signed the deed. This clause marks the close of the deed and is an essential part of the deed.

Answer 4b)

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

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

Answer 4(c)

This is a sufficient consideration for Chandan’s promise and this arrangement is a valid contract of guarantee.

Section 127 of the Indian Contract Act, 1872 defines consideration for guarantee as “Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee”.

Question 5

(a) *Explain in detail the general principles of drafting and conveyancing and other writings.* (12 marks)

(b) *Write a short note on ‘covenants and undertakings’.* (4 marks)

Answer 5(a)

Drafting of legal documents is a skilled job. A draftsman, in the first instance, must ascertain the names, description and addresses of the parties to the instrument. He must obtain particulars about all necessary matters which are required to form part of the instrument. He must also note down with provision any particular directions or stipulations which are to be kept in view and to be incorporated in the instrument. The duty of a draftsman is to express the intention of the parties clearly and concisely in technical language. With this end in view, he should first form a clear idea of what these intentions are.

When the draftsman has digested the facts, he should next consider as to whether those intentions can be given effect to without offending against any provision of law. A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided. As for instance, in cases where a deed to be executed by a limited company, it is necessary to go into the question as to whether the company has got power or authority under its memorandum to enter into the transaction. A limited company can do only that much which it is authorised by its memorandum. Further, a company being a legal entity, must necessarily act through its authorised agents. A deed, therefore, should be executed by a person duly authorised by the directors by their resolution or by their power of attorney.

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

Document should be supported by the schedules, enclosures or annexures in case any reference to such material has been made in that.

Answer 5(b)**Covenants and Undertakings**

The term covenant has been defined as an agreement under seal, whereby parties stipulate for the truth of certain facts. In Whasten's Law Lexicon, a covenant has been

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

Question 6

Attempt any four of the following :

- (i) *What is meant by ‘pre-incorporation contracts’ ? Can a company ratify a contract entered into by the promoters on its behalf before its incorporation ? Explain with reasons. (4 marks)*
- (ii) *Mention important guidelines which are required to be followed while entering into a foreign collaboration agreement. (4 marks)*
- (iii) *Draft an affidavit of creditor in proof of his debt in proceeding for the liquidation of a company. (4 marks)*
- (iv) *Define the following :*
 - (a) *Appeal*
 - (b) *Affidavit*
 - (c) *Articles of Association*
 - (d) *Rejoinder. (1 mark each)*
- (v) *What is ‘compounding of offences’ ? How does compounding of offences take place under the Code of Criminal Procedure, 1973 ? (4 marks)*

Answer 6(i)

Pre-incorporation contracts

The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre-incorporation contracts.

The promoters generally enter into such contracts as agents for the company about to be formed. The legal position is that since presence of two consenting parties is necessary for a contract, and the company before incorporation is a non-entity, the promoters cannot act as agents for the company, which has yet to come into existence. As such, the company is not liable for the acts of the promoters done before its incorporation.

Similarly, the company, after incorporation, cannot enforce any contract made before its incorporation, which means the company cannot sue the other party to the contract if the other party fails to carry out the contract. Promoters remain personally liable on the contract.

A company also cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit

of the contract purporting to have been made on its behalf before it came into existence, as ratification by the company when formed is legally impossible. The doctrine of ratification applies only if an agent contracts for a principal who is in existence and who is competent to contract at the time of the contract by the agent. Where a contract is made on behalf of principal known to both parties to be non-existent, the contract is deemed to have been entered into personally by the actual maker, i.e. the agent. The company may, if it desires, enter into a new contract, after its incorporation, with the other party which is known as novation of promoter's contracts;; and if it makes a fresh contract in terms of the preliminary contract, the liability of the promoters comes to an end and if it does not make a fresh contract within a limited, period of time, either of the parties may rescind the contract.

The pre-incorporation agreements entered into by the promoters acting on behalf of the intended company with third party cannot always be avoided for various reasons. These agreements affect the operations of the incorporated company.

Answer 6(ii)

Guidelines for entering into Foreign Collaboration Agreements

These guidelines cover the following aspects of foreign collaboration agreements:

1. *Investment* : Where in a foreign collaboration agreement, equity participation is involved, the value of the shares to be acquired should be brought in cash.
2. *Lump sum payment* : The amount agreed to be paid by an Indian party to a foreign collaborator for technology transfer should be paid in three instalments as follows:
 - (i) one-third to be paid after the agreement has been approved by the Central Government;
 - (ii) one-third on transfer of the technical documents; and
 - (iii) one-third on the commencement of commercial production.
3. *Royalty* : Royalty payable to a foreign collaborator has to be calculated on the basis of net ex-factory selling price of the product less excise duties and cost of imported components. The normal rate of royalty may be three per cent to five per cent. This rate will depend upon the nature and extent of the technology involved.
4. *Duration of agreement* : The period is approved by the Government usually for five years from the date of the agreement in the first instance or five years from the date of commencement of commercial production; the total period, however, not exceeding eight years from the date of the agreement.
5. *Renewal or extension of agreement* : The Central Government may consider an application for renewal of a foreign collaboration agreement or for extension of its period on merit.
6. *Sub-licensing* : An agreement shall not normally impose any restriction on the sub-licensing of the technical know-how to other Indian parties. Sub-licensing is, however, subject to the Central Government's approval.
8. *Exports* : No foreign collaboration agreement shall be allowed to contain any restriction on the free export to all countries, except in a case where the foreign

collaborator has licensing arrangements in which case the countries concerned shall be specified.

9. *Procurement of capital goods etc.* : There should be no restriction on procurement of capital goods, components, spares, raw materials etc. by the Indian party.
10. *Training* : Provision shall be made in the agreement for adequate facilities for training of Indian technicians for research and development.
11. *Exploitation of Indian patents* : Where any item of manufacture is patented in India, the payment of royalty or lump sum to the foreign collaborator should make provision for compensation for use of such patent until its expiry.
12. *Brand Name* : There should be no insistence on the use of foreign brand names on products for sale in India. There can, however, be no objection for use of foreign brand name on products to be exported to other countries.
13. *Indian Laws* : All collaboration agreements shall be subject to Indian laws.
14. *Approval of Central Government* : Every foreign collaboration agreement shall be approved by the Central Government.

While drafting a collaboration agreement, care should be taken that it is in strict compliance with the guidelines as detailed above. Every collaboration agreement must contain one or more clause to the effect: "The agreement shall be subject to Indian laws. The agreement shall be subject to the approval of the Government of India".

Answer 6(iii)

Affidavit of creditor in proof of his debt in proceeding for the liquidation of a company

IN THE (HIGH) COURT OF.....

The matter of the Indian Companies Act, 1956.

And

The matter of the liquidation of..... Company Limited.

I, AB, aged..... years, son of Shri..... resident of....., do hereby on oath (or on solemn affirmation) state as follows:

1. That the abovenamed company was on the..... day of..... 2009, the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of Rupees..... (Rs.....) only in account of (describe briefly the nature of the debt).
2. That in proof of the aforesaid debt I attach hereto the documents marked A, B and C.
3. That I have not, nor have any person or persons by my order or to my knowledge or belief for my use, received the aforesaid sum of Rupees..... or any part thereof, or any security or satisfaction for the same or any part thereof except the sum or security (state the exact amount of security).

4. That this my affidavit is true, that it conceals nothing and no part of it is false.

Sd/-

AB

Dated..... 2009

Deponent

Verification

I, the abovenamed deponent, verify that the contents of paragraphs 1 to 4 of this affidavit are true to my personal knowledge.

Sd/-

AB

Dated..... 2009

I, ... s/o..... r/o..... declare,
from a perusal of the papers produced by the deponent before me that I am satisfied that
he is Shri AB

Sd/-.....

Solemnly affirmed before me on this.....day of..... 2009
of..... (time) by the deponent.

Sd/-.....

(Oath Commissioner)

Answer 6(iv)

- (a) *Appeal* : Any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an “appeal”.
- (b) *Affidavit* : A statement or declaration on oath by the deponent is called Affidavit. The consequences of a false affidavit are serious. Therefore, great care is required in drafting it.
- (c) *Articles of Association* : Articles of Association is another equally important document for incorporation of a limited company. Articles are rules and regulations for management of internal affairs of the company. It constitute a contract between the company and its members and members inter se. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum. Section 36 of the Companies Act, 1956 emphasises its importance as to its contractual force. Articles should be in conformity with the provisions of Memorandum and the Companies Act.
- (d) *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 8, Rule 9 of the Civil Procedure Code. Under Rule 9, leave of the court is essential before any party can present a further pleading after the written statement has been filed.

Answer 6(v)**Compounding of offences**

'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.

Compounding saves the parties from the hassle of spending a lot of money, time and energy in lengthy legal proceedings. In a country like India where there are thousands of cases pending in the court 'compounding' is a good way of settling disputes or matters.

Compounding of Offences under the Code of Criminal Procedure : Section 320 of the Criminal Procedure Code, 1973 permits compounding of various offences under Indian Penal Code. Such compounding can be done either before or after institution of prosecution. It may be pointed out here that a crime is essentially a wrong done to society; therefore a compromise between the accused (wrong-door) and the individual victim should not be enough to absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences [see the table given in Section 320(1)] and some others as compoundable only with the permission of the court [see the table given in Section 320(1)]. After payment of such composition amount, prosecution will not be launched, or if it was launched, it will be withdrawn.

Question 7

- (a) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
- (i) *Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to a _____.*
 - (ii) *The present day system of pleadings in our country is based on the provisions of the _____ supplemented from time to time by rules in that behalf by the High Courts of the States.*
 - (iii) *_____ is an application by any party to an appellate court asking it to set aside or revise a decision of a subordinate court.*
 - (iv) *_____ compels courts to act within their jurisdiction when a tribunal acts without or in excess of jurisdiction or in violation of the rules or law.*
 - (v) *In compounding of offences, _____ make a joint application to the court that the parties have come to terms and the case may not be proceeded with. (1 mark each)*
- (b) *State the general guidelines of drafting notices under the Companies Act, 1956. (5 marks)*
- (c) *What is meant by a 'consent order' ? What remedies are available with the*

Securities and Exchange Board of India if the consent order is violated by a party ?
(6 marks)

Answer 7(a)

- (i) Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to a **specialist**.
- (ii) The present day system of pleadings in our country is based on the provisions of the **Civil Procedure Code, 1908** supplemented from time to time by rules in that behalf by the High Courts of the States.
- (iii) **An appeal** is an application by any party to an appellate court asking it to set aside or revise a decision of a subordinate court.
- (iv) **Writ of prohibition** compels courts to act within their jurisdiction when a tribunal acts without or in excess of jurisdiction or in violation of the rules or law.
- (v) In compounding of offences, **the accused and the complainant** make a joint application to the court that the parties have come to terms and the case may not be proceeded with.

Answer 7(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 and 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.

The point is that if any essential feature is left out, serious legal consequences may ensue, which one has to avert. Sending a second notice, in place of an incorrect or illegal one adds to the cost.

Answer 7(c)

Consent Order

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

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

Remedies available with SEBI in case of violation: Violation of consent order by a party (i.e. failure to obey) would invite appropriate action, including for violating SEBI orders, besides revival of the pending action. In this context, any proceeding which had been kept in abeyance pending the consent process will begin from such stage at which it was suspended.

Question 8

- (a) *Explain the guidelines for professional dress of Company Secretaries. (6 marks)*
- (b) *Why is art of advocacy important ? What are the important factors which Company Secretaries should keep in mind while making written pleadings ? (10 marks)*

Answer 8(a)**Guidelines for Professional Dress of Company Secretaries**

In professional life it is important to look presentable because personal appearance counts. How you look can be a major factor in how you are perceived by others. 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.

To enhance the visibility and brand building of the profession and ensuring uniformity, the Council of the Institute of Company Secretaries of India has prescribed the following guidelines for professional dress for members while appearing before judicial/quasi-judicial bodies and tribunals:

- (a) The professional dress for male members will be Navy Blue suit and white shirt with a tie (preferably of the ICSI) or navy blue buttoned-up coat over a pant or a navy blue safari suit.
- (b) The professional dress for female members will be saree or any other dress of a sober colour with a Navy Blue jacket.
- (c) Members in employment may wear the dress/uniform as specified by the employer for all employees or if allowed the aforesaid professional dress.
- (d) Practising Company Secretaries appearing before any tribunal or quasi-judicial body should adhere to dress code if any prescribed for appearing before such tribunal or quasi-judicial body or if allowed the aforesaid professional dress.

It may be pointed out that any person whether a lawyer, pleader or authorized representative representing a litigant before any court of law or a tribunal or any other authority discharging the functions of a court/a quasi judicial authority, should comport himself in a manner befitting his status as an officer of the court, a privileged member of the community and a gentleman.

Answer 8(b)**Art of Advocacy**

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

For winning a case, art of advocacy is important which in essence means to convince the judge and others that my position in the case is the proper interpretation. Advocacy/ court craft is learned when we enter the practising side of the profession. The aim of advocacy is to make judge prefer your version of the truth.

Apart from the legal side of the profession, advocacy is often useful and sometimes vital, in client interviewing, in negotiation and in meetings, client seminars and public lectures. It is a valuable and lifelong skill worth mastering.

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

Points to be kept in mind while drafting written pleadings

Pleadings could be both written and oral. Mastering both the kinds of pleadings is a 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 appears 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.
-

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed : 3 hours

Maximum marks : 100

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

Question 1

Attempt any four of the following :

- (a) Anand sells a property to Karan. After completion of the conveyance, Karan discovers that under a decree for partition, a portion of the property had been allotted to Chandan and Anand's omission to disclose the decree is fraudulent. Discuss the rights and course of action available to Karan. (5 marks)
- (b) Define 'deed'. What are the components of a deed in general ? (5 marks)
- (c) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :
 - (i) _____, in legal sense, means an act of preparing legal documents.
 - (ii) _____ are those deeds in which there are two or more parties.
 - (iii) _____ is a special type of agency, which combines agency with guarantee.
 - (iv) _____ is a method of acquiring the right to use equipment or real property for consideration.
 - (v) Pleadings filed by a defendant/respondent in answer to the claim set-out by the plaintiff/petitioner in the form of affidavit and/or supported by an affidavit are referred to as _____. (1 mark each)
- (d) State, with reasons in brief, whether the following statements are true or false :
 - (i) 'Drafting' and 'conveyancing' provide the same meaning although these terms are not inter-changeable.
 - (ii) Consideration is very important in a document and must be expressed. But, non-mention of consideration does not invalidate the document.
 - (iii) Agreements not relating to immovable property and agreements not creating an interest in immovable property are not compulsorily registrable.
 - (iv) "I promise to pay Balram Rs.2,000 and all other sums which shall be due to him" is a promissory note.
 - (v) A private trust will fail, if the object is uncertain or incapable of application. (1 mark each)
- (e) Choose the most appropriate answer from the given options in respect of the following :
 - (i) If a power of attorney is executed in favour of more than one person and is silent on the mode of execution by attorneys, the attorneys will be entitled to act only —
 - (a) Jointly
 - (b) Severally

- (c) *Both (a) and (b)*
- (d) *None of the above.*
- (ii) *The notices issued by a company under the Companies Act, 1956 may be—*
 - (a) *Contingent*
 - (b) *Conditional*
 - (c) *Both (a) and (b)*
 - (d) *None of the above.*
- (iii) *The Code of Civil Procedure, 1908 prescribes that dates, sums and numbers expressed in pleading shall be in —*
 - (a) *Figures*
 - (b) *Words*
 - (c) *Both (a) and (b)*
 - (d) *None of the above.*
- (iv) *The writ that is available to any person, whenever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially acts in excess of its legal jurisdiction, is —*
 - (a) *Mandamus*
 - (b) *Certiorari*
 - (c) *Both (a) and (b)*
 - (d) *None of the above.*
- (v) *The power of registered proprietor of a trade mark to assign his rights in the trade mark is dealt under section 37 of —*
 - (a) *The Copyright Act, 1957*
 - (b) *The Trade Marks Act, 1999*
 - (c) *The Trade and Merchandise Marks Act, 1958*
 - (d) *None of the above.*

(1 mark each)

Answer 1(a)

This is a case of non – disclosure of material defect in title. Section 55 of the Transfer of Property Act, 1882 prescribes the rights and liabilities of buyer and seller which can be modified by the parties to a contract by mutual consent and contract to the contrary of these provisions. One of the liabilities of the seller under section 55(1) of the Act is that he is bound to disclose to the buyer any material defect in the property or in his title to such property before the completion of the execution of the sale deed.

In other words, seller is liable to disclose latent defects in the property or in his title known to him before the completion of the execution of the sale deed. Such a latent defect should be material i.e. it should be such as would influence the buyer's decision if he knew about it. A latent defect is one which a purchaser would not be able to discover by ordinary diligence. If it could be, then it is a patent defect and there is no obligation on the part of the seller to disclose it.

Allotment of property to another co-owner under a partition deed not known to the purchaser is one of the examples in defects in the title. If A agreed to sell a property to B and puts B in possession, but B discovers defect in A's title before the sale deed is executed, in such a case B may sue for damages for breach.

In the given problem also there is non –disclosure of material defect in title. Karan i.e, the buyer has accepted the title and he discovers the fraud. He may sue to set aside the sale and claim damages. [*Gajapathi v. Alagia* (1886)ILR9 Mad 89]

Answer 1(b)

A deed is a writing —

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

In *Halsbury's Laws of England*, a deed has been defined as “an instrument written on parchment or paper expressing the intention or consent of some person or corporation named therein to make (otherwise than by way of testamentary disposition, confirm or concur in some assurance of some interest in property or of some legal or equitable right, title or claim, or to undertake or enter into some obligation, duty or agreement enforceable at law or in equity or to do, or concur in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation, sealed with the seal of the party, so expressing such intention or consent and delivered as that party's act and deed to the person or corporation intended to be affected thereby.

A deed is a present grant rather than a mere promise to be performed in the future.

Deeds are in writing, signed, sealed and delivered.

Deeds are instruments, but all instruments are not deeds.

A deed is divided into different paragraphs. Under each part relevant and related information is put in paragraph in simple and intelligible language. The usual parts or components or clauses of deeds in general are mentioned as follows:

- (1) Description of the Deed Title
- (2) Place and Date of execution of a Deed
- (3) Description of Parties to the Deed
- (4) Recitals
- (5) Testatum
- (6) Consideration
- (7) Receipt Clause
- (8) Operative Clause

- (9) Description of property
- (10) Parcels Clause
- (11) Exceptions and Reservations
- (12) Premises and Habendum
- (13) Covenants and undertakings
- (14) Testimonium Clause
- (15) Signature and attestation
- (16) Endorsements and supplemental Deeds
- (17) Annexures or Schedules.

Answer 1(c)

- (i) **Drafting**, in legal sense, means an act of preparing legal documents.
- (ii) **Indenture** are those deeds in which there are two or more parties.
- (iii) **Del Credere Agency** is a special type of agency, which combines agency with guarantee.
- (iv) **Lease** is a method of acquiring the right to use equipment or real property for consideration.
- (v) Pleadings filed by a defendant/respondent in answer to the claim set-out by the plaintiff/petitioner in the form of affidavit and/or supported by an affidavit are referred to as **Counter Affidavit**.

Answer 1(d)

- (i) True
- (ii) True
- (iii) True
- (iv) False
- (v) True

Answer 1(e)(i)

- (a) Jointly

Answer 1(e)(ii)

- (d) None of the above

Answer 1(e)(iii)

- (c) Both (a) & (b)

Answer 1(e)(iv)

- (b) Certiorari

Answer 1(e)(v)

- (b) The Trade Marks Act, 1999

Question 2

- (a) *Discuss the requirements of section 13 of the Companies Act, 1956 with regard to 'objects clause' of the memorandum of association of a company. What are the precautions which must be taken in drafting the objects clause ?*

(4 marks)

- (b) *Explain mortgage by deposit of title deeds.*

(4 marks)

- (c) *Draft a deed of agreement of admission of a new partner into a partnership firm.*

(8 marks)

Answer 2(a)

The object clause defines the very objects of its formation, existence and operations and powers which a company has towards the attainment of the objectives. There is no restriction on objects except it should be legal and lawful. While drafting the objects, care should be taken to see that:

- (i) the objects are stated in a precise and clear manner so that there is no ambiguity in their inter-presentation;
- (ii) each object is stated independently;
- (iii) there is no inconsistency or contradiction between the objects;
- (iv) the same objects are not repeated in other clauses of objects in different words and phraseology;
- (v) no object is illegal, immoral or against public policy;
- (vi) objects are properly arranged and divided and set in short sentences.

As per section 13 of the Companies Act, 1956 the objects clause is required to state (i) the main objects to be pursued by the company on its incorporation; (ii) subjects incidental and ancillary to the attainment of the main objects; and (iii) other objects not included in (i) and (ii) above. Further, it should state in case of non-trading companies the State(s) of its operation.

Main objects : The objects which are intended to be pursued by the company on its incorporation and in the immediate foreseeable future are its main objects. The objects clause should be of widest possible coverage in precise and clear expression. This will save the company from litigation on the ground that the object pursued by the company fall outside the permitted range of its activity

Objects incidental or ancillary : These are not independent objects and cannot be entered upon by the company independent of its main objects. These objects are pursued only to the extent they are necessary for attainment of the main objects. No borderline could be created between the main objects and objects incidental and ancillary to main objects. The attainment of main objects should be facilitated by the objects incidental

and ancillary. This makes it imperative that reasonable nexus or resemblance should exist or to be shown to exist in objects incidental and ancillary with main objects while drafting these clauses.

Other Objects : These are objects which are covered neither by main objects nor by objects ancillary or incidental thereto, but which are nevertheless necessary to enable the company to undertake all types of business activities which the company may anticipate to pursue. But other objects should not be ambiguous and irrelevant to the main objects of the company.

Answer 2(b)

Mortgage by Deposit of Title Deeds

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

1. Debt even time barred, present and future advances are covered under the equitable mortgage. In other types of mortgage, future advances are not covered.
2. Delivery of title deeds is required to be made in Bombay, Madras and Calcutta and other specified towns to which the facility is extended by State Government from time to time through Gazette notification.

It is not necessary for creation of mortgage that the property be located in the specified town or the company making deposit should have its registered office in that town.

3. This deposit can be made by the company through its nominee or agent duly authorised.
4. Intent to create security by deposit of title deeds should be present at the time of such deposit in the mortgagor.
5. Neither ownership nor possession of the property passes to the mortgagee under the equitable mortgage.

Equitable mortgage is preferred by the lenders/banks/creditors as well as the commercial enterprises because of the inherent advantages viz. (a) to save time and avoid inconvenience of documentation, and registration; (b) to minimise cost of creating mortgage and cost of borrowed funds by saving stamp duty; (c) to maintain secrecy of the debt transaction; (d) it is a cut short method and skips many formalities like compliance of Section 230A of Income-tax Act, 1961, and 293(1)(a) of the Companies Act.

Answer 2(c)

Deed of Agreement of Admission into Firm of a New Partner

THIS DEED OF AGREEMENT IS made the day of 2009 BETWEEN AB son of aged r/o and

CD son of aged r/o
 partners in the firm CD & CO. of the one part, AND EF son of
 aged years resident of of the other part.

WHEREAS the said AB and CD are partners in the firm CD & Co. situated in
 and are bound as such under a deed of partnership executed by them on the
 day of 200.. hereinafter referred to as the “partnership deed”.

AND WHEREAS and said EF is desirous of being admitted as a member in the
 aforesaid firm of CD & Co. and invest a sum of Rs. AND said AB and CD are willing
 to admit him as an additional partner.

NOW THEREFORE THE DEED WITNESSES that in pursuance of the said
 agreement and in consideration of the said EF bringing in and contributing the sum of
 Rupees (Rs.) only as additional capital of the above partnership firm, it
 is mutually agreed as follows:

1. The parties hereto shall, as from the date hereof be and continue partners for
 the unexpired residue of the terms mentioned in para of the partnership
 deed subject in all respects to the conditions, stipulations, and provisions of the
 aforesaid partnership deed, so far as applicable, and except as varied by this
 deed of agreement.
2. The capital mentioned in the partnership deed shall hereafter be changed to the
 sum of Rupees only and the partners shall hereafter have the undernoted
 shares in the capital.

AB shall have Rs. in the said capital;

CD shall have Rs. in the said capital; and

EF shall have Rs. in the said capital.

3. The profits and losses of the partnership shall continue to be borne by the
 partners hereto in proportion to their above named respective shares.

IN WITNESS WHEREOF the said AB, CD and EF have hereto at signed
 the day and the year first above mentioned.

WITNESSES:

- | | |
|----|-----------|
| 1. | Sd/- A.B. |
| 2. | Sd/- C.D. |
| 3. | Sd/- E.F. |

Question 3

- (a) Arvind mortgages his houses at Delhi and Gurgaon to Suresh. Arvind then
 mortgages the Delhi house to Navin. On default, Navin brings Delhi house to
 sale in enforcement of his mortgage and he himself purchases Delhi house.
 Suresh then obtains an order for sale on his mortgage. What are the rights and
 remedies available to Navin ? (5 marks)
- (b) What special points must be taken into account while drafting notices in case of
 a company ? (5 marks)
- (c) Draft a power of attorney to execute a deed of sale. (6 marks)

Answer 3(a)

The given problem is governed by section 81 of the Transfer of Property Act. A mortgagee acquires certain rights and incurs certain obligations in the property mortgaged. One of those rights is the right of marshalling. According to section 81 of the Transfer of Property Act "if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgage is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties".

In this case Navin is entitled to have the mortgaged debt satisfied out of the property not mortgaged to him (i.e house at Gurgoan) so long as the same will extend but not so to prejudice the rights of the Suresh.[See *Inderdawan v. Govind* ILR 23 Cal 790]

Answer 3(b)

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 and 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.

The point is that if any essential feature is left out, serious legal consequences may ensue, which one has to avert. Sending a second notice, in place of an incorrect or illegal one adds to the cost.

Answer 3(c)

Power of attorney to execute a deed of sale

KNOW ALL MEN BY THESE PRESENTS that I, AB, etc, hereby appoint CD, etc., as my attorney in my name and on my behalf to do or execute all or any of the acts or things which I have to do in pursuance of an agreement dated..... between me and XY and which are hereinafter mentioned, that is to say,

1. To receive from the purchaser or his heirs or assigns the sum of Rs. _____ being the price agreed to be paid to me by XY for the purchase of (description of property) under an agreement dated the _____ and to give an effectual receipt and discharge for the same;
2. To execute a proper sale deed of the said property or any other deed or assurance necessary for the completion of the sale of such property;

AND I hereby agree that all acts deeds and things lawfully done by my said attorney shall be construed as acts, deeds, and things done by me and I undertake to ratify and confirm all and whatsoever that my said attorney shall lawfully do or cause to be done for me by virtue of the power hereby given.

IN WITNESS hereof I have signed this deed on this _____ day of ____ 200__ .

Signed, sealed and delivered

AB

In the presence of :

Witness

Question 4

- (a) *What are the requisites of an 'award' under the Arbitration and Conciliation Act, 1996 ?* (4 marks)
- (b) *Distinguish between the following :*
- (i) *'Document' and 'deed'.*
 - (ii) *'Affidavit' and 'petition'.*
 - (iii) *'Counter guarantee' and 'fidelity guarantee'.*
 - (iv) *'English mortgage' and 'simple mortgage'.* (3 marks each)

Answer 4(a)

Award means the decision of the arbitrator to whom the dispute is referred. Under Section 2(1)(c) of the Arbitration and Conciliation Act, 1996 arbitral award includes "an interim award".

Requisites of an Award

The general requisites of an award are:

- (a) the law requires that the award shall be made in writing and signed by all the members of the arbitral tribunal or by the majority of them if the reason for any omitted signature is stated, stating its date and the place of arbitration.
- (b) it must be consistent with the submission;
- (c) it must be certain;
- (d) it must be fair to the parties;
- (e) it must be final;
- (f) its implementation must be possible;
- (g) the award must state the reasons upon which it is based.

Answer 4(b)(i)**Document and Deed**

Document: Document as per General Clauses Act, 1894 means "any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter". As for instance, a writing is a document; words printed, lithographed or photographed are documents; a map or plan is a document; an inscription on a metal plate or stone is a document; a caricature is a document. Thus, document is a paper or other material thing affording information, proof or evidence of anything.

Deed: Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability. For example, Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed and so on. A bond is also included in the wide field of expression 'Deed'.

A deed may be defined as a formal writing of a non-testamentary character, which purports and operates to create, declare, confirm, assign, limit or extinguish some right, title or interest.

A deed is a present grant rather than a mere promise to be performed in the future. Deeds are in writing, signed sealed and delivered. Deeds are instruments, but all instruments are not deeds.

Answer 4(b)(ii)

Affidavit and Petition

Affidavit : An affidavit is a statement or declaration on oath by the deponent. The consequences of a false affidavit are serious. Therefore, great care is required in drafting it.

Affidavits to be produced in a Court must strictly conform to the provisions of Order XIX, Rule 1 of the Code of Civil Procedure, 1908 and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which, on the basis of information received and believed to be true. In the latter case, the source of information must also be disclosed.

Petition : Petitions are complaints against the defendants or respondents in the event of any breach of contract or when a crime is committed or when loss or damages are incurred as the case may be.

Answer 4(b)(iii)

Counter Guarantee and Fidelity Guarantee

A guarantee, guaranteeing an employer against the misconduct of an employee or to answer for the debt or default of another, is called a “fidelity 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”.

Answer 4(b)(iv)

Simple Mortgage and English Mortgage

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

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

Question 5

- (a) *The government of a particular State and Sriram Holdings (P) Ltd. went to arbitration and the arbitrator passed an award on 12th October, 2003 against the*

appellant, copy of which was received by appellant on 23rd October, 2003. Review was sought on 2nd April, 2004, after 6 months from the date of award. Objections to the award were filed after 10 months from the date of the award. Will the appellant be entitled to file objections under the Arbitration and Conciliation Act, 1996 ? Support your answer with case law. (4 marks)

(b) Explain habendum. What does a habendum clause signify in a document ? (4 marks)

(c) Define 'affidavit'. What rules and guiding principles should be followed while drawing up an affidavit ? (8 marks)

Answer 5(a)

The facts of the matter are similar to the case of *State of Arunachal Pradesh v. M/s Daman Construction Co.* (JT 2007)(4) SC 118.

Dismissing the appeal, the Supreme Court held that it was absolutely thoughtlessness on the part of the appellant to have written a letter after six months i.e., on 2.4.2004 seeking review of the interim award. The Application moved under Section 33(1) of the Arbitration and Conciliation Act, 1996 is not strictly covered under the said section, i.e., seeking certain correction in computation of errors, or clerical or typographical errors. The application is however designed seeking review of award which the tribunal has no power. Secondly, the prayer directing the respondent to furnish Bank Guarantee, as it is an interim award and not final, is also not covered under Section 33. Therefore, the reply given by the arbitrator does not give rise to any cause of action to the appellant so as to move an application under Section 34(3) of the Act. Hence the appeal is dismissed.

Answer 5(b)

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

In India such phrases as "to have and to hold" or such an expression as "to the use of the purchaser" can very well be avoided as in cases except those of voluntary transfers such an expression is superfluous.

Answer 5(c)

An affidavit being a statement or declaration on oath by the deponent, is an important document. Therefore, great care is required in drafting it. The consequences of a false affidavit are serious. The following rules should be remembered when drawing up an affidavit:

- (1) Not a single allegation more than is absolutely necessary should be inserted;
- (2) The person making the affidavit should be fully described in the affidavit;
- (3) An affidavit should be drawn up in the first person;
- (4) An affidavit should be divided into paragraphs, numbered consecutively, and as far as possible, each paragraph should be confined to a distinct portion of the subject;
- (5) Every person or place referred to in the affidavit should be correctly and fully described, so that he or it can be easily identified;
- (6) When the declarant speaks of any fact within his knowledge he must do so directly and positively using the words "I affirm" or "I make oath and say";
- (7) Affidavit should generally be confined to matters within the personal knowledge of the declarant, and if any fact is within the personal knowledge of any other person and the petitioner can secure his affidavit about it, he should have it filed. But in interlocutory proceedings, he is also permitted to verify facts on information received, using the words "I am informed by so and so" before every allegation which is so verified. If the declarant believes the information to be true, he must add "and I believe it to be true".
- (8) When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents;
- (9) The affidavit should have the oath or affirmation written out at the end.

An affidavit has to be drawn on a non-judicial Stamp Paper as applicable in the State where it is drawn and sworn.

An affidavit shall be authenticated by the deponent in the presence of an Oath Commissioner, Notary Public, Magistrate or any other authority appointed by the Government for the purpose.

- (10) Affidavits are chargeable with stamp duty under Article 4, Schedule I, Stamp Act, 1899. But no stamp duty is charged on affidavits filed or used in Courts. Such affidavits are liable to payment of Court fee prescribed for the various Courts.

Question 6

(a) *What are the ingredients that are necessary to prepare —*

(i) *Power of attorney; and*

(ii) *Instrument of trust ?*

(3 marks each)

- (b) *Management issues an appointment letter to a probationer and the relevant para of his appointment letter reads as follows :*

“Clause (I) — You are hereby appointed as a Salesman.... You will serve a probationary period of six months; this period of probation may be extended by a further period of three months or more in suitable cases in the absolute discretion of the company. The company has the right to terminate your services during the period of probation or extended period of probation or before confirmation in writing without notice and without assigning any reason whatsoever.”

The probationer joined the services of the company on probation. The management terminated his services after 2 months of joining by a letter saying “we regret to terminate your services with immediate effect in terms of clause (I) of your appointment letter.”

Do you think what management did is correct ? What are the remedies available to the probationer ? (5 marks)

- (c) *What is ‘compounding of offences’ ? How does compounding of offences take place under the Securities and Exchange Board of India Act, 1992 ? (5 marks)*

Answer 6(a)(i)

A power of attorney as per section 1A of the Powers-of-Attorney Act, 1882, includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney. A power of attorney executed for the purpose of a specific act is called a “special power of attorney”. A power of attorney executed for the purpose of generally representing another person, or for performing more than one act, is called a ‘general power of attorney’.

A power of attorney can be executed by any person, who can enter into a contract i.e. a person of sound mind who has attained the age of majority.

Powers of attorney are executed in the form of Deed Poll, usually in the first person. It is a unilateral document. It begins either as - “KNOW ALL MEN BY THESE PRESENTS THAT I, ETC.” or “BY THIS POWER OF ATTORNEY, I, ETC.”. Generally, the operative words making the appointment are introduced directly without any recitals. If recitals become necessary, they should be added after the words “KNOW ALL MEN BY THESE PRESENTS” thus “THAT WHEREAS etc.”, and after recitals the operative part is introduced thus “Now I, the said AB, etc., hereby appoint, etc., or the deed may be drafted with the heading “THIS POWER OF ATTORNEY is made on the, etc., then adding the recitals, the operative part is introduced thus “NOW THIS DEED WITNESSES THAT I APPOINT, ETC.”.

The powers conferred on the attorney should be specifically stated after the appointment, preferably, in separate paragraphs. Sometimes after giving specific powers a general clause empowering the attorney to do all such lawful acts as the attorney should think reasonable is added, but this is not ordinarily necessary, as according to authorities such a clause does not extend or widen the authority.

Answer 6(a)(ii)

An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustee. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the

trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll. No specific words are necessary, but, whatever the words used, the deed should contain with reasonable certainty the matters mentioned under the heading 'Creation of Trust'.

While drafting a trust deed, it be seen that every clause in the deed is clear in its meaning. If there is any reference to any article, documents, rules, statutory Acts etc., the same are properly applied out. In case reference to these is to be repeated in the deed it is better to first define them and use the abbreviation in the deed subsequently.

The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty. No particular or technical words are necessary but the words used must be definite and unequivocal. The intention is expressed clearly in the recitals of the deed and in the operative part also. If the trustee is a stranger the property is transferable to him "upon trust". If the author is himself the trustee, he declares in the operative part that he "dedicates" or "sets apart" the property in trust for such and such purpose and constitutes himself as the trustee.

Different directions are given to the trustees by the author as to the manner in which the trust is to be worked. These are the conditions and provisions of the trust and vary in different kinds of trusts according to the circumstances. These conditions should be clearly incorporated in the trust deed. If the situation so warrants, provision for the appointment of new trustees should also be made in the deed.

Answer 6(b)

What management did is not correct as the service is terminated without any reason and wrongfully. In a similar case *Management Brooke Bond of India (P) Ltd v. Y. K. Gautam*, AIR 1973 SC 2634, the Industrial Tribunal directed the re-instatement and later the Supreme Court upheld the award of the Tribunal.

In a service contract, the terms of employment should be definitely fixed and clearly expressed. Modes and grounds of determining the employment during the term is one of the important provisions, and the same should be clearly expressed in the service contract. The grounds on which the employment may be determined during the term are generally misconduct, negligence, or want of medical fitness. Subject to what has been stated earlier, it may also be determined at pleasure by notice, without giving any ground. In the case of misconduct or neglect, no notice is required, but, provision may be made for framing charges and taking defence as in the case of Government Servants.

An employee is entitled to damages for wrongful dismissal or reinstatement if the termination of the service is not properly made as directed by the courts depending upon the facts and circumstances of the case.

Answer 6(c)

Compounding of offences

'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.

Compounding of offences under SEBI Act, 1992

Section 24A of SEBI Act, 1992 permits compounding of offences by the court where prosecution proceedings are pending. Section 24A of SEBI Act reads as under:

“Notwithstanding anything contained in the Code of Criminal Procedure, 1973 any offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending.”

Compounding of offence can cover appropriate prosecution cases filed by SEBI before the criminal courts. Prosecution here means filing of criminal complaints before various criminal courts by SEBI for violation of provisions of securities laws which may lead to imprisonment and/ or fine. Compounding of offence can take place at any stage after filing criminal complaint by SEBI. Where a criminal complaint has not yet been filed but is envisaged, the process for consent orders will be followed rather than the one for compounding.

Settlement of proceedings through compounding can be sought by any person who is notified that a proceeding may or will be instituted against him/her, or any party to a proceeding already instituted, may, at any time, propose in writing for settlement.

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

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

- Compliance of the civil enforcement action by the accused.
- Party has undergone any other regulatory enforcement action for the same violation.
- Any other factors necessary in the facts and circumstances of the case.

Where compounding is proposed by a party, such application may be made to the court and a copy can be addressed to the “Division of Prosecution, Enforcement Department” at SEBI’s Mumbai address.

So far as process of compounding of offences is concerned, any party who wishes to compound an offence shall file an appropriate application before the court where complaint is pending with a copy addressed to the Prosecution Division, Enforcement Department of SEBI’s Mumbai office which will forward the application/ request to be placed before the high powered Committee. The terms of compounding as recommended by the Committee and approved by the Competent Authority would be placed before the court by the Prosecution Division by way of written submissions or application, as appropriate, for passing orders as the court deems fit.

The final acceptance of any offer of compounding will come in to effect only upon the court passing the compounding order.

Question 7

- (a) *Mention the orders against which no appeal lies to the Securities Appellate Tribunal (SAT).* (4 marks)
- (b) *“In presenting a case before the tribunal/quasi-judicial body, a Company Secretary owes duty to the court, to the client and to the opponent.” Describe these duties of the Company Secretary.* (4 marks)
- (c) *Briefly explain the contents of a service contract. Draft a specimen agreement of employment of manager of a business concern.* (8 marks)

Answer 7(a)

No appeal shall lie to the Securities Appellate Tribunals from an order made

- (a) by the Board on and after the commencement of the Securities Laws (Second Amendment) Act, 1999
- (b) by an Adjudicating Officer,

with the consent of the parties.

Answer 7(b)

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

Company Secretaries should be able to formulate and present a coherent submission based upon facts, general principles and legal authority in a structured, concise and

persuasive manner. They should understand the crucial importance of preparation and the best way to undertake it and be able to demonstrate an understanding of the basic skills in the presentation of cases before the tribunals.

Duty to the Court

- (i) A Company Secretary shall, during the presentation of his case and while otherwise acting before a Court/Tribunal, conduct himself with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial officer, it shall be his right and duty to submit his grievance to proper authorities.
- (ii) A Company Secretary shall maintain towards the Courts a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community.
- (iii) A Company Secretary shall not influence the decision of a Court by any illegal or improper means. Private communication with the judge relating to a pending case is forbidden.
- (iv) A Company Secretary shall use his best efforts to restrain and prevent his client from resorting to sharp and unfair practices or from doing anything in relation to the Court, opposing counsel or parties which the Company Secretary himself ought not to do. A Company Secretary shall refuse to represent the client who persists in such improper conduct. He shall not consider himself a mere mouthpiece of the client, and shall exercise his own judgment in the use of restrained language in correspondence, avoiding scurrilous attacks in pleadings, and using intemperate language during arguments in Court.
- (v) A Company Secretary shall not enter appearance, act, plead or practice in any way before a Court/Tribunal or any other Authority, if the sole or any member thereof is related to the Company Secretary.
- (vi) A Company Secretary shall not appear in or before any Court or Tribunal or any other Authority for or against an organization or an institution, society or corporation, if he is a member of the Executive Committee of such organization or institution or society or corporation.
- (vii) A Company Secretary should not act or plead in any matter in which he is himself pecuniarily interested.

Duty to Client

- (i) A Company Secretary shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.
- (ii) A Company Secretary shall not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear if he can retire without jeopardizing his client's interest.

- (iii) A Company Secretary shall at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either him or continuing the engagement.
- (iv) It shall be the duty of a Company Secretary to fearlessly uphold the interest of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.
- (v) A Company Secretary shall not at any time, be a party to fomenting of litigation. A Company Secretary shall not act on the instructions of any person other than his client or his authorized agent.
- (vi) A Company Secretary shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client.

Duty to Opponent

- (i) A Company Secretary shall not in any way communicate or negotiate upon the subject-matter of controversy with any party represented by an Advocate except through that Advocate.
- (ii) A Company Secretary shall do his best to carry out the legitimate promise/promises, made to the opposite-party.

Answer 7(c)**Contents of a Service Contract**

Service contracts are drafted in the same way as other agreements. The terms of employment should be definitely fixed and clearly expressed and nothing should be left to presumptions. They are required to be both affirmative (describing the acts and duties to be performed) as well as negative (putting restrictions on the acts of the employee during and/or after the term of employment). It is therefore necessary to make provision for (1) the time or period of employment; (2) the remuneration and other perquisites, if any, including pay, allowances, commission, rent-free house, conveyance, etc.; (3) duties of employment; (4) powers of the employee; (5) leave and the terms on which it will be granted; (6) modes and grounds of determining the employment during the term; and (7) restrictive covenants.

As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man.

In respect of Government service, normally no formal contract is executed and only an appointment order is issued and the terms of service are thereafter governed by statutory rules and Government order. The same is the position of statutory corporations as employers.

Period of Service : This may be definite or indefinite. If no period is fixed or an indefinite period is stated, e.g., "so long as the parties respectively please", the contract is terminable by a reasonable notice on either side. What is a reasonable notice varies in different cases, according to the characters of the employment and the general custom, from 15 days to six months. When no term is fixed it is always proper to provide for determination by notice.

Remuneration : Remuneration may be fixed monthly salary, or fees or commission, or salary as well as fees or commission. Sometimes in business firms, employees are allowed a share in the profits in addition to a fixed salary. All these should be clearly provided.

Leave : Conditions and grounds on which, and the period for which leave may be granted as well as allowance payable during leave should be stated.

Determination of Employment : The grounds for determination of employment should be clearly expressed in the agreement. The grounds on which the employment may be determined during the term are generally misconduct, negligence, or want of medical fitness. Subject to what has been stated earlier, it may also be determined at pleasure by notice, without giving any ground.

Restrictive Covenants : It is usual to include restrictive covenants in the agreement such as that the employer will not undertake any other work or service or that he will not divulge the employer's secrets or make improper use of his trade secrets or information about the employer's affairs. While drafting restrictive covenants, it is necessary to see that they are not illegal.

Effect of Labour Laws : Many Acts have been passed by the Central or State legislatures relating to the conditions of employment of teachers and other employees of aided schools and colleges and of universities, and of workers in factories and commercial establishments, for e.g. the Factories Act, the Industrial Employment (Standing Orders) Act, the Payment of Wages Act, the Workmen's Compensation Act etc. In drawing up a service contract for such an employee, the provisions of the relevant Acts must be kept in view.

Specimen Agreement of Employment of Manager of a Business Concern

AN AGREEMENT made on this..... day of..... BETWEEN AB, etc. (hereinafter called the "employer") of the one part AND CD, etc. (hereinafter called the "manager") of the other part.

WHEREAS

1. The employer wants to appoint a suitable person to work as manager for his business concern; and
2. CD, the party of the other part, has agreed to serve as manager of the employer for his business concern.

NOW THIS AGREEMENT WITNESSES as follows :

1. The manager shall work as such for a term of..... years from the day of..... at..... or any other place as desired by the employer.

2. The manager shall give his whole time and attention to the said business and shall use his best endeavour to improve and expand the same and shall in all respects diligently and faithfully obey and observe all lawful orders and instructions of the employer in relation to the conduct of the said business and shall not without his consent divulge any secrets or dealings thereto.
3. The manager shall keep at the place of business at..... proper books of account showing all goods and moneys received and delivered and disbursed by him with necessary particulars of all such transactions and shall duly account for all moneys belonging to the employer and coming into the hands or power of the manager and shall forthwith pay the same to the employer or his bankers for the time being except only such moneys as the manager shall be authorised by the employer to retain for immediate requirements of the said business.
4. The employer shall pay to the manager during the continuance of his engagements and provided he shall duly observe and perform the agreement herein on his part contained, the salary of Rs..... per mensem on the first day of every calender month commencing from the first day of..... without any deduction except such as he will be bound to make under the Income-tax law for the time being in force, AND shall also pay the manager at the end of each year during the aforesaid period a further sum equal to 5 per cent on the gross sale return for the said year (or on the net profits of the said business for the said year (if any) after making such deductions as are properly made according to the usual custom of the said business in the estimation of net profits) provided always that upon the death or termination of the engagement of the manager before the expiration of the said period of years/ the employer shall forthwith pay to him or his heirs, executors, administrators or other legal representatives, as the case may be, in respect of the services of the manager of the whole or any part of the current month a due proportion of the salary of Rs. per mensem together with such further sum in lieu of such percentage as aforesaid as shall bear the same proportion to the estimated gross return (net profits) for the then current year as the part of the said year during which he has served, shall bear to the whole year, the gross return (net profits) being calculated on average of the past three years.
5. The employer shall during the continuance of the manager's engagement provide him with a suitable furnished house for residence free of rent, rates and taxes (except the charges for electricity consumed by him or of extra water used by him) and the manager shall reside in the said house.
6. The manager shall make such tour as may be necessary in the interest of the said business or as he may be directed by the employer to make and the employer shall pay him all reasonable expense actually incurred in undertaking such tours (or a travelling allowance at per mile for all journey by road and first class fare for journeys performed by rail and a halting allowance of Rs..... per diem when a halt of not less than 8 hours is made at one place).
7. The manager shall be entitled during his engagement to leave on full pay for a period equal to 1/11th of the period of service rendered and to a further leave on half pay in case of illness or incapacity to be proved to the satisfaction of the employer for a period of 15 days in one year.

8. Either party hereto may terminate the engagement of the manager at any time before the expiration of the said term of.....years on giving or sending by registered post to the other party three calendar months, notice in writing, such notice to be given or sent in the case of the employer to his house at and in case of the manager to his place of business or residence provided by the employer and on the expiration of the said three months from the date of giving or posting such notice, the said engagement shall terminate provided that the employer may terminate the said engagement at any time on payment of three months' pay in advance in lieu of such notice as aforesaid.
9. If the manager at any time willfully neglects or refuses or from illness or other cause becomes or is unable to perform any of the duties under this agreement, the employer may suspend his salary (and sum by way of percentage) during such neglect, negligence or inability as aforesaid and may further immediately terminate the engagement of the manager without giving any such notice or making such payment or salary in advance as hereinbefore provided.
10. The manager will at his own expense find and provide two respectable sureties to the amount of Rs..... each for his good conduct and for the due performance by him of this engagement and if he fails to do so for a period of three months from this date, the employer may terminate his services forthwith.

IN WITNESS WHEREOF, the parties hereto have signed this deed on the day and the year first above written.

Witness

Employer

Witness

Manager

Question 8

(a) Write notes on the following :

(i) Communication etiquettes

(ii) Advocacy tips to professionals.

(4 marks each)

(b) What is 'deed of assignment' ? Draft a specimen deed of assignment of copyright of a novel.

(8 marks)

Answer 8(a)(i)

In today's world of business, professionals need to know how to conduct themselves within the business world. One of the best ways to do so is to practice good professional etiquette. Practicing good professional etiquette is necessary for professional success in the emerging business scenario which is constantly changing and making the market place more competitive and contestable. Corporates look for those candidates who possess manners, a professional look and demeanour, and the ability to converse appropriately with business colleagues and clients. Though your academic knowledge and skills may be spectacular, but not knowing proper etiquette required to be successful in the professional career could be a roadblock preventing you to achieve success in the professional life and business relationships. Good professional etiquette indicates to potential employers that you are a mature, responsible adult who can aptly represent their company.

Being corporate professionals, you must practice some basic etiquette tips that would help you to go up the ladder of success in the workplace.

Communication Etiquettes

- Always speak politely. Listen to others attentively. A good listener is always dear to every client.
- While speaking over telephones, always greet the other person while starting and ending the call.
- Speak only when the other person has finished talking instead of interrupting in between.
- Show interest in what other people are doing and make others feel good.
- Stand about an arm's length away while talking to others.
- Question another person in a friendly, not prying, manner.
- Make eye contact when talking to others.
- Be polite. Avoid foul language, unkind statements, and gossip.
- Keep your conversations short and to the point.
- Maintain your sobriety and politeness even if the client speaks something offensive or rude and avoid replying back in harsh tone/words.

Answer 8(a)(ii)

Advocacy tips to professionals

Company Secretaries should be able to formulate and present a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner. They should understand the crucial importance of preparation and the best way to undertake it and be able to demonstrate an understanding of the basic skills in the presentation of cases before the tribunals.

Some of the tips given by legal experts which professionals like Company Secretaries should bear in mind while appearing before Tribunals or other quasi-judicial bodies are given herein below. They say while pleading, a judge in your pleadings looks for:

- (i) *Clarity* : The judge's time is limited, so make the most of it.
- (ii) *Credibility* : The judge needs to believe that what you are saying is true and that you are on the right side.
- (iii) *Demeanour* : We don't have a phrase "hearing is believing". The human animal which includes the human judge, is far more video than audio. The way we collect most of our information is through our eyesight.
- (iv) *Eye contact* : While pleading, maintain eye contact with your judge.
- (v) *Voice modulation* : Voice modulation is equally important. Modulating your voice allows you to emphasize the points you want to emphasize. Be very careful about raising your voice. Use your anger strategically. But use is rarely. Always be in control of it.

- (vi) *Psychology* : Understand judge’s psychology as your job is to make the judge prefer your version of the truth.
- (vii) *Be likeable*. At least be more likeable than your opponent. If you can convert an unfamiliar Bench into a group of people who are sympathetic to you personally, you perform a wonderful service to your client.
- (viii) Learn to listen.
- (ix) *Entertain your judge*. Humour will often bail you out of a tough spot.

Answer 8(b)

An assignment is a form of transfer of property and it is commonly used to refer the transfer of an actionable claim or a debt or any beneficial interest in movable property.

A transfer of an actionable claim is usually called an assignment thereof. Section 3 of the Transfer of Property Act, 1882 defines an actionable claim as:

“Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.”

The term assignment is, however, of wider import. It is well settled that a transfer of property clearly contemplates that the transferor has an interest in the property which is sought to be conveyed.

Specimen of Deed of Assignment of Copyright of a novel

THIS DEED OF ASSIGNMENT made this..... day of..... between..... (hereinafter called the “author”) of the first part and Messrs..... carrying on the business of publishers at..... (hereinafter called the “publishers”) of the second part.

WHEREAS the author is entitled to the copyright of the novel known as.....;

AND WHEREAS the publishers approached the author for assignment thereof, which the author has agreed to do on the terms and conditions hereunder contained.

NOW THIS DEED OF ASSIGNMENT WITNESSES as follows:

1. In consideration of and subject to the covenants on the part of the publishers as hereinafter contained, the author does hereby grant, convey, transfer, sell, assign and assure unto and to the use of the publishers all that copyright as defined in Section 14 of the Copyright Act, 1957, of the book entitled..... on the subject of..... to have and hold the same as absolute owners thereof for the full term of copyright as prescribed by law.
2. The publishers shall so long as the said work or any adaptation, modification or translation thereof is published and sold, submit to the author twice every year

once during the month of January and the other during the month of June, a statement of account showing details of copies printed, published, held in stock and sold or disposed of (Except otherwise by sale of damaged or destroyed copies) and of the profits, if any, earned thereunder.

3. The publishers shall pay or cause to be paid to the author or his nominee or nominees a royalty at the rate of..... per cent on the sale proceeds of the copies of the work or adaptations or translations thereof that may be actually published and as disclosed in the statement of account referred to in clause (2). No royalty shall be payable on any copies of the work that may be damaged or destroyed or disposed of otherwise than by regular sale.
4. That the publishers shall also pay to the author half the net profits earned by them, if any, from any transfer, sale or assignment of any of the rights comprising the copyright or from grant of any interest or license therein: provided that the publishers shall not be entitled to and shall not do or cause anything to be done in derogation of the author's rights, particularly the right to royalty reserved hereunder.
5. That the author does hereby agree to revise the work and bring it up to date or otherwise modify, alter, adapt or translate it or get it translated whenever reasonably required by the publishers provided also that the publishers will not normally require the author to do so more than once in two years; provided further that in case the author shall fail and/or neglect, and/or refuse, to revise, modify, alter, translate the work or get it translated as and when reasonably required by the publishers, they shall be at liberty to get the same done on his account by any person or persons of their choice after due notice to the author and deduct all costs, charges and expenses out of moneys payable to the author: provided also that in selecting the person proposed to revise, modify, alter, adapt or translate the work and in fixing the remuneration to be paid therefor, the author's wishes, if any, shall so far as possible, be respected by the publishers.
6. That the author has delivered (or shall deliver within a period of.....) the manuscript of the said work to the publishers.
7. That the author does hereby declare that the work of which the copyright is being hereunder assigned is entirely the original work of the author and that the same does not in any manner whatsoever violate or infringe any existing copyright or any other right of any other person or other persons; and further that it does not contain anything which may be considered as obscene, libellous, scandalous or defamatory.
8. The author hereby agrees to indemnify and keep the publishers indemnified against all claims, demands, suits and other actions and proceedings, if any, that may be instituted or taken and also against all damages, costs, charges, expenses which the publishers shall or may suffer, on account of printing, publication or sale of the said work or any part thereof, or by reason of such printing, publication and/or sale being an infringement of some other person's copyright or other rights in the work or by reason of its containing anything which may in any sense be obscene, libellous, scandalous or defamatory.

9. The publishers shall print and publish the work or cause the same to be printed and published as soon as practicable within a period of twelve months from the date of this contract, and in default thereof, the author may, by a notice in writing, call upon the publishers to print and publish the work within two months of the receipt of the said notice; and if the publishers shall still fail and/or neglect to print and/or publish the work within the said period, save and except in so far as they are prevented from doing so by circumstances beyond their control, the author shall be at liberty to rescind the contract on giving a notice to that effect to the publishers when the copyright shall revert fully to the author and all the rights of publishers shall as from that date stand determined.
10. That in case of a dispute or difference arising between the parties touching the meaning, construction, interpretation, breach or fulfilment or non-fulfilment of the terms of these presents or any clause or condition thereof, the same shall be referred to arbitration. The award of such arbitrator, shall be final and binding on both the parties and this clause shall be deemed as of submission within the meaning of the Arbitration and Conciliation Act, 1996 and its statutory modification and re-enactment.
11. That the words "author" and "publishers" or "parties" used hereinabove shall unless there be something contrary to the context, include their respective heirs, survivors, successors, representatives, executors, administrators and assigns and successors in business.

IN WITNESS WHEREOF the parties hereto have executed these presents on the date, month and the year hereinbefore mentioned in the presence of the witness.

Witness :

Author

Witness :

Publisher

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed: 3 hours

Maximum marks: 100

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

Question 1

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

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

(c) *Explain the following:*

(i) *Deed pool*

(ii) *Deed poll*

(iii) *Indenture*

(iv) *Cyrographum*

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

Answer 1(a)

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

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

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

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

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

Answer 1(b)

Do's and Don'ts while drafting the documents

Some Do's

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

Some Don'ts

The following things should be avoided while drafting the documents:

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

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

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

Answer 1(c)

(i) Deed Pool

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

(ii) Deed Poll

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

(iii) Indenture

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

(iv) Cyrographum

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

(v) Deed Escrow

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

Question 2

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

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

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

(i) *Contract of guarantee*

(ii) *Continuing guarantee*

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

Answer 2(a)

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

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

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

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

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

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

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

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

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

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

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

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

Answer 2(b)

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

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

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

installments each year as remuneration for legal services rendered.

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

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

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

Answer 2(c)

(i) Contract of guarantee

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

(ii) Continuing guarantee

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

(iii) Bank guarantee

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

Question 3

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

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

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

Answer 3(a)

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

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

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

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

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

Answer 3(b)

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

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

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

Distinction between Licence and Lease

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

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

strangers in his own name.

12. A licensee does not qualify for a vote. May qualify for a vote.
 13. Not liable for rents Liable.
 14. User not liable for public nuisance. Liable.
-

Answer 3(c)

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

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

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

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

Signature I

Signature II

Question 4

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

(b) Write notes on the following :

(i) Rule of adverse inference

(ii) Representative suit. (4 marks each)

Answer 4(a)

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

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

(i) Adopt Table A in full; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer 4(b)

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

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

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

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

the Court.

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

Question 5

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

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

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

Answer 5(a)

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

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

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

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

- The written statement should begin with the admission or denial of each fact alleged in the plaint. Each fact should be taken in the same order in which it is alleged in the plaint. One has to deny the averment of the plaint/petition which are incorrect, perverse or false. The denial has to be specific.
- One has to submit the facts which are in the nature of defence and to be presented in a concise manner.
- Attach relevant correspondence, invoice, challan, documents, extracts of relevant papers as annexures while reply is drafted to a particular para of the plaint.
- The pleadings are foundations of a case as such, no para of the plaint is to be left unattended.
- After reply, the same is to be signed by the constituted attorney of the opposite party or individual. In case of partnership, the partner authorized. In case of body corporate the Director, Vice President, Company Secretary etc duly authorized by the Board of Directors of the Company.
- The reply written statement is to be supported by an Affidavit of the opposite, party and duly notarized by an Oath Commissioner.
- The reply alongwith all annexures should be duly page numbered and be filed with the authority letter if not previously filed.
- Attach all the supporting papers, documents, documentary evidence, invoices, extracts of registers and other relevant papers.
- If any important point is omitted from being given in the reply, it would be suicidal as there is limited provision for amendment of pleadings.

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

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

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

Answer 5(b)

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

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

The Trust deed will contain the following:-

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

Answer 5(c)

(a) Simple Mortgage

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

(b) Mortgage by Conditional Sale

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

(c) Usufructuary Mortgage

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

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

(d) English Mortgage

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

(e) Mortgage by Deposit of Title Deeds

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

(f) Anomalous Mortgage

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

[Students may write any two types]

Question 6

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

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

Answer 6(a)

Foreign Collaboration Agreement

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

And

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

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

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

Now it is hereby mutually agreed and declared as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

WITNESSES:

- 1.
- 2.

Answer 6(b)

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

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

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

Question 7

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

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

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

Answer 7(a)

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

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

Procedure

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

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

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

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

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

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

Answer 7(b)

Drafting of affidavit in evidence

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

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

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

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

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

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

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

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

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

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

Answer 7(c)

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

Invitation Etiquettes:

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

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

Question 8

(a) *Explain the following :*

(i) *Habeas corpus*

(ii) *Mandamus.* (3 marks each)

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

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

Answer 8(a)

(i) Habeas Corpus:

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

(ii) Mandamus:

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

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

Answer 8(b)

Advocacy Tips

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

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

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

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

Answer 8(c)

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

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

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

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed : 3 hours

Maximum marks : 100

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

Question 1

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

Answer 1(a)

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

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

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

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

Answer 1(b)

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

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

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

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

Answer 1(c)

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

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

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

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

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

Question 2

(a) Explain the following :

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

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

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

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

Answer 2(a)(i)

Consent Order

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

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

Answer 2(a)(ii)

Testimonium

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

Answer 2(a)(iii)

Counter Affidavit

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

Answer 2(a)(iv)

Deed Escrow

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

Answer 2(a)(v)

Author of the Trust

A trust is defined in the Indian Trusts Act, 1882 as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner. (Section 3)

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

Answer 2(b)

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

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

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

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

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

Question 3

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

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

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

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

Answer 3(a)

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

Answer 3(b)

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

Question 4

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

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

Answer 4(a)

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

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

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

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

Answer 4(b)

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

Answer 4(c)

Notice of Dissolution of Partnership for insertion in a newspaper

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

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

Sd/- A,B and C

Question 5

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

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

(4 marks each)

Answer 5(i)

Habendum

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

Answer 5(ii)

Replication

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

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

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

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

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

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

Answer 5(v)**Arbitration Award**

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

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

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

Question 6

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

Answer 6(a)

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

A deed is a writing

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

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

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

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

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

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

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

Answer 6(b)

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

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

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

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

Answer 6(c)

Mortgage and Lease

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

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

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

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

Question 7

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

Answer 7(a)

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

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

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

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

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

Answer 7(c)

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

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

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

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

Question 8

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

Answer 8(a)

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

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

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

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

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

NOW THIS DEED WITNESSES:

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

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

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

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

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

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

Witness :

Vendor

Witness :

Purchaser

Answer 8(b)

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

Answer 8(c)

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

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 on 2011 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 at and 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 date 2011 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 :*
- (i) *'Endorsements' and 'supplemental deed'.*
 - (ii) *'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.

1. 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.
2. 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.
3. 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]

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.
