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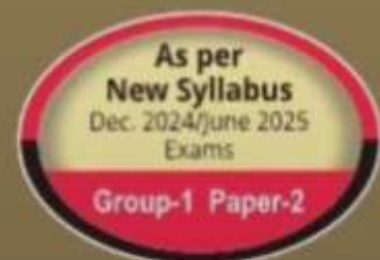
PREVIOUS EXAMS SOLVED PAPERS

# Drafting Pleadings & Appearances

## Key Highlights

- ▶ Topic-wise Coverage of Past Examination Questions with Authentic Answers
- ▶ Fully Updated Answers as per Relevant Provisions and Case Laws
- ▶ Incorporated Solved Paper of June 2024 Exam
- ▶ Chapter-wise Marks Distribution & Trend Analysis of Past Exams
- ▶ Chapter-wise Comparison with Study Material

CS Ankush Bansal  
LL.B., LL.M.



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PREVIOUS EXAMS SOLVED PAPERS

**Drafting Pleadings  
&  
Appearances**

**CS Ankush Bansal  
LL.B., LL.M.**

# Chapter-wise Marks Distribution

Ch. No.	Chapter Name	June 2024
1.	Types of Documents	5
2.	General principles of Drafting	-
3.	Laws relating to Drafting and Conveyancing	10
4.	Drafting of Agreements, Deeds and Documents	20
5.	Drafting of Commercial Contracts	10
6.	Documents under Companies Act, 2013	15
7.	Art of Opinion Writing	15
8.	Commercial Contract Management	10
9.	Judicial & Administrative framework	10
10.	Pleadings	5
11.	Art of Advocacy and Appearances	5
12.	Applications, Petitions and Appeals under Companies Act, 2013	15
13.	Adjudications and Appeals under SEBI Laws	5
14.	Appearance before other Regulatory and Quasi-judicial Authorities	5

# Previous Exam Trend Analysis

Year	Que. No.	Chapter Name	Marks	Category
June 2024 (New Syllabus)	1(a)	Documents under Companies Act, 2013	5	Descriptive
	1(b)	Art of Opinion Writing	5	Descriptive
	1(c)	Commercial Contract Management	5	Descriptive
	1(d)	Types of Documents	5	Descriptive
	1(e)	Drafting of Commercial Contracts	5	Descriptive
	2(a)	Laws relating to Drafting and Conveyancing	5	Descriptive
	2(b)	Drafting of Agreements, Deeds and Documents	5	Descriptive
	2(c)	Documents under Companies Act, 2013	5	Descriptive
	3(a)	Drafting of Agreements, Deeds and Documents	5	Descriptive
	3(b)	Drafting of Agreements, Deeds and Documents	5	Descriptive
	3(c)	Documents under Companies Act, 2013	5	Descriptive
	4(a)	Commercial Contract Management	5	Descriptive
	4(b)	Drafting of Commercial Contracts	5	Descriptive
	4(c)	Art of Opinion Writing	5	Descriptive
	4A(i)	Drafting of Agreements, Deeds and Documents	5	Descriptive
	4A(ii)	Art of Opinion Writing	5	Descriptive
	4A(iii)	Laws relating to Drafting and Conveyancing	5	Descriptive
	5(a)	Judicial & Administrative framework	5	Descriptive
	5(b)	Judicial & Administrative framework	5	Descriptive
	5(c)	Pleadings	5	Descriptive
6(a)	Applications, Petitions and Appeals under Companies Act, 2013	5	Descriptive	

Year	Que. No.	Chapter Name	Marks	Category
	6(b)	Applications, Petitions and Appeals under Companies Act, 2013	5	Descriptive
	6(c)	Applications, Petitions and Appeals under Companies Act, 2013	5	Descriptive
	6A(i)	Adjudications and Appeals under SEBI Laws	5	Descriptive
	6A(ii)	Art of Advocacy and Appearances	5	Descriptive
	6A(iii)	Appearance before other Regulatory and Quasi-judicial Authorities	5	Descriptive



1911  
1913  
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# 1

## CHAPTER

# TYPES OF DOCUMENTS

### INTRODUCTION

**Q1. What role do inclusive definitions of “document” play in business operations, and how do they contribute to clarity? [Expected Question]**

**Ans.**

- Inclusive definitions of “document” in various legislations, including the General Clauses Act and the Companies Act, provide a *comprehensive framework* that covers a *wide range of written or recorded matters*.
- These definitions *contribute to the effective functioning of businesses* by *reducing misunderstanding and vagueness during transactions*.
- Business documents, such as deeds, contracts, circulars, public notices, tenders, etc., fall under these inclusive definitions, *ensuring clarity and facilitating smooth business operations*.

### DEEDS

**Q2. What is the legal significance of a deed, and what does it generally encompass? [Expected Question]**

**Ans.** In legal terms, a deed is a *solemn document* used to describe various instruments through which *two or more individuals agree to establish a right or liability*. This includes documents like Gift Deeds, Sale Deeds, Deeds of Partition, Partnership Deeds, Deeds of Family Settlement, Lease Deeds, Mortgage Deeds, and more. Even a power of attorney has been considered a deed in older English cases. The term “*deed*” also includes a *bond within its scope*. 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.

*(For more Questions refer Chapter 2)*

### AGREEMENTS

**Q3. What is the legal distinction between an agreement and a contract? [Expected Question]**

**Ans.** An agreement which is *enforceable at law* is called a **contract**. Generally, when a contract is reduced to writing, the document itself is called an agreement.

Accordingly, there cannot be an agreement *unless there are two or more parties that agree to perform certain acts or refrain from doing something*.

In other words, an agreement between the parties is an instrument whereby the parties freely agree to perform certain acts or refrain from doing something, *unilaterally or bilaterally*. The purpose of the instrument is *to bind the parties to the terms and conditions agreed upon*.

**Q4. What are the different types of agreements commonly encountered in legal contexts?** [Expected Question]

OR

**What are the various kinds of agreements?** [Expected Question]

**Ans.** Few types of Agreement and their purposes are as under:

- (1) **Sale/Purchase Agreements:** Sale and Purchase agreements are entered into by the parties for the *purpose of transfer to property*. These agreements ensure that the property *legally transferred and conveyed to the other party without dispute*.
- (2) **Commercial Agency Agreements:** Sometimes businesses are conducted by traders *not directly with their counterparts but through the agency of independent agents appointed for the purpose*. Such agents would locate customers for the principal's goods and in certain conditions, would have an implied authority to deal with the goods of the principal, allow credit terms to customers and receive payment from the customers on behalf of the principal. Commercial Agency Contracts are *entered into by organisations for running businesses through this mode of business operation*.
- (3) **Collaboration Agreements:** When two parties *join hands for exchange* of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and/or managerial services, they are said to be collaborating in a desired venture. *Commercial Agency Contracts are used in such scenarios*.
- (4) **Arbitration Agreements:** The 'arbitration agreement' means an agreement by the parties *to submit to arbitration all or certain disputes* which have arisen or which may arise between them in respect of defined relationship whether contractual or not. It may be in the *form of an arbitration clause in a contract or in the form of a separate agreement*.

- (5) **Hypothecation Agreement:** 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.
- (6) **Outsourcing Agreements:** 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.
- (7) **Agreement for Assignment:** 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. An *important aspect of intellectual property laws deals with assignment agreements*. A transfer of an actionable claim is usually called an assignment thereof. For example, Assignment of Patents, Assignment of Trade Marks, Assignment of Copyrights, Assignment of Business and Goodwill etc.
- (8) **Shareholders' Agreements:** Shareholders' Agreements (SHA) are *quite common in business*. In India, shareholder's agreement has gained popularity and currency only lately with bloom in newer forms of businesses. *There are numerous situations where such agreements are entered into* – family companies, JV companies, venture capital investments, private equity investments, strategic alliances, and so on. Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how the company should be operated and the defining inter se shareholders' rights and obligations.
- (9) **Employment Agreements:** They are entered into between parties for the purpose *securing the availability of manpower for an organisation*.

## CONTRACT

**Q5. Discuss in brief about the term "Contract".**

**[Expected Question]**

**Ans.** An agreement *gives birth* to a contract. As per *section 2(e) of the Indian Contract Act, 1872* "every promise and every set of promises, forming the consideration for each other, is an agreement.

It is apparent from the definition that an agreement is based on a promise.

*According to section 2(b) of the Indian Contract Act, 1872*, "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise. An agreement, therefore, comes into existence when one party makes a proposal or offer to the other party and that other party signifies his assent thereto.

Therefore, *every contract is an agreement but not vice versa*. Agreements in which the idea of bargain is absent and there is *no intention to create legal relations are not contracts*.

**Q6. Difference between Deeds, Agreements and Contract. [Expected Question]**

Ans.

BASIS	DEEDS	AGREEMENTS	CONTRACT
MEANING	Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability	Every promise and every set of promises, forming the consideration for each other, is an agreement	An agreement enforceable by law is a contract
MODE	Preferable in writing	It may be oral or in writing	Preferable in writing
PURPOSE	Effecting a Right or Liability	Agreement on certain Act or Omission	Enforceability of agreements according to Law
CREATION OF RECORDS	Yes	Not necessary	Yes
RELATION	Deed may be agreements and contracts	Agreements are not necessarily Deeds or Contracts	It succeeds Agreement
EXAMPLE	Sale Deed, Lease Deed etc.	Non-Disclosure Agreements, Joint Venture Agreements	Agreements reduced into writing and enforceable under any law

**CIRCULARS**

**Q7. Define the term "Circular" and throw light on the Important Points for drafting a circular. [Expected Question]**

Ans.

- Circular is a *letter or notice sent to a large number of people*. The purpose of circulars is to *disseminate the information to large number of individuals*.

Generally, circulars are in written form so as to create a permanent record of the information and the same may be accessed to by the individuals in present as well as in future.

- A circular may be **issued and circulated in various modes** but in present era, the prevalent mode in which circulars are issued are in **electronic form** such as **by placing them at the website, sending them by emails etc.**
- **For example:** Central Government may issue a circular for giving clarification on any point of Law or providing any other necessary information to public at large.

**Important Points for drafting a circular are:**

- **Issuing Authority:** It is important to mention the name of the issuing authority on the circular for communicating the position and authority of the addressor. It reduces the chance of confusion in addresses and increase the chances of observance.
- **Details of Addressee:** It is essential to mention the details of addressees by name, designation etc. in circulars. The addressees are required to comply with the information specified a circular. Therefore, mentioning the details of addressees make the circulars effective.
- **Subject:** The mention of subject in a circular ensures that the circular receives the required attention. This will make circular more effective and chances of avoidance gets reduced.
- **Reference to Preceding information:** It is mandatory to mention the reference to the information already provided before the present circulars. It ensures the completeness of information and the addressee may understand the complete matter contained therein.
- **Main Information:** The main purpose of the circular is to disseminate the information to selected group of individuals. The information should be complete and in understandable language leaving no chance of ambiguity.
- **Source of Authority:** It is always preferable to mention the source of authority under which the signatory has issued the circular. This gives emphasis on observance of the circular and increases the chances of amenableness.
- **Signature:** The signature on the circular makes it **more reliable**.

**Q8. Throw light on the Advantages of Circular.**

**[Expected Question]**

**Ans. The advantages of issuing circular are:**

- **Ease of dissemination of information:** Circulars play significant part in the development and easy working of the businesses of organisations. Through circulars the information is circulated with ease.

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**[Expected Question]**

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- **Ease of dissemination of information:** Circulars play significant part in the development and easy working of the businesses of organisations. Through circulars the information is circulated with ease.

- **Economical:** Circulars are economical way of dissemination of information effectively. Through circulars, large number of individuals may be reached.
- **Expeditious:** Through circulars, important information can be disseminated to a large number of people expeditiously. Hence, it saves time and efforts of the authority.
- **Less Efforts:** Issuing circular for dissemination of information requires less efforts and can produce upright results.
- **Develop Consciousness:** Systematic and regular use of circulars for dissemination of information develop consciousness in the addressees and improves effectiveness.

## PUBLIC NOTICES

**Q9. Examine the concept of “public notice” and identify the entities or individuals authorized to issue such notices. [Expected Question]**

**Ans.** Public notices are issued *to convey information to large number of receivers* that may called public. These are announcements made *on a happening of a certain event of public interest*. These may be issued by a Government Agency or by an individual including organisations.

These may be issued for *varied reasons* such as providing information relating to, change in a law, struck off the name of companies by Registrar of Companies, Status of Complaints by an authority, Call for Information regarding submission of information pertaining to ‘Unclaimed Non-convertible Securities’, Public Notices by companies etc.

They are published *through websites, newspapers or any other prevalent way*.

**Entities or individuals authorized to issue such notices:**

- Central Government
- State Government
- Corporates
- Statutory corporations
- Authorised persons of various authorities

**Q10. Draft the Public Notice of extract of standalone unaudited financial results for the quarter and nine months. [Expected Question]**

Ans.

**PUBLIC NOTICE OF EXTRACT OF STANDALONE UNAUDITED FINANCIAL RESULTS FOR THE QUARTER AND NINE MONTHS**

XYZ Limited (Name of Company)							
CIN: _____							
Regd. Office: _____							
Cont. No. _____ Email id. _____ Fax. No. _____							
_____							
Website _____							
<b>EXTRACT OF STANDALONE UNAUDITED FINANCIAL RESULTS FOR THE QUARTER AND NINE MONTHS ENDED 31st DECEMBER, ..... (YEAR)</b>							
S. No.	Particulars	Quarter ENDED			NINE MONTH ENDED		YEAR ENDED
		31/12/21	30/09/21	31/12/20	31/12/21	31/12/20	31/03/21

The above is an extract of the detailed format of quarterly and nine months ended unaudited financial results filed with the stock exchange under Regulation 33 of the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015. The full format of the Quarterly Financial Results are available on the stock exchange websites (www.....com and www.....com) and also hosted on the Company's website at www.....

Date \_\_\_\_\_  
Place \_\_\_\_\_

\_\_\_\_\_ (Name)  
For and On Behalf of Board of Directors  
XYZ Limited

**STANDARD BIDS AND TENDERS**

**Q11. Highlight the Important points for preparing a document for Tendering Process. [Expected Question]**

Ans.

- (1) **Name and address of the organisation:** The name and address of the organisation *be mentioned on the initial page* of the document.

- (2) **Subject of the document:** The subject of the tender documents to be mentioned in *clear and comprehensive manner* in order to attract the attention of the Bidder.
- (3) **Index of the tender document:** The index of the documents can make the document convenient for the *prospective bidder*.
- (4) **Important dates and necessary information:** The information such as Tender Publication Date, Last date and time for sending Pre-Bid Queries in writing, Cost of Tender, Earnest Money Deposit, Pre-Bid Meeting date, time & venue, Last Date & address of Submission of Bids, Date, time & Venue of opening of Technical Bids and Financial Bids, contact details etc. should be provided in the tender document.
- (5) **Disclaimer Clause:** A disclaimer clause *with respect to reservations or observation* on the tender documents should be placed in the tender document.
- (6) **Job Description:** The job description in details should be mentioned in the tender document in order to *acquaint prospective bidders* with the requirements attached with the Job and evaluate and prepare their bids accordingly.
- (7) **Division of tender documents in parts:** The tender document be preferably prepared asking for Bid submissions in two parts *i.e. Technical Bid and Financial Bids*.
- (8) **Fees and Deposits:** The tender document should mention the fees and deposits commensurating the nature and quantum of work. The cost of the tender document may be required from the prospective bidder. Further, the provisions relating to *Earned Money Deposit (EMD)* and *Security Deposit are also to be placed in the tender document*.
- (9) **Conditions for forfeitures of EMD:** The clause providing for the circumstances in which EMD may be forfeited to be mentioned in the tender document. The general conditions in which EMD be forfeited are as under: (i) If the bidder withdraws its bid; (ii) The selected bidder delays or does not accept the Purchase/Work Order; (iii) The selected bidder fails to supply goods/services as per the terms of the Tender or fails to execute Purchase/Work Order.
- (10) **Pre Bid Meeting:** Pre Bid Meetings be conducted *in order to provide any clarification sought* on the tender.
- (11) **Scope of Work:** The scope of work in details be *mentioned in the tender documents*.
- (12) **Mention of Technical and administrative requirements:** The technical and administrative requirement be mentioned comprehensively in order to prevent the

halt in the Job at the later stage. The document should be clear and specific with respect to **technical and administrative requirements for performing the Job**.

- (13) **Eligibility Criteria:** Essential Requirements are to be mentioned in the **tender document**.
- (14) **Necessary forms and documents:** Formats such as of Technical Bids, Financial bids, past experience of the bidder, Tender Acceptance Letter, Standard Terms and Condition of Agreement may be mentioned in the tender document. Further, a list of document required to be attached in the tender document may also be provided in the document.

### LETTER OF CREDIT, BANK GUARANTEE, AND PERFORMANCE GUARANTEE

**Q12. Provide a brief overview of a Letter of Credit (LC) and its involved parties.** [Expected Question]

Ans.

- Letter of Credit ('LC'), also known as a **documentary credit** is a payment mechanism used **especially in international trade**. In an LC, buyer's bank undertakes to make payment to seller on production of documents stipulated in the document of LC.
- LC play an important role in the trade of a country, **especially in its international trade**.
- In most of the cases, the exporters (sellers) are personally not acquainted with the importers (buyers) in foreign countries. In such cases the exporters bear great risk, if they draw bills on importers, after having dispatched the goods as per their orders, because if the latter default in accepting the bills or making the payment, the exporter will suffer heavy losses. **To avoid such risks, the exporters ask the importers to arrange a letter of credit** from their banker in favour of themselves, on the basis of which goods may be exported to the foreign importers.

#### Parties to Letter of Credit (LC):

#### There are following four main parties to LC transaction:

- **Applicant Bank:** Applicant or he is also called as Opener of LC. The bank opens LC on behalf of the applicant customer who is buyer/importer of goods.
- **Issuing Bank:** Issuing bank is a bank which opens LC and undertakes to make payment to the beneficiary (seller/exporter) on submission of document as per the terms of LC.
- **Beneficiary:** Beneficiary is the seller/exporter of goods in whose favour LC is opened.

- **Advising Bank:** Advising Bank is the bank through whom LC is advised to the beneficiary. Normally it is located in seller's location/country.

**Q13. Briefly explain the Types of Letters of Credits. [Expected Question]**

**Ans.**

- (1) **Documentary LC and Clean LC:** When the LC contains a *clause that the payment is conditional on submission of document of title to goods* such as bill of lading (evidence of dispatch of good), it is called Documentary LC. If no such clause is in the LC, it is called a clean LC.
- (2) **Fixed Credit and Revolving Credit:** Fixed credit is where LC *specifies the amount up to which one or more bills can be drawn by the beneficiary within the specified time*. The LC remains effective till the specified amount is exhausted within specified time. In Revolving Credit, the LC opening bank does not specify the total amount up to which bills may be drawn, but mentions total amount up to which the bills may remain outstanding at a time.
- (3) **Revocable and Irrevocable LC:** In case of *revocable LC*, the opening bank reserves the right to cancel or modify the credit at any moment without prior notice to beneficiary. *Irrevocable credit* constitutes a definite undertaking of the issuing bank. Such a LC once established and advised cannot be cancelled or amended except with the consent of interested parties – beneficiary and negotiating bank.
- (4) **Confirmed and Unconfirmed LCs:** When the opening bank requests the advising bank in the exporter's country to add its confirmation to an irrevocable LC and the advising bank does so, the LC is "*irrevocable and confirmed*". The *advising bank is then called as 'confirming bank'* and its liability then becomes similar to the issuing bank. The confirmation cannot be cancelled or amended unless agreed by all the parties. A confirmed irrevocable LC *provides absolute security to the beneficiary*. If the advising bank does not add its confirmation, the LC remains as unconfirmed. In such case there will be no such obligation on the advising bank.
- (5) **'With' and 'Without Recourse' Credit:** In case of "*with Recourse*" bills, the banker as a holder of the bill, can recover the amount of the bill from the drawer, in case the drawee of the bill fails to pay it. In order to avoid such liability, the seller/exporter/drawer asks the importer/buyer to arrange credit "*Without Recourse*" to the drawer. In such a credit the issuing bank will have no recourse to the drawer (exporter) if the drawee (importer) fails to honour the bill. The liability of such a bill ends as soon as the bill is negotiated.

- (6) **Transferable LCs:** Ordinarily the beneficiary is authorized to draw bills of exchange under LC. But if the beneficiary is an *intermediary in the transaction and the goods are actually to be supplied by someone else*, the beneficiary may request the opener to arrange a transferable credit.
- (7) **Back-to-Back LC:** When a beneficiary *receives a non-transferable LC*, he may request a bank to open a new LC in favour of some other person (may be local supplier), on the security of LC issued in his favour. *Such LC is called Back-to-Back LC*. The terms of such LC are identical except that the amount (price) may be lower and the validity earlier.
- (8) **LC with Red Clause/Green Clause:** LC with a clause printed in red ink, contains authority from the *issuing bank to the advising/negotiating bank to grant advances (packing credit)* to the beneficiary up to a specified amount at the responsibility of former. It is a short-term advance recovered from the amount, payable by the *negotiating bank to the beneficiary* when it negotiates the documents under LC submitted by the beneficiary. *Green Clause is an extension of red clause LC allowing advances for storage of goods in warehouse in addition to packing credit*.
- (9) **Instalment Credit:** LC is issued for full value of goods but *part-shipments of specific quantities of goods within nominated period are required*. Credit is not available for *missed shipment* and shipments thereafter *unless permitted in LC document*.

Q14. Discuss the meaning of Bank Guarantee along with Types of Bank Guarantees. [Expected Question]

Ans.

- It is a *non-fund-based facility* required by the borrowers. Banks are often required to issue guarantees on behalf of their customers. A bank guarantee *ensures that the liabilities of the debtor will be met in the event he fails to fulfil his contractual obligations*.
- *It is an agreement between three parties:* The bank, the beneficiary and the applicant who seeks the guarantee from the bank.
- This agreement acts as an *undertaking assuring the beneficiary* that the bank would pay the *specified amount*, in the case of applicant's default in *delivering the "financial" or "performance" obligation as mentioned in the guarantee*.

Types of Banks Guarantees:

- (1) **Financial Guarantee:** Under this, bank guarantees that the *applicant will meet the financial obligation and in case he fails, the bank as a guarantor is bound*

*to pay* (e.g., guarantees towards revenue dues, taxes, duties and for disputed liabilities for litigations pending at courts; credit enhancement; repayment of financial securities etc.)

- (2) **Performance Guarantee:** Under this, *guarantee issued is for honouring a particular task and completion of the same in the prescribed/agreed upon manner* as stated in the guarantee document. (e.g., bid bonds, retention money guarantee etc.)

## BYE LAWS

**Q15. Define the term Bye laws along with examples. [Expected Question]**

**Ans.** A bye law is a law which is made by a *local authority* and which *applies only in their area*. So, certain organisations frame their Bye Laws for effective functioning.

*The legal recognition of Bye Laws is as under:*

According to *Article 13(3)(a) of the Constitution of India*, “*law*” includes any Ordinance, order, *bye-law*, rule, regulation, notification, custom or usage having in the territory of India the force of law.

*Examples of Bye Laws:*

- New Delhi Municipal Council Solid Waste Management Bye Laws, 2017
- Bye Laws of *National Stock Exchange of India Limited*
- Bye Laws of *Bombay Stock Exchange*
- Bye Laws of a *Multi State Cooperative Society*
- Bye Laws of *ICSI Institute of Insolvency Professionals*
- *ICSI registered Valuers Organisation* Bye Laws

## SHOW CAUSE NOTICE

**Q16. A Show Cause Notice (SCN) is an official document issued by a governing authority or an employer to an individual or entity, requesting an explanation for alleged misconduct or non-compliance with rules, regulations, or contractual obligations. [Expected Question]**

**Ans.** A show cause notice is a *document delivered to other party* to represent the matter. It summarizes the *alleged matter and grants the other party* an occasion to explain themselves. SCN may be issued *for varied reasons by various authorities* such as by Courts, Government, Quasi-judicial Authorities, Employers, other authorities etc.

The issuance of SCN is preferred by authorities due to the *observance of the principle of Natural Justice*. It is based on the principle *Audi alteram partem* (hear the other side) i.e., no one should be condemned unheard. It requires that *both sides should be heard before passing the order*.

Essentials of Show Cause: A show cause notice should inter alia address the following essentials:

- SCN should contain the *name of the issuer*.
- It should be *issued in writing*.
- It should be *written in clear language* in order to avoid ambiguity.
- It should mention the *correct and brief facts*.
- If there is a violation of Law, it should be *specifically mentioned*.
- Charges should be levelled specifically and *they should be vague or in contradiction with the information contained in SCN*.
- Proposed action should also be *mentioned in the SCN*.
- *Adequate time limit* should be given for the reply, unless otherwise specifically provided by any law.

#### STANDING ORDER

Q17. Throw light on the term “standing order” and matters to be provided in standing order. [Expected Question]

Ans.

- *‘Standing Orders’* defines the conditions of recruitment, discharge, disciplinary action, holidays, leave, etc., go a long way towards minimising friction between the management and workers in industrial undertakings.
- The Industrial Employment (Standing Orders) Act (said Act) *requires employers in industrial establishments to clearly define the conditions of employment* by issuing standing orders duly certified.
- *It applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding 12*. Model standing orders issued under the Act deal with classification of workmen, holidays, shifts, payment of wages, leaves, termination etc.
- The *objects of standing orders* are that the employer, once having made the *conditions of employment known* to his employed workmen cannot change them to their *detriment or to the prejudice of their rights and interests*.

Matters to be provided in standing order:

- *Classification of workmen*, e.g., whether permanent, temporary, apprentices, probationers, or badlis.

- **Manner of intimating** to workmen periods and hours of work, holidays, pay-days and wage rates.
- Shift working.
- Attendance and **late coming**.
- Conditions of, procedure in applying for, and the authority which **may grant, leave and holidays. Requirement to enter premises by certain gates, and liability to search.**
- **Closing and re-opening** of sections of the industrial establishment, and temporary stoppages of work and the rights and liabilities of the employer and workmen arising therefrom.
- **Termination of employment**, and the notice thereof to be given by employer and workmen.
- **Suspension or dismissal for misconduct, and acts or omissions** which constitute misconduct.
- Means of redress for workmen against **unfair treatment or wrongful exactions** by the employer or his agents or servants.

## BONDS

**Q18. Define the term Bond.**

**[Expected Question]**

**Ans.**

- Bond means a **formal document by which a person undertakes to perform a certain act**. The bonds are of **different types such as Surety Bond, bonds as financial instruments, judicial bonds, Guarantee bonds, saving bonds etc.**
- **The purpose of issuance of bonds** also differs according to the requirements. For example: Surety Bonds are undertaken for the purpose of providing security if a certain act agreed has not been done.
- **Financial Instruments bonds are evidence of a debt due on the organisation.**
- A bail bond is an **undertaking by an accused to appear for trial or to pay a sum of money** stated therein on non-compliance. A bond is also included in the wide compass of the term deed.
- **The purpose of undertaking** a bond is secure the act or omission for which the bond is issued as a security.

**Q19. Draft the Specimen for: Bond and Bail-bond.**

**[Expected Question]**

**Ans. BOND AND BAIL BOND FOR ATTENDANCE BEFORE COURT**

I, \_\_\_\_\_ (name), of \_\_\_\_\_ (place), having been arrested or detained without warrant by the Officer in charge of police station (or having been brought before the Court of \_\_\_\_\_), charged with the offence of

\_\_\_\_\_, and required to give security for my attendance before such Officer of Court on condition that I shall attend such Officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of rupees. Dated, this day \_\_\_\_ of \_\_\_\_\_, 2023.

TAXMANN



# 2

## CHAPTER

# GENERAL PRINCIPLES OF DRAFTING

### DRAFTING AND CONVEYANCING

**Q1. Drafting is the synthesis of Law and Fact in a language form?**  
[Dec. 2015 (4 Marks)]

**Ans. According to Stanley Robinson,** Drafting may be considered as the **synthesis (Combination) of law and fact in a language form.**

- All **three aspects on equal footing (rank equally) while drafting.**
- Legal drafting is **crystallised form of a legal right, privilege, function, duty, or status.**
- It is the **development and preparation of legal instruments** such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts and leases, etc.
- For better **understanding of drafting** the **NEXUS (connection/relation)** between the **law, the facts,** and the **language** must be fully understood and accepted.
- Drafting of legal documents requires, the following **pre-requisite,**
  - (i) The **skills** of a draftsman,
  - (ii) The **knowledge of facts and law** } So as to put facts in a systematised sequence
- To reduce the available information into writing with legal meaning; serious thinking along with prompt action is required (**Therefore drafting, is first thinking and second composing.**)
- The process of drafting **operates in two planes:**
  - (i) The conceptual, and
  - (ii) The verbal.
- Besides seeking the right words, the draftsman seeks the right concepts.

**Q2. Conveyance is an act of transfer of any property** [June 2016 (5 Marks)]  
**Or**

**What is the role of conveyance for the transfer of title in the property?**  
**[Dec. 2020 (5 Marks)]**

**Ans.** Conveyancing is the art of drafting of deeds and documents whereby land or interest in land i.e. immovable property, is transferred by one person to another; but the drafting of commercial and other documents is also commonly understood to be included in the expression.

**AS PER STAMP ACT:**

The term "Conveyance", is defined under section 2(10) of the Indian Stamp Act, 1899, Conveyancing "includes:

- (a) a conveyance on sale and
- (b) every instrument—
  - (i) by which property, whether movable or immovable, is transferred *inter vivos* (between the living) and
  - (ii) which is not otherwise specifically provided by Schedule I of the Act."

**AS PER TRANSFER OF PROPERTY ACT:**

Section 5 of Transfer of Property Act defines "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons.

Thus Conveyance is an act of by which movable or immovable property is transferred by way of sale, lease, gift or exchange.

**Q3. Why the knowledge about the Rules of Drafting of pleadings and conveyancing important in corporate affairs? Illustrate.**  
**[Dec. 2019 (5 Marks)]**

**Ans.** The knowledge about drafting and conveyancing is important for the corporate executives for:

- (i) **Obtaining legal consultations:** Better interaction could be had by the corporate executives while seeking legal advice from the legal experts, to decide upon the coverage and laying down rights and obligations of the parties therein.
- (ii) **Carrying out documentation departmentally:** An executive can make a better document with all facts known and judging the relevance and importance of all aspects to be covered therein.
- (iii) **Interpretation of the documents:** In India, in the absence of any legislation on conveyancing, it becomes imperative to have knowledge about the important rules of law of interpretation so as to put right language in the documents, give appropriate meaning to the words and phrases used therein, and incorporate the will and intention of the parties to the documents.

Therefore, knowledge in advance on the subject matter facilitates better communication, extraction of more information, arriving on workable solutions, and facilitates settlement of the draft documents, engrossment and execution thereof.

**Q4. Comment on the following statement; Drafting and Conveyancing have same meaning and are interchangeable words?**

[June 2019/Dec. 2017 (5 Marks)]

**Ans.** Both the terms “drafting and conveyancing” provide the same meaning although these terms **are not Interchangeable**.

BASIS	DRAFTING	CONVEYANCING
<b>Definition</b>	Drafting is defined as the synthesis of law and fact in a language form.	As per section 2(10) of the Indian Stamp Act, 1899, Conveyance “includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided by Schedule I” of the Act.
<b>Manner</b>	Drafting is the way and the manner of preparation of <b>any documents</b> .	Conveyancing is the way and the manner of preparation of <b>only those documents which involves transfer of property from one person to another</b> .
<b>Purpose</b>	It gives a general meaning synonymous to preparation of drafting of documents.	It gives <b>more stress on documentation</b> , more concerned with the transfer of property from one person to another.
<b>Scope</b>	The concept of drafting is <b>wider than</b> the concept of Conveyancing.	The concept of Conveyancing is <b>narrower</b> than the concept of drafting.
<b>Examples</b>	Retainership Agreement, Services Agreement, Arbitration Agreements etc.	Sale Deed, Mortgage Deed, etc.

**Q5. Write down the distinction between Conveyance and Contract.**

[Dec. 2021/Dec. 2020/Dec. 2017 (4 Marks)]

**Ans.** Apparently, conveyance is not a contract. The distinction between conveyance and contract is quite clear. **However**, there may be cases where the transaction may take part both contract as well as conveyance.

**For example, Sale Deed of Immovable Property [Section 54 of TPA]**

BASIS	CONTRACT	CONVEYANCING
<b>Meaning</b>	An agreement enforceable by law is a contract.	Art of drafting documents relating to transfer of property.
<b>Governing Act</b>	It is governed by the <b>Indian Contract Act, 1872.</b>	It is governed by the <b>Transfer of Property Act, 1882</b>
<b>Reciprocal Promises</b>	Contract consists of reciprocal promises and each party to the contract bound to perform the promise.	There is no such promise and title in respect of the property in question already passes in favour of the vendee.
<b>Create right of action</b>	It <b>creates a right of action</b> in favour of the parties. In case of breach of contract <b>No. of remedies</b> will be available to parties such as claim for <b>compensation, specific performance etc.</b> against the defaulting party.	Conveyance does <b>not create any right</b> of any action but at the same time it <b>alters the ownership of existing right.</b>

**Q6. Write down the distinction between Drafting and Documentation.**  
[Dec. 2018 (4 Marks)]

**Ans.** Following are the differences between Drafting and Documentation:

**DRAFTING:** According to Stanley Robinson, Drafting may be considered as the **synthesis (Combination) of law and fact in a language form.**

- All three aspects on equal footing (rank equally) while drafting.
  - Legal drafting is crystallised form of a legal right, privilege, function, duty, or status.
  - It is the **development and preparation of legal instruments** such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts and leases, etc.
- For better **understanding of drafting** the **NEXUS (connection/relation)** between the **law**, the **facts**, and the **language** must be fully understood and accepted.

- Drafting of legal documents requires, the following **pre-requisite**,
  - (i) The **skills** of a draftsman,
  - (ii) The **knowledge of facts and law** } So as to put facts in a systematised sequence
- To reduce the available information into writing with legal meaning; serious thinking along with prompt action is required (**Therefore drafting, is first thinking and second composing.**)
- The process of drafting **operates in two planes**:
  - (i) The conceptual and
  - (ii) The verbal.
- Drafting may cover all the types of documents in business usages. Drafting in legal sense, means an act of preparing the legal documents like agreements, contracts, deeds etc.

### DOCUMENT:

**Section 3 of the General Clauses Act, 1897**, defines Document as Any matter expressed or described upon any substance by means of letter, 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.

### FOR INSTANCES

- (a) **Writing** is a document.
- (b) **Words printed, lithographed or photographed** are documents.
- (c) **A map or plan** is a document.
- (d) **An inscription on a metal plate or stone** is a document.
- (e) **A caricature** is a document.

[**In short** document is a paper or other material thing affording information, proof or evidence of anything. **For example**, Minutes of meeting.]

Documentation is a set of documents provided on paper, or online, or on digital or analog media, such as audio tape or CD's.

Proper documentation provides evidence of what has transpired as well as provides information for researching discrepancies. Supporting documentation may come in paper or electronic form.

**Q7. 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. [Scoring Question]**

**Ans.** The issue whether hard disc of a computer is a document within the meaning of section 3 and section 65B of the Indian Evidence Act, 1872 was decided in the Case of **Dharamvir v. CBI (2008)**.

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 2 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.

**Q8. "All instruments are legal documents, but all legal documents are not instruments." Critically evaluate with reference to leading cases.**

[Scoring Question]

**Ans.** According to section 2(14) of the Indian Stamp Act, 1899, instrument includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.



### SOME IMPORTANT JUDICIAL PRONOUNCEMENTS



<i>Mohan Chowdhary v. Chief Commissioner</i>	Instrument <b>includes an order made by the President</b> in the exercise of his constitutional powers.
<i>Purshottam v. Potdar (SC)</i>	"Instrument" <b>includes awards made by Industrial Courts.</b>
<i>V.P. Sugar Works v. C.I. of Stamps U.P.</i>	"Instrument" <b>does not include</b> Acts of Parliament unless there is a statutory definition to that effect in any Act.
<i>Bishun v. Suraj Mukhi (SC)</i>	<b>A will is an instrument.</b>
<i>Savitribai v. Radhakishna</i>	The word "instrument" in Section 1 of the Interest Act is <b>wide enough to cover a decree.</b>

### LEGAL DOCUMENT

**Section 3 of the Indian Evidence Act, 1872**, defines **Legal Document** as "Any matter expressed or described upon any substance by means of letter, 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.

Also, according to **section 3(18) of General Clauses Act, 1897**, “Document” 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 may be used, for the purpose of recording that matter.

**For example:** A writing, words printed, lithographed or photographed, a map or plan, an inscription on a metal plate or stone, a caricature is a document.

→ It may be noted that all instruments are legal documents but all Legal Documents are not instruments as they may not always create, transfer, modify, limit, extend, suspend, extinguish or record a right or liability.

### GENERAL PRINCIPLES OF DRAFTING ALL SORTS OF DEEDS AND CONVEYANCING AND OTHER WRITINGS

**Q9. Explain Fowler’s 5 rules of Drafting. [Dec. 2022/Dec. 2019 (4 Marks)]**

**Ans.** 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.

**Followings are the Fowler’s 5 rules of Drafting:**

- (a) Use the *familiar word* rather than the *farfetched word* (Doubtful).
- (b) Use the *concrete word* rather than the *abstract word*.
- (c) Use the *single word* rather than *circumlocution* (Synonyms) word.
- (d) Use the *short word* rather than the *long word*.
- (e) Use the *Saxon word* rather than the *Roman word*.
- (f) Use the *active voice* rather than the *passive voice*.

**Q10. Write a short notes on the “Expert Opinion” [Dec. 2018 (4 Marks)]**

**Ans.** Drafting of legal documents is a skilled job. The duty of a draftsman is to express the intention of the parties clearly and concisely in technical language. If the draft document has been prepared for the first time to be used again and again with suitable modification depending upon the requirements of each case it should be got vetted by the experts to ensure its suitability and legal fitness if the corporate executive feels it so necessary.

Expert opinion comes from the professional who has acquired knowledge and skills through study and practice over the years, in a particular field or subject, to the extent that his or her opinion may be helpful in fact finding, problem solving, or understanding of a situation.

**Q11. Elucidate 8 principles which a draftsman should keep in mind while drafting.** [Dec. 2021 (4 Marks)]

Or

**Explain in detail the general principles of drafting and conveyancing and other writings?** [Scoring Question]



**Ans. To Sum Up, The Draftsman should keep in Mind the following Principles of Drafting:**

- (a) The documents should be **self-explanatory**.
- (b) The well drafted document should be **clearly understandable** to the person carries **competent knowledge** of the related subject matter.
- (c) The draft must be **easily understandable to layman**.
- (d) The document may **not be perfect** because it says **too much or too little or is ambiguous**.
- (e) Nothing is to be **omitted or admitted at random** on the document.
- (f) **Use of juridical language** should be made.
- (g) The **text of the document** shall contain all the relevant facts **divided into paragraphs** and simultaneously marked by use of numbers and letters for clause, sub-clause and paragraphs.
- (h) **The negative statements** should generally be **avoided**.
- (i) **Legal language** should be, **to the utmost possible extent, precise and accurate**.
- (j) **The active voice is preferable to the passive voice**, unless the passive voice in a particular connection makes the meaning more clear.
- (k) **Schedule** is a **pivotal part** of the document and should contain the relevant information which forms part of the document.

#### SOME DO'S AND DON'TS

**Q12. Drafting of legal documents is a skilled job requiring observance of many do's and don'ts?** [June 2022 (5 Marks)]

Ans.

DOs 	DON'Ts 
<ol style="list-style-type: none"> <li>(1) <b>Reduce the group of words to single word;</b></li> <li>(2) Use <b>simple verb</b> for a group of words;</li> <li>(3) <b>Avoid round-about construction;</b></li> <li>(4) Avoid <b>unnecessary repetition;</b></li> <li>(5) Write <b>shorter sentences;</b></li> </ol>	<ol style="list-style-type: none"> <li>(1) Avoid the use of words of <b>same sound</b>. <b>For example</b>, the words "Employer" and "Employee";</li> <li>(2) When the <b>clause</b> in the document is numbered it is convenient to refer to any one clause by using single number for it. <b>For</b></li> </ol>

<p>(6) Express the ideas in <b>fewer words</b>;</p> <p>(7) Prefer the <b>active to the passive voice</b> sentences;</p> <p>(8) Choose the <b>right word</b>;</p> <p>(9) <b>Know exactly the meaning</b> of the words and sentences <b>you are writing</b>;</p> <p>(10) <b>Put yourself in the place of reader</b>, read the document and satisfy yourself about the content, interpretation and the sense it carries.</p> <p>(11) State <b>Date, sums and numbers in both figures as well as words</b>.</p>	<p><b>example</b>, “in clause 2 above” and so on.</p> <p>(3) <b>Negative in successive phrases</b> would be very carefully employed.</p> <p>(4) Draftsman should <b>avoid the use of words “less than” or “more than”</b>, instead, he must use “not exceeding”.</p> <p>(5) <b>Properly use the word</b> like ‘either’, ‘or’ and other like words</p> <p>(6) Typing mistakes.</p>
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**IN WRITING AND TYPING, THE FOLLOWING MISTAKES ALWAYS OCCUR WHICH SHOULD BE AVOIDED**

- “And” and “or”;
- “Any” and “my”;
- “Know” and “now”;
- “Appointed” and “Applied”;
- “Present” and “Past” tense.
- “May” and “Shall”

**GUIDELINES FOR USE OF PARTICULAR WORDS & PHRASES**

**Q13. Discuss the guidelines for use of particular words and phrases in the conveyancing.** [June 2021 (5 Marks)]

**Ans.** There cannot be any clear cut rule which can be laid down as guideline for using the particular words and phrases in the conveyancing. However, the draftsman must be cautious about the appropriate use of the words and should be clear of its meaning. The following rules may be prescribed for the guidance of the draftsman for using any particular word and phrase in the drafting of the documents:

<b>Use of General words</b>	<b>For general words refer to ordinary dictionary for ascertaining the meaning of the words.</b> For example, <i>Oxford Dictionary</i> or <i>Webster’s Dictionary</i> or any other standard dictionary.
<b>Use of Current meaning</b>	<b>As far as possible current meaning of the words should be used</b> and if necessary, <b>case law</b> , where such words or phrases have been discussed, could be <b>quoted in reference</b> .

Use of <b>Legal terms</b>	For legal terms refer to legal dictionary like In India, <i>Mitra's Legal and Commercial Dictionary</i> is quite sufficient to meet the requirements of draftsman.
Use of <b>Technical words</b>	Technical words may be used after ascertaining their- <ul style="list-style-type: none"> <li>• Full meaning,</li> <li>• Import of the sense, and</li> <li>• Appropriate use warranted by the circumstances</li> </ul> } (For deriving a technical or special meaning with reference to the context)
Choice of the words & <b>Phrases</b>	The choice of the words and phrases should be made to convey the intention of the executor to the readers in the same sense he wishes to do.

### BASIC COMPONENTS OF DEEDS

**Q14. Legality of a written deed for performing a promise in near future?**

**[June 2018 (4 Marks)]**

**Ans.** 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. For instance: Gift Deed, Sale Deed, Deed of Partition, Partnership Deed etc. According to **Norton**, 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.

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.

It comprises of all the essentials of a valid contract provided under section 10 of the Indian Contract Act, 1872.

Therefore, written deeds for performing a promise in near future are enforceable in the court of law.

### VARIOUS KINDS OF DEED

**Q15. Enumerate the usual parts or components or clauses of a deed.**

**[June 2021 (4 Marks)]**

**Ans.** A good deed is one which conveys a good title, not one which is good merely in form. A good and sufficient deed is marketable deed; one that will pass a good title to the land it purports to convey.

<b>Inclusive Deed</b>	An inclusive deed is one <b>which contains within the designated boundaries of lands</b> which are expected from the operation of the deed.
<b>Latent Deed</b>	A latent deed is a deed <b>kept for 20 years or more in man's strong box.</b>
<b>Lawful Deed</b>	A lawful deed is a deed <b>conveying a good or lawful title.</b>
<b>Pretended Deed</b>	A pretended deed is a deed <b>apparently or prima facie valid.</b> For example, Sale of plot, tree in the plot are pretended to be sold along with the plot.
<b>Voluntary Deed</b>	A voluntary deed is one given <b>without any "valuable consideration"</b> , as that term is defined by law.
<b>Warranty Deed</b>	A warranty deed is a deed <b>containing a covenant of warranty.</b>
<b>Special Warranty Deed</b>	A special warranty deed which is in terms a <b>general warranty deed, but warrants title only against those claiming</b> by through, or under the <i>grantor</i> , conveys the described land itself, and the limited warranty does not, of itself, carry notice of title defects.



### SOME IMPORTANT TERMS WHICH IS CONNECTED WITH THE DEED

Q16. Explain Indenture and Cyrographum in relation of a deed.

[June 2021 (4 Marks)]

Ans.

<b>Deed Poll</b>	<ul style="list-style-type: none"> <li>• A deed <b>made and executed by a single party</b> is called as deed poll.</li> <li>• It is generally used for the purpose of: <ul style="list-style-type: none"> <li>→ Granting powers of attorney,</li> <li>→ Exercising powers of appointment,</li> <li>→ Setting out an arbitrator's award,</li> <li>→ Releases by way of extinguishment of claims,</li> <li>→ Cases of declaration of trustees, etc.</li> </ul> </li> <li>• It is drawn in <b>first person</b> usually.</li> </ul>
<b>Deed Pool</b>	A deed <b>between two or more parties</b> where as many copies are made as there are parties, so that each party may be in a possession of a copy. This arrangement is known as deed pool.
<b>Deed Escrow</b>	<ul style="list-style-type: none"> <li>• A deed, <b>which is signed only by one party until delivered to the other party,</b> will be called as deed escrow.</li> </ul>

	<ul style="list-style-type: none"> <li>It will be called as deed only after signing by the last party or signed by all the parties and dated when the last party signs it. The deed operates from the date it is last signed till then it is only a mere writing (scriptum).</li> </ul>
<b>Indenture</b>	<ul style="list-style-type: none"> <li>Indentures are those deeds in which <b>there are 2 or more parties.</b></li> <li>It was written in duplicate upon <b>one piece of parchment and two parts were severed so as to leave an indented or vary edge,</b> forging being then, rendered very difficult.</li> </ul> 
<b>Cyrographum</b> 	<ul style="list-style-type: none"> <li>This was <b>another type of indenture in olden times.</b> The word "Cyrographum" was <b>written between two or more copies</b> of the document and the parchment was cut in a <b>jugged line through this word.</b></li> <li>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 different writing for one of the parts of the original.</li> <li>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.</li> </ul>

### COMPONENTS OF DEED

**Q17. Enumerate the usual parts or components or clauses of a Deed.**

[Dec. 2020 (5 Marks)]

OR

**Define Deed. Write note on the components of Deed.** [Dec. 2018 (4 Marks)]

**Ans.** 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.

According to Norten, a deed is a writing on paper, vellum or parchment which means thin layers made skin of animal, sealed and 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.

**Example: Gift Deed, Sale Deed, Deed of Partition, Lease Deed, Mortgage Deed, a power of Attorney, Bond etc.**

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.

**COMPONENTS OF A DEED:** The below-mentioned are list of Components:

Description of the Deed Title.	Place and Date of execution of a Deed.	Recitals
Description of Property.	Description of Parties to the Deed.	Testatum
Parcel	Exceptions and Reservations.	Consideration
Covenants and Undertakings	Premises and Habendum	Receipt clause
Signature and Attestation	Endorsements and Supplemental Deeds.	Operative Clause.
Testimonium Clause	Annexures or Schedules.	

**Q18. The date of the execution of a deed is material for the purpose of limitation and registration of the document. If the date is accidentally missing in the deed, how do you, as a company secretary, will deal with such a situation? Refer the relevant law on the point. [Dec. 2019 (6 Marks)]**

**Ans.** The date of deed is the date on which parties sign or executing it. **If several parties to a deed sign the deed on different dates**, in such cases, the practice is to regard the last of such dates as the date of deed.

- The date on which the document is executed comes **after** the description of the deed.
- **UNDATED:** The date is **not strictly speaking an essential part** of the deed. A deed is perfectly valid if it is undated or the date given is an impossible one, e.g. **30th day of February.**
- In order to avoid mistake and risk of forgery, the date be should **written in words and in figures.**
- **It is the date of execution which is material in a document for the purpose of application of:**
  - (i) Law of limitation,
  - (ii) Registration Act, and
  - (iii) Passing of Title.

[In India there is a **short period of 4 months (Section 23 of Registration Act)** for its registration from the date of execution within which a deed must be presented for registration.]
- **REMEDY:** If no date is given **Oral Evidence** will always be admissible to prove the date of execution only it leaves necessary to prove it. However, it is of great importance to know the date from which a particular deed operates.

Q19. "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". Write a detailed note on this statement with reference to the decisions of the courts. [June 2016 (4 Marks)]

OR

What is meant by 'Recitals' as a component in a deed? What is its evidentiary value? [Dec. 2018 (4 Marks)]

OR

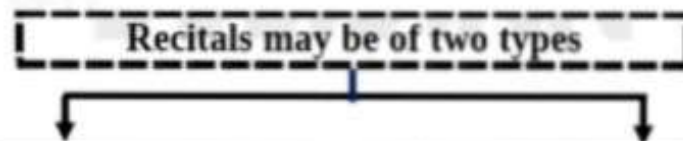
Reasons for drafting recitals in a deed with caution. [June 2014 (4 Marks)]

OR

Reasons for Drafting recitals in a Deed with due caution. [June 2014 (4 Marks)]

Ans.

- ✚ Recitals contain the **Short story or Brief history** of the property up to its vesting into its transferors.
- ✚ It contains the **background or factual details** of the transaction between parties.
- ✚ Care should be taken that recitals are **short and intelligible**.
- ✚ **Recital** 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.



Narrative Recitals	Introductory Recitals
<ul style="list-style-type: none"> <li>• It relates to the <b>past history</b> of the property transferred and <b>sets out the facts and instrument</b> 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.</li> <li>• It should be <b>written in chronological order</b> (i.e. in order of occurrence.)</li> </ul>	<ul style="list-style-type: none"> <li>• It explains the <b>motive or intention behind execution of deed</b>.</li> <li>• Introductory recitals are placed after narrative recitals.</li> <li>• The basic objective of doing so is to <b>put the events relating to change of hand</b> in the property.</li> </ul>

- ✚ It **controls** the **operative part of the Deed**.
- ✚ If the operative part of the deed 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**.

- ✚ Recitals carry evidentiary importance in the deed. It is evidence against the parties to the instrument and those claiming under and it may operate as estoppel. [*Ram Charan v. Girija Nandini*].
- ✚ 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.

**Q20. What are the considerations to be taken into account in the case of the words used in an agreement are found ambiguous? [Dec. 2021 (4 Marks)]**

**Ans.** When the terms of a deed are not clear or are ambiguous or the operative part creates a doubt about the intention of the parties, the recitals may be looked into to ascertain their real intention. If there are several recitals in a deed, as is the case with indentures, and there is at the same time some ambiguity in the operative part of the deed, it may be resolved by giving preference to such a recital as may appear to be the most important to convey the intention of the parties.

**Q21. Distinguish between Testatum and Testimonium Clause. [June 2022 (4 Marks)]**

OR

**Write a note on testimonium clause of a Deed. [Dec. 2021 (4 Marks)]**

**Ans.**

**(a) TESTATUM CLAUSE:**

This is the “witnessing” clause which **refers to the introductory recitals of the agreement, if any**, (i.e. sets out the intention of the parties and sets out in detail the transaction between the parties and also sets out capacity in which parties are acting and also states the consideration, if any, and **recites** (specify) acknowledgement of its receipt.)

It usually begins with the words “**Now This Deed Witnesses**”. Where there are more than one observation to be put in the clause the words, “**Now This Deed Witnesses as Follows**” are **put in the beginning** and **then paragraphs are numbered**.

**(b) TESTIMONIUM CLAUSE:**

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.

It usually begins with the words “**IN WITNESS WHEREOF** the parties aforesaid, namely, have on the day and year just above mentioned put their signature in the presence of the witnesses.

**Q22. Parcels Clause as a component of a Deed. [June 2013 (4 Marks)]**

**OR**

**Discuss how section 8 of the Transfer of Property Act, 1882 regarding operation of transfer has simplified parcels clause in a deed. [Scoring Question]**

**Ans.**

- ✚ The parcel is **technical description** of property transferred.
- ✚ It is a **methodical** description of the property.
- ✚ It is necessary that in case of **non-testamentary document** containing a **map or plan** of the property shall not be accepted **unless** it is accompanied by the True Copy. **[REFER SECTIONS 21 & 22 of Registration Act, 1908]**
- ✚ Usually the Parcel Clause starts with the words "**All Those.....**  
**And further or description covers as per the type of property subjected to transfer under the deed.**
- ✚ 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;

**Q23. Comment on the expression 'THE HAVE AND TO HOLD' as one of the components of a deed. [Dec. 2022 (4 Marks)]**

**OR**

**Define 'Habendum'. What does a habendum clause signify in a document?**

**[June 2018 (4 Marks)]**

**Ans.** *Habendum* is a part of deed which states the interest; the purchaser is to take in the property. **The purpose of the Habendum is to define the interest conveyed and to set out the limitations on the property involved.**

- The *habendum* **limits the estate mentioned in the parcels.**

- The term 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/transferred is **encumbered or not** a clear statement to this effect should be made in the *habendum*.
- If the parties to transfer enter into covenants, they should be entered **after** the *habendum*. (i.e. exceptions and reservation)



#### Earlier v. modern practice

- It usually begins with the words: **“THE HAVE AND TO HOLD”** or **“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.
- 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/unnecessary**.

**Q24. Write a note on covenants and undertakings. [Dec. 2014 (4 Marks)]**

**Ans.** The term “covenant” has been defined **as an agreement under seal**, whereby parties stipulates for the truth of certain facts. Every deed must contain the terms and condition by which the parties bind themselves. **However, it is not necessary to mention such covenants which are implied by law**, but if any special terms and conditions are desired **which are at variance with the implied covenants, then these must be clearly stated.**

Covenant clause includes undertakings also. Usually, covenant is stated first. In some instances, the covenants and undertakings are mixed, i.e. cannot be separated in that case, they are joint together, words put for this as **“The Parties aforesaid hereto and hereby mutually agree with each other as follows”**

**Q25. Explain Amino Attestandi. [June 2018 (5 Marks)]**

**Ans.** It is one of the usual parts or components of deed in general. After attestation clause, signatures of the executants of the documents and their witnesses attesting their signatures follow. It is essential that the attesting witness should have put his signature, amino attestandi, intending for the purpose of attesting that he has seen the executant sign or has received from him, a personal acknowledgement of his signature.

**Q26. Discuss Engrossment and Stamping of a Deed.****[Dec. 2021/June 2021 (4 Marks)]**

**Ans.** The **draft of document** is required to be **approved by the parties**. In case of companies it is approved by Board of Directors in their meeting or by a duly constituted committee of the board for this purpose by passing **requisite resolution** approving and authorising of its execution.

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 Stamp Act.

In case document is drafted **on plain paper but approved without any changes**, it can be lodged with **Collector of Stamps** for adjudication of stamp duty, **who will endorse certificate** recording the payment of stamp duty on the **face of document** and it will become ready for execution.

If a document **is not** properly stamped, neither it is rendered admissible as evidence **nor** it will be registered with Registrar of Assurances.

**Q27. Explain E-stamping?****[Scoring Question]**

**Ans.** E-stamping is a computer based application and a secured electronic way of stamping documents. The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. **The Stock Holding Corporation of India Limited (SHCIL) is the Central Record Keeping Agency (CRA).**

E-stamping is a computer based procedure and a secure manner for the state to pay non-judicial stamping duties. The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. E-stamping is beneficial for varied reasons such as E-stamps are less time-consuming; They are very easily accessible; They save cost; e-Stamp Certificate generated is tamper proof; e-Stamp Certificate generated has a Unique Identification Number; they are Easily accessible, they are secure and user friendly.

**ENGROSSMENT AND STAMPING**

**Q28. What do you understand by the Endorsements and Supplemental Deeds? Does such endorsement and supplemental deeds attract stamp duty?**

**[June 2022 (4 Marks)]**

**Ans. ENDORSEMENT:**

It 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. **[Excludes Promissory Note]**

**For example**, on the back of the cheque to sign one's name as Payee to obtain cash is an endorsement on the cheque.

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**

It 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. **On the other hand**, if the terms of the lease document are to be altered then it becomes necessary to give effect to such alteration through a supplementary deed. In case the alteration to be made in the terms and conditions and is of **minor nature** and can be expressed by a **short writing** execution of supplementary deed **may not be considered necessary as this can be done by endorsement only**.

**Q29. Distinguish between Endorsement and Engrossment?****[June 2016 (4 Marks)]****Ans.** Following is the difference between Endorsement and Engrossment:

“Endorsement”	“Engrossment”
<ul style="list-style-type: none"> <li>→ It means to <b>write on the back or on the face of a document</b> wherein it is necessary in relation to the contents of that document or instrument.</li> <li>→ The term “endorsement” is used with reference to <b>negotiable documents</b> like cheques, bill of exchange etc. <b>[Excludes Promissory Note]</b></li> <li>→ <b>For example</b>, on the back of the cheque to sign one’s name as Payee to obtain cash is an endorsement on the cheque.</li> <li>→ Endorsement is used to <b>give legal significance</b> to a particular document with reference to <b>new facts to be added in it</b>.</li> <li>→ Also, endorsement is used to express definite approval to a particular document.</li> </ul>	<ul style="list-style-type: none"> <li>→ The <b>draft of document</b> is required to be <b>approved by the parties</b>.</li> <li>→ In case of companies it is approved by Board of Directors in their meeting or by a duly constituted committee of the board for this purpose by passing <b>requisite resolution</b> approving and authorising of its execution.</li> <li>→ The <b>document after approval is engrossed</b> i.e. copied fair on the <b>non-judicial stamp-paper</b> of appropriate value as may be chargeable as per Stamp Act.</li> <li>→ In case document is drafted <b>on plain paper but approved without any changes</b>, it can be lodged with <b>Collector of Stamps</b> for adjudication of stamp duty, <b>who will endorse certificate</b> recording the payment of stamp duty on the <b>face of document</b> and it will become ready for execution.</li> <li>→ If a document is <b>not</b> properly stamped, neither it is rendered admissible as evidence <b>nor</b> it will be registered with Registrar of Assurances.</li> </ul>

**AIDS TO CLARITY AND ACCURACY/RULES OF INTERPRETATION**

**Q30.** "Drafting of documents is very important part of legal documentation. Documents are subject to interpretation when no clear meaning could be inferred by simple reading of documents." Explain this statement with reference to the rules relating to interpretation of formal legal documents.

[June 2015 (10 Marks)]

OR

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

[June 2011 (8 Marks)]

OR

Principles of interpretation of deeds and documents? OR Rules of Interpretation?

[Dec. 2017 (5 Marks)]

**Ans.** Interpretation is the process of ascertaining the true meaning of the words used in a statute.

To adjudicate disputes where the agreement is formal and written, the following rules of the interpretation may be applied:

- (i) **Deed:** Deed constitutes a primary evidence of the terms of a contract. The law forbids any contradiction of, or any addition, subtraction or variation in a written document. **(Section 91 of the Evidence Act.)**
- (ii) **Uncertainty:** **Sec. 92 of the Evidence Act** enables the court to examine the facts and surrounding circumstances. It also permits evidence of any separate oral agreement on which the document is silent and which is not inconsistent with its terms.
- (iii) **Words and Intentions:** Clear and unambiguous words prevail over any hypothetical consideration or supposed intention.
- (iv) **Intention:** Surrounding circumstances can be seen for ascertaining the intention of the parties.
- (v) **Preliminary and Final contract:** If a contract is completed in 2 parts and any difference between the preliminary contract and final contract arises, the terms of the latter must prevail.

- (vi) **Earlier clause v. Latter clause:** If in a deed later clause destroys the obligation created by the earlier clause, the latter clause is to be rejected and the earlier clause prevails.
- (vii) **Interpretation of words:** The court must interpret the words in their popular, natural and ordinary sense, subject to following exceptions:
  - (a) If contract affords an interpretation different from the ordinary meaning of the words;
  - (b) Where the conventional meanings are not the same with their legal sense.
- (viii) **Hardship:** Hardship to either party is not an element to be considered unless it amounts to a degree of inconvenience or absurdity to such an extent that the Courts are compelled to think that such could not be the meaning of the parties.
- (ix) **Liberal Construction:** The words must be understood in their natural and ordinary meaning.
- (x) **Leave alone no clause:** Every part of the document should be given a meaning.

#### IMPORTANT TERMS AND CONDITIONS IN THE AGREEMENT

**Q31. Explain the following: Force Majeure?**

**[June 2019 (4 Marks)]**

**Ans.** One of the very important provision witnessed in modern commercial contracts relates to Force Majeure clause or excuses for non-performance.

This is also referred as '**Act of God**', which includes circumstances and events like earthquake, floods, tsunami etc., which prevents one party to perform his part of the contract.

A "**Force Majeure**" clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.

This provision defines as to what particular circumstances or events beyond the control of the party 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 party to delay or refuse the performance.

It may be further provided that events of a similar nature which are beyond the control of the party and which could not have been avoided with due diligence would also furnish the above relief.

A force majeure may operate to excuse all or any part of the obligations of one or both parties to agreement.

19:11 TAXMANN



# 3

## CHAPTER

# LAWS RELATING TO DRAFTING AND CONVEYANCING

## PART – A: INDIAN CONTRACT ACT, 1872

### COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSAL

**Q1. Discuss Proposal or Offer and mention the essentials of Proposal.**

**[Scoring Question]**

**Ans. Proposal:** When one person *signifies to another his willingness to do or to abstain from doing anything*, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. [Sec. 2(a)]

The person making the proposal or offer is called the *proposer or offeror* and the person to whom the proposal is made is called the *offeree*.

#### Essentials of a proposal

- (a) There should be at least 2 persons.
- (b) One person should express his willingness to do or abstain from doing an Act or abstinence.
- (c) The purpose should be to obtain the assent of the other on the same thing.

**Q2. Mention the types of Offers.**

**[Scoring Question]**

**Ans. There are generally 7 types of Offers:**

**There are generally 7 types of Offers with difference as to type of Offers and their parties. They are as under:**

- (1) Particular Offer/Specific Offer
- (2) General Offer
- (3) Cross Offers
- (4) Open/Continuing/Standing Offer
- (5) Counter Offer
- (6) Contracts by Post
- (7) Contracts over the Telephone

**Q3. Mention the rules governing offers.**

**[Scoring Question]**

**Ans.** A valid offer must comply with the following rules:

- (a) An offer must be **clear, definite, complete and final**. It must not be vague. For example, a promise to pay an increased price for a horse if it proves lucky to promisor, is too vague and is not binding.
- (b) An offer **must be communicated to the offeree**. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.
- (c) The communication of an **offer may be made by express words-oral or written-or** it may be implied by conduct.
- (d) The communication of the **offer may be general or specific**. Where an offer is made to a specific person it is called specific offer and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals i.e., the world at large, it is a general offer.

**Q4. Discuss in brief Offer and invitation to offer.**

**[Scoring Question]**

**Ans.** Invitation to offer is a communication to invite certain person(s) or public for making offer. The same may be understood from below mentioned examples:

- (a) An invitation **to treat or an invitation to make an offer**: e.g., an auctioneer's request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self-service store or a shopkeeper's catalogue of prices are invitations to an offer.
- (b) A **mere statement of intention**: e.g., an announcement of a coming auction sale.
- (c) A mere **communication of information** in the course of negotiation: e.g., a statement of the price at which one is prepared to consider negotiating the sale of piece of land.

An offer that has been communicated properly continues as such until it lapses, or **until it is revoked by the offeror, or rejected or accepted by the offeree**.

**Q5. Discuss in brief about Communication and Essentials of section 3.**

**[Scoring Question]**

**Ans.** According to section 3 of the Indian Contract Act, 1872, the communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are **deemed to be made by any act or omission of the party proposing, accepting or revoking** by which he **intends to communicate such proposal, acceptance or revocation**, or which has the effect of communicating it.

Essentials of section 3:

- (a) The purpose of section 3 is to provide the provision relating to 4 incidents:

- Communication of the Proposal,
  - Acceptance of the Proposal,
  - Revocation of the Proposal, and
  - Revocation of the Acceptance.
- (b) There must be an **act or omission** of the maker for acceptance and revocation.
- (c) The Act or Omission should **intend to communicate** such proposal, acceptance or revocation, or should have the effect of communicating it.

**Q6. Discuss the Essentials elements of Valid Contracts. [Dec. 2011 (5 Marks)]**

**Ans.** According to section 10 of the Indian Contract Act, 1872, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

**Therefore, the essentials of valid contracts are:**

- (a) Valid Agreement as per section 2(e) of Indian Contract Act, 1872
- (b) Free Consent of the parties
- (c) Competence of Parties
- (d) Valid Consideration
- (e) Lawful Object
- (f) Agreement not declared Void.

**Q7. Discuss in brief about Valid Consideration its essentials and Rules Governing Consideration. [Scoring Question]**

**Ans.** According to section 2(d) of ICA, consideration is: when, at the desire of the promisor, the promisee or any other person **has done or abstained from doing**, or does or abstains from doing, or **promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.**

**Essentials of Considerations:**

- Consideration should be at the desire of the person making promise. He may be the offeror or the Offeree.
- The promisee or any other person on his/her behalf has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing an act or abstinence or promise.

**Rules Governing Consideration**

- (a) Every contract must be supported by **valuable consideration** otherwise it is formally **void subject to some exceptions.**
- (b) Consideration may be by **an act of abstinence or promise.**
- (c) There must be **mutuality** i.e., each party must do or agree to do something.

- (d) Consideration must be real, and not vague, indefinite, or illusory, e.g., a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.
- (e) Although **consideration must have some value**, it need not be adequate.
- (f) **Consideration must be lawful**. If the consideration is unlawful, the agreement is void.
- (g) Consideration must be **something more than the promisee is already bound** to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration.

**Q8. Bharathi, by a deed of gift made over certain property to her daughter, Narmadha, and directing her to pay an annuity to the donor's brother, Ram, as she had promised her brother Ram before gifting the said property. On the same day, Narmadha executed a deed, in writing, in favour of the donor's brother (Uncle) agreeing to pay the annuity. Afterwards, Narmadha declined to fulfil her promise to pay her uncle saying that no consideration had moved from him. Is the contention of Narmadha tenable? [June 2024 (5 marks)]**

**Ans.** Narmadha's contention that no consideration had moved from her uncle, Ram, and thus she is not obligated to fulfil her promise to pay the annuity is not tenable. Here's why:

1. **Consideration from a Third Party:** Under the Indian Contract Act, 1872, consideration can move from a third party and does not need to come directly from the promisee. In this case, the consideration moved from Bharathi (the donor) to Narmadha by gifting the property with the condition to pay an annuity to Ram.
2. **Binding Agreement:** Narmadha executed a deed in writing on the same day agreeing to pay the annuity to Ram. This written agreement reinforces her obligation to fulfil the promise as part of the terms of the gift.
3. **Legal Precedent:** The case of *Chinnaya vs. Ramayya (1882)* supports that a contract can be enforceable even if the consideration moves from a third party. The promise to pay Ram is binding as the consideration from Bharathi (the property) fulfils the requirement of the contract.

Thus, Narmadha's refusal to pay the annuity based on the lack of direct consideration from Ram is not valid. She is legally bound to fulfil her promise as the consideration from Bharathi makes the agreement enforceable.

**Q9. Discuss in brief about Lawful Object.**

**[Scoring Question]**

**Ans.** According to section 23 of ICA, the consideration or object of an agreement is lawful, unless:

- (a) it is forbidden by law; or
- (b) is of such a nature that if permitted, it would defeat the provisions of any law; or
- (c) is fraudulent; or
- (d) involves or implies injury to the person or property of another; or

(e) the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be **unlawful and every agreement of which the object or consideration is unlawful is void.**

**Q10. Discuss in brief Agreement not declared Void. [Scoring Question]**

**Ans. The following types of agreements are void under Indian Contract Act:**

- (a) Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract - **Section 11.**
- (b) Agreement made under a mistake of fact, material to the agreement on the part of the both the parties - **Section 20.**
- (c) An agreement of which the consideration or object is unlawful - **Section 23.**
- (d) If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void - **Section 24.**
- (e) An agreement made without consideration subject to three exceptions provided to - **Section 25.**
- (f) An agreement in restraint of marriage - **Section 26.**
- (g) An agreement in restraint of trade - **Section 27.**
- (h) An agreement in restraint of legal proceedings - **Section 28.**
- (i) Agreements, the meaning of which is not certain, or capable of being made certain - **Section 29.**
- (j) Agreement by way of wager- **Section 30.**
- (k) An agreement to enter into an agreement in the future.
- (l) An agreement to do an act impossible in itself - **Section 56(1).**

### CONTINGENT CONTRACT

**Q11. Discuss in brief about Contingent Contract. [Scoring Question]**

**Ans.** According to **section 31 of ICA**, a contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. Where there is a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen — such goods are known as contingent goods. Contingent goods fall in the class of future goods. A agrees to sell a certain TV set provided he is able to get it from its present owner. This is an agreement to sell contingent goods. In such a case, if the contingency does not happen for no fault of the seller, he will not be liable for damages. Actual sale **can take place only of specific goods and property in goods passes from the seller to buyer at the time of the contract**, provided the goods are in a deliverable state and the contract is unconditional. **There can be an agreement to sell only in respect of future or contingent goods.**

## PART – B: SPECIFIC RELIEF ACT, 1963

### SPECIFIC RELIEFS

**Q12. What does Section 6 of the Specific Relief Act, 1963, deal with?**

**[Scoring Question]**

**Ans.** Section 6 provides the provisions related to *suit by person dispossessed of immovable property*. It says that if any person is *dispossessed without his consent of immovable property otherwise than in due course of law*, he or any person through whom he has been in possession or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

**However, no suit under section 6 should be brought:**

- (a) after the expiry of six months from the date of dispossession; or
- (b) against the Government.

Appeal or review is **not allowed from any order or decree** passed in any suit instituted under section 6.

**Q13. What does Section 7 of the Specific Relief Act, 1963, pertain to, and how does it relate to the recovery of specific movable property? [Scoring Question]**

**Ans.** Section 7 of the Specific Relief Act, 1963, deals with the recovery of specific movable property. It states that a person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908, which is similar to the provision for the recovery of specific immovable property.

**Q14. "A contract may not always be specifically enforceable" Comment.**

**[Dec. 2011 (4 Marks)]**

**OR**

**What are the Contracts which cannot be specifically enforced under the SRA, 1963?**

**[Dec. 2020 (3 Marks) / June 2022 (3 Marks)]**

**Ans.** The specific performance of a contract is enforceable by the court subject to the provisions contained in section 11(2), section 14 and section 16.

**According to section 14, the following contracts cannot be specifically enforced, namely:**

- (a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of **section 20**;
- (b) a contract, the performance of which **involves the performance of a continuous duty** which the court cannot supervise;

- (c) a contract which is so *dependent on the personal qualifications* of the parties that the court cannot enforce specific performance of its material terms; and
- (d) a contract which is in *its nature determinable*.

**Q15. 'A' Contract to sell 'B' a piece of land consisting of 100 bighas turn out that 98 bighas of the land belongs to 'A' and the two remaining bighas to a stranger, who refuses to part with them. 'B' files the suit for specific performance against 'A' Decide with the help of the legal provisions, whether the specific performance suit is maintainable. [Dec. 2018 (5 Marks)]**

**Ans.** Section 12(2) of the Specific Relief Act, 1963 provides that where a *party to a contract is unable to perform the whole of his part*, but the part which must be left unperformed *by only a small proportion to the whole in value and admit compensation in money*, the Court may, at the suit of the either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

- A contract to sell *B a piece of land consisting of 100 bighas*. It turns out that 98 bighas of the land belongs to A and the two remaining *bighas to a stranger, who refuses to join with them*.
- The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money.
- A may be *directed at the suit of B to convey to B*, the 98 bighas and to make compensation to him for not conveying the two remaining bighas; B may be directed at the suit of A, to pay to A, on receiving the conveyance and possession of the land, *the stipulated purchase money less the sum awarded as compensation for the deficiency*.

**Q16. Against whom specific performance of a contract may be enforced under SRA, 1963? Explain. [June 2019 (3 Marks)]**

**Ans.** As per section 15 the specific performance may be obtained by:

- (a) any party thereto;
- (b) the *representative in interest or the principal*, of any party thereto.
- (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;
- (d) where the *contract has been entered into by a tenant for life* in due exercise of a power, the remainderman;
- (e) *a reversioner in possession*, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

- (f) **a reversioner in remainder**, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;
- (g) when a **limited liability partnership has entered into a contract** and subsequently becomes amalgamated with another limited liability partnership, the **new limited liability partnership which arises out of the amalgamation**.
- (h) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
- (i) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:  
**Provided** that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

**Q17. Mention person against whom specific performance cannot be enforced.**

**[Dec. 2012 (5 Marks)]**

**Ans. Section 16** Specific performance of a contract cannot be enforced in favour of a person:

- who has obtained substituted performance of contract under section 20; or
- who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

**Contract to sell or let property by one who has no title, not specifically enforceable**  
**[Section 17]**

**A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor:**

- (a) who, knowing himself not to have any title to the property, has contracted to sell or let the property;
- (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

The provisions above are also **applicable to contracts for the sale or hire of movable property** to the possible extent.

**Non-enforcement except with variation [Section 18]**

**Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:**

- (a) where by fraud, mistake of fact or mis-representation, the written contract of which performance is sought is in its **terms or effect different from what the parties agreed to**, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;
- (b) where the object of the parties was to **produce a certain legal result** which the contract as framed is not calculated to produce;
- (c) where the parties have, subsequently to the **execution of the contract, varied its terms**.

**Q18. A, a Hindu, in a suit to which B, his alleged wife is the defendant, seeks a declaration that his marriage was duly solemnised and prays for the order of restitution of conjugal rights. The Court makes the declaration and order of restitution of conjugal rights. C, a third party claiming that B is his wife, sues A for the recovery of B. Decide whether the declaration made in the former suit is binding upon C. [Dec. 2014 (5 Marks)]**

**Ans.** According to **section 35** of the Specific Relief Act, 1963, a declaratory decree is binding only on the parties to the suit in which there decree is passed, or on persons claiming through such parties respectively. Since, C was not party to the suit in which decree was passed, it is not binding against him.

## **PART – C: TRANSFER OF PROPERTY ACT, 1882**

### **SALE**

**Q19. In the light of judicial pronouncements, discuss the following: Transfer of immovable property by way of sale can be effected only by a deed of conveyance. [June 2018 (4 Marks)]**

**Ans.** Usually a transaction of a sale of immovable property involves 2 documents, e.g., Agreement to sell and the Conveyance Deed i.e. sale deed. But with only a Sale Deed the transaction of sale can be completed.

**In Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana** the Supreme Court of India observed that it has become common practice to effect transfers of immovable property by way of either General Power of Attorney (GPA) sales or sale agreement, GPA or will transfers in order to evade, inter alia, the payment of duties, taxes and other fees payable on transfer and registration.

The Apex Court held that such transactions are illegal and cannot be recognized as valid under law. The Apex Court further observed that a transfer of immovable property by way of sale can be effected only by a deed of conveyance. In the absence of a deed of conveyance, duly stamped and registered, no right, title or interest in an immovable property can be transferred.

**Q20. Drafting of a sale deed of immovable property requires comprehensive coverage of technicalities like offer, transfer, etc. Mention eight important covenants of sale deed of ABC Company's factory premises.**

[June 2012 (8 Marks)]

OR

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

[June 2010 (5 Marks)]

OR

**Write notes on the following: Conditions to be kept in mind while drafting a Sale Deed.**

[June 2021 (4 Marks)]

**Ans.** Following are the important aspects which should be kept in mind while drafting a Sale Deed:

<b>Lawful Consideration and Object</b>	<b>According to section 23 of Indian Contract Act, 1872</b> the consideration and object must be lawful.
<b>Competence of Person to Transfer</b>	<p><b>For a company</b>, the test of competence to enter into a transaction of sale or purchase is that its Board of Directors should authorise a person under the resolution passed in their meeting held in conformity with the <b>AOA</b> and having <b>object clause</b> to sell or purchase immovable property under its <b>MOA</b></p> <p><b>In case the other party is an individual</b> who is either selling to the company or purchasing from the company:</p> <p>(a) Should be of the <b>age of majority</b>, [Section 11]            (b) Be of <b>sound mind</b>; [Section 12 of Contract Act, 1872]            (c) <b>Not be disqualified</b> from contracting by any law to which such individual is subjected.</p>
<b>Transfer of All Interest - in the Property</b>	All interests which a transferor is capable of passing in the property as legal incident of the transfer should be <b>explained</b> (detailed out) in the document. <b>For example</b> , if it is transfer of land, the easements annexed thereto, the rents of profits thereof, things attached thereto etc.

<b>Absolute Transfer</b>	The transfer should be <b>free of any conditions or limitations</b> which may <b>inhibit (obstruct/prevent)</b> the other party to make full use of the property in exercise of legal rights.
<b>Absolute Interest in the Property</b>	The interest being transferred in the property <b>should not be conditional</b> which may <b>restrict full enjoyment</b> of the property by the transferee.
<b>Justification for Transfer</b>	<b>Cogent (clear/logical) reasons</b> for the transfer be given <b>so as to establish bona fide base for the transaction</b> and to avoid <b>eventualities of fraud</b> and multiple litigation therefrom.
<b>Creditors' Interest</b>	<b>Law protects creditors' interest</b> in the transferred property.
<b>Transfer in Good Faith and with Full Authority</b>	Where the property is transferred by a <b>person not to be the real owner</b> , it is necessary to make such transfer valid for the transferor should have the <b>authority to transfer and he must exercise this authority in good faith.</b>
<b>Protection for Defective Title</b>	Law protects the transferee who acquires the immovable property under good faith and for <i>bona fide</i> consideration but by any circumstance unknown to him is rendered to have defective title, [Sec. 51 of the Transfer of Property Act, provides such <b>protection to bona fide transferees</b> acquiring properties in good faith.]
<b>Precautions</b>	To avoid fraudulent transfers, the draftsman should <b>ensure that the title to such property has been investigated by competent advocate</b> and he has certified the title free from any encumbrance whatsoever.

**Q21. Drafting of a sale deed of immovable property requires comprehensive coverage of technicalities like offer, transfer, etc. Mention eight important covenants of sale deed of ABC company's factory premises.**

**[June 2012 (8 Marks)]**

**Ans. THIS AGREEMENT OF SALE** is made and executed at ..... (place) on the..... day of..... 2018, **BY AND BETWEEN** ABC Ltd. having its registered office at ..... acting through its director Mr. X authorized vide Board resolution dated..... **(Hereinafter called the VENDOR)**, which expression shall include their respective heirs, executors, administrators, legal representatives and assigns unless repugnant to the context **OF THE ONE PART.**

**AND**

CD son of ..... resident at ..... **(Hereinafter called the PURCHASER)** which expression shall include their

respective heirs, executors, administrators, legal representatives and assigns unless repugnant to the context **OF THE OTHER PART.**

**WHEREAS** the vendor is the **sole and absolute owner** of the property more fully set out in the Schedule **hereunder and hereafter** called as the "**SCHEDULED PROPERTY**".

**AND WHEREAS** the vendor being in need of funds for the **purpose** of..... has decided to sell the property more fully described in the Schedule hereunder and the purchaser has offered to purchase the same.

**AND WHEREAS** it is agreed that the vendor shall sell and the purchaser shall purchase the said property for a sum of Rs..... (Rupees .....) free of all encumbrances.

**NOW THIS AGREEMENT OF SALE WITNESSED AS FOLLOWS:**

1. The **Sale consideration** of the Scheduled Property is fixed at Rs..... (Rupees.....only) free of all encumbrances.
2. The purchaser has paid to the vendor this day, a sum of Rs..... (Rupees .....) by way of **earnest money** for the due performance of the agreement, the receipt of which sum the vendor hereby acknowledges.
3. The purchaser shall pay to the vendor the **balance sale price** of Rs..... (Rupees ..... only) before registration of the conveyance deed. (i.e. absolute Sale Deed and thus completing the Sale transaction).
4. The **time for performance** of the agreement shall be..... months from the date hereof and it is agreed that the time fixed herein for performance shall be of the **essence of this agreement.**
5. The vendor agrees that he will **deliver vacant possession** of the property to the purchaser before registration of the conveyance deed.
6. The vendor hereby assures the purchaser that he/she has **absolute power to convey** the same and **there are no encumbrances, liens, charges, Government dues, attachments, acquisition, or requisition, proceedings etc.**
7. The vendor shall **hand over all the title deeds of the property** to the purchaser or an advocate nominated by him within..... days from the date of this agreement **for scrutiny of title** and the opinion of the vendee's advocate regarding title to the property shall be final and conclusive. The purchaser shall duly intimate

the vendor about the approval of title within..... days after delivering the title deeds to him or to his advocate.

8. The vendor shall **execute the conveyance deed** in favour of the purchaser or his nominee as the purchaser may require.
9. If the vendor's title to the property **is not approved by the purchaser**, the vendor shall **refund** the purchaser the **earnest money** received by him under the agreement and on failure of the vendor to refund the same within..... days, he shall be liable to repay the same **with interest** thereon at the rate of..... per cent per annum.
10. If the **purchaser commits a breach of the agreement**, he shall **forfeit the earnest amount** of Rs..... (Rupees ..... ) paid by him to the vendor.
11. If the **vendor commits a breach of the agreement**, the vendor shall **not only refund** to the purchaser the sum of Rs..... (Rupees.....) received by him as **earnest money**, but shall also pay to the purchaser **an equal sum by way of liquidated damages**.
12. **IT IS AGREED** between the parties that **all expenses towards Stamp Duty and Registration charges shall be borne by the PURCHASER only**.
13. The **original of the "AGREEMENT"** signed by both the parties **shall be with the PURCHASER** and **copy of the same** similarly signed shall be with the **VENDOR**.

#### SCHEDULE OF PROPERTY

House No./ Plot No.:

Situated at:

District & State:

On its North is.....

South is.....

East is.....

West is.....

(As per the site plan attached herewith)

**IN WITNESS WHEREOF** the vendor and the purchaser have signed this agreement of sale/purchase on the day, month and the year above written, in the presence of the following witnesses:

**WITNESSES:**

- (1) Name:  
 Father's Name:  
 Address:  
 Signature:

**Vendor**

- (2) Name:  
 Father's Name:  
 Address:  
 Signature:

**Purchaser**

**Q22. Mr. AB is a Karta of AB-HUF A Joint Family. Family is engaged in various businesses and one of its business suffered heavy losses. With a view to fund the losses and its debts, AB-HUF decided to sale one of its property. You are required to draft a Deed of Sale of Joint Family property. Assume other facts, if required. [Dec. 2021 (5 Marks)]**

**Ans. THIS DEED OF SALE** made on this..... day of ..... by and between **AB for self and as Karta of AB-HUF** and representing all other coparceners viz., his sons named.....all constituting a Hindu Mitakshara undivided family of, etc., (**hereinafter called "the Vendor"**) which expression shall, where the subject or context allows, be deemed to include at all times hereafter all persons being from time to time the coparceners of the said family of the one part

**AND**

**CD of etc. (hereinafter called "the purchaser") of the other part.**

**WHEREAS** the said Joint family for several years past owned and still owns and possess inter alia the Lands, hereditaments and premises described in Schedule A hereto as a part of its estate.

**AND WHEREAS** the said joint family also carried on and still carries on various businesses under the different name and styles. One of its business running in the name and style of..... which suffered a heavy loss and its capital and reserves estimated at Rs..... in the year ..... owing to out-break of fire ..... at its godown on the day of .....

**AND WHEREAS** the joint family could not also pay its statutory dues and other capital and revenue liabilities of the said business aggregating to Rs..... for the years. .... and also its business debts estimated at Rs.....

**AND WHEREAS** the said joint family has at present no funds nor any other means or resources to make up the deficit as regards to the capita loss and to pay the liability of the family as regards the said statutory dues except by sale of one of its properties.

**AND WHEREAS** in the circumstances aforesaid the said AB for self and as Karta of the said AB-HUF has by an agreement dated..... agreed with the said CD for sale of the property fully mentioned and described in the Schedule hereto at and for the sum of Rs.....

**AND WHEREAS** such sale is in the interest and for the benefit of the said joint family and its estate.

**AND WHEREAS** the said CD after bona fide and independent enquiry is satisfied about the present financial condition of the family and in particular the debts and liabilities as aforesaid and the reasons for, circumstances behind and the necessary for the sale.

**NOW THIS, INDENTURE WITNESSETH AS UNDER:**

- (1) That in pursuance of the said agreement and in consideration of the sum of Rs..... paid by the said CD to the said AB simultaneously with the execution of these presents he, the said AB do hereby and hereunder for self and as Karta for and representing all other coparceners of the said joint family do hereby grant, sell, convey, transfer, assign and assure the said property together with all houses, buildings, fixtures etc., unto and to the use of the said CD absolutely and forever.
- (2) The Property sold is free from all encumbrances, charges, mortgages. Liens, prior agreement to sell, court proceedings, gift, of any nature whatsoever.
- (3) That from the date of execution of this Sale deed the CD becomes the sole and absolute owner of the said property under sale and shall be at full liberty to use, enjoy and utilize the said property under sale and also have right, power, absolute authority and be fully competent to sell or dispose of the same to anyone in any manner as deem fit.
- (4) That after the execution of this Sale deed neither the AB and the coparceners nor their legal heirs, may raise any objection or create any charge or demand any share in the said property under sale hereafter.

**IN WITNESS WHEREOF** the parties hereto have signed this Deed of Sale on the date mentioned against their respective Signatures.

**Witness:**

Signed, sealed and delivered

AB.....

CD.....

<b>Q23. Draft specimen agreement to sell patent rights.</b>	<b>[Scoring Question]</b>
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**Ans. SPECIMEN AGREEMENT TO SELL PATENT RIGHTS**

THIS AGREEMENT made on this \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_

**BETWEEN**

\_\_\_\_\_ S/o \_\_\_\_\_ r/o \_\_\_\_\_ hereinafter referred to as "the patentee" (which expression shall unless contrary to the context or meaning thereof including his successors, executors, administrators, legal representatives and assigns) of the one part.

**AND**

\_\_\_\_\_ S/o \_\_\_\_\_ r/o \_\_\_\_\_ hereinafter referred to as "the assignee" (which expression shall unless contrary to the context or meaning thereof including his successors, executors, administrators, legal representatives and assigns) of the other part.

The patentee and the assignee hereinafter are collectively referred to as the "**Parties**".**WHEREAS**

- (1) The patentee being inventor of \_\_\_\_\_ and holding patent rights (**more specifically stated in Schedule I hereto**) in exclusively manufacturing/marketing of products of several descriptions/sizes in using the patented process.
- (2) The assignee has approached the patentee in buying all rights/interests of the patentee relating to the said patent rights. The patentee has consented to vend those rights to the assignee on terms/conditions hereinafter appearing.

**NOW IT IS HEREBY CONSENTED AS FOLLOWS:****Agreement to Assign**

That in consideration of a sum of Rs. \_\_\_\_\_ (the patentee hereby acknowledges its receipt) to payable by the assignee to patentee and a further payment of Rs. \_\_\_\_\_,

the inventor shall vend to assignee all his rights/interests with concerning the said patent rights.

### **Deed of Assignment**

The patentee shall be executing an assignment deed and do all things as may be compulsory in vest owing said patent rights in the assignee.

### **Patentee's Agreement**

The patentee hereby agrees that, as per assignment of patent rights to the assignee, he shall correspond all progress made by him in said invention to assignee and shall help assignee for doing all acts, deeds/things compulsory for procuring a patent for such progress which shall be bestowed in the assignee on the same term/conditions as if such progress had formed portion of original invention.

### **Assignee's Agreement**

The assignee hereby agrees that, as per assignment of patent rights to him, he shall not do anything resulting in cancellation of said patent rights and shall, in the eventuality of such revocation, pay to patentee as liquidated compensation, the sum of Rs. \_\_\_\_\_, respectively.

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

**(The Schedule I hereinafter referred to)**

\_\_\_\_\_  
The Patentee  
(Name, Signature and Details)

\_\_\_\_\_  
The Assignee  
(Name, Signature and Details)

Witnesses

\_\_\_\_\_  
(Name, Signature and Details)

\_\_\_\_\_  
(Name, Signature and Details)

## **MORTGAGE AND ITS TYPES**

**Q24. Comment on the following: A mortgage is a transfer of interest in any property?**  
[June 2016 (5 Marks)]

**Ans.** The term mortgage has been defined under **section 58(a) of the Transfer of Property Act, 1882**. As per this, a mortgage is the **transfer of an interest in specific immovable property** for the purpose of securing any of the following.

- The **Payment of money advanced or to be advanced, by way of loan**; or
- An **existing or future debt**; or
- The **“performance of an engagement”** which may give rise to pecuniary liabilities.

It may be noted that in order to constitute a mortgage, the transfer of interest in immovable property must be for one of the aforesaid purposes.

In a mortgage **out of bundle of rights** which constitute ownership, some are transferred to the mortgagee and the other rights remain vested in the mortgagor.

The word **specific shows** that the description of the immovable property should not only be free from ambiguity and uncertainty, but that it should be specific as distinguished from general. A proper description of the property is necessary **to create a mortgage and for its registration**.

The word **‘engagement’** means a contract and the qualification **“as may give rise to pecuniary liability”** means a contract the non-fulfilment of which may result in a liability to pay money.

**Q25. Write note on the following: Types of Mortgage. [June 2017 (4 Marks)]**

**OR**

**Explain the following: Special advantages of Mortgage by deposit of title deeds. [June 2012 (4 Marks)]**

**OR**

**Distinguish between the following: Usufructuary Mortgage and Mortgage buy Conditional Sale. [June 2022 (4 Marks)]**

**OR**

**In a simple mortgage, the security for the debt is two-fold. Elucidate and cite case law, if any. [June 2024 (5 Marks)]**

**Ans.**

<p><b>Simple Mortgage</b> [Section 58(b)]</p>	<p>When the mortgagor, <b>without delivering possession</b> of the mortgaged property, gives a <b>personal undertaking to the mortgagee to repay</b> the amount due under the mortgage.</p> <p><b>Features -</b></p> <p>(i) There is <b>twofold</b> security:</p> <p style="margin-left: 20px;">(a) <b>Personal security</b> of mortgagor and</p> <p style="margin-left: 20px;">(b) <b>The mortgaged property.</b></p> <p>(ii) The <b>possession of property</b> is kept by the mortgagor.</p> <p>(iii) The <b>mortgagee can sell</b> the mortgage property <b>subject to decree of court.</b> (i.e. An express or implied power is given to</p>
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	<p>the mortgagee to cause the Property to be sold through the intervention of the Court.)</p> <p>(iv) <b>Reg. is compulsory.</b></p> <p>(v) There is <b>no transfer of ownership.</b></p> <p>(vi) <b>No right of possession or foreclosure is available</b> to the mortgagee.</p>
<p><b>Mortgage by conditional Sale</b> [Section 58(c)]</p>	<p>Where the mortgagor <b>ostensibly (apparently)</b> sells the mortgaged property on any of the following conditions:</p> <p><b>Features-</b></p> <p>(a) If the <b>loan is not repaid</b> at the stipulated time, the sale will become <b>absolute and binding;</b></p> <p>(b) If the <b>loan is repaid</b>, at the stipulated time, the sale will become <b>void and</b> the mortgagee shall <b>retransfer the property to the mortgagor.</b></p> <p>→ Unlike in the case of a simple mortgage, <i>the mortgagor in this case does not bind himself personally to repay the debt.</i></p> <p>→ The mortgagee is <i>not given the possession of the property.</i></p> <p>→ The mortgagee's remedy is '<i>foreclosure</i>', (i.e. he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage.)</p>
<p><b>Usufructuary mortgages.</b> [Section 58(d)]</p>	<p><b>Where the mortgagor-</b></p> <p>(1) <b>Deliver possession</b> of mortgaged property to the mortgagee; and</p> <p>(2) <b>Authorises the mortgagee:</b></p> <p>(a) <b>To retain</b> such possession <b>until</b> payment of the mortgage money; and</p> <p>(b) <b>To receive</b> the rents and profits accruing from the property or any part of such rents and profits for the interest or in payment of mortgage money etc.</p> <p>(c) The mortgagee in this case has <b>no remedy</b> either by <b>foreclosure or by sale.</b></p>
	<p>These types of mortgages have <b>features of both, simple mortgage and mortgage by conditional sale.</b> Hence it is a <b>combination</b> of both.</p> <p>Here the mortgagor <i>transfers the ownership of the property as security</i> and the mortgagee <b>promises to retransfer the ownership</b>, if the money is paid within a definite time.</p>

<p><b>English Mortgage</b> [Section 58(e)]</p>	<p>There is also a <b>personal covenant</b> as the <b>mortgagor</b> promises to repay within a certain date. The remedy of the mortgagee is <i>sale of the property to recover the debt</i>.</p> <p>The following are the main characteristics of an English mortgage:</p> <ul style="list-style-type: none"> <li>✓ English mortgage is followed by <b>delivery of possession</b>.</li> <li>✓ There is a <b>personal covenant</b> to pay the amount.</li> <li>✓ It is effected by an <b>absolute transfer of property, with a provision for retransfer</b> in case of repayment of the amount due.</li> <li>✓ <b>Power of sale out of Court order</b> is given on certain persons under certain circumstances.</li> </ul>
<p><b>Mortgage by deposit of title deeds</b> [Section 58(f)]</p>	<p>Mortgage by deposit of title deeds is called in English law as <i>equitable mortgage</i>.</p> <p>It is an <b>oral transaction</b> and no documents like Deed of Mortgage is required to be executed. It is however, prudent to have a record of transaction to avoid difficulties to establish the creation of the mortgage.</p> <p>In this case, a <i>Memorandum of Mortgage by deposit of title deeds</i> is prepared by the <b>mortgagee</b> to secure the specific mortgage money.</p> <p><b>The main characteristics of this type of mortgage are as under:</b></p> <ol style="list-style-type: none"> <li>(a) Debt even time barred, present and <b>future advances</b> are covered under the equitable mortgage. <b>(In other types of mortgage, future advances are not covered.)</b></li> <li>(b) <b>Intent to create security</b> by deposit of title deeds should be present at the time of such deposit in the mortgagor.</li> <li>(c) <b>Neither ownership nor possession</b> of the property passes to the mortgagee under the equitable mortgage.</li> <li>(d) <b>Registration is not necessary</b>, even if there is a Written record of the deposit under <b>section 59</b>.</li> <li>(e) This mortgage <b>prevails against a subsequent transferee</b> who takes under a registered instrument.</li> </ol> <p><b>Equitable mortgage is preferred by the lenders/banks/creditors as well as the commercial enterprises because of the inherent advantages viz.</b></p> <ul style="list-style-type: none"> <li>❖ To save time and avoid inconvenience of documentation, and registration;</li> <li>❖ To minimise cost of creating mortgage and cost of borrowed funds by saving stamp duty;</li> </ul>

	<ul style="list-style-type: none"> <li>❖ To maintain secrecy of the debt transaction;</li> <li>❖ <b>Section 180 of the Companies Act, 2013.</b></li> </ul>
<b>Anomalous mortgage</b> [Section 58(g)]	A mortgage, which doesn't belong to any of the above categories, is called an anomalous mortgage. It is generally combination of two or more mortgages e.g. a combination of a simple and a Usufructuary Mortgage.

**Q26. Explain the following: Main characteristics of the Equitable Mortgage.**  
[Dec. 2021 (4 Marks)]

**Ans. The main characteristics of the Equitable 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) 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 authorized.
- (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.

**Q27. Usufructuary Mortgage is similar to English Mortgage. Whether this statement is correct? Justify your answer.**  
[June 2017 (4 Marks)]

**OR**

**Distinguish between the following: English Mortgage and Usufructuary Mortgage.**  
[Dec. 2018 (4 Marks)]

**Ans.** 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 retransfer it to the mortgagor upon payment of the mortgaged money as agreed.

In a **Usufructuary 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.

**Hence, Usufructuary mortgage and English mortgage are not similar.**

**Q28. Distinguish between the following: Release and Reconveyance of Mortgaged Assets. [June 2018 (4 Marks)]**

**Ans.** Release of any of the mortgaged assets or reconveyance of the mortgaged property could be done by a registered document in case the mortgage has been created in the form other than equitable mortgage by deposit of title deeds by a registered deed of mortgage.

In those cases where release or reconveyance of mortgaged property covered under equitable mortgage is sought by the mortgagor, the same could be done by releasing the relevant title documents and re-depositing the remaining title deeds by rewriting the memorandum for creation of equitable mortgage. On redemption of equitable mortgage all the title deeds could be released by the mortgagee to the mortgagor by personal hand delivery and against accountable receipts from the mortgagor.

**Q29. Draft a specimen of memorandum of mortgage by deposit of title deeds. [Dec. 2019 (4 Marks)]**

**Ans. Memorandum that** this.....day of..... 2019, '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.....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..... 2019.**

**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.**

**Q30. Draft a specimen deed of Usufructuary Mortgage. [Dec. 2013 (8 Marks)]**

**Ans. THIS DEED OF MORTGAGE** is made and executed at ..... Day of..... 2018, **BY AND BETWEEN 'AB'** of etc. (hereinafter called "the Mortgagor") of the One Part,

**AND**

'CD' of etc. (hereinafter called "the Mortgagee") of the Other Part,

**WITNESSES that** on consideration of the sum of Rs.....now paid to the Mortgagor by the Mortgagee (the receipt whereof the Mortgagor does hereby acknowledge), the said 'AB' hereby conveys to the said 'CD'. All that etc. (describe the property): from this day **AND THAT the Mortgagee shall be in possession of the mortgaged property** under the terms of the deed for securing payment on the..... Day of..... 2018, of the principal sum secured, with the interest thereon at..... per cent per annum, which mortgage money will be **set off** against the **usufruct** of the mortgaged property, and the Mortgagee does hereby promise to keep clear accounts thereof.

**THE MORTGAGOR** hereby agrees that the Mortgagee shall **retain possession** of the mortgaged property until the principal sum together with the interest due be paid off out of the proceeds of the property and on payment of the aforesaid sum, the Mortgagee shall execute and register a release of the mortgaged property in favour of the Mortgagor, **AND THAT** the Mortgagee also shall not to, execute, perform nor suffer to the contrary any act deed or thing whereby or by reason or means whereof the value of the said property in his possession may be **diminished** or the same may otherwise be **prejudiced in title or estate**.

**THE MORTGAGOR** does also agree to pay the **Government revenue and the municipal tax** of the said property regularly and in case he fails to make such payment, the Mortgagee shall be at liberty to pay such revenue and taxes, and such sum paid shall be considered an **additional principal sum advanced to the Mortgagor**, and shall carry interest at the rate stipulated above.

**IN WITNESS WHEREOF** the parties herein under have set their hands on the date and year hereinabove mentioned in the presence of:

**Witnesses:**

1.

..... 'AB'

2.

..... 'CD'

**Q31. Draft the following Documents; Deed of Redemption or Reconveyance of Mortgaged property by the Mortgagor in favour of the Mortgagee.**

[Dec. 2019 (4 Marks)]

**OR**

**Draft a Deed of Redemption or Reconveyance of mortgage property by the mortgagor in favour of the mortgagee.**

[June 2021 (6 Marks)]

**Ans. THIS DEED** is made the..... day of..... 20..

**Between**

'A' of etc. (hereinafter called "the mortgagee") of the One Part

**And**

'B' of etc. (hereinafter called "the mortgagor") of the Other Part.

**WHEREBY** by a mortgage deed dated..... the property mentioned in that deed was mortgaged by the said 'B' in favour of the said 'A' to secure payment of the amount of Rs..... with interest @..... per cent per annum.

**NOW THIS DEED OF RECONVEYANCE WITNESSETH:**

That in consideration of all principal moneys and interest secured by the said mortgage deed dated..... having been paid, the receipt whereof the said 'A' hereby acknowledges.

They said 'A' as mortgagee hereby redeems or reconveys unto the said 'B' all the property comprised in the said mortgage deed to hold the same up to and to the use of the said 'B' as absolute owner discharged from all principal money and interest secured by and from all claims and demands under the aforesaid mortgage deed.

Mortgagee

Mortgagor

Witness

Witness

Date & Place

**LEASE**

**Q32. Comment on the following: A lease of Immovable property is a transfer of right.**

[June 2016 (5 Marks)]/[Dec. 2014 (4 Marks)]

**OR**

**In light of judicial pronouncements, discuss the following:**

**"A lease is a transfer of a right for use of equipment/real property for a consideration."**

[Dec. 2014 (4 Marks)]

**Ans. Chapter V of the Transfer of Property Act, 1882** contains the statutory provisions governing lease. This chapter comprises of **sections 105 to 117.**

According to **section 105** of Transfer of Property Act, 1882:

“A lease of **immovable property** is a **transfer of a right to enjoy such property**, made for a **certain time, express or implied, or in perpetuity**, in consideration of a **price paid or promised, or of money, a share of crops, service or any other thing of value**, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms”.

- The transferor is called the lessor,
- The transferee is called the lessee,
- The price is called the premium, and
- The money, share, service or other thing to be so rendered is called the rent.

- Thus, lease is a **contractual arrangement**, it **originates from a contract between the lessor and the lessee** and is **regulated** by the terms, conditions and covenants of such contract.
- In other words, 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 lessor and 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.

#### THE ESSENTIAL LEGAL ELEMENTS OF LEASE ARE:

- (a) The parties i.e. lessor or lessee;
- (b) The subject matter of lease i.e. the property to be leased;
- (c) Demise or partial transfer of such property;
- (d) The term and period of lease; and
- (e) The consideration or rent.

**Q33. What are the crucial legal components that form the foundation of a lease agreement, encompassing the identification of the parties involved, both lessor and lessee? [Scoring Question]**

**Ans. THE ESSENTIAL LEGAL ELEMENTS OF LEASE ARE:**

<b>Parties</b>	The parties to a lease are the lessor and the lessee. The lessor is also called the landlord and the lessee the tenant.
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<b>Subject matter of lease</b>	The subject matter of lease must be immovable property. The word "immovable property" may not be only house, land but also benefits to arise out of land, right to collect fruit of a garden, right to extract coal or minerals, rights of ferries, fisheries or market dues. The contract for right for grazing is not lease. A mining lease is lease and not a sale of minerals.
<b>Duration of lease</b>	The right to enjoy the property must be transferred for a certain time, express or implied or in perpetuity. The lease should commence either in the present or on some date in future or on the happening of some contingency, which is bound to happen. Though the lease can commence from a past day, but that is for the purpose of computation of lease period, as the interest of the lessee begins from the date of execution. No interest passes to the lessee before execution. In India, the lease may be in perpetuity.
<b>Consideration</b>	The consideration for lease is either premium or rent, which is the price paid or promised in consideration of the demise. The premium is the consideration paid of being let in possession, such as Salami, even if it is to be paid in instalments.
<b>Sub-lease</b>	A lessee can transfer the whole or any part of his interest in the property by sub-lease. However, this right is subject to the contract and he can be restrained by the contract from transferring his lease by sub-letting. The lessee can create sub-leases for different parts of the demised premises. The sub-lessee gets the rights, subject to the covenants, terms and conditions in the lease deed.

**Q34. Distinguish between the following: Lease and License.**

**[Dec. 2019 (4 Marks)/Dec. 2017 (4 Marks)]**

**Ans.**

<b>BASIS</b>	<b>LICENSE</b>	<b>LEASE</b>
<b>Transfer of Interest</b>	In the case of a license, there is no such transfer, although the licensee acquires a right to occupy the land.	In a lease, there is a transfer of interest in land.
<b>Heritable</b>	It's a personal non-heritable right.	It's a heritable right in rem.

BASIS	LICENSE	LEASE
Transferable	Licenses are non-transferable.	Leases are generally transferable.
Registration	As it is an instrument GRANTING right, registration is optional.	As it is an Instrument CREATING right registration is mandatory.
Transferee bound	The transferee of the licensor is not bound by the license.	The transferee of the lessor is bound by the lease.
Termination upon Death	Death of licensor terminates the license.	Whereas the death of the lessor does not terminate the lease.
Breach of Deed	In the case of breach of license deed, the aggrieved party can only claim the compensation.	In case of breach of lease deed, the aggrieved party can claim for the SPECIFIC PERFORMANCE.
Governing Act	It's governed by Indian Easement Act, 1882.	It's governed by Transfer of Property Act, 1882.
Consideration	Consideration is paid by way of fee.	Consideration is paid by way of rent.

Q35. In the light of judicial pronouncement on the subject distinguish in what respects should a lease deed be different from lease and license agreement.  
[Dec. 2017 (4 Marks)]

Ans. LEASE

A "lease" of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

### LICENSE

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

### Judicial precedents on distinction between lease and license

**Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala 1988 SCC 155**

The Supreme Court has held: "In order to determine whether a document created 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."

**Rajbir Kaur & Anr. v. M/s. S. Chokesiri & Co. 1988 (2) SCJ 316**

"In order to determine whether a document created 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:**

- a. The intention of the parties
- b. Whether the agreement creates an interest in the property.

**Q36. What is the difference between 'Mortgage' and 'Lease' from the point of view of drafting of an agreement? [Scoring Question]**

Ans.

**MORTGAGE**

According to section 58 of the Transfer of Property Act, 1882, a "mortgage" is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

Mortgage of property gives the lender a right to acquire and sell the property in case of default by the borrower in repayment of either the loan amount or other dues in accordance with the agreed terms and conditions. It creates a legally-binding contract between the parties.

- ❖ **Immovable property** includes lands, benefits arising out of the land and things attached to it and does not include standing timber, growing crops or grass.
- ❖ **Parties to mortgage**
  - ✓ The transferor in the case of a mortgage is called a 'mortgagor'.
  - ✓ The transferee in the case of a mortgage is called a 'mortgagee'.
- ❖ **Mortgage money**

The principal money and interest of which payment is secured for the time being are called the 'mortgage money'.

### ❖ Mortgage deed

The instrument, if any, by which a transfer is effected is called a “mortgage deed”.

### LEASE

Lease is a contract between lessor and lessee for the fixed term for the use on hired as specific asset selected by lessee. Lessor retains ownership of the assets and lessee gets the possession for the use of the asset on payment of specified rental over a period.

In every State there is a legislation providing for the rights of lessors and lessees of residential and commercial buildings. Thus the local rent control acts govern the leasing agreements. They override the provisions of the Transfer of Property Act.

### **As per section 105 of the Transfer of Property Act**

Lease is defined as “A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lessor, lessee, premium and rent defined. The transferor is called the lessor. The transferee is called the lessee. The price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.”

### Essentials

The essential legal elements of lease are:

- a. Parties i.e. lessor or lessee
- b. Subject matter of lease i.e. the property to be leased
- c. Demise or partial transfer of such property
- d. Term and period of lease
- e. Consideration or rent

**Q37. Dilip, the owner of a bungalow in Salt Lake area of Kolkata, decided to let-out his bungalow with 1,000 sq. feet area abutting 60 feet wide road to QRS Corporation, for a term of 3 years on a rent of Rs. 1,00,000 per month plus taxes, service charges, etc. thereon. The premises is to be used for office accommodation purposes only. Protecting the interests of all concerned parties, draft a specimen ‘agreement of license’ to use the property. Assume supplementary data as may be required. [Dec. 2016 (8 Marks)]**

**Ans. THIS AGREEMENT** is made on 3rd day of July 2024 between Dilip son (hereinafter referred to as the “owner”) of the **ONE PART.**

**AND**

**QRS Corporation** represented by Mr. its secretary being signatory to this agreement having its principal office at present at No..... (hereinafter referred to as “occupiers”) of the **OTHER PART.**

**WHEREAS** the occupiers approached the owner for permission for using of his property, bungalow No..... in Salt Lake, Kolkata fully mentioned and described in the Schedule hereto for a period of three years only from the date of signing of this agreement.

**AND WHEREAS** the owner has agreed to grant the permission to occupy the said premises reserving for himself the care, maintenance and services to property and on the basis of leave and license only.

**NOW THIS DEED WITNESSETH AS UNDER:**

- (1) This writing shall never be construed as any tenancy agreement or lease nor otherwise creating any other right or interest in the property in favour of the occupiers which is not at all the intention of the parties but on the contrary merely a temporary agreement or arrangement simply to allow the occupiers to use and occupy portion of the premises for their office accommodation under the control and supervision of the owner.
- (2) The owner shall retain two rooms; one in the ground floor and another in the first floor.
- (3) The owner shall have his own staff in the said rooms for the care and supervision and maintenance of and services to the property.
- (4) The occupiers shall, in consideration of such accommodation shall pay to the owner a fixed sum of ₹ 1,00,000/- per month plus taxes, service charges etc. for the period of three years after deducting TDS as applicable.
- (5) The occupiers shall pay a security deposit for such payments and observance of the covenants hereunder contained, kept with the owner a sum of ₹ 300000/- to be repaid without interest on revocation of license and surrender and deliver the possession of the said portion of the property subject to such deductions as the owner shall be entitled as against the occupiers. e.g., arrears of charges, unpaid taxes, electric bills, etc., as hereunder provided or otherwise permitted in law.
- (6) The occupiers shall on expiry of the period of 3 years or license having being revoked earlier, surrender the property and deliver the same to the owner when and in such an event he will be entitled to the refund of ₹ 300000/- subject to deductions.

- (7) In default of any payments to the owner or the Corporation of Kolkata or other appropriate authorities the owner shall be entitled to and shall have always the power to revoke the license hereunder granted at his absolute discretion and reoccupy the said portion of the property without subjecting himself to any liability.
- (8) The occupiers shall have no right to make any addition or alteration to the property, but shall be entitled to make interior decorations only by temporary wooden partitions which they shall remove at their own costs at the time of surrender of the property.

**IN WITNESS WHEREOF** the parties have executed this Agreement on the date abovementioned in the presence of:

**Witness**

- |     |          |
|-----|----------|
| (1) | Owner    |
| (2) | Occupier |

**Q38. A lease of Immovable property is a Transfer of Right?**

**[June 2016 (5 Marks)]**

**Ans.** A lease of immovable property is a transfer of right.

**As per section 105 of Transfer of Property Act, 1882,** a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, for consideration.

Thus a lease of immovable property is a transfer of right to enjoy the property for a certain time in consideration for a price paid or promised.

**Q39. Whether the licence as defined under the Indian Easements Act, 1882, is transferable?**

**[June 2024 (5 Marks)]**

**Ans.** Under the Indian Easements Act, 1882, a license is generally not transferable. According to section 56 of the Act, a license is a personal right granted to a licensee and does not create any interest in the property. Here are the key points regarding the transferability of a license:

1. **Personal Right:** A license is a personal right granted to an individual, allowing them to do something on the property of the licensor. It does not create an interest in the property and is typically specific to the licensee.
2. **Non-Transferability:** Since the license is personal to the licensee, it cannot be transferred or assigned to another person unless there is an express provision in the license agreement allowing such transfer.

3. **Section 56:** This section explicitly states that unless a different intention appears from the terms of the license, it is not transferable by the licensee or their legal representatives.

Therefore, unless the terms of the license specifically allow for transfer, a license under the Indian Easements Act, 1882, is not transferable.

## GIFT

**Q40. Define Gift. Discuss procedure for making a Gift, draft a specimen deed of Gift for love and affection. [Dec. 2017 (8 Marks)]**

**Ans.** Gift has been defined under section 122 of the Transfer of Property Act, 1882. Section 122 states that 'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, this gift is void.

For the purpose of making gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least 2 witnesses.

For the purpose of making gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

Gift should be made only for the existing property as gift of future property is void **under section 124 of the Transfer of Property Act, 1882**. Because gift of future property is mere promise and cannot be enforced. Section 125 provides that the gift of a thing to two or more donees of whom one does not accept it, is void as to the interest which he would have taken had he accepted. The intention conveyed under this Section is that a gift is personal to the donee and therefore if a gift made to two persons jointly and one of them does not accept it, the other cannot accept the whole.

### Stamp Duty and Registration

The value of the property gifted must be set forth in the deed of gift. Stamp Duty is payable on gift deed as on the conveyance as per amount of value of the property as mentioned in the deed or as per market value of such property whichever is greater as per Article 23 of the Indian Stamp Act, 1899. If the value of the property is intentionally omitted or under-valued with a view to defraud the revenue, prosecution may be invited **under section 64 of Indian Stamp Act (Muhamad Muzaffar Ali Allahabad)**. Further, penalty provisions under Gift-tax Act may also be attracted. Gift deed of immovable property is compulsorily registrable **as per section 123 of the**

**Transfer of Property Act and section 17(i)(a) of the Registration Act, 1908,** whatever may be the values.

### Deed of Gift for Love and Affection

**THIS DEED of GIFT** is made on the..... day of.....  
BETWEEN AB, etc. (called "the donor") AND CD, etc. (**called "the donee"**).

**WHEREAS** the donor is owner of the property described in the Schedule and out of his paternal affection for his daughter, the donee, is desirous of making a gift of the said property to the donee at the time of her marriage.

#### **NOW THIS DEED WITNESSES AS FOLLOWS:**

- (1) In consideration of the natural love and affection of the donor for the donee, the donor transfers to the donee free from encumbrances ALL the property described in the Schedule TO HOLD the same to the donee absolutely for ever.
- (2) The donee accepts the transfers.

**IN WITNESS WHEREOF, etc.,**

The Schedule above referred to

Signed, sealed and delivered

**Q41. Write notes on the following: Onerous Gift. [Dec. 2017 (4 Marks)]**

**Ans.** Onerous gift refers to a gift that is subject to conditions. These conditions are imposed on the recipient of the gift. Sometimes, onerous gift takes the nature of a sale because it involves the element of consideration.

**Transfer of Property Act describes onerous gift.** Section 127 states that where a gift is in the form of a single transfer to the same person of several things of which one is and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Besides, a donee not competent to contract and accepting the property burdened by any obligation is not bound by his acceptance but if after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound, subject to these provisions of section 127 of the Act.

Where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of property comprised therein. A company can make gift of its movable and immovable property provided it had been vested with requisite power of doing so in objects clause in its **Memorandum of Association and Articles of Association**. It would require **sanction of shareholders in general meeting under section 181 of the Companies Act, 2013**.

**Q42. In light of the judicial pronouncement, discuss Revocation of Gift.**

**[June 2019 (4 Marks)]**

**Ans. Revocation of Gift:** Section 126 of Transfer of Property Act, 1882 prescribes the circumstances when a gift may be suspended or revoked. As per section 126, the donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void, wholly or in part as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract it might be rescinded. Save as aforesaid a gift cannot be revoked. Gift in India is regulated by personal law, usages and customs. Under Hindu Law a gift once completed is binding upon the donor and it cannot be revoked by him unless the gift property was obtained by fraud or undue influence.

**Example:** A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

**Q43. Illustrate, whether stamp duty and registration of a Gift Deed is Compulsory?**

**[August 2021 (4 Marks)]**

**OR**

**In the light of Judicial pronouncement(s) discuss the following:**

**→ Stamp Duty and Registration of Gift Deed.**

**[Dec. 2021 (4 Marks)]**

**Ans.** Yes, the value of the property gifted must be set forth in the deed of gift. Stamp Duty is payable on gift deed as on the conveyance as per amount of value of the property as mentioned in the deed or as per market value of such property whichever is greater as per section 23 of the Indian Stamp Act, 1899. If the value of the property is intentionally omitted or under-valued with a view to defraud the revenue, prosecution may be invited under section 64 of Indian Stamp Act (**Muhamad Muzaffar Ali ILR 44 Allahabad**). Further, penalty provisions under Gift-tax Act may also be attracted.

Gift deed of immovable property is compulsorily registrable as per section 123 of the Transfer of Property Act and section 17(i)(a) of the Registration Act, 1908, whatever may be the values.

**Q44.**

(a) The employees registered union of ABC Ltd., proposes to construct a temple on half acre vacant plot adjoining factory dispensary in the factory campus. The local authorities and labour welfare officer also recommended the proposal and grant NOC for the same. The managing director of the company, 'XYZ', asked the Company Secretary to examine it, report and if worth approving put up a draft deed for consideration of the Board. The Company Secretary recommends it on the following main terms:

- (i) Draft deed will be prepared by the Company and executed by the Temple Management Committee (TMC).
  - (ii) Temple will be constructed within six months.
  - (iii) Annual rental of Rs. 100/- shall be payable by TMC to ABC Ltd. by the first week of January every year.
  - (iv) Employees will not be charged with any fees, donations etc., however may be accepted in case of volunteer.
  - (v) Proper cleanliness at all times, will be the responsibility of TMC.
  - (vi) Company's authorized officers shall be allowed to inspect temple premises on a one-week time notice, and TMC will be bound to follow their instructions.
  - (vii) Jurisdiction clause will be the local jurisdiction of the ABC Ltd., in case of any dispute. Though Arbitration Clause will also be mentioned. On the basis of the terms by the Company Secretary of ABC Ltd., you are required to draft a Deed of Grant of Land for temple in the factory premises. Assume other facts, if required. [Dec. 2019 (10 Marks)]
- (b) The date of the execution of a deed is material for the purpose of limitation and registration of the document. If the date is accidentally missing in the deed, how do you, as a company secretary, will deal with such a situation? Refer the relevant law on the point. [Dec. 2019 (6 Marks)]

**Ans. 44(a).** This grant is made on the 1st September, 2019 between ABC Ltd. (herein after called the grantor) of the one part, and Temple Management Committee (TMC) (hereinafter called the Grantee) of the other part;

**WHEREAS** the grantee on 1st July 2019 applied to the Grantor for the grant of Grantee's land admeasuring half an acre, which is lying vacant adjoining the

Company's Dispensary in factory complex, for the purpose of building a temple thereon;

**AND WHEREAS** the grantor has agreed with the grantee to grant him for the said purpose the land hereby transferred belonging to the grantor on the terms and conditions hereinafter contained;

**AND WHEREAS** the grantee has accepted the said grant for the said purpose and on the terms and conditions hereinafter contained.

**NOW, THIS DEED WITNESSES' AS FOLLOWS:**

- (1) In pursuance of the aforesaid agreement and in consideration of the Grantee's covenants hereinafter contained, and for the purpose of promoting, religion worship, the grantor hereby grants and transfers to the Grantee **ALL THAT PLOT of land etc., TO HOLD THE SAME** to the grantee and his Successors according to custom of Succession in the management of religious endorsements recognized by the religion professed by the Grantee for the purpose of a Temple and for no other purpose (excluding ancillary purposes) in accordance with the covenants and the provision hereinafter contained.
- (2) **The Grantee hereby covenants with the grantor as follows:**
  - (i) He will within six months from the date hereof erect a temple of the value of Rs..... on the said premises and will not use the said premises for any other purpose whatsoever.
  - (ii) If the grantee fails to erect a temple within the said period of six months, the said premises shall revert to the grantor.
  - (iii) Such temple, when erected shall be open to all human beings without any distinction of caste or creed to enter the said temple for worship and prayer and for no other purpose.
  - (iv) The grantee has undertaken to pay a sum of Rs. 100/- as annual rental to the grantor to be paid before first week of January every year in advance.
  - (v) The grantee shall not charge any fee, donations etc. from the employees of the grantor except by way of voluntary contributions for the benefit of the temple.
  - (vi) The grantee shall be bound to maintain proper cleanliness in the temple premises at all the times.
  - (vii) The grantee and his successors shall at all time hereafter keep such temple in good and substantial repair and will at his or their own cost perform all ceremonies of worship therein according to the religion professed by the grantee.
  - (viii) The grantee and his agents shall, on a prior notice of one week, permit at all reasonable times, the authorized officers of the company to examine the condition of the temple premises.

- (ix) If the said premises shall cease to be used for the purpose of a temple then the said premises and all buildings thereon shall revert to the grantor.
- (x) In case of any dispute arising out or concerning the terms of this deed, the same shall be referred to \_\_\_\_\_ for arbitration whose decision thereon shall be final and binding on the parties.
- (xi) In case of any other disputes arising out of or in any way connected with this deed the same shall be deemed to have arisen in .....and only courts in .....shall have jurisdiction to determine the same.

**In witness whereof, etc. ----**

**Signed, sealed and delivered.**

**ABC Ltd. on this \_\_\_\_\_ day of 2019 at \_\_\_\_\_ place.  
GRANTOR**

**Temple Management Committee (TMC)  
GRANTEE**

**Both signed by Grantor Grantee and two witness  
And registered as per law.**

**Ans. 44(b)** The date on which the document is executed comes immediately after the description of the deed. For example, "This Deed of Mortgage made on the first day of January, 2019". 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. Thus, the "date" of the document is important.

Date of execution of document is inscribed on the deed. The date is not strictly speaking an essential part of the deed. A deed is perfectly valid if it is undated or the date given is an impossible one, e.g. 30th day of February.

If no date is given oral evidence will always be admissible to prove the date of execution only it leaves necessary to prove it.

However, it is of great importance to know the date from which a particular deed operates. In India there is a short period of 4 months (Section 23 of Registration Act) for its registration from the date of execution within which a deed must be presented for registration. The date is important for application of law of limitation also. In view of the extreme importance of date of execution of deed it should be regarded as an essential requirement. The date of deed is the date on which parties sign or executing it. If several parties to a deed sign the deed on different dates, in such cases, the practice is to regard the last of such dates as the date of deed.

In order to avoid mistake and risk of forgery, the date should be written in both words and figures.

## PART – D: INDIAN STAMP ACT, 1899

### DEFINITIONS

**Q45. What do you mean by 'Promissory Note'? State the requisites of a promissory note with the help of some illustrations. [June 2013 (5 Marks)]**

**OR**

**What is 'Promissory Note' [June 2014 (3 Marks)]**

**Ans.** Promissory Note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument.

#### **Requisites of a promissory note:**

- ❖ A promissory note must be in **writing**, duly **signed** by its maker and properly **stamped** as per the Indian Stamp Act.
- ❖ It must contain an **unconditional undertaking or promise to pay**. Mere acknowledgement of indebtedness is not enough.  
Example: If someone writes 'I owe Rs. 5,000 to Satya Prakash', it is not a promissory note.
- ❖ It must contain a **promise to pay money** only.  
Example: If someone writes 'I promise to give Suresh a Maruti car', it is not a promissory note.
- ❖ The **parties (i.e. maker & payee)** to a promissory note **must be certain**.
- ❖ A promissory note may be payable on demand or after a certain date.  
Example: If it is written "3 Months after date I promise to pay Satinder or order a sum of Rs. 5,000 only" is a promissory note.
- ❖ The sum payable mentioned must be certain or capable of being made certain.

**Q46. Define the term 'bill of lading' under the Indian Stamp Act, 1899. [Dec. 2015 (5 Marks)]**

**OR**

**Explain the meaning of 'Bill of Lading' under the Indian Stamp Act, 1899. [June 2018 (5 Marks)]**

**Ans.** Bill of Lading [Sec. 2(4)] "Bill of Lading" includes a 'through bill lading' but does not include a mate's receipt.

### STEP BY STEP PROCESS OF BILL OF LADING

A bill of lading is a **RECEIPT** issued by the **Master of a Ship** for goods that have been handed [given] to him for delivery to a specific individual or his representatives.

3 copies are made, each signed by the master:

- **One copy** is kept by the **consignor of goods** (the person or business that sends goods to someone),
- One is kept by the **ship's master**, and
- One is forwarded to the **Consignee** (the individual or business to whom goods or documents are officially sent or delivered), who, upon receiving it, becomes the owner of the goods.

It is a **written evidence** of a **contract** for the **transportation and delivery of commodities** by sea for specific products.

### MATE'S RECEIPT

When goods are delivered on board a ship, the receipt is given by the person in-charge at that time. This receipt is known as the mate's receipt.

The shipper of the goods **returns this receipt to the master before the ship leaves** and receives from him bill of lading for the goods, signed by the master.

**Q47. Define 'lease' under the Indian Stamp Act, 1899. [Dec. 2018 (4 Marks)]**

**OR**

**Explain the terms 'Patta' and 'Kabuliyat', under the Indian Stamp Act, 1899. [Dec. 2020 (4 Marks)]**

**Ans. Lease [Sec. 2(16)] "Lease" means a lease of immovable property and includes also:**

- (a) A **patta**;
- (b) A **kabuliyat** or **other undertaking in writing**, [not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property];
- (c) Any instrument by which **tolls of any description are let**;
- (d) Any writing on an application for a lease intended to signify that the application is granted.

A **patta** is an instrument **given by the Collector of District or any other receiver of the revenue, to the cultivator, [farmer]** that details the terms under which the land is to be kept and the value or proportion of the produce to be paid therefor.

A **Kabuliyat** is **executed by the lessee**, accepting the terms of the lease and undertaking to abide [follow] by them. **Although, it is not a lease under section**

**105 of the Transfer of Property Act, 1882** it is expressly included in the definition for the purposes of the Stamp Act.

A **TOLL** is a tax that is paid in exchange for some liberty or privilege, such as the right to cross a bridge, use a ferry, travel along a highway, or sell goods at a market or Fair or the like. It does not include 'octroi' or 'chungi'.

**Q48. Explain the term "Receipt" under the Indian Stamp Act, 1899.**

[Aug. 2021 (4 Marks)]

**Ans.** As per section 2(23) of the Indian Stamp Act, 1899 define the term receipt.

"Receipt" includes any note, memorandum or writing-

- (a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or
- (b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt, or
- (c) whereby any debt or demand, or any part of a debt or demand, is acknowledged to have been satisfied or discharged, or
- (d) which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person.

#### ILLUSTRATIONS

- A mere acknowledgement in writing of the receipt of immovable property will not attract **sub-clause (b)**.
- **Under sub-clause (c)**, any acknowledgement in satisfaction or discharge of any debt or demand or any part thereof is covered; **for instance**, a receipt given by the secretary or other manager of a club acknowledging payment of the club dues comes within the sub-clause.
- An **ordinary cash memo** issued by a shopkeeper or another person selling the goods or other merchandise is not a receipt, unless it contains an acknowledgement of receipt of the money.
- A **letter acknowledging the receipt of money or cheque is a receipt**.
- A document merely saying that the signatory has received a sum of Rs. 500 is a receipt.

**Q49. Distinguish between 'Executed' and 'Execution' under the Indian Stamp Act, 1899.**

[June 2019 (4 Marks)]

**Ans. Executed/Execution [Section 2(12)]:** The words 'executed' and 'execution' used with reference to instruments mean 'signed' and 'signature' and includes attribution of electronic record within the meaning of section 11 of the Information Technology Act, 2000.

Signature includes mark by an illiterate person. [Section 3(52), General Clauses Act, 1897]

An instrument which is chargeable with stamp duty only on being "executed" is not liable to stamp duty until it is signed.

**Q50. Explain the term "Instrument" under the Indian Stamp Act, 1899.**

**[Scoring Question]**

**Ans.** Instrument includes –

- (a) every document, by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;
- (b) a document, electronic or otherwise, created for a transaction in a stock exchange or depository by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded; and
- (c) any other document mentioned in Schedule I.

However, it does not include such instruments as may be specified by the Government, by notification in the Official Gazette.

#### GENERAL PRINCIPLES GOVERNING LEVY OF STAMP DUTY

**Q51. What are the General Principles Governing Levy of Stamp Duty?**

**[Scoring Question]**

**Ans.**

<b>Duties on Instruments</b>	The basic principle of the Indian stamp Act is that it levies the duty on the instruments and not on the transaction covered by the instruments.
<b>Real nature on substance</b>	The stamp duty on an instrument depends <b>on the real nature on substance</b> of the transactions recorded in the instruments and not on any title or description or nomenclature given by the parties who execute the instruments.
<b>Valuation</b>	Sufficiency of stamp duty leviable on a document <b>must be determined by looking at the document and what is stated therein</b> and not on any other evidence. Additionally, the <b>valuation for stamp duty purposes</b> must be based <b>on the value as of the date the instrument is executed</b> , not with reference to <b>later</b> changes.
<b>Incidence of payment of duty and penalty</b>	Stamp duty chargeable on an instrument should be determined <b>with reference to law in force on the date of execution</b> of the instrument <b>but the levy of penalty is to be determined with reference to the law in force at the time of the presentation of the document in evidence.</b>
<b>Law relating to Payment</b>	Schedules specifying the rates of stamp duty <b>form part of the statute</b> and must be read together with it, <b>if there is any inconsistency between the schedule and the stamp Act, the latter prevail.</b>

**INSTRUMENT CHARGEABLE WITH DUTY**

**Q52. List any 10 instruments which are chargeable with duty under the Indian Stamp Act, 1899. [Dec. 2010 (5 Marks)]**

**Ans. 10 Instruments** which are chargeable with duty under the Indian Stamp Act, 1899 are as follows:

- ❖ Administration Bond.
- ❖ Agreement relating to Deposit of Title-Deeds, Pawn or Pledge.
- ❖ Bond
- ❖ Debenture
- ❖ Indemnity-bond
- ❖ Mortgage-deed
- ❖ Promissory-note
- ❖ Release
- ❖ Security Bond or Mortgage-deed
- ❖ Settlement.

**Q53. Discuss the instruments which are chargeable with duty under section 3 of the Indian Stamp Act, 1899. [Dec. 2021 (4 Marks)]**

OR

**State the instruments which are chargeable with duty under the Indian Stamp Act, 1899. [Dec. 2011 (4 Marks)]**

**Ans. Instruments chargeable with duty [Sec. 3]:** Subject to the provisions of the Act and the exceptions contained in **Schedule I**, following instruments shall be chargeable with a duty of the amount indicated in that schedule as the proper duty, namely:

- ❖ Instrument mentioned in 1st Schedule executed in India.
- ❖ Bill of exchange except payable on demand and promissory note.
- ❖ Every Instrument executed out of India but related to property in India.

However, no duty shall be chargeable in respect of:

- Any Instruments **executed by or on behalf of or in favour of GOVERNMENT.**
- Bills of exchange and promissory notes **executed outside India and acted upon outside India.**
- Instruments for the sale, transfer or other disposition of any **ship or Vessel.**

**Q54. Abhay's agricultural land was purchased by the government for the purpose of construction of a factory but no duty was paid for this transfer by the government. Abhay wanted to take back his land on the ground that government has not paid the duty and, therefore, no sale deed was executed: Will Abhay succeeds? Give reasons. [Scoring Question]**

**Ans.** As per section 3 of the Indian Stamp Act, 1899, no duty shall be chargeable in respect of instrument executed by and in favour of Government. Since, Abhay's agricultural land was purchased by the government no stamp duty is required to paid on it and instrument of transfer is valid. Thus, Abhay cannot take back his land on the ground that government has not paid the duty.

**Q55. It is the substance of the transaction as contained in the instrument that determines the stamp duty. Elucidate. [June 2022 (4 Marks)]**

**Ans.**

- ✓ **When determining the nature of an instrument**, courts have always support with the principle of **substance [matter/body] of the transaction**, over the **form [structure]**.
- ✓ It's possible that **the description provided at the document's head does not accurately reflect the substance of the transaction**.
- ✓ Although the **stamp duty is imposed on the instrument and not the transaction**, it is the substance of the transaction as stated in the instrument that determines the amount of the duty.
- ✓ One must **examine the full document** to ascertain whether it fits the description of a document **upon which the Act requires a stamp**.
- ✓ When a **single document has many purposes**, it is best to read the document as a **whole to identify the primary purpose**.
- ✓ The **Court must consider the document in its entirety** to determine whether it has been sufficiently stamped.

#### EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY

**Q56. What is the extent of liability of instruments to stamp duty where several instruments are executed in a single transaction? Explain with any one illustration. [Dec. 2019 (4 Marks)]**

**Ans. Several Instruments used in single transaction of sale, mortgage or settlement [Section 4]:** In case of sale, mortgage or settlement, if there are several instrument for 1 transaction, stamp duty is payable only on one instrument and on other instrument nominal stamp duty of Re. 1 is payable.

**Example:** 'A' executed a conveyance of immovable property. **On the same deed his nephew** (undivided in status) **endorsed his consent** to the sale, as such consent was considered to be necessary. **It was held that the conveyance was the principal instrument.** The consent was chargeable with only **Re.1**.

**Q57. Ram executed a gift deed of certain immovable properties in favour of his brother Shyam. By another deed, Shyam made provision for the living expenses of Ram and created a charge in his favour on some properties**

**included in the above mentioned gift deed in order to secure the payment of these living expenses. The government authority insists that deed executed by Shyam is liable to full duty. Decide with reasons. [Scoring Question]**

**Ans.** According to section 4 of the Indian Stamp Act, 1899, if there are several instrument for one transaction, stamp duty is payable only on one instrument and on other instrument nominal stamp duty of Re. 1 is payable.

Facts of the case are similar to *Maharaja Someshar Dutt*, wherein it was held that, when 2 deeds (documents) are executed by 2 brother; one document transferred all the property by way of gift and was stamped to it is full value, second document provided expenses during the life time of transferor, the 2 documents were part of the same transaction. They amounted to a settlement and section 4 applied and hence on second document nominal stamp duty of Re. 1 is payable.

**Q58. Arjun executed a power of attorney both in his personal capacity and in the capacity as an executor, trustee, manager and liquidator in favour of Bheem. Decide the liability of duty payable on the instrument.**

**[Dec. 2005 (4 Marks)]**

**Ans.** According to section 5 of the Indian Stamp Act, 1899, if one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duty payable on separate instrument.

Where a person possessing a 'representative capacity' such as trustee and a personal capacity and if he delegates his powers under both the categories then section 5 is attracted and stamp duty payable is aggregate amount of stamp duty payable on separate instrument.

**Q59. Are securities dealt in depository liable to stamp duty under the provisions of Indian Stamp Act, 1899? [June 2017 (5 Marks)]**

**Ans.** Securities dealt in depository not liable to stamp duty [Section 8A]: The Finance Act, 2019 substituted section 8A which reads as follows:

**Notwithstanding anything contained in the Act or any other law for the time being in force-**

- (a) **an issuer, by the issue of securities to one or more depositories shall, in respect of such issue, be chargeable with duty on the total amount of security issued by it and such securities NEED NOT be stamped;**
- (b) **the transfer of registered ownership of securities from a person to a depository or from a depository to a beneficial owner shall not be liable to duty under this Act or any other law for the time being in force;**

**METHODS OF STAMPING & CANCELLATION**

**Q60. When the instruments may be stamped with adhesive stamps, under the Indian Stamps Act, 1899? When and by whom such adhesive stamps may be cancelled?** [Dec. 2018 (5 Marks)]

OR

**What instruments may be stamped with adhesive? Why and how affixed stamps are cancelled as per the Indian Stamp Act, 1899?** [June 2023 (8 Marks)]

**Ans.** Section 11 of the Indian Stamp Act, 1899 provides that the following instruments **MAY BE** stamped with adhesive stamps namely:

- ✚ Instruments chargeable with a duty not exceeding 10 paise except Bills of exchange payable otherwise than on demand.
- ✚ Bills of exchange and Promissory notes **drawn or made out of India**.
- ✚ Entry as an advocate, vakil or attorney **on the roll of a High Court**.
- ✚ **Notarial Acts**.
- ✚ **Instruments relating to transfer of shares of company**.

Section 12(1)(a) provides that any person affixing [applying] any adhesive stamp to any instrument chargeable with duty, that has been executed [signed] by another person, **must cancel** the stamp at the time of affixing in order to prevent future usage.

Section 12(1)(b), Any person **signing** an instrument on any paper bearing an **adhesive stamp is required to cancel the stamp if it hasn't already been done at the time of execution**.

Section 12(2) Any instrument bearing an adhesive stamp which has not been cancelled is **deemed to be UNSTAMPED**.

**Q61. What are the modes of cancellation of adhesive stamps?**

[Dec. 2014 (4 Marks)]

OR

**Write a short note on: Mode of cancellation of adhesive stamps under the Indian Stamp Act, 1899.** [June 2015 (5 Marks)]

**Ans.** Section 12 of the Indian Stamp Act, 1899 makes the following provisions for the cancellation of stamps.

**Cancellation of adhesive stamps:** Any person affixing any adhesive stamp has to cancel it. If it is not cancelled as above then it should be cancelled by person executing it. A stamp has to be cancelled in such manner that it cannot be used again.

**Effect of not cancelling the stamps:** If stamps are not cancelled then instrument is treated as deemed to be unstamped.

**Mode of cancellation of adhesive stamp:** Cancellation of an adhesive stamp may be done by the person by writing.

- (a) His name or initial or
- (b) Name or initial of his firm or
- (c) Any other effectual manner.

**Q62. Describe the concept of 'E-stamping' under Indian Stamp Act, 1899.**

[Dec. 2020 (4 Marks)]

OR

**What is 'E-stamping'? Also, discuss its benefits.**

[Dec. 2016 (3 Marks)]

OR

**What are the benefits of E-stamping? How do we verify E-stamping?**

[June 2023 (4 Marks)]

OR

**Explain E-stamping. Enumerate its benefits.**

[June 2024 (5 Marks)]

**Ans.** E-stamping is a computer based application and a secured way of paying Non-Judicial stamp duty to the Government. The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. Stock Holding Corporation of India Ltd. (SHCIL) has been promoted by All India Public Financial Institutions and Insurance Majors.

SHCIL is known for its security, integrity, wide network and focus on technology. SHCIL is the only Central Recordkeeping Agency (CRA) appointed by the Government of India. The CRA is responsible for User Registration, Imprest Balance Administration and overall E-stamping application operations and maintenance.

**The benefits of e-Stamping are as under:**

- ❖ e-Stamp Certificate can be generated within minutes;
- ❖ e-Stamp Certificate generated is tamper proof;
- ❖ e-Stamp Certificate generated has a Unique Identification Number;
- ❖ Easy accessibility and faster processing;
- ❖ Security;
- ❖ Cost savings and User friendly.

Verification of E-stamping	Authorised Collection Centre (ACC)
<p>An e-Stamp can be verified online by clicking on verify e-Stamp certificate and entering the required details i.e.</p> <ol style="list-style-type: none"> <li>1. State</li> <li>2. Certificate Number (UIN)</li> <li>3. Stamp Duty Type (Description of Document)</li> <li>4. Certificate Issue Date</li> </ol>	<p>ACC means Authorised Collection Centre (ACC). Its an agent appointed by SHCIL. ACC is the intermediary between the CRA and Stamp Duty payer. Schedule Banks and Post Offices can become ACCs by completing the registration process.</p>

Verification of E-stamping	Authorised Collection Centre (ACC)
5. 6 Character alphanumeric string UIN is a Unique system generated number mentioned on the e-Stamp Certificate. Anybody, having the Unique Identification Number, can check the authenticity of the Certificate through www.shcilestamp.com.	
<b>Mode of Payment of Stamp Duty</b> The stamp duty may be paid through the following modes: Cash, Cheque, Demand Draft, Pay Order, RTGS, NEFT & Account to Account transfer.	

### DENOTING DUTY

**Q63. Write a short note on Denoting Duty? [June 2008 (4 Marks)]**

**Ans.** The object of this section is to **spare parties to an instrument**, the inconvenience of having to produce (in cases in which the duty payable on an instrument depends upon the duty already paid on another instrument), **the original or principal instrument** in order to prove that the **second instrument has been duly stamped**.

Section 16 provides that **where the duty with which an instrument [2nd Instrument]:**

- **is chargeable**, or
- **its exemption** from duty,

**depends in any manner upon the duty actually paid in respect of another instrument [1st Instrument/the Original or Principal instrument], the payment of such last mentioned duty, shall,**

- **if application is made in writing to the Collector for that purpose, and**
- **on production of both the instruments, be denoted upon such first mentioned instrument,**
- **by endorsement under the hand of the Collector of Stamps or in such other manner as the rules of the State Government may provide.**

### TIME OF STAMPING OF INSTRUMENTS

**Q64. A promissory note is executed by Suresh and Udit and stamp is afterwards affixed and cancelled by Suresh by again signing it. Explain whether the provisions of section 17 relating to time of stamping instruments have been complied with? [Expected Question]**

**Ans. Instruments executed in India [Section 17]:** Instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. Where a promissory note is executed by 'A' and 'B' and a stamp is afterwards affixed and cancelled by 'A' by again signing it, the stamping has taken place subsequent to

the execution and hence, the provisions of section 17 are not complied with. [*Rohini v. Fernandes*]

### VALUATION OF DUTY

**Q65. Atul mortgages his house of the value of Rs. 50,000 to Vijay. After some time Vijay buys the house from Atul for Rs. 25,000. Decide the amount on which Vijay has to pay the stamp duty under Indian Stamp Act, 1889.**

[Dec. 2018 (4 Marks)]

**Ans. According to section 24**, if property is transferred in satisfaction of debt due, then it will be considered in valuation purpose. However, as the **explanation to section 24**, where property is subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer, the amount of any duty already paid in respect of the mortgage.

Considering above provision duty payable will be calculated as follows:

Sale Price of Building	50,000
Add: Interest accrued on loan	-
	50,000
Mortgage loan amount	(25,000)
Amount on which duty is payable	25,000

**Q66. Rajesh mortgages a building of the value of Rs. 70,000 to Suresh for Rs. 50,000. Rajesh, subsequently, sells the building to Suresh. An unpaid amount of Rs. 5,000 against interest is also outstanding at the time of sale. Determine the value on which the stamp duty is payable in this transfer of property.**

[Expected Question]

**Ans. Explanation to section 24 of the Indian Stamp Act, 1999** provides that in the case of sale of property subject to mortgage or other encumbrances any unpaid mortgage money or money charged together with interest; if any due on the same shall be deemed to be part of the consideration for the sale provided that where property subject to a mortgage is transferred to the mortgagee he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

In the present problem, in the light of above rule, a stamp duty is payable on Rs. 70,000 + 5,000 i.e. Rs. 75,000 less the amount of stamp duty already paid for the mortgage. Hence stamp duty is payable on Rs. 25,000 now, if the duty on mortgaged amount of Rs. 50,000 has already been paid.

**PERSON LIABLE TO PAY DUTY**

**Q67. Who are liable to pay the stamp duty under the Indian Stamp Act, 1899 in the following instances:**

- (i) Mortgage deed
- (ii) Policy of insurance other than fire insurance?
- (iii) Transfer of shares in a company
- (iv) Conveyancing and conveyancing of a mortgaged property.

[Scoring Question]

**Ans. Duties by whom payable [Section 29]**

Instrument/deed/document	Person liable to pay Stamp Duty
Mortgage Deed	A person drawing, making/executing such instrument.
Policy of Insurance other than Fire Insurance.	Person taking the policy.
Sale of security through Stock Exchange	Buyer of such security.

**ADJUDICATION AS TO STAMPS**

**Q68. You are Company Secretary of Dowell Industries (India) Ltd. You are about to execute an agreement with 3rd party on behalf of the company. However, you are not sure as to correct stamp duty with which the agreement is chargeable.** [June 2020 (8 Marks)]

**Ans. Adjudication as to proper stamp [Section 31]:** If any person is not sure about the duty payable on any instrument, then he can apply to the Collector of stamps for his opinion regarding duty payable.

**Fee:** Such application has to be made with a **fee of Rs. 5.**

**Documents to be attached:** While making application to the collector following documents should be attached:

- Abstract of the instrument.
- Affidavit.
- Other evidences as may be required by Collector.
- Fee.

**INSTRUMENTS NOT DULY STAMPED – TREATMENT AND CONSEQUENCES**

**Q69. Explain the consequences of the instruments which are not duly stamped under the Indian Stamp Act, 1899.** [June 2010 (4 Marks)]

OR

**Explain the consequences that follow where the instruments are not duly stamped under the Indian Stamp Act, 1899. [Dec. 2014 (4 Marks)]**

**OR**

**Discuss the evidentiary value of an instrument not duly stamped under the Indian Stamp Act, 1899 [Scoring Question]**

**Ans. Following are the consequences of the instruments not duly stamped:**

- (1) **Impounding of Instrument not duly stamped [Section 33]:** If any Instrument is not duly stamped then it can be impounded under this section by:
  - **Arbitrator**
  - **Court**
  - **Public Officer** (Police Officer is excluded i.e. to say he cannot impound the instrument)
- (2) **Impounding of unstamped Receipt [Section 34]:** Unstamped Receipts can be implemented by Public Accountant or he may require the receipt to be stamped.
- (3) **Instruments not duly stamped inadmissible in evidence [Section 35]:** Shortcomings of the instrument not duly stamped are as follows:
  - Such instrument cannot be accepted as evidence by Civil Court or Arbitrators.
  - No one can act upon it.
  - It cannot be registered.
  - Such instrument cannot be authenticated by public officer or public authorities. However, if proper stamp duty & penalty is paid then above mentioned shortcomings go and it becomes valid.
- (4) **Admission of instrument - where not be questioned [Section 36]:** Once a documents is admitted in evidence (whether rightly or wrongly) it is not permissible to the Court whether it is Court of Appeal, revision or of First instance to go behind that order.

**Q70. Achal gives an instrument to Basu which is unstamped. This instrument is also not registered:**

- (i) **Will the instrument be admitted in evidence?**
- (ii) **Will the situation change if the instrument is stamped but not registered before passing to Basu and Basu gets it registered subsequently?**

**[June 2013 (5 Marks)]**

**Ans. Instruments not duly stamped inadmissible in evidence [Section 35]:** Shortcomings of the instrument not duly stamped are as follows:

- Such instrument cannot be accepted as evidence by Civil Court or Arbitrators.
- No one can act upon it.
- It cannot be registered.
- Such instrument cannot be authenticated by public officer or public authorities.

However, if proper stamp duty & penalty is paid then above mentioned shortcomings go and it becomes valid.

**Keeping in view the above provisions answer to given case is as follows:**

- (i) Instrument cannot be admitted in evidence since it is not stamped.
- (ii) If instrument is stamped before registration, then it can be registered subsequently.

**Q71. "If once the 'Instrument' has been admitted in evidence, it shall not be questioned later on in the same suit on the ground that it does not bear the adequate stamp duty or no stamp duty." Discuss briefly with reference to case laws. [June 2016 (5 Marks)]**

**Ans. Instruments not duly stamped inadmissible in evidence [Section 35]:** Shortcomings of the instrument not duly stamped are as follows:

- Such instrument cannot be accepted as evidence by Civil Court or Arbitrators.
- No one can act upon it.
- It cannot be registered.
- Such instrument cannot be authenticated by public officer or public authorities.

However, if proper stamp duty & penalty is paid then above mentioned shortcomings go and it becomes valid. An insufficient stamped instrument is not invalid and it can be admitted in evidence on payment of penalty. Instrument not duly stamped can be accepted as evidence in Criminal Court. Instrument not duly stamped is also admissible if it is executed by government.

**Q72. An instrument bears a stamp of sufficient amount, but for improper description, can it be certified as duly stamped? How the instrument can be rectified and what would be the date of its execution? [June 2013 (6 Marks)]**

**OR**

**State the law of inadmissibility in evidence of an instrument not duly stamped. [Dec. 2013 (3 Marks)]**

**Ans. Admission of improperly stamped instrument [Section 37]:** Opportunity is given under this section to a party for getting a mistake rectified when a stamp of proper amount, but of improper description has been used.

The state Government may make rules for instrument which bears a stamp of sufficient amount but of improper description. On payment of stamp duty of proper description any instrument so certified shall be deemed to have been duly stamped as from the date of its execution.

**RECOVERY AND REFUNDS**

**Q73. Explain the difference between the powers of the Collector under section 39 and the powers of the Controlling Revenue Authority under section 45 of Indian Stamp Act, 1899. [Dec. 2022 (4 Marks)]**

**Ans. The difference between the powers of the Collector under section 39 and the powers of the Controlling Revenue Authority under section 45 are:**

<b>Powers of the Collector under section 39</b>	<b>Powers of Controlling Revenue Authority under section 45</b>
Refund of penalty only.	Refund of Penalties and duties where they have been paid in excess.
Power to refund penalty is restricted only to 2 cases mentioned in section 39.	Powers under section 45 are not subject to any such limitation.
There is no time limit for the Collector to exercise his powers to refund.	Section 45 provides for the time limits.
The power under section 39 is routine function of the Collector.	The power under section 45 is to be exercised only when an application is made by a party
The collector may also use his discretion.	The power under section 45 is a purely discretionary one and the Chief Controlling Revenue Authority cannot be compelled to exercise his power by any further proceedings.

**PART – E: REGISTRATION ACT, 1908****INTRODUCTION & CLASSES OF DOCUMENTS**

**Q74. State the documents whose registration is compulsory under Registration Act, 1908. [Dec. 2017 (5 Marks)]**

**Ans.** There are certain documents which are compulsorily registrable. Section 17 of the Registration Act, 1908 lays down all the documents which are compulsorily required to be registered and those documents are:

- (1) **Instruments of gift of immovable property:** In a case where the donor dies before registration, the document may be presented for registration after his death and if registered it will have the same effect as registration in his life time. On registration the deed of gift operates as from the date of execution.

- (2) ***Other Non-testamentary instrument:*** Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.
- (3) ***Non-testamentary instruments which acknowledge the receipt or payment:*** Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest.
- (4) ***Lease of immovable property from year to year:*** Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
- (5) ***Non-testamentary instruments transferring or assigning any decree or order of a Court:*** Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

**Q75. What is the object of registration of documents under Registration Act, 1908? [Dec. 2021 (4 Marks)]**

**Ans. Following are the objectives of registration of documents under the Registration Act, 1908:**

- (1) Registration of a document ensures ***proper preservation and record*** of such document. It is particularly important in the case of ***immovable properties*** because the history of rights need to be established.
- (2) Documents which are required to be ***registered act as valid evidence in a court of law***. Documents which need to be compulsorily registered are not admissible in court if they are not registered.
- (3) Registered documents assist in the ***prevention of fraud***.
- (4) Registration gives people ***information regarding legal rights and obligations*** arising or affecting a particular property.

**Q76. Explain the documents of which registration is optional under the Registration Act, 1908. [June 2019 (5 Marks)]**

**Ans. Section 18 specifies documents, registration of which is optional. It provides that any of the following documents may be registered under this Act, namely:**

- (1) Instruments (other than instruments of gift and wills) which ***purport or operate to create, declare, assign, limit or extinguish***, whether in present or in future, any right, title or interest whether vested or contingent, of value less than one hundred rupees, to or in immovable property;

- (2) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any **such right, title or interest**;
- (3) leases of immovable property for any term **not exceeding one year and leases exempted** under section 17;
- (4) Instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to **create, declare, assign, limit or extinguish, whether in present or in future**, any right, title or interest, whether vested or contingent of a **value less than one hundred rupees**, to or in immovable property;
- (5) Instruments (other than wills) which purport or operate to **create declare, assign, limit or extinguish any right, title or interest** to or in movable property
- (6) **Wills**; and
- (7) Other documents **not required by section 17** to be registered.

**Q77. Write any 4 exceptions to the registration of non-testamentary documents under section 17(2) of Registration Act. [Dec. 2022 (4 Marks)]**

**Ans. The registration of the non-testamentary documents mentioned in clauses (b) and (c) of section 17(1) is subject to the exceptions provided in sub-section (2) of section 17. These are as follows:**

- (1) any **composition deed**, i.e., every deed the essence of which is composition; or
- (2) any instrument relating to **shares in Joint Stock Company**; or
- (3) any **debentures issued** by any such Company; or
- (4) any **endorsement upon or transfer** of any debenture; or
- (5) any document other than the documents specified under clause (e) above creating merely a right to obtain another document which will, when executed create, declare, assign, limit or extinguish any such right, title or interest; or
- (6) any **decree or order** of a court; or
- (7) any **grant** of immovable property by the Government; or
- (8) any **instrument of partition** made by Revenue-officer;

#### **TIME AND PLACE OF REGISTRATION SECTIONS 23-31 & OTHER IMPORTANT PROVISIONS**

**Q78. A document was executed outside India and it has been presented for registration within four months after its arrival in India, whether he may accept such document for registration on payment of proper registration fee. [Scoring Question]**

**Ans. As per section 26**, where the registering officer is satisfied that the document was executed outside India and it has been presented for registration **within four**

*months* after its arrival in India, he may accept such document for registration on payment of proper registration fee.

**Q79. "Is it necessary that registration of documents should be done only where the property is situated"? Discuss the provisions of the Registration Act, 1908 dealing with the matter. [June 2018 (5 Marks)]**

Ans.

➤ Place for Registering documents relating to land [Section 28]:

**Section 28** provides that documents affecting immovable property shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the relevant property is situated and any other document may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed or in the office of any other Sub-Registrar under the State Government at which ***all the persons executing desire the document to be registered.***

➤ Place for Registering Other Documents [Section 29]:

Every document not being a document referred to in section 28 or a copy of a decree or order, ***may be presented for registration:***

- (1) either in the office of the ***Sub-Registrar*** in whose ***sub-district*** the document was executed, or
- (2) in the office of any other Sub-Registrar under the State Government at which all the persons ***executing and claiming*** under the ***document desire the same to be registered.***

**Q80. Mention the place for Registering Other Documents, which are not specified under section 28. [Scoring Question]**

Ans. Every document not being a document referred to in section 28 or ***a copy of a decree or order, may be presented for registration:***

- either in the office of the Sub-Registrar in whose sub-district the document was ***executed, or***
- in the office of any other Sub-Registrar under the State Government at which all the persons ***executing and claiming under the document desire the same to be registered.***

**Q81. Who can present documents for registration at the proper registration office under the Registration Act, 1908? Explain. [June 2021 (4 Marks)]**

Ans. **Section 32** specifies the persons who can present documents for registration at the proper registration office. ***Such persons are as follows:***

- (1) some person ***executing or claiming*** under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or
- (2) the ***representative or assign*** of such person, or

- (3) the agent of such person, representative or assign, duly authorised by *power-of-attorney executed and authenticated* in the manner hereinafter mentioned.

### CONSEQUENCES OF NON-REGISTRATION OF DOCUMENTS REQUIRED TO BE REGISTERED COMPULSORILY

**Q82. What are cases in which a compulsorily registrable documents can be used in evidence, even if it has not been registered? [Scoring Question]**

**Ans.** *Section 49* of the Registration Act provides that no document required by section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall:

- (1) affect any immovable property comprised therein; or
- (2) confer any power to adopt; or
- (3) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

*Section 49 is mandatory*, and a document which is required to be registered cannot be received in *evidence as affecting immovable property*.

An unregistered document which comes *within section 17* cannot be used in any *legal proceeding to bring out indirectly* the effect which it would have if registered.

**Q83. Yash signed a deed of gift in favour of Raja. If Yash does not agree to its registration, will the gift deed be registered? Explain, whether delay in registration of a gift deed will postpone its operation? [June 2019 (4 Marks)]**

**Ans.** *Section 123* of the Transfer of Property Act, 1882 merely requires that *donor should have signed the deed of gift*. Hence a gift deed can be registered even if the donor does not agree to its registration (*Kalyan Sundaram Pillai v. Karuppa Mopnar*). *Delay in registration of a gift* does not postpone its operation. The gift deed will be registered even if Yash (donor) *does not agree to its registration*.

### PART – F: POWER OF ATTORNEY ACT, 1882

**Q84. Distinguish between the following; Power of Attorney and Letter of Authority. [June 2018 (4 Marks)]**

OR

**Distinguish between the following: Power of Attorney and Letter of Authority. [Dec. 2021 (4 Marks)]**

OR

**Write notes on the following: Letters of Authority.**

**[June 2012 (4 Marks)]**

**OR**

**Comment on the following: A letter of authority is nothing but a power of attorney.**

**[Dec. 2015 (4 Marks)]**

**Ans. Following are the key points on power of attorney:**

- (1) A power of attorney is a written document that grants one person the authority to act on behalf of another. It is made by "donor" authorising another, who is called the attorney of the person or "donee", appointing him to do any lawful act instead of the donor.
- (2) As defined by Stroud, a power of attorney as an authority whereby one is "set in turn, stead or place" of another to act for him.
- (3) As per **section 2(21) of the Indian Stamp Act, 1899**, "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.
- (4) As per **section 1A of the Powers of Attorney Act, 1882**, "Power of attorney" includes an instrument empowering a specified person to act for and in the name of the person executing it.
- (5) **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 majority.
  - ❖ Only in favour of a major.
- (6) **Agent v. Principal:** While functioning as an attorney, the donee is acting as an agent of the donor i.e. the executor of the power of attorney, who is the principal.
- (7) Applicability of section 2 of the Powers of Attorney Act, 1882 clearly 2 specifies that the signature of the agent will be deemed to be the signature of the principal.
- (8) **Form:** Power of Attorney is executed in the form of Deed Poll, usually in the first person. It begins as:

**"BY THIS POWER OF ATTORNEY, I, ETC."**

**"KNOW ALL MEN BY THESE PRESENTS THAT I, ETC."**

### Letter of Authority

Following are the key points on letter of authority:

- (1) A letter of authority is nothing but a power of attorney.
- (2) They are executed on plain paper and not on stamp paper.

- (3) Usually, these are issued for collection of some documents, papers, dividend, interest etc. by one person on behalf of another.
- (4) By and large, the law relating to power of attorney will also apply to the letters of authority.

**Q85. Distinguish between the following: Special and General Power of Attorney. [June 2019 (4 Marks)]**

**Ans.**

- ❖ **Meaning:** A "power of attorney" is a legal document that authorizes a person called an "agent" to act on behalf of the person who created the power of attorney, known as the "principal".
- ❖ **Types:** A power of attorney can be classified into two types; special power of attorney and general power of attorney.

**Following are the differences between the two:**

#### **Special Power of Attorney**

- ✓ "Special power of attorney" is a power of attorney executed for the purposes of a specific act. It is also called a "particular power of attorney".
- ✓ A specific act is meant to imply either a specific act or acts related to each other as to form one judicial transaction, such as all the acts necessary to perfect a mortgage or a sale of a particular property.
- ✓ **Duration:** A special power of attorney to do an act is determined when the act is done.
- ✓ **Example:** A creates power of attorney which would grant B; business partner the ability to use certain assets to care for your business in the event you become incapacitated.

#### **General Power of Attorney**

"General power of attorney" is a power of attorney executed for the purpose of generally representing another person, or for performing more than one act.

**Duration:** A general power of attorney will continue to be in force until expressly revoked or determined by the death of either party or expressly or impliedly limited for a particular period, Judicial Precedent:

In the case of **Fowler v. Broode P.N. Light & Co., (1893)**, the Court held that "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."

**Q86. Write notes on the following: Revocable and Irrevocable Power of attorney. [Dec. 2018 (4 Marks)]**

**Ans.** A power of attorney executed in favour of a person can always, at the discretion of the donor thereof, be revoked. The donee of a power of attorney is an agent of the donor. If a donee himself has an interest in the matters covered by the power of attorney, which forms the subject matter thereof, the power of attorney in the absence of express contract cannot be terminated to the prejudice of such interest. In other words, agency coupled with interest cannot be terminated without the consent of the other party (**Section 202 of the Indian Contract Act, 1872**). Therefore, a power of attorney executed, in which the donee himself has an interest, is irrevocable. Such irrevocable powers of attorney are executed in favour of the financial institutions by a company who offer financial assistance to the latter. Through such irrevocable powers of attorney, powers are given to the financial institutions for executing a security document for securing the financial assistance in the event of a company failing to execute such a document by a certain date.

A power of attorney is revocable if the principal reserves the right to revoke the power at any time. Once the principal revokes the power, the agent can no longer act on the principal's behalf. But a power of attorney can be made irrevocable if the document includes a provision that specifically states that the principal gives up the right of revocation or otherwise indicates that the power is irrevocable. As a practical matter, an irrevocable power of attorney is rarely used and is typically limited to a specific purpose.

**Q87. Is it necessary to get the power of attorney attested?**

**[June 2019 (4 Marks)]**

**Ans.** A power of attorney need not be attested. However, it would be advisable to execute the power of attorney before and have it authenticated by a Notary Public or any Court Judge/Magistrate, Indian Consul or Vice-Consul or representatives of the Central Government.

#### **Effect of Attestation**

If a power of attorney is so authenticated courts shall presume the authentic execution of the power of attorney (Section 85 of the Indian Evidence Act, 1872).

**Under section 85 of the Indian Evidence Act, 1872**, the Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Indian Consul or Vice-Consul or representative of the Central Government, was so executed and authenticated.

If a power of attorney gives authority to present documents for registration **under section 32 of the Registration Act, 1908** it must be executed before and authenticated

by the Registrar or Sub-Registrar within whose District or Sub District the principal resides or where the Registration Act is not in force, before any Magistrate or if it is executed outside India, before a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul or representative of the Central Government (**Section 33 of the Registration Act, 1908**).

But a power of attorney empowering an agent to execute a deed conveying the property in an immovable property and get the deed registered thereby perfecting the transaction of conveyance, need not be executed before the Officer appointed to authenticate and register documents in as much as when the agent executes the document in the name of the principal, he is the executant thereof and as such can himself present the document for registration.

**Q88. A Power of Attorney (POA) is executed in West Bengal and stamped amount of Rs. 100/- as per stamp duty of the State, now the POA is to be sent to Bihar, where stamp duty is Rs. 150/-. Comment on the validity of POA.**

**[June 2021 (4 Marks)]**

**Ans.** The exact amount of stamp duty on a Power of Attorney (POA) depends upon the State in which the POA is executed. If a POA executed in one state has to be sent to another state where the stamp, duty is higher, for use, then POA should be stamped with the difference in the duty before it is so used. Hence, in this case, the differential stamp duty of Rs. 50/- (i.e., 150-100) is to be paid before its use. Section 35 of the Indian Stamp Act, 1899 provides that an unstamped or inadequately stamped document is inadmissible in evidence.

**Q89. "Registration of a Power of Attorney is not compulsory". Comment.**

**[June 2019 (5 Marks)]**

**OR**

**Registration of power of attorney is not compulsory. Explain with reference to decided cases.**

**[Dec. 2020 (4 Marks)]**

**Ans.** Registration of a power of attorney is not compulsory.

**Section 4 of the Powers of Attorney Act, 1882** provides that it may be deposited in the High Court or District Court within the local limits of whose jurisdiction the instrument is with an affidavit verifying its execution, and a copy may be presented at the office and stamped as the certified copy and it will then be sufficient evidence of the contents of the deed. In certain cases, registration of power of attorney may become compulsory under section 17 of the Indian Registration Act, 1908.

Thus, a power which authorises the donee to recover rents of immovable property belonging to the donor for the donee's own benefit is an assignment and requires registration under clause (b) of sub-section (1) of section 17 of the Registration Act.

Similarly, a power of attorney which creates a charge on the immovable property referred to therein in favour of the donee of the power requires registration [**Indra Bibi v. Jain Sirdar, (1908)**].

In other cases, a mere general power of attorney, even though it deals with immovable property, need not be registered (**Kochuvareed v. Mariappa, A.I.R. 1954**) since it does not come under any of the documents specified in the Indian Registration Act, 1908 as requiring registration.

1921  
TAXMANN



# 4

## CHAPTER

# DRAFTING OF AGREEMENTS, DEEDS AND DOCUMENTS

### INTRODUCTION

**Q1. Why is it preferable to have a written contract over an oral or implied one?**  
[Scoring Question]

**Ans.** Though, contracts, deeds etc. can be written, oral, or implied also. However, it is always preferable to enter into written contracts as it *is always difficult to prove the terms of an oral or implied contract* than those of a written one.

***Some of the benefits of having a written contract are:***

- The process of writing down the contract's terms and signing the contract forces both parties to think about and be precise about the obligations they are undertaking. With an oral contract, *it is too easy for both parties to say "yes" and then have second thoughts.*
- With an oral contract, the parties may have *different recollections* of what they agreed on (just as *two witnesses to a car accident* will disagree over what happened).
- A written agreement *eliminates disputes over who promised what.*
- Some types of contracts must be in writing to be enforced. The Copyright Act, 1957 requires a *copyright assignment or exclusive license to be in writing.*
- If you have to go to court to enforce a contract or get damages, *a written contract will mean less dispute about the contract's terms as the burden of proof lies with you.*

### DOCUMENT – MEANING & HOW TO DRAFT A DOCUMENT?

**Q2. Define the term Document as per section 3 of the Indian Evidence Act, 1872.**  
[Scoring Question]

**Ans.** Section 3 of the Indian Evidence Act, 1872 states that a "Document" means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter.

- A writing is a document;

- Words printed, lithographed or photographed are document;
- A map or plan is a document;
- An inscription on a metal plate or stone is a document;
- A caricature is a document.

### TYPES OF AGREEMENTS/CONTRACTS

**Q3. What are the essential documents required for the formation of an entity?**  
[Scoring Question]

**Ans. Documents for formation of an Entity:**

- Memorandum of Association & Articles of Association
- Partnership Deed
- LLP Incorporation document and LLP Agreement
- Trust Deed v. Conversion of Partnership into Limited company
- Association of Persons agreement
- Section 8 company - Memorandum and Articles of Association
- Memorandum of Association and Rules and Regulations of Society.

**Q4. Mention the Documents relating to Cyber Law.** [Scoring Question]

**Ans. Documents relating to Cyber Law:**

- Software Services Agreement
- Internet services agreement
- Privacy Policy and User Agreement
- Software Escrow Agreement
- Website Development Agreement
- Internet Gateway Merchant Legal Agreement
- Technology related contracts.

### ALTERNATE DISPUTE RESOLUTION (ADR) AGREEMENTS

**Q5. Provide a brief discussion on Alternative Dispute Resolution (ADR) mechanisms, outlining the various types of ADR.** [Scoring Question]

OR

**What do you understand by Alternate Dispute Resolution (ADR) Mechanisms? Elucidate its different types.** [June 2024 (5 Marks)]

**Ans.** The process by which *disputes between the parties are settled or brought to an amicable result* without the intervention of Judicial Institutions and without any trail is known as Alternative Dispute Resolution (ADR). ADR offers to resolve all type of matters including civil, commercial, industrial and family etc., where people are not being able to start any type of negotiation and reach the settlement.

**Types of ADR:**

- **Arbitration**

The dispute is submitted to an arbitral tribunal which makes a decision (an "award") on the dispute that is mostly binding on the parties. It is **less formal than a trial**, and the rules of evidence are often relaxed. Generally, there is no right to appeal an arbitrator's decision. Except for some interim measures, there is very little scope for judicial intervention in the arbitration process.

- **Conciliation**

A non-binding procedure in which an impartial third party, the conciliator, assists the parties to a dispute in reaching a mutually satisfactory agreed settlement of the dispute. Conciliation is a **less formal form of arbitration**. The parties are free to accept or reject the recommendations of the conciliator. However, if both parties accept the settlement document drawn by the conciliator, it shall be final and binding on both.

- **Mediation**

In mediation, an impartial person called a "Mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator **does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves**. Mediation leaves control of the outcome with the parties.

**Q6. Draft Specimen on agreement of reference to common arbitrator.**

**[Scoring Question]**

**Ans. AGREEMENT OF REFERENCE TO COMMON ARBITRATOR**

**THIS AGREEMENT** is made at \_\_\_\_\_ on this \_\_\_\_ day of \_\_\_\_\_

**BETWEEN**

Mr. A \_\_\_\_\_ s/o \_\_\_\_\_ residing at \_\_\_\_\_  
hereinafter referred to as the Party of the First Part.

**AND**

Mr. B s/o \_\_\_\_\_ residing at \_\_\_\_\_ hereinafter  
referred to as the Party of the Second Part.

**WHEREAS** by an Agreement (Building contract) dated the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ 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** the Party of the Second Part has commenced the construction of the building according to the plans sanctioned by the Municipal Corporation and has completed the construction to the extent of the 1st floor level.

**AND WHEREAS** the Party of First Part has made certain payments to the Party of the Second Part on account but the Party of the Second Part is pressing for more payments

which according to the Party of the First Part he is not bound to pay and, therefore the work has come to a standstill.

**AND WHEREAS** disputes have therefore arisen between the parties hereto regarding the interpretation of certain provisions of the said agreement and also regarding the quality of construction and delay in the work.

**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 of a common arbitrator if agreed upon or otherwise to two Arbitrators 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.
- (2) **The points of dispute are:**
  - a. Whether the Party of the Second Part has carried out the work according to the sanctioned plans and specifications.
  - b. Whether the Party of the Second Part has delayed the construction.
  - c. Whether the Party of the Second Part is overpaid for the work done up to now.
  - d. Whether Party of the First Part is bound to make any further payment over and above the payments made up to now for the work actually done.
  - e. All other claims of one party against the other party arising out of the said contract up to now.
- (3) 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.
- (4) 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.
- (5) 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.
- (6) The Arbitrator will not make any interim award.

- (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) Subject to the provisions of the Arbitration & Conciliation Act, 1996 the award will be binding on the parties hereto.
- (9) The Arbitration shall subject to what is herein provided be governed by the provisions of the Arbitration and Conciliation Act, 1996.

**IN WITNESS WHEREOF** the parties have put their respective hands the day and year first hereinabove written. SIGNED by the within named

**Mr. A** \_\_\_\_\_

Signed by the within named

**Mr. B** \_\_\_\_\_

**In the presence of:**

1. \_\_\_\_\_
2. \_\_\_\_\_

**Q7. Draft the specimen of Model Arbitration clauses in an agreement, Model conciliation clauses and Model mediation clauses. [Scoring Question]**

**Ans. MODEL ARBITRATION CLAUSES IN AN AGREEMENT**

- i. Every dispute, difference, or question which may at any time arise between the parties hereto or any person claiming under them, touching or arising out of or in respect of this agreement (deed) or the subject matter thereof shall be referred to the arbitration of XY, etc. or if he shall be unable or unwilling to act, to another arbitrator to be agreed upon between the parties or failing agreement to be nominated by \_\_\_\_\_ or, failing agreement to two arbitrators one to be appointed by each party to the difference (whether consisting of one or more than one person) and in case of difference of opinion between them to an umpire appointed by the said two arbitrators before entering on the reference and the decision of the arbitrator (or such arbitrators, or umpire as the case may be) shall be final and binding on the parties.
- ii. In the event of any dispute, difference or question arising out of or in respect of this agreement or the commission of any breach of any terms thereof or of compensation payable thereof or in any manner whatsoever in connection with it, the same shall be referred to the Chamber of Commerce \_\_\_\_\_ (or the Association of \_\_\_\_\_) for arbitration as provided in Rules framed by the said Chamber (or Association) for the purpose. The decision or award so given shall be binding on the parties hereto.
- iii. All disputes arising between the partners as to the interpretation, operation, or effect of any clause in this deed or any other difference arising between the partners, which cannot be mutually resolved, shall be referred to the arbitration of \_\_\_\_\_ failing him to any other arbitrator chosen by the partners in writing. The decision of such an arbitrator shall be binding on the partners.

**EMPLOYMENT CONTRACTS**

**Q8. Discuss in brief about Employment Agreement. [Scoring Question]**

**Ans.** Employment agreement is an agreement that is entered into *between two parties, i.e., the employer and employee*. It is a document that describes the responsibilities and duties expected of an employee. It also describes *the profile of the job and the title*. The document ensures that the employee knows his place in the organisation and what is expected of him.

Employment agreements should be created in a way that *is just and fair for all the employees*. If this is followed, employees will do their tasks and responsibilities well and without any negative emotions toward their employers.

Usually, employment contracts contain only vague references to *the "policies and procedures to which the employee will be bound"*. The employer should provide the employee with all of the company policies and other documents that *relate to the contract or are referred to in the contract*.

**Q9. What are some critical considerations that should be addressed before finalizing an employment agreement, ensuring that both the employer and employee are well-informed and protected? [Scoring Question]**

**Ans.**

- Identify the *long-term requirement of employees*.
- Identify the *workmen and employees* not covered under definition of workmen, respectively.
- *Local laws of the State* should be borne in mind while drawing up the contracts.
- Issue appointment letters which clearly *define the employment terms and conditions*.
- Employment contracts, where necessary, should be put in place with clauses for wages, benefits, non-compete, confidentiality, term, termination etc.
- Depending on the requirement, use *fixed term contracts for workmen*.
- The terms and conditions of the employment should be *clearly explained to employees* before execution and should be drafted without any ambiguity.

**Q10. Draft the Specimen format of Employment Agreement.**

**[Scoring Question]**

**Ans.**

**AGREEMENT FOR EMPLOYMENT**

An **AGREEMENT** made on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

**BETWEEN**

\_\_\_\_\_ (Name of Company) represented by its Managing Director \_\_\_\_\_ (hereinafter called the "Employer" of the One Part.

**AND**

\_\_\_\_\_ (Name of the Employee & his details) (hereinafter called the "Employee" of the Other Part.

**WHEREAS**

The Employer is engaged in the business of \_\_\_\_\_ and maintains business premises at \_\_\_\_\_.

- (1) The employer wants to appoint a suitable person to work as \_\_\_\_\_ for his business concern;
- (2) The Employee, the party of the other Part, has agreed to serve as \_\_\_\_\_ for the business concern on the terms and conditions hereinafter set forth.

**NOW THIS AGREEMENT WITNESSED AND THE PARTIES HERETO AND HEREBY AGREE AS FOLLOWS:**

**(1) AGREEMENT TO EMPLOY AND BE EMPLOYED**

The Employer hereby employs the Employee as \_\_\_\_\_ at \_\_\_\_\_ and the Employee hereby accepts and agrees to such employment.

**(2) DESCRIPTION OF EMPLOYEE'S DUTIES**

Subject to the supervision and pursuant to the orders, advice, and direction of the Employer, the Employee shall perform such duties as are customarily performed by one holding such position in business concern. The Employee shall additionally render such other and unrelated services and duties as may be assigned to him from time to time by employer.

**(3) MANNER OF PERFORMANCE OF EMPLOYEE'S DUTIES**

The Employee shall at all times faithfully, industriously, and to the best of his/her ability, experience, and talent, perform all duties that may be required of and from him/her pursuant to the express and implicit terms hereof, to the reasonable satisfaction of employer. Such duties shall be rendered at the abovementioned premises and at such other place or places as employer shall in good faith require or as the interests, needs, business, and opportunities of employer shall require or make advisable.

**(4) DURATION OF EMPLOYMENT**

The term of employment shall commence on \_\_\_\_\_ and continue till such date the Employee works in the business concern subject, however, to prior termination as provided in Clause 9 hereof or by resignation by the Employee. In case of resignation, the Employee shall give one month prior notice to the Employer and on failure to do so, shall forego his salary for the notice period.

**(5) REMUNERATION**

The Employer shall pay a salary of \_\_\_\_\_ to the Employee for the services rendered to the business concern. The details of the salary are mentioned in Annexure A of the document. In addition to the foregoing, the employer shall also reimburse the expenses incurred by the Employee while travelling for and on behalf of the Employer pursuant to the employer's direction.

**(6) EMPLOYEE'S LOYALTY TO EMPLOYER'S INTEREST**

The Employee shall devote all his time, attention, knowledge, and skill solely and exclusively to the business and interests of the Employer, and the Employer shall be entitled to all benefits, emoluments, profits, or other issues arising from or incident to any and all work, services, and advice of the Employee. The Employee expressly agrees that during the term hereof he will not be interested, directly or indirectly, in any form, or manner, as partner, officer, director, stockholder, advisor, employee, or in any other form or capacity, in any other business similar to the employer's business or any allied trade, except that nothing herein contained shall be deemed to prevent or limit the right of employee to invest any of his surplus funds in the capital stock or other securities of any corporation whose stock or securities are publicly owned or are regularly traded on any public exchange.

**(7) NON-DISCLOSURE OF BUSINESS INFORMATION**

The Employee will not at any time, in any form or manner, either directly or indirectly divulge, disclose, or communicate to any person, firm, or corporation in any manner whatsoever any information of any kind, nature, or description concerning any matters affecting or relating to the business of employer, including, without limitation, the names of any its customers, the prices it obtains or has obtained, or at which it sells or has sold its products, or any other information concerning the business of employer, its manner of operation, or its plans, processes, or other data of any kind, nature, or description without regard to whether any or all of the foregoing matters would be deemed confidential, material, or important.

The parties hereby stipulate that, as between them, the foregoing matters are important, material, and confidential, and gravely affect the effective and successful conduct of the business of employer, and its good will, and that any breach of the terms of this section is a material breach of this agreement.

**(8) LEAVE**

The Employee will be entitled for one day leave for a completed month of service. Apart from this the employee will also be entitled to medical leave of 15 days in a year subject to submission of medical certificate in case the medical leave period exceeds three days.

**(9) TERMINATION OF SERVICE**

- The Employer shall terminate the services of the Employee without any previous notice, if the employer is satisfied based on medical evidence that the employee is unfit and is likely for considerable period to continue to be unfit by reason of ill health for discharge of his/her duties.
- The Employer shall terminate the services of the Employee without any previous notice, if the Employee is found guilty of any insubordination, intemperance, moral turpitude or other misconduct or of any breach or non-performance of any of the provisions of these conditions, or if otherwise found unsuitable for the efficient performance of his/her duties.

**(10) SETTLEMENT OF DISPUTE**

Any claim or controversy that arises out of or relates to this agreement, or the breach of it, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and relevant labour legislations.

**(11) WAIVER OR MODIFICATION EFFECTIVE ONLY IN WRITING**

No waiver or modification of this agreement or of any covenant, condition, or limitation herein contained shall be valid unless in writing and duly executed by the party to be charged therewith. Furthermore, no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration, or litigation between the parties arising out of or affecting this agreement, or the rights or obligations of any party hereunder, unless such waiver or modification is in writing, duly executed as aforesaid.

**(12) GOVERNING LAW**

This agreement and performance hereunder and all suits and special proceedings hereunder shall be construed in accordance with the laws of the State of \_\_\_\_\_, India.

**(13) BINDING EFFECT OF AGREEMENT**

This agreement shall be binding on and inure to the benefit of the respective parties and their respective heirs, legal representatives, successors, and assigns.

**IN WITNESS WHEREOF**

On behalf of the party of the ONE PART and by the party of the OTHER PART have hereto and hereby set their hands the day, month and year above mentioned:

\_\_\_\_\_  
1. Signature of the Party of the ONE PART (Employer)

\_\_\_\_\_  
2. Signature of the Party of the OTHER PART (Employee)

In the presence of

### SETTLEMENT AGREEMENTS

**Q11. Discuss in brief about Settlement agreement and what is the Purpose of a Settlement Agreement? [Scoring Question]**

**Ans.** A settlement agreement is a *legal contract that resolves the disputes* among all parties by coming to an agreement. It is a legal document where all parties in a court case, in civil law, *agree to an outcome of any judgment being made in advance.*

Usually, in settlement agreements, there is no need for a long court case which *saves the clients both time and money.* Settlement agreements are formed through mediation rather than through a trial.

Here are some situations in which a settlement agreement can apply:

- Any property damage claim;
- Mediation/Conciliation Settlement Agreements;
- Corporate Settlement Agreements;
- Family Business Settlement; and
- Employment disputes.

**Q12. Draft a Specimen of Settlement of Family Business. [Scoring Question]**

**Ans. SETTLEMENT OF FAMILY BUSINESS**

This Deed of Family Arrangement is executed on this \_\_\_\_\_ in the year 2020

**BETWEEN**

AB S/o MN aged \_\_\_\_\_ years, occupation \_\_\_\_\_  
r/o \_\_\_\_\_ (hereinafter called as the first party)

**AND**

CD S/o XM aged \_\_\_\_\_ years, occupation and r/o \_\_\_\_\_ (hereinafter called as the second party)

**WHEREAS**

- (1) The first party has started and carried out the business and undertaking described in Schedule 'A' by his own initiative and efforts with his own capital and funds.
- (2) The second party, who is son of the pre-deceased son of the first party and residing with him under the care and parentage of the first party and assisting him in conduct of the aforesaid business for which he was being paid share in profit. The second party thus having contributed his labour and skill for the development of the business

rendered valuable services for the same and rendered himself entitled for an equal share in the said business. It has been settled and decided to distribute the business amongst the parties so also the properties. The first party shall hold the share in business and properties described in Schedule 'B' and the second party shall hold the share in business and properties described in Schedule 'C'.

- (3) The movable and immovable properties, which is also described in Schedule 'A' have been acquired by the first party out of the funds of the said business in his name and for his use and benefits.

**NOW THIS DEED WITNESSETH AS FOLLOWS:**

- (1) The second party shall hold, own and possess as full and absolute owner of the business and properties described in Schedule 'C' without any demand or claim by the first party any account whatsoever for which, he has expressly granted, conveyed, transferred and assigned by the first party.
- (2) The business and properties have been distributed amongst the parties to this deed. It is hereby decided and declared that the first party hereinafter shall hold, own and possess as full and absolute owner of the business and properties described in Schedule 'B' and the second party shall not interfere in the same and he has relinquished his rights in the said part of business and properties described in Schedule 'A'.

**IN WITNESS WHEREOF** the parties to this DEED have put and subscribed their respective hands in presence of witnesses on this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ at \_\_\_\_\_.

1. Signature of the 1st Party

\_\_\_\_\_

2. Signature of the 2nd Party

**Witnesses**

1. \_\_\_\_\_ (Name, designation and address)

2. \_\_\_\_\_ (Name, designation and address)

**DRAFTING OF BYE LAWS OF SOCIETIES**

**Q13. Under section 20 of the Societies Registration Act, 1860, what types of societies are eligible for registration, and what specific purposes or activities do they typically undertake? [Scoring Question]**

**Ans.** A society may be *defined as an association of persons united together by mutual consent to deliberate, determine and act jointly for same common purpose.* When a

charitable organisation intends to have an open participation of large number of people in its *functioning and decision making, it must be registered as a Society.*

According to *section 20 of the Societies Registration Act, 1860*, the following societies can be registered under the Act: 'charitable societies, military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, *the diffusion of political education, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collection of natural history, mechanical and philosophical inventions, instruments or designs.*'

#### DRAFTING OF STANDING ORDERS

**Q14. What is the threshold for the applicability of the Industrial Employment (Standing Orders) Act in terms of the number of workers employed, and how does it vary between industrial establishments in general and those in the N.C.T. of Delhi? [Scoring Question]**

Ans.

- The Act makes it *obligatory for employers of an industrial establishment where 100 or more workers are employed* to clearly define the conditions of employment, by way of standing orders/services rules and to make them known to the workmen employed.
- *However, in the N.C.T. of Delhi*, the Act applies to an *industrial establishment where 50 or more workmen are employed or were employed in the preceding 12 months.*
- The employer is *required to prepare draft standing order*, which he propose to adopt and submit the same to the Certifying Officers for certification.
- The employer is *required to act in conformity with the certified standing orders* in dealing with the *day today affairs of the workmen.* Certified standing orders have the force of the law like any other enactment.

#### REPLY OF SHOW CAUSE NOTICES

**Q15. What are the key considerations that an individual must prioritize when responding to a Show Cause Notice from the Court, and why is it crucial to treat such notices with the highest priority and seriousness? [Scoring Question]**

OR

A competent jurisdictional authority has issued a show cause notice to Abdul Rehman. He has sought your advice for replying the same. What are the points that he must consider while replying to the show cause notice?

[June 2024 (5 Marks)]

**Ans.** If the Court sends a Show Cause Notice, the person to whom *such notice is given must give it the highest priority*. The show cause notice must not be taken lightly and its seriousness should be understood.

The reason being that by sending a reply to the show cause notice, he/she can avoid criminal charges put on him and also the liabilities which arise from them.

Points to be kept in mind while writing a reply to show cause notice:

- A proper explanation has to *be provided at the earliest*.
- It should be *kept as brief as possible*.
- It must be written in such a manner that the *Court is satisfied with the fact that he/she is aware of the gravity of the situation*.

#### NOTICES UNDER THE NEGOTIABLE INSTRUMENTS ACT

Q16. Under the proviso to section 138, what conditions must be met for the provisions of section 143 not to apply? [Scoring Question]

**Ans.** Conditions must be met for the provisions of section 143 not to apply:

- (a) the cheque has been presented to the bank *within a period of six months from the date on which it is drawn or within the period of its validity*, whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, *makes a demand for the payment of the said amount of money by giving a notice*; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, *within fifteen days of the receipt of the said notice*.

Q17. X, with the intention of disposing of his old stock of outdated machines, requested Y to place them in his shop for sale. Y handed over a blank cheque to X to be used only upon his instructions, after sold out of all those machines. However, since the machines were outdated and faulty, they could not be sold. Despite this, X lodged the cheque in the bank, which was subsequently dishonoured. Y received a notice under section 138 of the Negotiable Instruments Act, 1881, from X's advocate, demanding payment. You are required to draft a reply to the above notice, assuming the necessary facts.

[June 2024 (5 Marks)]

**Ans. Reply to Legal Notice under section 138 of Negotiable Instruments Act, 1881**

Name of the Advocate XXXXX

Advocate New Delhi-110019

Ph.011- 2437XXXX

Dt. 21.07.2015

To,

Sh. ....Advocate,

....., Delhi High Court,

New Delhi-110001

**SUB: REPLY TO YOUR LEGAL NOTICE U/S 138 NEGOTIABLE INSTRUMENT ACT, 1881 DATED 02.04.2023**

Dear Sir,

Your legal notice dated 2.4.2023 has been placed before me by my client Sh..... at Connaught Place, New Delhi - 110001 and I, the undersigned, have been instructed to reply to your said notice by my client on his behalf as under:

- A. That, at the outset you are being informed that the notice under reply, you have sent on behalf of your above said client, contains false and frivolous facts provided by your said client against my client, thereby your notice under reply deserves to be withdrawn, with unconditional apology by your client, because the claim made by you is without any basis and is based upon concocted facts, as no claim is made out against my client and in favour of your client.
- B. That, in fact, my client did not place any order for supply of any machines whatsoever, as alleged by you. But, with a view to dispose of your old stock of outdated machines, you requested my client to place them at his shop for sale. Keeping in view old relations my client agreed to your client's proposal, which was subject to the condition that payment would be made only after those machines were sold out. However, those machines were not only outdated, but were also mechanically faulty, because of which till date they are lying with my client, which your client is at liberty to take back with 2 days' prior notice. It is pertinent to mention here that the cheque in question was handed over by my client blank and the same was to be used only upon instructions of my client, after he could sold out your all those machines.
- C. That, however, your client has cheated my client by misusing that cheque which is not in the handwriting of my client. As a matter of fact, your client has committed fraud in the matter and, consequently, is liable to be proceeded under the relevant provisions of law.
- D. That, therefore, it is denied that the cheque in question was issued by my client to your client in discharge of any liability. Rather, your client has misused that blank cheque with ulterior motives, after forging the same.

**Reply on merits**

- (1) That the contents of para 1 of your legal notice are wrong and denied and whatsoever is stated above is reiterated. It is denied that my client purchased from you client any machines whatsoever. Rather, my client helped your client to keep your machines in his godown/shop for disposal. Therefore, it is denied that the cheque in question was issued in discharge of any liability towards my client, as alleged in this para.
- (2) That the contents of para 2 are denied for want of knowledge. However, it is reiterated that my client ever issued any cheque, in the manner as alleged by you.
- (3) That, in reply to para 3 of your legal notice, what is stated above is reiterated. It is submitted that your client was not entitled to use that cheque for encashment and deposit the same in his bank.
- (4) That the contents of paras 4 & 5 are denied for want of knowledge. However, it is reiterated that any cheque was issued in discharge of any liability towards my client to your client.
- (5) That the contents of para 6 need no comments. However, it is denied that my client committed any offence whatsoever.

In view of aforesaid facts and circumstances, you are being advised to further advise your client to withdraw the said notice under reply and further advise him not to drag my client in any frivolous litigation, failing which my client shall be constrained to contest the same, besides proceeding against your client under the relevant provisions of law, at the costs, risks and consequences of your client only. Copy kept for future record and reference.

Yours Sincerely,

Advocate

### TIPS TO IMPROVE DRAFTING OF LEGAL DOCUMENTS

**Q18. Mention few tips to improve drafting of legal documents.**

**[Scoring Question]**

**Ans.**

- **Keep Readers in Mind:** What you write should resonate with what the recipients or readers want. For figuring out the exactness, you should get deep with their expectations. The tone & intent of the document should be based on the requirement of the audience.
- **Jot Points Prior Writing:** Every legal document should be optimally organized. It is a key to its success. For it, create a layout by jotting all contextual points. Take those points as a guide for the effective legal document writing.
- **Avoid Formal & Technical Terms:** The formal and technical terms is called Legalese in legal writing. These can be typical legal phrases and jargon. The inclusion of words like aforementioned, herein, wherein, and hereto etc. can make

your writing offbeat, forced and detached. So, replace them with more concise, clear and simple words.

- **Keep Writing to The Point:** Your every word should be comprehensively brief. Keep your sentences short and concise, contributing to the entire case. Avoid extraneous words. Complex sentences have a great scope for redundancies. So, try to make them short and simple.
- **Active Voice Brings Clarity on Subject:** Passive voice creates confusion. It turns out more complicated when there is no mention of the subject of any doing. On the flip side, active voice makes it crystal clear who the doer or subject is. So, instead of writing "People were terminated", say, "XYZ terminated people".

1997-2015  
19-23  
TAXMANN

# 5

## CHAPTER

# DRAFTING OF COMMERCIAL CONTRACTS

### INTRODUCTION

**Q1. Discuss in brief about Commercial Contract and its objectives.**

[Scoring Question]

**Ans.** Commercial contracts are legally enforceable agreements between two or more parties. They are *agreements used to govern commercial activity(s)* and involve with the commercial aspects of a product or service.

They guarantee that *parties follow their word and streamline transaction flow*. The terms of a commercial agreement are usually *quite formal and vary for each organisation and transaction*.

A commercial contract meets two objectives:

- *the first* is that it must *simultaneously advance and protect the business interests* of the parties.
- *the second*, and often overlooked, goal of a properly drafted commercial contract is that it should *not unduly disturb or endanger the commercial arrangement* that the two contracting parties have struck.

### LIMITED LIABILITY PARTNERSHIP AGREEMENT

**Q2. Discuss in brief about limited liability partnership agreement and Content of LLP Agreement.**

[Scoring Question]

**Ans.** The LLP Agreement is a written contract among LLP partners or between the LLP and its designated partners. Filed within 30 days of LLP incorporation, it outlines rights, duties and key aspects like decision-making, adding or leaving partners and role changes. Essential for smooth LLP operation, it establishes a clear foundation for collaboration.

Content of LLP Agreement:

- Name of the LLP: The name must end with LLP or Limited Liability Partnership as per the provisions of the LLP Act, 2008.

- **Date of the agreement and parties to the agreement:** After incorporation, the agreement is to be executed within 30 days as per the LLP Act, 2008.
- **Introductory provisions:** It includes all the definitions of terms used in the LLP agreement.
- **Place of business:** The agreement must contain the place of business which is the registered office of the LLP.
- **Business activity:** It is important to include the business activities to be carried on by the LLP. It must be in the same nature as approved by the MCA at the time of incorporation of LLP.
- **Duration If the LLP:** is formed for the specific period, then such period must be mention after which the LLP must be dissolved. LLP can also be formed for certain object, after completion of such object; the LLP must be closed. In the absence of specific period or object, one can include the duration of LLP as up to the period until which, it is terminated with the consent of the partners of the LLP.
- **Accounting and Auditing etc.:** This includes how to maintain the books of account, whether it is cash basis or accrual basis. During which period a partner can access books of account, whether an audit is mandatory or will follow the rules mentioned in the LLP Act.
- **Partners' contribution and method of contribution:** Represents the contribution ratio of partners in terms of capital invested, interest on contribution, Profit Sharing Ratio as well as the time period after which the capital can be withdrawn by any of the designated partners. It is important for maintaining a good relationship between partners.

**Q3. A group of fashion designers, Akshita, Harshita and Hemalatha propose to form a Limited Liability Partnership (LLP). They seek your professional guidance on the drafting of the following clauses in the LLP Agreement:**

**[June 2018 (6 Marks)]**

**(a) Admission of new partner.**

**Ans.**

- No Person may be introduced as a new partner without the consent of all the existing partners. Such incoming partner shall give his prior consent to act as Partner of the LLP.
- Capital Contribution of the new partner may be tangible, intangible, movable or immovable property and the incoming partner shall bring minimum Contribution of Rs. .... (Rupees ..... only).
- Profit Sharing Ratio (PSR) of the incoming partner will be in proportion to his capital contribution in the LLP.

**(b) Extent of liability of the LLP.**

**Ans.** The LLP is not bound by anything done by a partner in dealing with a person if-

- (1) The partner in fact has no authority to act for the LLP in doing a particular act; and
- (2) The person knows that he has no authority or does not know or believe him to be a partner of the LLP.

**(c) Arbitration.**

**Ans.** All disputes between the partners or between the Partners and the LLP arising out of the LLP Agreement which cannot be resolved in terms of this LLP Agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.

**Q4. What are the key provisions regarding the mutual rights and duties of partners, as well as the Limited Liability Partnership (LLP) and its partners, in the absence of any specific agreement? [Scoring Question]**

**Ans.**

- The mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and its partners shall be determined, *subject to the terms of any limited liability partnership agreement or in the absence of any such agreement on any matter, by the provisions in this Schedule.*
- All the partners of a limited liability partnership are entitled to *share equally in the capital, profits and losses of the limited liability partnership.*
- Every partner shall indemnify the limited liability partnership for any loss caused to it by his fraud in the conduct of the business of the limited liability partnership.
- Every partner may *take part in the management* of the limited liability partnership.
- No partner shall be *entitled to remuneration for acting in the business or management* of the limited liability partnership.
- No person may be introduced as a partner *without the consent of all the existing partners.*
- Every limited liability partnership shall ensure that decisions taken by it are recorded in the minutes *within thirty days of taking such decisions and are kept and maintained at the registered office of the limited liability partnership.*
- Each partner shall *render true accounts and full information* of all things affecting the limited liability partnership to any partner or his legal representatives.

**JOINT VENTURE**

**Q5. Discuss in brief about the concept of Joint Venture and mention few Important clauses of joint venture agreement. [Scoring Question]**

Ans.

- A Joint Venture (JV) means a **strategic arrangement** between two or more businesses, where resources are pooled, to work together on a specific project or an ongoing basis.
- Joint ventures are a **useful way of collaborating with other businesses** and to combine different areas of expertise for targeted or general business purposes.
- Each of the participants in a JV is **responsible for profits, losses and costs associated with it**. However, the venture is its own entity, separate from the participants' other business interests.
- It is important that the **parties to the joint venture define their respective roles and responsibilities** early on and how the parties will work together to achieve the joint venture's targets.

**Few Important clauses of joint venture agreement:**

- Parties to the Joint Venture
- Rights and obligations of the parties
- Representation and warranties
- Indemnity clause
- Business object
- Purpose of the Joint Venture.

Q6. Dinson Inc., a Malaysian food processing company intending to expand its business in India plans to form a joint venture with Himalaya Agro Pvt. Ltd., a company incorporated under the Companies Act, 2013, engaged in the business of processing and marketing of food products. You are required to draft a specimen joint venture agreement for establishing the business with assumed data? [Dec. 2015 (8 Marks)]

Ans. **SPECIMEN OF JOINT VENTURE AGREEMENT**  
(Joint Venture with Foreign Company)

**THIS JOINT VENTURE AGREEMENT** is made and executed at.....on the ..... day of ..... **2024** BY and BETWEEN **AMCO INC.** incorporated under the appropriate laws of the United States of America having its office at 5 Seventh Street, New York **of the ONE PART.**

**AND**

**INCO LTD.** a company registered under the Companies Act, 1956 having its office at 99 Chowring Road Calcutta 700071 **of the OTHER PART.**

**WHEREAS AMCO INC.** (hereinafter referred to as **AMCO**) carries on business as **manufacturer of and dealer and exporter** in Computers, Computer Hardware's and

Software's and has worldwide market and intends to extend its **market here in India** and elsewhere.

**AND WHEREAS INCO LTD. (hereinafter referred to as INCO)** carries on business as manufacturer of, dealer in and exporter of **Computer Software's** and intends to expand its business in India and abroad.

**AND WHEREAS AMCO and INCO** intend to **co-operate** in manufacturing/dealing in and exporting Computers, Hardware's and Software's in India and abroad for **mutual benefit BY SETTING UP A NEW COMPANY.**

**NOW IT IS HEREBY AGREED BETWEEN THE PARTIES AS FOLLOWS:**

- (1) A Joint-stock company would be formed under the name and style of **Indo-American Company Pvt. Ltd.** registered under the Companies Act, 2013 having its Registered Office at.....
- (2) AMCO and three of its nominees and INCO and three of its nominees would be the **subscribers to the Memorandum and Articles of Association** of the said company to be incorporated.
- (3) The **shareholding in the Share Capital** of the said company to be incorporated would be in **equal proportions** between AMCO and INCO.
- (4) AMCO will be allotted shares in the said new company **partly in cash and partly towards the cost of plant, machinery and equipment to be supplied by AMCO to the new company** and in consideration **for assignments by AMCO of its Patent Rights, Trade Marks, Trade Names and Licences in favour of the new company to be incorporated.**
- (5) **Will furnish necessary technical assistance and expertise** to the new company for assembling, installation, start-up and for smooth running of the **manufacturing and selling processes** as might be required by the new company from time to time.
- (6) **Will furnish** to the new company **all other technical assistance and advice** in relation to the operation of the plant and machinery, repairs thereof, testing facilities, training facilities and Research & Development facilities should be arranged for, provided and continued for successful running of the business of the new company.
- (7) The consideration for allotment of shares of the new company to INCO shall be **paid in cash and in kind** such as by transfer of **immovable properties for the setting up of factory and making arrangement for the office accommodation of the new company.** The valuation of such immovable properties including office accommodation would be decided by mutual agreement between AMCO and INCO.
- (8) The shares that would be **allotted by the new company should not be transferred by either AMCO or INCO within a period of five years** from the date of allotment and thereafter if any of the parties intends to transfer any share then the **same shall**

be offered first to the other party at a price to be determined by a valuer to be appointed by mutual agreement and in absence by application to the Indian Chamber of Commerce.

- (9) Neither party shall carry on their own business in a manner which will directly or indirectly or adversely affect the business and profitability of the new company.
- (10) The expenses for the setting up and promotion of the new company would be shared equally by AMCO and INCO.
- (11) Any disputes or differences arising in relation to this agreement, its construction, validity, performance, breach or any other question shall be referred to the Indian Chamber of Commerce and the decision of the said Arbitrator shall be final and binding on both the parties.
- (12) This agreement is made subject to obtaining approvals of the Indian Government and other concerned authorities. [RBI]
- (13) In the event certain additions or alterations are required under this agreement due to imposition of certain terms and conditions by Government of India or appropriate authority granting the approval shall be incorporated in this agreement by way of a SUPPLEMENTAL AGREEMENT and if required the Memorandum and Articles of Association of the new company would also be in conformity with such directions or approvals of the appropriate authorities.

IN WITNESS WHERE OF the parties hereto have signed, sealed and delivered these presents on the day, month and year first abovewritten.

**SIGNED, SEALED AND  
DELIVERED BY**

Mr. ....  
Pursuant to the Board Resolution  
Dated of AMCO Inc. Signature  
in the presence of:

1.....  
2.....

**SIGNED, SEALED AND  
DELIVERED BY**

Mr. ....  
Pursuant to the Board Resolution  
Dated ..... of INCO Ltd. Signature  
in the presence of:

1 .....  
2 .....

**FOREIGN COLLABORATION AGREEMENTS**

**Q7. Write notes on the "Collaboration Agreements". [June 2014 (4 Marks)]**

**Ans.** When two parties join hands for exchange of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and/or managerial services, they are said to be collaborating in a desired venture. The word "collaboration" has, however, acquired

a specific meaning, which refers to cooperation between a party within India and a party abroad.

The agreements drawn and executed between such collaborating parties are known as “foreign collaboration agreements”. With sophistication and technical advance achieved in the developed countries and motivated by the desire of carrying the country into the twenty-first century, the Indian entrepreneurs are seeking all possible avenues for obtaining technical know-how in the fields of agriculture, mining, oil exploration, power generation, etc. A large number of Indian industrialists have already entered into long and short-term collaboration arrangements with foreign companies, firms etc.

In order to ensure quick processing of the proposed collaboration arrangements and on a uniform basis, the Central Government has issued guidelines for prospective collaborators so that they submit their proposals in accordance with those guidelines.

**Example:** Mr. A is a plot owner and Mr. B is constructor, entered into a contract stating inter alia that Mr. B will construct 4 floors on the entire plot and Mr. A will take two floors and remaining two floors will be owned by Mr. B on account of construction cost. Here, Mr. B is not taking any construction cost from Mr. A and they are using each other's' resources. Such contracts are named as Collaboration contracts.

**Q8. Mention important guidelines which are required to be followed while entering into a Foreign Collaboration Agreement? [Dec. 2013 (8 Marks)]**

**Ans.** These guidelines cover the following aspects of foreign collaboration agreements:

<b>Investment</b>	Where in a foreign collaboration agreement, <b>equity participation</b> if involved, the value of the shares to be acquired is brought in <b>cash</b> .
<b>Lump sum payment</b>	The amount agreed to be paid by an <b>Indian party to a foreign collaborator</b> for technology transfer should be paid in <b>3 instalments</b> as follows: <b>(i) 1/3rd</b> to be paid after the agreement has been <b>approved by the Central Government;</b> <b>(ii) Next 1/3rd</b> on transfer of the <b>technical documents;</b> and <b>(iii) Balance 1/3rd</b> on the <b>commencement of commercial production.</b>
<b>Royalty</b>	On the basis of ( <b>net ex-factory selling price – excise duty &amp; cost of imported components</b> ), rate of royalty may be <b>3% to 5%</b> , depending on the nature & extent of the technology involved.
<b>Duration of agreement</b>	Normal period of a foreign collaboration agreement is <b>8 years' subject to maximum of 10 years.</b> The period is approved by the Government <b>usually for 5 years</b> from the date of the agreement in the <b>first instance or 5 years</b> from the date of commencement of commercial production;

<b>Renewal or extension of agreement</b>	The Central Government may consider an application for <b>renewal</b> of a foreign collaboration agreement or <b>for extension of its period on merit</b> .
<b>Remittances</b>	Remittances to foreign collaborators are allowed only <b>on the basis of the prevailing exchange rates</b> .
<b>Sub-licensing</b>	<ul style="list-style-type: none"> <li>• An agreement shall <b>not normally impose any restriction on the sub-licensing</b> of the technical know-how to other Indian parties.</li> <li>• Sub-licensing is, however, subject to the Central Government's approval.</li> </ul>
<b>Exports</b>	No foreign collaboration agreement shall be allowed to contain any restriction on the <b>free export to all countries</b> , <b>EXCEPT</b> in a case where the foreign collaborator has <b>licensing arrangements</b> in which case the countries concerned shall be specified.
<b>Procurement of capital goods etc.</b>	There should be no restriction on procurement of capital goods, components, spares, raw materials etc. by the Indian party.
<b>Technicians</b>	The number, terms of service, remuneration etc. of technicians to be deputed on either side is subject to <b>APPROVAL OF THE RESERVE BANK OF INDIA</b> .
<b>Training</b>	Provision shall be made in the agreement for <b>adequate facilities for training of Indian technicians for RESEARCH AND DEVELOPMENT</b> .
<b>Exploitation of Indian patents</b>	Where any item of <b>manufacture is patented in India</b> , the payment of royalty or lump sum to the foreign collaborator should make provision for compensation for use of such patent <b>until its expiry</b> . There should also be provision for manufacture by the Indian company of the said item <b>even after the expiry of the collaboration agreement without making any additional payment</b> .
<b>Brand Name</b>	There should be <b>no insistence on the use of foreign brand names</b> on products for <b>sale in India</b> . There can, however, be no objection for use of foreign brand name on products to be <b>exported</b> to other countries.
<b>Indian Laws</b>	All collaboration agreements shall be <b>subject to Indian laws</b> .
<b>Approval of CG.</b>	Every foreign collaboration agreement shall be <b>approved by the Central Government</b> .

**Q9. 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?**  
[Dec. 2019 (8 Marks)]

**Ans. A SPECIMEN OF A COLLABORATION AGREEMENT**

“**THIS COLLABORATION AGREEMENT**” is made and executed at .....  
 on this ..... day of .....20XX **by and between AERCO Ltd.**  
 (Foreign Company) incorporated in the United Kingdom and having its registered  
 office at ..... **[Hereinafter called the U.K. company of the ONE PART]**

**AND**

**ABC Ltd.** a Company registered under the Indian Companies Act, 1956, and having  
 its registered office at ..... **[Hereinafter called the Indian company of  
 the OTHER PART]**

“**WHEREAS**” the Indian company has been incorporated with the **object** of  
 manufacture and production of the ..... as per its object and further  
**desirous to improve the quality and production of the goods** manufactured by it.

**AND WHEREAS** the Indian company has **already constructed factory buildings,**  
 installed plant and machinery and commenced manufacture and production of  
 .....

**AND WHEREAS** the Indian company therefore **approached** the U.K. company **who  
 have considerable experience** in the line of manufacture engaged in by the Indian  
 company, and requested them to extend to them necessary **technical assistance** in that  
 behalf;

**AND WHEREAS** the U.K. company has **agreed** to extend technical assistance and to  
 furnish to the Indian company for improvement of their business the **requisite know-  
 how** in the form of designs, plans, engineering drawings, technical advice **and also to  
 supply technicians to advice for improvement** of the existing factories, machineries  
 and plant **and also** to provide to the Indian personnel necessary **technical training**  
 to enable them **to successfully handle and exploit the technical know-how to be  
 imparted to the Indian company** subject to the terms and conditions set out  
 hereunder:

**NOW THIS AGREEMENT WITNESSES AS FOLLOWS:**

- (1) **IN CONSIDERATION OF THE REMUNERATION** paid by the Indian com-  
 pany to the U.K. company as described hereinafter **the U.K. company shall  
 supply to the Indian company:**
  - (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 Indian company in carrying out the improvement to the factories and for installing additional plants and machinery;
  - (e) **Impart technical training to selected Indian personnel** at their works in England 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.
- (2) For technical know-how and data supplied by the U.K. company to the Indian company as above, the Indian company shall make a **LUMP SUM PAYMENT** of Rs.... to the U.K. company phased as follows:
- (a) **1/3rd** on approval of the agreement by the **Central Government**;
  - (b) **NEXT 1/3rd** on the U.K. company supplying the Indian company 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 1/3rd** 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 CG. [**Duration of agreement**]
- (4) The Indian company **may but not bound to use foreign brand names** on their products for internal sale or on products to be exported. [**Brand Name**]
- (5) There shall be **no restriction** on the Indian company **exporting their products** to foreign countries.
- (6) The Indian company **shall not have the right to pledge, mortgage or assign or to sub-licence** the technical know-how, data, engineering designs, layouts etc. to other parties, **without the consent in writing** of the U.K. Company. [**Alienable subject to Foreign collaborator approval**]
- (7) There shall be no restraint on the Indian company having their own arrangements for procurement of raw materials, purchase of spares and components and for pricing their products and the sale thereof. [**Procurement of capital goods etc.**]

- (8) **Technicians** who may be deputed by the U.K. company to the Indian company **to advise and assist** the Indian company under this agreement **shall be paid their salary, travelling expenses and boarding and lodging by the Indian company.**
- (9) The Indian company shall **maintain the utmost secrecy** in connection with any technical data supplied by the U.K. company under this Agreement, and in particular shall keep all data concerned with the manufacturing processes **under lock and key. [Confidentiality clause]**
- (10) It is agreed that the payment made to the U.K. company shall include the compensation for use of the patent rights for the period of its duration and that the Indian company shall have the right for the period of its duration and **that the Indian company shall have the right to manufacture their products even after the expiry of this Agreement. [Exploitation of Indian patents]**
- (11) **On the expiry of the period prescribed herein or of extended period provided in clause 3** or upon the termination of this agreement for any reason the Indian company shall return to the U.K. company all copies of information data or material sent to it by the U.K. company 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..... 20XX in the presence of the following:

WITNESSES:

#### OUTSOURCING AGREEMENT

**Q10. BPO and KPO type of outsourcing.**

**[Dec. 2019 (5 Marks)]**

**Ans.** 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 good outsourcing agreement is one which provides a comprehensive road map of the duties and obligations of both the parties - outsourcer and service provider. It minimizes complications when a dispute arises. However, many times people neglect to pay attention while drafting an outsourcing agreement. Before finalizing an outsourcing agreement, the terms should be thoroughly discussed and negotiated to avoid any

misunderstanding at a later stage. It is advisable to consult a professional before finalizing any outsourcing agreement.

**Q11. Business and Knowledge process outsourcing has emerged as a key growth driver in the Indian service sector. Discuss the factors to be considered in drafting of an outsourcing Agreement. [Dec. 2015 (8 Marks)]**

**OR**

**'Outsourcing' is the contracting out of a company's non-core and non-revenue generating activities to specialists. Before signing an outsourcing agreement, what are the factors that must be addressed? [June 2016 (8 Marks)]**

**Ans. Before signing an outsourcing agreement, the following factors must be properly addressed:**

- (a) Duties and obligations of Outsourcer.
- (b) Duties and obligations of service receiver.
- (c) Security and confidentiality.
- (d) Legal compliance.
- (e) Fees and payment terms.
- (f) Proprietary rights.
- (g) Auditing rights.
- (h) Applicable law to outsourcing agreement.
- (i) Term of the Agreement.
- (j) Events of Defaults and Addressing.
- (k) Dispute Resolution Mechanism.
- (l) Time limits.
- (m) Location of Arbitration.
- (n) Number of Arbitrators.
- (o) Interim measures/Provisional Remedies.
- (p) Privacy Agreement.
- (q) Non-compete Agreement.
- (r) Confidentiality Agreement.
- (s) Rules Applicable.
- (t) Appeal & Enforcement.
- (u) Be aware of local peculiarities.
- (v) Survival terms after the termination of the outsourcing agreement.

**Q12. 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. [June 2018 (8 Marks)]**

**OR**

X Co. Ltd. intends to hire the operational staff like Malis, Sweepers, Security Guards, Typists etc. for its office in New Delhi. As a Company Secretary in practice, advise the management of X Co. Ltd. about the benefits of outsourcing the staff rather than direct recruitment. Also draft a specimen of the outsourcing agreement to be entered into with the Service Provider Company? [June 2017 (8 Marks)]

**Ans. The benefits of outsourcing are as under:**

- (a) Direct hiring of the staff becomes a permanent liability. It is very difficult to select right type of persons and it is equally difficult to remove them in case of any trouble.
- (b) Recruitment and selection is costly and time consuming. Hiring through outsourcing is comparatively very convenient and cost effective.
- (c) Lot of flexibility is there for hiring through outsourcing where as in direct recruitment, there is hardly any flexibility.
- (d) Staff hired through Service Provider is more sincere, active and efficient as compared to own staff.

### OUTSOURCING AGREEMENT

This **Agreement** is made on this ..... day of June ....., 2017 **between** ABC Co. Ltd. (hereinafter referred to as the Company), registered under the Companies Act, 1956, having registered office at Orchard Road, Modern Complex, New Delhi and acting through Mr. Mohan, Managing Director of the Company.

**and**

M/s. Lotus Service Providers (hereinafter referred to as Service Provider), a Partnership Firm having its office at S6- Defence Enclave, New Delhi and acting through Mr. Karan, Managing Partner of the Firm.

**WHEREAS** the Company is in need of the operational staff like typist, mails, sweepers, security guards, etc. for its registered office at Orchard Road, New Delhi.

**AND WHEREAS** the Service Provider has approached the Company for hiring and providing of the desired operational staff on outsourcing basis.

**Now it is agreed by and between the parties hereto as follows:**

#### **I. Obligations of the Service Provider**

- (a) That the service provider will hire and depute requisite number of staff like typist, malis, sweepers, security guards, etc. as and when demanded by the Company.
- (b) That the staff to be hired and deputed should be in the age group of 25-35 years of age and should have a minimum of 2 years' experience.

- (c) That due compliance of labour laws like contribution to PF, ESI, etc. will be the responsibility of the Service Provider. Proof for the payment of PF and ESI contribution will have to be submitted along with the monthly bills to be raised for claiming the wages of the deputed staff.
- (d) That the staff so deputed should have proper police verification and resident/identity proof.
- (e) That the Service Provider will be liable for the work and conduct of the staff deputed with the company. If case any request is received for change or substitution of any person, the same is attended immediately.

## II. Obligations of the Company

- (a) That the Company will pay wages equivalent to the minimum wages as fixed by the Labour Department from time to time.
- (b) That the Service Provider will be allowed commission of 10% on the total salary/wages bill for each month based upon the minimum wages fixed by the Labour Department.
- (c) That the company will make demand for the require staff at least 10 days in advance to the Service Provider so as to enable it to hire and depute the staff.
- (d) That the staff deputed by the Service Provider would be eligible for weekly off and other holidays as per the rules of the Company.

III. That in case any dispute arises with respect to the interpretation of any terms and conditions, the matter would be referred for arbitration. Each party will have a right to appoint one of their representatives as the arbitrator. The arbitration proceedings would be as provided under Arbitration and Conciliation Act, 1996.

In witness whereof, both the parties, set their hands, this .... day of ....., 2017.

Witness 1

For and on behalf of the Company

Witness 2

For and on behalf of the Service Provider

## JOINT DEVELOPMENT RIGHTS AGREEMENT

**Q13. Throw light on joint development rights agreement. [Scoring Question]**

**Ans.** In today's collaborative era, joint development arrangements have *become popular, especially in real estate*. In a Joint Development Agreement (JDA), a landowner *contributes land, and the developer takes on responsibilities like approvals, construction, and marketing*. This agreement, registered under *section 53A* of the Transfer of Property Act, binds both parties.

The landowner provides the land, and the developer offers compensation, which could be a lump sum, a percentage of sales revenue, or a share in the newly constructed project. This collaboration allows the developer to leverage their *expertise without the initial land investment, while the landowner gets a better price for their land.*

This *win-win situation extends beyond real estate* and can apply to joint development agreements in technology, focusing on research and development of Intellectual Property Rights. Such agreements are also known as strategic alliances. Overall, *joint development arrangements are strategic collaborations* where parties optimize their resources for mutual benefit without extensive financial investment.

## SERVICE AGREEMENTS

**Q14. Discuss in brief about the Contents of a Service Contract.**

**[Scoring Question]**

**Ans.** 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 as well as negative.*

**For other employment contract, important terms are discussed hereinafter:**

- **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.
- **Remuneration:** Remuneration may be fixed monthly salary, or fees or commission, or salary as well as fees or commission.
- **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.
- **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 example, the Factories Act, the Industrial Employment (Standing Orders) Act, the Payment of Wages Act, the Employees’ Compensation Act etc.

## DEALERSHIP AGREEMENT, DISTRIBUTORSHIP AGREEMENT & FRANCHISE AGREEMENT

**Q15. Discuss in brief about the Dealership Agreement and Common sections included in Dealership Agreements. [Scoring Question]**

**Ans.** A dealership agreement is a *formal contract* defining the terms between a distributor/vendor and a dealer, or between a general dealer and a vendor. The *complexity and length of these agreements may increase based on the scale of the manufacturer and the number of dealers involved.*

*Common sections included in Dealership Agreements are:*

- Purpose of the agreement.
- Tenure of the Agreement.
- The obligation of the parties, which may include.
- The procedure of supply and return of goods.
- Promotion and training.
- Invoices and the mode of payment.
- Any restrictions upon the parties.
- Termination of the dealership.

**Q16. Discuss in brief about Distributorship agreement and mention the content of checklist of factors to be considered when drafting a distribution contract. [Scoring Question]**

**Ans.** A distributorship agreement is a *legally binding contract between a supplier and a distributor* in which the distributor purchases and sells items from the supplier in order to sell them to retailers and/or consumers directly. The distributorship agreement describes the *parties' rights, expenses, area, and obligations in respect of product distribution.* The agreement confers on the distributor the right to supply the manufacturer's goods within a region or regions.

*The following is a checklist of factors to be considered when drafting a distribution contract:*

- Exclusive Distributor/Distributors.
- Terms and conditions of sale.
- Term for which the contract is in effect.
- Duration of the agreement.
- Marketing rights.
- Trademark licensing.
- Geographical territory covered by the agreement.
- Performance.

- Reporting.
- Returned goods credits and costs.

**Q17. Throw light on the franchise agreement and mention what should a standard franchise agreement include. [Scoring Question]**

**Ans.** A franchise agreement is a *legally enforceable contract* between a *franchisor and a franchisee*. These agreements authorise a franchisee to open a franchise site while also granting the ability to use franchise specific resources such as branding, business methods, and supplier sources. A franchise agreement, *like any other contract, is intended to define precise conditions for the parties' relationship.*

**A standard franchise agreement include:**

- (a) Basis of the agreement.
- (b) Grant of a franchise.
- (c) The agreement's duration.
- (d) Fee for franchising.
- (e) Operations management.
- (f) Services provided by franchisor.
- (g) Safety of Intellectual Property.
- (h) Training.
- (i) Advertising.
- (j) Limitations relating to defaults and damages.
- (k) Obligations upon expiration.
- (l) Royalties.

## **NON-DISCLOSURE AGREEMENT**

**Q18. Throw light on Non-Disclosure Agreement. [Scoring Question]**

**Ans.** A Non-Disclosure Agreement (NDA), also known as a "Confidentiality Agreement," is a legally binding contract creating a confidential relationship. Parties involved commit not to disclose sensitive information obtained during their interactions. NDAs are crucial in situations where companies are in discussions to collaborate, safeguarding their interests and the details of potential deals. This agreement prevents the release of information about the business processes or plans of the involved parties.

**The key elements of Non-Disclosure Agreements:**

- Identification of the parties.
- Definition of what is deemed to be confidential.
- The scope of the confidentiality obligation by the receiving party.

- The exclusions from confidential treatment.
- The term of the agreement.

### ELECTRONIC CONTRACTS (E-CONTRACTS)

Q19. Explain the following: Electronic or E-contracts. [June 2018 (4 Marks)]

OR

Write notes on the following; Essentials of E-contracts.

[June 2019 (5 Marks); June 2017 (4 Marks)]

OR

Critically comment on the following; Formation of E-contracts, being paperless, lies outside the Fowler's rules of drafting. [Dec. 2014 (5 Marks)]

**Ans.** E-contract (contract that is not paper based but rather in electronic form) is any kind of contract formed in the *course of e-commerce by the interaction of two or more individuals using electronic means*, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of *at least two electronic agents that are programmed to recognize the existence of a contract*. Traditional contract principles and remedies also apply to E-contracts. This is also known as *electronic contract*.

As per the Indian Contract Act, the essentials of an E-contract are:

- An offer or proposal by *one party and acceptance* of that offer by another party resulting in an agreement *consensus-ad-idem*.
- An intention to create *legal relations or intent to have legal consequences*.
- The agreement is supported by *lawful consideration*.
- The parties to contract are *legally capable of contracting*.
- *Genuine consent* between the parties.
- The *object and consideration of the contract* is legal and is not opposed to public policy.
- The terms of the *contract are certain*.
- The agreement is *capable of being performed*, i.e., it is not impossible of being performed.

Q20. Turfy Pvt. Ltd. wants to offer online shopping services to its customers. Some of the products are stocked with Doodle Warehouses while others are stocked with the manufacturers. Outline the scope of services provided by Turfy Pvt. Ltd., restricting the liabilities in case of defects found in products sold through the Turfy Pvt. Ltd. website. Further, illustrate the important disclaimers regarding use of the website by the customers while drafting the

E-contract, in case of loss or damaged suffered by the customers while availing services of Turfy Pvt. Ltd. [June 2022 (8 Marks)]

OR

What are E-contracts? Discuss important points with regard drafting of E-contract. [June 2015 (8 Marks)]

Ans. The important points relating to E-contracts are as under:

- The contract must specify that by using the 'X' website, the customer becomes *subject to the terms of a legal agreement* between the customer and Y. Customers must be informed that they must be of legal age to enter into the contract.
- *Acceptance of the terms* of the contract.
- The contract should clearly state that all content included on the 'X' website, such as text, graphics, logos, button icons, images, audio clips, digital downloads, data compilations, and software is the property of 'X' Ltd.
- *Customer's duties and obligations:* The contract should clearly lay down the duties and obligations of the customer.
- The contract should clearly mention that the reviews, comments, photos etc. posted by customers should not be illegal, obscene, threatening, defamatory, invasive of privacy, infringing of intellectual property rights, or otherwise injurious to third parties.
- The contract should *clarify how the prices listed* on the 'X's website are computed.
- The contract should mention the city/state and country *whose law will prevail in this contract*.
- The contract must lay down that the customer can terminate the *contract by closing his accounts*.

Q21. Write notes on the following: Types of E-contracts. [June 2014 (4 Marks)]

OR

Write notes on the following: Click-wrap or Web-wrap Agreements.

[Dec. 2018 (4 Marks); June 2016 (4 Marks)]

OR

Write notes on the following; Shrink-wrap agreement.

[Dec. 2017 (4 Marks)]

OR

Explain Electronic Data Interchange. (EDI)

[June 2019/Dec. 2015 (4 Marks)]

OR

Write a note on Electronic Data Interchange (EDI).

[June 2022 (4 Marks)]

OR

**Distinguish between the following: Click-Wrap Agreements and Shrink-Wrap Agreements.** [Dec. 2019 (4 Marks)]

OR

**Explain Click-Wrap Agreement.** [Dec. 2022 (4 Marks)]

**Ans. CLICK-WRAP OR WEB-WRAP AGREEMENTS**

A click-wrap agreement is mostly found as part of the INSTALLATION PROCESS of software packages, these are the agreements which we generally come across while SURFING INTERNET such as "I AGREE" to the terms or "I DISAGREE" to the above conditions. It is also called a "Click through" agreement or Click-wrap license.

**Click-wrap agreements can be of the following types:**

- **Type and click** where the user must type "I accept" or other specified words in an on-screen box and then click a "Submit" or similar button. This displays acceptance of the terms of the contract. A user cannot proceed to download or view the target information without following these steps.
- **Icon Clicking** where the user must click on an "OK" or "I agree" button on a dialog box or pop-up window. A user indicates rejection by clicking "Cancel" or closing the window. Upon rejection, the user can no longer use or purchase the product or service. A click-wrap contract is a "take-it-or-leave-it" type of contract that lacks bargaining power.

**THE SHRINK-WRAP AGREEMENTS**

Shrink-wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product like CD ROM of software. The terms and conditions are printed on the cover of CD ROM. Sometimes additional terms are imposed when in such licenses appear on the screen when the CD is downloaded to the computer. The user has right to return if the new terms and conditions are not to his liking.

**ELECTRONIC DATA INTERCHANGE OR (EDI)**

EDI is the computer-to-computer exchange of Business Documents in a Standard Electronic Format between Business Partners. These contracts used in trade transactions which enable the transfer of data from one computer to another in such a way that each transaction in the trading cycle can be processed with virtually no paperwork. For example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgement of export and other official documents, leading eventually to the shipment of the goods.

**Q22. Write notes on the following; Online shopping agreement between the Service Provider and manufacturer. [June 2017 (4 Marks)]**

**Ans. The important points relating to E-contracts are as under:**

1. Customer's relationship with Service Provider.
2. Acceptance of the terms of the contract.
3. Copyright.
4. Customer's duties and obligations.
5. License from Service Provider.
6. Reviews and comments.
7. Risk of loss.
8. Pricing.
9. Prohibitions.
10. Applicable Law.
11. Limitation of liability.
12. Exclusion of warranties.
13. Ending the relationship between 'X' and the customer.

**Q23. XYZ Ltd., a multinational conglomerate operating across various sectors, faces a critical decision regarding a strategic partnership proposal with a promising tech start-up. With 12 directors on the board, the urgency of the matter, coupled with the diverse locations of its board members, poses a challenge in convening an in-person meeting. Consequently, the company seeks an alternative method to pass the resolution.**

**W acted as a director on the Board of Directors of XYZ Ltd. between 2016 and 2018. He is also a shareholder in the said company, owning approximately 25.66% equity shares, and drew a salary of Rs. 2.50 lakhs per month. The Commissioner of Central Goods and Service Taxes, based on the information received indicating that XYZ Ltd. was availing Input Tax Credit (ITC) against fake/ineligible invoices, commenced an investigation under section 67 of the Central Goods and Services Tax Act, 2017, against XYZ Ltd. W, as per the commissioner's statement, admitted to the fact that he had acted as a director of the company between 2016 and 2018, and since then, he has been working in the company in the capacity of a mentor/advisor. Furthermore, W also stated to the CGST Department that, in his capacity as the mentor/advisor to the company, he received Rs. 30 Lakhs in the concerned FY i.e., 2019-2020, from the company. According to W, this money was given as he had been providing "strategic guidance" to the Company. The bank accounts of W have also been attached to the CGST Department.**

XYZ Ltd. enters into a contract with B, a logistics provider, to deliver a shipment of newly manufactured electronic gadgets to various retail stores across the country. The contract specifies a delivery deadline crucial for the upcoming Deepawali season sales. However, due to B's negligence, the delivery is delayed by two weeks, causing significant financial losses to XYZ Ltd. As a result of the delay, XYZ Ltd. misses the peak sales window, leading to decreased revenue and tarnished brand reputation. The company is contemplating seeking legal remedy for the loss caused.

The Ministry of Road Transport and Highways of India has announced a significant infrastructure project for the construction of Megha Highway. This highway project aims to connect various cities and towns, boosting transportation and economic development in the region. To execute this project, the ministry has initiated a tendering process inviting bids from qualified construction firms. XYZ Ltd., which is also engaged in construction activity, is contemplating participating in the tendering process for construction of the Megha Highway. As a major player in the construction industry, XYZ Ltd. sees this project as a lucrative opportunity to showcase its expertise, expand its portfolio, and contribute to the nation's infrastructure development. XYZ Ltd. wants to enter into E-contracts across the country for the sale of their various products. The company's counsel is considering the fact that conventional contract law may not be sufficient to address all the issues arising in electronic contracts. The Information Technology Act (IT Act) addresses some of the peculiar issues that arise in the formation and authentication of electronic contracts. The Indian Evidence Act, 1872, deals with the presumption as to e-records, providing electronic records as evidence in disputed matters (Sections: 85A, 85B, 88A, 85C).

Based on the facts of the above case study, answer the following questions:

- (a) You are required to guide XYZ Ltd. on the alternative method under the Companies Act, 2013, to pass the resolution for the strategic partnership with the tech start-up. What requirements will the company have to fulfil?
- (b) W has approached you to seek your opinion on the matter of attaching his bank accounts. Write an opinion.
- (c) Advise XYZ Ltd. on the remedies available to them under the Indian Contract Act, 1872 for the loss caused.
- (d) What considerations XYZ Ltd. should take into account, while preparing a tender document for the Megha Highway project?

**(e) What prohibitions must specifically be included in E-contracts? Furthermore, how shall the limitation of liability of XYZ Ltd. be addressed under E-contracts? [June 2024 (5 Marks each)]**

**Ans. (a):** To guide XYZ Ltd. on the alternative method under the Companies Act, 2013, for passing a resolution for the strategic partnership with the tech start-up, considering the urgency and the dispersed locations of the board members, the company can use the **resolution by circulation method**.

**As per section 175(1) of the Companies Act, 2013,** a Company may pass **resolution through circulation**. The said resolution may be circulated in draft, together with necessary papers, if any, to all the directors or members of the Committee at their address registered with the Company in India **by hand delivery or courier/post or through e-mail/fax**.

The same must be **approved by majority of directors or members**, who are entitled to vote on the resolution. A resolution passed through circulation shall be **noted at a subsequent meeting and made part of minutes of such meeting**.

Further, where **not less than one-third of the total number of directors of the company** for the time being require that any resolution under circulation must be decided at a meeting, **the chairperson shall put the resolution to be decided at a meeting of the Board**.

**Ans. (b):** Opinion on Attachment of W's Bank Accounts

#### **Background**

'W' acted as a director of XYZ Ltd. from 2016 to 2018 and is currently a mentor/advisor to the company. He received Rs. 30 lakhs in FY 2019-2020 for providing "strategic guidance." The Commissioner of Central Goods and Services Taxes (CGST) has initiated an investigation under section 67 of the Central Goods and Services Tax Act, 2017, against XYZ Ltd. for availing Input Tax Credit (ITC) against fake/ineligible invoices. As part of this investigation, W's bank accounts have been attached.

#### **Relevant Provisions:**

1. Section 67 of the CGST Act, 2017: Authorizes the Commissioner to conduct inspections, searches, and seizures if there is a reason to believe that any goods are stored or kept in a place to evade tax or that any books or documents relevant for proceedings are hidden or not produced for inspection.
2. Attachment of Bank Accounts: As per section 83 of the CGST Act, provisional attachment of any property, including bank accounts, can be made to protect the interest of the government revenue during the pendency of proceedings.

**Assessment:**

**Role of W:** W was a director and later a mentor/advisor. He admitted to his past role and current advisory capacity but is not directly implicated in the alleged fake invoices as per the provided information.

**Attachment Justification:** The attachment of bank accounts is typically justified if there is a substantial link to the evasion activity. W's advisory role might be scrutinized to ascertain if he had any influence over the financial decisions leading to the alleged evasion.

**Opinion:****1. Challenge the Attachment:**

**Grounds:** W should contest the attachment on the grounds that he is no longer a director and his advisory role does not involve handling finances or approving invoices.

**Evidence:** Provide clear evidence of his limited role post-2018 and the specific nature of his advisory work, which does not include involvement in financial transactions or ITC claims.

**2. File an Appeal:**

**Appropriate Authority:** W can file an appeal before the Appellate Authority challenging the attachment under section 83 of the CGST Act.

**Documentation:** Include all relevant documentation, including his appointment terms as a mentor/advisor and his bank statements showing legitimate transactions.

**3. Seek Legal Remedy:**

**Writ Petition:** If necessary, W may consider filing a writ petition in the High Court for quashing the attachment order on the grounds of being arbitrary and beyond the scope of his advisory duties.

**Conclusion:**

'W' should promptly take legal steps to challenge the attachment of his bank accounts by demonstrating his non-involvement in the alleged tax evasion activities and proving that his role in XYZ Ltd. post-2018 was purely advisory without financial oversight. Consulting with a tax lawyer specializing in GST matters is recommended for detailed representation.

**Ans. (c):**

XYZ Ltd. has several remedies available under the Indian Contract Act, 1872, to address the loss caused by B's negligence in delaying the shipment of electronic gadgets. Here's a detailed outline of the possible remedies:

**1. Damages (Sections 73 and 74 of the Indian Contract Act, 1872):**

XYZ Ltd. can claim damages for the loss caused by B's breach of contract.

- **Section 73:** Provides for compensation for loss or damage caused by the breach of contract. XYZ Ltd. can claim actual losses suffered due to the delay, including financial losses from missing the peak sales window and any loss in brand reputation.

- **Section 74:** If the contract specifies a penalty for breach, XYZ Ltd. can claim the specified amount without having to prove actual loss. However, the court can reduce the penalty if it is deemed unreasonable.

**2. Specific Performance (Section 10):**

Though specific performance is generally for cases where damages are not an adequate remedy, XYZ Ltd. might consider this if there are future contracts with B to ensure compliance with delivery deadlines.

**3. Injunction (Section 41):**

XYZ Ltd. can seek an injunction to prevent B from engaging in activities that could further harm their business interests. For instance, if B continues to engage in negligent practices that could impact future deliveries, XYZ Ltd. might seek an injunction to prevent such practices.

**Ans. (d):** Important considerations for preparing a document for Tendering Process:

- 1. Name and address of the organisation:** The name and address of the organisation be mentioned on the initial page of the document.
- 2. Subject of the document:** The subject of the tender documents to be mentioned in clear and comprehensive manner in order to attract the attention of the Bidder.
- 3. Index of the tender document:** The index of the documents can make the document convenient for the prospective bidder.
- 4. Important dates and necessary information:** The information such as Tender Publication Date, Last date and time for sending Pre-Bid Queries in writing, Cost of Tender, Earnest Money Deposit, Pre-Bid Meeting date, time & venue, Last Date & address of Submission of Bids, Date, time & Venue of opening of Technical Bids and Financial Bids, contact details etc. should be provided in the tender document.

5. **Disclaimer Clause:** A disclaimer clause with respect to reservations or observation on the tender documents should be placed in the tender document.
6. **Job Description:** The job description in details should be mentioned in the tender document in order to acquaint prospective bidders with the requirements attached with the Job and evaluate and prepare their Bids accordingly.
7. **Division of tender documents in parts:** The tender document be preferably prepared asking for Bid submissions in two parts i.e. Technical Bid and Financial Bids.
8. **Fees and Deposits:** The tender document should mention the fees and deposits commensurating the nature and quantum of work. The cost of the tender document may be required from the prospective bidder. Further, the provisions relating to Earned Money Deposit (EMD) and Security Deposit are also to be placed in the tender document.
9. **Conditions for forfeitures of EMD:** The clause providing for the circumstances in which EMD may be forfeited to be mentioned in the tender document. The general conditions in which EMD be forfeited are as under:
  - (a) If the bidder withdraws its bid;
  - (b) The selected bidder delays or does not accept the Purchase/Work Order;
  - (c) The selected bidder fails to supply goods/services as per the terms of the Tender or fails to execute Purchase/Work Order.
10. **Pre-Bid Meeting:** Pre-Bid Meetings be conducted in order to provide any clarification sought on the tender.
11. **Scope of Work:** The scope of work in details be mentioned in the tender documents.
12. **Mention of Technical and administrative requirements:** The technical and administrative requirement be mentioned comprehensively in order to prevent the halt in the Job at the later stage. The document should be clear and specific with respect to technical and administrative requirements for performing the Job.
13. **Eligibility Criteria:** Essential Requirements are to be mentioned in the tender document.
14. **Necessary forms and documents:** Formats such as of Technical Bids, Financial Bids, past experience of the bidder, Tender Acceptance Letter, Standard Terms and Conditions of Agreement may be mentioned in the tender document. Further, a list of document required to be attached in the tender document may also be provided in the document.

**Ans. (e):** To ensure clarity and enforceability, E-contracts should include specific prohibitions such as:

- (1) **Unauthorized Access and Use:** Prohibit unauthorized access, use, or alteration of the electronic system used to execute the contract.
- (2) **Fraudulent Activities:** Prohibit any form of misrepresentation, fraud, or deceit in the execution and performance of the E-contract.
- (3) **Data Misuse:** Prohibit misuse of any data shared under the e-contract, including unauthorized sharing, selling, or use of confidential information.
- (4) **Modification and Alteration:** Prohibit unapproved modifications or alterations to the E-contract terms and conditions.
- (5) **Specific Performance (Section 10):** XYZ Ltd. can seek a court order requiring B to fulfil their contractual obligations as originally agreed. However, given that the delivery has already been delayed, this remedy may be less relevant in this case.
- (6) **Injunction (Section 37):** XYZ Ltd. could seek an injunction to prevent B from committing further breaches or delays in any future obligations under the same contract or other related agreements.
- (7) **Rescission of Contract (Section 39):** If the breach is fundamental, XYZ Ltd. may have the option to rescind the contract, thereby freeing itself from any further obligations and seeking damages for the losses incurred up to the point of rescission.

**For entering into E-contracts across the country, XYZ Ltd. needs to address the limitation of liability effectively. Here are key considerations and strategies:**

- (a) **Clear Limitation of Liability Clauses:** Include explicit clauses in the E-contracts that limit XYZ Ltd.'s liability for damages. These clauses should define the maximum amount XYZ Ltd. can be held liable for in case of a breach.
- (b) **Force Majeure Clauses:** Incorporate force majeure clauses to protect against liabilities arising from unforeseen events that are beyond XYZ Ltd.'s control, such as natural disasters, acts of war, or government actions.
- (c) **Indemnity Clauses:** Use indemnity clauses to ensure that the counterparty indemnifies XYZ Ltd. for any third-party claims arising from the E-contract.
- (d) **Warranty Disclaimers:** Include disclaimers of warranties to limit the liability for issues related to the quality or performance of the products sold under the E-contracts.



# 6

## CHAPTER

# DOCUMENTS UNDER COMPANIES ACT, 2013

### TRANSFER OF UNDERTAKINGS: AMALGAMATION

**Q1. Explain the concept of amalgamation in the context of corporate entities. What are the two main methods through which amalgamation can occur, and how do they differ?** [Scoring Question]

**Ans.** Amalgamation means merging of two corporations, *destroying both in the process and creating an entirely new entity* i.e., a new financial organization.

This emergence *allows the newly formed company to inherit the assets and liabilities of its constituent parties to incorporate within as a sort of successor* to both of them being bigger and better than both as well. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings.

*There may be amalgamation either by:*

- the transfer of two or more undertakings *to a new company*, or
- the transfer of one or more undertakings *to an existing company*.

**Q2. Draft a Specimen agreement for Amalgamation & Transfer of Undertakings between two companies.** [Scoring Question]

**Ans. Specimen agreement for Amalgamation & Transfer of Undertakings between two companies**

**THIS DEED** is executed made on this \_\_\_\_ day of \_\_\_\_\_(Month),  
\_\_\_\_\_(Year) at \_\_\_\_\_(Place)

#### **BETWEEN**

ABS NGA COMPANY LIMITED, a public company with limited liability incorporated under the Companies Act, 2013, with corporate identity number: \_\_\_\_\_  
and having its registered office at \_\_\_\_\_ (hereinafter referred to as the "Transferor Company", which expression shall, unless repugnant to the context or meaning thereof, deem to include its successors and permitted assigns);

**AND**

**6.1**

MST SERVICES LIMITED, a company incorporated under the provisions of the Companies Act, 2013 with corporate identification Number: \_\_\_\_\_ and having its registered office at \_\_\_\_\_ (hereinafter referred to as the "Transferee Company", which expression shall, unless repugnant to the context or meaning thereof, deem to include its successors and substitutes from time to time).

The parties mentioned above are hereinafter collectively referred to as the "Parties" and individually as a "Party".

**Whereas:**

- a. This Scheme of Arrangement ("the Scheme") provides for amalgamation of \_\_\_\_\_ (Name of Transferor Company) with \_\_\_\_\_ (Name of the Transferee Company).
- b. Transferor Company was incorporated as a Private Company limited by shares under the provisions of the Companies Act, 2013 having CIN No. \_\_\_\_\_. The Registered Office of Transferor Company is situated at \_\_\_\_\_. The Transferor Company is engaged in the business of \_\_\_\_\_.
- c. Transferee Company was incorporated as a Private Company limited by shares under the provisions of the Companies Act, 2013 having CIN No. \_\_\_\_\_. The Registered Office of Transferee Company is situated at \_\_\_\_\_. The Transferee Company carries on business of \_\_\_\_\_.
- d. It is proposed to amalgamate Transferor Company with Transferee Company pursuant to a Scheme under sections 230 to 232 read with applicable Rules of Companies (Compromises, Arrangements and Amalgamations), Rules 2016 and other relevant provisions of the Act.
- e. This Scheme envisages vertical integration of Companies engaged in similar business profile resulting into consolidation of businesses, simplification of structure (including shareholding structure) thereby strengthening the financial position of Transferee Company and its operational optimisation.
- f. The other benefits likely to arise through the proposed arrangement are as follows:
  - (i) enable the Transferee Company to consolidate its business operations and provide significant impetus to its growth;
  - (ii) result in reduction in overheads, administrative, managerial and other expenditures and will enhance operational efficiency and optimal utilization of various resources;
  - (iii) be conducive to better and more efficient and economical control and conduct of the business;
  - (iv) enable elimination of duplication of administrative functions and the multiple records keeping resulting in reduced expenditure; result in significant reduction in

the multiplicity of legal and regulatory compliances required at present to be carried out by the Transferor Companies and Transferee Company;

- (v) Obtaining synergy benefits.

**NOW IT IS HEREBY AGREED AS FOLLOWS:**

- (1) The Scheme, set out herein in its present form or with any modification(s) approved, shall be effective from the latest date on which certified copies of the NCLT order under sections 230 to 232 of the Companies Act, 2013 is filed with the Registrar of Companies (RoC). Such date is called as the Effective Date.
- (2) Though this Scheme shall become effective from the Effective Date, the provisions of this Scheme shall be applicable and come into operation from the Appointed Date.
- (3) Subject to the provisions of this Scheme as specified hereinafter and with effect from the Appointed Date, whole of the Undertaking of the Transferor Companies including but not limited to all the movable and immovable properties and assets (whether tangible or intangible) of the Transferor Companies comprising, amongst others, all furniture and fixtures, investments, software's, computers/data processing, office equipment, electrical installations, telephones, telex, facsimile and other communication facilities, deposits, reserves, provisions, advances, receivables, funds, cash, bank balances and business licenses, permits, authorizations, approvals, lease, tenancy rights, permissions, incentives, if any and all other rights, patents, know-how, trade-mark, service mark, trade secret or other intellectual property rights, proprietary right, title, interest, contracts, consent, approvals and rights and powers of every kind, nature and description whatsoever, privileges, liberties, easements, advantages, benefits and approvals, if any, existing as on Appointed Date, shall, under the provisions of sections 230 to 232 of the Act, and pursuant to the confirmation order of the Hon'ble National Company Law Tribunal (NCLT) sanctioning this Scheme and without further act, instrument or deed, but subject to the charges effecting the same as on the Effective Date, be transferred and/or deemed to be transferred to and vested in the Transferee Company so as to become the properties, assets, rights of the Transferee Company.
- (4) From the aforesaid date of the purchase, the Transferee Company shall be liable for all the debts and liabilities of the Transferor Company and shall be liable to perform all its engagements. The Transferor Company shall be indemnified by the company against all claims and demands. The company shall Documents under Companies Act, 2013 defend all actions and proceedings against the vendor who shall also be indemnified in respect of such actions and proceedings.
- (5) Without prejudice to the above provisions, with effect from the Appointed Date, all inter-party transactions between the Transferor Companies and the Transferee Company, if any, shall be considered as intra-party transactions for all purposes.
- (6) The Transferee Company shall pay to the Transferor Company Rs. \_\_\_\_\_ as consideration for the aforesaid purchase and out of the aforesaid consideration Rs.

\_\_\_\_\_ shall be paid through bank transfer/cheque and the balance of Rs. \_\_\_\_\_ shall be paid to the vendor by allotment of \_\_\_\_\_ Equity Shares of Rs. \_\_\_\_ each in the capital of the company credited as fully paid-up shares.

- (7) The company shall create and issue \_\_\_\_\_ Equity Share of Rs. \_\_\_\_ each to increase its shares capital as aforesaid and for the same purpose the company shall pass a resolution in accordance with the Articles of Association of the company and in accordance with the provisions of the Companies Act, 2013.
- (8) For the purpose of Stamp Duty, the value of the immovable properties of the Transferor Company shall be fixed for Rs. \_\_\_\_\_ and the goodwill benefits of contracts and securities, debts, stock, fittings and fixture and all other properties of the Transferor Company shall be valued at Rs. \_\_\_\_\_.
- (9) With effect from the Appointed Date and up to the Effective Date, the Transferor Companies shall be deemed to have held and stood possessed of and shall hold and stand possessed of all its properties and assets for and on account of and in trust for the Transferee Company. The Transferor Companies hereby undertakes to hold their said assets with utmost prudence until the Effective Date.
- (10) Thereupon, the purchase shall be deemed to have been completed and the Transferor Company shall execute necessary documents and do all things and give assurance as may be necessary and reasonable for the vesting of all the properties, the subject matter of the aforesaid purchase by the company.

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

\_\_\_\_\_  
First Party

\_\_\_\_\_  
Second Party

\_\_\_\_\_  
Witness 1

\_\_\_\_\_  
Witness 2

**Q3. Amalgamation is basically a merger of two or more companies into one another company and the shareholders of each merging company becomes the shareholders in that another company. It may be either by:**

- (a) the transfer of 2 or more companies into one another new company, or  
(b) the transfer of one or more companies into one existing company.

**In light of the above, when a Transferor Company stands dissolved due to amalgamation, explain the status of legal proceedings pending before the court, in which the Transferor Company was a party. [June 2024 (5 Marks)]**

**Ans.** In the matter of **Speed line Agencies v. T Stanes & Co. Ltd.** - Supreme Court decided that, with effect from the effective date, all proceedings in which Transferor Company was a party be continued, prosecuted and enforced by or against the Transferee Company in the same manner and to the same extent as it would be or might have been continued, prosecuted and enforced by or against the Transferor Company as if the Scheme had not been made.

In other words, when a Transferor Company stands dissolved (with or without winding up) due to amalgamation, its right under the decree for eviction devolves on the Transferee Company.

### DEBENTURE TRUST DEED

**Q4. Explain the significance of a trust deed in the protection of the rights and interests of debenture-holders. How does it establish a framework for the trustees' responsibilities? [Scoring Question]**

**Ans.** Debenture Trust deed is a *written instrument legally conveying property* to a trustee often for the purpose of securing a loan or mortgage. It is the document creating and setting out the terms of a trust. It will usually contain the names of the trustees, the identity of the beneficiaries and the nature of the trust property, as well as the powers and duties of the trustees.

It constitutes trustees charged with the duty of looking after the rights and interests of the debenture-holders. A trust deed in **Form No. SH. 12** or as near thereto as possible shall be executed by the company issuing debentures in favour of the debenture trustees within three months of closure of the issue or offer.

A trust deed *for securing any issue of debentures* shall be open for inspection to any member or debenture-holder of the company, in the same manner, to the same extent and on the payment of the same fees, as if it were the register of members of the company; and a copy of the trust deed shall be *forwarded to any member or debenture-holder of the company, at his request, within 7 days* of the making thereof, on payment of fee.

**Q5. What details are typically included in the particulars of the appointment of Debenture Trustee(s) in Debenture Trust Deed? [Scoring Question]**

**Ans.** PARTICULARS OF THE APPOINTMENT OF DEBENTURE TRUSTEE(S):

- (1) The *conditions and procedure* for the appointment of the debenture trustee;
- (2) Procedure *for resignation* by trustee including appointment of new trustees;
- (3) Provision that the debenture trustee *shall not relinquish his office* until another debenture trustee has been appointed;

- (4) Procedure to remove debenture trustee by debenture-holders *providing for removal on a resolution passed by the holders* of not less than three fourth in value of debentures;
- (5) *Fees or commission* or other legal travelling and other expenses payable to the trustee(s) for their services;
- (6) Rights of the trustee including the *right to inspect the registers of the company* and to take copies and extract thereof and the right to appoint a nominee director.

**Q6. Draft a Specimen Debenture Trust Deed.****[Scoring Question]**

Ans. This DEBENTURE TRUST DEED is executed on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_.

**BETWEEN**

ABS COMPANY LIMITED, a public company with limited liability incorporated under the Companies Act, 2013, with corporate identity Number: \_\_\_\_\_ and having its registered office at \_\_\_\_\_ (hereinafter referred to as the "Company", which expression shall, unless repugnant to the context or meaning thereof, deem to include its successors and permitted assigns).

**AND**

MST SERVICES LIMITED, a company incorporated under the provisions of the Companies Act, 2013 with corporate identification Number: \_\_\_\_\_ and having its registered office at \_\_\_\_\_ (hereinafter referred to as the "Trustee", which expression shall, unless repugnant to the context or meaning thereof, deem to include its successors and substitutes from time to time).

The parties mentioned above are hereinafter collectively referred to as the "**Parties**" and individually as a "**Party**".

**WHEREAS:**

- A. The Company is engaged in the business of \_\_\_\_\_.
- B. The details of the authorised, issued, subscribed and paid-up share capital of the Company as on March 31, 20\_\_\_\_ is as under:

<b>(1) Authorized</b>	
Equity Share of Re. 1/- each	1,00,00,00,000
<b>(2) Issued, Subscribed and Paid-Up</b>	
Equity Share of Re. 1/- each fully paid-up	1,00,00,00,000

**C. The Company has pursuant to:**

- (a) the approval of its board of directors in terms of the resolution passed under section 179(3)(c) of the Companies Act at the meeting held on \_\_\_\_\_, 20\_\_\_\_, for the issuance of the Debentures;
- (b) the approval of its committee of directors in terms of the resolution passed on \_\_\_\_\_, 20\_\_\_\_, for the issuance of the Debentures; and
- (c) the approval of its shareholders in terms of the special resolution passed under section 180(1)(c) of the Companies Act at the meeting held on \_\_\_\_\_, 20\_\_\_\_, issued and allotted Debentures for an aggregate nominal amount of up to Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_) pursuant to the Offer Letter and the Information Memorandum.

- D. The Company has appointed the Trustee as the debenture trustee in relation to the Debentures, and the Trustee has consented to act as trustee for the debenture-holders pursuant to the Debenture Trustee Agreement.
- E. The Debentures are 'secured debentures' for the purposes of the Companies Act read with the Companies (Share Capital and Debentures) Rules, 2014.
- F. As per the terms of the Offer Letter, the Company is required to execute this Deed within 60 (sixty) days from the Date of Allotment, and as per the terms of the issue of the Debentures, the Trustee has called upon the Company to execute this Deed.

**NOW, THEREFORE,** in consideration of the premises and mutual agreements and covenants contained in this Deed and other good and valuable consideration (the receipt and adequacy of which are hereby mutually acknowledged), the Parties hereby agree as follows:

- (1) That in these presents unless there be something in the subject or context consistent therewith the expression following shall have the meaning hereafter mentioned, that is to say:
  - (a) "Company" means \_\_\_\_\_ Ltd.
  - (b) "Trustees" means Mr \_\_\_\_\_ or any other trustees hereof for the time being.
  - (c) "Debentures" means the debenture of the company in the form set out in the First Schedule hereto for the time being outstanding and entitled to the benefit of these presents.
  - (d) "Debenture-holders" means the holder for the time being of the debenture issued and entered in the register of debenture-holders, mentioned on the conditions endorsed on the debentures on the holder of the debentures.
  - (e) "Mortgaged premises" means the property belonging to the company described in the Second Schedule hereto and comprised in the security of the debenture-holders.

Words denoting the singular include the plural and vice versa unless the contrary appears from the context.

(f) Act means the Companies Act, 2013 and any modification or re-enactments thereof.

### Terms of Debentures:

- (2) The debentures entitled to the benefit of these presents shall consist of a series of number of debentures of Rs. \_\_\_\_\_ each, aggregating to Rs. \_\_\_\_\_ in all to rank pari passu without any preference or priority by reason of the date of issue or otherwise and secured by the mortgage hereby created on the mortgaged premises.
- (3) The company hereby covenants with the trustees that the company will on the \_\_\_\_ day of \_\_\_\_\_ or such earlier day as the principal moneys shall become payable under clause 7 hereof pay the debenture holders the amounts secured by their debentures respectively, and in the meantime will pay interest to the debenture-holders on the day of \_\_\_\_\_, 20\_\_\_\_ in each year, the first payment of interest to be made on the day of \_\_\_\_\_, 20\_\_\_\_.
- (4) All payments due by the company in respect of the Debentures issued hereunder whether of interest, principal or premium shall be made by cheque or warrant drawn by the company on its bankers and the company shall make at its own expenses all arrangements, with its Bankers as shall be necessary to ensure that such cheques or warrants shall be encashable for the amount for which they are expressed without any deduction whatsoever at the office of its bankers in Delhi or such other places in the Union of India as the Trustees may require.
- (5) In consideration of the debentures hereby authorised aggregating to Rs. \_\_\_\_\_ the company, as the beneficial owner, hereby mortgages unto the trustees all the fixed plant and machinery and fixture at present existing at the company's factory and described in part A of the Second Schedule hereto and which may be acquired by the company hereafter or fixed or erected hereafter at its factory for the benefit of the debenture-holders and the property described in Part B of the Second Schedule as security for the due payment of principal moneys amounting to Rs. \_\_\_\_\_ in aggregate with interest and all other charges, expenses and other dues, the payment of which has been secured by a charge on the mortgaged premises under these presents.

The charge hereby created on the property mentioned in Part A of the Second Schedule shall be the specified charge, while that on the property included in Part B of the Second Schedule shall rank as floating charges. The trustees may, at any time, by notice in writing to the company, convert the said floating charge into a specific charge as regards any assets included in the Second Schedule and specified in the notice in case it is, in the opinion of the trustees in danger of being seized or sold under any sort of distress or execution levied or threatened or in any other case.

- (6) The company shall hold and enjoy all the mortgaged premises and carry on therein and therewith the business or any of the business mentioned in the Memorandum of Association of the company until the security hereby constituted shall become enforceable under the terms of these presents, in which case the trustees may, in their discretion, without any such request as next hereinafter mentioned and shall upon the request in writing of the holder or holders of \_\_\_\_\_ at least of the debentures, enter upon or take possession of the mortgaged premises, or any of them and may in the like discretion and shall upon the like request sell, call in, collect and convert into money the same or any part thereof with full power to sell any of the same premises either together or in parcels, and either by public auction or private contract, and either for a lump sum or for a sum payable by instalments or for a sum on account and a mortgage or charge for the balance and with full power upon every such sale to make any special or other stipulations as to title or evidence, or commencement of the title or otherwise which the trustees shall deem proper and with full power to modify or rescind or vary any contract for sale of the said premises or any part thereof and to re-sell the same without being responsible for any loss which may be occasioned thereby and with full power to compromise and effect compositions and for the purposes aforesaid or any of them to execute and do all such assurance and things as they shall think fit.
- (7) The principal moneys due to the debenture-holders under this Indenture shall become immediately payable and the security hereby constituted shall become enforceable within the meaning of these presents in each and any of the following events:
- (a) If the company makes default in the payment of any interest which ought to be paid in accordance with these presents.
  - (b) If the company without the consent of debenture-holders ceases to carry on its business or gives notice of its intention to do so.
  - (c) If an order has been made by the Court of competent jurisdiction or a special resolution has been passed by the members of the company for winding up the company.
  - (d) If the company acts in contravention of clause \_\_\_\_\_ of its Articles of Association.
  - (e) If it is certified by a Chartered Accountants capable of being appointed as auditor under the Act, that the liabilities of the company exceed its assets.
  - (f) If the company creates or attempts to create any charge on the mortgaged premises or any part thereof without the prior approval of the trustees/debenture-holders.
  - (g) If in the opinion of the trustees the security of debenture-holders is in jeopardy:  
**Provided** that on the happening of the events specified in sub-clause (a), the permission given by clause 6 to hold and enjoy the mortgaged premises shall not be determined unless and until the trustees shall have first served on the \_\_\_\_\_ company a preliminary notice requiring the company to pay the interest in arrears and

the company shall have neglected for the period of 30 days to comply with such notice.

- (8) As soon as the principal money shall become payable and the security enforceable under the last preceding clause 7 (and unless the time for payment and the security to be enforced has been expressly extended by the debenture-holders), the trustees shall enter upon and take possession of the mortgaged premises and shall forthwith take steps to consult the debenture-holders for the purpose of determining whether the business of the company may be allowed to be carried on or whether the mortgaged premises shall be realised by sale or otherwise.
- (9) Until the happening of some one of the events mentioned in clause 7 of this Indenture, the trustees shall not be in any manner bound to interfere with the management of affairs of the said business except to the extent they may consider necessary for the preservation of the mortgaged premises or any part thereof.
- (10) If the debenture-holders resolve not to allow the business of the company to be carried on as mentioned in clause 9 above but to realise the security, the trustees shall after giving a notice of 30 days in writing to the company, proceed to realise the mortgaged premises by sale or otherwise and, in doing so, shall conform to discretion, if any, given by debenture-holders.
- (11) The trustees shall apply the proceeds of such sale or other mode of realisation in the following manner, that is to say, that the trustees shall pay:
  - (a) In the first place all costs, charges and expenses incurred in or about such sale or the performance or execution of trust or otherwise in relation to these presents or otherwise in respect of the security, including the remuneration of the trustees.
  - (b) Secondly, the interest for the time being due and owing on the debentures.
  - (c) Thirdly, the principal money then due and owing to debenture-holders.
  - (d) And lastly, the surplus, if any, to the company or its assignee:  
**Provided** that if the said money shall be insufficient to pay all such interest or principal money in full, then the said moneys shall be paid rateably and without preference or priority among all debenture-holders of this series according to the amount of the face value of the debentures held by them, but all interest shall be paid before any principal money.
- (12) When all the principal moneys and secured by these presents shall have been paid and satisfied, the trustees shall forthwith, upon the request and at the cost of the company and on being paid all the costs, charges and expenses properly incurred by the trustees in relation to the security, reconvey, reassign, release and surrender the mortgaged premises or so much or the same as shall not have been sold or disposed of, unto the company or its assigns.

- (13) If the company shall, at any time during the continuance of the security, be desirous of selling, demising or otherwise disposing of or dealing with any part of the mortgaged premises otherwise than in respect of the floating charge the ordinary course of the company's business, the trustees may, if satisfied that the debenture-holders' security shall not be thereby prejudiced, assent to or concur in such sale, demise, disposal or other dealing, and may, if necessary, release the property in question from the trust under this deed on such terms as the trustees may determine.
- (14) The company hereby covenants with the trustees:
- (i) That the moneys secured by this deed shall be the first mortgage and charge on the mortgaged premises and shall take precedence over all other moneys which may hereinafter be borrowed by the company against the security of the premises.
  - (ii) that the company shall maintain the mortgaged premises and any and every part thereof in a fit and efficient condition of repair and shall keep the said property duly insured against risk of fire, riot, civil and war risks with such insurers and in such manner as the trustees may determine from time to time and, in default, the trustees shall carry out repair and keep insured the mortgaged premises in the interest of the debenture-holders, and shall be entitled to the immediate payment of such expenditure in full.
- (15) (a) The company shall in each and every year during the continuance of this security pay to the trustees for the time being of these presents as and by way of remuneration for their services as Trustees the sum of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ only) per annum in addition to all legal, travelling and other costs, charges and expenses incurred by the Trustees on their officers, employees or agents in connection with the execution of the trust hereof (including all the costs, charges and expenses of and incidental to the approval and execution of these presents) and all other documents effecting the security herein and the fist of such payments to be made proportionately for the period and the said remuneration shall continue to be payable until the trust hereof shall be finally discharged. The trustees acknowledge having received from the company a sum of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ only) as their fee for agreeing and accepting the trusteeship of these presents.
- (b) The company shall pay to the trustees all legal travelling and other costs, charges and expenses incurred by them or their agents in connection with execution of trusts of these presents including costs, charges and expenses of and incidental to the approval and execution of these presents and all other documents affecting the security herein and will indemnify them against all actions,

proceedings, costs, charges, expenses, claims and demands whatsoever which may arise or be brought or made against or incurred by them in respect of any matter or thing done or permitted to be done without their wilful default in respect of or in relation to the mortgaged premises.

- (16) The debenture-holders may, by an ordinary resolution, remove the trustee or trustees, or the trustee or trustees may, with the consent of the directors of the company and of the majority of the debenture-holders in writing resign or retire from trusteeship.
- (17) In the event of death, bankruptcy, disability or resignation of any trustee or trustees, another trustee or trustees shall be appointed who shall thereafter have and exercise all powers of the trustee or trustees under these presents. The power of appointing a new trustee or trustees shall be vested in the directors, but no such trustees shall be appointed by the company until his appointment has been approved by an ordinary resolution of the debenture-holders.
- (18) The trustees may by agreement with the directors of the company modify the terms of the deed in any manner that may be necessary to meet any requirement or contingency, provided that the trustees are satisfied that such modifications are in the interests of the debenture-holders.
- (19) If any debenture is proved to the satisfaction of the company to have been lost, the company shall issue a fresh debenture on payment of a fee of Rs. \_\_\_\_\_ for each such debenture and on such indemnity as the directors may think fit.
- (20) The company hereby covenants with trustees that company will at all times during the continuance of the security (except as may be otherwise previously agreed in writing by the trustees):
  - (a) carry on and conduct its business in proper and efficient manner with due diligence and efficiency with sound financial standing and pay all rents, cesses on mortgage premises, and insured these properties against fire and natural calamities;
  - (b) to keep proper books of account as required under the Act and let them be open to inspection of trustees during business hours;
  - (c) to give trustees such information as he or they may require relating to business, mortgage property and the affairs of the company;
  - (d) not to effect any scheme of amalgamation, merger or reconstructions during the period of debenture or any part thereof remain outstanding;
  - (e) not to utilise any portion of the debentures for purposes other than those for which the same are issued;

- (f) not to make any material changes in the existing management set up. Not to declare any dividend to the equity (or preference shareholders, if any) in any year until the company has paid or made satisfactory provision for payment of the instalments of principal (if it has become due) and interest due on the debentures;
- (g) allow the debenture-holders a right to appoint a nominee director on the Board of the company. The said director so appointed shall not be liable for rotation nor required to hold any qualification. Thus, if need be, the company shall take immediate steps to amend its Articles of Association accordingly.

(21) The company hereby further covenants with the trustees that the company shall duly perform and observe the obligations hereby imposed upon it by this deed.

IN WITNESS WHEREOF THE COMPANY has caused its Common Seal to be affixed to these presents and the trustees have hereto set their hands the day and year above written.

Common Seal (if any) of the \_\_\_\_\_

\_\_\_\_\_  
First Party

\_\_\_\_\_  
Second Party

\_\_\_\_\_  
Witness 1

\_\_\_\_\_  
Witness 2

### SHARE PURCHASE AGREEMENT

Q7. What does a Share Purchase Agreement signify about the relationship between the buyer and the seller(s) in terms of taking over the target company?  
[Scoring Question]

Ans.

- A share purchase agreement is **defined as a legal contract between a seller and a buyer of shares**. They may be referred to as the **vendor and purchaser in the contract**. The specific number of shares are listed in the contract at the stated price.
- This agreement proves that the sale and the terms of it were **agreed upon mutually**. Share Purchase Agreement is an agreement entered into between the buyer and seller(s) of shares of a target company. Usually Share Purchase Agreements entail that the **buyer would be taking over whole or significantly whole of the undertaking of the company**.
- In such a scenario, the buyer would **not only be taking over the assets but also the liabilities of a company**.
- A Share Purchase Agreement sets out **specific rights and liabilities related to the purchase and sale of shares in a particular entity**.

- Usually, a share purchase agreement would be **typically used in the mergers and acquisitions processes**. A particular entity would **purchase about 50% or more of the share capital** of the target company.

**Q8. Discuss in brief Advantages of Share Purchase Agreement.**

**[Scoring Question]**

**Ans. Advantages of Share Purchase Agreement:**

- Shares Specified-** By entering into this form of agreement, there is a specific proportion of shares allocated to the buyer or the entity.
- Rights and Liabilities-** The rights and liabilities of the parties are specifically drawn from this form of agreement. This would ensure that all the parties' rights and liabilities arising out the agreement are covered. In case of any breaches, the parties' first point of reference would be the SPA.
- Warranties-** By entering into such an agreement the parties would be covered by specific warranties. Any party cannot escape the amount of any warranty which is arising from the share purchase agreement. All the parties would equally be covered by specific amount of warranties of the Share Purchase Agreement.
- No Third-Party Involvement-** As the contract has only specific amount of parties, there is no involvement of any other party or third-party.

## SHAREHOLDERS AGREEMENT

**Q9. Throw light upon the concept of Shareholders Agreement.**

**[Scoring Question]**

**Ans.**

- A shareholders' agreement is a **contract between a company's shareholders and the company itself**, establishing **rules to prevent potential future disputes**.
- This agreement **outlines shareholders' rights, obligations, share ownership, management, voting, and other protective measures**. In contrast, the Articles of Association (AoA) act as the company's constitution, being mandatory and standard, detailing shareholder roles, director responsibilities, and business activities.
- Unlike the AoA, **a shareholders' agreement prioritizes shareholder protection and is more flexible, adapting to their specific needs**.
- The shareholders' agreement is a **cost-effective way** to minimize business dispute risks, offering a clear framework for decision-making and dispute resolution.

- While the AoA and shareholders' agreement should complement each other, a shareholders' agreement *may include a supremacy clause*, allowing it to override the AoA if inconsistencies arise.

### UNDERWRITING AND BROKERAGE AGREEMENTS

**Q10. Provide a concise overview of Underwriting and Brokerage Agreements. [Scoring Question]**

Ans.

- Underwriting is a *crucial financial function* where individuals or institutions take on risk in exchange for a fee. Underwriters exist in banking, insurance, and stock markets.
- Investors benefit a lot from the *underwriting process as the information provided by an underwriting agency* can help them take a *more informed buying decision*.
- An underwriter who *holds a large chunk of the securities of a particular company* or is the market maker for such a security provides the core liquidity for the security and *enhances price stability and distribution*.
- The Underwriting Agreement *outlines the terms for underwriters to buy and distribute securities to the public*. Legal counsel from both the issuer and underwriters are *crucial in negotiating key provisions that significantly impact the offering*.

**Q11. Draft a Specimen Underwriting Agreement. [Scoring Question]**

Ans. 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 the Companies Act, 2013.
- (2) 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.
- (3) 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.
- (4) 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.
- (5) 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 considered 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 under writer, any amount or such credit being in excess of the commitment of any underwriter being similarly shared proportionately by the others.
- (6) 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.
- (7) 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.

(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 \_\_\_\_\_

### COLLECTIVE DECISION-MAKING PROCESS IN COMPANIES- "RESOLUTION"

**Q12. Distinguished between the Ordinary Resolution and Special Resolution.**

**[June 2019 (4 Marks)]**

**Ans. The significant differences between ordinary resolution and special resolution are:**

- Ordinary Resolution is one wherein ***simple majority is required to move the resolution at the general meeting.*** Special Resolution means a resolution in which ***supermajority is needed to pass the resolution at the general meeting.***
- In the ordinary resolution, ***consent of at least 51% members,*** is required for the resolution to be passed. On the other hand, the special resolution requires the ***consent of at least 75% members,*** in favour of the resolution.
- The copy of an ordinary resolution, signed by the officer of the company should be filed with the registrar only in certain cases. As against this, a printed or handwritten copy of a special resolution, containing the signature of the officer of the company must be filed with the Registrar of Companies (ROC) ***within 30 days.***
- Ordinary Resolution is passed ***to transact ordinary business.*** However, a special business can be ***transacted via special resolution or ordinary resolution,*** as per the requirements of the Companies Act, 2013.

**Q13. What is Resolution by Circulation as per the section 175 of the Companies Act, 2013?**

**[Dec. 2020 (4 Marks)]**

**Ans.**

- ***As per section 175(1) of the Companies Act, 2013,*** a Company may pass resolution through circulation. The said resolution may be circulated in draft, together with necessary papers, if any, to all the directors or members of the Committee at their address registered with the Company in India by hand delivery or courier/post or through e-mail/fax.

- The same must be **approved by majority of directors or members**, who are entitled to vote on the resolution.
- A resolution passed through circulation **shall be noted at a subsequent meeting** and made part of minutes of such meeting.
- Further, where **not less than one-third of the total number of directors of the company** for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

**Q14. What considerations should be kept in mind when drafting resolutions for both Board and general meetings? [Scoring Question]**

**Ans. The following points should be remembered while drafting resolutions, both for Board and general meetings:**

- (a) All essential facts are to be **included in the resolution**.
- (b) Surplus and meaningless words or phrases **should not be included** in resolutions.
- (c) **Reference to documents approved at a meeting should be clearly identified**, e.g., the re-appointment of a managing director should indicate that such appointment is on the terms and conditions contained in the draft agreement, a copy of which was placed before the meeting and initialed by the chairman for the purpose of identification.
- (d) Resolutions must **indicate the relevant provisions or sections of the Act and the Rules** pursuant to which they are being passed.
- (e) If a resolution is one which requires the **approval of the Central Government or confirmation of the National Company Law Tribunal/Court**, this must be stated in the resolution.
- (f) A resolution must indicate when it will **become effective**.
- (g) A resolution **must confine itself to one subject matter and two distinct matters** should not be covered in one resolution.
- (h) A resolution should be **crisp, concise and precise** and should be flexible enough to take care of eventualities.
- (i) Where lengthy resolutions have to be approved, they **should be divided into paragraphs and should be arranged in their logical order** having regard to the subject matter of the resolution.
- (j) A resolution must be so drafted that **anybody not present at the meeting or anybody referring to it at a later date will know clearly what the decision** was at that meeting without referring to any other document.

**Q15. Draft a resolution for approval and adoption of CSR policy.**

**[June 2024 (5 Marks)]**

**Ans. "RESOLVED THAT** pursuant to section 135 of the Companies Act, 2013 as amended from time to time and such other provisions as may be applicable and based on the recommendation of the CSR committee, the Board of Directors of the company do and hereby approve and adopt a CSR Policy.

**RESOLVED FURTHER THAT** the CSR Policy be and is hereby approved and signed by Mr./Ms. \_\_\_\_\_, Director.

**RESOLVED FURTHER THAT** the Directors of the company be and are hereby authorized severally to take necessary steps to give effect to the above resolutions and do all such acts, deeds and things as may be required to ensure compliance of the CSR Policy including disseminating the contents of policy on the website of the company."

bill  
19:20  
TAXMANN



# 7

## CHAPTER

# ART OF OPINION WRITING

### CASE FOR OPINION WRITING

Q1. Summarize standards applicable to preparation of an opinion. Mention the common purposes for which legal opinion are sought. [Dec. 2019 (4 Marks)]

OR

There are some standards which are applicable for preparation of an opinion. Explain. [Dec. 2020 (4 Marks)]

Ans. STANDARDS APPLICABLE TO PREPARATION OF AN OPINION:

- (1) **Generally:** A professional is *expected to be well informed* and to exercise such skill, prudence and diligence as professionals of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
- (2) **Customary Practice:** An attorney *does not ordinarily guarantee* the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although *not commonly known, may readily be found by standard research techniques*.
- (3) **Fraudulent or Misleading Opinions:** An opinion giver may be liable for an opinion that *constitutes fraudulent misrepresentation*. A professional owes a duty to non-clients *to refrain from fraudulent misrepresentation*. It is generally understood that, regardless of compliance with other standards, and even if an opinion is technically correct, a professional should not render an opinion that he recognizes would be misleading to the opinion recipient.
- (4) **Ethical Issues:** Relating to the Provision of Opinions to Non-clients *a professional delivering an opinion letter to a non-client should also consider ethical principles*. For example, rendering an opinion to a non-client *may conflict with the opinion giver's ethical obligations* to maintain the confidences of its client. He should *decline to give legal opinion* in such cases.

**CASE FOR OPINION WRITING:**

- (1) **Lawfulness of an action:** Opinion letters are given when *one wants to know if an action is lawful*.
- (2) **Legal consequences:** Sometimes a party entering into a transaction obtains legal opinion to ascertain if the action will lead to desired legal consequences.
- (3) **Regulatory requirements:** Sometimes legal opinion has to be sought because it is mandated by law to get the opinion of outside legal expert.
- (4) **Compliance:** A legal opinion can be sought for assessing the requirements of the regulatory regime so that the querist can meet the compliance requirement.
- (5) **Protective shield:** Clients sometimes desire the protection of an expert's legal opinion to be used as evidence of lack of mens rea in certain proceedings.
- (6) **Designed to mislead:** Sometimes promoters of unscrupulous schemes obtain as many opinions from different experts as is possible and use the one which is favourable to their scheme of things.
- (7) **To satisfy contractual requirements:** Sometimes a clause in commercial contracts require the opinion of an expert. E.g.: an opinion given by issuer's counsel to investors in connection with the sale of securities or by borrower's counsel to the lender pursuant to a loan agreement.
- (8) **Due Diligence:** Professionals and clients often cite due diligence as the principal reason for requesting opinion letters in business transactions.

**TYPES OF LEGAL OPINIONS**

Q2. Throw light upon the types of legal opinions.

[Scoring Question]

OR

Advices on Law and Advices on Evidence?

[Dec. 2022 (4 Marks)]

Ans.

- (1) **Advices on Transaction:** Due diligence is the *principal reason for opinion letters* in business transactions. An opinion letter may be *one component of a party's due diligence*, but it is not normally a substitute for due diligence performed by the opinion recipient and its counsel.
- (2) **Advices on Law:** Sometimes the client would want to know-how the law will apply to a given situation. Without in-depth knowledge of law and legal research one cannot give an opinion to the satisfaction of the client. The proper way is to start with the cases and work through to reach a deduction as to the principle of law that covers the situation. This is *top-down reasoning should be avoided*.
- (3) **Opinions on Facts:** The third type of opinion is one which is *predominantly related to facts*. One is given a series of statements and documents and asked whether on that material there are reasonable prospects of prosecuting or

defending the claim. ***The matter may be a simple personal injury case in which the law is well settled.*** The real question is whether one's side's witnesses will be believed or not. The first problem about this sort of opinion is that seldom does one have any real knowledge of what the other side's witnesses are going to say. One often has little idea of the quality of one's own witnesses and none at all of that of the oppositions. Here one has to search relevant material from the material one is provided with and then arrive at the probabilities of success or failure.

- (4) ***Advices on Evidence:*** A special type of opinion is a ***brief to advice on evidence.*** When advising on fact or law ***one should not be too positive.*** In relation to advices on quantum of damages ***one can never be sure so it is advisable to not give a precise figure but a range.*** Where the law is in a ***state of flux or doubtful the legal expert*** should always draw attention to this explaining why one cannot be more positive.

### QUALITY OF WRITING

**Q3. Why is it essential for a legal opinion to be written in plain and understandable language? [Scoring Question]**

**Ans.** The primary purpose of a legal opinion is to effectively communicate advice to clients, whether they are professionals or laypeople. Clarity and precision in language are ***imperative to ensure*** the advice conveyed is ***easily comprehensible.*** It's crucial to ***avoid archaic language and legalese,*** aiming for clear, concise explanations that use plain English whenever possible.

While ***specialised legal advice*** may require technical terms for precise meaning, the use of unnecessary jargon should be avoided. Perfect grammar, precise language, and accurate punctuation are ***essential for effective communication.***

### FORM AND ELEMENTS OF THE OPINION LETTER

**Q4. Could you describe the typical components covered in a legal opinion despite the absence of a legally prescribed form? [Scoring Question]**

**OR**

**Explain Form and Elements of the Opinion Letter? [ICSI Study Material]**

**OR**

**Mention the points which will cover a legal opinion? [Aug. 2021 (4 Marks)]**

**Ans. While there's no standardized legal form mandated by law; legal opinions tend to adhere to a customary structure. They usually encompass several key elements:**

- **Introductory Matters:** such as the date, *the identity of the opinion recipient*, the role of the opinion giver giving the opinion, and the purpose for which the opinion is given.
- **References:** a general or specific recitation of the documents and other *factual and legal matters* reviewed by the opinion giver, including in some instances a statement of reliance on various factual assumptions.
- **Legal Conclusions and Qualification:** the legal conclusions expressed in the opinion, and any *qualifications to the legal conclusions*.
- **Peculiar Matter:** matters *peculiar to the particular opinion*, such as matters relative to opinions of local counsel in other jurisdictions and specific limitations on the *use of the opinion*.
- **Signature:** the signature of the opinion giver.

**Q5. What are the typical components and considerations in drafting a legal opinion, even though there's no legally prescribed form? [Scoring Question]**

**Ans. Crafting a legal opinion typically entails several crucial elements:**

- (1) **Introductory Matters:**
  - **Title:** How is a legal opinion generally titled, and what information does the heading typically contain?
  - **Date and Addressee:** What important details about the date and recipient are commonly included in a legal opinion? How is the recipient specified and who can rely on the opinion as a matter of practice?
- (2) **Introduction:**

How is the introduction of a legal opinion structured, especially concerning outlining the issues addressed and ensuring clarity in framing the questions?
- (3) **Definitions:**

Why is it advisable to define principal terms used in a legal opinion, especially those derived from statutory law or in the underlying agreement?
- (4) **Understanding Facts of the Case:**

What is the importance of detailing the facts upon which the legal opinion is based? How does this process aid in identifying gaps, assumptions, and necessary further instructions?
- (5) **Research on Relevant Case Laws:**

How are legal opinions supported by relevant case laws and statutory provisions? What criteria are followed in citing authorities to support legal propositions?

(6) **Expression of the Opinion:**

What constitutes the substantive portion of a legal opinion, especially concerning providing concise answers or precise conclusions based on analysis and factual context?

(7) **Qualifications:**

In what instances are legal opinions subject to qualifications, and how are these qualifications typically framed to narrow the scope of the opinion or address exceptions?

(8) **Special Matters:**

How does a legal opinion cover foreign law, and what considerations arise when relying on local counsel or specialised counsel?

(9) **Signature:**

What customary practices are followed regarding the signature of a legal opinion, especially concerning the manner in which it's signed and by whom?

(10) **Usual Disclaimers:**

Why are disclaimers important in legal opinions, and what key information do these disclaimers commonly cover to protect against potential malpractice claims?

This comprehensive approach *ensures that a legal opinion* covers essential aspects, provides reliable advice, and safeguards against potential legal pitfalls.

**Q6. "The opinion giver may also be requested to furnish an opinion on matters governed by the laws of some other country." Comment and discuss the reliance of the opinion of local counsel on foreign laws. [June 2022 (5 Marks)]**

**Ans. Foreign Law and Reliance on Local Counsel**

The principal opinion giver for a party in a business transaction typically renders an opinion covering the laws of the state and applicable central laws and sets forth this limitation in the text of the opinion. The opinion giver may also be requested to furnish an opinion on matters governed by the laws of some other country. Unless the limited nature of the review of another jurisdiction's law is described in the opinion, because the opinion giver would likely be held to the same standard as a lawyer licensed or otherwise competent to give advice on the law of the other jurisdiction, the opinion giver will, in most instances, seek the advice and opinion of local counsel.

An opinion giver should, however, always be cognizant of the fact that rendering an opinion based upon legal principles applicable in foreign jurisdictions exposes the opinion giver to liability for a negligent interpretation of that law.

The retention of local counsel to furnish an opinion raises different questions with respect to the principal opinion giver's responsibility for the opinions expressed in the local lawyer's opinion.

If the principal opinion giver renders an opinion on the same matters as the local lawyer, the opinion giver customarily expresses its reliance on the local counsel's opinion (an example of recommended language is included below) rather than simply restating the local counsel's opinion in the body of its opinion:

In rendering the opinions expressed in paragraphs, and \_\_\_\_\_, we have relied [solely] on the opinion of \_\_\_\_\_, insofar as such opinions relate to the laws of \_\_\_\_\_, and we have made no independent examination of the laws of that jurisdiction.

When expressly stating reliance on the opinion of local counsel, the principal opinion giver's sole responsibility is to exercise reasonable care in the selection of local counsel (if, in fact, the principal opinion giver selects such counsel). The opinion giver is not responsible for independently investigating or otherwise verifying the law of the foreign jurisdiction. The principal opinion giver may assume a broader responsibility to examine the statutory and case law of the foreign jurisdiction if the principal opinion giver's opinion letter states that the opinion giver "concurs" with the legal opinions provided in the opinion letter of local counsel or that the local counsel's opinion letter is satisfactory in substance. The preferred and more recent common practice is for the local counsel's opinion letter to be addressed to the recipient of the principal opinion letter (rather than to the principal opinion giver) and for the principal opinion giver not to render an opinion on that subject.

**Q7. While forming an opinion, comment on "reliance put by opinion giver on the certificates of public official" while understanding the facts of a case.**

**[June 2024 (5 Marks)]**

**Ans. Reliance on Certificates of Public Officials:** Usually opinions include legal conclusions concerning the corporate nature and existence of the Company and its ability to transact business. They also often include legal conclusions concerning the good standing and ability of the Company to transact business in other jurisdictions.

These opinions customarily are based on certificates of public officials in the various jurisdictions involved. The principal certificate among them is the certified copy of the Articles of Incorporation, together with amendments. This certification represents conclusive evidence of the formation of the corporation and prima facie evidence of its existence for all purposes.

Certain certificates may be required from various state agencies. For example, in loans backed by mortgage of immovable property, certificates showing the title to the property may be required. Many states have implemented websites on which such information can be accessed at any time. The information on any particular website can only be relied upon as current to the extent specified by the state agency responsible for that website.

Because certificates of public officials will normally bear a date before the delivery of the opinion, the opinion giver must decide what additional verification, if any, is necessary for purposes of the opinion. Additional verification may or may not be necessary depending upon the facts and circumstances of the case. In general, customary practice does not require that every certificate be updated. Opinion recipients routinely accept opinions that in part are based on certificates of a reasonably recent date.

#### THINGS TO BE KEPT IN MIND WHILE PREPARING FOR OPINION

**Q8. Mention the things to be kept in mind while preparing for opinion.**

[Scoring Question]

OR

**What are the things to be kept in mind while preparing for opinion letter?**

[ICSI Study Material]

**Ans. Opinions that are not Cost-Effective**

- Opinion givers are held to *certain standards of skill and care in rendering legal opinions*. Although the nature and extent of the applicable standards of care are not defined, the opinion giver is *obligated to avoid misleading opinion* recipients about the scope and depth of any investigation undertaken.
- Moreover, professionals are responsible for conducting customary legal and factual diligence in rendering legal opinions. For this reason, *rendering an opinion letter is a costly process*, even in the context of a relatively *straightforward matter or business transaction*.

#### Inappropriate Scope

In a business transaction a number of opinions would be considered inappropriate because their scope is not reasonably within the competence of the opinion giver or they are not cost-justified. **Examples:**

- the client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the client;

- the client is not in material violation of any central, state or local law, regulation or administrative ruling; and
- the client is not in material violation of any contract, indenture or undertaking to which it is a party or by which it may be bound.

The common characteristic of these examples is that they are *essentially open-ended*. Requests for opinions of this sort inherently cast into question whether the party requesting the opinion may be effectively seeking *legal “insurance” rather than legal “assurance.”* an opinion giver may properly refuse to give such opinions.

#### *Fraudulent or Misleading Opinions and the Limits of Professional Competence*

- A professional *should not render an opinion that he/she knows would be misleading*. In addition, a professional should not render an opinion *based on factual assumptions* if he/she knows that the assumptions are false or that reliance on those facts is unreasonable. In addition, a professional should not be asked to render opinions on matters that are outside his or her area of professional competence.
- *In no event* should a professional be asked for opinions that are generally beyond the professional competence of professionals from that area of practice, *such as asking a Professional to express his opinion on financial statement analysis or valuation.*

#### *The Time to prepare Opinion Letter*

- Sometimes one may be *faced with the necessity of giving an urgent opinion* or one when the time is not available to allow one to perform the depth of research one would wish. This may occur because the matter *is truly urgent*.
- Even in these circumstances *one should not make the mistake of giving a half-baked*, half thought out opinion over the telephone and promising the written advice at a later date.
- If the opinion giver is wrong not only, will he face considerable embarrassment in correcting his informal opinion but if his client has acted on the faith of it, the opinion giver will have no defence to a claim for damages.
- *Example:* Mr. A, comes to you for taking opinion on a matter, which is required to be used in a return to be filled on the next day. In this scenario, *proper due diligence should be done before giving any opinion.*

Q9. 'A Company Secretary should not render any fraudulent or misleading opinion'. Discuss. [Dec. 2021 (4 Marks)]

**Ans.** A Company Secretary *should not render an opinion that he/she knows would be misleading*. In addition, a professional should not render an opinion *based on factual assumptions* if he/she knows that the assumptions are false or that reliance on those facts is unreasonable. In addition, a professional should not be asked to render opinions on matters that are outside his or her area of professional competence. *In no event* should a professional be asked for opinions that are generally beyond the professional competence of professionals from that area of practice, *such as asking a professional to express his opinion on financial statement analysis or valuation*.

#### STANDARDS APPLICABLE TO PREPARATION OF AN OPINION

**Q10. There are some standards which are applicable for preparation of an opinion. Explain. [Dec. 2020 (4 Marks)]**

**Ans. Following are the standards applicable for preparation of an opinion:**

- (a) **Generally:** A professional is expected to be well informed and to exercise such skill, prudence and diligence as professionals of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
- (b) **Customary Practice:** An attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.
- The opinion preparers should devote the time needed to interpret and apply legal principles relevant to the situation at hand, ascertain (through appropriate inquiry and certificates of officers of the Company) the facts that underlie the opinion, and identify areas of significant uncertainty (if any) in the interpretation and application of legal principles. In certain cases, opinion givers may conclude that it is necessary to conduct research with respect to particular legal principles or to conduct an investigation of the underlying facts relevant to the opinion.
- (c) **Fraudulent or Misleading Opinions:** An opinion giver may be liable for an opinion that constitutes fraudulent misrepresentation. A professional owes a duty to non-clients to refrain from fraudulent misrepresentation. It is generally understood that, regardless of compliance with other standards, and even if an opinion is technically correct, a professional should not render an opinion that he recognizes would be misleading to the opinion recipient.
- (d) **Ethical Issues Relating to the Provision of Opinions to Non-clients:** A professional delivering an opinion letter to a non-client should also consider ethical prin-

ciples. For example, rendering an opinion to a non-client may conflict with the opinion giver's ethical obligations to maintain the confidences of its client. He should decline to give legal opinion in such cases.

#### COMPANY SECRETARY AUDITING STANDARD ON OPINION WRITING

**Q11. Examine the significance of materiality in the process of forming an opinion according to CSAS-3. [Scoring Question]**

**Ans. *The Auditor shall consider Materiality while forming his opinion and adhere to:***

- *The principle of completeness* that requires the Auditor to consider all relevant Audit Evidence before issuing a report;
- *The principle of objectivity* that requires the Auditor to apply professional judgment and scepticism in order to ensure that all reports are factually correct and that findings or conclusions are presented in a relevant and appropriate manner;
- *The principle of timeliness* that implies preparing the report in due time; and
- *The principle of a contradictory process* that implies checking the accuracy of facts and incorporating responses from concerned persons.

**Q12. Examine the stages involved in developing a modified opinion within the CSAS-3 opinion-forming process. [Scoring Question]**

**Ans. *The Auditor shall express modified opinion when the Auditor concludes that:***

- (a) Based on the Audit Evidence obtained, there is *non-compliance with the applicable laws* in terms of timelines or process; or
- (b) Based on the Audit Evidence obtained, the Records as a whole are not *free from Misstatement*; or are not maintained in accordance with applicable laws; or
- (c) He is *unable to obtain sufficient and appropriate* Audit Evidence to conclude that there is due compliance with the applicable laws in terms of timelines and process; or
- (d) He is *unable to obtain sufficient and appropriate Audit Evidence* to conclude that the Records as a whole are free from Misstatement; or are maintained in accordance with applicable laws.

Whenever the Auditor expresses a modified opinion or disclaims an opinion, the *text of the opinion shall be either in italics or bold letters.*

**Q13. Examine the Auditor's Responsibility stage within the framework of forming an opinion according to CSAS-3. [Scoring Question]**

Ans.

- The Auditor's Report shall include a section with the heading "**Auditor's Responsibility**". Auditor's Report shall state that the responsibility of the Auditor is to express opinion on the compliance with the applicable laws and maintenance of records based on audit.
- The Auditor's Report shall also state that **the audit was conducted in accordance with applicable Standards**. The Auditor's Report shall also explain that those standards require that the Auditor comply with statutory and regulatory requirements and **plan and perform the audit to obtain reasonable assurance** about compliance with applicable laws and maintenance of Records.
- Auditor's Report shall also state that **due to the inherent limitations** of an audit including internal, financial and operating controls, there is an unavoidable risk that some **Misstatements or material non-compliances** may not be detected, even though the audit is **properly planned and performed in accordance with the standards**.

**Q14. Discuss in brief about Form of an Opinion.**

**[Scoring Question]**

Ans. Form of an Opinion:

Unmodified Opinion: The Auditor shall express an unmodified opinion when based on Audit Evidence, the Auditor concludes that:

- there is due compliance with the applicable laws in terms of **timelines and process**; and
- the Records as relevant for the audit verified by him as a whole are **free from Misstatement and maintained** in accordance with the applicable laws.

Modified Opinion: The Auditor shall express modified opinion when the Auditor concludes that:

- based on the Audit Evidence obtained, there is **non-compliance** with the applicable laws in terms of timelines or process; or
- based on the Audit Evidence obtained, the Records as a whole are not **free from Misstatement**; or are not maintained in accordance with applicable laws; or
- he is unable to obtain **sufficient and appropriate Audit Evidence** to conclude that there is due compliance with the applicable laws **in terms of timelines and process**; or
- he is unable to **obtain sufficient and appropriate Audit Evidence** to conclude that the Records as a whole are free from Misstatement; or are **maintained in accordance with applicable laws**.

Whenever the Auditor expresses a modified opinion or disclaims an opinion, *the text of the opinion shall be either in italics or bold letters.*

**Q15. As per The Company Secretaries Auditing Standard (CSAS-3), how the auditor should deal, if, after accepting the audit engagement, the appointing authority imposes a limitation on the scope of the audit.**

**[June 2024 (5 Marks)]**

**Ans. Limitation:** If, after accepting the Audit Engagement, the Appointing Authority imposes a limitation on the scope of the audit which, in the opinion of the Auditor, is likely to result in the need to express a modified opinion or to disclaim an opinion, the Auditor shall request the Appointing Authority to remove the limitation.

If the Appointing Authority refuses or fails to remove the limitation, the Auditor shall communicate the matter to the Management and determine whether it is possible to perform alternative procedure to obtain sufficient and appropriate Audit Evidence.

If the Auditor is unable to obtain sufficient and appropriate Audit Evidence, the Auditor shall determine the implications as follows:

- a. If the Auditor concludes that the possible effects of unavailable Audit Evidence could be non-material, the Auditor shall modify the opinion; or
- b. If the Auditor concludes that the possible effects of unavailable Audit Evidence could be material, the Auditor shall express disclaimer of opinion.

### SAMPLE FORMAT OF OPINIONS

**Q16. Draft a Specimen on Opinion.**

**[ICSI Study Material]**

**Ans.**

**Opinion**

Date: \_\_\_\_\_

To,

\_\_\_\_\_

\_\_\_\_\_

On the basis of the reference received by \_\_\_\_\_, the following question has been framed for legal opinion:

**Question: Is the appointment of a person as a sole arbitrator by one party barred in law even if the same be provided in the arbitration agreement between the parties?**

1. The Arbitration and Conciliation Act, 1996 does not bar the appointment of a person as a sole arbitrator by one party. However, it places certain fetters on such appointments and these have further been elaborated by the Supreme Court and various High

Courts in a number of judgments. Having said that, there are still certain areas that need to be ironed out.

2. According to section 12(3) of the Arbitration and Conciliation Act, 1996, An arbitrator may be challenged only if—
  - (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
  - (b) He does not possess the qualifications agreed to by the parties.
3. Clause (a) of section 12(3) is clear in its language that the appointment of an arbitrator can be challenged if there are circumstances that give rise to justifiable doubts as to his independence or impartiality. Appointment of a sole arbitrator by one of the parties raises justifiable doubts as to the arbitrator's independence or impartiality. Thus the other party can always challenge the appointment of such an arbitrator in Court and the appointment of the arbitrator is most likely to be struck down.
4. The Supreme Court in the matter of **TRF Limited v. Energo Engineering Projects Ltd., (2017) 8 SCC 377** ruled against unilateral appointments of arbitrators and further clarified it in **Perkins Eastman Architects DPC v. HSCC (India) Limited 2019 (9) SCC Online SC 1517**, where it held that a party to an arbitration agreement can neither appoint oneself or any other person unilaterally as the sole arbitrator. In both these cases the arbitration clause provided that only the officer at a specified rank or someone nominated by that officer could act as the sole arbitrator.
5. The reason for holding it so is because a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course of the dispute resolution by having the power to appoint an arbitrator. In a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution.
6. If the arbitration clause provides for appointment of sole arbitrator by one of the parties, such arbitrator should be appointed with the consent of the other party. However, if one party appoints a sole arbitrator and the other party does not object to it, it would be considered as a waiver and that appointment would be considered valid. A point to be kept in mind is that such an appointment should not be made by a person who himself is disentitled to act as an arbitrator under the provisions of the Arbitration and Conciliation Act, 1996.

**Disclaimer:** The opinions expressed herein are given to you solely for your use and may not be relied upon by any other person or entity or for any purpose whatsoever without our prior written consent. The opinions herein are provided as legal opinions only, and not as representations of fact. The opinions expressed herein are as of the date of this letter and



7.14

PART I: DRAFTING AND CONVEYANCING

we have no obligation to update these opinions for any period following the date of this letter.

**I advice accordingly.**

Sincerely yours,

(Name & signature)

1800  
1923  
**TAXMANN**



# 8

## CHAPTER

# COMMERCIAL CONTRACT MANAGEMENT

### INTRODUCTION

**Q1. Examine the definition and objectives of a contract, elaborating on its inherent meaning and the fundamental purposes it serves in legal and commercial contexts.** [Scoring Question]

**Ans.**

- Contracts are an essential *deep rooted in civilized society* and have gradually become an *indispensable part of our lives*. Right from buying milk and bread in the morning till ordering online food for dinner, all are one or other forms of contract.
- Though in personal life, we instinctively [automatically] enter into various contract and/or agreement, yet in commercial world, these contracts are *quite significant and forms an integral part for the success of the business*.
- As per section 2(h) of Indian Contract Act, 1872 – a contract is *“an agreement enforceable by law”*.

### PURPOSE OF CONTRACT

The main purpose of a contract is to *formalize new relationships and outline the various legal obligations each party owes to the other*.

*Presently, most contracts are agreed between businesses as well as individuals.*

- While Individuals will sign basic contracts occasionally - to sell a house, or accept a job offer, and
- Businesses sign legal agreements in the masses, with partners, customers, and suppliers.

The truth is, *contractual agreements form the backbone of every commercial relationship*.

**Q2. “How does the significance of contracts extend to both professional and personal spheres, and what are some key points that highlight their importance in these contexts?”** [Scoring Question]

**Ans. Some key points highlighting the significance of contract are as below:**

- **Avoids Misunderstanding and legal disputes (Impact on business):**  
Misunderstanding is a common problem confronted in any business due to several reasons. To avoid such cases, drafting a contract is important and it is required for both parties to read the consented rules and abide by them.
- **Evidence in Court of Law:**  
The contract can act as legal evidence if any of the party files a suit against the other at times of contract breaching.
- **Prevents Conflicts and Minimizes Risk:**  
Contracts detail down each party's responsibility. This leads to clarity between the parties and better understanding among them regarding the deal.
- **Increases Operational Efficiency:**  
Contracts are essentially binding agreements that state that one side will deliver goods and services for a certain consideration by the other side. A contract with the appropriate term will help the business to operate efficiently.
- **Proof of Details (Impact on business):**  
The prime purpose of creating a contract is related to the recording of details, which both parties have *agreed with mutual consent*. These details will *serve as legitimate proof* and are very important in a contract.

### NEGOTIATION OF BEST COMMERCIAL AND OPERATIONAL TERMS WITH VENDOR

**Q3. "Outline key principles for establishing optimal commercial and operational terms with vendors." [Scoring Question]**

**Ans. Following are some major guidelines for creating best commercial and operational terms with the vendor:**

- **Make a plan:** Before you reach out to the vendors, make a plan as to what you are going to ask. For example: have a plan in place before you approach a vendor to negotiate new payment terms. It's important to know what you can afford to pay now. This plan will give you a starting point from which to negotiate.
- **Be proactive in communication:** Early communication is always *more welcome than suddenly reaching out in an emergency*. Try to be proactive about your need to renegotiate.
- **Be Patient:** Stay confident and remember that you can always walk away. Typically, it is not a good idea to take the first offer carefully consider and respond with a better counter offer.
- **Start Strong:** By making your payments in full and on time you begin to build trust. Vendors are not likely to negotiate with a company who has missed a

deadline or made late payments. Similarly, vendors don't want clients who are overly complicated or difficult to work with.

- **Sell the vendor:** Your vendor wants to be well-represented and sell as much of their product as possible. Demonstrate to the vendor how you can help them meet their goals and increase their sales. Will you get their product in front of key demographics? Is your sales team world-class? Maybe you can find ways to promote the vendor in your operations. ***Sell your operation to the vendor and they will be excited to work with you.***

### CREATE, ANALYSE AND EXECUTE CONTRACTS

**Q4. "What are the essential components commonly covered in a carefully drafted contract?"** [Scoring Question]

**Ans.** A well-drafted contract is likely to ***state every detail and the extent to which the parties are bound to each other.*** A contract defines the relationship between the parties.

**A contract states the:**

- The ***goal or objectives*** that the parties intend to achieve through the transaction.
- The ***scope of work*** to be performed by the contracting parties.
- In case of a specific purpose, the ***description of specific purpose*** to be achieved.
- The ***consideration agreed*** to be paid and terms of payment.
- The ***indemnities*** which each party would give the other as applicable.
- The ***limit of the liability*** of each person vis-a-vis the other party or a third-party.
- ***Grounds of termination*** of the contract.

**Q5. Discuss in brief few General Conditions of a Valid Contract.**

[Scoring Question]

**Ans.** **The general terms and conditions of the contract include but not limit to the following:**

<b>Legal Status of the Parties</b>	This clause deals with the legal status and nomenclature of the parties entering into the contract.
<b>Definitions</b>	Definition clause is an important clause in a contract. It defines all the important and capitalized terms in a contract. It majorly aims to capture the intent of a capitalized term used in a contract.
<b>Interpretation Clause</b>	A good contract always captures a general interpretation clause, which clarifies the intention of some general terms used in the agreement. For example, he includes she and alike.
<b>Object/Scope of Work and/or Services</b>	This is one of the important clauses in a contract. It captures the scope of work/object for which the contract is being entered upon between the parties.

<b>Representations and Warranties</b>	In this clause, parties represent and warrants certain factual details, which forms the integral part of the contract and basis which parties are acting upon the contract.
<b>Contractual Period</b>	This clause defines the term of the contract. A good contract also captures the renewal of term and the conditions of such renewal.
<b>Fees and Taxes</b>	<b>Consideration is a valid essential of the contract.</b> Hence this clause captured fees and taxes mutually decided for the scope of work of that contract.
<b>Payment Method</b>	Apart from consideration for a contract, <b>it is also vital to clearly capture the method</b> vide which the fees and commercials of the contract shall be paid.
<b>Commencement Date</b>	This clause <b>identifies the effective date</b> of the contract on which the rights and obligations of the parties shall take effect.
<b>Rights and Obligations of the Contractual Parties</b>	This clause specifies the rights and obligations of the contractual parties.
<b>Termination of Contract</b>	This clause describes <b>the process of termination of contract</b> , in case party wishes to terminate the contract <b>before it expires</b> . It also identifies the events which will cause the contract to terminate by either of the parties.
<b>The Right of Withdrawal from the Contract</b>	This covered the withdrawals rights of the parties; in case they wish to withdraw from few obligations of the contract.
<b>Indemnification</b>	This clause states the obligations of the parties to indemnify other party, hold and safe harmless, and defend, at its own expense, from and against all suits, claims, demands, and liability of any nature or kind, arising out of acts of omission of the indemnifying party.
<b>Limitation of Liability</b>	This clause limits the liabilities of the parties in case of any indemnity or liability required to be given/bear under the contract.
<b>Confidentiality</b>	<ul style="list-style-type: none"> <li>✓ When two or more parties enter into a contract, there will almost certainly be a considerable number of details exchanged for all parties to fulfil their contractual obligations.</li> <li>✓ Given the necessity of providing some details about each party's financial and business practices, the contract must have a strict confidentiality clause.</li> <li>✓ This provision should prohibit all parties from disclosing any and all information exchanged during the transaction.</li> </ul>

	Of course, where valuable intellectual property is at stake, this is especially important.
<b>Force majeure/ Mitigating Factors</b>	The term "Force Majeure" simply means "greater factor". This clause should be included in all commercial contracts because it can shield parties from events that are beyond their control. For example — a shipping schedule could be <b>unavoidably interrupted in the event of a natural disaster</b> such as an earthquake or hurricane. In general, the term "Force Majeure" is very broad, and many contracts have clauses that cover items like terrorist attacks and even acts of God. This provision is necessary to ensure that any failure to perform as a result of an unforeseen interruption is not considered as breach of contract.
<b>Jurisdiction</b>	<ul style="list-style-type: none"> <li>✓ Cross-border transactions are quite common these days, both domestically and internationally.</li> <li>✓ When the parties to a contract are from different states, or even different countries, <b>it can be difficult to determine which state's laws apply to the contract.</b></li> <li>✓ As a result, commercial contracts should always state which state will have authority over the deal, so that the relevant laws are crystal clear.</li> </ul>
<b>Dispute Resolution</b>	<ul style="list-style-type: none"> <li>✓ Parties are increasingly using an arbitration provision in their contracts, forcing the parties to agree to arbitration before or in lieu of finding a settlement through litigation.</li> <li>✓ This is <b>usually a quicker and less expensive way to resolve contract-related issues.</b></li> </ul>
<b>Damages</b>	<ul style="list-style-type: none"> <li>✓ Due to high level of contract violations and the need to prevent them, it is also common practice for commercial contracts to include damages clauses.</li> <li>✓ <b>Liquidated damages</b> clauses, which are normally <u>a fixed sum due if one party fails to perform, will be used in most contracts.</u></li> <li>✓ Depending on the extent and effect of the violation, <u>a court can award other forms of damages in addition to that amount.</u></li> </ul>

**Q6. Discuss in brief few Special Conditions of a Valid Contract.**

**[Scoring Question]**

**Ans.** As the name suggests, special conditions are special as per the nature of the contract. These conditions cannot be common for all the contracts.

**Few instances of special conditions are as follows:**

- Sub-Contracting
- Assignment
- Additional Scope of Work
- Alternative Dispute Resolution
- Data Deletion and/or Data Purging Clause
- Privilege and Immunities
- Tax Exemption
- Choice of Law

**CONTRACT RELATED DOCUMENTS AND CORRESPONDENCE**

**Q7. “What are the various types of contract documents, and how does the specific documentation required for a project vary based on the project type and the contracts involved?”** [Scoring Question]

**Ans. The most common types of contract documents are:**

<b>Contract Agreement</b>	A contract agreement defines the agreement between the client and the contractor in which the parties are specified and their responsibilities are defined in the construction process.
<b>Scope of work</b>	This document outlines the specific work to be completed under the contract. It may also include information on how the work will be performed, timelines, milestones, and other important details.
<b>Addendum</b>	An addendum is a document attached to and executed with the original contract, making it a part of the original contract from the start.
<b>General Conditions</b>	General conditions define all general terms and items such as utilities, vehicles, organizational structure, mobilization, and demobilization. But these items are not directly related to the construction activities. Obligations of both parties, general conditions, overhead costs, bonuses, and some other conditions are included in this portion.
<b>Special Conditions</b>	Special conditions describe specific requirements and instructions for the work. Mostly they are addendums to the general conditions. Special conditions include details and conditions regarding the individual tasks or the whole project.
<b>Bill of Quantities</b>	Bill of Quantities is a document used for tendering that lists all work to allow the contractor to price the work for which he or she is bidding. It includes quantity and price for each work and

	after the bidding phase, it will be an attachment of the contract document.
<b>Schedule</b>	Work schedule is very important for both parties. Because a project cannot be performed without a proper plan. A project schedule shows site delivery date, start and finish milestones, project duration, and other useful information. A work schedule can be created by using various project scheduling techniques.
<b>Budget</b>	The budget outlines the estimated costs for the project. This may include materials, labour, overhead, and other associated costs.
<b>Drawings and Specifications</b>	Detailed drawings and specifications are often required for construction projects. These documents provide information on the materials to be used, dimensions, tolerances, and other important details.
<b>Insurance requirements</b>	Most contracts will require that certain insurance policies be in place before work can begin. This may include general liability insurance, workers' compensation insurance, or other specialised coverage.
<b>Bonding Requirements</b>	Many public projects require that contractors obtain performance bonds or payment bonds before work can begin. These bonds protect the owner from financial loss if the contractor fails to perform as specified in the contract.
<b>Technical Specifications</b>	Technical Specifications describe the materials, workmanship, and equipment required for a task. Typically, technical specifications describe the end product, therefore, the client should describe them clearly before the tendering stage. Every little task should be specified and deviation limits should be determined in technical specifications.

### MAINTENANCE OF CONTRACT DOCUMENTS

**Q8. Define the term Maintenance of contract documents and mention the types of Maintaining Contract Documents. [Scoring Question]**

**Ans.** Maintenance of contract documents means *creating and maintaining accurate records* of all communications and correspondence with contracting parties. It *may or may not* involve monitoring compliance with contract terms and keeping track of any changes or amendments that need to be made.

**When it comes to document management, there are two main types of systems:**

- manual and
  - electronic.
- (a) **A manual document management system (DMS)** is controlled by humans. This could involve a physical filing system where employees manually file documents or an online system where employees enter data into a database.
- (b) **An electronic document management system (EDMS)**, on the other hand, is a system that is controlled by computers. This could involve an online system where employees access files remotely or an offline system where employees download files to their computers.

**Q9. Difference between Document Management and Contract Management.**  
[Scoring Question]

**Ans.** It is to be noted that while contract management and document management involve the organization and tracking of documents, there are several key distinctions between the two disciplines. Let us understand them one by one as below:

Document Management	Contract Management
Document management includes maintaining, arranging and storing the documents for better tracking and retrieval, when necessary, but it does not include features like negotiation, risk management, and compliance.	Contract management includes elements of negotiation, risk management, and compliance.
Document management is simply the process of organizing and storing documents.	Contract management is the process of negotiating, drafting, executing, and managing contracts.
Document management helps businesses find specific documents quickly and easily.	Contract management helps businesses manage their contractual obligations effectively.
Document management is a sketchy solution that helps businesses organize and track documents.	Contract management is a more comprehensive solution that includes risk management, compliance, and the negotiation of contracts.
Document management is more beneficial for businesses that need to find specific documents quickly and easily.	Contract management is more beneficial for businesses that need to manage contractual obligations.

However, one has to always remember that Document management along with Contract Management systems works to improve the overall efficiency of a business and business contracts.

### TRACKING OF CONTRACTS AND EXTEND, RENEW AND CLOSE

**Q10. "What are the key stages that contracts typically undergo to mitigate financial, legal, and procurement risks within an organization?"**

**[Scoring Question]**

**Ans. These stages include:**

- **Request and draft:** The parties decide to enter into an agreement, and one party offers the initial draft with the necessary clauses, terms and conditions.
- **Review and negotiations:** A lawyer or business professional examines the contract provisions to identify any potential risks. Both parties negotiate over the contract's terms and conditions and make any necessary adjustments to establish acceptable terms for both sides.
- **Approval and execution:** If both parties agree to the contract's wording, they approve it and execute the deal via their preferred signing method.
- **Storage:** Each party should store the signed contract in a secure yet easily accessible location.
- **Reporting and analytics:** Both parties can accumulate, filter, analyse, and report on contract data.
- **Amendments:** Both parties can negotiate addendums to their contracts and use jointers to add a new party to the original contract.
- **Extend, Expiration (Close) and Renewals:** When the parties reach the end of the contract, they may decide to renew their agreement, negotiate a new contract, or terminate it.

### BUILD AND MAINTAIN RELATIONSHIP WITH VENDORS, CLIENTS

**Q11. "How does the establishment and maintenance of relationships with vendors and clients benefit from open and honest communication, in what ways can cultivating strong supplier relationships significantly enhance customer service and contribute to reducing overall stress levels?"** [Scoring Question]

**Ans.**

- **Choose suppliers that align with your values**

If excellent customer service is important to you then choose suppliers for whom this is also paramount. It is **vital for good customer relations** that any products, materials or services you supply your clients have **warranties or return policies that match your own.**

➤ **Be a great customer**

Think about what you love about your customers and do the same for your suppliers. ***Pay on time and keep your records*** in order so you don't have to waste your suppliers' time by getting them to re-send things.

➤ **Maintain Regular Communication**

Keep in touch with your suppliers and try and schedule a ***time to get together over a coffee***. Reflect on what's working well and talk through areas for improvement. Having the opportunity for both parties to provide feedback on what's been helpful or difficult can be the spark to develop innovative ways to strengthen the relationship even further.

➤ **Give timely feedback**

***Don't ring up and yell at your supplier*** if stuff is not going right. Instead, be calm and direct so things do not fester and become the proverbial storm in a teacup.

➤ **Reward good service with loyalty**

If your supplier has done the right thing by you, ***reward them with your loyalty and continue your business relations with them.***

### CONTROL OVER ANY CHARGES FOR SERVICES OUT OF THE SCOPE OF THE CONTRACT

Q12. Explain the conditions which are required to be fulfilled under section 70 of the Indian Contract Act, 1872 for a court to allow compensation under the principle of Quantum meruit. [June 2024 (5 Marks)]

Ans. The 3 conditions need to be fulfilled before the benefit of this section can be invoked by a person. The 3 conditions under section 70 of Indian Contract Act, 1872 are as follows:

- The first condition is that the claimant should either lawfully do something for another person or deliver something to him;
- The second condition is that while doing or delivering something, the claimant must not be acting gratuitously; and
- Thirdly, the person for whom something is done or to whom something is delivered must enjoy the thing done for or delivered to him as the case may be.

Q13. Throw light on Quantum meruit compensation. [Scoring Question]

Ans. Compensation under quantum meruit is ***awarded for the services rendered by the contractor*** when the payment thereof is not fixed by the contract.

Quantum meruit is a right which **arises outside a construction contract**. A quantum meruit claim arises, where work is done or services rendered by the contractor for the employer or owner, in circumstances which entitle the constructor doing the work or rendering the services to receive a reasonable additional remuneration, the **situation being one where either there is no construction contract or there is a contract but the particular situation is not covered under that construction contract**.

#### ACTION IN CASE OF BREACH OF CONTRACT

**Q14. "How does section 74 address penalties concerning the breach of a contract? What distinctions does it make between liquidated damages and penalties"?**  
[Scoring Question]

**Ans.** The party to the contract may agree at the time of contracting that, in the occurrence of breach, the party in default has **to pay a stipulated sum of money to the other**, or may agree that in the event of breach by one party any amount paid by him shall be forfeited.

- If this **sum is genuine pre-estimate of damage** likely to flow from the breach is called '**liquidated damage**'.
- If it is not genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, **it may be called 'penalty'**.
- **Section 74 provides for the measure of damages in two classes:**
  - where the contract names a sum to be paid in case of breach; and
  - where the contract contains any other stipulation by way of penalty.

**Q15. "Under what circumstances may a court decree specific performance of a contract, and what factors contribute to the determination of whether specific performance is an appropriate remedy in a given situation"?**  
[Scoring Question]

**Ans.** The situation where specific performance of contract may be allowed are as under:

- (a) **When there is no standard for ascertaining actual damage:** When it is **impossible to quantify the actual damage** caused by the non-performance of the act agreed to be done, the Court may, in its discretion, **grant a decree of Specific Performance** of that act.
- (b) **When monetary compensation would not afford adequate relief:** When the act agreed to be done is such that compensation offered in money for its non-performance would not afford adequate relief.
- (c) **However, until the contrary is proved, it is to be presumed that:** The breach of a contract to transfer immovable property cannot be adequately compensated by

payment of money. **The breach of a contract to transfer movable property can be so compensated, except in the following cases:**

- Where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are ***not easily obtainable in the market.***
- Where the property is held by the defendant as the ***agent or trustee of the plaintiff.***
- Usually, the Courts are entitled to presume that in case of breach of contract to transfer of immovable property, mere compensation is not adequate relief, whereas specific performance is adequate relief, whereas in the case of movable property, ***compensation is the ordinary relief and specific performance is exceptional. However, it must be noted that these presumptions are rebuttable.***

19:23 TAXMANN



**PART II**

**PLEADINGS AND APPEARANCES**

by **TAXMANN**



# 9

## CHAPTER

# JUDICIAL & ADMINISTRATIVE FRAMEWORK

### INTRODUCTION & TYPES OF COURTS AND THEIR JURISDICTION

**Q1. Write a note on the following: Supreme Court of India plays the role of the guardian of Constitution of India. [Dec. 2020 (4 Marks)]**

**Ans.** Supreme Court of India is the highest level of court of Indian juridical system which is established as per Part V, Chapter IV of the Constitution of India.

- **Original Jurisdiction:** The Supreme Court exercises original jurisdiction exclusively to hear the cases of disputes between the Central Government and the State Governments or between the States. The Supreme Court has original but not exclusive jurisdiction for enforcement of Fundamental Rights as per the provision of Constitution of India through the way of writs.
- **Appellate Jurisdiction:** Supreme Court has the power to exercise extra ordinary jurisdiction to hear any appeal related to any matter for which any court or tribunal had decided with judgment through the option of special leave petition except the case of tribunal related to Armed Forces.
- **Advisory Jurisdiction:** The Supreme Court has the option to report its opinion to the President about any questions raised of public importance referred to it by the President.

Hence, it can be concluded that **Supreme Court of India plays the role of the guardian of Constitution of India.**

**Q2. Discuss in brief about E-Courts and its Objectives. [Scoring Question]**

**Ans.**

- The e-Committee, established by the Government of India, was formed at the request of *the Hon'ble Chief Justice* of India to develop a national policy *for computerizing the Indian Judiciary* and provide *guidance on technological and managerial changes.*
- The project aims to revolutionize the Indian Judiciary through the integration of *ICT (Information and Communication Technology)* in court processes.

- The e-Courts Project originated from the "*National Policy and Action Plan* for Implementation of *Information and Communication Technology (ICT)* in the Indian Judiciary – 2005" proposed by the *e-Committee of the Supreme Court of India*.
- The e-Courts *Mission Mode Project* is a nationwide initiative *supervised and funded* by the Department of Justice, Ministry of Law and Justice, Government of India.
- Its focus is on the implementation of *ICT in District Courts across India*, aiming to enhance efficiency and effectiveness in the judicial system.

**The objectives of the e-Courts mission project are:**

- To deliver *prompt and citizen-centric services* in adherence to the e-Court Project Litigant's Charter, ensuring efficiency and timely resolution.
- To *develop, install & implement* decision support systems in courts.
- To *automate the processes* to provide transparency in accessibility of information to its stakeholders.
- To *enhance judicial productivity, both qualitatively & quantitatively*, to make the justice delivery system affordable, accessible, cost effective, predictable, reliable and transparent.

**Q3. Discuss in brief about the E-Courts services.**

**[Scoring Question]**

**Ans.** There are 39 *High Courts Complexes and 3479 complexes* under the e-Court Services. The website [https://ecourts.gov.in/ecourts\\_home/index1.php](https://ecourts.gov.in/ecourts_home/index1.php) provides the updated data with respect to High Court Complexes'/District and Taluka Court Complexes' Pending cases, disposed cases and cases listed as on date. The parties can *search the status of the cases, caveats and courts orders online*.

**The services of the Supreme Courts are also available on the website <https://main.sci.gov.in/>. The services inter alia include:**

- Cause List.
- Latest Updates.
- Latest Judgments.
- Listing notices.
- E-SCR (Supreme Court of India reportable judgments).
- Online Appearances.
- Live Streaming of Cases.
- Physical Hearing (Hybrid Options).

**TYPES OF TRIBUNALS/QUASI-JUDICIAL BODIES****Q4. Write a Short note on Debt Recovery Tribunal. [Dec. 2022 (5 Marks)]****Ans.**

- The Debt Recovery Tribunals have been constituted under *section 3 of the Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993.*
- The **ORIGINAL AIM** of the Debts Recovery Tribunal was to receive claim applications from Banks and *Financial Institutions against their defaulting borrowers.*
- DRT was established for expeditious adjudication and recovery of debts due to banks and financial institutions *in order to reduce the Non-Performing Assets (NPA) of the Banks and F. I's.*
- Prior to the introduction of Debt Recovery Tribunal, petitions had to be filed separately for adjudication of cases and execution proceedings in different courts depending upon their jurisdiction.
- DRT acts as a **SINGLE JUDICIAL FORUM** for adjudication of cases as well as execution of the decrees passed for recovery of debts due to banks and financial institutions *under RDDBFI Act and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act, 2002.*

**Q5. Write a note National Company Law Tribunal. [Dec. 2022 (4 Marks)]****OR**

Rush Bank, a banking company, wants to take action against the defaulting borrower, being CS advise the appropriate forum to file the petition. Suggest, whether THFL, and MBFC (Not a banking company) can file the petition against the defaulting borrower before the same forum? Give a reasoned reply.

**[Dec. 2022 (5 Marks)]**

**Ans.** National Company Law Tribunal (NCLT) is a quasi-judicial body exercising equitable jurisdiction, which was earlier being exercised by the High Court or the Central Government. It has been established by the Central Government under section 408 of the Companies Act, 2013 with effect from 1st June, 2016.

*The Tribunal has powers to regulate its own procedures. The establishment of the National Company Law Tribunal (NCLT) consolidates the corporate jurisdiction of the following authorities:*

- Company Law Board.
- Board for Industrial and Financial Reconstruction.
- The Appellate Authority for Industrial and Financial Reconstruction.

- Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the High Courts.

**Q6. "Tribunals are a part of the executive branch of the government which are assigned with the powers and duties to act in Judicial Capacity for settlement of disputes". Comment and name any four of such tribunals along with the aim of formation. [June 2021 (4 Marks)]**

**Ans.** Tribunals in India are a part of the Executive branch of the Government which are assigned with the powers and duties to act in judicial capacity for settlement of disputes. Part XIV of the Constitution of India makes provisions for establishment and functioning of the Tribunals in India. They are quasi-judicial bodies that are less formal, less expensive and enable speedy disposal of cases.

**Following are some of Tribunals in India:**

- **Motor Accident Claims Tribunal (MACT):** The Motor Accidents Claims Tribunal deals with matters related to compensation of motor accidents victims or their next of kin. Victims of motor accident or legal heirs of motor accident victims or a representing Advocate can file claims relating to loss of life/property and injury cases resulting from Motor Accidents. Motor Accident Claims Tribunal are presided over by Judicial Officers from the State Higher Judicial Service and are under direct supervision of the Hon'ble High Court of the respective state.
- **Central Administrative Tribunal (CAT):** Central Administrative Tribunal is a multi-member body to hear on cases filed by the staff members alleging non-observation of their terms of service or any other related matters and to pass judgments on those cases. This Tribunal established in pursuance of the amendment of Constitution of India by Article 323A.
- **National Green Tribunal (NGT):** National Green Tribunal was established for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation of damages to persons and property and for related matters.

#### **PROCEDURAL ASPECTS OF WORKING OF CIVIL COURTS**

**Q7. Write notes on the following; Applicability of Principles of Res judicata. [June 2019 (4 Marks)]**

**OR**

**Explain the Principles of Res judicata and its impact on litigation.**

**[Dec. 2020 (5 Marks)]**

**OR**

**'X' filed a civil suit for eviction and possession of his property against 'Y', an unauthorised occupier. But the case 'dismissed by default' without any hearing and not considering merits of the case by Honourable court, due to several non-appearances of 'X'. Now 'X' again wants to file another civil case before the same court for same cause of action. Advise 'X'.**

**[Dec. 2019 (4 Marks)]**

**Ans.** The principle of res judicata aims at bringing finality to the litigation. The basic principle is that a final judgment rendered by a court of competent jurisdiction is conclusive on merits as to rights of the parties and constitutes an absolute bar against subsequent action involving the same claim.

**The principle of res judicata applies only under following circumstances:**

- The matter directly and substantially in issue has been directly and substantially in issue in a former suit between same parties or between whom they claim litigation under the same title.
- The matter is in the court competent to try such subsequent suit or the suits in which such issue has been subsequently raised and has been heard and finally decided.

The word former suit means suit decided prior, irrespective of the date of institution. The matter must be decided on merits i.e., the issue was alleged by one party and denied by the other. ***The principle of res judicata is one of convenience and not one of absolute justice*** and it should not be unduly conditioned and qualified by technical interpretations.

**Q8. Examine and comment on the following; Rejection of plaint will amount to decree.**

**[June 2011 (4 Marks)]**

**OR**

**A civil suit was filed without disclosing the cause of action in the plaint and the Honourable court rejects the Plaint. Comment and advise the plaintiff for remedial measures, if any.**

**[Dec. 2019 (4 Marks)]**

**Ans.** *Order 7 rule 11 of CPC* mentions the provisions, where the plaint should be rejected.

**The plaint will be rejected in the following cases:**

- Where it does not disclose the cause of action.
- Where the relief claimed is undervalued and Plaintiff fails to correct the valuation within the time fixed.
- If the relief is properly valued but insufficient court fee/stamp is paid and the Plaintiff fails to make good such amount.

- Where the suit appears to be barred by any law, from the statements in the plaint.
- Where plaint is not in duplicate, and
- Where there is non-compliance with statutory provisions.

**Q9. On what grounds court has power to reject the plaint. [Scoring Question]**

**Ans.** The court has power to reject the plaint on following grounds:

- Where it does not disclose the *cause of action*.
- Where the relief claimed is undervalued and Plaintiff fails to *correct the valuation within the time fixed*.
- If the relief is properly valued but insufficient court fee/stamp is paid and the *Plaintiff fails to make good such amount*.
- Where the suit appears to be barred by any law, from the statements in the plaint. The rejection of plaint on aforesaid grounds does *not of its own force bar the Plaintiff from presenting a fresh plaint*.

**Q10. Write note on the following: Affidavits. [Dec. 2012 (4 Marks)]**

**Ans.** The court may at any time for sufficient reason order that any *particular fact or facts may be proved by affidavit or affidavit of any witness* may be read at hearing, on such condition, as court thinks reasonable. Affidavit shall contain only such facts as the deponent is able of his own knowledge to prove except on *interlocutory applications on which statement of belief may be admitted provided grounds are stated*. The affidavits have to be *properly verified to avoid any dispute* at a later stage.

Need for verification of affidavits is to test genuineness and authenticity of allegations and also to make the deponent responsible for allegation made. Affidavit, which is not properly verified, is no affidavit at all. If affidavits are not in conformity with the rules, they can be rejected. Instead of rejecting the affidavit the court may give opportunity to the party to file proper affidavit. Interlocutory applications can also be decided on affidavits. Even if evidence is given on affidavit the court may direct that such person will be produced for cross examination.

### **TYPES OF CRIMINAL TRIAL**

**Q11. Distinguished between: Summon and Warrant Case.**

**[Dec. 2019/June 2019 (4 Marks)]**

**Ans.** First Information Report: Under section 154 of the Code of Criminal Procedure, an FIR or First Information Report is registered by any person. FIR puts the case into motion. An FIR is information given by someone (aggrieved) to the police relating to the commitment of an offense.

Investigation: The next step after the filing of FIR is the investigation by the investigating officer. A conclusion is made by the investigating officer by examining

facts and circumstances, collecting evidence, examining various persons and taking their statements in writing and all the other steps necessary for completing the investigation and then that conclusion is filed to the Magistrate as a police report.

**Charges:** If after considering the police report and other important documents the accused is not discharged then the court frames charges under which he is to be tried. In a warrant case, the charges should be framed in writing.

**Plea of guilty:** Section 241 of the Code of Criminal Procedure, 1973 talks about the plea of guilty. After framing of the charges, the accused is given an opportunity to plead guilty, and the responsibility lies with the judge to ensure that the plea of guilt was voluntarily made. The judge may upon its discretion convict the accused.

**Prosecution evidence:** After the charges are framed, and the accused pleads not guilty, then the court requires the prosecution to produce evidence to prove the guilt of the accused. The prosecution is required to support their evidence with statements from its witnesses. This process is called "examination in chief". The Magistrate has the power to issue summons to any person as a witness or orders him to produce any document.

**Statement of the accused:** Section 313 of the Criminal Procedure Code gives an opportunity to the accused to be heard and explain the facts and circumstances of the case. The statements of accused are not recorded under oath and can be used against him in the trial.

**Defence evidence:** An opportunity is given to the accused to produce evidence so as to defend his case. The defenses can produce both oral and documentary evidence.

**Q12. Explain the Summary Trial.**

**[June 2019 (4 Marks)]**

**Ans.** Cases which generally take only one or two hearings to decide the matter comes under this category. The summary trials **are reserved for small offences to reduce the burden on courts and to save time and money.** Those cases in which an offence is punishable with an **imprisonment of not more than six months can be tried in a summary way.** The point worth noting is that, if the case is being tried in a summary way, a person **cannot be awarded a punishment of imprisonment for more than three months.** The trial procedure is provided **from section 260 to section 265 of the Code of Criminal Procedure, 1973.**

**Stages of Criminal Trial in Summary Cases:**

- The procedure followed in the **summary trial is similar to summons-case.**
- Imprisonment up to **three months** can be passed.
- In the judgment of a summary trial, the judge should record the **substance of the evidence and a brief statement of the finding of the court with reasons.**

**REFERENCE AND REVISION UNDER CRIMINAL PROCEDURE CODE**

**Q13. Can revision application be made where aggrieved party has right to appeal in the matter? Elucidate with relevant provisions of Criminal Procedure Code. [June 2019 (4 Marks)]**

**Ans.** Sections 397 to 401 of the Code of Criminal Procedure deals with the revisional jurisdiction of the High Court and the Sessions Court.

- **The object of the revision** is to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction in order to **correct miscarriage of justice arising from misconception of law**, irregularity of procedure, neglect of proper precautions of apparent harshness of treatment which **has resulted on the one hand in some injury to the due maintenance of law and order**, or on the other hand in some undeserved hardship to individuals.
- **NO REVISION WHERE RIGHT TO APPEAL EXISTS** [Section 401(4)] Sub-section (4) of section 401 provides that the party having right of appeal cannot apply for revision. If the party does not file an appeal against an order of the inferior criminal Court, he will not be permitted to prefer a revision against that order. But legal bar does not stand in the way of High Court's exercise of power of revision suo motu.

**Q14. "No revision where right to appeal exists" Comment and state when revision may be treated as an appeal. [June 2021 (5 Marks)]**

**Ans.** **NO REVISION WHERE RIGHT TO APPEAL EXISTS:** [Section 401(4)] Sub-section (4) of section 401 provides that the party having right of appeal cannot apply for revision. If the party does not file an appeal against an order of the inferior criminal Court, he will not be permitted to prefer a revision against that order. But legal bar does not stand in the way of High Court's exercise of power of revision suo motu.

**REVISION MAY BE TREATED AS APPEAL:** Sub-section (5) of the section 401 vests a discretionary power in the High Court to treat a revision petition as an appeal and deal with it under its appellate jurisdiction under **Chapter XXX**. But it can do so when an appeal against the order of the inferior Court lies but the petitioner has filed a revision under an erroneous belief that an appeal does not lie and when it is in the interest of justice to do so.

**Q15. "A Subordinate Court cannot be supposed to entertain in a reasonable doubt on a point of law". Explain and state various provisions of reference under the Civil Procedure Code, 1908. [June 2022 (6 Marks)]**

**Ans.** A reference should be made to the High Court by a **District Judge or Judge of a Court of Small Causes**, under the provisions of section 113 and Order XLVI, Rule I

of the Code of Civil Procedure, only when the presiding *Judge entertains a reasonable doubt on the point of law or usage having the force of law referred, and not merely on the importunity of pleaders.*

**Mode of reference**

**In making a reference the presiding Judge should be careful to conform to the requirements of Order XLVI, Rule I, of the Code of Civil Procedure by:**

- i. drawing up a statement of the facts;
- ii. stating the point on which doubt is entertained; and
- iii. stating his opinion on such point.

Each of the above statement should be precise and clear, or the High Court will find itself compelled to return the reference for amendment under Order XLVI, Rule 5, of the Code of Civil Procedure.

**Q16. "The System of Appeal provides an opportunity to correct Judicial Orders which otherwise would operate unjustly" - Elaborate with relevant provision under the CPC, 1908 and the Criminal Procedure Code, 1973.**

**[June 2022 (5 Marks)]**

**Ans. Sections 96 to 112 of the C.P.C.** provides the following four kinds Appeals:

- (1) **Appeals from Original Decrees [Secs. 96 to 99 & Order 41]:** Appeals from original decrees may be preferred in the Court superior to the Court passing the decree. Where the decree has been passed with the consent of parties, no appeal lies. The appeal from original decree lies on a question of law as well as on question of fact.
- (2) **Second Appeal [Secs. 100 to 103]** As per section 100 of the Civil Procedure Code, an appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a SUBSTANTIAL QUESTION OF LAW. [It includes an appeal lie from an appellate decree passed ex parte.] According to section 102 of the CPC, NO second appeal shall lie from any decree, when subject matter of the original suit is for recovery of money not exceeding Rs. 25, 000. **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) Appeal from Orders [Secs. 104 to 106, Order 43 and Rules 1 & 2]**

In general appeals against the orders are not allowed. However, if it is specifically permitted under the provisions of law, appeal can be filed against the orders on ground of defects 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 43, Rule 1.

**(4) Appeal to the Supreme Court**

Section 109 of the Code of Civil Procedure, 1908 provides: An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, **if the High Court certifies that:**

- The case involves a substantial question of law of general importance; and
- In the opinion of the High Court the said question needs to be decided by the SC.

**A-132 TO 135 of the Constitution** deal with ordinary appeals to the Supreme Court.

**Q17. Review of a case means re-examination or reconstruction of its own decision by the same court. Explain. [Dec. 2020 (4 Marks)]**

**Ans. Section 114 of the Code of Civil Procedure** provides for a substantive power of review by a civil court and consequently by the appellate courts.

**(a) Review - Subject as aforesaid, any person considering himself aggrieved:**

- by a decree or order from which an appeal is allowed by this Code, but from which ***no appeal has been preferred***,
- by a decree or order from which ***no appeal is allowed by***, this Code, or
- by a decision on a reference from a ***Court of Small Causes***,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

**(b) Condition precedent:** The conditions to invoke section 114 have been dealt with in Order XLVII Rule 1 of the CPC. They are:

- **Discovery of new and important matter or evidence:** An application for review on the ground of discovery of new evidence should show that: (i) such evidence was available and of undoubted character; (ii) that the evidence was so material that its absence might cause a miscarriage of justice; and (iii) that it could not with reasonable care and diligence have been brought forward at

the time of the decree. The applicant has, however, to satisfy that there was no remissness on his part.

➤ **Mistake or error apparent on the face of the record**

Whether there is a mistake or error apparent on the face of record in a case depends on individual facts. However, it must be borne in mind, that in order to come to the conclusion that there is a mistake or error apparent on the face of record, it must be one which is manifest on the face of record. The error or mistake be so manifest, so clear, that no court would permit such an error or mistake to remain on the record.

➤ **Any other sufficient reason**

The phrase “any other sufficient reason” means a reason at least analogous to those specified in the rule immediately previously, namely, excusable failure to bring to the notice of the court new and important matter or evidence or mistake or error apparent on the face of the record. These words have been interpreted in *Chajju Ram v. Neki*, to mean a reason sufficient on grounds at least analogous to those specified in 1 and 2.

**Q18. Revision under section 115 of the Code of Civil Procedure, 1908.**

**[Dec. 2022 (4 Marks)]**

**Ans.** Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it.

**Section 115 empowers the High Court to satisfy itself on three matters:**

- that the order of the *subordinate court is within its jurisdiction*;
- that the case is one in which the court *ought to exercise jurisdiction*; and
- that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity by committing some error of procedure in the course of the trial which is material in that *it may have affected the ultimate decision*.

The Supreme Court has observed in *Major S. S. Khanna v. F.J. Dhillon, 1964 S.C.*, that the exercise of jurisdiction under section 115, C.P.C., is discretionary and that the court is not bound to interfere merely because the conditions in clauses (a), (b) and (c) of section 115 are satisfied. The fact that another remedy is available to *an aggrieved party by way of any appeal from the ultimate judgment or decree, is one of the relevant considerations for refusing to exercise discretion u/s. 115, C.P.C.*

**Q19. Distinguish between the following: Revision and Appeal.**

**[June 2019 (4 Marks)]**

**Ans. Revision:** Revision is not a continuation of the suit, but is altogether a separate proceeding. Hence a fresh vakalatnama would be necessary to enable the advocate to

file the petition for revision. Section 115 of the Code of Civil Procedure, 1908, empowers a High Court to entertain a revision in any case decided by a subordinate Court in certain circumstances. This jurisdiction is known as revisional jurisdiction of the High Court. Unlike the appeal, revision is not a statutory right. The superior court therefore can decide to examine or not examine a decision made by a lower court. The main primary purpose of a revision is to make sure that justice has been administered properly and also to correct any errors that could have led to improper justice.

**Appeal:** In simpler terms, appeal is the process in which an unsuccessful party in a case decides to take the case to a higher court to seek for reversal of a decision made by a lower court. The party that files an appeal believes that there were errors made either on the laws or facts raised. Although "Appeal" has not been defined in the Code of Civil Procedure, 1908 yet 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". 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. Appeal from original decree is known as first appeal. Second appeal means the *appeal from the decree or judgment from the appellate Court*.

**Q20. You are not happy with the judgment issued by the court. The client has approached the lawyer to file an application for review of the judgment. Draft an application for review of the judgment. [June 2018 (8 Marks)]**

Ans. **APPLICATION FOR REVIEW OF A JUDGMENT**  
(Under Or. 47, r. 1 of C.P. Code)

A.B. ....  
.....Plaintiff.

Versus

1. C.D.

2. E.F. ....  
.....Defendants

The above-named defendants most respectfully sheweth:

- (1) That the plaintiff instituted a suit against the **petitioner-defendants** in this court and obtained a judgment and a decree in his favour on.....
- (2) That **no appeal is allowed** against the said judgment/decree by law. (Or, no appeal has been preferred against the said decree/judgment).
- (3) That the defendants are aggrieved with the said judgment/decree and pray for review of the said judgment/decree on the following, amongst others,

**GROUND S**

- (a) Discovery of new and important matter or evidence.
- (b) Discovery of some mistake or error apparent on the face of the record.
- (c) Any other sufficient reason.

**It is, therefore, prayed that your honour may be pleased to:**

- (i) **Set aside** the judgment;
- (ii) **Re-hear** the suit and pass judgment accordingly.

**Q21. In a pending Suit defendant filed written statement denying Plaintiff's claim for right of recovery of building. In this process he filed list of five witnesses before the Hon'ble Court, three of whom were employees of City Development Authority. Court summoned three defence witnesses out of the list of five witnesses filed by the defendant and closed the evidence stage. Court passed a cryptic and unreasoned order. With a view to cure this defect in trial of the suit and to prevent the miscarriage of justice, defendant decided to file Revision Petition. Draft a suitable Revision Petition taking into account the above facts and assume data, wherever required. [June 2019 (8 Marks)]**

Ans.

**SPECIMEN FORM OF REVISION**

In the High Court of.....  
**Civil Appellate Jurisdiction**  
 Civil Revision No..... of 2024

**IN THE MATTER OF:**

ABC S/o ..... R/o.....  
...Petitioner

**Versus**

XYZ S/o..... R/o .....  
...Respondent

**AND**

**IN THE MATTER OF:**

**CIVIL REVISION AGAINST THE ORDER DATED.....  
 PASSED BY THE LEARNED SUB-JUDGE, 1ST CLASS..... IN  
 THE SUIT ENTITLED ABC -V.- XYZ (CIVIL SUIT NO. .... OF  
 2024)**

May it please the Hon'ble Chief Justice, High Court of..... and his  
 companion Justices.

**The petitioner MOST RESPECTFULLY SHOWETH:**

- A. That the petitioner named above has filed a suit against the respondents for the **recovery of possession of a house** situated in....., fully described in the plaint. The suit is pending in the court of Sub-Judge 1st Class..... and the next date of hearing is.....
- B. That on being summoned the respondent appeared before the court below and filed his written statement wherein he **denied the petitioner's title set up in the suit property.**
- C. That the trial court framed issues on..... and directed the petitioner (plaintiff) to produce evidence, upon which the petitioner promptly furnished to the court below a list of witnesses and also deposited their diet expenses etc., making a request that the witness be summoned by that Court.
- D. That on a previous date of hearing that is....., 2024, **2 witness** of the petitioner had appeared and their statements were recorded. However, the learned Presiding Officer of the court below passed an order that the remaining witnesses be produced by the petitioner-plaintiff on his own without seeking the assistance of the court. This order was passed despite a request by the petitioner that at least those witness named in the list who are State employees should be summoned by the court, as they are required to produce and prove some official records.
- E. That on the next date of hearing the learned trial court by the order impugned in this revision closed the evidence of the petitioner-plaintiff on the ground that the remaining witnesses were not produced by him.
- F. That the impugned order has **caused great prejudice** to the petitioner and if the same is allowed to stand the petitioner's suit is bound to fail.
- G. That the trial court has unjustifiably denied assistance of the court to the petitioner-plaintiff to secure the attendance of his witnesses. **The interests of justice demand that he is provided with all legal assistance in this regard.**

In the facts and circumstances discussed above the **petitioner prays** that this Hon'ble Court be pleased **to quash and set aside the order under revision and direct** the court below to provide assistance of the court for summoning the plaintiff-witnesses.

PETITIONER

Q22. Sharma, a resident of Delhi, filed a revision petition before the Delhi High Court challenging an order passed by the subordinate court in a property dispute case. The order had gone against him, as instead of filing appeal before

appellate court, he sought relief under section 115 of the Civil Procedure Code (CPC).

Sharma has been embroiled in a property dispute for several years. Frustrated by the delays and complexities of the traditional court system, he seeks a more efficient resolution to his case. Upon hearing about the e-Courts Project, Mr. Sharma decides to explore its services. The e-Courts Project was conceptualized on the basis of the “National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary 2005” submitted by e-Committee, Supreme Court of India with a vision to transform the Indian Judiciary by ICT enablement of Courts. The e-Courts Mission Mode Project, is a Pan-India Project, monitored and funded by Department of Justice, Ministry of Law and Justice, Government of India for the District Courts across the country.

Furthermore, Sharma had advanced a sum of Rs. 5 Lakh to Mr. T on 1st November 2023, with an agreed rate of interest @ 12 per cent per annum and repayment within three months. He recovered Rs. 5 Lakh with in time from T but could not recover the agreed interest even after repeated reminders. He wants to file suit against T for recovery of interest.

Based on the facts of the above case study, answer the following questions:

- (a) The e-Courts Project, initiated and based on the National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the judiciary, aims to transform the Indian judiciary through ICT enablement of courts. State the objective of the e-Courts mission project. What services are available to litigants through the e-Courts Project?
  - (b) What are the grounds upon which the High Court can intervene in revision proceedings? Whether it can interfere, if it differs from the conclusions of the subordinate court on questions of fact or law?
  - (c) Sharma approaches you seeking guidance on filing a suit against T. Advise him on the necessary facts to include in the suit for the recovery of interest from T.
- [June 2024 (5 Marks each)]

Ans.

(a) The objective of the e-Courts mission project are:

- To deliver *prompt and citizen-centric services* in adherence to the e-Court Project Litigant’s Charter, ensuring efficiency and timely resolution.
- To *develop, install & implement* decision support systems in courts.

- To **automate the processes** to provide transparency in accessibility of information to its stakeholders.
- To **enhance judicial productivity, both qualitatively & quantitatively**, to make the justice delivery system affordable, accessible, cost effective, predictable, reliable and transparent.

**Services available to litigants through the e-Courts Project**

The website provides the updated data with respect to High Court Complexes'/ District and Taluka Court Complexes' Pending cases, disposed cases and cases listed as on date. The parties can **search the status of the cases, caveats and courts orders online**.

**The services of the Supreme Courts are also available on the website <https://main.sci.gov.in>** **The services inter alia includes:**

- Cause List.
- Latest Updates.
- Latest Judgments.
- Listing notices.
- E-SCR (Supreme Court of India reportable judgments).
- Online Appearances.
- Live Streaming of Cases.
- Physical Hearing (Hybrid Options).

**Ans. (b):**

In revision proceedings under section 115 of the Civil Procedure Code (CPC), the High Court can intervene on specific grounds. The High Court's powers in revision are more limited than in an appeal and are primarily focused on ensuring that there is no miscarriage of justice.

**Here are the grounds upon which the High Court can intervene:**

- (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.

However, **it is crucial to note** that the High Court will not interfere in revision proceedings merely because it differs from the conclusions of the subordinate court on questions of fact or law. The High Court's role in revision is not to re-evaluate

the evidence or re-assess the factual findings of the subordinate court unless these findings are perverse or are ***based on a complete misappreciation of evidence leading to a miscarriage of justice. The High Court's intervention is intended to correct substantial legal errors rather than mere differences in opinion.***

***In Sharma's case***, if the subordinate court's order in the property dispute case has any jurisdictional errors, material irregularities, or results in a failure of justice, the High Court can intervene. However, if Sharma's petition is based solely on a difference of opinion regarding the subordinate court's conclusions on factual or legal questions, ***the High Court is unlikely to interfere.***

**Ans. (c): Where interest is sought in the suit:**

- 📌 Where the plaintiff seeks interest, the plaint shall contain a statement to that effect along with the details set out.
- 📌 Where the plaintiff seeks interest, the plaint shall state whether the plaintiff is seeking interest in relation to a commercial transaction within the meaning of section 34 of the Code of Civil Procedure, 1908 and, furthermore, if the plaintiff is doing so under the terms of a contract or under an Act, in which case the Act is to be specified in the plaint; or on some other basis and shall state the basis of that.
- 📌 ***Pleadings shall also state:***
  - the rate at which interest is claimed;
  - the date from which it is claimed;
  - the date to which it is calculated;
  - the total amount of interest claimed to the date of calculation; and
  - the daily rate at which interest accrues after that date.

By including these facts in his suit, Sharma will provide a clear and comprehensive basis for his claim, facilitating the court's understanding and consideration of his case.

# 10

## CHAPTER

# PLEADINGS

### INTRODUCTION & MEANING

**Q1. Briefly explain the concept of pleadings.**

**[Scoring Question]**

**Ans.**

- Pleading is the *beginning stage of every lawsuit* in which parties formally submit their claims and defences. Hence pleadings are the backbone of litigation. Pleadings are, therefore, the *foundation of any litigation*.
- As per *Rule 1 of Order 6 of the Code of Civil Procedure, 1908*, pleading is defined as *plaint or written statement*.
- The document stating the cause of action and other necessary details and particulars in support of the claim of the plaintiff is called the *"plaint"*.
- The defence statement containing all material facts and other details filed by the defendant is called the *"written statement"*.

**Q2. Explain the following; Objects of Pleadings.**

**[June 2018 (4 Marks)]**

**OR**

**Pleadings is just a written complaint for preventing deviations from the course which litigation must take as held in Ganesh Trading v. Motiram AIR 1970 SC 480.**

**[Dec. 2014 (5 Marks)]**

**Ans.** The main objective behind formulating the rules of pleading is to find out and narrow down the controversy between the parties.

**Main Object of pleadings:**

- To define the *issue of fact and question of law* to be decided between the parties;
- To *give fair notice* of the case which has to be met so that the *opposite party may direct his evidence to the issue disclosed by them*; and
- To provide a *brief summary of the case of each party*, which is readily available for reference and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the questions raised in the action and of the issues decided therein, *so as to prevent future litigation upon matters already adjudicated upon between the litigants*.

**Q3. Discuss in brief about Function of Pleadings. [Scoring Question]**

**Ans.** The *function of a pleading* is not simply for the *benefit of the parties* but also and perhaps primarily for the assistance of the court by defining with *precision for the assistance of the court* the area beyond which without the leave of the court and consequential amendment of the pleadings, *the conflict must not be allowed to extend.*

#### FUNDAMENTAL RULES OF PLEADINGS

**Q4. In a Pleading, there is no scope for Law and evidence as per Order 6 of the Code of Civil Procedure, 1908; Yet, in practice, both are pleaded in higher courts, like High Courts and Tribunals. [June 2015 (4 Marks)]**

**Ans. FUNDAMENTAL RULES OF PLEADINGS [ORDER 6, RULE 2]**

The four fundamental rules of pleadings are:

- i. That a pleading shall contain, *only a statement of facts, and not Law;*
- ii. That a pleading shall contain *all material facts and material facts only.*
- iii. That a pleading shall state *only the facts* on which the party pleading relies and not the evidence by which they are to be proved.
- iv. That a pleading shall state such material facts concisely, but with *precision and certainty.*

**Q5. Material facts vis-à-vis immaterial facts while drafting a plaint. [June 2014 (4 Marks)]**

**Ans. PARTICULAR INSTANCES OF MATERIAL FACTS**

- ***In a suit for damages for injuries sustained in a collision:*** The plaintiff in framing his statement of claim should set out the circumstances of the collision, so far as they are known to him, with clearness and accuracy to enable his adversary to know the case he has to meet, he should also state in particular terms the particular acts of negligence which, according to him, caused the collision.
- ***Where a party claims the benefit of a special rule or custom:*** Then he must allege all facts which bring the case within the ambit of that special rule or custom.
- ***In a money suit:*** It is material to allege part-payment of the loan and also any other fact which gives a new leave of 3 years' time to the loan in order to save the suit from the bar of limitation.
- ***When a plaintiff bases his claim on some document:*** It is material to state the effect of such a document. For example, where the case is based on a sale-deed, it is material to state that a particular person has sold property to him by a sale-deed dated so and so which was duly registered.

**EXAMPLE OF FACTS NOT MATERIAL**

- ***In a suit on a Promissory note:*** It is not material to state that the plaintiff requested the defendant to make the payment and he refused, because no demand is necessary when the promissory note becomes due and it is payable immediately.
- ***In a suit for recovery of money for the goods sold:*** It is not material to state that the goods belonged to the plaintiff or that the goods were sold to the defendant on the belief that he would honestly make the payment.
- ***General Damages not required to be proved:*** In the case of damages general damages are presumed to be the natural or probable consequence of the defendant's act. Such damages need not be proved. But special damages will not be presumed by law to be the consequence of the defendant's act but will depend on the special circumstances of the case. Thus, the proof of special damages is essential to sustain an action. ***For example,*** in a suit for defamation it will have to be mentioned that services of the plaintiff were terminated as a result of a particular article which damaged the professional reputation of the plaintiff so much salary which he might have continued to get but for the publication of the defamatory article.

**Q6. Illustrate the expectations to the general rule of Pleadings that pleading must state material facts only. [June 2021 (5 Marks)]**

**Ans. The following are the exception to the general rule of pleadings that it must state all material facts and material facts only:**

**CONDITIONS PRECEDENT [ORDER 6, RULE 6 OF CPC]**

There is no need for a party to state in his pleading the performance of any condition precedent for its averment shall be implied in his pleading. But if the other party desires to contest the performance or occurrence of such condition he must raise the point specifically and distinctly in his pleading.

**PRESUMPTION OF LAW [ORDER 6, RULE 13 OF CPC]**

**Order 6 Rule 13, C.P.C.** provides that neither party need in any pleading 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. Thus, in a suit on a Promissory Note the Plaintiff need not allege consideration as section 118 of Negotiable Instrument Act, raises a presumption in his favour. It is also not necessary to state that the Defendant executed the bond of his own free will and without any force or fraud BECAUSE the burden of proving any fact invalidating the Bond lies upon the defendant.

### MATTERS OF INDUCEMENT

It is sometimes desirable to commence a plaint with some introductory averments stating:

- Who the parties,
- What business they carry on,
- How they are related or connected, and
- Other surrounding circumstances leading up to the dispute.

Such facts are not essential to the cause of action and therefore not material, **BUT they are allowed because they explain what follows.** They are called '*Matters of Inducement*' and such prefatory statements should be **reduced to a minimum.**

**Q7. Explain the following: Facta Probanda and Facta Probandia.**

**[Dec. 2021 (4 Marks)]**

**Ans.** Material facts are those facts which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Evidence also consists of facts and in order to distinguish between the two kinds of facts, the material facts on which the party pleading relies for his claim or defence are called facta probanda and the facts by means of which they (i.e., material facts) are proved are called facta probantia.

**FACTA PROBANDA:** The facts which are to be proved. These are the facts on which a party relies and are ought to be stated in the pleading.

**FACTA PROBANTIA:** These are the facts which are not to be stated because by their means facta probanda are proved. Thus, these facts are the evidence as to the existence of certain facts on which the party relies for his cause of action or defence as the case may be. Facta probantia are not facts in issue, but they are relevant in that at the trial their proof will establish the existence of facts in issue.

### SUITS FOR TEMPORARY AND PERMANENT INJUNCTIONS

**Q8. Distinguished between the following: Wording in the order of Permanent Injunction and wording in the order of Temporary Injunction.**

**[June 2014 (4 Marks)]**

**Ans.** Preventive Relief is granted at the discretion of the court by injunction, Temporary or Perpetual. The Relief of injunction is an equitable relief and he who seeks equity must do equity. Hence, a party who asks for an injunction must be able to satisfy the court that his dealing of the matter had been fair, honest and free of any fraud or illegality.

Temporary injunctions are regulated by the Provisions under *Order XXXIX* of Code of Civil Procedure, 1908. A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. A suit may be filed for obtaining permanent injunction. However, *temporary injunction can be in the nature of interim relief.*

**Q9. Write notes on the following; Pleint Structure.**

[June 2018/Dec. 2017 (4 Marks)]

Ans.

- **PLAINT:** Particulars to be contained in plaint provided under *order VII, Rule 1*.
- **HEADING AND TITLE:** Name of the Court in which the suit is filed indicated at the top of the first page. Heading of the plaint means the court in which the suit is instituted. Therefore, the name of the court has to come on the top of the plaint (*Order VII, Rule 1(a)*). If a court has various jurisdictions the specific jurisdiction in which the suit is being instituted should be given below the name of the court.
- **BODY OF THE PLAINT:** Then follows the *body of the suit/plaint*. The plaintiff acquaints the *court and defendant with the case*. The statement of facts is divided into paragraphs numbered consecutively. As far as convenient a paragraph should contain only one allegation. *Dates, time and numbers should be expressed in figures as well as in words.*

The Law of Pleading in India has divided the body of the plaint into two parts:

- Substantive portion, and
- Formal portion.

**Q10. Order VII Rule 1 of the Code of Civil Procedure, 1908.**

[Dec. 2022 (4 Marks)]

Ans. **PLAINT:** Particulars to be contained in plaint provided under order VII, Rule 1.

According to this rule the plaint shall contain the following particulars:

- (a) The name of the Court in which the suit is brought;
- (b) The name, description and place of residence of the plaintiff;
- (c) The name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) The facts constituting the cause of action and when it arose;
- (f) The facts showing that the Court has jurisdiction;
- (g) The relief which the plaintiff claims;
- (h) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

- (i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

**Q11. Mr. X is an owner of a Bungalow situated at Jaipur. He has given the said Bungalow on rent to Mr. A at a monthly rent of ₹ 50,000. As per the rent agreement tenant has to pay rent before 10th of every month. Failure to pay rent in time for continuous two months will empower the owner to force the tenant to vacate the Bungalow before the expiry of agreement. Tenant Mr. A is not paying rent for last three months. Notice have been served on the tenant Mr. A to vacate the Bungalow and pay the rent due to him. However, no response in this regard is received by the owner. Now Mr. X, the owner of the Bungalow wants to file the suit for Ejectment and recovery of arrear of rent. Draft appropriate suit to be filed before the Court of Small Causes. Assume other necessary facts, if required. [Dec. 2021 (8 Marks)]**

Ans.

### FORMAT OF PLAINT

Suit for Ejectment and Arrears of Rent

In the Court of Small Cause, .....

Suit No. .... Of .....

(SPACE FOR COURT-FEE STAMP)

AB S/o CD Age..... Resident of

..... Plaintiff

Versus

PQ S/o RS Age..... Resident of

.....Defendant

*Suit for Ejectment, Arrears of Rent and Mesne Profits*

The above-named plaintiff states as follows: -

1. That the plaintiff is the owner of the house No. .... Situated at ..... and bounded as below:-

#### **Boundaries of the Houses**

\* \* \* \* \*

2. That under **verbal agreement** made on **MAY 9, 20XX** the defendant became a **monthly tenant** to the plaintiff in respect to the house described in **paragraph I** above at the rent of Rupees ..... Per month and has been in occupation of the said house as such tenant since the abovementioned date of the agreement.
3. That the defendant has **not paid the rent from JULY 1, 20XX** or any part thereof.
4. That the plaintiff duly **determined the said tenancy** by serving on the defendant, by **registered post on SEPTEMBER 1, 20XX a notice to quit** the said house **within 30 days** of the receipt of the notice and pay the entire arrears of rent from **JULY 1, 20XX**

That the said notice was served upon the defendant on SEPTEMBER 7, 20XX yet the defendant has not vacated the house, nor has he paid the said arrears of rent or any part thereof. Hence the defendant is liable to ejection under relevant **section 20 UP Act, No. XIII of 1971.**

5. That now a **total sum of Rupees .....** is due to the plaintiff as against the defendant, that is **Rupees..... on account of arrears of rent from JULY 1, 20XX to OCTOBER 7, 20XX, and Rupees .....** On account of **damages for use and occupation** from JULY 1, 20XX, TO OCTOBER 7, 20XX, the date of filing the suit.
6. That the **cause of action** for the said arose on **OCTOBER 8, 20XX**, when the period stipulated in the said notice expired.
7. That the defendant resides at ..... **within the jurisdiction of the court.**
8. That the **valuation of the suit for purpose of jurisdiction and payment of court fee is Rupees .....** , has been paid.

**Wherefore the plaintiff claims –**

- (a) That the **decree for Ejection of the defendant from the house** described in paragraph 1 above be passed in favour of the plaintiff.
- (b) That the **decree of Rupees..... on account of arrears of rent from July 1, 20XX to October 7, 20XX** be passed in favour of the plaintiff.
- (c) That a **decree for Rupees .....** **On account of damages for use and occupation at the rate of Rupees..... per month from July 1, 20XX, to October 7, 20XX**, the date of suit, be passed in favour of the plaintiff as against the defendant.
- (d) That a **decree for further damages** for use and occupation at the **aforesaid rate TILL** the Ejection of the defendant be passed in favour of the plaintiff as against the defendant **on payment of additional court fee.**
- (e) That **cost of the suit be allowed to the plaintiff.**

*Place: .....*

*Date: .....*

**AB**  
**Plaintiff**  
**Through**  
**Advocate**

### VERIFICATION

I, AB, above named, plaintiff, **do hereby verify** that the contents of paragraphs ..... and ..... of the above plaint are true **to my personal knowledge** and the contents of the

paragraphs ..... and ....., I believe to be true **on the basis of the legal advice received by me** from counsel and on perusal of records of the case.

Signed and verified this ..... day of. 20....., at .....

AB  
Plaintiff

### WRITTEN STATEMENT

**Q12. Write notes on the following; Written Statement. [June 2013 (4 Marks)]**

Ans.

- Written statement contained in **Order 8, Rule 1 of C.P.C.** Written statement is a **reply to the plaint filed by the plaintiff.**
- It is the pleading of the defendant wherein he specifically **denies or admit** the each and every allegation or Material facts (Facts in issue) given in the plaint.
- **Denial or admission** must be Para wise and clear and also states any new facts or ground which is necessary to defeat the opponent.
- If defendant wants to put his own claim against the plaintiff he can put it by way of set-off and counter-claim under **Order 8, Rule 6 and 6A of C.P.C.**

**Q13. Comment on the following statements; Essentials of a Written statement. [Dec. 2018 (5 Marks)]**

Ans. It is essential for the defendant to file his defence in writing. If the **defendant fails to file written statement**, the court may pronounce judgment against him or may **under Order 8, Rule 10 of Civil Procedure Code**, make such order in relation to the suit as it deems fit. If the defendant has omitted to avail of his right to file a written statement at or before the first hearing, the court can extend the time for filing it, in exercise of its discretion, if the circumstances so warrant. The rule has to be worked in a manner so as to advance justice (**Mehar Chand v. Suraj Bhan, AIR 1971 Punj 435**).

When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the **general rules of pleading laid down in the preceding paras**. A subsequent pleading filed by the plaintiff, either in reply to a defendant's claim of set off, or with leave of the court, in answer to defendant's pleas in defence, is also called a "written statement" (**also called Replication or Rejoinder**). All the rules relating to defendant's written statement apply, **mutatis mutandis to such written statement of the plaintiff also**.

**Q14. Distinguished between the following; Plaint and Written Statement. [June 2019 (4 Marks)]**

Ans. **Plaint:** A plaint is a legal document which contains the written statement of the plaintiff's claim. A plaint is the first step towards the initiation of a suit. In fact, in the

very plaint, the contents of the civil suit are laid out. A plaint is usually divided in parts such as a heading, the cause title, the body, the prayer and signature and verification of the plaintiff. The heading signifies the appropriate jurisdiction of the court while cause title is the name, description and capacity of litigating parties. Plaint should contain name, description and residence of defendant. The entire legal machinery under the Civil Law is set in motion by filing of plaint and hence plaint is the actual starting point of all pleadings in a case.

**Written Statement:** Written statement means a pleading for defense. In other words, a written statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff along with any new facts in his favour or that takes legal objections against the claim of the plaintiff. The defendant is required to file a written statement of his defense at or before the first hearing or such time as may be allowed along with the list of documents relied upon by him. If defendant disputes maintainability of the suit or takes the plea that the transaction is void it must be specifically stated. A general denial of grounds alleged in the plaint is not sufficient and denial has to be specific and must be substantiated with documentary evidence wherever possible. The denial should not be an evasive denial but it must be on point of substance. Every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading shall be deemed to be admitted.

**Q15. QVT Ltd. instituted a suit against KA Furnitures Ltd. for breach of contract for supply of 200 study tables priced at 500 per table, on the following three counts:**

- (a) KA Furnitures Ltd. did not supply full order within the stipulated time of three months from the date of contract.
- (b) The wood used for making the tables was not as per agreed specifications, instead of sheesham wood, neem wood was used.
- (c) Legs of 50 tables were found bent and weak.

All this occasioned a heavy loss of ₹ 25,000, which was claimed with interest @ 10% per annum and costs in the suit against defendants. The defendant, KA Furnitures Ltd., refuted the claim made in the plaint by stating in written statement that “the defendant generally denies the allegations made by plaintiff as got up and unsustainable”.

**Explain with reasons whether this defense would sustain in courts.**

[Dec. 2016 (8 Marks)]

**Ans.**

- It is necessary that one has to deny the averment of the plaint/petition which are incorrect or false. In case any averment contained in any paragraph of the plaint is

not denied specifically, it is then presumed to have been admitted by the other party. (*Order 8, Rule 5 of Code of Civil Procedure*).

- It must be borne in mind that the denial has to be specific and not evasive or general. (*Order 8, Rules 3 & 4 of CPC*). This has been reiterated in *Dalvir Singh Dhillowal v. Kanwaljit Singh 2002 (1) Civil LJ 245 (P&H)*; *Badat & Co. v. East India Trading Co. AIR 1964 SC 538*. However, general allegation in the plaint cannot be said to be admitted because of general denial in written statement. [*Union v. A. Pandurang, AIR 1962 SC 630.*]
- It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.
- Thus, where a defendant denies an allegation of fact in the plaint, **he must not do so evasively, but answer the point of substance.**
- In the light of the above, the general refutation and denial made by KA Furniture Ltd. against the specific averments of *VT Ltd. are not valid.*

**Q16. Draft a specimen Written Statement of a suit for ejectment and arrears of rent. Assume facts, as required. [June 2022 (6 Marks)]**

Ans.

**FORMAT OF WRITTEN STATEMENT**

**Suit for Ejectment and Arrears of Rent**

**In the Court of Small Cause, .....**

**Suit No. .... of .....**

**(SPACE FOR COURT FEE STAMP)**

**AB S/o CD Age..... Resident of**

**..... Plaintiff**

**Versus**

**PQ S/o RS Age..... Resident of**

**..... Defendant**

**“Written Statement for Ejectment, Arrears of Rent and Mesne Profits”**

**The above-named defendant states as follows: -**

- (1) That the defendant admits the facts stated in paragraph 1 of the plaint.**
- (2) That the defendant admits the agreement mentioned in paragraph 2 of the plaint and his occupation of the said house as alleged therein.**
- (3) That the defendant denies that he has not paid the rent from July 1, 20XX, as stated in paragraph 3 of the plaint.**
- (4) That the defendant admits service of the notice alleged in paragraph 4 of the plaint, but does not admit that the plaintiff duly determined the defendant’s tenancy thereby. That the defendant admits that he continues to be in occupation of the said house but denies that he has not paid any part of the said arrears of rent or that he is liable to ejectment under the provisions of law alleged in paragraph 4 of the plaint.**

- (5) That the defendant **does not admit anyone of the several allegations made in paragraph 5 of the plaint.**
- (6) That **no cause of action** even occurred to the plaintiff alleged in **paragraph 6** of the plaint.
- (7) That the defendant **admits the jurisdiction of the court as alleged in paragraph 7** of the plaint.
- (8) That **paragraph 8** of the plaint **relates to valuation of the suit and payment of court fee.**

#### ADDITIONAL PLEAS

- (9) That the defendant has paid the rent for the months May, June, July and August, 20XX, **to Sri EF, the plaintiff's authorized agent** who has been collecting the rent of the said house on behalf of the plaintiff **but no rent receipts in respect of the aforesaid months have been issued** to the defendant even after repeated demands by the defendant.
- (10) That the rent for the **September, 20XX, and that for the subsequent months was tendered** to the said agent of the plaintiff and to the plaintiff himself but both have **refused to accept it.**
- (11) That in fact only Rupees ..... , **are due** from the defendant to the plaintiff as arrears of the rent, being the rent for the months mentioned in **paragraph 10** above and that the defendant is ready and willing to pay the said amount to the plaintiff.
- (12) That the **notice mentioned in paragraph 4 of the plaint is invalid** in that it did not purport to give sufficient period of time of the defendant as stipulated in **section 30 of the U.P. Act No. XIII of 1972.**
- (13) That there are **absolutely no grounds for granting the relief prayed for by the plaintiff and the suit is liable to be dismissed with costs.**

*Place: .....*

*Date: .....*

*Defendant  
Through  
Advocate*

#### VERIFICATION

I, PQ, above-named, defendant, do hereby verify that the contents of paragraphs ..... and ..... of the above Written Statement are true to my personal knowledge and the contents of the paragraphs ..... and ....., I believe to be true on the basis of the legal advice received by me from counsel and on perusal of records of the case.

**Signed and verified this ..... day of..... 20....., at .....**

*AB  
Defendant*

**Q17. Distinguished between the following: 'Set-off' and 'Counter-claim' in the light of case law on Counter-claim. [Dec. 2014 (4 Marks)]**

**Ans. Set-off [Order 8, Rule 6]**

*According to Black's Law Dictionary* set-off is the defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim.

**Order 8, Rule 6** deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant. **Set-off may be of two kinds:** (a) Legal set-off and (b) Equitable set-off.

**Counter-claim [Order 8, Rule 6A]**

- A counter-claim is any right or claim which the *defendant may be set-up against the plaintiff*, IN ADDITION to the right of legal set-off.
- This right or claim of the defendant may be in respect of a cause of action accruing to him against the plaintiff either *before or after the filing of the suit*.
- But the defendant must set-up the claim before he has delivered his defence or before *the time limited for delivering his defence has expired*.
- The counter-claim may be in the nature of a claim for *damages or not*.

**Q18. "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. [June 2010 (6 Marks)]**

**OR**

**While drafting written statements, certain important consideration must be borne in mind. Identify at least 10 requirements with reference to law on the subject. [Scoring Question]**

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

- One has to deny the averment (allegation) 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 (ambiguous) (Order 8, Rules 3 & 4 CPC). However, general allegation in the plaint

cannot be said to be admitted because of general denial in written statement.

**[Union v. A. Pandurang]**

- 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. **[Vinod Kumar v. Surjit Kumar]**
- After reply, the same is to be signed by the constituted attorney of the opposite party. It may be noted that if the plaint or reply is not filed by a duly authorised person, the petition would be liable to be dismissed. **[Nibro Ltd. v. National Insurance Co. Ltd.]**
- “General rule is that no pleadings, no evidence” 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. **[Mrs. Om Prabha Jain v. Abnash Chand Jain]**
- 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. **[R Tiwary v. B Prasad]**

**Q19. What are the different forms of defence that may be adopted by a defendant while replying to opponent's pleadings? [June 2012 (8 Marks)]**

Ans.

- **Traverse or Denials:** A defendant is said to take the defence of denial when he totally and categorically, denies the allegations contained in the plaint. It is also called ‘traverse’. Admissions and denials of the material facts alleged in the plaint should be given in the opening paragraphs of the body of the written statement.
- **Dilatory pleas:** Another plea may sometimes be taken which **MERELY DELAYS THE TRIAL OF A SUIT ON MERITS**. e.g.: a plea that the hearing should be stayed under section 10 of CPC (res sub-judice) or that the suit is not properly framed or the plea that the court fee paid by the plaintiff is not sufficient. These pleas are called as “dilatory pleas” Such pleas should be raised at the earliest opportunity.
- **An objection in point of law:** The **defendant MAY ADMIT** the facts stated by the plaintiff and may at the same time raise an objection in point of law. (Which was formerly called in England “a demurrer”), e.g., that the plaint allegations do not disclose a cause of action, or that the special damages claimed are too remote.

- **Special Defense:** A “*confession and avoidance*” or “*special defense*”, where he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, such as where he admits the bond in suit but pleads that it has been paid-up, or that the *claim is barred by limitation*.

**Q20. Where the defendant pleads set-off, he will be in the position of plaintiff. [June 2011 (4 Marks)]**

**Ans.** 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 v. Sreerajah Vellanki Srinivasa]

**Q21. Denial and Dilatory Pleas in Written Statement. [Dec. 2022 (4 Marks)]**

**Ans.**

**Denials:** A defendant is said to take the defence of denial when he totally and categorically, denies the allegations contained in the plaint. It is also called ‘*traverse*’. Admissions and denials of the material facts alleged in the plaint should be given in the opening paragraphs of the body of the written statement. It may be emphasized that bare denials are in themselves valid defences to the claim made in the plaint. **Rules as to denials:**

- Denials must be specific,
- Denials must not be evasive.

**Dilatory pleas:** Pleas which merely delay the trial of a suit on merits have been characterized as ‘*dilatory pleas*’. They simply raise formal objections to the proceedings and do not give any substantial reply to the merits of the case, e.g., the plea that the court-fee paid by the plaintiff is not sufficient. Such pleas should be raised at the earliest opportunity.

**Q22. What is the significance of notices in legal proceedings, especially concerning appeals, revisions, and transfers of property? Discuss the dual categorization of notices, emphasizing the requirements for giving notice before taking actions affecting individuals and the instances where notices act as essential prerequisites, such as under section 106 of the Transfer of Property Act, 1882 and section 80 of the CPC. [Scoring Question]**

**Ans.** There is no self-contained general law relating to notices laying down therein what exactly *constitutes a notice*.

Notice is a subject of *considerable importance and indeed its scope has become is becoming wider and wider* for the simple reason that many cases are fought in court on this solitary issue that there was *no notice or the notice given to the affected party was inadequate*.

**For example:**

- The purpose of the **notice under section 80 of the CPC** is to afford the government or relevant public officer an opportunity to reassess the legal position, potentially make amends, or settle claims outside of court. This legislative provision aims to prevent unnecessary litigation, ensuring that public resources, time, and money are not wasted. The underlying intention is to promote the advancement of justice by allowing authorities a chance to address claims before resorting to litigation.
- **Section 106 of the Transfer of Property Act** dictates the **period and manner of giving notice** for the termination of a lease, applicable to agricultural, manufacturing, or residential purposes. However, this section applies only in the absence of a conflicting contract, local law, or usage. The essential requirements for a valid notice include it **being in writing, signed by the notice giver or an authorized agent**. A mere typewritten name is insufficient. The notice must be explicit, clearly stating the termination of tenancy within the specified timeframe.

## PETITIONS

**Q23. Decree has been awarded by the court. Advice on information required for making written application for execution of Decree. [June 2017 (5 Marks)]**

**Ans.** Every application for the execution of a decree shall be in writing save as otherwise provided sub-rule (1) (above) signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:

- (1) The No. of the suit;
- (2) The name of the parties;
- (3) The date of the decree;
- (4) Whether any appeal has been preferred from the decree;
- (5) The amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed;
- (6) The amount of costs (if any) awarded;
- (7) The name of the person against whom execution of the decree sought;
- (8) The mode in which the assistance of the court is required, whether—
  - i. By the delivery of any property specifically decreed;
  - ii. By the attachment or by the attachment and sale, or by the sale without attachment, of any property;

- iii. By the arrest and detention in prison of any person;
- iv. By the appointment of a receiver;
- v. Otherwise, as the nature of the relief granted may require.

The court to which an application is made under *sub-rule (2)* may require the applicant to produce a certified copy of the decree.

**Q24. Explain the power to grant Special Leave (SL) under Article 136 of the Constitution of India. Who can exercise this power? Are the provisions of this Article applicable on Defence Personnel? [Dec. 2019 (4 Marks)]**

OR

**Write a note on the following: Special Leave Petition (SLP).**

[Dec. 2018 (4 Marks)]

OR

**What are the provisions in the constitution regarding filing of SLP?**

[June 2017 (8 Marks)]

**Ans.** In suitable cases, where some arguable questions, mostly on legal points are involved, the Constitution confers under *Article 136* wide discretionary powers on the Supreme Court to entertain appeals even in cases *where an appeal is not otherwise provided for*. But so far as questions of fact, as distinct from questions of law, is concerned, it is only in rare or exceptional cases that the Supreme Court interferes and that too when finding of the High Court or the lower Court is such that it shocks the conscience of the court.

**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 judgment, 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 judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any *law relating to the Armed Forces*".

**Q25. Draft a Special Leave Petition (SLP) before Supreme Court of India with assumed data. [Dec. 2017 (12 Marks)]**

OR

**Draft a Special Leave Petitions to the Supreme Court of India against NCLT decision of liquidation of your company. If required assume other facts.**

[June 2021 (4 Marks)]

OR

A specimen of affidavit in support of Special Leave Petition filed before the Hon'ble Supreme Court of India. Assume: facts, if required.

[Scoring Question]

Ans.

**Specimen Form of a Petition for Special Leave in the Supreme Court of India**

IN THE HON'BLE SUPREME COURT OF INDIA  
[CIVIL APPELLATE JURISDICTION]

SLP (Civil) No..... of .....

**SPECIAL LEAVE PETITION**

[Under Article 136 of the Constitution of India]

**IN THE MATTER OF:**

ABC Company Ltd., a company registered under the Companies Act, 1956 through.....  
Chairman/Managing Director, the company having its registered office at.....

...Petitioner

*Versus*

- (1) ..... S/o..... R/o.....  
(2) Union of India through the Secretary, Ministry of Corporate Affairs, New Delhi.  
(3) The Registrar of Companies.....

...Respondent

May it please the Hon'ble Chief Justice of India and His Lordship's Companion  
Judges of the Supreme Court.

**The petitioner-appellant-(company) MOST RESPECTFULLY SHOWETH:**

- (1) That the petitioner is a company duly incorporated under the provisions of the Companies Act, having its registered office at..... and is **challenging by way of this Special Leave petition** the judgment and order of the High Court of..... dated ..... in proceeding under Section..... of the Companies Act, 2013.
- (2) **That the questions of law involved in this matter are as follows:**
- (a) Whether the High Court has fallen into error in taking the view that.....  
.....?
- (b) Whether it would be a good ground for winding-up of the petitioner-company that two of its directors are not on speaking terms and there is, thus, a deadlock in the administration of the affairs of the company.

OR

[Here state any other ground that has been taken by the respondents or any of the respondents seeking the relief of winding-up of the company from the High Court or any other relief .....].

- (c) Whether.....
- (3) That respondent No. 1 herein had filed a petition before the Hon'ble High Court of..... seeking the relief..... which petition was contested by the petitioner-company *inter alia* on the grounds that.....
- (4) That the High Court after hearing the parties through their respective counsel allowed the said petition, holding that sufficient grounds had been made out for winding-up of the petitioner-company (or any other relief claimed in the petition before the HC).
- (5) That the aforesaid findings and the final judgment/order of the High Court are **assailed** on the following, amongst, other.

**GROUND**

- 5.1 That.....
- 5.2 That.....
- 5.3 That.....
- (6) That the petitioner **has not filed** any appeal or other proceeding relating to this matter in this Hon'ble Court or any other Court.

**RELIEF**

The petitioner-company accordingly prays that this Hon'ble Court be pleased to grant Special Leave to Appeal in the matter and to allow the appeal, set aside the impugned judgment/order passed by the High Court and dismiss the petition filed by the respondent (No. ....) in the High Court.

**PETITIONER**

**AFFIDAVIT**

**IN THE HON'BLE SUPREME COURT OF INDIA**

**IN THE MATTER OF:**

.....

**...Petitioner**

*Versus*

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

**...Respondent**

I, .....company through the petitioner in the Special Leave Petition titled as above do hereby solemnly affirm and state as under:

- (1) That I am the Chairman/Managing Director etc. of the petitioner-company and am fully aware of and conversant with the relevant facts concerning the matter in issue in this petition.

(2) That the contents of the accompanying Special Leave Petition are true and correct to the best of my knowledge and belief.

(3) That no relevant fact has been concealed or kept back in the SLP.

I, further solemnly affirm at..... (Place) this the..... day of..... that the above averments are true and correct. Nothing has been kept back or concealed.

DEPONENT

### MEMORANDUM OF APPEAL

**Q26. Examine the following statements: The right of appeal is not a natural or inherent right. [Dec. 2015 (4 Marks)]**

Ans.

- 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.
- In Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors., the apex Court held that the right of appeal though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorizes filing of an appeal, it can impose conditions as well.
- Thus, it is evident from the above that **the right to appeal is a creation of Statute and it cannot be created by acquiescence** of the parties or by the order of the Court.

**Q27. Discuss in brief about Memorandum of Appeal. [Scoring Question]**

Ans. Memorandum of appeal contains the **grounds on which the judicial examination is invited.** A memorandum of appeal is meant to be a succinct statement of the grounds upon which the appellant proposes to support the appeal. It is a notice to the Court that such specific grounds are proposed to be urged on behalf of the appellant, as also a notice to the respondent that he should be ready to meet those specific grounds. The theory of an appeal is that the suit is continued in the Court of appeal and reheard there. An appeal is essentially a continuation of the original proceedings.

**Q28. 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.**

**[June 2015 (8 Marks)/June 2011 (6 Marks)]**

**OR**

**Define 'appeal'. Discuss various kinds of appeal provided under the Code of Civil Procedure, 1908.**

**[Dec. 2013 (8 Marks)]**

**OR**

**State the provisions relating to appeals under the Code of Civil Procedure, 1908.**

**[June 2013 (8 Marks)]**

**Ans. 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, Order XLII);
  - (3) Appeals from Orders (Sections 104 to 106, Order XLIII, Rules 1 and 2); and
  - (4) Appeals to the Supreme Court (Sections 109 & 112, Order XLV).
- **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.
  - **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.
  - **Appeals from, Orders under sections 104 to 106** would lie only from the following Orders on grounds of defect or irregularity of law:
    - An Order under **section 35A** of the Code allowing special costs;
    - An Order under **section 91 or section 92** refusing leave to institute a suit;
    - An Order under **section 95** for compensation for obtaining arrest, attachment or injunction on insufficient ground;
    - An Order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree; and
    - Appealable Orders as set out under **Order XLIII, Rule 1.**
  - **Appeals to the Supreme Court**

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

**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 judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other

proceeding, if the High Court certifies under **Article 134A that the case involves a substantial question of law as to interpretation of the Constitution.**

**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.

**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.

**Q29. Explain the provisions of Appeal under Civil Procedure Code, 1908. What points are to be considered while drafting an appeal? [June 2018 (8 Marks)]**

**Ans. An appeal may be divided into three parts:**

- formal part, known as the memorandum of appeal,
- material part, grounds of appeal, and
- relief sought for.

**As a general rule, in the grounds of appeal, the following points may be raised:**

- any mistake committed by the lower Court in weighing the evidence;
- any mistake in the view of law entertained by the lower Court;
- any misapplication of law to the facts of the case;
- any material irregularity committed in the trial of the case;
- any substantial error or defect of procedure;
- and the defect, error or irregularity of any interlocutory order passed in the case, whether the same was appealable or not.

**Drafting Grounds of Appeals:**

- Grounds of objection should be written distinctly and specifically;
- They should be written concisely;
- They must not be framed in a narrative or argumentative form; and
- Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.

## WRIT PETITION

**Q30. Name and explain various types of Writs allowed by Constitution of India.**

**[June 2017 (4 Marks)/Dec. 2015 (8 Marks)]**

**OR**

**Explain the following: Writ of Mandamus.**

**[June 2019 (4 Marks)]**

**OR**

Explain the following: Writ of Habeas Corpus.	[June 2010 (3 Marks)]
OR	
Write notes on the following: Prohibition and Certiorari.	[Dec. 2018 (4 Marks)]
OR	
Briefly explain four types of Writs.	[Dec. 2020 (8 Marks)]
OR	
Distinguish between the following Article 32 and Article 226 of the Constitution of India.	[Dec. 2022 (4 Marks)]
OR	
Distinguished between: Writ of Habeas Corpus and Quo Warranto.	[June 2018 (4 Marks)]
OR	
Distinguished between: Writ of Certiorari and Writ of Prohibition.	[June 2015 (8 Marks)]

**Ans.** The concept of writ is originated from the maxim "*Ubi jus ibi remedium*" means where there is a right there is a remedy. A right without a remedy is useless.

**Article 32** provides that the Supreme Court shall have power to issue directions or order or writs for the enforcements of any of the rights conferred by Part III of the constitution.

**Article 226** empowers every High Court also, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority within those territories, directions, orders for any right, or writs for the enforcement of Fundamental Rights.

### (1) WRIT OF HABEAS CORPUS

<b>Meaning</b>	The words 'Habeas Corpus' literally mean "to have the body".
<b>Issued by</b>	High Court or Supreme Court.
<b>Issued when</b>	When a person is deprived of personal liberty or detained wrongfully. The applicant may be the <b>prisoner or any person acting on his behalf.</b>
<b>Who can apply</b>	Every application for a writ of 'habeas Corpus' has to be accompanied by an affidavit stating the nature and instances of the restraint, <i>i.e.</i> , with the day and cause of his caution, and detention
<b>Rule</b>	No person can be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner. The writ of habeas Corpus is in the nature of an order calling upon the person who has detained another, to produce the latter before the court in order to let the court know the ground of his detention and to set him free if there is no legal justifications. The writ of Habeas corpus is a
<b>Reasons</b>	

<b>Objective</b>	remedy available to a person who is confined without legal justification. If the writ is issued, the detaining authority has to produce person before the court. This is in order to let the court know on what ground he has been confined and to set him free if there is no justification for his detention.
<b>Disobedience to this writ</b>	The disobedience to this writ is met with by punishment for contempt of Court under the Contempt of Courts Act. This is a powerful safe guard to protect a person from arbitrary act of executives and powerful individuals.

## (2) WRIT OF MANDAMUS

<b>Meaning</b>	<b>The word 'Mandamus' literally means- command.</b>
<b>Issued by</b>	Supreme Court and the High Court in each State.
<b>Issued to</b>	Any government, Court, Corporation or Public authority to do or <b>forbear</b> from doing some specific act which that body is obliged under law and not against discretionary duties.
<b>Reasons</b>	To do or refrain from doing, as the case may be, and which is in the nature of public Duty and certain cases a statutory duty.
<b>Objectives</b>	The purpose of the writ is to remedy defects of justice. The Writ of Mandamus is, as a general rule, a matter for the discretion of the court.
<b>Features</b>	<ul style="list-style-type: none"> <li>✓ The person filing the application for Writ of Mandamus must have a legal right.</li> <li>✓ Mandamus does not lie against the President or the Governor of a State for the exercise of their duties and powers. <b>(A- 361)</b></li> <li>✓ It does not lie also against a private Individual or body or private party.</li> <li>✓ A writ of mandamus cannot be issued to a private Individual.</li> <li>✓ The writ of mandamus may be refused by the Court if an alternative remedy exists except in case of infringement of fundamental rights.</li> </ul>

## (3) WRIT OF PROHIBITION

<b>Meaning</b>	<b>Prohibition</b> commands inactivity. The writ of prohibition, as its very name suggest, issued by a superior court, directing an inferior court, forbidding it to continue proceeding:
<b>Features</b>	<ul style="list-style-type: none"> <li>→ With jurisdiction in excess of its jurisdiction; or</li> <li>→ With exercise of jurisdiction when it does not have one; or</li> <li>→ With contravention of law.</li> </ul>

<b>Issued against</b>	<ul style="list-style-type: none"> <li>→ It is a judicial writ but it can be issued to non-judicial public bodies in cases where such bodies take quasi-judicial decisions.</li> <li>→ The writ of prohibition also lies against a Judge of an inferior court where he is interested in the suit or is otherwise biased; or he alters or rescinds his judgment.</li> <li>→ Not available against a public officer who is not vested with judicial functions.</li> <li>→ The writ of prohibition is based upon the principle, "<b>Prevention is better than cure</b>"</li> </ul>
<b>Reasons</b>	<ul style="list-style-type: none"> <li>→ A writ of prohibition orders the immediate stoppage of trial of the case in the lower court. If any judge or any party proceeds with the case in spite of the writ, contempt of court proceedings can be started against the person concerned.</li> </ul>

#### (4) WRIT OF CERTIORARI

<b>Meaning</b>	<b>'To be more fully informed of'</b>
<b>Issued by</b>	This writ can be issued by a superior court.
<b>Issued to</b>	To direct the judge of an inferior court or to the officer of an inferior body exercising quasi-judicial acts.
<b>Reasons</b>	If the inferior court or inferior body is acting in excess or want of jurisdiction, and is exercising judicial or quasi-judicial functions, the aggrieved party may pray for certiorari. It requires that the record of the proceeding in some cause or matter pending before such inferior court or body be transmitted to the superior court. It is available to any person, wherever anybody of persons having legal authority to determine questions affecting the rights of subjects.
<b>Explanation</b>	The writ removes the proceeding from such body to the High Court, to <b>quash</b> (Reverse) a decision that goes beyond its jurisdiction. Under the Constitution of India, all High Courts can issue the writ of certiorari throughout their territorial jurisdiction when the subordinate judicial authority acts. <ul style="list-style-type: none"> <li>(i) Without or in excess of jurisdiction or in</li> <li>(ii) Contravention of the rules of natural justice or</li> <li>(iii) Commits an error apparent on the face of the record.</li> </ul> However, it is the direction of the court to issue the writ.

#### (5) WRIT OF QUO WARRANTO

<b>Meaning</b>	<b>Literal meaning of Quo warranto is What is your authority? It is an order in the nature of an injunction restraining a person from acting in public office to which he is not entitled.</b>
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<b>Issued when</b>	The holder of the office has to show to the court under what authority he holds the office. (i) The office is of public and of a substantive nature, or is (ii) Created by statute or by the Constitution itself, and (iii) The respondent has asserted his claim to the office. It can be issued even though he has not assumed the charge of the office.
<b>Objective</b>	To prevent the illegal assumption of any public office or usurpation of any public office by anybody.
<b>Issued against</b>	Against that person only who is occupying a public office or at least if the duties attached to the office are of a public nature.
<b>Example</b>	Chief Minister, Advocate General, Chairman of a Municipality and a Member of a University.
<b>Who can apply</b>	Any private person can apply to the court for the writ, even if he has no personal interest in the matter.

## AFFIDAVIT

**Q31. In the light of the Judicial pronouncements, discuss the following: It is well settled that evidence should be tailored strictly according to pleadings. [Dec. 2014 (4 Marks)]**

OR

**Write a note on the Affidavit in evidence. [Dec. 2016 (4 Marks)]**

**Ans.** Evidence, as defined in section 3 of the Evidence Act, 1872 means and includes:

- all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statements are called oral evidence;
- all documents including electronic records produced for the inspection of the Court; such documents are called documentary 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:**

- (1) 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.
- (2) In case, the petitioner himself was involved in the execution of a contract, he should file affidavit-in evidence.

- (3) The allegations or charges or grounds relating to facts should be reproduced 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 evidence. [Section 5, Indian Evidence Act.]
- (4) 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.
- (5) 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.
- (6) 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.
- (7) At the time of tendering affidavit-in-evidence, the party must bring along with it either the original of papers, documents, books, registers relied upon by it or bring with it the carbon copy of the same.

**Q32. What is an affidavit? What are the rules that should be remembered while drafting an affidavit? [June 2019 /Dec. 2017/Dec. 2012 (4 Marks)]**

**OR**

**State the ten essential ingredients of an affidavit conforming to the provisions of Order XIX, Rule 1 of the Code of Civil Procedure,**

**[June 2012 (10 Marks)]**

**Ans.** An affidavit is a sworn statement in writing made especially under oath before an authorized officer. Therefore, great care is required in drafting it. A Court may, at any time, for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any particular witness may be read at the hearing, provided that the Court may order the deponent to appear in person in Court for cross-examination [Order XIX Rule 2(1)].

**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 (Order XIX Rule 5);
- (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 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" or "I make oath and say" (Order XIX Rule 8).
- (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 following oath or affirmation written out at the end: "I swear that this my declaration is true, that it conceals nothing, and that no part of it is false". Or "I solemnly affirm that this my declaration is true, that it conceals nothing and that no part of it is false". Any alterations in the affidavit must be authenticated by the officer before whom it is sworn. 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.

**Q33. Draft an Affidavit of a creditor in proof of his debt in proceeding for the Liquidation of Company. Assume data.**

**[Dec. 2018 (8 Marks); Dec. 2015 (5 Marks)]**

**OR**

**Define Affidavit. Draft a specimen affidavit of creditor in proof of the debt in proceeding for liquidation of a company. Assume facts.**

**[Dec. 2020 (6 Marks)]**

Ans.

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

IN THE (HIGH) COURT OF .....  
In the matter of the Indian Companies Act, 2013  
and

The matter of liquidation of .....company limited.

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

- (1) That the above named company was on the .....day of .....  
..... 2024. The date of order for winding-up the same and still is justly and  
truly indebted to me in the sum of Rupees ..... only in account of  
.....
- (2) That in proof of the aforesaid debt. I attach here to the documents mark 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..... 2024

Deponent

**VERIFICATION**

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

Sd/-  
AB

Dated.....2024

I.....S/o.....R/o.....Declare, from a  
perusal the papers produced by the deponent before me that I am satisfied that he is Shri  
AB

Solemnly affirmed before me on this .....day of ..... 2024  
of..... (time) by the deponent.

Sd/-  
.....  
(Oath Commissioner)

**INDEMNITY BONDS & UNDERTAKINGS**

**Q34. What is an Indemnity bond according to section 124 of the Indian Contract Act of 1872? Explain the nature of an Indemnity bond, its purpose, and the parties involved in this financial agreement. Additionally, differentiate between an Indemnity bond and an undertaking, highlighting the characteristics and contexts in which they are commonly used.**

**[Scoring Question]**

**Ans.** As per section 124 of the Indian Contract Act of 1872, an Indemnity bond refers to an agreement between two persons or parties, where one person promises to make payment for the losses and damages of another person caused by his/her conduct or by another party. In other words, it is a financial contract drawn between two parties that promise financial security to a person as the aggrieved party can claim monetary compensation if the contract is breached. The Indemnity bond is primarily used in the mortgage, accounting, law, IT, and insurance industries. Undertaking is a promise to do something on happening or non-happening of certain event as may be undertaken by person promising therein. Undertaking can be said to be a formal promise or pledge entered into by a person and if it was given to the court then additionally it was a promise to act in a particular manner.

**ARGUMENTS ON PRELIMINARY SUBMISSIONS**

**Q35. Explain the Preliminary Submission or Objection in legal Pleadings.**

**[June 2012 (4 Marks)]**

**Ans.**

- Preliminary submissions should *primarily confine to the true and correct facts* regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings.
- Additionally, the provisions of law or legal objections relevant and applicable to the issues involved in the matter should also be mentioned so as to demonstrate that the relief being claimed by the opponent is not eligible to be granted and/or that the relief being claimed by the party being represented by a lawyer/authorized representative should ordinarily be allowed as per those provisions of law.
- Before incorporating such facts and/or provisions of law in the write-up, a lawyer/authorized representative should be thorough with the provisions of law and interpretation, thereof, based upon relevant judgments so as to ensure that the submissions being made on behalf of the client are accepted and upheld by the Presiding Officer/Court/Tribunal as the case may be.
- Thus, for example, if a claim being opposed by a lawyer/authorized representative is evidently barred by limitation, such an objection should be taken in the

preliminary submissions/objections. Such type of submissions/objections should be duly supported by law on the point or by relevant case law/judgments.

### ARGUMENTS ON MERITS

**Q36. Examine and discuss the following: Arguments on merits.**

**[Dec. 2016/June 2014 (4 Marks)]**

**Ans.** Such arguments as relate to the facts pleaded by the parties are termed as arguments on merits. While addressing arguments on merits, a lawyer/authorized representative should carefully point out the pleadings of the parties and the relevant evidence in support thereof, led by the parties, both oral as well as documentary.

A lawyer/authorized representative should ensure that all or any contradiction in the pleadings of the opponent and the evidence in support of such pleadings are duly pointed out while submitting his/her arguments. Thus, where an agreement/contract of service is pleaded and there is no evidence either oral or documentary on record in support of such an agreement/contract, it should be specifically pointed out that the opponent has failed to prove/establish that such an agreement/contract actually exists or that the same had actually been executed at all.

### LEGAL PLEADINGS/WRITTEN SUBMISSIONS

**Q37. Define and provide examples of “special defences” in the context of a suit based on a contract. How might a defendant admit making a contract while still avoiding the potential consequences of such an admission?**

**[Scoring Question]**

**Ans.** As already pointed out above, legal pleadings/submissions should be taken under the heading “preliminary submissions/objections”. While taking such plea one should ensure that the legal provisions and/or interpretation, thereof, is very clear and directly applicable to the issues involved in the matter. Thus, where an unregistered agreement/contract forms the basis of a claim set up by a party and such an agreement/contract compulsorily **requires registration under section 17 of the Registration Act**, a legal plea should be taken that since the agreement/contract is not a registered document, the same could not be looked into or relied upon by the Court for the reasons that the same cannot be read in evidence. Similarly, all other legal submissions which go to the root of the controversy and which are sufficient as well as material for adjudication of the issues involved, should be taken in opposition to the claims put forth by the opponent.

**Some illustrations are as under:**

- Suit is not maintainable for want of statutory notice etc.
- Plaintiff does not disclose cause of action.

- Plaintiff has no right to sue.
- Suit barred by principles of res judicata.
- Suit barred by principles of waiver, estoppel, acquiescence.
- Suit is barred by special enactment.
- Court has no jurisdiction.
- Suit is barred by limitation.
- Suit is premature, and so on.

### WITNESSES IN PLEADINGS

**Q38. What is the significance of witnesses in pleadings, especially considering that the Code of Civil Procedure, 1908 does not explicitly define the term “witnesses in pleadings”?** [Scoring Question]

**Ans.** Witnesses in legal pleadings, though not defined in the Code of Civil Procedure, 1908, can be represented through affidavits and notarized documents. An affidavit, a sworn written statement made under oath before an authorized officer or Magistrate, is regulated by Order 19 of the Code. It is a declaration of facts signed by the deponent, the person making it, affirming the accuracy of the contents to their knowledge. Affidavits must solely contain facts, be paragraphed, and numbered as per the Code. They should be attested by a Notary or Oath Commissioner to prevent forgery, as specified in the Code. Notarization, done by a government-appointed notary public, certifies the document’s genuineness and proper execution, aiming to prevent fraud. A notarized document is considered complete once the notary signs, stamps it with a notary seal and registration details, and records the act in a register. The notary serves as an impartial witness, verifying that parties have knowingly and willingly entered into the agreement.

### REJECTIONS IN PLEADINGS - ORDER 7, RULE 11

**Q39. Mention the cases where plaint will be rejected.** [Scoring Question]

**Ans.** Order 7 Rule 11 of CPC mentions the provisions, where the plaint should be rejected.

***The plaint will be rejected in the following cases: -***

- (a) Where plaint does not disclose the cause of action,
- (b) Where relief claimed is undervalued,
- (c) Where plaint is insufficiently stamped,
- (d) Where suit is barred by law,
- (e) Where plaint is not in duplicate, and
- (f) Where there is non-compliance with statutory provisions.

Under Order 7 Rule 11 the grounds for rejection are not exhaustive.

**LEGAL NOTICE AND ITS REPLIES**

**Q40. Discuss in brief about Legal Notice and mention the points in legal notice. [Scoring Question]**

**Ans.** A legal notice is basically a legal intimation that is sent to the opponent, it indicates that the aggrieved is preparing a lawsuit to be filed against the concern, in the case the demand that is mentioned in the notice does not get fulfilled. Therefore, a legal notice can be defined as a formal communication to any legal entity or to a person, informing the other party about the intention of undertaking legal proceedings against them.

**Legal notice must mention the following points:**

- Name and address of the parties
- Facts and grievances
- Compensation
- Signature

**Q41. Mention procedure of sending a legal notice. [Scoring Question]**

**Ans. The procedure of sending a legal notice includes –**

- (a) The legal notice must be addressed to the person against whom the grievances arise.
- (b) A legal notice must be sent on a plain paper or on the letterhead of a lawyer.
- (c) The legal notice must categorically mention the time period in which the addressee must respond to the notice, the time period can be 30 to 60 days. The time period must be stipulated within which the other party is expected to fulfil the demands.
- (d) The legal notice should be signed by the lawyer as well as the sender.
- (e) The legal notice must be sent either through a registered post or courier. It is advisable to ensure that the acknowledgement is retained.

# 11

## CHAPTER

# ART OF ADVOCACY AND APPEARANCES

### PROFESSIONAL ETIQUETTES

**Q1. Explain and comment on the following: Etiquettes is the art of behaving in front of others. [Dec. 2013 (3 Marks)]**

**Ans.** 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 behaviour*. Each society has its own distinct etiquette, and various cultures within a society also *have their own rules and social norms*.

**Q2. What is meant by Etiquette? What are the invitation etiquettes to be observed by a Company Secretary? [June 2010 (5 Marks)]**

**Ans.** 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.

### 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.

- (1) 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.
- (2) If an **RSVP card** is not included, respond by calling or sending a brief note.
- (3) If *you cancel after initially accepting an invitation*, phone your regrets as soon as possible. Send a note of regret following the phone conversation.
- (4) Don't ask for permission *to bring a guest* unless the invitation states.
- (5) **Arrive** at the event promptly, but not too early.
- (6) **Mingle and converse** with the other guests.
- (7) *Don't overstay* your welcome.
- (8) *Extend your thanks* as you leave.

**Q3. What is meant by Professional Etiquette? Mention any 10 communication etiquettes to be observed by a Company Secretary? [June 2013 (10 Marks)]**

**Ans. Communication Etiquettes:**

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

(For professional etiquette refer Q1.)

**Q4. Mention the Etiquette When Attending Hearings According to clause 7 of ICSI (Guidelines for Attire and Conduct of Company Secretaries), 2020. [Scoring Question]**

**Ans. All members appearing before any quasi judicial body shall endeavour to adhere to the following:**

- (1) Do not enter the court room **chewing gum, beetle leaf, tobacco, gutka or pan masala**.
- (2) Do not enter the court room in an **inebriated state**.
- (3) **Switch off all mobile and other beeping devices** or put them on silent mode before entering the courtroom as these may disrupt the proceedings.
- (4) Enter the courtroom silently and **bow to the Judge** as a sign of respect before proceeding to your seat.
- (5) **Silence must be observed** at all times during the hearing.
- (6) Ensure that **all loose sheets of papers are securely fastened, indexed and tagged** so as not to waste the time of the court in locating the documents.
- (7) Behave in a **polite and courteous manner** with all present in the court room and maintain decorum.
- (8) Make all **efforts to support and complement court efforts** and see that the administration of justice does not fail on account of apathy or neglect.

- (9) *Do not attempt to capture photographs* or audio/video record the proceedings.
- (10) As a sign of courtesy to the Judge, *bow to the Judge just before leaving the courtroom.*

### COURT CRAFT

**Q5. Write notes on the following: Court Craft. [June 2018/Dec.2012 (4 Marks)]**

Ans.

- *Advocacy/court craft* is learned *when we enter the practicing side of the profession.* The aim of advocacy is *to make judge prefer your version of the truth.*
- Practicing court craft in your professional life, will make a great impact. *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.*

**Q6. 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? [Scoring Question]**

Ans. *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/judgments.*

*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 judgments;
- 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 and this is to be done on the permission of the concerned Court/Tribunal;
- Meet clearly with the specific points raised by the opponent in the reply affidavit.

**Q7. 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 NCLT or other tribunals. Discuss the aspects relevant at both these stages.**

[Scoring Question]

**Ans. Following aspects could be relevant at both these stages:**

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

### CONDUCT AND ETIQUETTE

**Q8. ABC Ltd. wishes to draw a note of duties for its newly appointed CS with respect to court, client and opponent while representing the company in a case before the CCI, New Delhi. Draw out a draft note of CS duties along these lines for consideration of the Chairman and Managing Director.**

[Dec. 2012 (6 Marks)]

**Ans. Duty to the Court/Tribunal:**

- (1) 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**.
- (2) 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 and legal system**.
- (3) A Company Secretary shall not influence the decision of a Court by any **illegal or improper means**. Private communications with the judge relating to a **pending case are forbidden**.
- (4) 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.
- (5) 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*.

- (6) A Company Secretary should not act or plead in any matter in which he is *himself pecuniarily interested*.

**Duty to Client:**

- (1) 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.
- (2) 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.
- (3) 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.
- (4) 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.
- (5) A Company Secretary shall not do anything whereby he *abuses or takes advantage of the confidence reposed in him by his client*.
- (6) Avoid the *interruption to the Client*.
- (7) To be *prompt, Orderly and systematic*.
- (8) Advice, inform and arrange the interim relief for the *protection of subject matter of the case*.
- (9) Ensure that the *execution of the decision* has been made.

**Duty to Opponent:**

- (1) 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.
- (2) A Company Secretary shall do his best to carry out the *legitimate promise/promises*, made to the *opposite-party*.

**ADVOCACY TIPS**

Q9. What are the advocacy tips to be borne in mind by a PCS while appearing before the tribunal?  
[Dec. 2019/Dec. 2018/Dec. 2013 (4 Marks)]

**Ans.** 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:**

- (1) **Clarity:** The judge's time is limited, so make the most of it.
- (2) **Credibility:** The judge needs to believe that what you are saying is true and that you are on the *right side*.
- (3) **Demeanour:** We do not have a phrase "*hearing is believing*". Humans which include the human judge, is far more video than audio. The way we collect most of our information is through our eyesight.
- (4) **Eye contact:** While pleading, *maintain eye contact with your judge*.
- (5) **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.
- (6) **Confident temperament and precise communication:** The appearance of a confident company secretary can be helpful for him to present his case. *Precise communication* will make the judges to listen carefully.
- (7) **Psychology:** Understand *judge's psychology* as your job is to make the judge prefer your version of the truth.
- (8) **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.
- (9) **Learn to listen:** Entertain your judge. *Humour will often bail* you out of a tough spot.
- (10) **Knowledge and Preparation:** Knowledge of the *subject matter and proper preparation* of the case is of utmost importance and comes before any *other skill a professional* can have for winning a case.
- (11) **Order sheet:** Order sheet are maintained in every proceeding by the Court Master and shall contain all orders passed by the *Appellate Tribunal from time to time*. A Professional should keep track of the Order Sheets and try to obtain if allowed by the *rules pertaining to the proceedings*.

### APPEARANCE ETIQUETTES

**Q10. Examine and discuss the following: Arguments on Merits.**

**[Dec. 2016 (4 Marks)]**

**Ans.** Such arguments *as relate to the facts pleaded by the parties are termed as arguments on merits*. While addressing arguments on merits, an authorized

representative should **carefully point out the pleadings** of the parties and the relevant evidence in support thereof, led by the parties, **both oral as well as documentary**.

An authorized representative **should ensure that all or any contradiction** in the pleadings of the opponent and the evidence in support of such pleadings are **duly pointed out while submitting his/her arguments**.

Thus, where an **agreement/contract of service** is pleaded and there is no evidence **either oral or documentary** on record in support of such an agreement/contract, it should be specifically pointed out that the opponent has failed to prove/establish that such an agreement/contract actually exists or that the same had actually been executed at all.

Furthermore, the **relevant facts and/ or contradictions extracted** from the opponent or his/her witness during **the course of cross-examination** and relating to the factual issues involved in the matter, should be highlighted so as to draw attention of the Court/Tribunal towards such **facts/contradictions**.

**Q11. State the arguments on Preliminary Submissions. [Dec. 2014 (4 Marks)]**

**Ans.** Preliminary submissions should primarily confine to the true and correct facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings.

Additionally, the provisions of law or legal objections relevant and applicable to the issues involved in the matter should also be mentioned so as to demonstrate that the relief being claimed by the opponent is not eligible to be granted and/or that the relief being claimed by the party being represented by a lawyer/authorized representative should ordinarily be allowed as per those provisions of law.

Before incorporating such facts and/or provisions of law in the write-up, an authorized representative should be thorough with the provisions of law and interpretation, thereof, based upon relevant judgments so as to ensure that the submissions being made on behalf of the client are accepted and upheld by the Presiding Officer/Court/Tribunal as the case may be.

Thus, for example, if a claim being opposed by an authorized representative is evidently barred by limitation, such an objection should be taken in the preliminary submissions/objections. Such type of submissions/objections should be duly supported by law on the point or by relevant case law/judgments.

**PRE-REQUISITES FOR ENTERING APPEARANCE**

**Q12. Write notes on 'Affidavit in evidence'. [Dec. 2016 (4 Marks)]**

**Ans.** The following must be kept in Mind while preparing the Affidavit-in-Evidence by the parties:

- (1) 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.
- (2) In case, the petitioner himself was **involved in the execution of a contract**, he should file **affidavit-in evidence**.
- (3) The allegations or charges or grounds relating to facts should be reproduced duly supported by documentary evidence.
- (4) 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. **E.g.**, hand-writing or finger print experts etc.
- (5) 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.
- (6) 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.
- (7) At the time of tendering affidavit-in-evidence, the party must bring along with 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) cannot be relied upon and tendered as an evidence. [Section 65 of Indian Evidence Act, 1872] [BEST EVIDENCE PRINCIPLE]

**Q13. Write a note on the 'Rules of Adverse inference'.**

**[Dec. 2017/Aug. 2021/June 2023 (4 Marks)]**

**Ans. No evidence** is required of matters which are, either formally admitted for the purposes of the trial, in **civil cases**, by the pleadings, by answer to interrogatories, by agreement or otherwise and in **criminal cases**, as regards proof of those documents admitted under **section 294**, Code of Criminal Procedure, 1973.

It is **incumbent** (obligation) 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. [*Ms. Shefali Bhargava v. Indraprastha Appollo Hospital*]

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 on which reliance could be based. [*Dr. Harkanwaljit Singh Saini v. Gurbax Singh*]

**Q14. 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 draw against such party. Explain.**

**[June 2018 (4 Marks)]**

**Ans.** The statement is true and has been upheld by the Court. In *Ms. Shefali Bhargava v. Indraprastha Appollo Hospital, 2003 NCJ 787 (NC)*, the Court has observed that it is incumbent upon a party in possession of best evidence on the issue involved is a complex or difficult one, 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, 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. This is also known as the doctrine or rule of adverse inference.

**Q15. In the light of judicial pronouncement, discuss the following:**

**“A party can produce expert evidence in the cases involving complex or technical issues.”**

**[Dec. 2016 (4 Marks)]**

**Ans.** 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 on which reliance could be based. [*Dr. Harkanwaljit Singh Saini v. Gurbax Singh*]

#### **DRESS CODE**

**Q16. In a seminar on ‘appearances in courts’, the keynote speaker highlighted the significance of dress code for a Company Secretary appearing in courts representing his *company-in-lis*. A debate set in when a lady CS insisted that there should be no dress code for ladies while appearing before Courts/Tribunals.**

**Explain the importance of professional dress code and state the guidelines for professional dress of Company Secretaries. [Dec. 2016 (8 Marks)]**

**OR**

**Dress code is essential for looking professional while appearing before judicial bodies and tribunal. [Dec. 2020 (4 Marks)]**

**Ans.** 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. How you look, talk, act and work determines whether you are a professional or an amateur. The way you dress, speaks volumes about who you are as a person and as a professional. Whenever you enter a room for the first time, it takes only a few seconds for people you have never met to form perceptions about you and your abilities. Your clothes and body language always speak first. So it is important that your image gives people the right impression.

Some of the perceptions people can form solely from your appearance are: your professionalism; your level of sophistication; your intelligence and your credibility. Whether these perceptions are real or imagined, they underscore how your appearance instantly influences the opinions of strangers, peers, and superiors. Being well dressed in a corporate setting can influence not just perceptions, but also promotions.

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.

#### **GUIDELINES FOR PROFESSIONAL DRESS OF COMPANY SECRETARIES**

If you are concerned about your career, you will be more concerned with looking professional than looking trendy. If you look and behave like a highly-trained and well-groomed professional, you will win the respect and honour of your valued clients. 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 attire prescribed by ICSI (Guidelines for Attire and Conduct of Company Secretaries), 2020.

**Q17. What are the guidelines for professional dress code of members of the members of the Institute of Company Secretaries of India:**

- (a) Dress code for Male Members.
- (b) Dress code for Female Members.
- (c) Dress code before the tribunals.
- (d) Dress code while in employment. [Dec. 2017 (4 Marks)]

**Ans.**

- (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) 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 attire prescribed by ICSI (Guidelines for Attire and Conduct of Company Secretaries), 2020.
- (d) Members in employment may wear the dress/uniform as specified by the employer for all employees or if allowed the aforesaid professional dress.

#### **GUIDELINES FOR PROFESSIONAL DRESS OF COMPANY SECRETARIES**

**Q18. Explain the objectives of the ICSI (Guidelines for Attire and Conduct of Company Secretaries), 2020. [June 2024 (5 Marks)]**

**Ans. The objective of issuing these Guidelines is to:**

- (a) Provide the rules of etiquette and decorum for appearance before the courts, statutory bodies and quasi judicial bodies such as NCLT, NCLAT, SEBI, CCI, etc.

- (b) Ensure respect for authority and to maintain dignity of the profession of company secretaries.
- (c) Prevent company secretaries from contemptuous behaviour to the judicial authorities.
- (d) Guide company secretaries as to which attire is considered unsuitable, unconventional or inappropriate and interfering with the orderly administration of justice.
- (e) Project a professional image amongst the regulators and build a brand for the profession of Company Secretaries.

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## CHAPTER

# APPLICATIONS, PETITIONS AND APPEALS UNDER COMPANIES ACT, 2013

### NCLT RULES & NCLAT RULES

**Q1. Sudharshini approaches the National Company Law Tribunal in some matter and submits a document in Tamil. The Registry of the NCLT refuses to accept the document as it is in Tamil. Is the refusal of the Registry tenable? Explain. [June 2024 (5 Marks)]**

**Ans.** The refusal of the Registry of the National Company Law Tribunal (NCLT) to accept a document in Tamil is tenable based on the procedural requirements of the NCLT regarding the language of submissions.

#### Relevant Provisions:

##### (1) Language of the Tribunal:

- According to the National Company Law Tribunal Rules, 2016, and the National Company Law Appellate Tribunal Rules, 2016, the official language for proceedings and submissions is English.

##### (2) Rule 7 of the NCLT Rules, 2016:

- Rule 7 specifically states that all proceedings before the Tribunal shall be conducted in English. This includes all petitions, applications, affidavits, and other documents submitted to the Tribunal.

#### Key Points:

- **Official Language:** The official language for all submissions and proceedings before the NCLT is English.
- **Translation Requirement:** If a document is in a language other than English, it must be accompanied by a certified translation in English for it to be accepted by the Tribunal.

#### Conclusion:

Based on the above provisions, the refusal of the Registry of the NCLT to accept the document in Tamil is tenable. Sudharshini must provide a certified English translation of the document to comply with the procedural rules of the NCLT.

**Q2. Explain NCLAT Rules in detail.****[Scoring Question]**

**Ans. NCLAT RULES:** Many rules provided under NCLT rules are mutatis mutandis similar to the rules made under NCLAT Rules. However, other different rules of NCLAT are discussed hereunder:

**Sitting of Appellate Tribunal (Rule 8)**

NCLAT shall hold its sitting at its headquarters in New Delhi.

**Presentation of appeal (Rule 22)**

- (1) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
- (2) Every appeal shall be accompanied by a certified copy of the impugned order.
- (3) All documents filed in the Appellate Tribunal shall be accompanied by an Index in triplicate containing their details and the amount of fee paid thereon.
- (4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.
- (5) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.

**Title of affidavits (Rule 67)**

Every affidavit shall be titled as "Before the National Company Law Appellate Tribunal." followed by the cause title of the application or other proceeding in which the affidavit is sought to be used.

**Suo motu summoning of documents (Rule 74)**

Notwithstanding anything contained in these rules, the NCLAT may, suo motu, issue summons for production of public document or other documents in the custody of a public officer in **Form NCLAT-6**.

**Marking of documents (Rule 75)**

- (1) The documents when produced shall be marked as follows:
  - (a) if relied upon by the appellant's or petitioner's side, they shall be numbered as 'A' series.

- (b) if relied upon by the respondent's side, they shall be marked as 'B' series.
- (c) The Appellate Tribunal exhibits shall be marked as 'C' series,
- (2) NCLAT may direct the applicant to deposit with NCLAT by way of Demand Draft or Indian Postal Order drawn in favour of the pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi, a sum sufficient to defray the expenses for transmission of the records before the summons is issued.

#### **Order (Rule 88)**

The final decision of NCLAT on an appeal or proceedings before NCLAT shall be delivered by way of Judgment.

#### **Operative portion of the order (Rule 89)**

All orders or directions of the Bench shall be stated in clear and precise terms in the last paragraph of the order.

#### **Placing of Supreme Court orders before NCLAT (Rule 101)**

Whenever an interim or final order passed by the Supreme Court of India in an appeal or other proceeding preferred against a decision of NCLAT is received, the same shall forthwith be placed before the Chairperson or Members for information and kept in the relevant case file and immediate attention of the Registrar shall be drawn to the directions requiring compliance.

#### **Filing through electronic media (Rule 103)**

NCLAT may allow filing of appeal or proceedings through electronic mode such as online filing and provide for rectification of defects by e-mail or internet and in such filing, these rules shall be adopted as nearly as possible on and from a date to be notified separately and the Central Government may issue instructions in this behalf from time to time.

**Q3. Explain Rule 35 of NCLT Rules regarding Advertisement detailing petition. [Scoring Question]**

**Ans. Advertisement detailing petition:**

As per Rule 35(1) of Companies NCLT Rules, 2016 the petitioner shall advertise the petition in Form NCLT-3A at least 14 days before the date fixed for hearing at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the proposed company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.

**Rule 35(2) of Companies NCLT Rules, 2016:** Every such advertisement shall state:

- (a) the date on which the application, petition/reference was presented;
- (b) the name and address of the applicant petitioner and his authorized representative, if any;
- (c) the nature and substance of application, petition/reference;
- (d) the date fixed for hearing;
- (e) a statement to the effect that any person whose interest is likely to be affected by the proposed petition

**Rule 35(3) of Companies NCLT Rules, 2016:** Where the advertisement is being given by the company, then the same shall also be placed on the website of the company, if any.

**Rule 35(4) of Companies NCLT Rules, 2016:** An affidavit shall be filed to the Tribunal with such proof of advertisement or of the service, as may be available in, not less than 3 days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to be served.

**Rule 35(5) of Companies NCLT Rules, 2016:** Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit.

**Rule 35(6) of Companies NCLT Rules, 2016:** The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule.

#### Notice to Opposite Party

**Rule 37(1) of NCLT Rules, 2016** states that the Tribunal shall issue notice in Form NCLT-5 to the respondent to show cause against the application or petition on a date of hearing specified in the notice. Such notice in Form No. NCLT-5 shall be accompanied by a copy of the application with supporting documents.

**Rule 37(2) of NCLT Rules, 2016:** If the respondent does not appear on the date specified in the notice in Form NCLT-5, the Tribunal, after according reasonable opportunity to the Respondent, shall forthwith proceed ex parte to dispose of the application.

**Rule 37(3) of NCLT Rules, 2016:** Where any objection of any person whose interest is likely to be affected by the proposed petition, he may either in person or through

authorized representative file a reply accompanied with an affidavit along with copies of such documents on which it relies, with an advance service to the petitioner.

**Q4. Describe the procedure for filing an appeal before NCLAT against the other of NCLT. [Scoring Question]**

**Ans.**

**Procedure for Filing an Appeal Before NCLAT Against the Orders of NCLT:**

**Rule 23 of NCLAT Rules, 2016- Presentation of appeal**

- (1) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
- (2) Every appeal shall be accompanied by a certified copy of the impugned order of NCLT.
- (3) All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.
- (4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.
- (5) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.
- (6) The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal.

**Rule 23 of NCLAT Rules, 2016- Number of copies to be filed**

The appellant or petitioner or applicant shall file three authenticated copies of appeal or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

**Rule 24 of NCLAT Rules, 2016-Endorsement and verification**

At the foot of every appeal or pleading there shall appear the name and signature of the authorised representative and every appeal or pleadings shall be signed and verified by the party concerned in the manner provided by these rules.

**Rule 25 of NCLAT Rules, 2016-Translation of document**

- (1) A document other than English language intended to be used in any proceeding before the Appellate Tribunal shall be received by the Registry accompanied by a

copy in English, which is agreed to by both the parties or certified to be a true translated copy by the authorized representative engaged on behalf of parties in the case.

### **Fee for filing an Application**

#### **Rule 55 of NCLAT Rules, 2016**

- (1) Fee for filing appeal or interlocutory application, and process fee shall be 5000/-.
- (2) The fee and process fee shall be deposited by separate demand draft or Indian Postal Order favouring the Pay and Accounts Officer, Ministry of Corporate Affairs, payable at New Delhi.

**Q5. Mrs. P who holds 500 equity shares of Zeta Limited made an application through instrument of transfer to the Company for transfer of 300 equity shares in favour of Mrs. H. Zeta Limited refused to register the transfer of shares in favour of Mrs. H, stating that she has been declared as a wilful defaulter by the banks. What are the rights available to Mrs. H, under the Companies Act, 2013 for such refusal? [Dec. 2019 (4 Marks)]**

**Ans. As per section 58(4) of the Companies Act, 2013,** if a public company without sufficient cause refuses to register the transfer of securities within a period of 30 days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

**As per section 58(5),** the Tribunal, while dealing with such an appeal, may, after hearing the parties, either dismiss the appeal, or by order –

- (a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of 10 days of the receipt of the order; or
- (b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

Thus Mrs. H can file an appeal with the Tribunal as mentioned above.

**Q6. Comment on the following:  
What are the rights available against refusal of transfer of shares by a company? [June 2017 (5 marks)]**

**Ans. Appeal against Refusal to Register Transfer of Shares.**

**Section 58** of the Companies Act, 2013 lays down that if a company refuses, whether in pursuance of any power of the company under its articles or otherwise, to register

the transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the company, it shall, within 2 months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

Section 58 further lays down that the transferor or transferee, or the person who gave intimation of the transmission by operation of law, as the case may be, may appeal to the Board/Tribunal against any refusal of the company to register the transfer or transmission, or against any failure on its part within the period referred to in the preceding paragraph, either to register the transfer or transmission or to send notice of its refusal to register the same. The appeal under above paragraph shall be made within 2 months of the receipt of the notice of such refusal or, where no notice has been sent by the company, within four months from the date on which the instrument of transfer, or the intimation of transmission, as the case may be, was delivered to the company.

**Q7. Write note on the following: Meaning of Interlocutory Application under NCLAT Rules, 2016. [June 2023 (4 Marks)]**

**Ans.** According to rule 2(f) of National Company Law Appellate Tribunal Rules, 2016 (NCLAT Rule, 2016) "interlocutory application" means an application in any appeal already instituted in the National Company Law Appellate Tribunal (NCLAT), but not being a proceeding for execution of the order or direction of NCLAT.

Further, according to Rule 31, every interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in Form NCLAT-2 and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing an affidavit supporting the application.

**Q8. "National Company Law Tribunal (NCLT) can rectify mistakes in its own orders on suo motu basis." Comment with reference to the Companies Act, 2013 and Judicial Pronouncements. [Scoring Question]**

**Ans.** As per section 420(2) of the Companies Act, 2013, the National Company Law Tribunal may at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record:

- (1) Amend any order passed by it, and
  - (2) Shall make such amendment, if the mistake is brought to its notice by the parties:
- Provided** that no such amendment shall be made in respect of any order against which an appeal has been preferred.

Further, pursuant to **Rule 11 of National Company Law Tribunal Rules, 2016**, Tribunal has inherent power to make such order as may be necessary for meeting the end of justice or to prevent abuse of the process of the tribunal, accordingly, the Tribunal can rectified the order passed by its own.

**In Sree Ayyanar Spinning & Weaving Mills Ltd. v. Commissioner of Income Tax, 2008**, it was held that under first part of the provision, the tribunal is empowered to suo motu rectify any mistakes apparent on record any time within two years from the date of its original order. Under the second part, either the taxpayer or the department may file an application highlighting the mistake apparent on record. In light of the provision, the Apex Court held that the appellate tribunal took time beyond the stipulated period even though the application was filed well within the period. Thus, in the mentioned event the applicant has filed the application within the stipulated period of two years from the date of original order, it is binding for the appellate tribunal to decide the matter on the basis of merits and not on the ground of limitation.

Thus, section 420(2) read with Rules 11, 154 and 155 of National Company Law Tribunal Rules, 2016 substantiate that the Tribunal has power to rectify a mistake apparent from the record on its own motion or on an application by a party under the Act.

**Q9. A Corporate Insolvency Resolution Proceedings (CIRP) was initiated by the financial creditors and the National Company Law Tribunal (NCLT) passed the order of acceptance of proposal of the Resolution Applicant. After taking over the control and management of the Corporate Debtor, the Resolution Applicant observed an apparent mistake in the order. The proposal of the Resolution Applicant was to provide payment of ₹ 4,79,06,549 to all the Operational Creditors, whereas in the order it was wrongly written as ₹ 4,97,06,549. The Resolution Applicant seeks your professional advice to get the inadvertent mistake rectified. Discuss the relevant provisions of the law and suggest the procedure for its rectification. [June 2023 (4 Marks)]**

**Ans. According to section 420(2) of the Companies Act, 2013, the National Company Law Tribunal** may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties. However, no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act. Procedure for rectification.

**According to Rule 154(1) of the NCLT Rules, 2016**, any clerical or arithmetical mistakes in any order of the NCLT or error therein arising from any accidental slip or omission may at any time, be corrected by NCLT on its own motion or on application

of any party by way of rectification, Further, according to rule 154(2) of the NCLT Rules, 2016, an application under Rule 154(1) may be made in **Form No. NCLT-9 within 2 years** from the date of the final order for rectification of the final order not being an interlocutory order.

**General power to amend NCLT may, within a period of 30 days** from the date of completion of pleadings, and on such terms as to costs or otherwise, as it may think fit, amend any defect or error in any proceeding before it and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

In view of the above, the resolution applicant can apply **under Rule 154(1) of NCLT Rules, 2016 in Form No. NCLT-9 within 2 years** from the date of the final order.

**Q10. Rectification of mistake by NCLT on Suo Motu basis.**

**[Dec. 2022/Dec. 2019 (4 Marks)]**

**Ans. Sec. 420(2) of the Companies Act, 2013** provides that NCLT may at any time **within 2 years** from the date of the order, with a view to rectifying any mistake apparent from the record:

- (i) Amend any order passed by it,
- (ii) And shall make such amendment, if the mistake is brought to its notice by the parties:

**Provided** that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

The word 'may' suggest that the provision confers a discretionary power on NCLT in the matter of rectifying what it may find to be a mistake in its order.

Further, **Rule 11 of the NCLT Rules, 2016 read with Rules 154 and 155 thereof**, clearly indicates that noting in the NCLT rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal. Thus, the NCLT has power to rectify a mistake apparent from the record on its own motion or on an application by a party under the Act.

**Q11. Arghya Industries Ltd. decided to file an appeal before Hon'ble NCLAT due to an Order that has been passed by Hon'ble NCLT on May 6, 2019 without consent of the parties. The Order was received by the Company on May 7, 2019. The employees of the Company went on a strike for a period of 10 days from June 25, 2019 demanding salary hike and other benefits. The operations of the**

Company came to a grinding halt due to the strike and other extraneous reasons. Thereafter, the Company proposed to file an appeal on July 9, 2019 before the Hon'ble NCLAT and the Company prayed for condonation of delay. The Management of the Company was planning to seek professional help on the following queries:

- (i) Whether the proposed appeal would be admitted by the NCLAT.
- (ii) What is the maximum period allowed by the NCLAT for condonation of delay?

As a Practicing Company Secretary, advise the Management of the Company.

[Dec. 2021 (5 Marks)]

**Ans. According to section 421 of the Companies Act, 2013** any person aggrieved by an order of the NCLT may prefer an appeal to the NCLAT. However, no appeal shall lie to NCLAT from an order made by the NCLT with the consent of parties.

Every appeal section 421 of the Act shall be filed **within a period of 45 days** from the date on which a copy of the order of the NCLT is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed. Further, NCLAT may entertain an appeal after the expiry of the said period of 45 days from the date aforesaid, but **within a further period not exceeding 45 days**, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

- (i) In the given case, the order was passed by NCLT on May 6, 2019 but was received by the company on May 7, 2019. Accordingly, the appeal should have been filed before NCLAT within 45 days from May 7, 2019 i.e., by June 21, 2019. The Company could not file the appeal with the time provided in section 421 of the Act and prayed for condonation of delay. Now, in the given case, the company propose to file the appeal on July 9, 2021. Though the appeal could have been admitted on the grounds that the Order of NCLT was passed without the consent of the parties but the appeal was not tendered within the prescribed time. Further, the NCLAT may not condone the delay in view of the fact that the strike in the company started on June 25, 2019 i.e., 4 days after the expiry of the 45 days from the date of receiving the NCLT Order. Thus, it may be said that the appellant was not prevented by any sufficient cause from filing the appeal within the prescribed time. Hence, the proposed appeal may not be admitted by NCLAT.
- (ii) The maximum period allowed for condonation of delay is 45 days if NCLAT is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

**Q12. PQR Express Limited is aggrieved by an order of National Company Law Appellate Tribunal. As a Company Secretary, advise the Company as to where**

**an appeal can be filed against the order of NCLAT and also comment on limitation period of appeal against the order. [June 2019 (4 marks)]**

**Ans.** As per section 423 of the Companies Act, 2013, any person aggrieved by any order of the Appellate Tribunal may file an appeal to the SC **within 60 days** from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order.

The Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

In the given case, PQR Express Limited can file an appeal to Supreme Court of India against order of NCLAT within 60 days from the date of receipt of order of the Appellate Tribunal.

#### **APPLICATION IN CASE OPPRESSION AND MISMANAGEMENT & CLASS ACTIONS**

**Q13. Mere lack of confidence between the majority shareholders and minority shareholders would not be enough to order for relief under section 241. [Scoring Question]**

**Ans.** The scope of Section 241 was very succinctly enunciated by the Supreme court in **Shanti Prasad Jain v. Kalinga Tubes Ltd.** Where it observed that "It is not enough to show that must be shown as a preliminary to the application under section 241.

It must further be shown that the conduct of majority shareholders were oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of consecutive story.

There must be continuous acts on the part of the majority shareholders continuing to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some members. The conduct must be burdensome, harsh and wrongful.

Mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless lack of confidence springs from oppression of minority by the majority in the management of the company's affairs and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.

**Q14. A petition signed by 100 members of a company has been moved to NCLT for prevention of mismanagement. Later on, half of the members (signatories)**

withdrew their consent after filing the petition. Examine whether the remaining applicants (petitions/signatories) to the petition would be successful in their complaint to NCLT. [Scoring Question]

Ans.

- Once the consent has been given by the requisite number of members by signing the application, the application may be made by one or more of them on behalf and for the benefit of all of them.
- It has been held by the Supreme Court in **Rajahmundry Electric Supply Co. v. A. Nageshwara Rao**, AIR 1956 SC 213, that if some of the consenting members have, subsequent to the presentation of the application, withdrawn their consent, it would not affect the right of the applicant to proceed with the application.
- Obtaining of consent is a condition precedent to the making of the application and hence a consent obtained subsequent to the application is ineffective. **Makhan Lal Jain v. The Amrit Banaspati Co. Ltd.**, (1954).
- In **Chandramurthy v. K. L. Kapsi** (2005) CLB, a person who had disposed of his shares was not allowed to apply. Therefore, in the above case, the withdrawal of consent by some of the members shall not affect the success of the remaining applicants.

Q15. "The minority shareholders are empowered under the Companies Act, 2013 to bring action with a view to prevent the majority from oppression and mismanagement". Justify the statement with rights available to minority shareholders under the Act. [Scoring Question]

Ans. The various rights are available to the minority shareholders under the Companies Act, 2013 to bring action with a view to prevent oppression and Mismanagement:

- (a) Right to appoint Small Shareholder's Directors.
- (b) Right to apply to NCLT for Oppression and Mismanagement.
- (c) Right to file a Class Action Suit under section 245(1) of the Companies Act, 2013.

Q16. A group of shareholders of ABC Developers Limited consisting of 24 members decided to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors. The company has a total of 250 members and the group of 24 members holds one-tenth of the total paid-up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is that due to mismanagement by the Board of directors, the company is incurring losses and the company has not declared any dividends even when profits were available in the past years for declaration of dividend. In the light of the provisions of the Companies Act, 2013, advise the group of shareholders regarding the chances of success for:

**(a) getting the petition admitted**

**(b) obtaining relief from the Tribunal.**

**[June 2019 (4 Marks)]**

**Ans.** Section 244 of the Companies Act, 2013 provides the right to apply to the Tribunal for relief against oppression and mismanagement. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

- (1) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.
- (2) In the case of company not having share capital, not less than one-fifth of the total number of its members.

Since the group of shareholders do not number to 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief.

However, pursuant to Section 244 of the Act, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under section 241.

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (**Ashok Betelnut Co. P. Ltd. v. M.K. Chandrakanth**).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (**Thomas Veddon V.J. v. Kuttanad Robber Co. Ltd.**). Thus, the shareholders may not succeed in getting any relief from Tribunal.

## COMPOUNDING OF OFFENCES

**Q17. What do you mean by compounding of offences? Which offences can be compounded under the Companies Act, 2013 and which cannot?**

**[June 2021 (4 Marks)]**

**OR**

**Explain the nature of offences, which can be compounded under the Companies Act, 2013. Specify the jurisdiction for compounding such offences.**

**[June 2024 (5 Marks)]**

**Ans.** Compounding is not defined in Companies Act, 2013 or Foreign Exchange Management Act, 1999 or SEBI laws.

As per the Black's Law Dictionary, to "Compound" means "to settle a matter by a money payment, in lieu of other liability."

As per this definition Compounding is akin to a Settlement Mechanism, a settlement by paying the penalty in lieu of facing the prosecution for the offence committed. By looking into the provisions of the Corporate Laws which contain provision for compounding, it will be noted that compounding is an admission of guilt either voluntarily or on receipt of notice of default or initiation of prosecution. The defaulters agree to pay penalty which may be ordered by the Compounding authority to be paid.

### **Types of Compounding**

To compound an offence, it is necessary to know the type of offence. Offence on a topic of compounding can be of 2 types:

- (i) Compoundable offence; and
- (ii) Non-compoundable offence.

If the offence is compoundable, the same can be compounded as per the procedure prescribed and it is not possible to compound a non-compoundable offence.

### **As per Section 441 of the Companies Act, 2013:**

- (i) **Compoundable offence**: Any offence punishable under that Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only or imprisonment and also with fine may be compounded. Thus, if the offence is punishable with fine only or imprisonment or fine or with fine alone can be compounded.
- (ii) **Non-compoundable offence**: Any offence punishable under this Act (whether committed by a company or any officer thereof) being an offence punishable with imprisonment only or imprisonment and also with fine cannot be compounded.

Any offence otherwise compoundable cannot also be compounded if the investigation against such company has been initiated or is pending under this Act.

An offence committed by a company or its officer within a period of 3 years from the date on which a similar offence committed by it or him was compounded under this section. If the offence is not similar, this restriction to compound will not apply. It may be noted that any second or subsequent offence committed after the expiry of a period of 3 years from the date on which the offence was previously compounded, shall be deemed to be a first offence and is eligible to be compounded.

**Q18. Discuss the liability of executive and non-executive directors for fraud committed by the Managing Director of the company which came to their notice during a Board Meeting. [June 2023 (4 Marks)]**

**OR**

**“The Company’s management is taken care of by the Board of Directors and the directors are expected to perform in the best interests of the company as they are in a fiduciary position. Even a single director’s intentions to gain an undue advantage out of stakeholders’ money can result in fraud.” Will fraud by just one director make the other directors liable? [June 2022 (4 Marks)]**

**Ans.** Executive directors can usually be caught in the net of suspicion of fraud, since they are hands on involved in the day to day operations of the company and are aware of where there are loopholes in the systems prevalent within the company. However, the non-executive directors or the independent directors cannot escape responsibility simply by virtue of their position.

**Section 2(60) of the Companies Act, 2013** implicates ‘every director’ in respect of a contravention of the provisions of the Act (including Section 447 - Fraud as discussed above) who consented to the fraud or is aware of the contravention can become covered within the term ‘**officer who is in default**’.

The method of awareness is also provided for - this must be either by participating in board proceedings without objecting to the same or even by virtue of receipt of proceedings of the board. ‘Proceedings of the board’ can normally be understood to mean the minutes, but can it also include board papers? What if an independent director receives board papers relating to details of the annual financial statements? Often board papers can be so bulky that they comprise of an entire lever arch file. Can the director be expected to reasonably read everything and will this prove his ‘awareness’ of the fraud? These are some questions to be pondered.

Resignation may seem to be the immediate recourse to a non-executive director, but that does not absolve someone from liability, since the proviso to Section 168(2) of the Companies Act, 2013 clearly provides that the director who has resigned shall be liable even after his resignation, for the offences which occurred during his tenure.

Here’s where the attendance registers, board papers and minutes which you thought were mundane, suddenly become relevant. Attendance at the board meeting promptly brings a director within the ‘awareness’ purview discussed above. A recording of who attended the meeting, where they did not participate in the discussion and voting and where they dissented is very relevant to affixing liability.

The board papers need to be concise and clear. Board papers circulated over a period of time, if efficiently compiled, might be instrumental in throwing up a red flag for a director, and might result in an independent either recording his dissent or in extreme cases, resignation.

**SS 1:** Secretarial Standard on Meetings of the Board of Directors requires that the draft minutes need to be circulated to all the members of the board of directors, not only

those who attended the meeting. Thus the proceedings of the Board can be available even to those who did not attend the meeting and they can therefore be considered to be aware of a contravention. It certainly makes sense to have your minutes fairly detailed and also for the directors who receive the draft, to read it thoroughly.

**Q19. Jay Capitals Ltd. is a Non-Banking Finance Company (NBFC), incorporated under the Companies Act, 2013 and has got the licence to operate as NBFC from the Reserve Bank of India (RBI). Prachi, who belongs to the promoter group, was the Managing Director of the said NBFC. On account of certain irregularities, the Reserve Bank of India debarred Prachi from occupying any position in the NBFC. But every agenda papers placed before the Board of Directors were being first perused by Prachi unauthorisedly and the Board thereafter, approved or disapproved the agenda, on her verbal instructions. In the light of the above facts, what is the status of Prachi in the NBFC? Can she be held liable for her acts? Give reasons in support of your answer. [June 2023 (4 Marks)]**

**Ans.** According to section 2(60)(v) of the Companies Act, 2013, “officer who is in default”, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means the following officers of a company, namely: Any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity.

In the given situation, although Prachi is not occupying any position in Jay Capitals Ltd. a non-banking finance company on papers, but the Board of the company was accustomed to act as per the verbal instructions of Prachi.

Hence, the status of Prachi can be of “Officer in default” in terms of section 2(60) of the Act and she can be held liable for her acts.

**Q20. Food Department prosecuted a Director of a Multi-National Company for certain offences. The Case went up to Supreme Court, wherein the Director contended that though he is one of the Director of the Company, he was not in-charge of operations of the Company and hence, cannot be prosecuted. Discuss with relevant case law, if any. [Dec. 2020 (4 Marks)]**

**Ans.** If the Company has officer-in-default specified under Sec. 2(60) of the Companies Act, 2013 other Directors cannot be held liable.

In *Pepsico India Holdings Private Limited v. Food Inspector and Anr.* [2011], the Supreme Court held that it is now well established that in a complaint against a

Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the Company for the conduct of its business.

A mere bald statement that a person was a Director of the Company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company.

Therefore, the Director is right in contending that though he is one of the Director of the Company, he was not in-charge of operation of the Company and hence cannot be prosecuted in the absence of any specific allegations regarding his role in the management of the Company.

**Q21. Explain whether the following offences are compoundable, if yes, by whom?**

- (i) Failure to disclose director's interest and participation by interested director.
- (ii) Intentionally giving false evidence under Sec. 449 of the Companies Act, 2013.
- (iii) Failure to maintain proper books of account before winding-up.
- (iv) Not publishing the order of confirmation of reduction in share capital by the Tribunal.

[June 2022 (4 Marks)]

**Ans.**

**(i) Failure to disclose director's interest and participation by interested director**  
According to section 184(4) of the Companies Act, 2013 (the Act), if a director of the company contravenes the provisions of section 184(1) and 184(2) of the Act i.e. related to Failure to disclose director's interest, such director shall be liable to a penalty of Rs. 1 lakh. The offence mentioned above is punishable under section 184(4) of the Act.

**In view of sec. 441(1)(b) of the Act** the above offence is compoundable by Regional Director or any officer authorised by the Central Government, as the punishment does not involve imprisonment.

**(ii) Intentionally giving false evidence under Sec. 449 of the Companies Act, 2013**

If any person intentionally gives false evidence within the purview of sec. 449 of the Companies Act, 2013, he shall be punishable with imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and with fine which may extend to Rs. 10 lakhs. The offence given above is punishable under sec. 449 of the Act. In view of sec. 441 of the Act, the offence is non-compoundable as the offence is punishable with imprisonment as well.

**(iii) Failure to maintain proper books of account before winding-up**

According to section 338 of the Companies Act, 2013, where a company is being wound-up, if it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding-up, or the period between the incorporation of the company and the commencement of the winding-up, whichever is shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable, be punishable with imprisonment for a term which shall not be less than 1 year but which may extend to three years and with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 3 lakhs.

**In view of Sec. 441** the above, the offence is non-compoundable as the punishment involves imprisonment as well.

**(iv) Not publishing the order of confirmation of reduction in share capital by the tribunal according to section 66(4) of the Companies Act, 2013** the order of confirmation of the reduction of share capital by the Tribunal under section 66(3) of the Act shall be published by the company in such manner as the Tribunal may direct.

The punishment for above mentioned offence which was earlier mentioned in Sec 66(11) is now omitted by Companies (Amendment) Act, 2020 w.e.f. 21st December, 2020.

According to section 450 of the Act, where no penalty or punishment is provided elsewhere in the Act, the company and every officer of the company who is in default or such other person shall be liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of Rs. 2 lakhs in case of a company and Rs. 50,000 in case of an officer who is in default or any other person.

In view of section 441 of the Act, the offence is compoundable by Regional Director or any officer authorised by the Central Government as the punishment doesn't involve imprisonment.

**Q22. PQR Ltd. failed to file return of allotment against the 16 lakh shares allotted by the Board of directors at its meeting held on 20th April, 2016 and got order for compounding of offence on 10th June, 2018. The company again failed to file return of allotment against the 11 lakh shares allotted by the Board of directors at its meeting held on 4th March, 2019. What options are available to the company in respect of this default? [June 2021 (4 Marks)]**

**Ans.** Interval between 2 similar offences for compounding under section 441 of the Companies Act, 2013. **Sec. 441(2) of the Companies Act, 2013** expressly provides that if any offence which was committed by company or the officers was compounded **under section 441** of the Act, and an offence similar to what was compounded earlier is committed again by a company or its officers within a period of 3 years from the date on which the earlier offence was compounded, then the provisions of section 441 will not be applicable and the company and the officers concerned will not be eligible for compounding again.

In other words, similar offence can be compounded only once in 3 years. Hence, in the given case, the company cannot go for compounding for non-filing of return of allotment. However, there is no such restriction imposed under sec. 454 on adjudicating a penalty by the adjudicating officer. The **AO** may, by an order—

- (a) impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of this Act; and
- (b) direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

**According to section 460(b) of Companies Act, 2013**, where any document required to be filed with the Registrar of Companies (ROC) under any provision of the Companies Act, 2013 is not filed within the time specified therein, the CG may, for reasons to be recorded in writing, condone the delay. So, the option of adjudication and condonation of delay is available to the company.

**Q23. Enumerate the Compounding Authorities under Companies Act, 2013. Write the procedure for compounding in brief. [June 2019 (4 Marks)]**

**Ans.** In terms of Section 441 of the Act, there are two compounding authorities:

- **Regional Director:** The Regional Director appointed by the Central Government as a Regional Director for the purposes of the Companies Act, 2013.
- **National Company Law Tribunal (NCLT)** Procedure for Compounding of offence.
- Call for a board meeting to decide on compounding as per the Companies Act, 2013.
- Arrive at the amount of the time involved as per the relevant section(s).
- Hold the Board Meeting and pass resolution(s) to compound and provide for preparation and providing necessary authorization for compounding.
- Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Tribunal

or the Regional Director or any officer authorised by the Central Government, as the case may be.

- The filing with Registrar of Companies (ROC) is done in the e-form GNL-1 prescribed for this purpose. Also deliver sufficient number of hard copies of the compounding application to ROC for him to forward it to RD/Tribunal based on the quantum of fee involved.
- There will be a personal hearing before the Regional Director or Tribunal which will decide the amount to be paid for compounding.
- Get the order passed by the RD/Tribunal and pay the amount stipulated within the time fixed.
- File Order of RD/NCLT with ROC in form INC-28 and ROC will take note of the same.

**Q24. "A Company and its officers will not be eligible for compounding again for similar offence". Elucidate. [Dec. 2019 (5 Marks)]**

**Ans.** If any offence committed by Company or the officers was compounded under section 441 of the Companies Act, 2013, and an offence **similar to what was compounded earlier is committed again by a company or its officers within a period of 3 years** from the date on which the earlier offence was compounded, then the provisions of section 441 of the Companies Act, 2013 will not be applicable and the company and the officers concerned will not be eligible for compounding again. In other words, similar offence can be compounded only once in 3 years.

**Section 451 of the Companies Act, 2013** provides that if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of 3 years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

**Q25. 'There is a difference in legislative intent for incorporating Section 441 and Section 454 under the Companies Act, 2013' Discuss. [Dec. 2020 (4 Marks)]**

**Ans.** **Both these sections are independent of each other.** The question of one section overriding the other does not arise. They operate concurrently but not parallel. It means simultaneously.

**According to section 441 of the Companies Act, 2013,** notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under Companies Act, 2013 (whether committed by a company or any officer thereof) [not being an offence punishable with imprisonment only, or punishable with imprisonment

and also with fine], may, either before or after the institution of any prosecution, be compounded by:

- (a) the Tribunal; or
- (b) where the maximum amount of fine which may be imposed for such offence does not exceed Rs. 25 Lakh, by the Regional Director or any officer authorised by the Central Government.

**Further, Section 454 of the Companies Act, 2013**, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of Companies Act, 2013, in the manner as may be prescribed and such adjudicating officer may, by an order:

- (a) impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of Companies Act, 2013; and
- (b) direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

It may be noted that, section 441 which deals with compounding and Section 454 which deals with adjudication are not same. The adjudicating officer has no power to compound. The Regional Director alone can compound. If Central Government has to authorize another officer for compounding it has to be under section 441(1)(b) and not under 454. The adjudicating officer u/s 454 can only adjudicate on the quantum of penalty. He has no right to go into the merits and demerits of the default.

**Q26. Thinking Star Limited, a Public Limited Company was into manufacturing of steel and steel products. The Company wanted to expand its operations and to fund the same, it evaluated various options including bank loan, private placement, etc. However, due to a paucity of time the Company went ahead and funded its operations by issuing shares to a friend of Mr. XY, the Managing Director of the Company on private placement basis. The Company failed to comply with the provisions of the Companies Act, 2013.**

**Mr. XY was not willing to act, unless there was any notice from the regulators. Mr. S, the Corporate Advisor to the Company suggested Mr. XY to compound the offence as it would be in the best interest of the Company. Advise Mr. XY. [Dec. 2019 (4 Marks)]**

**Ans.** As provided under section 441 of the Companies Act, 2013 any offence punishable (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded

by the Tribunal; or where the maximum amount of fine which may be imposed for such offence does not exceed Rs. 25 lakhs, by the Regional Director or any officer authorised by the Central Government.

However, as per section 454 of the Companies Act, 2013 provides that the adjudicating officer appointed by the central government may, by an order impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of this Act; and direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

In the given case, the company has made private placement without complying the provisions under section 42 of the Companies Act, 2013. Hence, the promoters and directors of the company be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies with interest to subscribers within a period of 30 days of the order imposing the penalty.

Accordingly, the suggestion of Mr. S, Corporate adviser is not correct, as the offence under section 42 of Companies Act, 2013 is subject to the adjudication by the adjudication officer appointed by the Central Government and compounding provisions are not applicable on defaults in private placement.

**Q27. An offence under the Companies Act, 2013 was compounded by the Company and Compounding order was issued by the Compounding Authority specially for offences by the Company and the Directors of the Company as officer in default. The Company has paid the Compounding Fee. However, one of the Director, who is also a party to the Compounding as officer in default feels that compounding fee is high and he would like to go for an Appeal. Evaluate whether the Director will be allowed to make an appeal. Also indicate the penal provision for non-compliance of compounding orders.**

**[Dec. 2021 (4 Marks)]**

**OR**

**An offence under Companies Act, 2013 was compounded by RST Ltd. and compounding order was issued by the compounding authority specially for offences by the Company and the Directors of the Company as officer in default. Company has paid the compounding fee. After the payment, compounding authority came across certain facts about the offence. If those facts had surfaced at the time of deciding compounding fee, compounding authority would have levied higher fee. Since suppression of fact was higher, compounding authority reopened the matter and revised the compounding fee and**

asked Company to pay the differential. Evaluate tenability of action of the compounding authority, in the light of the judicial pronouncement.

[Dec. 2023 (4 Marks)]

**Ans.** It is necessary to refer to the below cases to understand the applicable law in the given circumstances.

- **No appeal against order of composition:** A person having agreed to the composition of offence is not entitled to challenge the said proceeding by filing an appeal. [*S V Bagi v. State of Karnataka (1992)*].
- **No penalty or prosecution after compounding:** In *P P Varkey v. STO (1999) 114 STC 224 (Bom. HC DB)*, it was held that once an offence is compounded, penalty or prosecution proceeding cannot be taken for same offence.
- **No challenge to the compounding order:** In *S Viswanathan v. State of Kerala (1993) (Ker. HC DB)*, it was held that once the matter is compounded, neither department nor assessee can challenge the compounding order. **Department cannot reopen the matter on the reason that actual suppression was much higher.**

In view of the above, it can be said that the director will not be allowed to make an appeal.

According to section 441(5) of the Companies Act, 2013. If any officer or other employee of the company who fails to comply with any order made by the Tribunal or the Regional Director or any officer authorised by the Central Government under section 441(4) of the Companies Act, 2013, the maximum amount of fine for the offence proposed to be compounded under this section shall be twice the amount provided in the corresponding section in which punishment for such offence is provided.

#### ADJUDICATION OF PENALTIES

Q28. What do you mean by 'Adjudicating' under the Companies Act, 2013? What factors Adjudicating Officer shall consider while adjudging quantum of penalty? [June 2021 (4 marks)]

OR

Surasandhya, is a Practising Company Secretary specialising in Corporate and allied laws. One of her clients approached her, seeking inputs on value of penalty/fine payable for certain offences committed by his Company. He wants to understand the factors which are considered in deciding the quantum of penalty. Outline the factors considered while deciding the quantum of penalty.

[Dec. 2021 (4 Marks)]

**Ans.** The word “Adjudicating” has not been defined in the Companies Act, 2013. “Adjudication” the legal process by which an arbiter or judge reviews evidence and argumentation, including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved.

Adjudication of Penalty under Companies Act, 2013 means the official imposing of penalty as prescribed under the respective sections of Companies Act, 2013 on the Company and its officers by the designated officer of MCA.

**According to Sec. 454(3)(a)** of the Companies Act, 2013 read with Rule 3(12) of the Companies (Adjudication of Penalties) Rules, 2014, while adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely:

- (a) size of the company;
- (b) nature of business carried on by the company;
- (c) injury to public interest;
- (d) nature of the default;
- (e) repetition of the default;
- (f) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and
- (g) the amount of loss caused to an investor or group of investors or creditors as a result of the default;

**Provided** that, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Companies Act, 2013, to which the offence is related to.

**Q29. ROC has sent a Notice to a Company alleging default under Section 92(4) and Section 137(2) of the Companies Act, 2013. On receiving the notice, the Company immediately arranges to file the respective Forms>Returns and communicates within 30 days of the notice that the it has made good the default. However, the ROC proceeded to prosecute the Company for non-compliance under the aforesaid Section. Is the action of the Registrar justified? If so, what may be the penalty for such non-compliances? [Dec. 2021 (4 Marks)]**

**Ans. Section 454(3) of the Companies Act, 2013,** provides that the adjudicating officer may, by an order—

- (a) impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of the Act; and
- (b) direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

However, a proviso has been to section 454(3) of the Act inserted *vide* the Companies (Amendment) Act, 2020 w.e.f. 22.01.2021, which provides as under:

In case the default relates to non-compliance of section 92(4) or section 137(1) or 137(2) and **such default has been rectified either prior to, or within 30 days** of, the issue of the notice by the adjudicating officer, no penalty shall be imposed in this regard and all proceedings under this section in respect of such default shall be deemed to be concluded.

Accordingly, in the given case, the ROC, who is the designated Adjudicating Officer for levying penalties under the above mentioned provisions is not empowered to proceed to levy penalty if the requisite Forms prescribed under the said provisions have been filed within 30 days of issue of the Notice.

**Q30. Arun, an individual shareholder of M/s. BEL Ltd. is holding 2% of the voting rights. He made a complaint before the Adjudicating Authority that investments proposed to be made by the Company are without any adequate security and prayed for injunction to restrain the company from making such investments. Whether Arun will succeed in his attempt? Explain with decided case law. [June 2021 (5 Marks)]**

**Ans.** Where the directors representing the majority of shareholders perform an illegal or ultra vires act, an individual shareholder has right to bring an action. The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company. In such case a shareholder has the right to restrain the company by an order or injunction of the court from carrying out an ultra vires act.

In **Bharat Insurance Ltd. v. Kanhaiya Lal**, the plaintiff was a shareholder of the Bharat Insurance Company. One of the objects of the company was "To advance money at interest on the security of land, houses, machinery and other property situated in India....."

The plaintiff complained that "several investments had been made by the company directors on behalf of the company without adequate security and contrary to the provisions of the memorandum and therefore, prayed for perpetual injunction to restrain it from making such investments".

**The Court observed:** "In all matters of internal management, the company itself is the best judge of its affairs and the Court should not interfere. But application of assets of a company is not a matter of internal management. As directors are acting ultra vires in the application of the funds of the company, a single member can maintain a suit" Hence in the given case, Arun will succeed in his attempt.

# 13

## CHAPTER

# ADJUDICATIONS AND APPEALS UNDER SEBI LAWS

**Q1. Examine the role of Adjudicating Officers under the SEBI Act, 1992 to determine the quantum of fine when any provisions specified in the SEBI Act or SCRA, 1956 are not been complied with. [June 2024 (5 Marks)]**

**Ans.**

- (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB, the Board may appoint any officer **not below the rank of a Division Chief** to be an Adjudicating Officer **for holding an inquiry** in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.
- (2) **While holding an inquiry the adjudicating officer shall have POWER:**
- **To summon and enforce the attendance** of any person acquainted with the facts and circumstances of the case
  - **To give evidence** or
  - **To produce any document** which in the opinion of the Adjudicating Officer, may be useful for or relevant to the subject-matter of the inquiry and

If, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), **he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.**

- (3) **The Board may call for and examine the record of any proceedings under this section** and if it considers that the order passed by the Adjudicating Officer is **erroneous to the extent** it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, **pass an order enhancing the quantum of penalty**, if the circumstances of the case so justify.

**Holding of Inquiry [Rule 4 Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995]**

The Board or the Adjudicating Officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice

(being not less than 14 days from the date of service thereof) why an inquiry should not be held against him. **[Rule 4(1)]**

Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him. **[Rule 4(2)]**

If, after considering the cause, if any, shown by such person, the Board or the Adjudicating Officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorized representative. **[Rule 4(3)]**

On the date fixed, the Board or the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place. **[Rule 4(4)]**

The Board or the Adjudicating Officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary the hearing may be adjourned to a future date and in taking such evidence the Board or the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872: **[Rule 4(5)]**

**Provided** that the notice referred to in sub-rule (3), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.

While holding an inquiry under this rule the Board or the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which, in the opinion of the Board or the adjudicating officer, may be useful for or relevant to, the subject-matter of the inquiry. **[Rule 4(6)]**

If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Board or the adjudicating officer, the Board or the Adjudicating Officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so. **[Rule 4(7)]**

**Q2. PQ Limited was a Company listed on XYZ Stock Exchange. The Company was making continuous losses and was not performing well. There were also reports of alleged financial irregularities in media. Also, many complaints were received by Securities Board of India (SEBI), regarding its listed securities. Subsequently, SEBI passed an Order to delist the securities of the Company**

**from the said stock exchange. As a Company Secretary, advise PQ Limited for further course of action. [Dec. 2019 (4 Marks)]**

**Ans.** As per section 15T of the SEBI Act, 1992, any person aggrieved by an order of the Board or by an order made by an adjudicating officer may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the SEBI or the Adjudicating Officer, as the case may be, is received by him.

The Tribunal shall give an opportunity of being heard to the respondent and may pass the order confirming, modifying or setting aside the decision of SEBI. SAT shall also send a copy of its order to every party to appeal and to the concerned Adjudicating Officer. Further, the matter filed before SAT is dealt with as expeditiously as possible and is endeavoured to be disposed of within 6 months from the date of receipt of the appeal.

Thus, PQ Limited should consider filing an appeal to Securities Appellate Tribunal (SAT). Alternatively, the company may go for delisting of the securities in accordance with the SEBI (Delisting of Securities) Regulations, 2009.

**Q3. SEBI issued an order against the directors of the Shyam and Company Ltd., a listed entity, against their failure to comply with the some of the provisions of the SEBI (LODR) Regulations, 2015 and levied penalty for the same. However, the directors of the company are of the opinion the penalty levied by the SEBI for non-compliance of the provisions are not applicable to the company since these provisions came into effect after the amendment in the SEBI (LODR) Regulations, 2015 and company had complied with the old provisions, which were applicable on the company at the prevailing time. Advise the company the legal recourse available to it, quoting the relevant provisions of the law. [June 2021 (4 Marks)]**

**Ans.** The recourse available to the company is to make an appeal before the Securities Appellate Tribunal (SAT).

**Section 15T of the Securities Exchange Board of India Act, 1992** provides that any person aggrieved,—

(a) by an order of the SEBI made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or

- (b) by an order made by an adjudicating officer under this Act or, (c) by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

**According to section 15T(3) of the SEBI Act, 1992,** every appeal under section 15T(1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the SEBI or the Adjudicating Officer or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

It has been provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.

**Section 15T(4)** of the Act provides that on receipt of an appeal under section 15T(1), the SAT may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

**Section 15T(5)** of the Act provides that the SAT shall send a copy of every order made by it to the SEBI, or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be the parties to the appeal and to the concerned Adjudicating Officer.

**Section 15T(6)** provides that the appeal filed before the SAT under 15T(1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within 6 months from the date of receipt of the appeal.

Accordingly, Shyam and Company Ltd. may prefer an appeal against the impugned order, before the Securities Appellate Tribunal.

**Q4. What are the penalties/punishments for insider trading under section 15G of SEBI Act, 1992? [June 2023 (4 Marks)]**

**Ans.** If any insider who,—

- (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information; or
- (ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or

- (iii) counsels, or procures for any other person to deal in any securities of any body corporate on the basis of unpublished price-sensitive information, shall be liable to a penalty which shall not be less than Rs. 10 lakhs but which may extend to Rs. 25 crores or 3 times the amount of profits made out of insider trading, whichever is higher.

**Q5. Renkel RTA Services Ltd. is the Registrar to the Issue and Transfer Agent ('RTA') of Alphanso Ltd. Avan, an investor discovered that certain shares of Alphanso Ltd. were held by his grandfather and accordingly he applied to the RTA seeking information on transferring the said shares in his name. Avan found some mistakes by RTA, while clearing and sorting out the old documents.**

**He made a complaint in the SCORES Platform against the RTA. Based on the complaint, Securities and Exchange Board of India (SEBI) ordered investigation by its Whole Time Member (WTM). The investigation revealed several such incidents. WTM of SEBI found that the RTA was negligent and did not exercise appropriate due diligence while processing various requests and prima facie found violating Clauses 2, 3 and 16 of the Schedule III of the Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 ('Regulations of 1993'). Accordingly, the WTM issued an ex parte ad interim order prohibiting the RTA from accepting fresh clients in respect of its activities till further directions. The RTA is aggrieved by the ex-parte ad interim order passed by the WTM of the SEBI has filed an appeal.**

**In light of judicial pronouncements, comment whether the action of WTM of SEBI is tenable. [Dec. 2021 (5 Marks)]**

**Ans.** The facts given in the question are similar to case decided by SAT in *Cameo Corporate Services Ltd. v. Securities and Exchange Board of India*.

In this case it was observed by Securities Appellate Tribunal that having heard the learned counsel for the parties and having perused the ex parte ad interim order and the confirmatory order we find that except in the case of the complainant where there is a prima facie case of a person impersonating the grandfather of the complainant all other discrepancies either relate to mismatching of photographs or signatures or that the PAN card being fake and not been verified from the Income Tax website/NSDL and accordingly a prima facie case of lack of basic due diligence was made out against the appellant.

What is noticeable is that apart from the complainant's case no other investor has come forward to make a complaint relating to the wrongful transfer of the share certificates illegally to a third party.

The discrepancies pointed out by SEBI do not reveal that the appellant made any gain by this wrongful transfer nor there is any finding of a loss being caused to an investor. Thus, exercising the powers under sections 11 and 11B of the Securities Exchange Board of India Act, 1992 restraining the appellant from accepting fresh clients for a period of 3 months for failing to exercise due diligence appears to be harsh and unwarranted in the facts and circumstances of the given case.

Thus, *ex parte* interim order may be made when there is an urgency. As held in ***Liberty Oil Mills & Ors. v. Union of India & 18 Ors.*** (1984) SC decided on May 1, 1984, the urgency must be infused by a host of circumstances, viz. large-scale misuse and attempts to monopolize or corner the market. In the said decision, the Supreme Court further held that the regulatory agency must move quickly in order to curb further mischief and to take action immediately in order to instil and restore confidence in the capital market.

The aforesaid principle of law is squarely applicable in the instant case. In our opinion, the impugned order is harsh and unwarranted. We are of the opinion that there was no real urgency in passing an *ex parte ad interim* restraint order which virtually amounts to passing a final order especially when a detailed enquiry has been ordered.

In our opinion, the respondent is empowered to pass an *ex parte* interim order only in extreme urgent cases and that such power should be exercised sparingly. In the instant case, we do not find that any extreme urgent situation existed which warranted the respondent to pass an *ex parte* interim order. We are of the opinion that the impugned order is not sustainable in the eyes of law as it has been passed in gross violation of the principles of natural justice as embodied in Article 14 of the Constitution of India.

The restraint order is in our opinion unjustified. In view of the aforesaid, the impugned order insofar as it restrains the appellant from accepting fresh clients is quashed. Other directions issued by the Whole Time Member of SEBI will continue to operate against the appellant. The appeal is partly allowed. In the circumstances of the case, there shall be no orders as to costs.

Based on the above judgment, it can be concluded that the Whole Time Member issued an *ex parte ad interim* order prohibiting the RTA from accepting fresh clients, without any urgency. Hence, the action of Whole Time Member may not be tenable.

**Q6. Explain the effect of Settlement Order on third party rights or other proceedings. Also, state the circumstances under which the Settlement Order is revoked. [June 2022 (4 Marks)]**

**Ans. Regulation 27 of the SEBI (Settlement Proceedings) Regulations, 2018** provides for Effect of settlement order on third party rights or other proceedings. According to Regulation 27:

- (1) A settlement order under the said regulations shall not be admissible as evidence in any other proceeding relating to an alleged default not covered under the settlement order nor affect the right of third parties arising out of the alleged default.
- (2) Where any applicant who obtains a settlement order is also noticee along with any other person in any civil and administrative proceeding, the Adjudicating Officer or the Securities Exchange Board of India (SEBI) while disposing proceedings against such other person may make necessary observations in respect of the applicant insofar as is necessary to prove the act of another:

**Provided** that, unless the settlement order is revoked, such observations shall *qua* the applicant be subject to the settlement order obtained by the applicant.

- (3) Where any person has obtained a settlement order, which contains observations in respect of any other person for the commission of an alleged default, such an order shall not in itself be admissible as evidence against such other person.

**Further, Regulation 28 of SEBI (Settlement Proceedings) Regulations, 2018** provides the provisions related to Revocation of the settlement order. According to Regulation 28:

- (1) If the applicant fails to comply with the settlement order or at any time after the settlement order is passed, it comes to the notice of the SEBI that the applicant has not made full and true disclosure or has violated the undertakings or waivers, settlement order shall stand revoked and withdrawn and SEBI shall restore or initiate the proceedings, with respect to which the settlement order was passed.
- (2) Whenever any settlement order is revoked, no amount paid under these regulations shall be refunded.

**Q7. Write short notes on: Rejection of Application under Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018.**

**[June 2022 (4 Marks)]**

**Ans.** The regulation related to rejection of application under Securities Exchange Board of India (Settlement Proceedings) Regulations, 2018 (the said regulations) is

provided under Regulation 6 of the said regulations. The provisions of the regulation 6 are as under:

**Regulation 6(1) of the said regulations provides that an application may also at any time be rejected on the following grounds:**

- a. Where the applicant refuses to receive or respond to the communications sent by the Securities Exchange Board of India (SEBI);
- b. Where the applicant does not submit or delays the submission of information, document, Revised Settlement Terms etc., as called for by the SEBI;
- c. Where the applicant who is required to appear, does not appear before the Internal Committee on more than one occasion;
- d. Where the applicant violates in any manner the undertaking and waivers as provided in Part-C of the Schedule-I;
- e. Where the applicant does not remit the settlement amount within the period specified in clause (a) of sub-regulation (2) of regulation 15 and/or does not abide by the undertaking and waivers;
- f. Where the applicant fails to comply with the condition precedent(s) for settlement within the time as required by the Internal Committee.

**Regulation 6(2) of the said regulations provides that the rejection under regulation 6(1) shall be communicated to the applicant:**

**Provided** that the applicant shall continue to be bound by the waivers given in respect of limitation or laches in respect of the initiation or continuation or restoration of any legal proceeding and the waivers given under sub-para (d), (e), (f) and (g) of para 12 of the undertaking and waivers as provided in Part-C of the Schedule-I.

**Q8. An unlisted public company has Authorised Share Capital of 10,00,000 Equity voting shares of Rs.10 each of same class. The subscribed and fully paid up Share Capital of the Company is 8,00,000 shares of Rs. 10 each. To comply with statutory provisions on dematerialisation of shares, the company applied for allotment ISIN with a depository for the entire authorised share capital instead of application for paid-up share capital.**

- (i) Examine the validity of the process adopted by the Company quoting relevant provisions.
- (ii) What is the penalty, if any, prescribed for violation of process in such cases under Securities Contracts (Regulation) Act, 1956. [Dec. 2020 (5 Marks)]

**Ans. (i)** As a general rule inter alia the Depository Rules, Securities Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015 and under sec. 23F of the Securities Contract Regulation Act, 1956, the dematerialisation

of more than the issued securities of a company or delivers in the stock Exchange the securities which is not listed in stock Exchanges are not permitted at all.

Further, according to Section 19E of Depository Act, 1996, if the company/ issuer fails to reconcile the records of dematerialised securities with all the securities issued, it shall be liable to a penalty which shall not be less than Rs. 1 lakh but which may extend to Rs. 1 lakh for each day during which such failure continues subject to a maximum of Rs.1 crore.

**The provisions of Section 28 of Depositories Act, 1996** provides that provisions of this Act shall be in addition to, and not in derogation of, any other law relating to the holding and transfer of securities. Therefore, the process adopted by the company is invalid.

**(ii) Section 23F of the Securities Contracts (Regulation) Act, 1956** provides that If any issuer dematerialises securities more than the issued securities of a company, he shall be liable to a penalty which shall not be less than Rs. 5 lakhs but which may extend to Rs. 25 crores.

**Q9. What are the penalties/punishments for the contravention under the Securities Contracts (Regulation) Act, 1956 where no separate penalty has been provided. [June 2023 (4 Marks)]**

**Ans.** Whoever fails to comply with any provision of this Securities Contracts (Regulation) Act, 1956, the rules or articles or bye-laws or the regulations of the recognised stock exchange or directions issued by the Securities and Exchange Board of India for which no separate penalty has been provided Shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.

**Q10. What are the penalties/punishments for contravention of any provisions of Foreign Exchange Management Act, 1999. [June 2023 (4 Marks)]**

**Ans.** According to section 13(1) of Foreign Exchange Management Act, 1999 (FEMA), If any person contravenes any provision of Foreign Exchange Management Act, 1999, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to Rs. 2 lakhs where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to Rs. 5,000 for every day after the first day during which the contravention continues.

**Q11. Amexo International Ltd. is aggrieved by the Order of Deputy Director of Enforcement Directorate (ED), and is evaluating to seek further remedies in this regard. Advise the Company regarding the Appellate jurisdiction under FEMA and also explain in brief the procedure for making such Appeal.**

**[Dec. 2021 (4 Marks)]**

**Ans.** The first stage of appeal in the Foreign Exchange Management Act, 1999 is the appeal against the order of the Adjudicating Authorities. It is an appeal before the Special Director (Appeals) under **section 17(2) of the FEMA.**

The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.

Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals).

**Procedure under sec. 17 of the FEMA (read with the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000) for filing of appeal before Special Director (Appeals):**

- (1) Every appeal under section 17 (1) shall be filed within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person, provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of 45 days, if he is satisfied that there was sufficient cause for not filing it within that period,
- (2) The Appeal shall be filed in Form I, signed by the applicant in triplicate and accompanied by three copies of the order appealed against, together with the fee of Rs. 5,000/-.
- (3) On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.

The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.

**As per section 19 of the FEMA,** any person aggrieved from the order Special Director (Appeals) may prefer an appeal to Appellate tribunal.

**Further, under section 35 of FEMA,** any person aggrieved from the order or decision of the Appellate Tribunal may file an appeal to the High Court.

**Q12. Gama Ltd. issued purchase orders and paid advance for import of steel used in its manufacturing. In the meantime, as new Managing Director took charge of the Company, the finance and procurement teams were busy in briefing him about the Company's processes. Though the raw material arrived in India, the Company failed to submit bill of entries. Thus, the goods for which foreign exchange was remitted had reached the destination, but the same were not released and kept in bonded warehouse. Adjudicating Authority under the Act imposed penalty on Managing Director and the Company.**

**Explain whether this transaction constitutes contravention of the provisions of FEMA Act, 1999 and whether Managing Director can escape the penalty?**

**[Dec. 2022 (4 Marks)]**

**Ans.** The facts of the given situation are similar to the case of *Suborno Bose (Appellant) v. Enforcement Directorate and Anr. (Respondents)* decided by Supreme Court.

In the given case, it was held that the goods had arrived in India, but the Company failed to submit Bill of Entry and did not take delivery of the goods due to which the import formalities were not completed for want of submission of Bill of Entry. Thus, though the goods for which foreign exchange was remitted had reached the destination of the users, but the same were not released and as such kept in bonded warehouse.

That resulted in contravention of sec. 10(6) of Foreign Exchange Management Act, 1999 (FEMA) read with secs. 46 and 47 thereof.

The Supreme Court while hearing the appeal in the matter held that contravention in section 10(6) of the Foreign Exchange Management Act, 1999 (FEMA) is a continuing actionable offence. The Company and the persons managing the affairs of the Company remain liable to take corrective measures in right earnest. Considering the admitted fact that the Managing Director (MD) took over the management of the Company and was fully alive to the default committed by the Company, yet failed to take corrective steps in right earnest.

MD now cannot be heard to contend that no liability could be fastened on him individually. Indeed, FEMA regulations provides for the period within which the foreign exchange ought to be surrendered if the Company was not wanting to take delivery of the goods imported. That does not mean that the contravention ceased to exist beyond the specified period. On the other hand, after the specified period had expired, it would be a case of deemed contravention until rectified.

Applying the above decision, it can be concluded that transaction under question is a deemed contravention of sec. 10(6) of FEMA read with Secs. 46 and 47 thereof and MD cannot escape penalty as imposed the adjudicating authority.

**Q13. ABC Exports Limited aggrieved by an order of Adjudication Authority under Foreign Exchange Management Act, 1999, wants to file an appeal against the order in Civil Court. As a Company Secretary, advise ABC Exports Limited whether the civil court has jurisdiction to entertain such a suit? If not, suggest an alternate remedy. [June 2019 (4 Marks)]**

**Ans.** Civil court cannot entertain such suits as civil court has no jurisdiction. As per section 34 of Foreign Exchange Management Act, 1999, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. In the given case, ABC Exports Limited can appeal to:

**(A) Appeal to Special Director (Appeals)**

As per section 17(1) of Foreign Exchange Management Act, 1999, the Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.

As per section 17(2) of Foreign Exchange Management Act, 1999, any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement may prefer an appeal to the Special Director (Appeals).

**(B) Appeal to Appellate Tribunal (Section 19)**

As per section 19(1) of Foreign Exchange Management Act, 1999, save as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in section 17(1), or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal.

**Q14. 'Though the term 'settlement' is widely used in stock exchanges and securities market, Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 has different meaning to it' — Discuss and also brief on the terms of settlement as per aforesaid regulations.**

**[Dec. 2020 (4 Marks)]**

**Ans.** The term Settlement, is commonly used in the stock exchanges and stock market to mean as payment of consideration and completion of a market transaction. However, in the context of SEBI (Settlement Proceedings) Regulations, 2018 (hereinafter referred to as "The Settlement Regulations") the term "settlement" is used more as a mechanism for dealing with the arrears of cases pending before the SEBI while providing flexibility of a wider array of enforcement actions which will achieve twin goals of an appropriate sanction and deterrence without resorting to long drawn litigation before SEBI, SAT and Courts etc.

**Regulation 9 of the Settlement Regulations provides that:**

- (1) The settlement terms may include a settlement amount and/or non-monetary terms, in accordance with the guidelines specified in Schedule-II of SEBI (Settlement Proceedings) Regulations, 2018.
- (2) **The non-monetary terms may include the following:**
  - (a) Suspension or cessation of business activities for a specified period;
  - (b) Exit from Management;
  - (c) Disgorgement on account of the action or inaction of the applicant;
  - (d) Refraining from acting as a partner or officer or director of an intermediary or as an officer or director of a company that has a class of securities regulated by the Board, for specified periods,
  - (e) Cancel securities and reduce holdings where the securities are issued fraudulently, including bonus shares received on such securities, if any, and reimburse any dividends received, etc.;
  - (f) Lock-in of securities;
  - (g) Implementation of enhanced policies and procedures to prevent future securities laws violations as well as agreeing to appoint or engage an independent consultant to review internal policies, processes and procedures;
  - (h) Provide enhanced training and education to employees of intermediaries and securities market infrastructure institutions;
  - (i) Submit to enhance internal audit and reporting requirements.
- (3) The settlement amount, excluding the legal costs and disgorged amount, shall be credited to the Consolidated Fund of India.
- (4) The application fee referred to in sub-regulation (2) of Regulation 3 and the legal costs, if any, forming part of the settlement amount shall be credited to the Securities and Exchange Board of India General Fund.

*Explanation.* – Legal costs shall include liquidated costs, as may be determined by the Board, in respect of costs for obtaining appropriate orders from the Tribunal or Court under sub-regulation (2) of Regulation 24.

- (5) The amount of profits made or losses avoided by the applicant that may be disgorged as part of the settlement terms, shall be credited to the Investor Protection and Education Fund.

**Q15. Write short note on 'Consent Order' issued by SEBI.**

**[Dec. 2020 (4 Marks)]**

**Ans.** Consent order means an order setting aside administrative or civil proceedings between the regulator and a person who may prima facie be found to have violated securities laws. 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 resulting to litigation lengthy proceedings and consequent delays.

Consent orders cannot be construed as waiver of statutory powers by Securities Exchange Board of India (Board). The board always has the right to proceed for appropriate action if it cannot achieve its objectives through consent order. The provisions of Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 regulate the issuance of Consent/Settlement Orders.

**Q16. What is the procedure for compounding of contraventions under Foreign Exchange Management Act, 1999?**

**[June 2021 (4 Marks)]**

**Ans.** Central Government has notified the Foreign Exchange (Compounding Proceedings) Rules, 2000 for the purpose of compounding of offences **under section 15 of the Foreign Exchange Management Act, 1999**. It contains the detailed guidelines and procedure for compounding of offences under Foreign Exchange Management Act, 1999.

**The broader process prescribed for compounding of offences under FEMA is as follows:**

- (1) Application is to be made to the appropriate compounding authority as per format given in the Foreign Exchange (Compounding Proceedings) Rules, 2000.
- (2) Every application for compounding any contravention under this rule shall be made in Form to the along with a fee of Rs. 5000/- by Demand Draft in favour of compounding authority.
- (3) The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings.
- (4) For the purpose of adjudging the quantum of amount on payment of which the contravention shall be compounded, compounding fee, the Compounding

Authority shall consider the guidance note provided for the purpose in the amended Rules.

- (5) The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerned as expeditiously as possible and not later than 180 days from the date of application.

If the Enforcement Directorate is of the view that the proceeding initiated before it relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the Compounding Authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13 of FEMA.

Further, the cases attracting the provisions under section 3(a) or those attracting special provisions under section 37(A) of the FEMA, 1999 - relating to assets held outside India in contravention of section 4, shall also not be eligible for compounding by the Reserve Bank.

**Q17. Explain the powers of Enforcement Directorate to compound the contraventions under the provisions of Foreign Exchange Management Act, 1999. [June 2021 (4 Marks)]**

**Ans.** If any Person contravenes provisions of **Section 3(a) of Foreign Exchange Management Act, 1999.**

- (a) in case where the sum involved in such contravention is five lakhs rupees or below, by the Deputy Director of the Directorate of Enforcement;
- (b) in case where the sum involved in such contravention is **more than Rs. 5 lakhs but less than Rs. 10 lakhs**, by the Additional Director of the Directorate of Enforcement;
- (c) in case where the sum involved in the contravention is **Rs. 10 lakhs or more but less than Rs. 50 lakhs** by the Special Director of the Directorate of Enforcement;
- (d) in case where the sum involved in the **contravention is Rs. 50 lakhs or more but less than Rs. 1 crore** by Special Director with Deputy Legal Adviser of the Directorate of Enforcement;
- (e) in case the sum involved in such contravention is **Rs. 1 crore or more**, by the Director of Enforcement with Special Director of the Enforcement Directorate:

**Provided further** that no contravention shall be compounded unless the amount involved in such contravention is quantifiable.

**MEDIATION**

**Q18. Write notes on the following: Practicing Company Secretary, who is in practice since 2010 with LL.B. degree intends to be empanelled as 'Mediator or Conciliator' under Companies (Mediation and Conciliation) Rules, 2016. Can he be empanelled? If not, why? [June 2023 (4 Marks)]**

**Ans.** According to rule 4(f) of Companies (Mediation and Conciliation) Rules, 2016, a person shall not be qualified for being empanelled as mediator or conciliator unless he is a qualified legal practitioner for not less than 10 years.

According to rule 4(g) of Companies (Mediation and Conciliation) Rules, 2016, a person shall not be qualified for being empanelled as mediator or conciliator unless he is or has been a professional for at least 15 years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary.

In the given situation, the Practicing Company Secretary (PCS) is not fulfilling the requirement of rule 4(g) for empanelment as mediator or conciliation as for a PCS the requirement is at least 15 years of continuous practice.

Also, a LLB Degree holder is not authorized to practice law unless registered as an Advocate with the appropriate Bar Council, and therefore, the PCS is also not eligible under rule 4(f) of Companies (Mediation and Conciliation) Rules, 2016. Accordingly, he cannot be empanelled as 'Mediator or Conciliator'.

**Q19. "Mediation and conciliation are all basically non-adjudicatory dispute resolution processes." State briefly the disadvantages of adjudicatory process which has led to rise of mediation and conciliation process. [Scoring Question]**

**Ans.** Mediation and conciliation are all basically non-adjudicatory dispute resolution processes where neutral third party renders assistance to the parties to the dispute to reach a satisfactory settlement. Following disadvantages of adjudicatory process has led rise of mediation and conciliation process:

- Delay in resolution of the dispute
- Uncertainty of outcome
- Inflexibility in the result/solution
- High cost
- Difficulties in enforcement and
- Hostile atmosphere

Thus, Mediation gives a voluntary and flexible negotiated conflict reduction process with the assistance of experts. It involves a structured negotiation where the mediator listens to the parties, ascertains the facts and circumstances as also the nature of the grievance, conflict or dispute, encourages the parties to open up to identify the causes

therefore, creates conducive atmosphere to enable the parties to explore various alternatives and ultimately facilitates the parties to find a solution or reach a settlement. In short, it is a professionally and scientifically managed negotiation process.

**Q20. “Mediator or conciliator facilitates in arriving a decision to resolve the dispute and that he shall not and cannot impose any settlement.” In background of this statement, explain who is responsible to take a decision under Companies (Mediation and Conciliation) Rules, 2016 and what is the time limit for completion of mediation or conciliation. [June 2022 (4 Marks)]**

**Ans. Rule 18 of the Companies (Mediation and Conciliation) Rules, 2016** provides that the parties shall be made to understand that the mediator or conciliator facilitates in arriving a decision to resolve the dispute and that he shall not and cannot impose any settlement nor the mediator or conciliator give any assurance that the mediation or conciliation shall result in a settlement and the mediator or conciliator shall not impose any decision on the parties.

In accordance with the abovementioned rule, parties alone shall be responsible for making decision. Time limit for completion of mediation or conciliation is provided *vide* **Rule 19 of Companies (Mediation and Conciliation) Rules, 2016** which is as under:

- The process for any mediation or conciliation under these rules shall be completed within a period of 3 months from the date of appointment of expert or experts from the Panel.
- On the expiry of 3 months from the date of appointment of expert from the Panel, the mediation or conciliation process shall stand terminated.
- In case of mediation or conciliation in relation to any proceeding before National Company Law Tribunal (NCLT) or National Company Law Appellate Tribunal (NCLAT) which could not be completed within 3 months, the NCLT or as the case may be NCLAT, may on the application of mediator or conciliator or any of the party to the proceedings, extend the period for mediation or conciliation by such period not exceeding 3 months.

**Q21. Section 442 of the Companies Act, 2013 enables settlement of dispute through ‘alternate dispute resolution’ – In this context, highlight the differences between mediation and conciliation. [Dec. 2021 (4 Marks)]**

**Ans. Section 442(3) of the Companies Act, 2013 (the Act)** provides that the Central Government or the Tribunal (NCLT) or the Appellate Tribunal (NCLAT) before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as

the Central Government or the NCLT or the NCLAT, as the case may be, deems fit. section 442 of the Act enables settlement of disputes through 'Alternate Dispute Resolution'.

**Mediation:** Mediation is a structured process. The Mediator assists the disputants to reach a negotiable settlement. The Process results in signed agreement which decides the future behaviour of the parties. Further, the decision of the mediator is called "settlement".

It is the process by which the parties to a dispute have closed-door discussions on a contentious issue in the presence of neutral mediator(s). This is a voluntary process and is undertaken only if all the parties are willing to go by it. The mediator, who is specially trained, helps the parties move from their positions, towards assessing where their interests are. Then, he/she helps the parties determine how the matter can be settled, examining various options. Unlike formal adjudicatory processes, the mediation need not be confined to the issues raised in the case, but can go beyond to other matters the parties want resolved. They can also agree to disagree on some issues, while resolving the rest.

Mediation is a time-bound, private and confidential process. The information shared must be kept confidential by all parties, including the mediator. This facilitates a free and frank discussion on matters in dispute. Equally important, the discussions cannot be brought up before the court if the disputes are not resolved through mediation.

In mediation, the mediator does not suggest the manner of settlement to the parties. Any settlement arrived at using either process is voluntary. No settlement can be imposed by the mediator or conciliator.

**Conciliation:** The term "Conciliation" has been defined under black law dictionary as "The process of adjusting or settling disputes in a friendly manner through extra judicial mean". Conciliation is the assistance rendered by a conciliator to the parties to a dispute, in an independent and impartial manner, in their attempt to reach an amicable settlement of their dispute. Conciliator brings the disputants to agreement through negotiation. Further, the Conciliator is appointed only after the dispute has arisen. The decision of the Conciliator is called "award".

The conciliation process is similar to mediation. But the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties.

**Q22. Explain the meaning of Mediation and Conciliation. What is the difference between these two terms? [June 2021 (4 Marks)]**

**Ans.**

**Mediation:** The term “mediation” has been defined under black law dictionary as “an act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute”.

**Conciliation:** The term “Conciliation” has been defined under black law dictionary as “The process of adjusting or settling disputes in a friendly manner through extra judicial mean”.

#### Difference between Mediation and Conciliation

Mediation	Conciliation
Mediation is a structured process. Mediator assists the disputants to reach a negotiable settlement. The Process results in signed agreement which decides the future behaviour of the parties. Further, the decision of the mediator is called “settlement”.	Conciliator brings the disputants to agreement through negotiation. Further, the Conciliator is appointed only after the dispute has arisen. The decision of the Conciliator is called “award”.
In mediation, the mediator does not suggest the manner of settlement to the parties. Any settlement arrived at using either process is voluntary. No settlement can be imposed by the mediator or conciliator.	The conciliation process is similar to mediation. But the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties.

**Q23. ‘Companies Act, 2013 allows settlement of disputes even through Mediation and Conciliation’ — Enumerate the matters which cannot be referred to Mediation and Conciliation. [Dec. 2020 (4 Marks)]**

**Ans. Matters not to be referred to the mediation or conciliation:** As per Rule 30 of Companies (Mediation and Conciliation) Rules, 2006, the following matters shall not be referred to mediation or conciliation, namely:

- (a) the matters relating to proceedings in respect of inspection or investigation under Chapter XIV of the Act; or the matters which relate to defaults or offences for which applications for compounding have been made by one or more parties.
- (b) cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion, etc.
- (c) cases involving prosecution for criminal and non-compoundable offences.

- (d) cases which involve public interest or interest of numerous persons who are not parties before the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

**Q24. A Practicing Company Secretary wants to establish his practice in the field of Mediation and Conciliation. He wants to know whether he would not be eligible to be appointed as a Mediator or Conciliator as per Rule 5 of Companies (Mediation and Conciliation) Rules, 2016. Advise him.**

**[Dec. 2019 (4 Marks each)]**

**Ans.** As per rule 4 of Companies (Mediation and Conciliation) Rules, 2016, a Company Secretary with at least fifteen years of continuous practice is qualified for being empanelled as mediator or conciliator.

However, as per rule 5 of Companies (Mediation and Conciliation) Rules, 2016, a person shall be disqualified for being empanelled as mediator or conciliator, if he—  
is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending; has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude;

- has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government;
- has been punished in any disciplinary proceeding, by the appropriate disciplinary authority; or
- has, in the opinion of the Central Government, have such financial or other interest in the subject matter of dispute or is related to any of the parties, as it is likely to affect the discharge of his professional obligations as a mediator or conciliator.

# 14

## CHAPTER

# APPEARANCE BEFORE OTHER REGULATORY AND QUASI JUDICIAL AUTHORITIES

### RIGHT TO LEGAL REPRESENTATION

**Q1. Right to Legal Representation under the Companies Act, 2013.**

**[Dec. 2014 (4 Marks)]**

**Ans. Right to Legal Representation: under the Companies Act, 2013, Section 432 of the Companies Act, 2013 dealing with right to legal representation envisages that the applicant or the appellant may either appear in person or authorise one or more Chartered Accountants or Company Secretaries or Cost Accountants or Legal Practitioners or any Officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.**

**Q2. Write notes on the following as desired:**

**“Name forums where a company secretary in practice can appear as authorized representative.”**

**[Dec. 2019 (4 Marks)]**

**Ans.** The Company Secretaries in practice are rendering value added services to corporate sector as independent professionals. Apart from this a Company Secretary can appear as an authorized representative before NCLT, Competition Commission of India (CCI), Securities Appellate Tribunal (SAT), Telecom Regulatory Authority of India (TRAI) and various other Tribunals.

<b>Under the Companies Act</b>	Section 432 of the Companies Act, 2013 dealing with right to legal representation envisages that the applicant or the appellant may either appear in person or authorise one or more Chartered Accountants or Company Secretaries or Cost Accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.
<b>Under the TRAI Act</b>	<b>Section 17 of the Telecom Regulatory Authority of India (TRAI) Act, 1997</b> authorizes Company Secretaries to present his or its case before the Appellate Tribunal.

<b>Under the SEBI Act</b>	<b>SEBI Act, 1992 under Section 15V</b> permits the appellant either to appear in person or authorise one or more of practising Company Secretaries, Chartered Accountants, Cost Accountants or Legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunals.
<b>Under the Competition Act</b>	<b>Section 35 of the Competition Act, 2002</b> authorises Company Secretaries in practice to appear before Competition Commission of India.
<b>Under Real Estate (Regulation and Development) Act, 2016</b>	As per section 56 of the Real Estate (Regulation and Development) Act, 2016 a Company Secretary holding certificate of practice can appear before Appellate Tribunal or a Regulatory Authority or Adjudicating Officer on behalf of applicant or appellant as the case may be.

#### APPEARANCE UNDER THE COMPANIES ACT, 2013

**Q3. Illustrate the provisions of appeal from orders of a tribunal under the Companies Act, 2013. [Aug. 2021 (4 Marks)]**

**Ans.** Appeal from Orders of Tribunal section 421 of the Companies Act, 2013 provides that any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties. Every appeal shall be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as, may be prescribed.

It may be noted that the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days from the date aforesaid, but within a further period not exceeding 45 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

On the receipt of an appeal, the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of receipt of the order of the Appellate Tribunal to him on any question of law.

**Q4. National Company Law Tribunal as quasi judicial body.**

**[June 2023 (4 Marks)]**

**Ans.** National Company Law Tribunal is a quasi judicial body exercising equitable jurisdiction, which was earlier being exercised by the High Court or the Central Government.

It has been established by the Central Government under section 408 of the Companies Act, 2013 with effect from 1st June, 2016.

The National Company Law Tribunal has powers to regulate its own procedures.

The establishment of the National Company Law Tribunal consolidates the corporate jurisdiction of the following authorities:

- Company Law Board (CLB)
- Board for Industrial and Financial Reconstruction. (BIFR)
- The Appellate Authority for Industrial and Financial Reconstruction
- Jurisdiction and powers relating to winding-up restructuring and other such provisions, vested in the High Courts.

**APPEARANCE UNDER THE TRAI ACT, 1997**

**Q5. Enumerate the Appellate Authorities under the Telecom Regulatory Authority of India Act, 1997 and the Securities and Exchange Board of India Act, 1992.**

**[June 2013 (5 Marks)]**

**OR**

**Process of appeal to Securities Appellate Tribunal (SAT) under the SEBI Act, 1992.**

**[Dec. 2014 (4 Marks)]**

**Ans. Appellate Authorities under the Telecom Regulatory Authority of India Act, 1997:**

**Appeal to the Supreme Court:** Section 18 of the Telecom Regulatory Authority of India (TRAI) Act, 1997 provides that notwithstanding anything contained in the Code of Civil Procedure, 1908 or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code.

No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties. Every appeal under this section shall be preferred within a period of 90 days from the date of the decision or order appealed against.

The Supreme Court may however entertain the appeal after the expiry of the said period of 90 days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

### Appellate Authorities under the Securities and Exchange Board of India Act, 1992

**Appeal to the Securities Appellate Tribunal (SAT):** Section 15T of the SEBI Act, 1992 lays down that any person aggrieved:

- (1) (a) by an order of SEBI made, under this Act, or the rules or regulations made thereunder, or  
(b) by an order made by an adjudicating officer under this Act;  
(may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.
- (2) No appeal shall lie to the Securities Appellate Tribunals from an order made  
(a) by SEBI;  
(b) by an Adjudicating Officer, with the consent of the parties.
- (3) Every appeal 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. The Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.
- (4) On receipt of an appeal, the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

### Appeal to Supreme Court

**Section 15Z** lays down that any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order.

The Supreme Court, may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

### **APPEARANCE UNDER THE SEBI ACT, 1992**

**Q6. Enumerate the Appellate Authorities under the Securities and Exchange Board of India Act, 1992. [Dec. 2018 (4 Marks)]**

**Ans.** Appellate Authorities under the Securities and Exchange Board of India Act, 1992 are Securities Appellate Tribunals and Supreme Court of India.

**According to section 15T of the SEBI Act, 1992**, any person aggrieved by an order of the Board or by an order made by an adjudicating officer under this Act; or by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

**According to section 15Z of the SEBI Act, 1992**, any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court.

**Q7. Explain the following:**

**“Provisions relating to appeal to the Securities Appellate Tribunal under the Securities and Exchange Board of India Act, 1992”. [Dec. 2012 (4 Marks)]**

**Ans.**

- (a) Section 15T of the SEBI Act, 1992 provides 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.
- (b) No appeal shall lie to the SAT from an order made by SEBI; by an Adjudicating Officer, with the Consent of the parties.
- (c) 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.
- (d) 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.
- (e) On receipt of an appeal, the SAT, may after giving the parties to appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
- (f) 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.

**APPEARANCE UNDER THE COMPETITION ACT, 2002**

**Q8. Write notes on the following:**

**“Provisions relating to appeal before the Competition Appellate Tribunal under the Competition Act, 2002.”** [June 2016 (4 Marks)]

**OR**

**Explain Appellate Authorities under the Competition Act, 2002.**

[June 2024 (5 Marks)]

**Ans.** The Competition Act, 2002 (the Act) is a legislation in India that aims to promote and sustain competition in the market, protect consumer interests, and prevent anti-competitive practices. The Act provides for the establishment of various appellate authorities to ensure the effective implementation of its provisions. These appellate authorities play a critical role in adjudicating disputes and resolving appeals related to competition law violations.

**The following are the appellate authorities under the Competition Act, 2002:**

<b>National Company Law Appellate Tribunal (NCLAT)</b>	The NCLAT is a quasi judicial body established under the Companies Act, 2013, and also acts as the appellate tribunal for competition-related matters. The NCLAT hears appeals against orders passed by the Competition Commission of India (CCI) and orders of the Director-General (DG) of the CCI. The NCLAT has the power to confirm, modify, or set aside any order passed by the CCI or the DG.
<b>High Courts</b>	High Courts have jurisdiction to hear appeals against the orders of the CCI or the DG. Appeals to High Courts are filed under Article 226 of the Constitution of India, which allows for the judicial review of decisions taken by administrative bodies. The appellate authorities play a critical role in ensuring the effective implementation of the Competition Act, 2002, and providing a mechanism for parties to challenge orders passed by the CCI or the DG. These authorities help ensure that competition is promoted and sustained in the market, consumer interests are protected, and anti-competitive practices are prevented.
<b>Supreme Court of India</b>	The Supreme Court of India is the highest court of appeal in the country and has the power to hear appeals against the orders of the NCLAT. Appeals to the Supreme Court are usually filed in cases where the NCLAT has erred in law or where there is a substantial question of law to be decided.

**Q9. Write notes on the following:**

**“Appellate authorities under the Income-Tax Act, 1961”.**

**[Dec. 2016 (4 Marks)]**

**Ans. Appellate Authorities under the Income-Tax Act, 1961**

Appeal against the order of the Income-Tax Officer lies with the Appellate Assistant Commissioner or the Commissioner (Appeals) or Commissioner of Income-tax. Appeal against the order of the Appellate Assistant Commissioner or the Commissioner (Appeals) can be preferred by the assessee or the income-tax department and such appeal lies with the Appellate Tribunal. Appeal against the order of the Appellate Tribunal by way of reference by the Tribunal can also be preferred by the assessee or the income-tax department and such appeal lies to the High Court. The Order of the High Court on the reference can be challenged either by the assessee or by the income-tax department by preferring an appeal to the Supreme Court which is the final appellate authority.

#### **APPEARANCE UNDER REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016**

**Q10. Explain the right to legal representation of a Company Secretary under the Competition Act, 2002 and Real Estate. (Regulation and Development) Act, 2016.**

**[Aug. 2021 (4 Marks)]**

**Ans.** Right to Legal Representation under Competition Act, 2002 Competition Authorities and the companies world over avail services of professionals to guide and advise them on various aspects of competition law. Professionals also assist companies in designing, implementing and maintaining affective competition compliance programmes.

**Section 35 of the Competition Act, 2002**, authorises Company Secretaries in practice to appear before Competition Commission of India. Besides, there are a number of concepts and terms such as value of assets, turnover, determination of market, relevant market, geographic market which require active professional involvement and advice. Further, Competition Act, 2002 provides a number of factors to be considered by the Competition Commission of India in determining appreciable adverse effect on competition.

**According to section 35 of the Competition Act, 2002** a person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

**Right to Legal Representation under Real Estate (Regulation and Development) Act, 2016**

As per section 56 of the Real Estate (Regulation and Development) Act, 2016 a Company Secretary holding certificate of practice can appear before Appellate Tribunal or a Regulatory Authority or Adjudicating Officer on behalf of the applicant or appellant as the case may be.

According to the said section the applicant or appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

**Hence a Company Secretary holding certificate of practice can:**

- Represent a person (promoter) before any real estate regulatory authority for registration of real estate project.
- Represent a person before real estate appellate tribunal.
- Represent a person before Adjudicating Officer.

**Q11. Explain Regulatory and Appellate Authority under Real Estate (Regulation and Development) Act, 2016. [Dec. 2022 (5 Marks)]**

**Ans. Real Estate Regulatory Authority:** Apart from the day to day implementation of the Real Estate (Regulation and Development) Act, 2016 and the Rules and Regulations made thereunder the immediate responsibility of the Regulatory Authority are:

- (a) Registration of the real estate project and the real estate agent;
- (b) Extension of registration of the real estate project and its revocation;
- (c) Renewal of registration of the real estate agent and its revocation;
- (d) As per section 34 the Authority is responsible to maintain a website of records for public viewing of:
  - all projects registered with the Authority including details of projects as specified in the Act and the rules and regulations to be disclosed on the website;
  - details of promoters with photographs of promoters;
  - details of projects in case of revocation of registration or where any project penalized under the Act;
  - details of agents registered under the Act including his photograph and also of those agents whose registration has been revoked.
- (e) As per section 71 the Authority is required to appoint one or more 'Adjudicating Officer in consultation with appropriate Government.

- (f) As per section 32 the Regulatory Authority is also required to make recommendations on various matters for the growth and promotion of a healthy, transparent, efficient and competitive real estate sector.

**Real Estate Appellate Tribunal:**

The Appellate Tribunal is a quasi judicial body, which is empowered to hear appeals from the orders/decisions/directions of the Regulatory Authority or the Adjudicating Officer, as the case may be. The form and manner and the fees payable towards filing the appeal and the manner for hearing and disposing the appeal are to be provided by Rules to be made by the appropriate Government.

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TAXMANN

