

---

# STUDY MATERIAL

## PROFESSIONAL PROGRAMME

# DRAFTING, PLEADINGS AND APPEARANCES

## MODULE 1 PAPER 3



**THE INSTITUTE OF  
Company Secretaries of India**

**भारतीय कम्पनी सचिव संस्थान**

**IN PURSUIT OF PROFESSIONAL EXCELLENCE**

Statutory body under an Act of Parliament

(Under the jurisdiction of Ministry of Corporate Affairs)

---

---

© THE INSTITUTE OF COMPANY SECRETARIES OF INDIA

**TIMING OF HEADQUARTERS**

Monday to Friday  
**Office Timings – 9.00 A.M. to 5.30 P.M.**

*Public Dealing Timings*  
**Without financial transactions – 9.30 A.M. to 5.00 P.M.**  
**With financial transactions – 9.30 A.M. to 4.00 P.M.**

*Phones*  
011-45341000

*Fax*  
011-24626727

*Website*  
[www.icsi.edu](http://www.icsi.edu)

*E-mail*  
[info@icsi.edu](mailto:info@icsi.edu)

# PROFESSIONAL PROGRAMME

## DRAFTING, PLEADINGS AND APPEARANCES

Drafting, in legal sense, means an act of preparing the Legal Documents like agreements, contracts, deeds, etc. A proper understanding of drafting cannot be realised unless the nexus between the Law, the facts and the language is fully understood and accepted. Drafting of deeds and documents for various purposes in a company usually forms part of multifacet duties of the Company Secretary. For this purpose, the course contents of this study material have been so designed as to provide practical orientation and develop necessary acumen in drafting legal documents. Only those deeds and documents have been included which are of direct relevance to the work of a Company Secretary. Further, the literature available on the subject has been found to be unwieldy and it has, therefore, been our endeavour to make the study material tailored made. Every effort has been made to provide a self-contained material and an integrated approach has been adopted throughout.

While writing the study material, relevant provisions of the various Acts and Rules made thereunder have been kept in mind. Except where found absolutely necessary, text of the provisions of Bare Act(s), Rule(s), Order(s), etc. have not been produced. This paper presupposes knowledge of substantive law; therefore, students are advised to have thorough knowledge of the same by referring to various Acts mentioned at appropriate places in this study material. This paper also warrants continuous updation in terms of substantive and procedural laws as well as latest judicial pronouncements. Moreover, drafting of petitions, deeds and documents is an art and even acquiring working knowledge in this demands application of skills of higher order. Students are, therefore, advised not only to master the principles and applications of drafting and pleadings, but also keep themselves abreast of latest developments by regularly resorting to reading of at least one of the leading English Newspapers and additional source materials concerning corporate world which are published from time to time. Students are also advised to refer the 'Student Company Secretary e-bulletin'/'Chartered Secretary' wherein all important judicial and legislative developments are reported regularly.

Although care has been taken in publishing this study material yet the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf. In the event of any doubt, students may write to the Directorate of Academics in the Institute for clarification at **academics@icsi.edu**.

Should there be any discrepancy, error or omission in the study material, the Institute shall be obliged if the same is brought to its notice for issue of corrigendum in the e-bulletin Student Company Secretary.

# PROFESSIONAL PROGRAMME

## Module 1

### Paper 3

#### Drafting, Pleadings and Appearances (Max Marks 100)

#### SYLLABUS

##### Objective

To provide expert knowledge of drafting, documentation and advocacy techniques.

##### Detailed Contents

1. **Judicial & Administrative framework:** Procedure; Jurisdiction and Review; Revisions; Reference; Appellate forum.
2. **General Principles of Drafting and relevant Substantive Rules :** Drafting, Concept, General Principles and relevant substantive rules thereof; Drafting in simple language, nuances of drafting, common errors and its consequences like litigation, liability. Drafting policies, code of conduct, guidance note, waivers, releases, disclaimers, Basic Components of Deeds, Endorsements and Supplemental Deeds, Aids to Clarity and Accuracy, Legal Requirements and Implications; Supreme Court Rules and other guiding principles for drafting.
3. **Secretarial Practices & Drafting :** Principles relating to Drafting of various resolutions; Drafting of notices & Explanatory Statements; Preparation of Agenda for meetings; Drafting and recording of minutes.
4. **Drafting and Conveyancing relating to Various Deeds and Agreements :** Conveyancing in General, Object of Conveyancing- Drafting of Conveyancing agreements, wills, encumbrances and gift deeds.
5. **Drafting of agreements, documents and deeds :** Drafting of various Commercial Agreements, Guarantees, Counter Guarantees, Bank Guarantees, Outsourcing Agreements, Service Agreements, E-Contracts, Legal License, IPR Agreements; General and Special Power of Attorney; Pre-incorporation Contracts; Share Purchase Agreement; Shareholders Agreements and Other Agreements under the Companies Act, 2013; Drafting of Memorandum of Association and Articles of Associations; Drafting of Provisions for Entrenchment of Specified Provision of Articles; Joint Venture and Foreign Collaboration Agreement, Non-disclosure Agreements ; Drafting of Limited Liability Partnership Agreement, Drafting of Bye Laws for Societies; Drafting Replies to Regulatory Show Cause Notices; Review of critical business documents and press releases; Responding to proxy Advisory Reports, Drafting Response to Media Reports; Drafting and review of crisis communications, presenting complex legal subjects to simple business oriented language.
6. **Pleadings :** Pleadings in General; Object of Pleadings; Fundamental Rules of Pleadings; Civil: Plaint Structure; Description of Parties; Written Statements, Interlocutory Applications, Original Petition, Affidavit, Execution Petition and Memorandum of Appeal and Revision, Petition under Articles 226 and 32 of Constitution of India, Special Leave Petition; Criminal: Complaints, Criminal Miscellaneous Petition, Bail Application and Memorandum of Appeal and Revision; Drafting of Affidavit in Evidence;

Arguments on Preliminary Submissions; Arguments on Merits; Legal Pleadings and Written Submissions, Application, Petitions, Revision Petitions, Notice of Motion, Witness, Improper Admission, Rejection, Appeal, Review, Suits, Undertakings, Indemnity Bonds, Writs, Legal Notices, Response to Legal Notices.

7. **Art of Writing Opinions** : Understanding facts of the case; case for opinion writing, Application of relevant Legal Provisions to the facts; Research on relevant case Laws; Discussion and Opinion writing.
8. **Appearances & Art of Advocacy**: Requisites for entering appearances; Appearing before Tribunals/ Quasi-judicial Bodies such as NCLT/ NCLAT/ / CCI/ TRAI/ Tax Authorities and Appellate Tribunals/ and authorities such as ROC/ RD/ RBI/ ED/Stock Exchange/ SEBI/ RERA; Art of advocacy.

#### **Case Laws, Case Studies & Practical Aspects**

# LESSON WISE SUMMARY

## DRAFTING, PLEADINGS AND APPEARANCES

### Lesson 1- Judicial and Administrative Framework

Under the Constitution, the primary function of the legislature is to make law, that of the executive is to execute law and that of the judiciary is to enforce the law.

In view of the multifarious activities of a welfare state, the legislature cannot work out all the details to fit the varying aspects of complex situations. It must necessarily delegate the working out of details to the executive or any other agency. Therefore, one of the most significant developments of the present century is the growth in the legislative powers of the executives. There is no such general power granted to the executive to make law, it only supplements the law under the authority of legislature.

The objective of the lesson is to introduce the students regarding:

- Legislative Functions of Administration
- Types of Tribunals/Quasi-Judicial Bodies
- Types of Courts
- Procedural aspects of working of Civil Courts
- Procedural aspects of working of Criminal Court
- Appellate Forum
- Reference, Review and Revisions under CPC

### Lesson 2- General Principles of Drafting and Relevant Substantive Rules

Drafting may be defined as the synthesis of law and fact in a language form. The importance of the knowledge about drafting and conveyancing for the corporate executives has been felt particularly for the three reasons viz., obtaining legal consultations; for carrying out documentation departmentally and for interpretation of the documents.

Knowledge of drafting and conveyancing for the corporate executives is also essential for doing 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.

A number of documents are required to be studied and interpreted by the corporate executives. 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.

It is expected that, at the end of this lesson, student will, inter- alia, be in a position to:

- Drafting, its meaning
- Conveyancing, its meaning
- Drafting and Conveyancing: Distinguished

- Distinction between Conveyance and Contract
- General Principles of Drafting
- Legal Implications and Requirements
- Components of Deeds.

### **Lesson 3- Secretarial Practice in Drafting Notice, Agenda and Minutes of Company's meetings**

A company is an artificial judicial person created by law having its own distinct entity form and capable of entering into contracts. Though company is bestowed with the characteristic of separate legal entity but it cannot take decision on its own. It is capable of acting in its own name, entering into contracts. It is capable of owning and holding property in its own name, sue others and to be sued by others in its name. Despite all these powers, since it is not a natural person, it expresses its will or takes its decisions through natural persons i.e. directors or members.

Members or directors of a company can exercise their powers and can bind the company only when they act as a body at a validly convened and held meeting. As a company secretary you need to guide the members on the conduct of affairs of the company and facilitate the convening of meetings and attend Board and Committee meetings and maintain minutes of these meetings.

The objective of the lesson is to facilitate the students to acquaint with:

- Collective decision making process in companies
- Secretarial Standards- Introduction
- Secretarial Standard on Board Meetings
- Secretarial Standard on General Meetings
- Important points to be remembered while drafting notice of Board Meeting
- Practical Aspect of Drafting Resolutions and Minutes

### **Lesson 4-Drafting and Conveyancing Relating to Various Deeds and Documents (I)**

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. A company has to execute countless commercial agreements and other contracts during the course of its business. It is very much desirable and useful to keep in view certain important points in regard to the drafting of contracts, particularly commercial and international trade contracts.

There is no particular form prescribed for the drawing up of trade contracts, except that they must fulfil all the essential requirements of a valid contract under the law applicable to the contract. If the law requires any particular category of contracts to be in writing or to be registered, these formalities must be complied with. A contract may be hand written, type written or printed. It may be as brief or as detailed as the circumstances of a particular trade transaction demand.

The purpose of the lesson is to familiarize the students with:

- Drafting of Agreements
- Important Points Regarding Drafting of Contracts
- Commercial Agency Contracts
- Guidelines for Entering into Foreign Collaboration Agreements
- Arbitration Agreements

- Hypothecation Agreement
- Outsourcing Agreements

### **Lesson 5- Drafting and Conveyancing Relating to Various Deeds and Documents (II)**

Wharton in his Law Lexicon (1953), page 784 defines a power of attorney as “a writing given and made by one person authorizing another, who, in such case, is called the attorney of the person (or donee of the power), appointing him to do any lawful act instead of that person, as to receive rents, debts, to make appearance and application in court, before an officer of registration and the like. It may be either general or special, i.e., to do all acts or to do some particular act”.

A power of attorney is one of the documents which plays an important role in conveyancing. Granting a Power of Attorney is a legal process that involves the drafting of a document which assigns to another person the power to act as your legal representative.

The objective of the lesson is to familiarize the students with:

- Deeds of Power of Attorney
- Promissory Note
- Relinquishment Deed
- Hire-Purchase Deeds
- Family Settlement Deeds

### **Lesson 6 - Drafting and Conveyancing Relating to Various Deeds and Documents (III)**

Property has, always, been on the fundamental elements of socio economic life of an individual. 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 and “to transfer property” is to perform such an act. The law relating to transfer of property is governed by the Transfer of Property Act, 1882. A mortgage is a transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, existing or future debt or the performance of an acknowledgement, which may give rise to pecuniary liabilities.

Lease is a contract between lessor and lessee for the fixed term for the use on hire of a specific asset selected by lessee. Lessor retains ownership of the assets and lessee has possession and use of the asset on payment of specified rental over a period. It is a sort of contractual arrangement between the two parties whereby one acquires the right to use the property called “lessee” and the other who allows the former the right to use his owned property, called the “lessor”. Thus, lease is a contractual arrangement, it originates from a contract between the lessor and lessee and is regulated by the terms, conditions and covenants of such contract.

The objective of the lesson is to introduce the students regarding:

- Drafting of Deed of Sale of Immovable Property
- Drafting of Deed of Mortgage
- License
- Form of Deed of License
- Essential Points to be observed for Drafting of Lease Documents
- Drafting of a Lease Documents



## **Lesson 7- Drafting and Conveyancing Relating to Various Deeds and Agreements-IV**

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. The deed of assignment stipulates what kind of rights have been assigned. An important aspect of intellectual property laws deals with assignment agreements. An assignment agreement is an intellectual property (IP) transaction that deals with the ownership and disposition of intellectual property rights as well as with the control over the use of or access to intellectual property.

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

It is expected that, at the end of this lesson, student will, inter- alia, be in a position to:

- Deeds of Assignment
- Assignment of Patents,
- Assignment of Trade Marks
- Assignment of Copyrights
- Assignment of Business and Goodwill
- Partnership Deeds
- Trust Deeds

## **Lesson 8-Drafting of Agreements under the Companies Act**

Generally Promoter of a company is a person who does the necessary preliminary work in connection with the formation and the establishing of the company. It is Promoters only who conceives an idea, develops it, formulates a scheme or project and takes all the necessary steps for the formation of a company to implement the project or the scheme.

Memorandum of association of the company is the fundamental formation document. It is the constitution and charter of the company. It contains the basic conditions on the strength of which the company is incorporated. Articles are rules and regulations for management of internal affairs of the company. It constitutes a contract between the company and its members and members inter se. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum. Shareholders' agreements (SHA) are the result of mutual understanding among the shareholders of a company to which, the company generally becomes a consenting party. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act.

The objective of the lesson is to facilitate the students to acquaint with:

- Promoters' Contract-Pre- Incorporating Contracts
- Drafting of Memorandum
- Drafting of Articles
- Underwriting Contract
- Shareholders Agreement

## **Lesson 9 –Pleadings**

Order 6, Rule 1 of Civil Procedure Code (C.P.C.) defines 'pleading'. It means either a plaint or a written statement. The object of a pleading which aims at ascertaining precisely the points for contention of the parties to a suit. The rules of pleading and other ancillary rules contained in the Code of Civil Procedure have one main object in view. It is to find out and narrow down the controversy between the parties. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

Pleadings are, therefore, the foundation of any litigation, and must be very carefully drafted.

It is expected that, at the end of this lesson, student will, inter- alia, be in a position to:

- Fundamental Rules of Pleading
- Plaint Structure
- Description of the Parties
- Written Statement
- Requirement of Written Statement
- How to draft a Written Statement
- Affidavit

## **Lesson 10 - Art of Writing Opinions**

A legal opinion is a written statement by a judicial officer or a legal expert based on giver's professional understanding of a particular aspect of any matter based on legal principles. A person might want to know the correct legal position on a matter of interest or the likelihood of his winning a case if he initiates legal proceedings based on the information that he has supplied to the expert. An effective and legally sound legal opinion has an immense value. It can show where a party stands in a given factual matrix when looked from a legal perspective and also save time and money spent in futile litigation proceedings.

The obligation of an opinion giver to exercise diligence in determining the factual and legal bases for an opinion is implicit in every opinion letter. The first rule is always to commence the opinion by setting out the facts that have been given or have been presumed from the instructions given. Adopting the practice of commencing opinion by outlining the facts upon which one is advising serves another purpose as well. It crystallises those facts in one's mind, visualises any gaps as to which one may need to take further instructions or make assumptions and, where issues of fact are involved, suggests areas which need attention.

The objective of the lesson is to introduce the students regarding:

- Case for opinion writing
- Types of Legal Opinion
- Form and Elements of the Opinion Letter
- Expression of the Opinion
- Writ

## **Lesson 11- Appearances and Art of Advocacy**

Quasi-Judicial bodies/Tribunals have power similar to Courts which decides on cases in specific areas. They are called as Quasi-Judicial because they do not have full powers as that of the Court. A Company Secretary has been recognized under various Acts to appear as an authorized representative before various tribunals/

quasi-judicial bodies such as National Company Law Tribunal (NCLT), Competition Commission of India (CCI), Telecom Regulatory Authority of India (TRAI) National Company Law Appellate Tribunal (NCLAT), Securities Appellate Tribunal etc.

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

The objective of the lesson is to facilitate the students to acquaint with:

- Right to legal representation
- Appellate authorities under the Companies Act, 2013
- Appellate authorities under TRAI Act, 1997
- Appellate authorities under SEBI Act, 1992
- Appellate authorities under the Competition Act, 2002
- Drafting of Affidavit in Evidence
- Art of Advocacy

## LIST OF RECOMMENDED BOOKS

### DRAFTING, PLEADINGS AND APPEARANCES

#### BOOKS FOR READINGS

1. G.M. Kothari and Arvind G. Kothari : Drafting, Conveyancing and Pleadings (1982); 2nd Ed., N.M. Tripathi (P.) Ltd., Bombay.
2. P.C. Mogha : The Indian Conveyancer (1987); 10th Ed. Rev. by Justice K.N. Goyal, etc. Eastern Law House, Calcutta.
3. Hargopal : The Indian Draftsman; Guide to Legal Drafting (1995); 10th Ed. Rev. by Nitin Khanna & A.C. Moitra, the University Book Agency, Allahabad. Vol. I & II.
4. N.S. Bindra : Conveyancing Drafting & Interpretation of Deeds (1985); 7th Silver Jubilee Ed. Rev. by S.K. Verma, etc.; Volumes 1 to 5, Law Publishers, Allahabad.
5. Dr. J.C. Verma : Commerical Drafting & Conveyancing, 1988 Ed.; Bharat Law House, New Delhi.
6. P.C. Mogha : The Law of Pleadings in India (1987); 14th Ed. Rev. by Justice K.N. Goyal, etc. Eastern Law House, Calcutta.
7. DeSouza : Forms and Precedents of Conveyancing (1999); 13th Ed. Rev. by C.R. Datta and M.N. Das.
8. Rodney D. Ryder : Drafting Corporate & Commercial Agreements (2005); 1st Ed., Universal Law Publishing Co., Delhi.

#### Books for References :

1. Maxwell : The Interpretation of Statutes (1976); 12th Ed., second impression Rev. by P. St. J. Langan, N.M. Tripathi (P) Ltd., Bombay.
2. Stanley Robinson : Drafting - Its Application to Conveyancing and Commercial Documents (1980); 1st Ed., Chapters 1 to 11, Butterworths, London.
3. Kelly : Draftsman (1979); 14th Ed. Rev. by R.W. Ramage, pp. 2 to 161, 228 to 235, 476 to 509, Butterworths, London.
4. Shiv Gopal : Conveyancing Precedents and Forms (1975); 4th Ed., Eastern Book Company, Lucknow.
5. G.M. Kothari : Principles & Precedents of the Law of Conveyancing, Draftsman and Interpretation of Deeds & Documents (1995); Law Book Company, Allahabad.
6. M.G. Gurha : A Guide to the Deeds (1981); 2nd Ed., Modern Law House, Allahabad.

# ARRANGEMENT OF STUDY LESSON

## Module-1 Paper-3

### DRAFTING, PLEADINGS AND APPEARANCES

S.No.	Lesson Tittle
1	Judicial and Administrative Framework
2	General Principles of Drafting and Relevant Substantive Rules
3	Secretarial Practice in Drafting Notice, Agenda and Minutes of Company's Meetings
4	Drafting and Conveyancing Relating to Various Deeds and Documents (I)
5	Drafting and Conveyancing Relating to Various Deeds and Documents (II)
6	Drafting and Conveyancing Relating to Various Deeds and Documents (III)
7	Drafting and Conveyancing Relating to Various Deeds and Documents (IV)
8	Drafting of Agreements under the Companies Act
9	Pleadings
10	Art of Writing Opinions
11	Appearances & Art of Advocacy
	Practical Exercises
	Test Paper

# CONTENTS

## LESSON 1

### JUDICIAL AND ADMINISTRATIVE FRAMEWORK

Legislative Functions of Administration	2
Necessity and Constitutionality	2
Constitutionality	2
Forms and Requirements	4
Requirements	4
Modes of control over delegated legislation	5
Tribunals	7
Types of Courts	9
Supreme Court of India	9
High Courts of India	10
Lower Courts of India	10
Revenue Courts	10
Procedural aspects of working of Civil Courts	10
Procedural aspects of working of criminal courts	16
Types of Criminal Trial	16
1. Warrant Cases	16
2. Summons Cases	18
3. Summary Trial	18
Appellate Forum	19
Reference and Revision under Criminal Procedure Code	19
Reference, Review and Revision under Civil Procedure Code	24
LESSON ROUNDUP	30
TEST YOURSELF	31

## LESSON 2

### GENERAL PRINCIPLES OF DRAFTING AND RELEVANT SUBSTANTIVE RULES

Introduction	34
Drafting – Its Meaning	34

Conveyancing — Its Meaning	35
Drafting and Conveyancing: Distinguished	35
Distinction Between Conveyance and Contract	36
General Principles of Drafting All Sorts of Deeds and Conveyancing and Other Writings	36
Some Do's	38
Some Don'ts	39
Guidelines for use of Particular Words and Phrases for Drafting and Conveyancing	39
Use of Appropriate Words and Expressions	40
Aids to Clarity and Accuracy	42
Interpretation of Deeds and Documents	42
Legal Implications and Requirements	44
Basic Components of Deeds	45
Deed	45
Document	45
Various Kinds of Deeds	46
Components of Deeds	47
Engrossment and Stamping of a Deed	55
LESSON ROUNDUP	55
TEST YOURSELF	56

### LESSON 3

#### SECRETARIAL PRACTICE IN DRAFTING NOTICE, AGENDA AND MINUTES OF COMPANY'S MEETINGS

Collective Decision making process in companies- "Resolution"	58
Powers of the Board	59
Delegation of Powers	60
Secretarial Standards	60
Introduction	60
Secretarial Standard on Board Meetings (SS-1)	61
Guidance on the Provisions of SS-1	62
Convening a Meeting	62
Manner of conducting requisitioned Meeting	62
Day, Time, Place, Mode and Serial Number of Meeting	62
Notice of the meeting	62

Frequency of Meetings	66
Quorum	67
Attendance at Meetings	68
Chairman	71
Passing of Resolution by Circulation	72
Minutes	74
Disclosure	80
Annexure I	80
Annexure IA	82
Annexure IB	83
Annexure IC	84
Annexure ID	85
Annexure IE	86
Annexure IF	86
Annexure II	87
Annexure III	88
Annexure IV	89
Annexure V	93
Annexure VI	96
Annexure VII	96
Annexure VIII	102
Secretarial Standard on General Meetings: (SS-2)	105
Scope	105
Guidance on the Provisions Of SS-2	106
Practical Aspects of Drafting Resolutions and Minutes	121
Resolutions	121
Specimen Attendance Slip	124
Annexure II	124
Annexure III	129
Annexure V	133
Annexure VI	133
Annexure VII	134
Annexure VIII	135
Annexure IX	136



Annexure X	136
Annexure XI	137
Annexure XIII	137
Annexure XIV	138
Annexure XV	138
Annexure XVII	139
Annexure XVIII	140
Annexure XIX	144
LESSON ROUND UP	146
TEST YOURSELF	146

## **LESSON 4**

### **DRAFTING AND CONVEYANCING RELATING TO VARIOUS DEEDS AND DOCUMENTS (I)**

Drafting of Agreements	150
Form of Contract	150
Important Points in Regard to Drafting of Contracts	150
Additional Guidelines Regarding Agreement to Sell/Purchase	152
Contracting Parties	152
Consideration	153
Subject Matter	153
Time for Performance	153
Drafting of an Agreement	153
Attestation, Registration and Stamp Duty	154
Terms and Conditions in the Agreement to Sell/Purchase	155
Building Contracts	157
Commercial Agency Contracts	160
Del Credere Agency	161
Ingredients of an Agency Contract	161
Collaboration Agreements	164
Guidelines for Entering into Foreign Collaboration Agreements	164
Arbitration Agreements	170
Pre-requisites of Arbitration	170
Submission of Dispute to Arbitration	170
Aim of Arbitration	171

Methods of Arbitration	171
Guarantees : Counter Guarantee, Fidelity Guarantee, Performance Guarantee, Bank Guarantee	173
Purpose of a Guarantee	174
Form of a Guarantee	174
Fidelity Guarantee	174
Construction of a Guarantee	174
Consideration for a Guarantee	175
Surety's Liability	175
Subrogation of Surety to the Rights of Creditor on Payment	175
Continuing Guarantee	175
Hypothecation Agreement	177
Outsourcing Agreements	179
Service Agreements	183
Contents of a Service Contract	183
Electronic Contracts (E-Contracts)	186
Essentials of E-Contract	187
Types of E-Contracts	187
Click-wrap or Web-wrap Agreements	187
The Shrink-wrap Agreements	188
Electronic Data Interchange or EDI	188
On-Line Shopping Agreement	188
Important Points in Regard to E-Contracts	188
Leave and License Agreement	191
Lease, License and Rental Agreements	192
Lease and License: Distinction	192
Factors to be Considered While giving out Premises on Leave & License Basis	193
Will	195
Who can make a Will?	195
Types of Wills	195
Privileged Will	195
Unprivileged Will	196
Language, Stamp Duty & Registration	196
A Will does not require any stamp duty.	196
Attestation	196

Construction of Wills	196
Probate	197
Letters of Administration	197
Broad Outlines	197
Relinquishment Deed	201
GIFT	203
Some Basic Aspects	203
Deed of Gift - How Made	204
Stamp Duty and Registration	205
Specimen Forms of Gift Deeds	205
LESSON ROUND UP	210
TEST YOURSELF	211

## LESSON 5

### DRAFTING AND CONVEYANCING RELATING TO VARIOUS DEEDS AND DOCUMENTS (II)

Promissory Note	214
Parties to a Promissory Note	214
Essentials of a Promissory Note	214
Deeds of Power of Attorney	216
Introduction	216
Who can Execute Power of Attorney	217
Form of Deed of Power of Attorney	217
Authentication of Power of Attorney	217
Duration of Power of Attorney	218
Revocable and Irrevocable Power of Attorney	218
Power of Attorney by a Company	218
Stamp Duty on Power of Attorney	219
Construction of a Power of Attorney	219
Registration of Power of Attorney	220
Hire-Purchase Deeds	230
Introduction	230
Deeds of Hire-Purchase Agreements	230
Minimum Payment Clause	231
Types of Hire-Purchase Agreements.	231

Stamp Duty and Registration	231
The Hire-Purchase Act, 1972	232
Model Forms of Hire-Purchase Agreements	237
Family Settlement Deeds	247
Concept of Family Arrangement	247
Essentials of Family Settlement	248
Family Arrangement When Enforceable?	249
LESSON ROUND UP	250
TEST YOURSELF	250

## **LESSON 6**

### **DRAFTING AND CONVEYANCING RELATING TO VARIOUS DEEDS AND DOCUMENTS (III)**

Deeds of Sale of Land and Building	254
Introduction	254
Essential Requirements of Sale of Immovable Property	254
Rights and Liabilities of Buyer and Seller	255
Documentation	255
Drafting of Deed of Sale of Immovable Property	255
Acquisition of Immovable Property by a Company	256
Specimen Forms for Deeds of Sale of Immovable Property	257
Sale by Liquidator of a Company in Voluntary Liquidation	265
A Specimen of Deed of Sale by Liquidator of a Company in Voluntary Liquidation	265
A Specimen of Deed of Sale by an Administrator under Orders of the Court	266
Sale of Business and Assignment of Goodwill	267
A Specimen of Deed of Sale of a Business and Assignment of Goodwill	267
Mortgage and its Types	269
Mortgage	269
Types of the Mortgages	269
Who can be Mortgagor and Mortgagee?	270
Rights of Mortgagee	271
Liabilities of Mortgagee	271
Rights and Liabilities of Mortgagor	271
Drafting of Deed of Mortgage	271
Further Charge	273

Appointment of Receiver under Mortgage	273
Release and Reconveyance of Mortgaged Assets	274
Deed of Simple Mortgage	274
Deed of Mortgage by Conditional Sale	275
Deed of Usufructuary Mortgage	276
Deed of English Mortgage	277
Deed of Further Charge	278
Memorandum of Mortgage by Deposit of Title Deeds	278
License	281
License when Transferable	281
Revocation of License	281
Form of Deed of License	282
Registration and Stamp Duty	282
Specimen Forms of Licenses	282
Lease	284
Essential Points to be Observed for Drafting of Lease Documents	285
Drafting of a Lease	286
Sub-Lease	287
Surrender of Leases	287
Registration and Stamp Duty	287
Distinction between License and Lease	287
Specimen Forms of Leases	288
LESSON ROUND-UP	301
TEST YOURSELF	302

## **LESSON 7**

### **DRAFTING AND CONVEYANCING RELATING TO VARIOUS DEEDS AND AGREEMENTS-IV**

Deeds of Assignment	306
Assignment of Business Debt	306
Consideration for Assignment	306
Liability of Transferee of an actionable claim	307
Warranty of Solvency of a Debtor	307
Assignment of Shares in a Company	307
Assignment of Policies of Insurance	308

Assignment of Patents	309
Assignment of Trade Marks	311
Assignment of Copyrights	313
Assignment of Business and Goodwill and Other Rights and Interests	315
Partnership Deeds	317
Introduction	317
Partnership - Its Nature and Meaning	317
Who can be Partners	318
Registration of Partnership Firm	318
Registration of Partnership Firm under the Income-tax Law	318
Partnership Deed/How Made	319
Introduction of a New Partner	320
Retirement and Expulsion of Partners	320
Nomination of Successor	320
Purchase of Business by a Partner	320
Dissolution of Partnership	320
Execution and Attestation: Registration	321
Annexures	321
Trust Deeds	328
Introduction	328
Objects of Trust	329
Public and Private Trusts	329
Trusts among the Hindus and the Muslims	330
Creation of Trust	330
Instrument of Trust: How it is Drafted	330
Acceptance of Trust	331
Registration and Stamp Duty	331
Revocation and Extinction of Trusts	331
Annexures	333
LESSON ROUNDUP	347
TEST YOURSELF	348

## LESSON 8

### DRAFTING OF AGREEMENTS UNDER THE COMPANIES ACT

Promoter	350
----------	-----

Promoters' Contract – Pre-Incorporation Contracts	350
Agreement by Company Adopting Contract made on its behalf before its Incorporation	353
Memorandum of Association	354
Drafting of Memorandum	354
Article of Association	356
Entrenchment Provisions	357
Contents of Articles	357
Drafting of Articles	358
Underwriting and Brokerage Agreements	359
Power of a Company to Pay Brokerage/Underwriting Commission	360
Underwriting Contract	362
Shareholders' agreements	363
Enforceability of the Shareholder's Agreement	363
Contract of Appointment of Managing Director	367
Contract of Appointment of Manager	371
Contract of Appointment of Company Secretary	373
Deeds of Amalgamation of Companies: Transfer of Undertakings	376
Compromise and Arrangements	377
Arrangement	379
Slump Sale Agreement	379
LESSON ROUND UP	380
TEST YOURSELF	382

## LESSON 9

### PLEADINGS

Background of Indian System	384
Introduction	384
Object of Pleadings	385
Fundamental Rules of Pleadings	385
Pleading Civil	393
Plaint Structure	394
Written Statement	396
How to Draft a Written Statement	398
Drafting of Reply/Written Statement – Important Considerations	399

Dilatory Pleas	403
Interlocutory Application	403
Original Petition	404
Affidavit	404
Execution Petition	406
Memorandum of Appeal and Revision	407
Complaint	415
Criminal Miscellaneous Petition	415
Bail	416
First Information Report (FIR)	418
LESSON ROUND-UP	420
TEST YOURSELF	421

## LESSON 10

### ART OF WRITING OPINIONS

A. Introduction	424
B. Case for opinion writing	424
C. Types of Legal Opinion	425
D. Quality of Writing	425
E. Form and Elements of the Opinion Letter	426
F. Things to be kept in mind while preparing for opinion letter	431
G. Standards Applicable to Preparation of an Opinion	433
Writs	433
Types of Writs	434
LESSON ROUNDUP	440
TEST YOURSELF	440

## LESSON 11

### APPEARANCES AND ART OF ADVOCACY

Introduction	444
Right to Legal Representation	444
Under the Companies Act, 2013	444
Under the TRAI Act, 1997	444



Under the SEBI Act, 1992	444
Under the Competition Act, 2002	444
Under Real Estate (Regulation and Development) Act, 2016	444
Appellate Authorities under the Companies Act, 2013	445
Constitution of National Company Law Tribunal	445
Constitution of Appellate Tribunal	445
Appeal from Orders of Tribunal	445
Appeal to Supreme Court	445
Registrars of Companies	446
Regional Directors	446
Appellate Authorities Under SEBI Act	446
Appeal to the Securities Appellate Tribunal.	446
Appellate Authorities under the Income-Tax Act, 1961	446
Appeal to Commissioner (Appeals)	447
Appeal by Person Denying Liability to Deduct Tax	447
Appeals to Appellate Tribunals	447
Statement of the Case to the High Court	448
Statement of Case to the Supreme Court	448
Appeal to the Supreme Court	449
Appellate Authorities under Real Estate (Regulation and Development) Act, 2016	449
Real Estate Regulatory Authority	449
Real Estate Appellate Tribunal	449
Directorate of Enforcement	449
Drafting of Affidavit In Evidence – Important Considerations	450
Rule of Adverse Inference	451
Arguments on Preliminary Submissions	451
Arguments on Merits	452
Legal Pleadings/Written Submissions	452
Dress Code	452
Guidelines for Professional Dress of Company Secretaries	453
Professional Etiquettes	453
Dressing Etiquette	454
Handshake Etiquette	454
Communication Etiquettes	455

Invitation Etiquette	455
Dining Etiquettes	455
Court Craft	456
Preparatory Points	456
Drafting of Pleadings	456
Oral Pleadings	457
While Presenting Your Case	457
As Regards Advocacy	458
Conduct and Etiquette	458
Duty to the Court	458
Duty to Client	459
Duty to Opponent	459
Important Principles	459
Advocacy Tips	460
LESSON ROUND-UP	460
TEST YOURSELF	461
<b>TEST PAPERS</b>	<b>482</b>

# Lesson 1

## Judicial and Administrative Framework

### LESSON OUTLINE

- Legislative Functions of Administration
- Types of Tribunals/Quasi-Judicial Bodies
- Types of Courts
- Supreme Court
- High Court
- Civil Court
- Revenue Court
- Procedural aspects of working of Civil courts
- Procedural aspects of working of Criminal court
- Appellate forum
- Reference, Review and Revisions under CPC
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

The word jurisdiction is used in various contexts. It means legal authority, extent of power and limitation on such powers. It is a term of comprehensive import embracing every kind of judicial action. It means power and authority of the court to hear and determine a judicial proceeding and power to render particular judgement in question. In other words it is the right and power of the court to adjudicate the subject matter in a given case. Jurisdiction in a wide sense means the extent of the power of the court to entertain suits, appeals and applications. In its technical sense jurisdiction means the extent of the authority of a court to administer Justice not only with reference to the subject-matter of the suit but also to the local and pecuniary limits of its jurisdiction.

The meaning of the word “jurisdiction” has been expounded with some detail in a Full Bench case in *Hriday Nath Roy v. Ram Chandra*, (A.I.R. 1921 Cal. 34). The following passage from the judgment of the said case is relevant in this connection:

“In the order of reference to a Full Bench in the case of *Sukhlal v. Tara Chand*, [(1905) 33 Cal. 68], it was stated that jurisdiction may be defined to be the power of Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

The objective of the study lesson is to make the students understand the judicial and administrative framework.

## LEGISLATIVE FUNCTIONS OF ADMINISTRATION

In view of the multifarious activities of a welfare state, the legislature cannot work out all the details to fit the varying aspects of complex situations. It must necessarily delegate the working out of details to the executive or any other agency. Therefore, one of the most significant developments of the present century is the growth in the legislative powers of the executives. There is no such general power granted to the executive to make law, it only supplements the law under the authority of legislature. This supplementary legislation is known as 'delegated legislation' or 'subordinate legislation'. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law.

### Necessity and Constitutionality

The Parliament cannot supply the necessary quantity and quality legislation for effectively running the country. Some of the limitation of the law making role of the Parliament are:

- i) The Parliament sits only for a limited period of time whereas the complexity of modern administration requires that there must be a law-making body available on tap. Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.
- ii) The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.
- iii) Certain matters covered by delegated legislation are of technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. Legislature cannot provide for such matters as the members are at best politicians and not experts in various spheres of life.
- iv) Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration.
- v) The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitably utilized.

However, the attitude of the jurists towards law making by the executive has not been unanimous. The practice of delegated legislation was considered to promote centralization. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. It was believed that law making by the administration would lead to increased governmental interference in individual activity and usurpation of legislative power by the executive. Increased governmental functions and complexity, however, have ensured that delegated legislation cannot be wished away.

### Constitutionality

Under the Constitution of India, Articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The power of Legislature to delegate its legislative power is not prohibited in the Constitution.

There are number of judicial pronouncements by the courts where they have justified delegated legislation. For e.g. In re *Delhi Laws Act case*, AIR 1961 SC 332; *Vasantlal Magan Bhai v. State of Bombay*, AIR 1961 SC 4; *S. Avtar Singh v. State of Jammu and Kashmir*, AIR 1977 J&K 4.

While commenting on indispensability of delegated legislation Justice Krishna Iyer observed in the case of *Arvinder Singh v. State of Punjab*, AIR 1979 SC 321, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization. Delegation of some part of legislative power becomes a compulsive necessity for viability.

There are risks inherent in the process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may-

- a) not lay down any policy at all;
- b) declare its policy in vague and general terms;
- c) not set down any standard for the guidance of the executive;
- d) confer an arbitrary power to the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation.

Delegation is permissible so long as the Legislature does not abdicate its law making role in favour of the executive. When a legislature is given plenary power to legislate on a particular subject, there must also be an implied power to make laws incidental to the exercise of such power. A legislature cannot certainly strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law making has to be discharged by the legislature itself but delegation may be resorted to as a subsidiary or ancillary measure. (*Edward Mills Co. Ltd. v. State of Ajmer*, (1955) 1. S.C.R. 735)

Mahajan C.J. in *Hari Shankar Bagla v. State of Madhya Pradesh*, A.I.R. 1954 S.C. 555, had observed: "The Legislature cannot delegate its functions of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The legislature must declare the policy of the law and the legal principles which are to control and guide cases and must provide a standard to guide the officials of the body in power to execute the law".

Therefore the extent to which delegation is permissible is well settled. The legislature cannot delegate its essential legislative policy and principle and must afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf. (*Vasant lal Maganbhai Sanjanwala v. State of Bombay*, A.I.R. 1961 S.C. 4).

The guidance may be sufficient if the nature of things to be done and the purpose for which it is to be done are clearly indicated. The policy and purpose may be pointed out in the section conferring the powers and may even be indicated in the preamble or elsewhere in the Act.

In dealing with the challenge the vires of any Statute on the ground of excessive delegation, it is necessary to enquire whether the impugned delegation involves the delegation of an essential legislative functions or power because excessive delegation is a ground for invalidity of statute. In *Vasant Lal's case* (A.I.R. 1961 S.C. 4). Subba Rao, J. observed as follows; "The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another." The self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for the Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits.

Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to

#### 4 PP-DP&A

abdication of power if resorted to within proper limits. The delegation should not, in any case, be unguided and uncontrolled. Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a non-essential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and non-essential legislative functions.

#### Forms and Requirements

Law making by the administration can take various forms. It can be in the form of rules, regulations, bye-laws etc. In the case of this normal type of delegated legislation, the limits of the delegated power are clearly defined in the enabling statute and they do not include such exceptional powers as the power to legislate on matters of principle or to impose taxation or to amend an act of legislature.

There are various types of delegation of legislative power:

1. Skeleton delegation: In this type of delegation of legislative power, the enabling statutes set out broad principles and empowers the executive authority to make rules for carrying out the purposes of the Act. A typical example of this kind is the Mines and Minerals (Regulation and Development) Act, 1948.
2. Machinery type: This is the most common type of delegation of legislative power, in which the Act is supplemented by machinery provisions, that is, the power is conferred on the concerned department of the Government to prescribe –
  - i) The kind of forms
  - ii) The method of publication
  - iii) The manner of making returns, and
  - iv) Other administrative details

Another form of delegated legislation is the 'removal or difficulty clause' in any Act itself. Usually such a power comes with a time limit within which it can be exercised. The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power. The power to make such a modification no doubt, implies certain amount of discretion but it is a power to be exercised in aid of the legislative policy of the Act and cannot

- i) travel beyond it, or
- ii) run counter to it, or
- iii) change the essential features, the identity, structure or the policy of the Act.

#### Requirements

**The following requirements are made necessary for the exercise of the delegated authority under different statutes:**

- i. Prior consultation of interests likely to be affected by proposed delegated legislation. Legislatures while delegating powers abstain from laying down elaborate procedure to be followed by the delegates but certain Acts do however provide that interested bodies must be consulted before the formulation and application of rules and regulations. The object is to ensure the participation of affected interests so as to avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated.
- ii. Prior publicity of proposed rules and regulations: Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them

to make representation for consideration of the rule-making authority. The rules of publication provide that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper.

- iii. Publication of Delegated Legislation - Adequate publicity of delegated legislation is absolutely necessary to ensure that law may be ascertained with reasonable certainty by the affected persons. Further the rules and regulations should not come as a surprise and should not consequently bring hardships which would naturally result from such practice. If the law is not known a person cannot regulate his affairs to avoid a conflict with them and to avoid losses. The importance of these laws is realised in all countries and legislative enactments provide for adequate publicity.
- iv. Laying: After delegation is sanctioned in an Act, the exercise of this power by the authority concerned receives the attention of the House of the Parliament. Indeed, it is this later stage of parliamentary scrutiny of the delegated authority and the rules as framed in its exercise that is more important. In a formal sense, this is sought to be provided by making it necessary that the rules, etc., shall be laid on the Table of the House. The provisions for laying the rule, etc., are being made now practically in every Act which contains a rule making provision.

### Modes of control over delegated legislation

The practice of conferring legislative powers upon administrative authorities though beneficial and necessary is also dangerous because of the possibility of abuse of powers and other attendant evils. There is consensus of opinion that proper precautions must be taken for ensuring proper exercise of such powers. Wider discretion is most likely to result in arbitrariness. The exercise of delegated legislative powers must be properly circumscribed and vigilantly scrutinized by the Court and Legislature

The control of delegated legislation may be one or more of the following types: -

- 1) Procedural;
- 2) Parliamentary; and
- 3) Judicial

#### 1) Procedural

**Control of delegated legislation by procedure** – From the citizen's point of view the most beneficial safeguard against the dangers of the misuse of delegated legislation is the development of a procedure to be followed by the delegates while formulating rules and regulations. The Acts of Parliament delegating legislative powers to other bodies or authorities often provide certain procedural requirements to be complied with by such authorities while making rules and regulations etc. These formalities may consist of consultation with interested bodies, publication of draft rules and regulations, hearing of objections, considerations of representations etc.

If the formal requirements are mandatory in nature and are disregarded by the said authorities then the rules etc. so made by these authorities would be invalidated by the Judiciary. In short, subordinate legislation in contravention of mandatory procedural requirements would be invalidated by the court as being ultra vires the parent statute. The question of the effectiveness of the application of the doctrine of ultra vires, so far as procedure is concerned, would largely depend upon the words used in the particular statute. If the words are specific and clearly indicate the bodies to be consulted, then it would be possible to show noncompliance. On the other hand, if the procedural requirements were merely of directory nature, then a disregard thereof would not affect the validity of subordinate legislation.

The question whether particular procedural requirements are mandatory or directory must be examined with care. In case the statute provided for the effect of noncompliance of such requirements, then it is



## 6 PP-DP&A

to be followed by the courts without difficulty. But uncertainty creeps in where the statute is silent on the point and decision is to be made by the judiciary. The courts in determining whether the provisions to this effect in a particular Statute are mandatory or directory are guided by various factors. They take into consideration the whole scheme of legislation and particularly evaluate the position of such provisions in their relation with the object of legislation. The nature of the subject matter to be regulated, the object of legislation, and the provisions as placed in the body of the Act must all be considered carefully, so as to find out as to what was the intention of the legislature.

### 2) Parliamentary

Parliamentary control in India over delegation: Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated. In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions.

In India, the question of control on rule-making power has always engaged the attention of the Parliament. Parliamentary control of delegated legislation is exercised:

- A) Through Parliamentary debate on the provisions of a Bill providing for delegation. During such debates the issue of necessity of delegation and the contents of the provisions providing for delegation can be taken up.

The Bills tabled in the Parliament are generally accompanied with Memoranda of Delegated Legislation in which; -.

- i) full purpose and effect of the delegation of power to the subordinate authorities,
  - ii) the points which may be covered by the rules,
  - iii) the particulars of the subordinate authorities or the persons who are to exercise the delegated power, and
- B) By getting them scrutinized by Parliamentary Committee of the Rules, Regulations, Bye-laws and Orders. Under the Rule of Procedure and Conduct of Business of the Lok Sabha, provision has been made for a Committee which is called 'Committee on Subordinate Legislation'. It is usually presided over by a Member of the Opposition. The Committee examines whether:-
  - i) the statutory rules, orders, bye-laws, etc. made by any-making authority, and reports to the House whether the delegated power is being properly exercised within the limits of the delegated authority, whether under the Constitution or an Act of Parliament.
  - ii) the Subordinate legislation is in accord with the general objects of the Constitution or the Act pursuant to which it is made;
  - iii) it contains matter which should more properly be dealt within an Act of Parliament;
  - iv) it contains imposition of any tax;
  - v) it, directly or indirectly, ousts the jurisdiction of the courts of law;
  - vi) it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly confer any such power;
  - vii) it is constitutional and valid;
  - viii) it involves expenditure from the Consolidated Fund of India or the Public Revenues;



- ix) its form or purpose requires any elucidation for any reason;
- x) it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; and

there appears to have been unjustifiable delay in its publication on its laying before the Parliament.

- C) By the Laying requirement (discussed above). The members are informed of such laying in the daily agenda of the House. The advantage of this procedure is that Members of both the Houses have such chances as to –
  - i) modify or repeal the enactment under which obnoxious rules and orders are made, or
  - ii) revoke rules and orders themselves.

### 3) Judicial

Judicial control over delegated legislature can be exercised at the following two levels :-

1) Delegation may be challenged as unconstitutional; that is the delegation can be challenged in the courts of law as being unconstitutional, excessive or arbitrary or

2) That the Statutory power has been improperly exercised.

1. The scope of permissible delegation is fairly wide. Within the wide limits delegation is sustained if it does not, otherwise, infringe the provisions of the Constitution. Article 13(3)(a) of the Constitution of India lays down that law, which includes any ordinances, order, by-law, rule, regulation, notification, etc. if found in violation of fundamental rights would be void. The limitations imposed by the application of the rule of ultra vires are quite clear. If the Act of the Legislature under which power is delegated is ultra vires, the power of the legislature in the delegation can never be good. If the Act violates any Fundamental Rights the rules, regulations and bye-laws framed there under cannot be better. Where the Act is good, still the rules and regulations may contravene any Fundamental Right and have to be struck down.

2. The court can inquire into whether delegated legislation is within the limits laid down by the statute. The validity of the rules may be assailed as the stage in two ways:-

- i) That they run counter to the provisions of the Act; and
- ii) That they have been made in excess of the authority delegated by the Legislature.

If a piece of delegated legislation were found to be beyond such limits, court would declare it to be ultra vires and hence invalid. The administrative authorities exercising legislative power under the authority of an Act of the Parliament must do so in accordance with the terms and objects of such statute. To find out whether administrative authorities have properly exercised the powers, the court have to construe the parent statute so as to find out the intention of the legislature. The existence and extent of the powers of administrative authorities is to be affixed in the light of the provisions of the parent Act. The method under these sub-heads for the application of the rule of ultra vires is described as the method of substantive ultra vires. Here the substance of rules and regulations is gone into and not the procedural requirements of the rule making that may be prescribed in the statute. The latter is looked into under the procedural ultra vires rule.

### Tribunals

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.

## 8 PP-DP&A

There are tribunals for settling various administrative and tax-related disputes, including Central Administrative Tribunal (CAT), Income Tax Appellate Tribunal (ITAT), National Company Law Tribunal (NCLT), Customs, Excise and Service Tax Appellate Tribunal (CESTAT), National Green Tribunal (NGT) and Securities Appellate Tribunal (SAT), among others.

Tribunals were added in the Constitution by Constitution (Forty-second Amendment) Act, 1976 as Part XIV-A, which has only two articles viz. 323-A and 323-B. Article 323A provides that a law made by the parliament may provide for establishment of an Administrative Tribunal for the Union and a separate Administrative Tribunal for each state or two or more states. Article 323 B empowers the parliament or state legislatures to set up tribunals for matters other than those mentioned under Article 323A.

### **Some of the important Tribunals are as follows:**

#### **1. Debt Recovery Tribunal (DRT)**

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 of the Banks and Financial Institutions.

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.

#### **2. National Company Law Tribunal**

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 1<sup>st</sup> 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:

- i) Company Law Board
- ii) Board for Industrial and Financial Reconstruction.
- iii) The Appellate Authority for Industrial and Financial Reconstruction
- iv) Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the High Courts.

#### **3. Consumer Forum**

To protect the rights of the consumers in India and establish a mechanism for settlement of consumer disputes, a three-tier redressal forum containing District, State and National level consumer forums has been set up. The District Consumer Forum deals with consumer disputes involving a value of upto Rupees twenty lakh. State Commission has jurisdiction in consumer disputes having a value of upto Rs.1 crore. The National Commission deals in consumer disputes above Rs.1 crores, in respect of defects in goods and or deficiency in service. It is important to note that consumer courts do not entertain complaints for alleged deficiency in any service that is rendered free of charge or under a contract of personal service.

#### 4. 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.

#### 5. 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 Articles 323A.

#### 6. 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.

### Types of Courts

Broadly speaking there are two types of courts- civil and criminal. The civil courts deal with matters of civil nature whereas the criminal courts deal with criminal matters. Then there are Constitutional Courts.

The framework of the current legal system has been laid down by the Indian Constitution and the judicial system derives its powers from it but the system has been inherited from the British rule that preceded independence. In India, we have courts at various levels – different types of courts, each with varying powers depending on the tier and jurisdiction bestowed upon them. They form a hierarchy with the Supreme Court of India at the top, followed by High Courts of respective states with District and Sessions Judges sitting in District Courts and Magistrates of Second Class and Civil Judge (Junior Division) at the bottom.

The normal trend of the judiciary system is to start any general dispute in the lower court which is then escalated to the higher courts. The judgments can be challenged in the higher courts if the parties to the cases are not satisfied. The process of escalation is systematic.

### Supreme Court of India

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. It plays the role of the guardian of the Constitution of India.

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. This court is also an appellate court.

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. Supreme Court has the power to withdraw or transfer any case from any High Court. The Supreme Court has the authority to review any verdict ordered. The order of Supreme Court is binding on all courts across India.

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.

## High Courts of India

Article 226 of Constitution of India has given the power to the High Courts to issue different writs for the enforcement of Fundamental Rights guaranteed under the Constitution. High Courts also hear appeals against the orders of lower courts. Article 227 of Indian Constitution has empowered all High courts to practice superintendence over all the courts and tribunals effective within the regional jurisdiction of the High Court. All the High Courts have the power to pronounce punishment for contempt of court. The High Courts are confined to the jurisdiction of State, group of States or Union Territory. The subordinate courts are covered by the administrative power of the High Courts under which they function.

## Lower Courts of India

The District Court in India are established by the respective State Government in India for every district or more than one district taking into account the number of cases, population distribution in the district. These courts are under administrative control of the High Court of the State to which the district concerned belongs.

The court at the district level has a dual structure that runs parallel- one for the civil side and one for the criminal side. The civil side is simply called the District Court and is headed by the district judge. There are additional district judges and assistant district judges who are there to share the additional load of the proceedings of District Courts. These additional district judges have equal power like the district judges for the jurisdiction area of any city which has got the status of metropolitan area as conferred by the state government. These district courts have the additional jurisdictional authority of appeal handling over the subordinate courts in their jurisdiction. The subordinate courts covering the civil cases, in this aspect are considered as Junior Civil Judge Court, Principal Junior and Senior Civil Judge Court, which are also known as Subordinate Courts. All these courts are treated with ascending orders.

The criminal court at the district level is headed by the Sessions Judge. Usually there are Additional Sessions Judges as well in the Court to share the workload of the Sessions Judge. The subordinate courts covering the criminal cases are Second Class Judicial Magistrate Court, First Class Judicial Magistrate Court, and Chief Judicial Magistrate Court along with family courts which are established to deal with the issues related to disputes of matrimonial issues only. The status of Principal Judge of family court is at par with the District Judge.

The court of the district judges is the highest civil court in a district. It exercises both judicial and administrative powers. It has the power of superintendence over the courts under its control. The parallel structure of law courts at the district level usually converges at the top and the head of the court has power of trying both civil and criminal cases. Thus he is designated as the District and Sessions Judge. It must also be borne in mind that name of the subordinate courts at the district level is not uniform across the States.

## Revenue Courts

There is a government apparatus to deal with revenue matters. These are 'courts' but are not a part of Judiciary because they come under the administration of the State governments. Revenue courts deal with matters pertaining to stamp duty, registration etc.

At the lowest level, we have the 'Tehsildar' or Assistant Tehsildar. Above it is the office of the 'Sub-Divisional Officer' (SDO). Then comes the office of District Collector and above it is the 'Board of Revenue'. The Board of Revenue is the highest decision making body at the State level.

## Procedural aspects of working of Civil Courts

### 1. Jurisdiction

The Civil Procedure Code, 1908 stipulates that the courts shall have jurisdiction to try all suits of a civil nature

excepting suits of which cognizance is either expressly or impliedly barred. The inherent lack of jurisdiction cannot be cured even by consent of parties, which means if the court does not have any jurisdiction at all; the parties cannot subsequently confer it by an agreement. The onus of proving that the court does not have jurisdiction lies on the party who disputes the jurisdiction. The jurisdiction is basically of three types.

- (a) Pecuniary
- (b) Territorial: The purpose of territorial jurisdiction is to ensure smooth and speedy trial of the matter with least inconvenience to the affected parties. Hence the suit cannot be filed at any place depending on wish of the party. The court concerned should have territorial jurisdiction. The territorial jurisdiction is conferred on a court by following factors:-
  - (i) By virtue of the fact of residence of the Defendant
  - (ii) By virtue of location of subject matter within jurisdiction of the court.
  - (iii) By virtue of cause of action arising within jurisdiction of such court.
- (c) As to subject matter: For example, Motor Vehicles Act provides for special tribunal for matters under it. Similarly disputes relating to terms of service of government servants go to Administrative Tribunals.

The first and fundamental rule governing jurisdiction is that suit shall be instituted in the court of lowest grade competent to try it.

## **2. Stay**

With the object of preventing courts of concurrent jurisdiction simultaneously trying two parallel suits in respect of the same matter in issue, Civil Procedure Code has vested inherent power in the court to stay the suit. The pendency of a suit in Foreign Court does not preclude the courts in India for trying a suit founded on same cause of action. The application for stay of suit is maintainable at any stage of the suit. The court does not have option to refuse on ground of delay.

## **3. Res Judicata and bar to further Suits**

The principle of res judicata aims at bringing finality to the litigation. The basic principle is that a final judgement 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:

- (i) 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.
- (ii) 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.

## **4. Plaint**

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. Though the law has not laid down any tight jacket formats for plaints, its minimum contents have been prescribed.

The Plaintiff is required to annex list of documents which the Plaintiff has produced along with the plaint and shall

## **12 PP-DP&A**

also submit additional copies as may be required. Where the Plaintiff sues upon a document in his possession or power he shall produce it in the court when plaint is presented. If the document is not in his possession, the Plaintiff will state in whose possession it is. A document, which has to be produced and has not been produced at the time of presenting the plaint cannot be received in evidence at the hearing of the suit without permission from the concerned court.

If after submitting the plaint the court finds that it should be submitted before some other court the plaint is returned, and intimation thereof is given to the Plaintiff.

The court has power to reject the plaint on following grounds:

- (i) Where it does not disclose the cause of action.
- (ii) Where the relief claimed is undervalued and Plaintiff fails to correct the valuation within the time fixed.
- (iii) If the relief is properly valued but insufficient court fee / stamp is paid and the Plaintiff fails to make good such amount.
- (iv) 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.

## **5. Summons**

When the suit is duly instituted summons may be issued to Defendant to appear and answer the claim. Summons is an instrument used by the court to commence a civil action or proceedings and is a means to acquire jurisdiction over party. It is a process directed to a proper officer requiring him to notify the person named, that an action has been commenced against him, in the court from where process is issued and that he is required to appear, on a day named and answer the claim in such action.

Defendant to whom a summons has been issued may appear in person or by a pleader duly instructed or by a pleader accompanied by some person who is able to answer all questions. To expedite the filing of reply and adjudication of claim, the court may direct filing of written statement on date of appearance and issue suitable summons for that purpose. Failure to do so may result in Ex-parte judgement. The provisions of substituted service have to be resorted when the summons is not served by normal process through the court bailiff.

Where the court is satisfied that there is reason to believe that the Defendant is keeping out of the way for purpose of avoiding service or that for any others reason the summons cannot be served in ordinary way the court shall order summons to be served by affixing copy thereof in conspicuous part of the house. To expedite service of summons one more provision is relating to substituted service under which the court orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the Defendant last resided or carried on business or personally worked for gain. Where the service is substituted, the court shall fix time for appearance of the Defendant as the case may require.

## **6. Appearance of Parties**

On the day fixed in the summons the Defendant is required to appear and answer and the parties shall attend the court unless the hearing is adjourned to a future day fixed by the court. If the Defendant is absent court may proceed ex-parte. Where on the day so fixed it is found that summons has not been served upon Defendant as consequence of failure of Plaintiff to pay the court fee or postal charges the court may dismiss the suit. Where neither the Plaintiff nor the Defendant appears the court may dismiss the suit. Such dismissal does not bar fresh suit in respect of same cause of action.



If the Defendant appears and Plaintiff does not appear and the Defendant does not admit the Plaintiff's claim wholly or partly, court shall pass order dismissing the suit. If Defendant appears and admits part or whole of the claim the decree will be passed accordingly. If the Plaintiff shows sufficient cause reopening of the matter is mandatory. What is sufficient cause depends upon facts and circumstances of each case and the court adopt liberal and generous construction which advances cause of justice and hence restoration is ordinarily not denied.

## 7. Adjournments

Courts have the power to adjourn a case and take it up on a future date. Adjournments frequently sought by the parties contribute significantly to the delays caused in deciding the matters. The granting of adjournments is at the discretion of the court. The rules governing adjournments are considerably strict if applied in their true spirit.

## 8. Ex-parte Decrees

A decree against the Defendant without hearing him or in his absence/in absence of his defence can be passed under the following circumstances:-

- (i) Where any party from whom a written statement is required fails to present the same within the time permitted or fixed by the court, as the case may be the court shall pronounce judgement against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgement a decree shall be drawn up.
- (ii) Where Defendant has not filed a pleading, it shall be lawful for the court to pronounce judgement on the basis of facts contained in the plaint, except against person with disability.
- (iii) Where the Plaintiff appears and Defendant does not appear when suit is called up for hearing and summons is properly served the court may make an order that suit will be heard ex parte.

If an exparte decree is passed and the Defendant satisfies that he was prevented by sufficient cause then he has the following remedies open:

- (i) Prefer appeal against decree.
- (ii) Apply for Review.
- (iii) Apply for setting aside the Ex-parte Decree.

The words "Sufficient Cause" has not been defined and it will depend on facts and circumstances of each case. The Defendant is not entitled to approach the court to set aside the exparte decree as a matter of right. An exparte decree is an equally effective decree unless set aside in appeal or by the same court. The court, which passed exparte decree, has the power to set aside the decree.

## 9. Interlocutory Proceedings

The period involved between initiation and disposal of litigation is substantially long. The intervention of the court may sometimes be required to maintain the position as it prevailed on the date of litigation. In legal parlance it is known as "status quo". It means preserving existing state of things on a given day. In that context interlocutory orders are provisional, interim, temporary as compared to final. It does not finally determine cause of action but only decides some intervening matter pertaining to the cause.

The procedure followed in the court is that the separate application for interim relief is moved at the time of filing of suit or at a subsequent stage. The court either grants the order ex-parte or issues urgent show cause notice and the reply is to be filed within short time.

One of the most common interlocutory reliefs sought is that of 'injunction'.

## **10. Written Statement**

The Defendant is required to file a written statement of his defence 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. 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.

## **11. Examination of Parties**

Examination of parties is an important stage after appearance. At first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement. Such admissions and denials shall be recorded. The examination may be an oral examination.

Where admission of facts have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for determination of any such question between the parties, make such order or give such judgement as it may think fit.

## **12. Production of documents**

The parties or their pleaders shall produce at or before the settlement of issues, all documentary evidence of every description in their possession or power, on which they intend to rely, and which has not been filed in the court or ordered to be produced.

No documentary evidence in the possession or power of any party, which should have been but has not been produced in accordance with the aforesaid requirements, shall be subsequently admissible. Any objection as to mode of proof is to be raised at the time when document is sought to be proved in evidence. When document is exhibited without any objection as to mode of proof, it is not proper for the court to take any objection regarding the mode of proof for providing the document at final stage.

Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents shall be deemed to be admitted. The court may however at its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.

## **13. Framing of Issues**

The court shall at first hearing, after reading the plaint and written statement ascertain upon what material propositions of facts or law parties are at variance.

Court is required to pronounce judgement on all the issues. Issues may be framed from allegations made on oath by the parties or in answer to interrogatories or from contents of documents produced by either party. If the court is of the opinion that the case or any part thereof may be disposed of on issue of law only, it may first try it, if issue relates to:-

- (i) Jurisdiction of the court,
- (ii) Bar to the suit created by law for the time being in force.

Where the parties are at issue on some question of law or fact and issues have been framed by the court as herein-above provided, if the court is satisfied that no further argument or evidence than what the parties can at once adduce is required upon such of the issues as may be sufficient for decision of the suit and that no injustice



will result from proceeding with the suit forthwith, the court may proceed to determine such issues and if the finding thereon is sufficient for the decision, may pronounce judgement accordingly.

#### **14. Summoning and Attendance of Witnesses**

On the date appointed by the court and not later than 15 days after the date on which issues are settled parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents.

The judge shall make or dictate on a typewriter or cause to be mechanically recorded, a memorandum of the substance of deposition of witnesses. A witness may be examined on commission also. If signature of witness is not taken on any part of deposition or correction it does not make deposition invalid. The court may at any stage of a suit inspect any property or thing concerning which any question may arise. The court also has the power to recall any witness who is already called earlier and put such questions as deemed fit. Court is also having suo moto powers. The court may of its own accord, summon and examine any witness including a party to the suit or strangers to the suit.

Where a person to whom summons has been issued either to attend or to give evidence or production of any documents and his deposition or production is material and person has failed to attend without lawful excuse, court may issue orders for arrest either with or without bail. If the witness appears such orders may be withdrawn.

#### **15. Affidavits**

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.

#### **16. Final Argument**

Once the documents have been exhibited in the court and the witness(es) of both the sides examined and cross-examined, the stage is set for 'final arguments'.

It allows both the sides to present its case after taking into account the submissions made by the witnesses of the other party and the documents produced by it. It can, therefore, be said to be an opportunity for both the sides to present a summary of their case or defence, as the case may be.

#### **17. Judgement**

Judgement means the statement given by the judge on ground of which a decree is passed. The court after the case has been heard shall pronounce judgement in open court either within one month of completion of arguments or as soon thereafter as may be practicable, and when the judgement is to be pronounced judge shall fix a day in advance for that purpose.

Where judgement is not pronounced within 30 days from the date on which hearing of case was concluded, the court shall record the reasons for such delay.

## 16 PP-DP&A

The last paragraph of the judgement shall indicate in precise terms the relief, which has been granted by such judgement. Every endeavor shall be made to ensure that the decree is drawn as expeditiously as possible and in any case within 15 days from the date on which the judgement is pronounced.

The court also has the power to award 'cost'. If on any date fixed for hearing, a party to the suit fails to take step or obtains adjournment for producing evidence, the court may also award costs for causing delay. If the court finds, that the claim or defence as against the objector is false or vexatious to the knowledge of the party by whom it has been put forward, and if such claim is disallowed, abandoned or withdrawn, court holding the claim false or vexatious may order compensatory costs.

## 18. Decree And Execution

After the decree is passed the process of execution which involves actual implementation of the order of the court through the process of the court starts the entire process of executing of decree.

### Procedural aspects of working of criminal courts

Code of Criminal Procedure (CrPC), 1973 is the procedural law for conducting a criminal trial in India. The procedure includes the manner for collection of evidence, examination of witnesses, interrogation of accused, arrests, safeguards and procedure to be adopted by police and courts, bail, the process of criminal trial, a method of conviction, and the rights of the accused of a fair trial by principles of natural justice.

A criminal court is usually set in motion with the registration on a First Information Report (FIR) under the CrPC. Indian Penal Code (IPC) is the primary penal law of India, which applies to all offences. Indian Evidence Act is a comprehensive, treatise on the law of evidence, which is used in the trial, the manner of production of the evidence in a trial, and the evidentiary value which can be attached to such evidence.

### TYPES OF CRIMINAL TRIAL

According to the Code of Criminal Procedure, a criminal trial is of three types. Depending upon the type of criminal trial the different stages of a criminal trial are discussed below.

#### 1. Warrant Cases

According to Section 2(x) of Code of Criminal Procedure, 1973 a warrant case is one which relates to offences punishable with death, imprisonment for life or imprisonment for a term exceeding two years. The trial in warrant cases starts either by the filing of FIR in a police station or by filing a complaint before a Magistrate. Later, if the Magistrate is satisfied that the offence is punishable for more than two years, he sends the case to the Sessions court for trial. The process of sending it to Sessions court is called "committing it to Sessions court".

#### Important features of a warrant case are:

- Charges must be mentioned in a warrant case
- Personal appearance of accused is mandatory
- A warrant case cannot be converted into a summons case
- The accused can examine and cross-examine the witnesses more than once.
- The Magistrate should ensure that the provisions of Section 207 are complied with. Section 207 of Cr. P.C. 1973, include the supply of copies such as police report, FIR, statements recorded or any other relevant document to the accused.

The stages of trial in warrant cases are given from Section 238 to Section 250 of the Code of Criminal Procedure, 1973.

### A. Different Stages of Criminal Trial in a Warrant Case when instituted by the police report

- **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 commission 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 defense can produce both oral and documentary evidence.
- **Judgement:** The final decision of the court with reasons given in support of the acquittal or conviction of the accused is known as judgement. In case the accused is acquitted, the prosecution is given time to appeal against the order of the court. When the person is convicted, then both sides are invited to give arguments on the punishment which is to be awarded. This is usually done when the person is convicted of an offence whose punishment is life imprisonment or capital punishment.

### B. Stages of Criminal Trial in a Warrant Case when Private Complaint institutes case

It may sometimes happen that the police refuses to register an FIR. In such cases one can directly approach the criminal court under Section 156 of CrPC. On the filing of the complaint, the court will examine the complainant and its witnesses to decide whether any offence is made against the accused person or not. After examination of the complainant, the Magistrate may order an inquiry into the matter by the police and to get him submit a report for the same.

- After examination of the complaint and the investigation report, the court may come to a conclusion whether the complaint is genuine or whether the prosecution has sufficient evidence against the accused or not. If the court does not find any sufficient material through which he can convict the accused, then the court will dismiss the complaint and record its reason for dismissal.

- After examination of the complaint and the inquiry report, if the court thinks that the prosecution has a genuine case and there are sufficient material and evidence with the prosecution to charge the accused then the Magistrate may issue a warrant or a summon depending on the facts and circumstances.

## 2. Summons Cases

According to Section 2(w) of Code of Criminal Procedure, 1973, those cases in which an offence is punishable with an imprisonment of fewer than two years is a summons case. A summons case doesn't require the method of preparing the evidence. Nevertheless, a summons case can be converted into a warrant case by the Magistrate if after looking into the case he thinks that the case is not a summons case.

### Important points about summons case

- A summons case can be converted into a warrant case.
- The person accused need not be present personally.
- The person accused should be informed about the charges orally. No need for framing the charges in writing.
- The accused gets only one opportunity to cross-examine the witnesses.

The different stages of criminal trial in a summons case are given from Section 251 to Section 259 of the Code of Criminal procedure.

### Stages of Criminal Trial in a Summons Case

- **Pre-trial:** In the pre-trial stage, the process such as filing of FIR and investigation is conducted.
- **Charges:** In summons trials, charges are not framed in writing. The accused appears before the court or is brought before the court then the Magistrate would orally state the facts of the offence he is answerable.
- **Plea of guilty:** The Magistrate after stating the facts of the offence will ask the accused if he pleads guilty or has any defense to support his case. If the accused pleads guilty, the Magistrate records the statement in the words of the accused as far as possible and may convict him on his discretion.
- **Plea of guilty and absence of the accused:** In cases of petty offences, where the accused wants to plead guilty without appearing in the court, the accused should send a letter containing an acceptance of guilt and the amount of fine provided in the summons. The Magistrate can on his discretion convict the accused.
- **Prosecution and defense evidence:** In summons case, the procedure followed is very simple and elaborate procedures are eliminated. If the accused does not plead guilty, then the process of trial starts. The prosecution and the defense are asked to present evidence in support of their cases. The Magistrate is also empowered to take the statement of the accused.
- **Judgement:** When the sentence is pronounced in a summons case, the parties need not argue on the quantum of punishment given. The sentence is the sole discretion of the judge. If the accused is acquitted, the prosecution has the right to appeal. This right to appeal is also extended to the accused.

## 3. Summary Trial

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 judgement 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.

### Appellate Forum

Any society that claims to uphold the supremacy of law will definitely have an elaborate provision for appeal under its various laws. This is because the majesty of judiciary notwithstanding, at the end of the day, judges are human beings and they can also be at fault just like any other individual. It is a fundamental tenet of a just society that the shortcomings of men should not operate to the disadvantage of fellow human beings in the courts of law. The system of Appeal provides an opportunity to correct judicial orders which otherwise would operate unjustly. Indian legal system has made sufficient provisions for appeal both under the Civil Procedure Code as well as the Criminal procedure Code. Various laws themselves have specific provisions for appeal.

Under the Civil Procedure Code, an appeal may be an appeal from order or an appeal from decree. All orders are not appealable and complete description of the appellable orders has been given in Order 43 of the Code of Civil Procedure. The appeal has to be preferred within prescribed limitation period before the appellate court. The limitation period for appeal to High Court is 90 days and appeal to District Court is 30 days. If the period of limitation is expired, then application for condonation of delay also is required to be moved.

The Code of Criminal Procedure, 1973 also contains elaborate provisions on appeals against a judgment or order of the criminal courts. Appeals to the Sessions Court and to the High Court are largely governed by the same set of rules and procedure. But the High Court being the highest appellate court within a state, has been given primacy in many cases where appeal is permissible.

Thus, District and Sessions Court and High Courts are the most common appellate forums.

The Supreme Court is the appellate court of last resort and enjoys very wide plenary and discretionary powers in the matters of appeal. Under Article 136 of the Constitution, the Supreme Court also enjoys a plenary jurisdiction in matters of appeal. However, Article 136 is not a regular forum of appeal at all. It is a residual provision which enables the Supreme Court to interfere with the judgment or order of any court or tribunal in India in its discretion.

Indian laws that have constituted Tribunals for dispute settlement or grievance redressal have constituted appellate forum. For example, under the Companies Act, 2013 the appellate forum is National Companies Law Appellate Tribunal (NCLAT) if one wants to challenge the order of National Company law Tribunal. Similarly, the appellate tribunal for SEBI is Securities Appellate Tribunal (SAT) and for Debt Recovery Tribunal is Debt Recovery Appellate Tribunal (DRAT). Some of the laws like the Companies Act provide that matters from appellate tribunal (NCLAT) will go directly to the Supreme Court and not to the High Courts.

As appeal by itself shall not operate as stay of proceedings under the decree or order, except when directed otherwise by the appellate court, the execution of decree passed by the lower court also shall not be stayed for the mere reason that appeal is preferred.

### Reference and Revision under Criminal Procedure Code

#### Reference

Section 395 of Code of Criminal Procedure, 1973 (Cr.P.C.) empowers a Court subordinate to the High Court to

make a reference to the High Court under sub-section (1) if following conditions exist: –

- (1) The case pending before it must involve a question as to validity of any Act, Ordinance or Regulation. A mere plea raised by a party challenging the validity of an Act is not sufficient to make a reference to the High Court unless the Court itself is satisfied that a real and substantial question as to validity of the Act is actually involved for the disposal of the case.
- (2) Secondly, the Court should be of the opinion that such Act, Ordinance Regulation, as the case may be, is invalid or inoperative but has not been so declared by High Court or by the Supreme Court.
- (3) While making a reference to the High Court, the Court shall refer to the case setting out its opinion and reasons for making a reference.

The section does not permit a reference with a view to resolve a conflict of authority where different views on a certain point of law have been expressed by some High Court, the reason being that the Court desiring to make a reference is supposed to follow the law laid down by the High Court to which it is subordinate.

It is necessary for the Court making a reference to give its own opinion on the law which is sought to be referred to for clarification because the High Court is not expected to answer hypothetical questions of law however interesting or important they might be.

## Revision

Sections 397 to 401 of the Code deal with the revisional jurisdiction of the High Court and the Sessions Court. Revision lies both in pending and decided cases and it can be filed before a High Court or a Court of Session. Very wide discretionary powers have been conferred on the Sessions Court and the High 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.

The purpose of revision is to enable the revision court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the inferior criminal court.

Section 397 empowers the High Court and the Sessions Judge to call for records of any inferior Criminal Court and examine them for themselves as to whether a sentence, finding or order of such inferior Court is legal, correct or proper and whether the proceedings of such Court are regular or not, with a view to prevent miscarriage of justice and perpetuation of illegality.

The High Court or the Sessions Judge have the power to interfere at any stage of the proceeding, i.e., the case and they are under a legal duty to interfere when it is brought to their notice that some person has been illegally prosecuted or subjected to harassment, or some material error of law or procedure has been committed by an inferior Court which has resulted in miscarriage of justice.

The cases of wrong exercise of jurisdiction or non-exercise of jurisdiction or improper appreciation of evidence etc. call for interference of the High Court or the Sessions Judge under Section 397.

The provisions of Section 397 are attracted under the following conditions: –

- (a) The proceedings must be that of an inferior Criminal Court;
- (b) The term 'inferior Court' includes all Magistrates whether judicial or Executive, exercising original or appellate jurisdiction. They shall be deemed to be inferior to the Sessions Judge for the purposes of Sections 397 and 398. The Court of District Magistrate shall also be an inferior Court to the Sessions Judge for the purpose of this section;



- (c) Such inferior Court must be situate within the local limits of the jurisdiction of the revisional Court; and
- (d) The purpose of calling records by the revisional Court should be to enable itself to satisfy as to correctness or legality of any finding, sentence or order recorded or passed or to examine the regularity of any proceedings of such inferior Court.

The revisional jurisdiction of the High Court or a Sessions Judge under Section 397 extends only to the 'inferior Criminal Courts' and it does not include a civil or revenue Court acting under Section 340 of Cr.P.C. The Sessions Judge is inferior to the High Court and, therefore, the High Court can call for and examine the record of any proceeding before the Sessions Judge.

### **Proceeding:**

The term 'proceeding' used in Section 397 (1) has a very wide connotation. It is not only confined to cases related to a commission or trial of an offence but include all judicial proceedings taken before an inferior Criminal Court even though they are not related to any specific offence. The real test is not the nature of the proceeding but nature of Court in which such proceeding is held. If it is held in an inferior Criminal Court, the revisional jurisdiction of the High Court or Sessions Judge would extend to such proceeding under Section 397 (1).

The revisional Court has the power to order the release of offender on bail or bond under Section 397 (1). The discretion in this regard should, however, be used judicially considering all the circumstances of the case. Dismissal of revision by the High Court without assigning reasons is not sustainable and matter may be remitted to the Court for reconsideration.

### **Interlocutory Order:**

Sub-section (2) section 397 bars the exercise of revisional power in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. The statutory bar on the power of revision in relation to interlocutory orders is intended with the object of eliminating inordinate delay in the disposal of criminal cases and to ensure expeditious trials.

What is an interlocutory order has always been a debatable issue, more so, because it has not been defined anywhere in the Code of Criminal Procedure. An order which is not final but merely provisional or temporary is generally called an interlocutory order. But the true test of determining whether or not, an order is interlocutory in nature is whether the order in question finally disposes of the rights of the parties or leaves the case still alive and undecided. For instance, grant or cancellation of bail, adjournment of cases, etc. are interlocutory orders.

The Supreme Court has, however, held that the term 'interlocutory order' as used in Section 397(2) should be given liberal construction in favour of the accused in order to ensure fairness of the trial and the revisional power of the High Court or the Sessions Judge could be attracted to 'intermediate' or 'quasi-final' orders which are not purely interlocutory in nature.

### **No Second revision:**

Sub-section (3) of Section 397 permits only one revision therefore if an application is made to a Sessions Judge and he is of the opinion that it should be referred to the High Court, then a fresh application for revision can be made to the High Court. But the sub-section bars an application for the revision to the High Court if a person has already applied for it to the Sessions Judge or vice versa.

A person can directly move a revision application to the High Court without first approaching the Sessions Judge. But if he moves the Sessions Judge he cannot thereafter approach the High Court for another revision.

## 22 PP-DP&A

The general rule in this regard is that a concurrent jurisdiction is conferred on two Courts, the aggrieved party should ordinarily first approach the inferior Court, i.e., the Sessions Judge in the context of Section 397(3) unless exceptional grounds for taking the matter directly to the higher Court (High Court in this case) are made out.

Under Section 398 Cr PC, the revision Court may make an order for further inquiry. Further inquiry entails supplemental inquiry upon fresh evidence. The power under Section 398, Cr PC is not co-extensive with Section 397, Cr PC but extends far wider as the record can 'otherwise' be examined by the revision Court without recourse to Section 397, CrPC.

Sessions Judge's powers of revision (Section 399 of CrPC)

- (1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Section 401(1) of the Code.
- (2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, applied to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.
- (3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

Thus, while hearing a case records of which have been called for revision by himself, the Sessions Judge has the same powers as the High Court has under Section 401 of the Code. It would appear from Section 399(3) of the Code that, while a person has the choice to move either the High Court or the Sessions Judge under Section 397 of the Code, if he chooses to go before the Sessions Judge, he cannot thereafter go before the High Court even if the Sessions Judge rejects his revision application.

An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Section 401 deals with the powers of the High Court as a Court of revision. It is a discretionary jurisdiction vested in the High Court which should be exercised sparingly to decide questions as to legality, propriety, regularity or correctness of any finding, sentence or order recorded or passed by the inferior Criminal Court. The section also empowers the High Court to direct tender of pardon to the accused as contemplated by Section 307.

The High Court can exercise revisional powers under this section either suo motu, that is, on its own initiative or on a petition of any aggrieved party or any other person. The exercise of revisional power by the High Court is, however, subject to two limitations which are as follows:

- (1) Where a person or someone on his behalf has made an application for revision before the Sessions Judge under Section 399 (3), no further revision can be entertained by the High Court at the instance of such person; and
- (2) Where an appeal lies but it was not availed of by the person, no revision can be entertained by the High Court at the instance of the party who could have appealed but did not do so.

The High Court may even direct additional evidence to be taken in case of a revision against discharge of the accused in the interest of justice. But otherwise the jurisdiction of the High Court in a criminal revision is



drastically restricted and it cannot embark upon re-appreciation of the evidence.

Sub-section (1) of Section 401 provides that in the exercise of revisional jurisdiction the High Court may exercise any of the powers conferred on it as a Court of Appeal subject to exceptions specified there under. These exceptions are:

- (1) In an appeal, the High Court is empowered under Section 386 (a) to reverse an order of acquittal into conviction and vice versa, but in its revisional power it cannot convert a finding of acquittal into a conviction as per sub-section (3) of Section 401. It has no jurisdiction to convert finding of acquittal into one of conviction by seeking recourse to indirect method of ordering retrial.
- (2) In appeal, the High Court will interfere if it is satisfied about the guilt of the accused but in revision it may interfere only when it is brought to its notice that there has been miscarriage of justice.
- (3) An appeal cannot be dismissed unless the accused or his pleader is afforded an opportunity to be heard but in revision the accused is to be given opportunity to be heard only if the order to be passed is going to be prejudicial to him.

The revisional power of the High Court may be said to be wider in scope than its appellate powers in the sense that the High Court can correct irregularities or improprieties of procedure which come to its notice. Again, the provision of abatement of appeal on death of the accused does not apply to revision petition and it can exercise its revisional power even after the death of the accused.

As already discussed in the context of Section 397 (2) the High Court shall not use its revisional power in relation to an interlocutory order passed by an inferior criminal Court in any appeal, inquiry, trial or other proceeding.

Though the High Court is not empowered to set aside an order of acquittal in exercise of its revisional jurisdiction but where the acquittal is based on compounding of an offence and the compounding is invalid in law, such an acquittal may be set aside by the High Court in the exercise of revisional powers.

Though the High Court has no power to set aside an order of acquittal and convert it into conviction of the accused under this section but it has the power to direct re-trial of the case when there has been patent illegality or gross miscarriage of justice in the findings of the inferior Court.

The High Court should order re-trial of the case under its revisional jurisdiction only in very exceptional cases where the “interests of public justice require interference for the correction of gross miscarriage of justice”. It cannot be exercised merely because the inferior Court has misappreciated the evidence or taken a wrong view in interpreting any provision of law.

### **No Revision where right to Appeal exists:**

Sub-section (4) of section 401 provides that the party having right of appeal cannot apply for revision. The Cr.P.C. provides a remedy, by way of appeal under Chapter XXX and 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. It can itself call for the records of proceedings of any inferior criminal Court and has power to enhance the sentence by exercising its revisional jurisdiction.

### **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.

**Enhancement or Reduction of Sentence:**

The High Court, under its revisional jurisdiction does not exercise power of enhancing the sentence in every case in which the sentence passed appears to be inadequate. It would interfere when it is convinced that the sentence passed is manifestly and grossly inadequate.

The District Magistrate, a Sessions Judge or the Government pleader may draw the attention of the High Court to a sentence which is inadequate and deserves to be enhanced or the High Court can also suo motu call for the record of a particular case where it is of the opinion that the sentence awarded is grossly inadequate.

There is no limitation on the power of the High Court as regards enhancement of sentence to the extent of maximum prescribed by the Penal Code, except in cases tried by Magistrates. But before doing so, the Court has to be issued a show-cause notice against the enhancement of his sentence.

**Reduction:**

If after hearing the State, i.e., the Government pleader, the High Court comes to a conclusion that the sentence imposed on the accused is too severe and needs to be reduced, it may reduce it exercising its revisional jurisdiction. However, it cannot be reduced below the prescribed statutory limit, if any, provided in the Indian Penal Code or the relevant Act.

**Fact finding:**

The jurisdiction of the High Court in revision of criminal cases is severely restricted and confined only to the questions of law. It cannot embark upon a re-appreciation of evidence.

The High Court does not normally interfere with a concurrent finding of fact.

The High Court in exercise of its revisional power will not go into the question of sufficiency of material before the lower Court for its decision or order. Where the trial has dealt with the matter fully, the High Court will not interfere and disturb the order of the trial Court. While disposing of revision petition the High Courts must ensure that the principles of natural justice are not violated.

**Reference, Review and Revision under Civil Procedure Code****References**

**Reference under Section 113 and Order XLVI, Civil Procedure Code** – (a) A reference 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, should be made 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.

(b) A proviso has been added to Section 113 of the Code by the Codes of Civil Procedure and Criminal Procedure (Amendment) Act, 1951 (No. XXIV of 1951). Now where a Court finds that it is necessary for the disposal of a case to decide a question about the validity of any Act, Ordinance or Regulation and the Court is of the opinion that the Act, Ordinance or Regulation is invalid or inoperative but has not been so declared by the High Court of that State or the Supreme Court, the Court shall refer the matter in the manner laid down for the opinion of the High Court.

**“Reasonable doubt on a point of law”** – A subordinate Court cannot be supposed to entertain a reasonable doubt on a point of law if it has been decided clearly in a ruling of the High Court, unless some doubt has been thrown on the correctness of the same by a ruling of the Supreme Court. Nor has an Appellate Court, which has no jurisdiction to hear an appeal, any jurisdiction to make a reference.

**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.

**References under Order XLVI, Rule 7** – It should also be noted that, by the terms of Order XLVI, Rule 7, a reference may be made only when it appears to the District Court that a Court subordinate to it has by reason of erroneously holding a suit to be cognizable by a Court of Small Causes, or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested; unless this condition is fulfilled – that is, unless the Court is itself of opinion that one of these errors has been committed, – it has no power to refer; when that condition is fulfilled, the Court still has a discretion to make or refuse to make a reference unless it be required to make it by a party. In the latter case, the Court is bound to make a reference.

**References by Sub-Judge as a Court of appeal** – If a Subordinate Judge sitting as a Court of appeal is of opinion that a reference ought to be made under Order XLVI, Rule 7, of the Code of Civil Procedure, he should submit the record of the case to the District Judge for orders with a statement of reasons.

**Character of suit to be described in reference** – It is essential that the true character of the suit should be described with precision and accuracy in the heading of the reference.

**Parties should be heard before making reference** – A reference by a Civil Court under Order XLVI, Rule 6 or 7, of the Code of Civil Procedure shall not be made until the parties to the suit have had an opportunity of showing cause against such reference in the Court which proposes to make it.

**Objections of parties to be placed of record** – The Court making a reference under any of the sections mentioned in the preceding paragraph shall in its order of reference, certify that such opportunity has been given, and shall place on record the objections, oral or written (if any), of any party against the making of such reference.

**Notice of references to parties** – The Court making the reference shall give notice, either orally or in writing, to such parties as attended or are represented in Court when the order of reference is made –

- (i) that the attendance of the parties in the High Court at the hearing of the reference is not obligatory;
- (ii) that any party desirous of attending at such hearing must enter an appearance at the office of the Deputy Registrar on or before a date to be specified in the notice.

**Date fixed for appearance in High Court** – The date specified shall be such as to allow a reasonable time for the parties to appear in the High Court, and shall be a date not less than one month in advance of the date of making the reference.

**Court shall satisfy that parties have been informed** – The Court shall certify in its order (1) that the notice required by paragraph 12 has been duly given, orally or in writing as the case may be, and (2) the date specified in such notice.

While making reference under this rule court is not to submit its opinion on merits. *Ganga Datt and others v. Mandir Narayan Deota*, AIR 1953 HP 31.

**Necessary records to be sent along with order of reference** – The Court making the reference shall forward, with its order, the record of the suit in which the reference is made and of all proceedings (if any) by way of

execution or otherwise in such suit subsequent to the decree, and also the records of any other connected proceedings necessary for consideration of the reference in the High Court.

**Reminder from High Court if no reply received** – Whenever it is found that a reference made to the High Court has not been replied to, or intimation of a date having been fixed given within two months of making such reference, the attention of the Registrar should be drawn to the fact.

### **Review: Section 114 of Code of Civil Procedure 1908**

Review means re-examination or re-consideration of its own decision by the very same court. An application for review may be necessitated by way of invoking the doctrine '*actus curiae neminem gravabit*' which means an act of the court shall prejudice no man. The other maxim is, '*lex non cogit ad impossibilia*' which means the law does not compel a man to do that what he cannot possibly perform.

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. Section 114 of the code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47, Rule 1 of the CPC.

The section is worded as follows:

*114. Review- Subject as aforesaid, any person considering himself aggrieved –*

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,*
- (b) by a decree or order from which no appeal is allowed by, this Code, or*
- (c) 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.*

An 'aggrieved' person is one who has suffered a legal grievance, i.e., against whom a decision has been pronounced which has wrongfully affected his title or wrongfully deprived him of something which he was entitled to.

All decrees or orders cannot be reviewed. The right of review has been conferred by S. 114 and Order XLVII of the Code.

### **Condition precedent:**

The conditions to invoke Section 114 have been dealt with in Order XLVII Rule 1 of the CPC. They are:

#### **1. 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.

#### **2. 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. In coming to the finding that a mistake or error is apparent on the face of record, the court is not

required to look into other evidence. Such mistake or error should appear in the order itself or from any other document, which it referred in the said order. If such error occurs then the court is definitely bound to review such judgment.

The mistake is not limited to a mistake of fact. It may be of law. It should be an error which can be seen by a mere perusal of the record without reference to any other extraneous matter. Where, therefore, the legal position is clearly established by a well-known authority, but the Judge has by some oversight failed to notice the same and thus gone wrong, it will be a case coming within the category of an error apparent on the face of the record. The error has to be patent, and an ordinary error of law or a mere failure to interpret a complicated point of law correctly is not an error of law apparent on the face of the record.

Failure of the court to take into consideration an existing decision of the Supreme Court taking a different or contrary view on a point covered by its judgment would amount to a mistake or error apparent on the face of the record. But a failure to take into consideration a decision of the High Court would not amount to any mistake or error apparent on the face of the record.

In view of the Explanation added by the amendment of 1976, a subsequent decision of the Supreme Court or a larger Bench of the same court taking a contrary view on the point covered by the judgment does not amount to a mistake or error apparent on the face of the record.

### 3. 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).

#### *Difference between Appeal and Review:*

It is well-settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1, C.P.C. There are definitive limits to the exercise of the power of review and it cannot be exercised on the ground that the decision was erroneous on merits. That is the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate Court.

Scope of an application for review is much more restricted than that of an appeal. The Supreme Court in *Lily Thomas vs. Union of India*, AIR 2000 SC 1650, has held that the power of review can only be exercised for correction of a mistake and not to substitute a view and that the power of review could only be exercised within the limits of the statute dealing with the exercise of such power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained.

Where an appeal has been preferred a review application does not lie. But an appeal may be filed after an application for review. In such event the hearing of the appeal will have to be stayed. If the review succeeds the appeal becomes infructuous for the decree appealed from is superseded by a new decree. No court can, however, review its order after it has been confirmed on appeal.

A party who is not appealing from a decree or order may, however, apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Order XLVII of CPC deals with Review. Rule 1 is the primary rule that has been discussed above. Some of the other important rules under Order XLVII are:

Order XLVII, Rule 4: No application for review, however, shall be granted without previous notice to the opposite party to appear and oppose the application. It shall also not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge at the time of the passing of the decree or order, without strict proof of such allegation.

Order XLVII, Rule 6: Where the application for a review is heard by more than one judge and the court is equally divided, the application shall be rejected. Where there is a majority, the decision shall be according to the opinion of the majority.

Order XLVII, Rule 7: An order of the court rejecting the application for review shall not be appealable, but an order granting the application may be objected to at once by an appeal from the order granting the application or in any appeal from the decree or order finally passed or made in the suit.

In case the application has been rejected on failure of the applicant to appear, the court may restore the rejected application to the file on being satisfied that the applicant was prevented by sufficient cause from appearing upon such terms as to costs or otherwise as it thinks fit.

Order XLVII, Rule 9: No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

### **Revision - Section 115 of Code of Civil Procedure 1908**

The section reads as follows:

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

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

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

*Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.*

*(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.*

*(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.*

*Explanation: In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.*

### **Scope:**

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 : (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the court ought to exercise jurisdiction; and (c) 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.



In order for Section 115 to come into picture, it is necessary to establish three conditions precedent for calling upon and for requesting the revisional court to exercise the revisional jurisdiction. These conditions are as under:

- (a) That the order impugned amounts to be a case decided;
- (b) That the order impugned is not directly liable to be challenged by way of appeal from the order itself before the same court before which the revision has been filed;
- (c) That the order impugned suffers from jurisdictional error.

The power to interfere under Section 115 is much circumscribed. The section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved. Unless the lower appellate court had exercised jurisdiction where it had none or exercised it illegally or with material irregularity, the High Court cannot interfere with the order of the lower appellate court even when the order sought to be revised be erroneous or not in accordance with the law.

In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the court whose order is the subject of the revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.

The decision of the subordinate court on all questions of law and fact not touching its jurisdiction is final and however erroneous such a decision may be, it is not revisable under sub-ss. (a) and (b) of Section 115. On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction, e.g., on a preliminary fact upon the existence of which its jurisdiction depends, the subordinate court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court in its revisional jurisdiction under the sub-section.

The words 'acting illegally' would mean acting in breach of some provisions of law and the words 'acting with material irregularity' would mean committing some error of procedure and in the course of proceedings, which is material in the sense that it may have affected the ultimate decision. Therefore, it is only when a court decides a case perversely that it can be said to act illegally or with material irregularity in the exercise of its jurisdiction and the other errors of questions of law or procedure are outside the scope of cl. (c) of S. 115 of the Civil Procedure Code. The mere fact that the decision of the lower court is erroneous, whether it be upon a question of fact or law, does not amount to an illegality or material irregularity. To come to an erroneous conclusion does not amount to acting with material irregularity or illegality and a court has much jurisdiction to pass a correct order as a wrong one.

It may be pointed out that the jurisdiction under Section 115 of the Code is a discretionary one. The Supreme Court has observed in *Major S.S. Khanna v. F.J. Dhillon, A.I.R. 1964 S.C. 497*, 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 under S. 115, C.P.C.

Under Section 115, the High Court can call for the record of the case suo motu and revise the same if it finds that the subordinate court exercised a jurisdiction not vested in it by law or failed to exercise the jurisdiction so vested or acted in the exercise of its jurisdiction illegally or with material irregularity. Therefore, if the case is not presented by a duly authorised person and the court finds that the impugned order falls within the purview of Section 115, it can suo motu revise it.

**‘Any case which has been decided’**

The power of the High Court under Section 115 is exercisable in respect of ‘any case which has been decided’. The word “case” is something wider but not wide enough to include every order passed by a court during the pendency of a suit. It would include a decision on any substantial question in controversy between the parties affecting their rights, even though such order is passed in the course of the trial of the suit.

A case can be said to have been decided when any rights or obligations for the parties are adjudicated upon. The orders which are passed in a routine manner and do not decide any substantial right or question affecting rights of the parties cannot be said to amount to a case decided.

The Supreme Court observed in *Major S.S. Khanna v. Brig. F.J. Dhillon*, that the expression ‘case’ is a word of comprehensive import; it includes a civil proceeding and is not restricted by anything contained in Section 115 of the Code to the entirety of the proceeding in a civil court. To interpret the expression ‘case’ as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant.

The “case decided” is to be construed in its wider amplitude giving realistic meaning to these words. “Case decided” does not necessarily mean case finally adjudicated, rather each decision which terminates a part of the controversy though the suit or the case may not be finally decided, shall come within the ambit of the term “case decided”.

**Illegally or with material irregularity:**

The words ‘illegally’ and ‘material irregularity’ in Section 115 do not cover either error of fact or of law. These words do not refer to the decision arrived at but to the manner in which it is reached. The errors as contemplated relate to material defects of procedure.

Section 115 empowers the High Court to satisfy itself upon three matters, viz., (a) that the order of the subordinate court is within its jurisdiction, (b) that the case is one in which the court ought to exercise jurisdiction, and (c) that in exercising jurisdiction the court has not acted illegally that is in breach of some provision of law, or with material irregularity.

If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court upon questions of fact or law. The High Court will not interfere with an incorrect decision of the lower court where there is no question of lack of jurisdiction or material irregularity in procedure. Where there is a wilful disregard or conscious violation of a rule of law or procedure the case is one of material irregularity calling for interference in revision.

**LESSON ROUNDUP**

- The word jurisdiction is used in various contexts. It means legal authority, extent of power and limitation on such powers. It is a term of comprehensive import embracing every kind of judicial action. It means power and authority of the court to hear and determine a judicial proceeding and power to render particular judgement in question.
- In view of the multifarious activities of a welfare state, the legislature cannot work out all the details to fit the varying aspects of complex situations. It must necessarily delegate the working out of details to the executive or any other agency. Therefore, one of the most significant developments of the present century is the growth in the legislative powers of the executives. There is no such general power granted to the executive to make law, it only supplements the law under the authority of legislature.



- Under the Constitution of India, Articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The power of Legislature to delegate its legislative power is not prohibited in the Constitution.
- Law making by the administration can take various forms. It can be in the form of rules, regulations, bye-laws etc. In the case of this normal type of delegated legislation, the limits of the delegated power are clearly defined in the enabling statute and they do not include such exceptional powers as the power to legislate on matters of principle or to impose taxation or to amend an act of legislature.
- In India, we have courts at various levels – different types of courts, each with varying powers depending on the tier and jurisdiction bestowed upon them. They form a hierarchy with the Supreme Court of India at the top, followed by High Courts of respective states with District and Sessions Judges sitting in District Courts and Magistrates of Second Class and Civil Judge (Junior Division) at the bottom.
- Code of Criminal Procedure, 1973 is the procedural law for conducting a criminal trial in India. The procedure includes the manner for collection of evidence, examination of witnesses, interrogation of accused, arrests, safeguards and procedure to be adopted by police and courts, bail, the process of criminal trial, a method of conviction, and the rights of the accused of a fair trial by principles of natural justice.
- A reference 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, should be made 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.
- Review means re-examination or re-consideration of its own decision by the very same court. An application for review may be necessitated by way of invoking the doctrine ‘*actus curiae neminem gravabit*’ which means an act of the court shall prejudice no man. The other maxim is, ‘*lex non cogit ad impossibilia*’ which means the law does not compel a man to do that what he cannot possibly perform.

### TEST YOURSELF

1. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the present day. Comment.
2. Enumerate various types of delegation of legislative power.
3. Discuss modes of control over delegated legislation.
4. Discuss procedural aspects of working of Civil Courts.
5. The summary trials are reserved for small offences to reduce the burden on courts and to save time and money. Discuss Briefly.
6. Discuss Reference, Review and Revision under Civil Procedure Code, 1908.



# Lesson 2

## General Principles of Drafting and Relevant Substantive Rules

### LESSON OUTLINE

- Introduction
- Drafting, its Meaning
- Conveyancing, its Meaning
- Drafting and Conveyancing: Distinguished
- Distinction between Conveyance and Contract
- General Principles of Drafting all sorts of Deeds and Conveyancing & other Writings
- Some Do's & Don'ts
- Guidelines for Use of Particular Words and Phrases for Drafting & Conveyancing
- Use of Appropriate Words and Expressions
- Aids to Clarity and Accuracy
- Legal Implications and Requirements
- Deed and Document
- Various Kinds of Deeds
- Components of Deeds
- Engrossment and Stamping of a Deed
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

Drafting, in legal sense, means an act of preparing the legal documents like agreements, contracts, deeds etc. A proper understanding of drafting cannot be realised unless the nexus between the law, the facts, and the language is fully understood and accepted. Conveyancing is an art; an art of drafting deeds and documents whereby any right, title or interest in an immovable property is transferred from one person to another.

The importance of the knowledge about drafting and conveyancing for the corporate executives has been felt particularly for the three reasons viz., (i) for obtaining legal consultations; (ii) for carrying out documentation departmentally; (iii) for interpretation of the documents.

A corporate executive must note down the most important legal requirements which must be fulfilled while drafting complete instrument on the subject.

The objective of the study lesson is to make the students understand the meaning and distinction between drafting and conveyancing, general principles of drafting of deeds, legal implications and requirements, engrossment and stamping of a deed etc.

## INTRODUCTION

Importance of drafting and conveyancing for a company executive could be well imagined as the company has to enter into various types of agreements with different parties and have to execute various types of documents in favour of its clients, banks, financial institutions, employees and other constituents.

The importance of the knowledge about drafting and conveyancing for the corporate executives has been felt particularly for the three reasons viz.,

- (i) for obtaining legal consultations;
- (ii) for carrying out documentation departmentally;
- (iii) for interpretation of the documents.

With the knowledge of drafting and conveyancing, better interaction could be had by the corporate executives while seeking legal advice from the legal experts in regard to the matters to be incorporated in the documents, to decide upon the coverage and laying down rights and obligations of the parties therein. 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.

Knowledge of drafting and conveyancing for the corporate executives is also essential for doing 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.

A number of documents are required to be studied and interpreted by the corporate executives. 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.

## DRAFTING – ITS MEANING

Drafting may be defined as the synthesis of law and fact in a language form [*Stanley Robinson: Drafting Its Application to Conveyancing and Commercial Documents (1980)*; (Butterworths); Chapter 1, p.3]. This is the essence of the process of drafting. All three characteristics rank equally in importance. In other words, legal drafting is the crystallization and expression in definitive 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.

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

Drafting, in legal sense, means an act of preparing the legal documents like agreements, contracts, deeds etc.

A proper understanding of drafting cannot be realised unless the nexus between the law, the facts, and the language is fully understood and accepted. Drafting of legal documents requires, as a pre-requisite, the skills of a draftsman, the knowledge of facts and law so as to put facts in a systematised sequence to give a correct presentation of legal status, privileges, rights and duties of the parties, and obligations arising out of mutual understanding or prevalent customs or usages or social norms or business conventions, as the case may be, terms and conditions, breaches and remedies etc. in a self-contained and self-explanatory form without any patent or latent ambiguity or doubtful connotation. To collect, consolidate and co-ordinate the above facts in the form of a document, it requires serious thinking followed by prompt action to reduce the available information into writing with a legal meaning, open for judicial interpretation to derive the same sense and intentions of the parties with which and for which it has been prepared, adopted and signed.

## CONVEYANCING — ITS MEANING

Technically speaking, 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.

Mitra's legal and commercial dictionary defines "conveyance" as the action of conveyancing, a means or way of conveyancing, an instrument by which title to property is transferred, a means of transport, vehicle. In England, the word "conveyance" has been defined differently in different statutes. Section 205 of the Law of Property Act, 1925 provides that the "conveyance includes mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of any interest therein by any instrument except a will". "Conveyance", as defined in clause 10 of Section 2 of the Indian Stamp Act, 1899, "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." Section 5 of the Transfer of Property Act, 1882 (Indian) makes use of the word "conveyance" in the wider sense as referred to above.

Thus, conveyance is an act of conveyancing or transferring any property whether movable or immovable from one person to another permitted by customs, conventions and law within the legal structure of the country. As such, deed of transfer is a conveyance deed which could be for movable or immovable property and according to the Transfer of Property Act, 1882, transfer may be by sale, by lease, by giving gift, by exchange, by will or bequeathment. But acquisition of property by inheritance does not amount to transfer under the strict sense of legal meaning.

In India the forms of conveyancing are based on the present English Forms. It is to be taken note that no legislation in India has ever been passed on the law of conveyancing.

## DRAFTING AND CONVEYANCING: DISTINGUISHED

Both the terms "drafting and conveyancing" provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas "drafting" gives a general meaning synonymous to preparation of drafting of documents. Document may include documents relating to transfer of property as well as other "documents" in a sense as per definition given in Section 3(18) of the General Clauses Act, 1897 which include any matter written, expressed or described upon any substance by means of letters, figures or mark, which is intended to be used for the purpose of recording that matter. For example, for a banker the document would mean loan agreement, deed of mortgage, charge, pledge, guarantee, etc. For a businessman, document would mean something as defined under Section 2(4) of the Indian Sale of Goods Act, 1930 so as to include a document of title to goods i.e. "Bill of lading, dock-warrant, warehouse-keepers' certificate, wharfingers' certificate, railway receipt multi-modal transport document warrant or order for the delivery of goods and any other document used in ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." As per Section 2(36) of the Companies Act, 2013 the term "document includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form. Thus, drafting may cover all types of documents in business usages.

In India, the commercial houses, banks and financial institutions have been using the term "documentation" in substitution of the words "drafting and conveyancing". Documentation refers to the activity which symbolises preparation of documents including finalisation and execution thereof.

## DISTINCTION BETWEEN CONVEYANCE AND CONTRACT

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

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

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

When the draftsman has digested the facts, he should next consider as to whether those intentions can be given effect to without offending against any provision of law. He must, therefore, read the introductory note, or, if time permits, the literature on the subject of the instrument. A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Validity of document in the eye of law cannot be ignored and at the same time the facts which should be disclosed in the document cannot be suppressed. Nothing is to be omitted or admitted at random. Therefore, knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided. For example, in cases where a deed to be executed by a limited company, it is necessary to go into the question as to whether the company has got power or authority under its memorandum to enter into the transaction. A limited company can do only that much which it is authorised by its memorandum. Further, a company being a legal entity, must necessarily act through its authorised agents. A deed, therefore, should be executed by a person duly authorised by the directors by their resolution or by their power of attorney.

It is also to be ensured that the format of documents adopted adheres to the customs and conventions in vogue in the business community or in the ordinary course of legal transactions. For any change in the form of such document, use of juridical and technical language should invariably be followed. The statements of negatives should generally be avoided. The order of the draft should be strictly logical. Legal language should be, to the utmost possible extent, precise and accurate. The draft must be readily intelligible to laymen. All the time the draftsman must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words and choose his phraseology to fit them. [*Piesse and Giechrist Smith book on The Elements of Drafting*, 2nd Ed. pp. 7-12].

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

In addition to above facts, following rules should also be followed while drafting the documents:

**(i) Fowlers' five rules of drafting**

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

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

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

**(ii) Sketch or scheme of the draft document**

It is always advisable to sketch or outline the contents of a document before taking up its drafting. This rule is suggested by *Mr. Davidson*, a celebrated authority on conveyancing in his book on *Conveyancing*, 4th Ed., Vol. I, p. 20, where the learned author says as follows:

"The first rule on which a draftsman must act is this-that before his draft is commenced, the whole design of it should be conceived, for if he proceeds without any settled design, his draft will be confused and incoherent, many things will be done which ought to be done and many left undone which ought to be done. He will be puzzled at every step of his progress in determining what ought to be inserted and what is to guide him in his decision because he does not know what his own object is."

The importance of the above rule cannot be overemphasized and it should be observed by every draftsman.

**(iii) Skelton draft and its self-appraisal**

After the general scheme of the draft has been conceived, the draftsman should note down briefly the matters or points which he intends to incorporate in his intended draft. In other words, he should frame what is called a "skeleton draft" which should be filled in or elaborated as he proceeds with his work. Once the draft of the document is ready, the draftsman should appraise it with reference to the available facts, the law applicable in the case, logical presentation of the facts, use of simple language intelligible to layman, avoidance of repetition and conceivable mis-interpretation, elimination of ambiguity of facts, and adherence to the use of Fowlers' Rules of drafting so as to satisfy himself about its contents.

**(iv) Special attention to be given to certain documents**

Certain documents require extra care before taking up the drafting. For example, it must be ensured that contractual obligations are not contrary to the law in the document, where the facts so warrant to ensure. Further, in all the documents where transfer of immovable property is involved through any of the prescribed legal modes, it is necessary to ensure the perfect title of the transferor to such property proposed to be transferred by causing investigation and searches in relation to such title done through competent lawyers or solicitors in the concerned offices of Registrar of Assurance, local authorities, Registrar of Companies (in the case of the vendor being a corporate unit) etc. In addition, the requisite permissions required under different enactments viz., Income-tax Act, Land Ceiling Laws, Companies Act, 2013, Lessor's consent in the case of leasehold land, or any compliance desired under other Central or State Laws or personal laws etc. should be planned to be obtained in advance and recited in the documents wherever thought necessary.



**(v) Expert's opinion**

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.

To sum up, the draftsman should bear in mind the following principles of drafting:

- (i) As far as possible the documents should be self-explanatory.
- (ii) The draftsman should begin by satisfying himself that he appreciates what he means to say in the document.
- (iii) The well drafted document should be clear to any person who has competent knowledge of the subject matter.
- (iv) The draft must be readily intelligible to a layman.
- (v) The document may not be perfect because it says too much or too little or is ambiguous or contains one or more of the facts because it has to be applied in circumstances which the draftsman never contemplated. This should be avoided in the drafting of the documents.
- (vi) Nothing is to be omitted or admitted at random on the document that is to say negative statements should generally be avoided.
- (vii) Use of juridical language should be made.
- (viii) The text of the documents should be divided into paragraphs containing the relevant facts. Each paragraph should be self-explanatory and should be properly marked by use of Nos. of letters for clause, sub-clause and paragraphs.
- (ix) Schedule should be provided in the documents. Schedule is a useful part of the document and should contain the relevant information which forms part of the document. Whether any portion of the document should be put into the schedule(s) will depend upon the circumstances. The schedule is important in the document as it explains useful matters which forms part of the document and should not be ignored and should not be inserted in the body of the document. The main function of the schedule is to provide supplementary test to the document with clarity and convenience.
- (x) The active voice is preferable to the passive voice, unless the passive voice in a particular connection makes the meaning more clear. [See *Sir Rohland Burrow's Book on Interpretation of Documents*, pp. 119 to 121].

**Some Do's**

1. Reduce the group of words to single word;
2. Use simple verb for a group of words;
3. Avoid round-about construction;
4. Avoid unnecessary repetition;
5. Write shorter sentences;
6. Express the ideas in fewer words;
7. Prefer the active to the passive voice sentences;
8. Choose the right word;
9. Know exactly the meaning of the words and sentences you are writing; and



10. Put yourself in the place of reader, read the document and satisfy yourself about the content, interpretation and the sense it carries.

### Some Don'ts

The following things should be avoided while drafting the documents:

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

While writing and typing, the following mistakes generally occur which should be avoided:

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

### GUIDELINES FOR USE OF PARTICULAR WORDS AND PHRASES FOR DRAFTING AND CONVEYANCING

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:

- (1) For general words refer to ordinary dictionary for ascertaining the meaning of the words. For example, *Oxford Dictionary* or *Webster's Dictionary* or any other standard dictionary may be referred to for this purpose.
- (2) For legal terms refer to legal dictionary like *Wharton's Law Lexicon* or other dictionaries of English Law written by eminent English Lexicographers as Sweet Cowel, Byrne, Stroud, Jowit, Mozley and Whiteley, Osborn etc. In India, *Mitra's Legal and Commercial Dictionary* is quite sufficient to meet the requirements of draftsman.
- (3) As far as possible current meaning of the words should be used and if necessary, case law, where such words or phrases have been discussed, could be quoted in reference.
- (4) Technical words may be used after ascertaining their full meaning, import of the sense and appropriate use warranted by the circumstances for deriving a technical or special meaning with reference to the context.
- (5) 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.
- (6) The draftsman should also use at times the recognised work of eminent legal expert on the interpretation

of statutes. In *Maxwell's Interpretation of Statutes* use of some of the words is explained for the guidance of the readers.

The above guidelines acquaint the students of a few instances leading to the choice of appropriate word or phrase. As a matter of fact, much will depend upon the executives own skills and talents as to how they express the wishes of the company in limited words befitting to an expression of a certain event or description of facts.

## USE OF APPROPRIATE WORDS AND EXPRESSIONS

After discussing the guidelines for use of particular words and phrases in drafting of documents, meaning of some of the terms commonly used in drafting of deeds and documents is discussed hereunder:

**Instrument:** The word “instrument” has been interpreted in different judgements by different courts with reference to the different enactments. As such, the meaning of instrument has to be understood with reference to the provision of a particular Act. For example, under Section 2(b) of the Notaries Act, 1952, and Section 2(14) of the Indian Stamp Act, 1899, the word “instrument” includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

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

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

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

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

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

**Deed, Indure and Deed Poll:** These terms have been discussed at length in “Study II”.

**“AT”, “NEAR”, “ON”, “in the vicinity” and the like:** In construing a description, the word “at” when applied to a place, is less definite in meaning than “in” or “on”. Primarily, “at” signifies nearness, and is thus a relative term. When used in describing the location of real estate the word “near” signifies relativity in a greater or less degree. It may be equivalent to “at” or it may import the sense of “at” or “along” as in the expression “along the sea shore”.

The word “on” when used in describing the location of the land with reference to some geographical feature may mean, “in the vicinity of”. The phrase “in the vicinity” imports nearness to the place designated but not adjoining or abutting on it. The word “immediate” when used to qualify the word “vicinity” may signify adjoining.

Generally “Adjoining”, “Adjacent” or “Contiguous”: In the absence of anything to the contrary indicated by the deed itself words descriptive of the land conveyed are construed according to their proper and most generally known signification, rather than according to their technical sense with the view of giving effect to the probable intention of the parties. Nevertheless, specific terms of description may be regarded as having a technical meaning unless controlled by something else in the deed.

The word “adjoining” does not necessarily import that the boundary of the land conveyed is conterminous with the boundary of the adjoining land, for all that the word implies is contiguity, and hence it is equally applicable

where one boundary is shorter than the other. It has been held that a common corner will make two tracts of land “contiguous”.

The term “adjacent” is not synonymous and “abutting”. It may imply contiguity but the term is more often a relative one depending for its meaning on the circumstances of the case.

“LOT”: The term “lot” is sometimes used in restrictive sense as a wood lot, a house lot, or a store lot, but where the term is used unqualifiedly, especially if it refers to a lot in a certain range or right, it is almost uniformly used in a technical sense and means a lot in a township as duly laid out by the original proprietors. Lots from lands which have been surveyed and laid out in ranges and townships which are numbered in regular sequence may be sold and described by number and range without a more particular description. In the absence of qualifying words, the designation of the number of a lot will be taken to refer to the original place of the city or town.

Generally speaking, in a conveyance of fractional part of a designated lot, the word “lot” refers to that portion of the premises set aside for private use, and hence does not include the right to occupancy of any part of a street on which it abuts.

“And”, “Or”: As used in deeds, the word “and” ordinarily implies the conjunctive, while “or” ordinarily implies the alternative or is used as a disjunctive to indicate substitution. There is a presumption that when the word “or” is used in the *habendum* of deed, the grantor intended it to express its ordinary meaning as disjunctive, and that he did not intend to use the word “and” which will be read “or” and “or” will be read “and” but such construction is never resorted to for the purpose of supplying an intention not otherwise appearing.

“Subject to”: The words “subject to” in a deed conveying an interest in real property are words of qualification of the estate granted. Even though the words “Subject to” mentioned in the phrase “subject to a specified encumbrance” bear the obvious meaning that only the equity of redemption belonging to the grantor passes by a deed, such words may, under the circumstances of the particular case, be ambiguous. To ascertain the intention in such an ambiguous case, all the circumstances are taken into consideration, and the primary meaning of the words “subject to” will be departed from, if necessary, in order to effectuate what seems best to accord with intention of the parties. Of course, the rights of an earlier grantee to which a later grant is expressed to be subject are neither abridged nor enlarged by the later grant.

*Use of the terms “excepting”, “reserving” and the like*: While there is a well defined distinction between a “reservation” and an “exception” in deed, the use, in the instrument of conveyance, of one or the other of these terms is by no means conclusive of the nature of the provisions. In fact, it may be said that since these two terms are commonly used interchangeably little weight is given to the fact, that the grantor used one or the other. The use of the technical word “exception” or “reservation” will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the entire instrument, and when their intention is determined it will be given effect, provided no settled rules of law are thereby violated. In cases of doubt, the question will be determined in the light of the subject matter and circumstances of the case, and the deed will be construed, where possible, so as to give it validity.

“More or less”, “about”, “estimated” and the like: The words “more or less” when related to the description of the property in a deed, are generally construed with reference to the particular circumstances involved. In relation to the quantity of land conveyed, the description is not rendered indefinite by the addition of the words “more or less” to the specified area. Such words are used as words of precaution and safety and are intended to cover unimportant inaccuracies. They and other words of like import regarding the quantity of acres intended to be conveyed are regarded as matters of description of the land, and not of essence of the contract, and the buyer as a general rule takes the risk of quantity in the absence of any element of fraud. But in case of a considerable and material discrepancy in quantity, relief may be had after the conveyance. Accordingly, where the deed purports to convey the whole of a designated tract, described

whatever may be its acreage, the grant is not defeated by a discrepancy between the recited and the actual area. When used with reference to the quantity of land conveyed, the words “estimated” and “about” are synonymous with the phrase “more or less”.

In construing a description as to the length of a line, the words “more or less” may be deemed to have some meaning so as not to fix the distance absolutely even though they may be often construed as having practically no effect.

*Words indicating compass points:* The words “north”, “south”, etc. indicating points of the compass, may, no doubt, be controlled or qualified in their meaning by other words of description used in connection with them, but unless qualified or controlled by other words, they mean “due north”, “due south” etc. Moreover, the words “Easterly”, “Westerly”, etc. when used alone in the description of land, will be construed to mean “due East”, “due West”, etc. unless other words are used to qualify their meaning. Where, however, the land is described as being the “West half” of a city lot and a North to South line will divide the lot almost diagonally, it has been held that parol evidence can be introduced on the theory that such evidence neither enlarges nor diminishes the grant, but merely identifies the land.

## AIDS TO CLARITY AND ACCURACY

The following discussion is devoted to devices that are resorted to provide clarity and accuracy in documents:

### Interpretation of Deeds and 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. There is no law in India on the interpretation of documents also. On the subject of interpretation of statutes Maxwell's works published by Butterworth commands wide acceptance by the judiciary all over India. Based on the said work a set of principles has been evolved for the interpretation and construction of documents, assessing the language and assigning the exact meaning to the words and phrases to be used in the documents. Some of the relevant principles of interpretation of deeds and documents are discussed below:

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

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

- (1) A deed constitutes the primary evidence of the terms of a contract, or of a grant, or of any other disposition of property (Section 91 of the Evidence Act). The law forbids any contradiction of, or any addition, subtraction or variation in a written document by any extrinsic evidence, though such evidence will be admissible to explain any ambiguity (Section 92 of the Evidence Act). The document should, therefore, contain all the terms and conditions, preceded by recital of all relevant and material facts.
- (2) In cases of uncertainty, the rules embodied in provisos 2 and 6 of Section 92 of the Evidence Act can be invoked for construing a deed. The sixth proviso enables the court to examine the facts and surrounding circumstances to which the language of the document may be related, while the second proviso permits evidence of any separate oral agreement on which the document is silent and which is not inconsistent with its terms.

- (3) The cardinal rule is that clear and unambiguous words prevail over any hypothetical considerations or supposed intention. But if the words used are not clear and unambiguous the intention will have to be ascertained. In other words, if the intention of the parties can be gathered from the words and expressions used in a deed, such an intention does not require to be determined in any other manner except giving the words their normal or natural and primary meanings. It is the dominant intention of the document as disclosed from its whole tenor, that must guide the construction of its contents.
- (4) In case the terms are not unambiguous it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties. The social milieu, the actual life situations and the prevailing conditions of the country are also relevant circumstances.
- (5) Sometimes a contract is completed in two parts. At first an executory contract is executed and later on an executed contract. In case of any difference between the preliminary contract and final contract, the terms of the latter must prevail.
- (6) If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the latter clause is to be rejected as repugnant and the earlier clause prevails.
- (7) The court must interpret the words in their popular, natural and ordinary sense, subject to certain exceptions as,

- (i) where the contract affords an interpretation different from the ordinary meaning of the words; or
- (ii) where the conventional meanings are not the same with their legal sense.

- (8) Hardship to either party is not an element to be considered unless it amounts to a degree of inconvenience or absurdity so great as to afford judicial proof that such could not be the meaning of the parties.
- (9) All mercantile documents should receive a liberal construction. The governing principle must be to ascertain the intention of the parties through the words they have used. The Court should not look at technical rules of construction, it should look at the whole document and the subject matter with which the parties are dealing, take the words in their natural and ordinary meaning and look at the substance of the matter.

The meaning of such a contract must be gathered by adopting a commonsense approach and it must not be by a narrow, pendantic and legalistic interpretation.

- (10) No clause should be regarded as superfluous, since merchants are not in the habit of inserting stipulations to which they do not attach some value and importance. The construction adopted, should, as far as possible, give a meaning to every word and every part of the document.
- (11) Construction given to mercantile documents years ago, and accepted in the mercantile world should not be departed from, because documents may have been drafted in the faith thereof.
- (12) If certain words employed in business, or in a particular locality, have been used in particular sense, they must *prima facie* be construed in technical sense.
- (13) The ordinary grammatical interpretation is not to be followed, if it is repugnant to the general context.
- (14) Antecedent facts or correspondence, or words deleted before the conclusion of the contract cannot be considered relevant to ascertain the meaning.
- (15) Evidence of acts done under a deed can, in case of doubt as to its true meaning, be a guide to the intention of the parties, particularly when acts are done shortly after the date of the instrument.
- (16) Unless the language of two documents is identical, and interpretation placed by courts on one document is no authority for the proposition that a document differently drafted, though using partially similar

language, should be similarly interpreted. However, judicial interpretation of similar documents in the past can be relied on, but as the effect of the words used must inevitably depend on the context and would be conditioned by the tenor of each document such decisions are not very useful unless words used are identical.

- (17) If the main clause is clear and the contingency mentioned in the proviso does not arise, the proviso is not attracted at all and its language should not be referred to for construing the main clause in a manner contradictory to its import.
- (18) The fact that a clause in the deed is not binding on the ground that it is unauthorised cannot *ipso facto* render the whole deed void unless it forms such an integral part of the transaction as to render it impossible to sever the good from the bad.
- (19) As a general rule of construction of documents, the recitals are not looked into, if the terms of the deed are otherwise clear. If in a deed the operative part is clear, or the intention of the parties is clearly made out, whether consistent with the recitals or not, the recitals have to be disregarded. It is only 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 that 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. An ambiguity in the recitals, when the terms of the contract or the intentions of the parties are clear from the operative part, has no importance. If the recitals refer to an earlier transaction evidenced by a deed, such reference does not amount to an incorporation of the terms and conditions of the earlier deed unless the parties so intended.
- (20) Sometimes a standard form is used, particularly in contracts with government departments or big corporations. In these standard printed forms, words not applicable are deleted according to the requirements of individual transactions. A question often arises, whether reference may be made to the deleted words for interpreting the terms of the contract. The true rule is that the court must first look at the clause without the deleted words, and only if that clause is ambiguous then for solving the ambiguity assistance may be derived by looking at the deleted words. If something is added in handwriting or by typewriter to a printed form, such addition should prevail over the language in print.
- (21) If an alteration by erasure, interlineations, or otherwise is made in a material part of a deed after its execution by, or with the consent of, any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void, but only with prospective effect. However, an alteration which is not material i.e., which does not vary the legal effect of the deed in its original state but which merely express that which was implied by law in the deed as originally written, or which carries out the intention of the parties already apparent on the face of the deed and does not otherwise prejudice the party liable thereunder will not make the deed void.

### Legal Implications and Requirements

Drafting of documents is very important part of legal documentation. Documents are subject to interpretation when no clear meaning could be inferred by a simple reading of the documents. The legal implications of drafting, therefore, may be observed as under:

- (a) Double and doubtful meaning of the intentions given shape in the document.
- (b) Inherent ambiguity and difficulties in interpretation of the documents.
- (c) Difficulties in implementation of the objectives desired in the documents.
- (d) Increased litigation and loss of time, money and human resources.



- (e) Misinterpretation of facts leading to wrongful judgement.
- (f) Causing harm to innocent persons.

The above implications could be avoided if drafting principles are fully adhered to by the draftsman as discussed in the foregone paragraphs.

## BASIC COMPONENTS OF DEEDS

Having understood, the meaning of drafting and conveyancing it is necessary to familiarise with various terms such as deeds, documents, indentures, deed poll etc. These terms are frequently used in legal parlance in connection with drafting and conveyancing. Out of these, the meaning of deeds and documents, have a common link, and used in many a time interchangeably, but it is very essential to draw a line in between.

### Deed

In legal sense, a deed is a solemn document. Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability. To take for example Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed and so on. Even a power of Attorney has been held in old English cases to be a deed. A bond is also included in the wide compass of the term deed.

For such an instrument covering so wide field it is difficult to coin a suitable definition. 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. Many authorities have tried to define the deed. Some definitions are very restricted in meaning while some are too extensive definitions. The most suitable and comprehensive definition has been given by *Norton on 'Deeds'* as follows:

A deed is a writing –

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

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

A deed is a present grant rather than a mere promise to be performed in the future. Deeds are in writing, signed, sealed and delivered.

Deeds are instruments, but all instruments are not deeds.

### Document

“Document” as defined in Section 3(18) of General Clauses Act, 1894 means any matter expressed or described upon any substance by means of letters, figures or marks, or by the more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

**Illustration:**

A writing is a document.

Words printed, lithographed or photographed are documents. A map or plan is a document.

An inscription on a metal plate or stone is a document. A caricature is a document. Thus document is a paper or other material thing affording information, proof or evidence of anything.

All deeds are documents. But it is not always that all documents are deeds. A document under seal may not be a deed if it remains undelivered, e.g. a will, an award, a certificate of admission to a learned society, a certificate of shares or stocks and share warrant to bearer, an agreement signed by directors and sealed with the company's seal, license to use a patented article, or letters of co-ordination.

Documentary evidence as such is an important piece of evidence of which the Courts and Tribunals take judicial cognizance.

### Various Kinds of Deeds

Particular statutory definitions cover different sets of deeds. In the re-statement of American Law in Corpus *Juris Secundum*, the following kinds of deeds have been explained:

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

A latent deed is a deed kept for twenty years or more in man's escritoire or strong box. A lawful deed is a deed conveying a good or lawful title.

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

A voluntary deed is one given without any "valuable consideration", as that term is defined by law, one founded merely on a "good", as distinguished from a "valuable", consideration on motives of generosity and affection, rather than a benefit received by the donor, or, detriment, trouble or prejudice to the grantee.

A warranty deed is a deed containing a covenant of warranty.

A special warranty deed which is in terms a general warranty deed, but warrants title only against those claiming by, through, or under the grantor, conveys the described land itself, and the limited warranty does not, of itself, carry notice of title defects.

Some other terms connected with deeds are of importance of general legal knowledge. These terms are mentioned herein below:

#### **(i) Deed Pool**

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

#### **(ii) Deed Poll**

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

**(iii) (a) Indenture** – Indenture are those deeds in which there are two or more parties. It was written in duplicate



upon one piece of parchment and two parts were severed so as to leave an indented or vary edge, forging being then, rendered very difficult. Indentures were so called as at one time they are indented or cut with uneven edge at the top. In olden times, the practice was to make as many copies or parts as they were called, of the instruments as they were parties to it, which parts taken together formed the deed and to engross all of them of the same skin of parchment. This practice of indenting of deeds is no more used in England and at present indenture means a deed between two or more persons / parties importing the meaning of executed contract of conveyancing.

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

**(iv) Deed Escrow**

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

### Components of Deeds

As explained what is a deed, it is now appropriate to know more about drafting of Deed as a document. Out of various types of deeds, Deeds of Transfer of Property is the most common one. Deeds of Transfer include Deed of Sale, Deed of Mortgage, Deed of Lease, Deed of Gift etc. These deeds effect a transfer of property or interest.

A deed is divided into different paragraphs. Under each part relevant and related information is put in paragraph in simple and intelligible language as explained in the earlier chapter. If a particular part is not applicable in a particular case that part is omitted from the document.

The usual parts or components or clauses of deeds in general are mentioned as follows:

- (1) Description of the Deed Title.
- (2) Place and Date of execution of a Deed.
- (3) Description of Parties to the Deed.
- (4) Recitals.
- (5) Testatum.
- (6) Consideration.
- (7) Receipt Clause.
- (8) Operative Clause.
- (9) Description of Property.
- (10) Parcels Clause.
- (11) Exceptions and Reservations.
- (12) Premises and Habendum.
- (13) Reddendum

- (14) Covenants and Undertakings.
- (15) Testimonium Clause.
- (16) Signature and Attestation.
- (17) Endorsements and Supplemental Deeds.
- (18) Annexures or Schedules.

The above parts of the deeds are described as under:

### **1. Description of the Deed Title**

A deed usually begins with the name of the deed and as such the deed should contain the correct title such as “This Deed of Sale”, “This Deed of Mortgage”, “This Deed of Lease”, “This Deed of Conveyance”, “This Deed of Exchange”, “This Deed of Gift” etc. These words should be written in capital letters in the beginning of document. Where it is difficult to locate the complete transaction out of number of transactions covered under the deed, it may not be possible to give single name to the deed like

‘Deed of Gift’ and as such it would be better to describe the deed as “This Deed” written in capital letters like “THIS DEED”.

This part hints the nature of the deed and gives a signal to the reader about the contents of the Deed.

Sometimes a question may arise whether a particular instrument or document is a deed of conveyance of transfer. To ascertain the nature of the document it becomes necessary to read the language of the document and locate the intention of the parties which is the sole determining factor. Besides the intention of the parties, consideration paid for conveyance is another important aspect in assessing the document as a conveyance. Consideration may be paid initially or may be agreed to be paid in future also. However, in those cases where any condition is stipulated as precedent to the title being passed on to the purchaser then the document does not become conveyance unless the condition is performed. The document may be couched in ambiguous terms then the interpretation of the wordings would throw light on the intention of the parties so as to treat a particular document as conveyance or contract or otherwise.

### **2. Place and Date of Execution of a Deed**

We first highlight the importance of “date”. 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, 2020”. 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. 30<sup>th</sup> 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 be written in words and in figures.

The place determines the territorial and legal jurisdiction of a document as to its registration and for claiming

legal remedies for breaches committed by either parties to the document and also for stamping the document, as the stamp duty payable on document differs from State to State. An Illustration of this part follows:

“This Deed of Lease made at New Delhi on the First day of December One Thousand Nine Hundred and Eighty Eight (1.12.1988)” etc.

### **3. Description of Parties**

The basic rule is that all the proper parties to the deed including inter-parties should be properly described in the document because inter-parties are pleaded as they take benefit under the same instrument. While describing the parties, the transferor should be mentioned first and then the transferee. Where there is a confirming party, the same may be placed next to the transferor. In the order of parties, transferee comes in the last.

Full description of the parties should be given to prevent difficulty in identification. Description must be given in the following order:

Name comes first, then the surname and thereafter the address followed by other description such as s/o, w/o, d/o, etc. It is customary to mention in India caste and occupation of the parties before their residential address.

However, presently mention of caste is not considered necessary. But to identify the parties if required under the circumstances, it may be necessary to mention the profession or occupation of a person/party to the deed. For example, Medical Practitioner, Chartered Accountant, or Advocate or likewise.

In the case of juridical persons like companies or registered societies it is necessary that after their names their registered office and the particular Act under which the company or society was incorporated should be mentioned. For example, “XYZ Co. Limited, the company registered under the Companies Act, 1956 and having its registered office at 1, Parliament Street, New Delhi”.

In cases where the parties may be idol then name of the idol and as represented by its “Poojari” or “Sewadar”, or so, should be mentioned. For example, “the idol of Shri Radha Mohan Ji installed in Hanuman Temple in Meerut being 10, Jawahar Chowk, Lale Ka Bazar, Meerut City acting through its Sewadar Pt. Krishan Murari Lal Goswami of Mathura”.

In the case of persons under disability like minor, lunatic, etc. who cannot enter into a contract except through a guardian or a ward, in certain cases through guardian with the permission of the court where necessary, full particulars of the same should be given with the authority from whom a guardian draws power. For example, “Mohan, a minor, acting through Ramdev as guardian appointed by Civil Judge Class I, Delhi by order on... passed under Section... of... Act or “Mohan, Minor acting through his father and natural guardian Ramdev etc.” In this way, particulars for the sake of identification of the party should be given. Similarly, in the case of partners, trustees, co-partners, etc. full details of the parties should be given for the sake of identification.

Reference label of parties are put in Parenthesis against the name and description of each party to avoid repetition of their full names and addresses at subsequent places. The parties are then prepared to by their respective labels e.g. “lessor” and “lessee” in a lease deed.

The form is illustrated as under:

“This lease deed is made at New Delhi on the ..... day of .....  
2020 between Shri Vinod resident of..... (Hereinafter called  
‘lessor’) of the one part and Shri Dinov resident of ..... (hereinafter  
called ‘lessee’) of the other part.

It is also necessary that refusee of heirs, executors, assigns liquidators, successors etc. should be made against each party’s name after putting labels. It shall safeguard the interest of the parties. Legal heirs of the property of the party can take benefit on death of the original party when the easy identification of the party is done by giving

the notation of the “one part” and “of other part” will be written as of first part ‘for party one’, ‘of the second part’ for party two and ‘of the third part’ for party three and so on, the likewise illustrating this.

Between..... called the lessor.

(which term shall mean and unless, it be repugnant to the context or meaning thereof mean and include the heirs, legal representative or assigns of one part) AND..... called the lessee (which term shall unless it be repugnant to the context or meaning thereof mean and include the heirs, legal representative or assigns (or in case of a company the liquidator or assigns).

#### **4. Recitals**

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

Introductory recitals are placed after narrative recitals. The basic objective of doing so, is to put the events relating to change of hand in the property.

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

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

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

1.

2.

3.

etc.

#### **5. Testatum**

This is the “witnessing” clause which refers to the introductory recitals of the agreement, if any, and also states the consideration, if any, and recites acknowledgement of its receipt. The witnessing clause usually begins with the words “NOW THIS DEED WITNESSES”. Where there are more than one observations to be put in the clause the words, “NOW THIS DEED WITNESSES AS UNDER” are put in the beginning and then paragraphs are numbered.

#### **6. Consideration**

As stated above, consideration is very important in a document and must be expressed. Mention of consideration is necessary otherwise also, for example, for ascertaining stamp duty payable on the deed under the Indian

Stamp Act, 1899. There is a stipulation of penalty for non-payment of stamps, but non-mention of consideration does not invalidate the document.

In the absence of mention of consideration the evidentiary value of document is reduced that the document may not be adequately stamped and would attract penalty under the Stamp Act.

### 7. Receipt

Closely connected with consideration is the acknowledgement of the consideration amount by the transferor, who is supposed to acknowledge the receipt of the amount. An illustration follows:

“Now this Deed witnesses that in pursuance of the aforesaid agreement and in consideration of sum of ₹.

100,000/- (Rupees One Lakh Only) paid by the transferee to the transferor before the execution thereof (receipt of which the transferee does hereby acknowledge)”.

### 8. Operative Clause

This is followed by the real operative words which vary according to the nature of the property and transaction involved therein. The words used in operative parts will differ from transaction to transaction. For example, in the case of mortgage the usual words to be used are “Transfer by way of simple mortgage” (usual mortgage) etc. The exact interest transferred is indicative after parcels by expressing the intent or by adding *habendum*. (The parcel is technical description of property transferred and it follows the operative words).

### 9. Description of Property

Registration laws in India require that full description of the property be given in the document which is presented for registration under Registration Act. Full description of the property is advantageous to the extent that it becomes easier to locate the property in the Government records and verify if it is free from encumbrances. If the description of the property is short, it shall be included in the body of the document itself and if it is lengthy a schedule could be appended to the deed. It usually contains area, measurements of sides, location, permitted use, survey number etc. of the property.

### 10. Parcels Clause

This is a technical expression meaning methodical description of the property. It is thereby a brief description of the property which is the subject matter of the deed. 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. 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. This clause includes words such as: Messuages, Tenements, Hereditaments, Land, Water etc. But use of these now has been rendered unnecessary in view of Section 8 of Transfer of Property Act, 1882 given herein below.

*“Section 8. Operation of transfer — Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.*

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

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

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

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

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

This Section has cut down the length of the deeds and do away with description of minute details of the incidents of the property intended to be conveyed.

### **11. Exceptions and Reservations Clause**

It refers to admission of certain rights to be enjoyed by the transferor over the property to be agreed to by the transferee. All exceptions and reservations out of the property transferred should follow the parcels and operative words. It is the contractual right of the parties to the contract or to the document to provide exceptions and reservations which should not be uncertain, repugnant or contrary to the spirit of law applicable to a particular document or circumstances. For example, Section 8 of the Transfer of Property Act, 1882 provides for transfer of all the interest to the transferee in the property and any condition opposing the provisions of law will be void. Further, Section 10 of the said Act provides that any condition or limitation absolutely restraining the transferee of property in disposing of his interest in the property is void. So, nothing against the spirit of law can be provided in the document.

The clause generally is signified by the use of words "subject to" in deeds, where it is mentioned, it is advisable that both the parties sign, to denote specific understanding and consenting to this aspect.

### **12. Premises and Habendum**

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

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

### **13. Reddendum**

It is peculiar to a deed of lease. Here is mentioned the mode and time fixed for payment of rent. It begins with the word "rendering or paying" with reference to the rent. Thus it is a reserving clause in a deed, especially the clause in a lease that specifies the amount of the rent and when it should be paid.

### **14. Covenants and Undertakings**

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



### 15. 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.

The usual form of *testimonium* clause is as under:

“In witness whereof, parties hereto have hereunto set their respective hands and seals the date and year first above written”. This is the usual English form of *testimonium* clause. In India, except in the case of companies and corporations seals are not used and in those cases *testimonium* clause reads as under:

“IN WITNESS WHEREOF the parties hereto have signed this DEED on the date above written”.

Thus *testimonium* clause can be worded according to the status and delegation of executants. Moreover, this clause in the deed presupposes that the proper parties are signing the document.

### 16. Signature and Attestation Clause

After attestation clause, signatures of the executants of the documents and their witnesses attesting their signatures follow. If the executant is not competent enough to contract or is juristic person, deed must be signed by the person competent to contract on its behalf. For example, if the deed is executed by the company or co-operative society then the person authorised in this behalf by and under the articles of association or rules and regulations or by resolution as the case may be should sign the document and seal of the company/society should be so affixed, thereto by mentioning the same.

In India, the Deed of Transfer is not required to be signed by the transferee even though the transferee is mentioned as party in the document. All conditions and covenants are binding upon him without his executing the conveyance, if he consents to it by entering into the lease granted under the conveyance. However, in case the deed contains any special covenant by the transferee or any reservation is made by the transferee then it is always proper to have the deed signed by the transferee also.

Attestation is necessary in the case of some transfers, for example, mortgage, gift, sale, and revocation of will. In other cases, though it is not necessary, it is always safe to have the signatures of the executant attested. Attestation should be done by at least two witnesses who should have seen the executant signing the deed or should have received from the executant personal acknowledgement to his signatures. It is not necessary that both the witnesses should have been present at the same time. There is no particular form of attestation but it should appear clearly that witnesses intended to sign is attesting the witnesses. General practice followed in India is that the deed is signed at the end of the document on the right side and attesting witnesses may sign on the left side. If both the parties sign in the same line then the transferor may sign on the right and the transferee on the left and witnesses may sign below the signatures.

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.

### 17. Endorsements and Supplemental Deeds

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

document. Thus, endorsement is an act or process of endorsing something that is written in the process of endorsing when a provision is added to a document altering its, scope or application. Under the Registration Act, 1908 the word endorsement' has significant meaning and it applies to entry by the Registry Officer on a rider or covering slip tendered for registration under the said Act.

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

In conveyancing practices endorsements which are of general use and for which no supplementary deed is necessary are those which relate to part payment or acknowledgement of a debt by a debtor. The main stress is that endorsement should represent or exhibit the intention of the parties to the document. Thus, in the context of negotiable instruments, endorsements which are made on the document will definitely differ with reference to the nature and content of the prior document and will be added to the endorsement explained above. Endorsements are common for negotiating a negotiable document or instrument or transfer of bill of exchange or policy or insurance or Government securities and there is no particular form of endorsement prescribed in such cases. Endorsements follow the forms by customs, conventions and trade practices or banking norms.

The following forms of endorsement and supplemental deed respectively could be used by business executives while facing a situation of altering the documents:

1. Form of Endorsement: The endorsement on the document may begin either by saying:

This deed made on this .....day of ..... between within named ..... and within named .....” or directly like, “The parties to the within written deed hereby agree as follows:”

The operative part of the deed then follows usually without any recital unless any recital is considered necessary to make the deed intelligible. Generally, no recital is added but there may be exception in different situations to this rule. The original deed on which endorsement is made as referred to in the endorsement is within the written deed and the parties, recital covenants in the original deed are referred to as within named “Lessor” or “within named parties” or “within mentioned covenants” or “within described use” or “the garden described in the schedule of the within written deed”.

These are the examples when endorsement is to be made for the first time in the document.

There may be situations where subsequent endorsement becomes necessary on the document which bears already an endorsement. In such eventuality when endorsement is made one after another reference in the latter to the former endorsement shall be made by the use of the word “above” instead of M/s “within”. After the operative part of endorsement the usual *testimonium* clause shall be added ending with signatures of executants and of witnesses, if necessary.

2. For giving effect to the supplemental deed the form of the deed of agreement will be more or less the same as the prior document with the difference that with the other names of the parties the words, “Supplemental



(intended to read as annexed) to a deed of..... dated..... made between the parties thereto (or between.....) hereinafter called the principal deed”, shall be added. In case the particulars of a principal deed are somewhat long it is more convenient to refer to the principal deed in the first recital and to say that this deed (the one under preparation) is supplemental to that (the former) deed; for example, “Whereas this deed is supplemental to a deed of sale made, etc. hereinafter called the ‘principal deed’.

There may be situations when the supplemental deed is supplemental to several deeds. In such a case, each prior deed should be mentioned clearly by way of recitals to make the deed with reference to the existing deed intelligible and free from ambiguity.

All endorsements or supplemental deed should be stamped according to the nature of the transaction which they evidence. In case the endorsement is made for receipt of money which should be stamped as a receipt. In case it is an agreement, it must be stamped as an agreement. Some documents if endorsed are exempted from stamp duty, for example, endorsement made on the prior deed, receipt of mortgage money, endorsement on mortgage deed. Similarly, transfer of bill of exchange or policy of insurance or security of Government of India can be endorsed without attracting the stamp duty.

### **18. Annexures or Schedules**

A deed remains incomplete unless particulars as required under registration law about the land or property are given in the Schedule to be appended to the deed. It supplements information given in the parcels. A Site Plan or Map Plan showing exact location with revenue no. Mutation No., Municipal No., Survey No., Street No., Ward Sector/Village/Panchayat/Taluka/District etc..... Plot No., etc. so that the demised property could be traced easily.

### **Engrossment and Stamping of a Deed**

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 Indian 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, it is rendered inadmissible in evidence nor it will be registered with Registrar of Assurances.

### **LESSON ROUNDUP**

- Drafting of legal documents is a skilled job. A draftsman, in the first instance, must ascertain the names, description and addresses of the parties to the instrument. The duty of a draftsman is to express the intention of the parties clearly and concisely in technical language.
- A corporate executive must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject.
- All the time the draftsman must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words and choose his phraseology to fit them. Apart from the above facts, there are certain rules that should also be followed while drafting the documents.
- For using particular words and phrases in the conveyancing, the draftsman must be cautious about the appropriate use of the words and should be clear of its meaning.

- Drafting of documents is very important part of legal documentation. Documents are subject to interpretation when no clear meaning could be inferred by a simple reading of the documents.
- Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability. To take for example Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed and so on.
- 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. Many authorities have tried to define the deed. Some definitions are very restricted in meaning while some are too extensive definitions.
- The usual parts or components or clauses of deeds in general are: Description of the Deed Title; Place and Date of execution of a Deed; Description of Parties to the Deed; Recitals; Testatum; Consideration; Receipt Clause; Operative Clause; Description of property; Parcels Clause; Exceptions and Reservations; Premises and Habendum; Covenants and Undertakings; Testimonium Clause; Signature and Attestation; Endorsements and Supplemental Deeds; Annexure or Schedules.
- The draft of document is required to be approved by the parties. The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per 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.

### TEST YOURSELF

1. As a company secretary, please advise what are the preliminary requirements of drafting which a company executive should consider before drafting a document?
2. Draw guidelines for use of particular words or phrases in drafting and conveyancing.
3. As a company secretary, please advise what are the principles which a corporate executive should keep in mind while drafting company's documents?
4. What are the "do's" and "don'ts" which a draftsman should keep in mind while drafting company's documents?
5. Discuss briefly the Components of Deed of Transfer of Property.
6. What do you understand by endorsement and supplemental deeds? Does such an endorsement or supplemental deed attract stamp duty?
7. Explain "Habendum". What does a Habendum clause signify in a document? How does the absence of a Habendum clause in a document effect the validity of the document?

---



---



---



---



---

# Lesson 3

## Secretarial Practice in Drafting Notice, Agenda and Minutes of Company's Meetings

### LESSON OUTLINE

- Collective decision making process in companies- Resolution
- Powers of the Board
- Secretarial Standards- Introduction
- Secretarial Standard on Board Meetings- (SS-1)
- Guidance on the provisions of SS-1
- Annexures to SS-1
- Secretarial Standard on General Meetings (SS-2)
- Guidance on the Provisions of SS-2
- Practical Aspect of Drafting Resolutions
- Resolutions passed in General Meetings
- Annexures to SS-2
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

A company, being a legal entity, cannot act by itself. It, therefore, expresses its will or takes its decisions through Resolutions passed at validly held Meetings. Determining what constitutes a Meeting is therefore an important issue. A Meeting has been defined as "coming together of two or more persons face to face so as to be in each other's presence or company". [In *Re. Associated Color Laboratories Ltd.* (1970) 12 D.L.R.]. The decision-making powers of a company are vested in the Members and the Directors and they exercise their respective powers through Resolutions passed by them. The will of members of a company is expressed through Resolutions passed at general meetings or through postal ballots. Similarly, the will of the governing body of the company (i.e. its Board of Directors) is expressed through Resolutions at meetings of the Board or those passed by circulation. General Meetings of the Members provide a forum for them to express their will with regard to the management of the affairs of the company. The primary purpose of a Meeting is to ensure that a company gives reasonable and fair opportunity to those entitled to participate in the Meeting to take decisions as per the prescribed procedures.

Section 118(10) of the Companies Act, 2013, provides that every company shall observe Secretarial Standards with respect to general and board meeting specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved as such by the Central Government. Secretarial Standard SS-1 and SS-2 w.r.t. meetings of Boards of Directors and general meetings respectively has been issued and revised in this respect.

As u/s 205(1)(6) of the Companies Act, it is the duty of Company Secretary to ensure compliance of Secretarial Standards in the company, so it is very important for the students to learn about the procedural aspects relating to meetings.

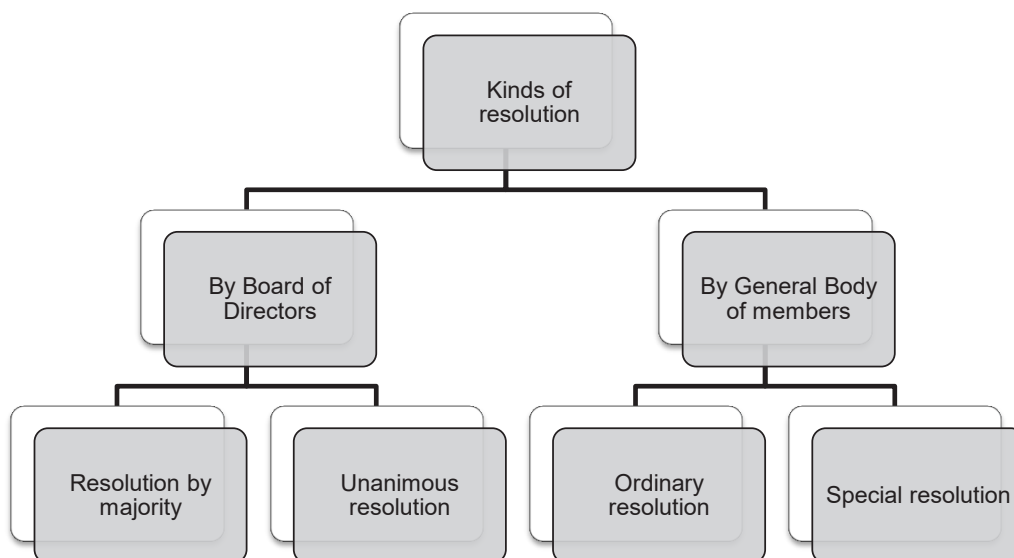
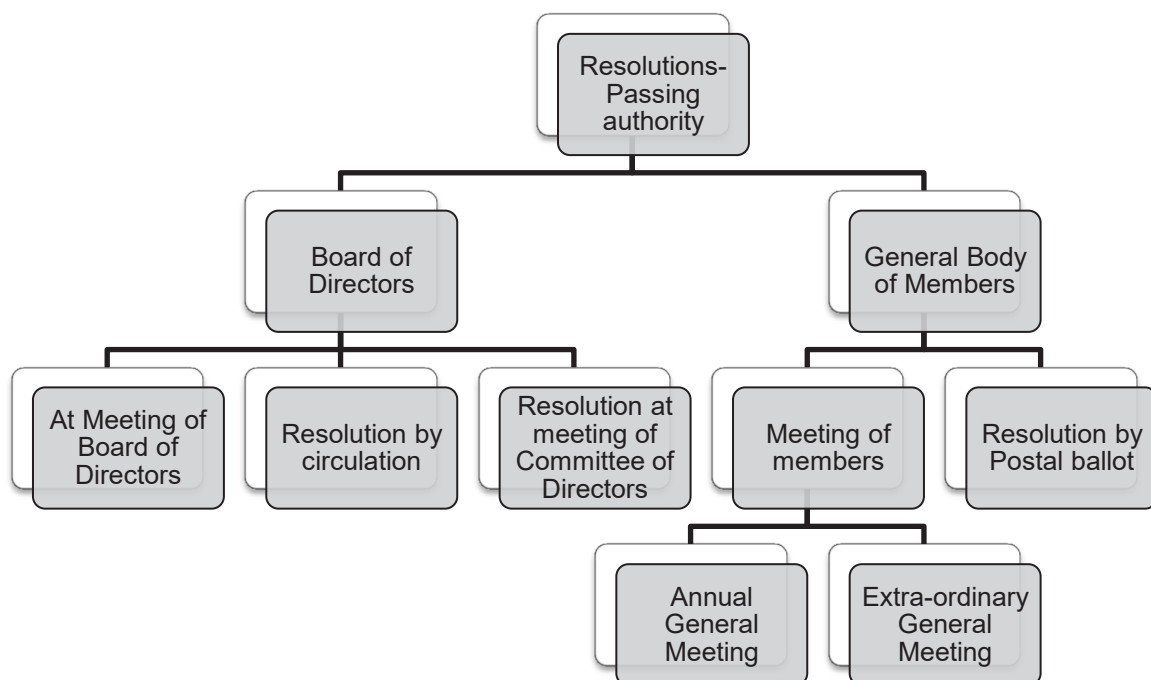
The Institute of Company Secretaries of India is the only professional body in the world to issue Secretarial Standards. The Institute of Company Secretaries of India has announced that the Secretarial Standards on Meetings of the Board of Directors (SS-1) and General Meetings (SS-2) w.e.f. 1st July, 2015. The Secretarial Standards have been revised and the revised Secretarial Standards have received approval from the Central Government. The revised Secretarial Standards shall be applicable for compliance by Companies (except the exempted class of companies) from October 1, 2017 .

## COLLECTIVE DECISION MAKING PROCESS IN COMPANIES- “RESOLUTION”

A company is an artificial judicial person created by law having its own distinct entity form and capable of entering into contracts. Though company is bestowed with the characteristic of separate legal entity but it cannot take decision on its own. It is capable of acting in its own name, entering into contracts. It is capable of owning and holding property in its own name, sue others and to be sued by others in its name. Despite all these powers, since it is not a natural person, it expresses its will or takes its decisions through natural persons (i.e. directors or members) collectively which is known as “resolutions.”

There are two collective bodies in the company which take decision through resolutions:

- (i) Board of Directors – who manage, control and direct the business of the company, and
- (ii) General body of members – who ultimately own the company.



- The meetings of a company under the Companies Act, 2013 can be generally classified as under:
  1. Meetings of the Directors and their Committees
  2. Meetings of Members:
    - (a) Annual General Meetings (AGM)
    - (b) Extraordinary General Meetings (EGM)
    - (c) Class Meetings.

There are other meetings too like meeting of debenture/ bond holders, meeting of creditors, contributories, Court convened meeting etc. but they do not find place in conducting routine business of company.

- Board of directors take decision by passing resolution as follows:
  - (i) Resolution by majority (≥51%)
  - (ii) Unanimous resolution( 100%)
- Resolution of members may be :

- (i) Ordinary resolution:

An Ordinary resolution is one which satisfies all of the following criteria :

- the notice required under the Companies Act, 2013 has been duly given to all the people entitled to receive the same,
- votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled to do so, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.

Any decision to be taken by the members of the Company is taken by means of an Ordinary Resolution unless there is a specific requirement to take it other than through Ordinary Resolution.

- (ii) Special resolution

A special resolution is one which satisfies all of the following criteria:

- the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
- the notice required under this Act has been duly given; and
- the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

## **POWERS OF THE BOARD**

1. **Powers to be exercised at Board Meetings:** The Board of Directors of a company shall exercise certain powers on behalf of the company only by means of Resolutions passed at a Meeting of the Board

and not by a Resolution passed by circulation. A list of powers of the Board to be exercised at the Board Meeting is given in **Annexure IA**.

2. **Powers to be exercised by unanimous consent:** Certain powers of the Board shall be exercised by Resolutions passed at Meetings, with the consent of all the Directors present at the Meeting. A list of powers of the Board to be exercised by Unanimous Consent is given in **Annexure IC**.
3. **Powers to be exercised subject to passing of Special Resolution:** Certain powers of the Board are exercisable by the Directors only with the consent of the company by way of a Special Resolution passed in a General Meeting or through Postal Ballot. A list of powers to be exercised subject to passing of Special Resolution is given in **Annexure ID**.
4. **Powers to be exercised subject to other approvals:** There are several powers in the realm of day-to-day management of the company which the Board should exercise subject to the approval at the General Meeting or by the Central Government or by the National Company Law Tribunal (NCLT) or subject to the requirements of other Statutory Authorities and/or Regulators. An illustrative list of such powers is given in **Annexure IE**.

### Delegation of Powers

Subject to the provisions of the Articles of the company, the Board may delegate any of its powers to Committees with or without such restrictions and limits as may be imposed.

The Board may, by a Resolution passed at a Meeting, delegate certain powers to any Committee of Directors, the Managing Director, the Manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, on such conditions as it may specify. [First Proviso to sub-section (3) of Section 179 of the Act]

For delegation of powers, a board resolution must be passed at meeting of Board of Directors. A list of such powers is given in **Annexure IF**.

## SECRETARIAL STANDARDS

### Introduction

Section 118(10) of the Companies Act, 2013, provides that every company shall observe Secretarial Standards with respect to general and board meeting specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved as such by the Central Government. The Ministry of Corporate Affairs on 10th April, 2015 accorded the approval of the Central Government to the Secretarial Standards (SS) namely-

- (i) SS-1 Meetings of the Board of Directors and
- (ii) SS-2 General Meetings

These standards became applicable w.e.f. 01.07.2015. Thereafter, these Standards were revised in June 2017 and they came into force w.e.f. 01.10.2017.

**Scope:** Secretarial Standards are in conformity with the provisions of the Companies Act, 2013. However, if due to subsequent changes in the Act, a particular Standard or any part thereof becomes inconsistent with the Act, the provisions of the Act shall prevail.

In terms of section 205(1)(6), it is one of the functions of the Company Secretary to ensure that the company complies with the applicable Secretarial Standards.

## SECRETARIAL STANDARD ON BOARD MEETINGS (SS-1)

In terms of sub-section (10) of Section 118 of the Act, every company is required to observe SS-1 except

- (i) One Person Companies(OPC)having only one Director on its Board and
- (ii) Such other class or class of companies which are exempted by Central Government through Notification e.g. companies licensed under Section 8 of the Companies Act, 2013

Exemptions shall be applicable to a Section 8 company provided it has not committed a default in filing its Financial Statements or Annual Return with the Registrar of Companies.

However, Section 8 companies need to comply with the applicable provisions of the Act relating to Board Meetings.

### Applicability to Meetings of the Committees

SS-1 is also applicable to the Meetings of Committee(s) of the Board constituted in compliance with the requirements of the Act. At present, the Act provides for the constitution of following mandatory committees of the Board based on the certain thresholds:

- Audit Committee
- Nomination and Remuneration Committee
- Corporate Social Responsibility (CSR) Committee
- Stakeholders Relationship Committee

In case any other committee of the Board is constituted voluntarily or pursuant to any other statute or regulations etc., the company may comply with SS-1 with respect to meetings of such committee(s) as a good governance practice.

### Secretarial Standard on meetings of the Board of Directors: SS – 1 (Relevant extract for drafting notice, agenda and minutes of Meeting of Board of Directors/ Committee thereof)

The first version of SS-1 was applicable to Meetings of the Board of Directors and its Committees, in respect of which Notices were issued during 1st July, 2015 to 30th September, 2017. The revised version of SS-1 applies to Meetings of the Board of Directors and its Committees, in respect of which Notices are issued on or after 1st October, 2017. SS-1 prescribes a set of principles for convening and conducting Meetings of the Board of Directors and matters related thereto. Guidance Note sets out the explanations, procedures and practical aspects in respect of the provisions contained in revised SS-1 (effective from 1st October, 2017) to facilitate compliance thereof by the stakeholders.

Section 179 of Companies Act 2013 describes the scope of the powers of the Board of Directors as it states "The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do." The powers of the Board are however, subject to the provisions contained in that behalf in the Act, other statutes, as well as the Memorandum and Articles of Association of the company or any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in General Meeting (Section 179 of the Act).

All the powers vested in Directors are exercisable by them collectively, acting together, unless such powers have been delegated to one or more Directors by the Board.

Subject to the provisions of the Act, all powers which the company is authorised to exercise and do can be exercised by the Directors

- (i) at a Meeting [Section 173] or
- (ii) by Resolutions passed by circulation [Section 175] or



- (iii) by delegating the same to Committees or to the Managing Director or other principal officers [Proviso to 179(3)] or others in accordance with the provisions of the Act and the Articles.

## GUIDANCE ON THE PROVISIONS OF SS-1

### Convening a Meeting

Authority means who can convene meeting i.e. who shall sign notice of board meeting.

Subject to Articles of Association of a company, Board meeting may be convened by

- Any Director of a company
- The Company Secretary or where there is no Company Secretary, any person authorized by the Board in this behalf, on the requisition of a Director.
- The Company Secretary cannot summon a Meeting on his own, unless authorized by the Board of Directors or the Articles to do so.

### Manner of conducting requisitioned Meeting

Where any Meeting of the Board is called and held on the basis of a requisition by a Director, the provisions of the Act and SS-1 relating to Notice, Agenda, Notes on Agenda, length of Notice and manner of service of Notice and all other applicable provisions have to be complied with.

### Day, Time, Place, Mode and Serial Number of Meeting

It is mandatory for every meeting to have a serial number for ease of reference.

Serial number of the original Meeting and the adjourned Meeting should be the same. For eg: In case the serial number of the original Meeting is 12th Meeting, the serial number of the adjourned Meeting should be 12 th Meeting (Adjourned).

#### Illustrations

- (i) Serially numbering on Calendar Year basis as follows: "1/2015", "2/2015", "3/2015" and so on.... In the next year, numbering would be "1/2016", "2/2016", "3/2016" and so on.
- (ii) Serially numbering on financial year basis as follows: "1/2015-16", "2/2015-16", "3/2015-16" and so on....or 1/15-16, 2/15-16, 3/15-16 and so on.....
- (iii) Continuous serially numbering across years: 120th Meeting, 121st Meeting, 122nd Meeting and so on .....

Here, a company may choose to either count and give continuous numbering from its incorporation or give continuous numbering from Meetings held on or after 1st July, 2015, this being the date from which SS-1 became effective.

In any case, the company should follow a uniform and consistent system.

*Board of Director's meeting can be convened even on Sunday and national holiday too. Even a meeting of Board of Director's adjourned for want of quorum can be held on national holiday.*

### Notice of the meeting

- (i) **Venue of the meeting:** Notice of the Meeting shall clearly mention a venue, whether registered office or otherwise, to be the venue of the Meeting and all the recordings of the proceedings of the Meeting, if conducted through Electronic Mode, shall be deemed to be made at such place.



- (ii) **Communication by a Director of his intention to participate through Electronic Mode:** A Director intending to participate through Electronic Mode should communicate his intention to the Chairman or the Company Secretary of the company. He should give prior intimation to that effect sufficiently in advance so that the company is able to make suitable arrangements in this behalf [Rule 3(3)(d) of the Companies (Meetings of Board and its Powers) Rules, 2014]. After giving the aforesaid intimation, if the Director decides to participate by being present physically at a particular Meeting, he may so participate after communicating the same to the Company.
- (iii) **Meetings through Electronic Mode:** There is no restriction on a company to hold all its Meetings through Electronic Mode provided the company ensures presence of physical Quorum during consideration of any of the restricted items of business and comply with the applicable legal provisions. Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 requires that restricted items shall not be dealt with in a Meeting through Electronic Mode. Unless, the requisite Quorum is present physically in such Meeting.
- (iv) **Delivery of Notice :** Notice in writing of every Meeting shall be given to every Director by hand or by speed post or by registered post or by facsimile or by e-mail or by any other electronic means. Where a director specifies a particular means of delivery of notice, the notice shall be given to him by such means. But, in case of a meeting conducted at a shorter notice, the company may choose an expedient mode of sending notice.
- (v) **Form of Notice:** The Notice should preferably be sent on the letter-head of the company. Where it is not sent on the letter-head or where it is sent by e-mail or any other electronic means, there should be specified, whether as a header or footer,
  - the name of the company and
  - complete address of its registered office together with all its particulars such as
    - ✓ Corporate Identity Number (CIN) as required under Section 12 of the Act,
    - ✓ date of Notice,
    - ✓ authority and name and designation of the person who is issuing the Notice, and
    - ✓ preferably the phone number of the Company Secretary or any other designated officer of the company who could be contacted by the Directors for any clarifications or arrangements.

A specimen Notice is given in **Annexure II**.

- (vi) **Authority to sign Notice:** Notice should be signed by the Company Secretary. If there is no Company Secretary, the Notice should be signed by any Director or any other person who is authorised by the Board to issue Notice.
- (vii) **Essentials of Notice:**
  - ✓ The Notice shall specify the serial number, day, date, time and full address of the venue of the Meeting.
  - ✓ Day and date specified in the Notice should be as per the Gregorian calendar.
  - ✓ The time specified in the Notice should be the time of commencement of the Meeting.
- (viii) **Notice of Requisitioned Meeting:** In the case of a requisitioned Meeting, it is advisable to mention in the Notice the fact that the Meeting is being convened on the requisition of a Director.
- (ix) **Intimation to Directors for availability of option to participate through Electronic Mode:** The Notice shall inform the Directors about the option available to them to participate through Electronic

Mode and provide them all the necessary information. The Notice shall also contain the contact number or e-mail address(es) of the Chairman or the Company Secretary or any other person authorized by the Board, to whom the Director shall confirm in this regard. If a Director intends to participate through electronic mode, he shall give sufficient prior intimation to the Chairman or to the Company Secretary to enable them to make suitable arrangements in this behalf. The Director may intimate his intention of participation through electronic mode at the beginning of the Calendar year also, which shall be valid for such calendar year.

- (x) **Notice is mandatory:** The Notice of a Meeting shall be given even if meetings are held on pre-determined dates or at pre-determined intervals.
- (xi) **Time period for giving Notice:** Notice convening a Meeting shall be given at least seven days before the date of the Meeting, unless the Articles prescribe a longer period.

Illustration

If the Meeting is proposed to be held on 14th November, the last date for giving the Notice would be 7th November.

- (xii) **Adequate Notice should be given:** Adequate Notice of the Meeting should be given so that Directors can plan their schedule so as to attend and participate in the Meeting. Participation in Meetings is central to the discharge of a Director's responsibilities. Unless Directors attend Meetings and participate in discussions with other members of the Board, they are not likely to be fully aware of the affairs of the company and may not be able to exercise the care and diligence that is expected of them.
- (xiii) **Notice period in the Articles:** The company may prescribe a longer Notice period through its Articles, in which case the Articles should be complied with. However, the statutory Notice period of seven days cannot be reduced by the company in its Articles.
- (xiv) **Notice to contain detailed note of each item of business:** Each item of business requiring approval at the Meeting shall be supported by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal and the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed. However any other decision taken at the meeting may also be recorded in the Minutes in the form of Resolution.
- (xv) **Draft Resolution:** Where approval by means of a Resolution is required, the draft of such Resolution shall be either set out in the note or placed at the Meeting. However, any other decision taken at the Meeting may also be recorded in the Minutes in the form of Resolution. Detailed Notes on each item on the Agenda requiring approval at the Meeting, accompanied by a draft Resolution, where necessary, would be a step towards ensuring informed decisions / deliberations.

Resolutions drafted and circulated to Directors in advance, along with the Agenda saves time at the Meeting, clarifies the subject matter, facilitates discussion, simplifies preparation of Minutes of the Meeting and enables issuance of certified copies of Resolution, wherever required, after the Meeting and before the Minutes thereof are finalised.

- (xvi) **Specimen Agenda and items of business:** The items of business that are required by the Act or any other applicable law to be considered at a Meeting of the Board shall be placed before the Board at its Meeting. An illustrative list of such items is given in Annexure I. This list is bifurcated into:
  - Items which are required to be approved by the Board at its Meeting as prescribed under the Act, and
  - Items of business to be placed before the Board at its Meeting illustrated in SS-1 in addition to those prescribed under the Act is given in Annexure IA and IB respectively.

- There are certain items which shall be placed before the Board at its first Meeting. "First Meeting" means the first Meeting of the Board held after the incorporation of the company.
- Specimen Agenda for the First Meeting of the Board and for subsequent Board Meetings are given in Annexure III and IV respectively.

**(xvii) Drafting an Agenda:** The practical aspects of drafting an Agenda, Notes on Agenda and related aspects are given in Annexure V. An item for some business which may arise before the Meeting, may be included while circulating the Agenda by adding the words "if any" after the said item. For eg: To review the status of legal cases, if any; if there is no update on the legal cases at all, a nil report may be given. If during the course of a Board Meeting, any Agenda item containing a proposal is deferred for consideration to a subsequent Meeting and there is any change in the said proposal, the Notes on Agenda of the new proposal should explain the modifications in the proposal since the Board was already provided with the Agenda of the earlier Meeting and has been informed of the earlier proposal.

**(xviii) Numbering of each item of business:**

Each item of business to be taken up at the Meeting shall be serially numbered.

**Illustrations**

- (i) Serially numbering irrespective of the number of meeting: Items to be discussed in any Meeting of the Board would be numbered 1, 2, 3, 4... and so on.
- (ii) Serially numbering on the basis of the number of the Meeting as follows: Items to be discussed in 12th Meeting of the Board would be numbered as 12.1, 12.2, 12.3, 12.4, etc. Items to be discussed in the 13th Meeting would be numbered as 13.1, 13.2, 13.3 and so on.
- (iii) Continuous numbering across years/Meetings: Suppose there are 8 items to be discussed in the first Meeting and 10 items in second Meeting. In such a case, the items of 1<sup>st</sup> Meeting will be numbered as item number 1-8 and the items in the second Meeting would be numbered 9-18 and so on.....

A company may choose to count and give continuous numbering either from its incorporation or from Meetings held on or after 1st July, 2015, this being the date from which SS-1 became effective.

Whatever method company chooses, it should follow a uniform and consistent system.

Any item not included in the Agenda may be taken up for consideration with the permission of the Chairman and with the consent of a majority of the Directors present in the Meeting.

**(xix) Shorter Notice for notice and agenda:** To transact urgent business, the Notice, Agenda and Notes on Agenda may be given at shorter period of time than stated above, by complying with the following requirements.

**(xx) Additional content in such shorter notice issued for conducting "urgent business:**

- ✓ The fact that the Meeting is being held at a shorter Notice shall be stated in the Notice.
- ✓ Holding a Meeting at shorter Notice is deviating from the conventional practice. Hence, this fact should be brought out in the Notice convening the Meeting. As a good governance practice, the reasons for convening the Meeting at shorter Notice may also be stated in the Notice.

**(xxi) Presence of Independent Director or ratification of decisions:** For meetings held on short notice, atleast one independent director should be present at the meeting. If none of the Independent Directors are present at the Meeting held on shorter Notice and on the subsequent circulation of Minutes, none

of the decisions or any of the decisions taken at such Meeting is disapproved or not ratified by at least one Independent Director, if any, such decisions of the Board in respect of such items fail.

The company should, therefore not implement decisions taken at such Board Meeting until they are ratified by at least one Independent Director, if any. In case the company does not have an Independent Director, ratification of the decisions taken at such Meeting should be done by the majority of Directors of the company. However, such ratification by majority is not required where the item was approved at the Meeting itself by a majority of Directors of the company.

### Frequency of Meetings

<b>Meetings of the Board</b>	The company shall hold at least four Meetings of its Board in each Calendar Year with a maximum interval of one hundred and twenty days between any two consecutive Meetings. Now, the stricter requirement of holding Board Meeting in every quarter has done away with. As a good governance practice, the Board may approve in advance, a calendar of dates for Meetings to be held in a year.
<b>Provisions for One Person Company, Small Company and Dormant Company</b>	<p>Further, it shall be sufficient if a One Person Company, Small Company or Dormant Company holds one Meeting of the Board in each half of a calendar year and the gap between the two Meetings of the Board is not less than ninety days. If a One Person Company, Small Company or Dormant Company holds only two Meetings in a year, then the gap between the two such Meetings should be minimum 90 days.</p> <p>If more than two Meetings are held in a year where the gap between the first and the last Meeting in a year exceeds 90 days then it would be sufficient compliance of the requirement. The above provision is equally applicable in case of a private “start-up Company”. (MCA Notification G.S.R. 583(E) dated 13th June, 2017).</p> <p>The term “start-up company” means a private company incorporated under the Act and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.</p>
<b>Meetings of Committees</b>	<p>Committees shall meet as often as necessary subject to the minimum number and frequency prescribed by any law or any authority or as stipulated by the Board. For example, the Audit Committee of equity listed company should meet at least four times in a year and not more than one hundred and twenty days should elapse between two Meetings.</p> <p>Also, the Audit Committee of equity listed company may invite the finance director or head of the finance function, head of internal audit and a representative of the statutory auditor and any other such executives to be present at the meetings of the committee. Occasionally the audit committee may meet without the presence of any executives of the company.</p>

<b>Meeting of Independent Directors</b>	<p>Where a company is required to appoint Independent Directors under the Act, such Independent Directors shall meet at least once in a Calendar Year. However, the MCA vide Notification dated 5th July, 2017 has clarified that the Independent Directors are required to meet at least once in a financial year.</p> <p>The independent directors of the company shall hold at least one meeting in a financial year without the attendance of non-independent directors and members of management; [Clause VII (1) of Schedule IV to the Act]. The meeting shall be held to review the performance of Non-Independent Directors and the Board as a whole; to review the performance of the Chairman and to assess the quality, quantity and timeliness of flow of information between the company management and the Board and its members that is necessary for the Board to effectively and reasonably perform their duties.</p> <p>A Meeting of Independent Directors is not a Meeting of the Board or of a Committee of the Board. Therefore, provisions of SS-1 shall not be applicable to such Meetings. A record of the proceedings of such a Meeting may be kept. The Company Secretary, wherever appointed, shall facilitate convening and holding of such meeting, if so desired by the Independent Directors.</p>
<b>Invitees in meeting of independent directors</b>	<p>In order to seek some clarification, opinion, views, etc., the Independent Directors may invite the Company Secretary or the Managing Director or any other officer of the company or a Company Secretary in Practice or any other expert to attend such a Meeting or a part thereof.</p> <p>If so invited, the Company Secretary or the Managing Director or any other officer of the company or a Company Secretary in Practice or any other expert may attend such Meeting or any part thereof.</p>

### Quorum

The Quorum for a Meeting is the minimum number of Directors whose presence is required to constitute a valid Meeting and who are competent to transact business and vote thereon.

<b>Quorum shall be present throughout the Meeting</b>	<p>In order that a Meeting may be properly constituted and the business be validly transacted, Quorum should be present throughout the meeting.</p>
<b>Interested Director not to participate in Quorum</b>	<p>An Interested Director should neither participate nor vote in respect of an item in which he is interested, nor such Director be counted for Quorum in respect of such item. However, such Director may be present in the Meeting during discussions on such item. In case of a private company, a Director shall be entitled to participate in respect of such item after disclosure of his interest.</p> <p>If the item of business is a related party transaction, then he shall not be present at the meeting, whether physically or through electronic mode, during discussions and voting on such item.</p> <p>In case of a private company, MCA Notification dated 5 th June, 2015 states that sub-section (2) of Section 184 of the Act shall apply with the exception that the Interested Director may participate at such Board Meeting after disclosure of his interest.</p>

	<p>For the purpose of Quorum, as per Explanation to sub-section (3) of Section 174 of the Act, an Interested Director means a Director covered under sub-section (2) of Section 184 of the Act which in turn provides for disclosure of interest by an Interested Director and prohibits his participation in an item in which he is interested.</p> <p>[In line with MCA Notification No. G.S.R. 464(E) dated June 5<sup>th</sup>, 2015] MCA Notification G.S.R. 583(E) dated 13<sup>th</sup> June, 2017 specifically provides that in case of a private company, an Interested Director may also be counted towards quorum after disclosure of his interest pursuant to Section 184.</p>
<b>Related Party Transaction</b>	<p>If the item of business is a related party transaction, then the interested director shall not be present at the Meeting, whether physically or through Electronic Mode, during discussions and voting on such item. As per Rule 15(2) of the Companies (Meetings of Board and its Powers) Rules, 2014, an Interested Director shall not be present during discussions and voting on the item in which he is interested, if the item happens to be a related party transaction.</p>
<b>Disclosure of interest by Interested Director</b>	<p>As stated, any Director of the company who is interested in a matter being considered at the Meeting should disclose his interest.</p> <p>Every Director should, at the first Meeting of the Board in which he participates as a Director and thereafter at the first Meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board Meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals, which should include his shareholding. [Sub-section (1) of Section 184 of the Act read with Rule 9 of the Companies (Meetings of Board and its Powers) Rules, 2014].</p>
<b>Quorum w.r.t. Directors participating through Electronic Mode</b>	<p>Directors participating through Electronic Mode in a Meeting shall be counted for the purpose of Quorum, unless they are to be excluded for any items of business under the provisions of the Act or any other law.</p>
<b>Quorum for Meetings of the Board</b>	<p>The Quorum for a Meeting of the Board shall be one-third of the total strength of the Board, or two Directors, whichever is higher.</p>
<b>Quorum for Meetings of Committees</b>	<p>Unless otherwise stipulated in the Act or the Articles or under any other law, the Quorum for Meetings of any Committee constituted by the Board shall be as specified by the Board. If no such Quorum is specified, the presence of all the members of any such Committee is necessary to form the Quorum.</p>

### Attendance at Meetings

- (i) **Attendance register** : Every company shall maintain attendance register for the Meetings of the Board and Meetings of the Committee. The pages of the attendance register shall be serially numbered.
- (ii) **Manner of maintaining attendance register**: Attendance may be recorded on separate attendance



sheets or in a bound book or register. If an attendance register is maintained in loose-leaf form, it shall be bound periodically, at least once in every three years.

**(iii) Particulars of attendance register:** The attendance register shall contain the following particulars:

- serial number and date of the Meeting;
- in case of a Committee Meeting name of the Committee;
- place of the Meeting;
- time of the Meeting;
- names and signatures of the Directors,
- the Company Secretary and
- persons attending the Meeting by invitation and their mode of presence, if participating through Electronic Mode

The attendance register should also contain the capacity in which an Invitee attends the Meeting and where applicable, the name of the entity such Invitee represents, and the relation, if any, of that entity to the company. This would enable recording of the same in the Minutes as required in paragraph 7.2.1.2 of SS-1.

This paragraph of SS-1 also clearly classifies the persons “present”, “in attendance” and “Invitees” for the purpose of the Meeting. Thus, the main participants of the Meeting i.e. Directors should be treated as “present”; the Company Secretary, who is the person responsible for facilitating, convening the Meeting and attend the same as a part of his duty should be treated as “in attendance” and any other person other than the above two categories, including KMPs, should be treated as “Invitees” at the Meeting, for all purposes.

In case an Institution has appointed a Nominee Director on the Board of the company and such Nominee Director is unable to attend the Meeting, another person may be sent by the Institution to attend the specific Meeting. At times, foreign collaborators of the company may be invited to attend Meetings. All such persons attending the Meeting by invitation should be treated as “Invitees”.

Persons who are present in a Meeting merely to provide administrative assistance to an Invitee or Director or Company Secretary should neither be treated as “Invitees” nor as “in Attendance”. The Chairman may use his discretion in recording the presence of such persons.

If a Committee deems it necessary, it may invite any other Director, who is not a member of the Committee, to attend the Meeting of the Committee for specific purpose. Such Director should then be treated as an “Invitee” at the Meeting for all purposes.

**(iv) Signing of Attendance Register:** The attendance register shall be deemed to have been signed by the Directors participating through Electronic Mode, if their attendance is recorded in the attendance register and authenticated by the Company Secretary or where there is no Company Secretary, by the Chairman or by any other Director present at the Meeting, if so authorised by the Chairman and the fact of such participation is also recorded in the Minutes.

In terms of this paragraph of SS-1, the attendance of any of the Directors participating through Electronic Mode in a Meeting is required to be recorded in the attendance register and authenticated by the Chairman or the Company Secretary. Such authentication may also be done by any other director present at the meeting, if so authorised by the Chairman. This is provided to facilitate the authentication process in the absence of Company Secretary.

Authentication of the entries in the attendance register by the Company Secretary or the Chairman

confirms the integrity of the information entered in the Attendance Register. Authentication also becomes essential considering the significance of the attendance register as conclusive proof before the Courts/Tribunals, as also for audit and other purposes.

In case of meeting where directors are present in person, each Director should sign the attendance register. Additionally, the Company Secretary, who is in attendance at Board Meetings and persons attending a Meeting by invitation, should sign the attendance register.

Signing of the attendance register would not only be evidence of the particular Director being present at the Meeting but would also facilitate payment of sitting fees and accounting thereof by the company.

- (v) **Place of maintaining attendance register:** The attendance register shall be maintained at the Registered Office of the company or such other place as may be approved by the Board. The attendance register is open for inspection by the Directors. Even after a person ceases to be a Director, he shall be entitled to inspect the attendance register of the Meetings held during the period of his Directorship.
- (vi) **Roll call for Directors participating through Electronic Mode:** In case of Directors participating through Electronic Mode, the Chairman shall confirm the attendance of such Directors. For this purpose, at the commencement of the Meeting, the Chairman shall take a roll call. The Chairman or the Company Secretary shall request the Director participating through Electronic Mode to state his full name and location from where he is participating and shall record the same in the Minutes.

The requirement for roll call is in line with the requirement under Rule 3(4) and Rule 3(5) of the Companies (Meetings of Board and its Powers) Rules, 2014. During the roll call, every Director participating through Electronic Mode should state, for the record, the following namely:

- (a) name;
- (b) the location from where he is participating;
- (c) that he has received the Agenda and all the relevant material for the Meeting; and
- (d) that no one other than the concerned Director is attending or having access to the proceedings of the Meeting at the location mentioned in (b) above. [Rule 3(4) of the Companies (Meetings of Board and its Powers) Rules, 2014]

The proceedings of such Meetings shall be recorded through any electronic recording mechanism and the details of the venue, date and time shall be mentioned. The attendance register shall be preserved for at least eight financial years from the date of last entry made therein and may be destroyed thereafter with the approval of the Board.

- (vii) **Leave of absence:** Leave of absence shall be granted to a Director only when a request for such leave has been communicated to the Company Secretary or to the Chairman or to any other person authorised by the Board to issue Notice of the Meeting. Request for leave of absence may be either oral or written. Any such request received should be mentioned at the Meeting and should be recorded in the Minutes of the Meeting. The Minutes of the Meeting should clearly mention the names of the Directors present at the Meeting and those who have been granted leave of absence.
- (viii) **Vacation of office of Director:** The office of a Director shall become vacant in case the Director absents himself from all the Meetings of the Board held during a period of twelve months with or without seeking leave of absence of the Board. For the purpose of counting of Board Meetings held in the preceding twelve months, the counting should commence from the date of the first Board Meeting held Immediately after the Meeting which the Director concerned last attended.

A Board Resolution need not be passed to show that office of Director has been vacated by a particular Director. Vacation of office is automatic as soon as a Director is found to have incurred disability as



contemplated by clause (b) of sub-section (1) of Section 167 of the Act) [Bharat Bhushan v. H.B. Portfolio Leasing Ltd. (1992) 74 Comp. Cas. 20 (Del)]. As a matter of good governance, due intimation of such vacation should be sent to such Director forthwith and the Board may take note of such vacation at its next Meeting.

- (ix) **Proxies cannot be appointed to attend Board Meetings:** The Act does not contain any provision conferring on the Directors the right to appoint a proxy to attend Board Meetings.

### Chairman

- (i) **Meetings of the Board:** The Chairman of the company shall be the Chairman of the Board. If the company does not have a Chairman, the Directors may elect one of themselves to be the Chairman of the Board. The procedure for appointment and powers and duties of a Chairman may be prescribed in the Articles of the company.
- (ii) **Appointment of Chairman:** For a Meeting to be properly constituted, the Chairman of the Board or a validly elected person should be in the chair. The Act does not provide for appointment of a Chairman of the Meeting but the Model Articles provide that the Board may elect a Chairman of its Meetings and determine the period for which he is to hold office [Regulation 70 (i) of Table F of Schedule I to the Act]. While appointing such person, the Board may stipulate a time period for the person to continue as Chairman of the Board. At the end of such period, the Board may either re-appoint the person or appoint any other Director as Chairman of the Board. It is considered a good practice for every company to have a Chairman who would be the Chairman for Meetings of the Board of Directors as well as general meetings of the company. Normally, the Directors elect one amongst themselves to be the Chairman of the Board and he continues to act as such until he ceases to be a Director or until another Director is appointed as the Chairman. The Chairman may be appointed in accordance with the relevant provision in the Articles. Companies may provide, in their Articles, for the appointment of a Vice-Chairman to act as Chairman in the absence of the Chairman. In absence of such provision in the Articles and in the absence of the Chairman, the Directors may elect one of themselves as a Chairman for the Meeting.
- (iii) **Election of Chairman in the absence of elected chairman:** The Chairman of the Board shall conduct the Meetings of the Board. If no such Chairman is elected or if the Chairman is unable to attend the Meeting, the Directors present at the Meeting shall elect one of themselves to chair and conduct the Meeting, unless otherwise provided in the Articles. If no Chairman is elected by the Board, or if at any Meeting, the Chairman is not present within five minutes after the time appointed for holding the Meeting, the Directors present may choose one of their number to be Chairman of the Meeting [Regulation 70 of Table F of Schedule I to the Act].
- (iv) **Role of Chairman:** The Chairman shall ensure that the required Quorum is present throughout the meeting and at the end of discussion on each agenda item, the Chairman shall announce the summary of the decision taken thereon. The main function of the Chairman is to preside over and conduct the Meeting in an orderly manner.
- (v) **Interested Chairman should vacate the Chair:** If the Chairman is interested in an item of business, he shall entrust the conduct of the proceedings in respect of such item to any Non-Interested Director with the consent of the majority of Directors present and resume the Chair after that item of business has been transacted. However, in case of a private company, the Chairman may continue to chair and participate in the Meeting after disclosure of his interest. If the item of business is a related party transaction, the Chairman shall not be present at the Meeting, whether physically or through Electronic Mode, during discussions and voting on such item.
- (vi) **Chairman of Committee Meeting:** A member of the Committee appointed by the Board or elected

by the Committee as Chairman of the Committee, in accordance with the Act or any other law or the Articles, shall conduct the Meetings of the Committee. If no Chairman has been so elected or if the elected Chairman is unable to attend the Meeting, the Committee shall elect one of its members present to chair and conduct the Meeting of the Committee, unless otherwise provided in the Articles. The Board may appoint a Chairman for a Committee at the time of the constitution of the Committee. If the Board has not appointed the Chairman, the Committee may elect a Chairman of its Meetings and if no such Chairman is elected, or if at any Meeting the Chairman is not present within five minutes after the time appointed for holding the Meeting, the members present may choose one of their members to be Chairman of the Meeting unless otherwise provided in the Articles (Regulation 72 of Table F of Schedule I to the Act).

### Passing of Resolution by Circulation

The Act requires certain business to be approved only at Meetings of the Board. However, other business that requires urgent decisions can be approved by means of Resolutions passed by circulation. Resolutions passed by circulation are deemed to be passed at a duly convened Meeting of the Board and have equal authority.

- (i) **Authority for resolution by circulation:** The Chairman of the Board or in his absence, the Managing Director or in their absence, any Director other than an Interested Director, shall decide, before the draft Resolution is circulated to all the Directors, whether the approval of the Board for a particular business shall be obtained by means of a Resolution by circulation. For the purpose of this paragraph of SS-1, in case of a private company, an Interested Director may also decide, before the draft Resolution is circulated to all the Directors, whether the approval of the Board for a particular business should be obtained by means of a Resolution by circulation. In addition to the items prescribed in the Act (given in Annexure IA), an illustrative list of items given under SS-1 that should not be passed by circulation is given in Annexure IB.
- (ii) **When does Resolution by circulation fails:** Where not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting, the Chairman shall put the Resolution for consideration at a Meeting of the Board.
- (iii) **Despatch of circular resolution:** A Resolution proposed to be passed by circulation shall be sent in draft, together with the necessary papers, to all the Directors including Interested Directors on the same day.
- (iv) **Mode of delivery of circular resolution:** The draft of the Resolution to be passed and the necessary papers shall be circulated amongst the Directors by hand, or by speed post or by registered post or by courier, or by e-mail or by any other recognised electronic means. An additional two days should be added for the service of the draft Resolution, as in case the same has been sent by the company by speed post or by registered post or by courier, while computing the date of circulation of the draft of the Resolution given to the Directors to respond in case of Resolution by circulation.

A time period of minimum three years from the date of meeting has been prescribed for preserving proof of sending and delivery of the draft of the Resolution and the necessary papers.

- (v) **Essentials of circular resolution:** Each business proposed to be passed by way of Resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed and the draft of the Resolution proposed.
  - The note shall also indicate how a Director shall signify assent or dissent to the Resolution proposed and the date by which the Director shall respond.

- Notice and Agenda are not necessary for passing of a Resolution by circulation. However, necessary papers which explain the purpose of the Resolution should be sent along with the draft Resolution to all the Directors, or in the case of a Committee, to all the members of the Committee.
- It would be advisable to also explain the reasons as to why approval is sought by circulation.
- As explained earlier that circular resolution will fail and shall be considered at a meeting, if not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting. As such, it is necessary to put in the note being circulated with the proposed Resolution, the last date for receiving responses from the Director to the Resolutions proposed.
- Each Resolution shall be separately explained. The decision of the Directors shall be sought for each Resolution separately. A single note containing more than one Resolution may be circulated but the note should enable the signifying of the decision by a Director on each Resolution separately.
- *A suggested format for circulation is given in Annexure VI.*

**(vi) Approval of circular resolution:** The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting. For a Resolution under circulation to be passed, it should be approved by a majority of dis-interested Directors, who are entitled to vote. The Resolution, if passed, shall be deemed to have been passed on the earlier of:

- the last date specified for signifying assent or dissent by the Directors; or
- the date on which assent has been received from the required majority, provided that on that date the number of Directors, who have not yet responded on the resolution under circulation, along with the Directors who have expressed their desire that the resolution under circulation be decided at a Meeting of the Board, shall not be one third or more of the total number of Directors; and shall be effective from that date, if no other effective date is specified in such Resolution.

**(vii) Requisite Majority:** If any special majority or the affirmative vote of any particular Director or Directors is specified in the Articles, the Resolution shall be passed only with the assent of such special majority or such affirmative vote.

**(viii) Numbering of Resolutions:** Every such Resolution shall carry a serial number. During e-filing, companies are required to quote Resolution numbers in certain cases. Numbering would facilitate the above and also enable ease of reference. The company may choose to follow its existing system of numbering, if any or any new system of numbering, which should be distinct and enable ease of reference or cross-reference.

#### Illustrations

- (i) Serially numbering on Calendar Year basis : "Circular Resolution No. 1/2015", "2/2015", "3/2015" and so on....
- (ii) Serially numbering on financial year basis : "Circular Resolution No. 1/2015-16", "2/2015-16", "3/2015-16" and so on...
- (iii) Continuous numbering across years : Circular Resolution No. 10, 11, 12 ... and so on...

In any case, the company should follow a uniform and consistent system while numbering the Resolutions.

- (ix) **Recording:** Resolutions passed by circulation shall be noted at a subsequent Meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the Minutes of such Meeting. This is in line with sub-section (2) of Section 175 of the Act, which requires a Resolution passed by circulation to be noted at a subsequent Meeting of the Board or the Committee thereof, as the case may be, and recorded in the Minutes of such Meeting. The text of the Resolution along with details of dissent and abstention should be recorded and taken note of in the next Meeting and should be recorded in the Minutes of such Meeting. As a matter of good governance, if a Resolution by circulation is not passed due to lack of majority, or if it has to be taken up at a Meeting of the Board due to one-third of the directors requiring the same, this fact should be appropriately recorded in the Minutes of the next Meeting. Now there is no need for recording in Minutes the fact that the Interested Director did not vote on the Resolution.

## Minutes

'Minutes' are the official recording of the proceedings of the Meeting and the business transacted at the Meeting. Every company shall keep Minutes of all Board and Committee Meetings in a Minutes Book. Minutes kept in accordance with the provisions of the Act evidence the proceedings recorded therein. There is no restriction in law on the language of recording Minutes.

- (i) **Maintenance of Minutes:** Minutes shall be recorded in books maintained for that purpose. A distinct Minutes Book shall be maintained for Meetings of the Board and each of its Committees. A company may maintain its Minutes in physical or in electronic form. Minutes may be maintained in electronic form in such manner as prescribed under the Act and as may be decided by the Board. Minutes in electronic form shall be maintained with Timestamp. Every listed company or a company having not less than one thousand shareholders, debenture holders and other security holders, may maintain its records in electronic form [Rule 27 of the Companies (Management and Administration) Rules, 2014].
- (ii) **Consistency in the form of maintaining Minutes:** A company shall however follow a uniform and consistent form of maintaining the Minutes. Any deviation in such form of maintenance shall be authorised by the Board. Companies should maintain the Minutes of all Meetings either in physical form or in electronic form. In other words, companies should not maintain Minutes of a few Meetings in physical form and of a few Meetings in electronic form.
- (iii) **The pages of the Minutes Books shall be consecutively numbered:** This shall be followed irrespective of a break in the Book arising out of periodical binding in case the Minutes are maintained in physical form so as to facilitate easy retrieval of any decision/Resolution and additionally to safeguard the integrity of the Minutes. Thus, where a Minutes Book is full and a new Minutes Book is prepared, the numbering should continue from the number appearing on the last page of the previous Minutes Book. This should also be followed irrespective of the number or year of Meeting. For the purpose of this paragraph of SS-1, a company may choose to give consecutive numbering from Meetings held on or after 1st July, 2015, this being the date from which SS-1 became effective. In the event any page or part thereof in the Minutes Book is left blank, it shall be scored out and initialled by the Chairman who signs the Minutes. This shall be equally applicable for maintenance of Minutes Book in electronic form with Timestamp.
- (iv) **No attachment or pasting is allowed in Minutes:** Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.
- (v) **Contents of Minutes:**

**General Contents:** Minutes should state at the beginning the following:

- The name of the company

- The type of Meeting (Board Meeting, Committee Meeting, etc.)
- The serial number, day, date and venue of the Meeting
- The time of commencement of the Meeting

**Specific Contents:** Minutes shall *inter-alia* contain:

- The name(s) of Directors present and their mode of attendance, if through Electronic Mode: In case all Directors are present physically, the Minutes need not specially record the mode of attendance. However, the Minutes should record the same in respect of Directors who participated in the Meeting through Electronic Mode.
- In case of a Director participating through Electronic Mode, his particulars, the location from where he participated and wherever required, his consent to sign the statutory registers placed at the Meeting.
- Minutes should record the location from where the Directors participating through Electronic Mode participated in the Meeting.
- The name of Company Secretary who is in attendance and Invitees, if any, for specific
- Items and mode of their attendance if through Electronic Mode.
- Record of election, if any, of the Chairman of the Meeting.
- The election, if any, of the Chairman of the Meeting, as provided in paragraph 5 of SS-1, should be recorded in the Minutes.
- Record of presence of Quorum: If at the commencement of the Meeting, Quorum is present, but subsequently any Director leaves before the close of the Meeting due to which the Quorum requirement is not met for businesses taken up thereafter, then the Meeting should be adjourned and a statement to that effect should be recorded in the Minutes.
- The names of Directors who sought and were granted leave of absence.
- Noting of the Minutes of the preceding Meeting.
- Minutes of the preceding Meeting, including any adjourned Meeting, should be noted.
- Noting the Minutes of the Meetings of the Committees.
- *Minutes of a Board Meeting should contain a noting of the Minutes of the Meetings of all its Committees which have been entered in the Minutes Book of the respective Committees and which have not yet been noted by the Board.*
- *This is a good governance practice which would ensure that the Board remains intimated about the deliberations and discussions that have taken place at Committee Meetings.*
- *The text of the Resolution(s) passed by circulation since the last Meeting, including dissent or abstention, if any.*
- *If any Director on the Board dissents or abstains from voting on any of the Resolution passed by circulation, then such dissent or abstention should be recorded in the Minutes.*
- *The fact that an Interested Director did not participate in the discussions and did not vote on item of business in which he was interested and in case of related party transaction such director was not present in the Meeting during discussions and voting on such item. (Earlier this was specifically provided to be recorded but now in revised SS-1, there is no such specific requirement)*
- *In case of a private company, the Minutes should record the fact that an interested Director*

*after disclosure of his interest participated in the discussion and voted thereat (In line with MCA Notification No. G.S.R. 464(E) dated June 5, 2015)*

- *The views of the Directors particularly the Independent Director, if specifically insisted upon by such Directors, provided these, in the opinion of the Chairman, are not defamatory of any person, not irrelevant or immaterial to the proceedings or not detrimental to the interests of the company.*
- *If any Director has participated only for a part of the Meeting, the Agenda items in which he did not participate:*
- *In the event, a particular Director leaves the Meeting early, the fact of his so leaving should be incorporated in the Minutes. Likewise, if a particular Director joins the Meeting after its commencement, this fact should also be recorded in the Minutes.*
- *The fact of the dissent and the name of the Director who dissented from the Resolution or abstained from voting thereon.*
- *Names of Directors who abstained from voting and names of those dissenting should also be mentioned in the Minutes.*
- *Ratification by Independent Director or majority of Directors, as the case may be, in*
- *case of Meetings held at a shorter Notice.*
- *If the Independent Director does not ratify the decision taken at the Meeting held at a shorter Notice or if he abstains from such ratification, a statement to that effect should be recorded in the Minutes.*
- *Consideration of any item other than those included in the Agenda with the consent of majority of the Directors present at the Meeting and ratification of the decision taken in respect of such item by a majority of Directors of the company.*
- *Minutes should state that items which were not included in the Agenda were taken up with the consent of the Chairman and majority of the Directors present at the Meeting. Minutes should also state that the decision taken in respect of such item has been approved / ratified by the majority of the Directors of the company.*
- *The time of commencement and conclusion of the Meeting.*
- *The Minutes should record the time when the Meeting commenced and concluded.*
- *In addition to what is stated above, the following should also be recorded in the Minutes, to the extent applicable:*
  - (a) *the fact that the Notices given by Directors disclosing their Directorships and shareholding in other companies, bodies corporate, firms, or other association of individuals as per Section 184 of the Act and their shareholdings in the company/ holding/subsidiary/associate company as per Section 170 of the Act, were read and noted;*
  - (b) *the fact of unanimity of decisions of dis-interested directors as contemplated by Sections 203 and 186 of the Act and listed out in Annexure IC;*
  - (c) *the fact that the register of contracts with related parties and contracts and bodies etc. in which Directors are interested was placed before the Meeting and was signed by all the Directors present thereat (Section 189 of the Act);*
  - (d) *Noting of declaration of independence by Independent Directors [Sub-section (7) of Section 149 of the Act];*



- (e) Noting of declaration that none of the Directors are disqualified to be appointed / continuing as a Director of the company or are disqualified to act as a Director on the basis of non-compliance by other companies on the Board(s) of which they are Directors, in terms of the provisions of sub-section (2) of Section 164 of the Act;
- (f) In case of demise or resignation or disqualification of any Director, details of such Director and noting of vacation of his office.
- (g) In case a Resolution placed before the Board is rejected or withdrawn, the fact of it so having been rejected or withdrawn.

Apart from the Resolution or the decision, Minutes shall mention the brief background of all proposals and summarise the deliberations thereof. In case of major decisions, the rationale thereof shall also be mentioned.

Brief description of the discussions which took place should be recorded in the Minutes, as evidence of the fact that the Board has considered and deliberated the matter before taking any decision on the same. The decisions shall be recorded in the form of Resolutions, where it is statutorily or otherwise required. In other cases, the decisions can be recorded in a narrative form. For instance: If the Board approves a project, the decision of the Board may be mentioned with the following narrative since there is no statutory mandate in this case to record the decision in the form of Resolution:

“Project XYZ was approved by the Board after a thorough discussion.”

Where a Resolution was passed pursuant to the Chairman of the Meeting exercising his second or casting vote, the Minutes shall record such fact. The Article, if any, referring to the casting vote by the Chairman should also be recorded in the Minutes.

(vi) **Recording of Minutes:** Companies follow diverse practices with respect to recording of Minutes. Some companies record only the decisions while few companies record only the Resolutions that capture the decisions taken and some companies record the entire proceedings in the form of almost an exact transcript of what had transpired at the Meeting. SS-1 seeks to harmonise such divergent practices by providing principles for recording of Minutes.

- The Minutes should be recorded in such a way that it enables any reader to understand what had transpired in the Meeting.
- Specimen Minutes of the first and subsequent Board Meetings are given in Annexure VII and VIII respectively.
- Minutes shall contain a fair and correct summary of the proceedings of the Meeting:
- Minutes are not an exhaustive record of everything said at a Meeting. Minutes should record the decisions of the Board, with a narrative to put them in context. They should not attempt to record all reasons for decisions taken, i.e. all arguments put forth for and against a particular Resolution. There is also no need to record the details of voting.
- Since the Notes on Agenda contain the background of the proposal in detail, the Minutes should contain only the summary of the proposal. It is not required that whatever is contained in the Notes on Agenda be reproduced verbatim; however, the crux of the matter should be captured in the Minutes.
- The Company Secretary shall record the proceedings of the Meetings. Where there is no Company Secretary, any other person duly authorised by the Board or by the Chairman in this behalf shall record the proceedings.
- In case a Company Secretary is unable to attend a Meeting, or in the absence of the Company

Secretary, any other person duly authorised by the Board or by the Chairman may attend and record the proceedings of the Meeting.

- The Chairman shall ensure that the proceedings of the Meeting are correctly recorded.

**(vii) Chairman's discretion:** The Chairman has absolute discretion to exclude from the Minutes, matters which in his opinion are or could reasonably be regarded as defamatory of any person, irrelevant or immaterial to the proceedings or which are detrimental to the interests of the company. The Chairman has the responsibility to ensure that the Minutes contain a fair and accurate summary of the proceedings at the Meeting. The word "fair" signifies the need to record matters as transpired at the Meeting without any bias. While doing so, he has absolute discretion to exclude matters of the nature as specified above.

**(viii) Minutes shall be written in clear, concise and plain language:**

- Minutes need not be an exact transcript of the proceedings at the Meeting.
- Minutes should be written in simple language and should contain a brief synopsis of the discussions along with the decisions taken at the Meeting.
- Minutes should record the essential elements of the discussion and the complete text of the Resolutions passed at the Meeting.
- In case any Director requires his views or opinion on a particular item to be recorded verbatim in the Minutes, the decision of the Chairman whether or not to do so shall be final.
- Minutes shall be written in third person and past tense. Resolutions shall however be written in present tense.
- There is no restriction in law on the language in which the Minutes are recorded.

**(ix) Recording of unsigned documents which were not part of the Notes on Agenda:** Wherever the decision of the Board is based on any unsigned documents including reports or notes or presentations tabled or presented at the Meeting, which were not part of the Notes on Agenda and are referred to in the Minutes, shall be identified by initialing of such documents by the Company Secretary or the Chairman.

**(x) Recording of supersession or modification of earlier resolution:** Where any earlier Resolution(s) or decision is superseded or modified, Minutes shall contain a specific reference to such earlier Resolution(s) or decision or state that the Resolution is in supersession of all earlier Resolutions passed in that regard.

**(xi) Noting of minutes of preceding Meeting:** Minutes of the preceding Meeting shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

**(xii) Noting of minutes of Committee Meeting:** Minutes of the Meetings of any Committee shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

**(xiii) Finalisation of Minutes:**

- Within fifteen days from the date of the conclusion of the Meeting of the Board or the Committee, the draft Minutes thereof shall be circulated by hand or by speed post or by registered post or by courier or by e-mail or by any other recognised electronic means to all the members of the Board or the Committee, as on the date of the Meeting, for their comments.
- The above requirement has been introduced in line with Rule 3(12) of the Companies (Meetings of Board and its Powers) Rules, 2014, which requires the draft Minutes of the Meetings held through Electronic Mode to be circulated to the Directors within fifteen days. This requirement has been extended to physical Meetings also since it is a good practice.



- A minimum period of three years from the date of meeting has been prescribed for maintaining proof of sending draft minutes and its delivery.
- Only if Chairman is authorized by the Board, he has discretionary power to consider the comments of any director received after expiry of seven days from the date of dispatch of draft minutes to them.

**(xiv) Entry in the Minutes Book**

- Minutes shall be entered in the Minutes Book within thirty days from the date of conclusion of the Meeting.
- The date of entry of the Minutes in the Minutes Book shall be recorded by the Company Secretary. Where there is no Company Secretary, it shall be entered by any other person duly authorised by the Board or by the Chairman.
- The date of entry of the Minutes should be recorded on the last page of the respective Minutes. If the Minutes are maintained in electronic form, the date of entry should be captured in Timestamp.

**(xv) Alteration in the minutes once entered in the Minutes Book:** Minutes, once entered in the Minutes Book, shall not be altered. Any alteration in the Minutes as entered shall be made only by way of express approval of the Board at its subsequent Meeting at which the Minutes are noted by the Board and the fact of such alteration shall be recorded in the Minutes of such subsequent Meeting. Any corrections or modifications in the text of Minutes, duly entered in the Minutes Book and signed by the Chairman, would tantamount to alteration of Minutes.

**(xvi) Modification of Resolutions passed by the Board:** A Resolution passed by the Board cannot be subsequently modified or altered, unless the Resolution is superseded, modified or altered by the Board by means of another Resolution duly passed.

**(xvii) Signing and Dating of Minutes:** Minutes of the Meeting of the Board shall be signed and dated by the Chairman of the Meeting or by the Chairman of the next Meeting. The Chairman shall initial each page of the Minutes, sign the last page and append to such signature the date on which and the place where he has signed the Minutes.

- The place for this purpose should be the city where the Minutes are being signed. The date on which the Minutes are signed should be appended to the signature.
- Any blank space in a page between the conclusion of the Minutes and signature of the Chairman shall be scored out.
- The Minutes should be recorded on consecutive pages of the Minutes Book. No blank space should be left in between the Minutes.
- If the Minutes are maintained in electronic form, the Chairman shall sign the Minutes digitally.
- Scanned signature of the Chairman cannot be affixed on the Minutes.

**(xviii) Minutes, once signed by the Chairman, shall not be altered, save as mentioned in this Standard:** As SS-1 specifically provides for that any alteration in the Minutes, as entered, should be made only by way of an express approval of the Board at its subsequent Meeting at which the Minutes are noted by the Board and the fact of such alteration shall be recorded in the Minutes of such subsequent Meeting. Within 15 days of signing of the Minutes, a copy of the said signed Minutes certified by the Company Secretary or if there is no Secretary then by any of the director authorized by the Board, shall be circulated to all the directors as on the date of meeting and appointed thereafter. But if any Director has waived right of receiving the said copy of signed

Minutes either in writing or his waiver is recorded in Minutes then there is no need of sending him such copy.

**(xix) Inspection and Extracts of Minutes:** Extracts of the Minutes shall be given only after the Minutes have been duly entered in the Minutes Book: However, without waiting for these formalities, certified copies of the Resolutions can be issued even earlier, once a Resolution is passed. Provided, certified copies of Resolutions can be given only when the text of a Resolution proposed to be passed at a Meeting had been placed before the Meeting.

- Many a times, it might be necessary to furnish certified copies of Resolutions or file the same with authorities for various purposes. Therefore, when the Notes on Agenda are prepared, if an item is of such nature as would require a certified copy to be given to third parties immediately after the passing of the Resolution, the text of the Resolution should be included in the Notes on Agenda or tabled at the Meeting so that certified copies can be issued at any time after the Resolution is passed.
- Such situations may arise in the case of Resolutions passed for opening of bank accounts, taking loans from financial institutions, etc. where the bank account cannot be opened/operated or the financial assistance cannot be availed of without furnishing a certified copy of the Resolution.
- A company can implement Resolutions passed at Meetings of the Board or Committee thereof without waiting for noting of the concerned Minutes at the next Meeting of the Board or the Committee, as the case may be.
- A copy of the Board Resolution may be certified by the Company Secretary or the Chairman or by any Director. There is no restriction on the certification of a Board Resolution by a Director who was not present at the Meeting where such a Resolution was passed. Such Director should however ensure that what he certifies is based on his knowledge of what had transpired at the Meeting.

## Disclosure

The Annual Report and Annual Return of a company shall disclose the number and dates of Meetings of the Board and Committees held during the financial year indicating the number of Meetings attended by each Director. The Report of the Board of Director's shall include a statement on compliance of applicable Secretarial Standards. The above statement may be given as under:

"The Directors have devised proper systems to ensure compliance with the provisions of all applicable Secretarial Standards and that such systems are adequate and operating effectively".

The above statement is intended to align the disclosure requirement with the provisions of Section 134(5)(f) of the Act, which requires the Directors to state in the Directors Responsibility Statement that the Directors have devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems are adequate and operating effectively.

## Annexure I

Illustrative list of items of business which shall not be passed by circulation and shall be placed before the Board at its Meeting

### General Business Items

- Noting Minutes of Meetings of Audit Committee and other Committees.
- Approving financial statements and the Board's Report.

- Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company.
- Specifying list of laws applicable specifically to the company.
- Appointment of Secretarial Auditors and Internal Auditors.

### **Specific Items**

- Borrowing money otherwise than by issue of debentures.
- Investing the funds of the company.
- Granting loans or giving guarantee or providing security in respect of loans.
- Making political contributions.
- Making calls on shareholders in respect of money unpaid on their shares.
- Approving Remuneration of Managing Director, Whole-time Director and Manager.
- Appointment or Removal of Key Managerial Personnel.
- Appointment of a person as a Managing Director / Manager in more than one company.
- In case of a public company, the appointment of Director(s) in casual vacancy subject to the provisions in the Articles of the company.
- According sanction for related party transactions which are not in the ordinary course of business or which are not on arm's length basis.
- Sale of subsidiaries
- Purchase and Sale of material tangible/intangible assets not in the ordinary course of business.
- Approve Payment to Director for loss of office.
- Items arising out of separate Meeting of the Independent Directors if so decided by the Independent Directors.

### **Corporate Actions**

- Authorise Buy Back of securities
- Issue of securities, including debentures, whether in or outside India.
- Approving amalgamation, merger or reconstruction.
- Diversify the business.
- Takeover another company or acquiring controlling or substantial stake in another company.

### **Additional list of items in case of listed companies**

- Noting minutes of Board Meetings of the unlisted subsidiary.
- Quarterly, half-yearly and annual financial results for the listed company.
- Recruitment and remuneration of senior officers just below the level of the Board of Directors.
- Agreement by the company with existing share transfer agent/ the new share transfer agent in the manner as specified by the Board from time to time.
- Statement of all significant transactions and arrangements entered into by the unlisted subsidiary.

- Approving Annual operating plans and budgets.
- Capital budgets and any updates.
- Information on remuneration of Key Managerial Personnel.
- Show cause, demand, prosecution notices and penalty notices which are materially important.
- Fatal or serious accidents, dangerous occurrences, any material effluent or pollution problems.
- Any material default in financial obligations to and by the company, or substantial non-payment for goods sold by the company.
- Any issue, which involves possible public or product liability claims of substantial nature, including any judgement or order which, may have passed strictures on the conduct of the company or taken an adverse view regarding another enterprise that can have negative implications on the company.
- Details of any joint venture or collaboration agreement.
- Transactions that involve substantial payment towards goodwill, brand equity, or intellectual property.
- Significant labour problems and their proposed solutions. Any significant development in Human Resources/ Industrial Relations front like signing of wage agreement, implementation of Voluntary Retirement Scheme etc.
- Quarterly details of foreign exchange exposures and the steps taken by management to limit the risks of adverse exchange rate movement, if material.
- Non-compliance of any regulatory, statutory or listing requirements and shareholder services such as non-payment of dividend, delay in share transfer etc.

## Annexure IA

### Powers of the Board to be exercised at Board Meetings as prescribed under the Act

- (a) To make calls on shareholders in respect of money unpaid on their shares;
- (b) To authorise buy-back of securities under Section 68 of the Act;
- (c) To issue securities, including debentures, whether in or outside India;
- (d) To borrow monies;

The above clause shall not apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act. (Explanation I to sub-section (3) of Section 179 of the Act) In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (d) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of. (Explanation II to sub-section (3) of Section 179 of the Act)

- (e) To invest the funds of the company;
- (f) To grant loans or give guarantee or provide security in respect of loans;
- (g) To approve financial statement and the Board's report;
- (h) To diversify the business of the company;
- (i) To approve amalgamation, merger or reconstruction;

- (j) To take over a company or acquire a controlling or substantial stake in another company;
- (k) Any other matter which may be prescribed, which at present are as follows:
  - (1) To make political contributions;
  - (2) To appoint or remove key managerial personnel (KMP);
  - (3) To appoint internal auditors and Secretarial Auditor;

[Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 read with amendment thereto dated 18th March, 2015]

The acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of Section 179. (Second Proviso to sub-section (3) of Section 179 of the Act)

#### **Appoint a Director to fill a casual vacancy**

If the office of any director appointed by the company in General Meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the Articles of the company, be filled by the Board of Directors at a Meeting of the Board:

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

(Sub-section (4) of Section 161 of the Act)

### **Annexure IB**

Illustrative List of Items to be exercised at Board Meeting as given in SS-1 in addition to those prescribed under the Act

#### **General Business Items**

1. Noting Minutes of Meetings of Audit Committee and other Committees.
2. Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company.
3. Specifying list of laws applicable specifically to the company. The Board is required to take note of the specific list of laws applicable to the company. For example, Banking Regulation Act, 1949 in case of banking companies.

#### **Specific Items**

1. Approving remuneration of Managing Director, Whole-time Director and Manager.
2. Approving appointment of a person as a Managing Director / Manager in more than one company.
3. According sanction for transactions with Related Party which are not in the ordinary course of business or which are not on arm's length basis.
4. Approving sale of subsidiaries
5. Approving purchase and sale of material tangible/intangible assets not in the normal course of business.
6. Approving payment to Managing Director/ Whole-time Director Manager for loss of office.

7. Items arising out of separate Meeting of the Independent Directors if so decided by the Independent Directors.

**Additional list of items in case of listed companies**

1. Noting minutes of Board Meetings of the unlisted subsidiary.
2. Quarterly, half-yearly and annual financial results for the listed company.
3. Recruitment and remuneration of senior officers just below the level of the Board of Directors.
4. Agreement by the company with existing share transfer agent/ the new share transfer agent in the manner as specified by the Board from time to time.
5. Statement of all significant transactions and arrangements entered into by the unlisted subsidiary.
6. Approving Annual operating plans and budgets.
7. Approving Capital budgets and any updates.
8. Approving/Noting Information on Remuneration of Key Managerial Personnel.
9. Noting show cause, demand, prosecution notices and penalty notices which are materially important.
10. Noting fatal or serious accidents, dangerous occurrences, any material effluent or pollution problems.
11. Noting any material default in financial obligations to and by the company, or substantial non-payment for goods sold by the company.
12. Noting any issue, which involves possible public or product liability claims of substantial nature, including any judgement or order which, may have passed strictures on the conduct of the company or taken an adverse view regarding another enterprise that can have negative implications on the company.
13. Noting details of any joint venture or collaboration agreement.
14. Noting transactions that involve substantial payment towards goodwill, brand equity, or intellectual property.
15. Noting significant labour problems and their proposed solutions. Any significant development in Human Resources/ Industrial Relations front like signing of wage agreement, implementation of Voluntary Retirement Scheme etc.
16. Noting Quarterly details of foreign exchange exposures and the steps taken by management to limit the risks of adverse exchange rate movement, if material.
17. Noting non-compliance of any regulatory, statutory or listing requirements and shareholder services such as non-payment of dividend, delay in share transfer etc.

**Annexure IC**

**Powers to be exercised by unanimous consent**

- (a) Power to appoint or employ a person as its Managing Director under Section 203 of the Act if he is the Managing Director or Manager of one and not more than one other company;
- (b) Power to invest or to give loans or guarantee or security under Section 186(5) of the Act.
- (c) Power to remove trustees for the depositors after issue of circular or advertisement and before expiry of his term [Rule 7(4) of the Companies (Acceptance of Deposits) Rules, 2014]

## Annexure ID

### Powers to be exercised subject to passing of Special Resolution at General Meeting or through Postal Ballot

- (a) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or, where the company owns more than one undertaking, of the whole or substantially the whole of any such undertaking.

*Explanation.* – For the purposes of this clause, –(i) “undertaking” shall mean an undertaking in which the investment of the company exceeds twenty per cent of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent of the total income of the company during the previous financial year; (ii) the expression “substantially the whole of the undertaking” in any financial year shall mean twenty per cent or more of the value of the undertaking as per the audited balance sheet of the preceding financial year;

Nothing in clause (a) above shall affect the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as referred to therein, in good faith; or the sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

Any special Resolution conveying consent of the company as aforesaid may stipulate such conditions as may be specified therein including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transaction. However, conditions so stipulated shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the applicable provisions contained in the Act.

- (b) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation.
- (c) To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves apart from temporary loans obtained from company's bankers in the ordinary course of business.

Provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

Special Resolution under this clause shall specify the total amount upto which monies may be borrowed by the Board of Directors.

*Explanation.* – For the purposes of this clause, –the expression “temporary loans” means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature;

No debt incurred by a company in excess of the limit imposed by clause (c) above shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded.

- (d) To remit or give time for the repayment of, any debt due from a Director. [Section 180 of the Act]

The above restrictions would not however be applicable to a private company since MCA has vide its Notification dated 5 th June, 2015 exempted private companies from the provisions of Section 180 of the Act.



## Annexure IE

### **Powers to be exercised subject to approvals of the General Meeting or the Central Government or the National Company Law Tribunal or the requirements of other Statutory Authorities and/or Regulators**

- (i) To appoint a Managing Director, Whole-time Director or Manager and pay Remuneration to such person in case such appointment or remuneration is at variance to the conditions specified in Schedule V; (General Meeting and Central Government approval) [Sub-section (4) of Section 196 of the Act]
- (ii) To make contributions to bona fide charitable and other funds in excess of the limit of 5% of the average net profits for the immediately preceding three financial years; (General Meeting approval) (Section 181)
- (iii) To give any loan or any guarantee or provide security in connection with a loan to any other body corporate or person and acquire by way of subscription, purchase or otherwise, the securities of any other body corporate in excess of the limits laid down for the said purposes for the Board of Directors (Section 186); (General Meeting approval by special Resolution)
- (iv) In case of a public company, in the absence or inadequacy of profits of a company in any financial year, to pay Remuneration to its managerial personnel within the limit and in excess of the limits set out in Clause A and B of section II of Part II of Schedule V appended to the Act; (Section 197).
- (v) In case of listed companies, disposal of shares in its material subsidiary which would reduce its shareholding (either on its own or together with other subsidiaries) to less than 50% or cease the exercise of control over the subsidiary except in cases where such divestment is made under a scheme of arrangement duly approved by Court/ Tribunal. (Previous approval of Shareholders in General Meeting by way of Special Resolution (SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015)
- (vi) In case of listed companies, to pay Remuneration (apart from sitting fees) to non-executive Directors, including independent Directors, (Previous approval of shareholders in General Meeting) (SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015).
- (vii) In case of listed companies, to sell, dispose and lease assets amounting to more than twenty percent of the assets of the material subsidiary on an aggregate basis during a financial year unless the sale/ disposal/ lease is made under a scheme of arrangement duly approved by a Court/Tribunal (Prior approval of shareholders by way of special Resolution) (SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015).
- (viii) In case of listed companies, all material Related Party Transactions shall require approval of the shareholders through Ordinary Resolution and all the related parties shall abstain from voting on such resolutions (SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015).

The above clause is not applicable in case related party transactions entered are between:

- (a) Two government companies.
- (b) A holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the General Meeting for approval. Similarly, in case of insurance companies and banking companies, approval of IRDA and RBI respectively is required for certain items in accordance with their extant rules.

## Annexure IF

### **Powers which may be Delegated by the Board**

- (a) To borrow monies;

- (b) To invest the funds of the company;
- (c) To grant loans or give guarantee or provide security in respect of loans.

Powers delegated by the Board should prescribe the limits in respect of :

- (i) the total amount outstanding at any one time upto which moneys may be borrowed by the delegate;
- (ii) the total amount outstanding upto which the funds may be invested and the nature of investments which may be made by the delegate; and
- (iii) the total amount outstanding upto which loans may be made by the delegate, together with the purposes and the maximum amount in respect of each individual case.

[Sub-section (3) of Section 179 of the Act]

## **Annexure II**

### **Specimen Notice of a Board Meeting**

Name of the Company .....

Registered Address .....

CIN - ..... Email- ..... Telephone: .....

**Website:** .....

#### **NOTICE OF ..... (SERIAL NUMBER OF MEETING) BOARD MEETING**

Mr. ....

Director,

New Delhi.

Dear Sir,

1. NOTICE is hereby given that the ..... (serial number of Meeting) Meeting of the Board of Directors of the company will be held on ..... (day of the week), the ..... (date) ..... (month) ..... (year) at ..... (a.m./p.m.) at ..... (Venue)
2. The Agenda of the business to be transacted at the Meeting is enclosed/will follow
3. You may attend the Meeting through Electronic Mode, the details of which are enclosed. In case you desire to participate through such mode, please send a confirmation in this regard to ..... (Name of Company Secretary/ Chairman/other Authorised Person), email ....., Tel No. .... within ..... days (time frame) to enable making necessary arrangements.

Kindly make it convenient to attend the Meeting.

Yours faithfully,

For.....Limited/Pvt Limited

(Signature)

(Name)

(Designation)

(Email, phone No.)

Important points to be remembered while drafting notice of Board Meeting:
---

- |   |
|---|
| <ol style="list-style-type: none"> <li>1. This should preferably be on the <b>letter-head</b> of the company. Where it is not sent on the letter-head or where it is sent by e-mail or any other electronic means, there should be specified, whether as a header or footer, the name of the company and complete address of its registered office together with all its particulars such as <b>Corporate Identification Number (CIN)</b> as required under Section 12 of the Act, date of Notice, authority and name and designation of the person who is issuing the Notice and preferably, the phone number of the Company Secretary or any other senior officer who could be contacted by the Directors for any clarifications or arrangements.</li> <li>2. If the Meeting is at a venue other than the Registered Office / Corporate Office of the company, detailed location of such venue should be given.</li> <li>3. The Agenda, together with the notes thereon, may either be sent alongwith the Notice or may follow at a later date.</li> <li>4. In the absence of an advance communication or confirmation as indicated herein, from the Director regarding his participation through Electronic Mode, it shall be assumed that he will attend the Meeting physically.</li> </ol> |
|---|

<b>Annexure III</b>
---------------------

<b>Illustrative List of Items of Business for the Agenda for the first Meeting of the Board of Directors</b>
--

1. To appoint the Chairman of the Meeting.
2. To grant leave of absence, if any.
3. To note the Certificate of Incorporation of the company, issued by the Registrar of Companies.
4. To take note of the Memorandum and Articles of Association of the company, as registered.
5. To note the situation of the Registered Office of the company and ratify the registered document of title of premises of the registered office in the name of the company or a Notarised copy of lease /rent agreement in the name of the company.
6. To note the first Directors of the company.
7. To read and record the Notices of disclosure of interest given by the first Directors.
8. To consider appointment of Additional Directors.
9. To consider appointment of the Chairman of the Board.
10. *To consider constitution of Board Committees and approve their terms of reference.*
11. To consider appointment of the First Auditors.
12. To adopt the Common Seal of the company, if any.
13. To appoint Bankers and to open bank accounts of the company.
14. To approve entering into agreements with depositories for issue of shares in dematerialised form and authorising Directors to execute the said agreements on behalf of the company.
15. To authorise printing of share certificates and correspondence with the depositories, if any.
16. To authorise the issue of share certificates to the subscribers to the Memorandum and Articles of Association of the company.
17. To approve and ratify preliminary expenses and preliminary agreements.

18. To approve the appointment of Key Managerial Personnel, if applicable, and other senior officers.

## **Annexure IV**

### **Illustrative Agenda of a Meeting other than the first Meeting of the Board of Directors**

**Agenda for the ..... (Number) Meeting of the Board of Directors of ..... (Company Name), to be held on ..... (Day), ..... (Date, Month and Year) at ..... (Time) at ..... (Venue)**

1. Attendance and Minutes
  - 1.1 To elect a Chairman of the Meeting (if applicable);
  - 1.2 To grant leave of absence to Directors not present at the Meeting;
  - 1.3 To take note of the Minutes of the previous Meeting;
  - 1.4 To take note of the action taken in respect of the earlier decisions of the Board;
  - 1.5 To take note of the Resolutions passed by circulation since the last Meeting, if any;
  - 1.6 To take note of the minutes of Meetings of Committee(s) of the Board;
  - 1.7 To take note of the certificate of compliance.
2. Directors (including, where applicable, Alternate Directors)
  - 2.1 To read and take note of the disclosure of interests by Directors;
  - 2.2 To read and take note of disclosure of shareholdings of Directors in the company and its holding / subsidiary / associate company;
  - 2.3 To read and take note of declarations by Independent Directors that they meet the criteria of independence laid down in the Act;
  - 2.4 To sign the register of contracts;
  - 2.5 To give consent to a contract, wherever applicable in which a Director(s) is/are interested;
  - 2.6 To consider appointment(s) and fixation of Remuneration(s) of key managerial personnel, through the Nomination and Remuneration Committee, where applicable;
  - 2.7 To consider and to give consent for the appointment of a Managing Director/Manager who is already a Managing Director/Manager of another company, through the Nomination and Remuneration Committee, where applicable;
  - 2.8 To take note of nomination of Director(s) made by financial institution(s)/ BIFR/ Central Government/ bank(s) etc.;
  - 2.9 To recommend for the approval of Members appointment of Independent Directors, through the Nomination and Remuneration Committee, where applicable;
  - 2.10 To appoint Additional Director(s) through Nomination and Remuneration Committee, where applicable;
  - 2.11 To appoint a Director to fill the casual vacancy of a Director, through the Nomination and Remuneration Committee, where applicable;
  - 2.12 To accept/ take note of resignation(s) of Director(s)/ withdrawal/change of nomination in case of nominee Director(s);
  - 2.13 To consider commission for Non-Executive Directors;

## 90 PP-DP&A

- 2.14 To delegate powers to Managing/ Whole- time Directors or to Committees constituted by the Board.
- 3. Related party transactions
  - 3.1 To approve transactions with Related Party which are not in the ordinary course of business or which are not on arm's length basis, through the Audit Committee, where applicable;
  - 3.2 To recommend for the approval of the Members, transactions with Related Party beyond the prescribed threshold limits and which are either entered not in the ordinary course of business or not on arm's length basis, through the Audit Committee, where applicable.
- 4. Shares
  - 4.1 To authorise printing of new share certificates;
  - 4.2 To approve transfer/ transmission/ transposition of shares;
  - 4.3 To authorise issue of duplicate share certificates;
  - 4.4 To authorise issue of share certificates without surrender of letters of allotment
  - 4.5 To consider the position of dematerialized and rematerialized shares and the beneficial owners.
- 5. Share Capital
  - 5.1 To make allotment of shares;
  - 5.2 To make calls on shares;
  - 5.3 To forfeit shares;
  - 5.4 To issue bonus shares;
  - 5.5 To issue rights shares;
  - 5.6 To make fresh issue of share capital;
  - 5.7 To authorise buy-back of shares.
- 6. Debentures, Loans and Public Deposits
  - 6.1 To consider matters relating to issue of debentures including appointment of Debenture Trustees;
  - 6.2 To borrow money otherwise than on debentures and by way of Commercial Paper, Certificate of Deposit, etc.;
  - 6.3 To approve raising of money through public deposits;
  - 6.4 To approve the text of the advertisement for acceptance of public deposits and to sign the same.
- 7. Long term loans from financial institutions/ banks
  - 7.1 To authorise making applications/ availing long term loans from financial institutions/ banks and to authorized officers to accept modifications, approve the terms and conditions of loans, execute loan and other agreements and to affix the Common Seal of the company on documents;
  - 7.2 To accept terms contained in the letter of intent of financial institutions/ banks;
  - 7.3 To authorise execution of hypothecation agreements and to create charges on the company's assets;
  - 7.4 To take note of the statement of total borrowings/ indebtedness of the company.

In case of availing of loans/ financial assistance from banks/ financial institutions, the draft Resolutions are generally provided by the banks/ financial institutions, which may be modified as appropriate and circulated to the Directors along with the related item of the Agenda.

8. Banking Facilities

- 8.1 To open/ operate/ close bank accounts;
- 8.2 To avail bank loans;
- 8.3 To renew/ enhance banking facilities including bank overdraft;
- 8.4 To open special/ separate banks accounts for dividend, deposits and unpaid amounts thereof.

9. Investments, Loans and Guarantees

- 9.1 To consider investment in securities of of other bodies corporate;
- 9.2 To consider other investments;
- 9.3 To make loans to other persons;
- 9.4 To consider placing inter-corporate deposits;
- 9.5 To consider giving guarantees for loans to other bodies corporate or security in connection with such loans.

10. Review of Operations

- 10.1 To review operations;
- 10.2 To consider periodic performance report of the company.

Brief notes on the working of the company or its units or branches should contain figures comparable with the figures for the corresponding period of the previous year and that of the budget or forecast for that period.

11. Payment of interim dividend

- 11.1 To consider payment of interim dividend.

12. Projects

- 12.1 To take note of the progress of implementation of modernization/ new project(s) in hand;
- 12.2 To consider expansion/ diversification.

13. Capital Expenditure

- 13.1 To sanction capital expenditure for purchasing/ replacing machinery and other fixed assets;
- 13.2 To approve sale of old machinery/ other fixed assets of the company.

14. Revenue Expenditure

- 14.1 To approve mandatory CSR expenditure of the company, through the CSR Committee;
- 14.2 To approve donations including contributions to political parties;
- 14.3 To sanction grants to public welfare institutions;
- 14.4 To sanction staff welfare grants and other revenue expenditure;
- 14.5 To approve writing off bad debts.

15. Auditors, etc.

- 15.1 To appoint an Auditor to fill a casual vacancy in the office of the Auditor, through the Audit Committee, where applicable;

## 92 PP-DP&A

- 15.2 To appoint a Cost Auditor, through the Audit Committee, where applicable;
- 15.3 To appoint a Secretarial Auditor.
- 15.4 To appoint an Internal Auditor.
- 16. Personnel
  - 16.1 To appoint, accept the resignation of, promote or transfer any senior officer of the company;
  - 16.2 To approve/ amend rules relating to employment/ employee welfare schemes, and provident fund/ superannuation/ gratuity schemes of the company;
  - 16.3 To sanction loan limits for officers and staff or personal exigencies or for purchase of a vehicle, land, house, etc.;
  - 16.4 To formulate personnel policies.
- 17. Legal Matters
  - 17.1 To note and to give directions on significant matters;
  - 17.2 To consider amendment to Memorandum/ Articles of Association;
  - 17.3 To consider and take note of the status of pending litigations by and against the company.
- 18. To approve agreements
  - Restructuring
    - 18.1 To consider merger/ demerger/ amalgamation;
    - 18.2 To consider formation of joint ventures;
    - 18.3 To consider subsidiarization / desubsidiarization of other companies.
- 19. Delegation of Authority
  - 19.1 To nominate occupier/ factory manager under Factories Act; an owner under Mines Act or Directors / representatives under the Legal Metrology Act;
  - 19.2 To delegate powers to representative to attend General Meetings of companies in which the company has investments;
  - 19.3 To delegate powers to approve transfer, transmission, issue of duplicate share certificates/ allotment letters, etc.;
  - 19.4 To delegate authority with regard to signing of contracts, deeds and other documents; execution of indemnities, guarantees and counter guarantees; filing, withdrawing or compromising legal suits;
  - 19.5 To delegate authority with regard to registration, filing of statutory returns, declarations, etc. (in the physical or Electronic Mode) under company law, central excise, sales tax, customs and other laws;
  - 19.6 To delegate powers in respect of the employees of the company including matters relating to appointments, confirmations, discharge, dismissal, acceptance of resignations, granting of increments and promotions, taking disciplinary actions, sanctioning of leave, travel bills and welfare expenses, etc.;
  - 19.7 To delegate powers to grant advances to contractors, suppliers, agents, etc.;
  - 19.8 To delegate powers relating to purchase/construction and sale of stores, spare parts, raw materials, fuel and packing materials; fixed assets; shares or debentures of companies; government securities; and to fix limits up to which executives can authorise or sanction payments; operating of bank accounts etc.;



- 19.9 To delegate powers to engage consultants, retainers, contractors, etc.;
- 19.10 To delegate powers to provide financial assistance to employees, etc. for personal exigencies or for purchase of a vehicle, house, etc.;
- 19.11 To delegate powers to allow rebates/ discounts on sales; to incur expenditure on advertisements, to settle claims, to sanction donations, etc.
- 20. Annual Financial Statements
  - 20.1 To consider annual financial statements, through the Audit Committee, where applicable;
  - 20.2 To consider consolidated financial statements, if applicable, through the Audit Committee, where applicable;
  - 20.3 To consider recommending dividend to shareholders;
  - 20.4 To approve appropriation of profits and transfers to reserves;
  - 20.5 To take note of the Auditors' report.
- 21. Annual General Meeting
  - 21.1 To appoint an agency and a scrutiniser for conduct of e-voting in connection with the Resolutions proposed at the Annual General Meeting;
  - 21.2 To ascertain the Directors retiring by rotation;
  - 21.3 To convene the Annual General Meeting;
  - 21.4 To close the register of members and decide the record date / book closure period;
  - 21.5 To recommend and for the approval/ratification of the Members, appointment and remuneration of Auditors;
  - 21.6 To recommend for the ratification of the Members, remuneration of the Cost Auditors;
  - 21.7 To consider other matters requiring shareholders' approval;
  - 21.8 To approve the Report of the Board of Directors;
  - 21.9 To approve the Notice of the General Meeting and authorise the Company Secretary to issue the Notice to the Members and all other persons and to take all action as may be necessary in this regard.
- 22. Miscellaneous matters
  - 22.1 To consider matters arising out of the Minutes of the previous Meeting;
  - 22.2 To fix the date and venue of the next Meeting;
  - 22.3 Any other matter with the permission of the Chair and with the consent of the majority of the Directors present at the Meeting.

## **Annexure V**

### **Drafting of Agenda, Notes on Agenda and related matters – Practical aspects**

1. While preparing the Agenda and notes thereon, good drafting is of the essence. Important or non-routine items of the Agenda have to be written with special care, employing not only good drafting skills but also an understanding of commercial considerations and the business environment. For the purpose :
  - (a) Divide the Agenda into two parts: - the first part containing usual or routine items and the second

part containing other items which can further be bifurcated as (i) items for approval; and (ii) items for information/noting.

- (b) For each item of the Agenda an explanatory note should be provided. The explanatory note should give sufficient details of the proposal, including the proposed Resolution, if any, references to the provisions of the Companies Act and other applicable laws, the Memorandum and Articles of Association, other relevant documents, decisions of previous Board or General Meetings, as necessary. The explanatory note may be drafted under the following heads :
  - (i) Background (or Introduction);
  - (ii) Proposal, with recommendations of the management;
  - (iii) Provisions of Law;
  - (iv) Decision(s) to be taken ; and
  - (v) Interest, if any, of any Directors.
2. As a good governance practice, the agenda item should be initiated by the concerned Department (Head of Department or other authorised person) and approved by the competent authority as may be decided by the Board.
3. The Company Secretary should refer to the Agenda of previous Meetings, to see whether any items had been deferred and should consider whether such items are to be included for discussion at the ensuing Meeting.
4. The Company Secretary should also refer to the Minutes of the Meeting held during the corresponding period of the previous year to see whether there are any recurring periodic items (e.g. interim/final dividend, quarterly results). The Company Secretary should finalise the Agenda in consultation with the Chairman or in his absence the Managing Director or in his absence the Whole-time Director.
5. Notes on policy matters should present clear-cut issues in order to facilitate due deliberations and precise decisions at the Meeting.
6. The Company Secretary should keep, in addition to a record of matters to be discussed, a separate folder of all such correspondence, notes and documents which need to be dealt with at the Meeting. In preparing the Agenda, the Company Secretary should refer to this folder to ensure that all items which require the decision of the Board are included in the Agenda.
7. A separate Agenda item number should be given for items which are brought forward for discussion from a previous Meeting rather than placing them under the omnibus Agenda items. For example:

Item No.9. DISINVESTMENT MANDATE

To note the appointment of the company as advisors for the disinvestment process of ABC Limited.

(Refer to Item No. 18 of the Minutes of the Meeting held on.....).

***A few extra copies of the Agenda should always be kept available at the Meeting.***

NOTES ON AGENDA FOR THE FIRST BOARD MEETING
---

**Item No. 1 : To appoint chairman of the meeting:**

In terms of Article..... of the Articles of Association of the Company, the Directors to select one of them as Chairman of the meeting.

**Item No. 2: To note the certificate of incorporation of the company, issued by the Registrar of Companies.**

Original Certificate of Incorporation No. .... dated ..... received from the Registrar of Companies together with a copy of the Memorandum and Articles of Association will be placed before the meeting.

**Item No. 3: To take note of Memorandum and Articles of Association of Company, as registered.**

Printed copies of the Memorandum and Articles of Association as registered with the Registrar of Companies will be placed before the meeting.

**Item No. 4: To note the situation of the registered office of the company.**

The Board may kindly take note of the situation of the registered office of the company as intimated to the Registrar of Companies.

**Item No. 5: To note the appointment of the first directors of the Company**

Mr ..... and Mr. .... are the first directors as stated in Article ..... of the Articles of Association of the company and as intimated to the Registrar of Companies.

**Item No. 6: To read and record the notices of disclosure of interest given by the Director**

The Board may kindly record the notices of disclosure of interest given by Directors of the Company.

**Item No. 7: To elect chairman, appoint Managing Director and Secretary**

Article ..... of the Articles of Association of the company relating to the Chairman of the Board be referred to the Board. The Board may kindly appoint a managing director and a secretary of the company.

**Item No. 8: To consider the appointment of first auditors of the company.**

Certificate in writing received from the proposed Auditors will be placed before the meeting for appointment of the first Auditors of the company.

**Item No. 9: To approve preliminary expenses and preliminary contracts.**

Statement of preliminary expenses and preliminary contracts incurred will be placed before the meeting.

**Item No. 10: To adopt the common seal of the company.**

Common Seal of the company will be placed before the meeting for approval, adoption and safe custody.

**Item No. 11: To authorise printing of the Share Certificate form.**

Design sample of Share Certificate will be placed before the meeting for approval and printing.

**Item No. 12: To place draft statement in lieu of prospectus.**

Draft statement in lieu of Prospectus will be placed before the meeting.

**Item No. 13: To consider plan of action for commencement of business.**

Board be informed that Certificate of Commencement of Business is essential for commencement of business by a public company.

**Item No. 14: To place copies of agreements entered into prior to incorporation.**

Copy of the Memorandum of Understanding entered into between Mr. .... Chairman of the company and M/s. .... be placed before the Board.

**Item No. 15: To appoint bankers and to open bank account of the Company.**

Board be informed about the bankers of the company and the opening of the Company's Bank Account with .. Bank.

**Item No. 16: To decide payment of sitting fees**

Board be informed about payment of sitting fees to the Directors in accordance with Article..... of Articles of Association of the Company.

**Item No. 17: To consider any other matter with the permission of the chair.**

Board may discuss any other item apart from notified items of business with the permission of the chair.

## Annexure VI

**Resolution No. \_\_\_\_\_**

**..... (NAME OF COMPANY)**

Mr. .... (Director)

Dear Sir,

**Resolution by circulation**

The following Resolution is intended to be passed by circulation as per the provisions of Section 175 of the Companies Act, 2013. A note explaining the urgency and necessity for passing the said Resolution by circulation and the supporting papers (if any) are enclosed.

“ RESOLVED THAT .....

(Resolution intended to be passed is to be reproduced)”

None of the Directors are deemed to be concerned or interested in the Resolution.

\*Assent / Dissent / Require Meeting

Signature

Name

Date

Kindly indicate your response to the aforesaid Resolution, by appending your signature and the date of signing in the space provided beneath the Resolution and return one copy to the undersigned or by e-mail at the address mentioned below so as to reach us on or before .....

Yours faithfully,

For ..... (Name of Company).

Company Secretary

e-mail id:

Address:

Contact No:

\*Strike off whichever is not applicable

## Annexure VII

**Specimen Minutes of the first Board Meeting**

Minutes of the first Board Meeting of ..... (Company Name), held on ..... (Day), ..... (Date, Month and Year) at ..... (Venue) from ..... (Time of Commencement) till.....(Time of conclusion)

Present:

1. .... (in the Chair)

2. ....

3. ....

4. ....

In attendance:

..... Company Secretary

### **1. Chairman for the Meeting**

Mr..... was elected as the Chairman for the Meeting.

### **2. Quorum**

The business before the Meeting was taken up after having established that the requisite Quorum was present.

### **3. Leave of absence**

Leave of absence was granted to Mr./ Ms. X who expressed his inability to attend the Meeting owing to his pre-occupation.

### **4. Certificate of Incorporation of the company**

The Board was informed that the company has been incorporated on ..... and the Directors noted the Certificate of Incorporation No..... of....., dated ..... issued by the Registrar of Companies,.....

### **5. Memorandum and Articles of Association**

A printed copy of the Memorandum and Articles of Association of the company as registered with the Registrar of Companies, ..... was placed before the Meeting and noted by the Board.

### **6. Registered Office**

The Board noted that the Registered Office of the company will be at ....., the intimation of which has already been given to the Registrar of Companies,.....

### **7. First Directors**

The Board noted that in terms of Article ..... of the Articles of Association of the company, Mr....., Mr..... and Mr..... are the first Directors of the company.

### **8. Notices of disclosure of interest by the Directors**

Notices of interest under Section 184(1) of the Companies Act, 2013 received from Mr....., Mr..... and Mr....., Directors of the company, on ....., were tabled and the contents thereof were read and noted by the Board.

### **9. Appointment of Additional Directors**

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman proposed that Mr. .... having DIN ..... and Mr..... having DIN ..... be appointed Additional Directors of the company in terms of Section 161 of the Companies Act, 2013. Brief profiles of Mr. .... and Mr..... along with their consents to act as Directors, if appointed, were tabled.

The Board agreed with the same and passed the following Resolutions:

- (a) “ RESOLVED THAT , pursuant to the provisions of Section 161 of the Companies Act,2013 and Companies (Appointment and Qualification of Directors) Rules, 2014 and any other applicable

provisions read with Article \_\_\_\_\_ of the Articles of Association of the company, Mr.....be and is hereby appointed as Additional Director of the company to hold office from the date of this Meeting till the first Annual General Meeting of the company.”

“RESOLVED FURTHER THAT ....., Director/Company Secretary be and is hereby authorised to sign and file necessary forms/ documents with the Registrar of Companies and make entries, as appropriate, in the registers of the company.”

- (b) “RESOLVED THAT , pursuant to the provisions of Section 161 of the Companies Act,2013 and Companies (Appointment and Qualification of Directors) Rules, 2014, and any other applicable provisions read with Article \_\_\_\_\_ of the Articles of Association of the company, Mr..... be and is hereby appointed as Additional Director of the company to hold office from the date of this Meeting till the first Annual General Meeting of the company.”

“RESOLVED FURTHER THAT ....., Director/Company Secretary be and is hereby authorised to sign and file necessary forms/ documents with the Registrar of Companies and make entries, as appropriate, in the registers of the company.”

## 10. Chairman and Vice-Chairman of the Board

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Board, after discussion, decided that Mr. .... be appointed as Chairman of the Board, who would be the Chairman for all Meetings of the Board as also for general meetings of the company. The Board also decided that Mr. .... be appointed as Vice-Chairman of the Board.

The Board thereafter passed the following Resolution:

“RESOLVED THAT until otherwise decided by the Board, Mr..... be and is hereby elected as the Chairman of the Board of Directors of the company.”

“RESOLVED FURTHER THAT , until otherwise decided by the Board, Mr..... be and is hereby elected as the Vice-Chairman of the Board of Directors of the company.”

## 11. Board Committees

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Board approved constitution of the following Board Committees, as required in terms of Sections 177 and 178 of the Companies Act, 2013, with the members as detailed below:

- (a) Audit Committee

.....

- (b) Nomination and Remuneration Committee

.....

- (c) Stakeholders Relationship Committee

.....

- (d) Corporate Social Responsibility (CSR) Committee

.....

The Board also approved the Terms of Reference of the Audit Committee, the Nomination and Remuneration Committee, the Stakeholders Relationship Committee and the CSR Committee, as tabled, copies of which were initialled by the Chairman for the purpose of identification.

## **12. Appointment of First Auditors**

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman stated that pursuant to Section 139 of the Companies Act, 2013, First Auditors are to be appointed within thirty days from the registration of the company. For this purpose, Messrs. ...., Chartered Accountants,....., had been approached to act as the first Auditors of the company. A letter received from Messrs....., conveying their consent was placed before the Directors. The Board, after discussion passed the following Resolution:

“RESOLVED THAT Messrs. ...., Chartered Accountants, ...., be and are hereby appointed pursuant to Section 139(6) of the Companies Act, 2013, as the first Auditors of the company at such remuneration as may be fixed by the Board in consultation with the Auditors to hold office from the date of this Meeting till the conclusion of the first Annual General Meeting of the company.”

“RESOLVED FURTHER THAT the Director/Company Secretary be and is hereby authorised to make the necessary filings with the Statutory Authorities”.

[Not applicable to Government companies or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments - in such cases appointment of auditors to be made by Comptroller and Auditor General].

## **13. Common Seal of the company, if any (not mandatory)**

The Chairman tabled a Seal bearing the company's name, CIN and the address of the registered office to be adopted as the Common Seal of the company, and the following Resolution was passed:

“RESOLVED THAT the Common Seal of the company, the impression of which appears in the margin against this Resolution, be and is hereby adopted as the Common Seal of the company.”

## **14. Appointment of Chief Executive Officer of the company**

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman informed the Board that for promotion, development and expansion of the company's business, it is necessary to appoint a whole – time Chief Executive Officer. He advised the Board that it is proposed to appoint Mr. .... who has vast industry experience as the Chief Executive Officer of the company; Mr..... has given his consent to act as Chief Executive Officer, if appointed. The Board agreed with the same and passed the following Resolution:

“RESOLVED THAT pursuant to Section 203 of the Companies Act, 2013, Mr..... be and is hereby appointed as the Chief Executive Officer of the company, on the terms and conditions set out in the draft agreement/ appointment letter, placed on the table, a copy of which was initialled by the Chairman for the purpose of identification.”

“RESOLVED FURTHER THAT Mr. ...., Chief Executive Officer, do perform such functions and duties specified in the agreement/ appointment letter and as assigned to him by the Board from time to time.”

“RESOLVED FURTHER THAT \_\_\_\_\_, Director/Company Secretary be and is hereby authorised to sign and file the necessary forms/documents with the Registrar of Companies and make entries, as appropriate, in the registers of the company.”

## **15. Appointment of Company Secretary**

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman advised the Board that it is proposed to appoint Mr. ...., who holds the prescribed



qualifications as Company Secretary of the company; Mr..... has given his consent to act as Company Secretary, if appointed. The Board agreed with the same and passed the following Resolution:

“RESOLVED THAT pursuant to Section 203 of the Companies Act, 2013, Mr....., holding the prescribed qualification under Section 2(24) of the Companies Act, 2013, be and is hereby appointed as Company Secretary of the company, on the terms specified in the draft agreement/ appointment letter, placed on the table, a copy of which was initialled by the Chairman for the purpose of identification.”

“RESOLVED FURTHER THAT Mr. ...., Company Secretary, do perform the duties which are required to be performed by a secretary under the Companies Act, 2013 and any other duties assigned to him by the Board or the Chief Executive Officer.”

“RESOLVED FURTHER THAT ....., Director be and is hereby authorised to sign and file the necessary forms/documents with the Registrar of companies and make entries, as appropriate, in the registers of the company.”

#### 16. Appointment of Chief Financial Officer

Reference was made to Mr. ....’s note dated ..... on the subject, as circulated.

The Chairman advised the Board that it is proposed to appoint Mr..... who is a ..... (Qualification) as the Chief Financial Officer of the company; Mr..... has given his consent to act as Chief Financial Officer, if appointed. The Board agreed with the same and passed the following Resolution:

“RESOLVED THAT pursuant to Section 203 of the Companies Act, 2013, and related Rules and Regulations framed thereunder, Mr. .... be and is hereby appointed as Chief Financial Officer of the company, on the terms specified in the draft agreement/ appointment letter, placed on the table, a copy of which was initialled by the Chairman for the purpose of identification.”

“RESOLVED FURTHER THAT Mr. ...., Chief Financial Officer, do perform the functions which are required to be performed by a Chief Financial Officer under the Companies Act, 2013 and any other duties assigned to him by the Board or the Chief Executive Officer.”

“RESOLVED FURTHER THAT ....., Director/Company Secretary be and is hereby authorised to sign and file the necessary forms/documents with the Registrar of Companies and make entries, as appropriate, in the registers of the company.”

#### 17. Appointment of bankers and opening Bank A/c with .... Bank

The Chairman informed the Board that it is proposed to open a current account in the name of the company with .....Bank. The Board agreed with the same and passed the following Resolution:

“RESOLVED THAT a current account be opened in the name of ..... Limited with the ..... Bank, ....., and that the Bank be instructed to honor all cheques, bills of exchange, promissory notes or other orders which may be drawn by/ accepted/ made on behalf of the company and to act on any instructions so given relating to the account, whether the same be overdrawn or not, relating to the transactions of the company and that any two of the following Directors/officers of the company, jointly, namely:

1. Mr...Director
2. Mr...Director
3. Mr ...Chief Financial Officer
4. Mr ...Company Secretary

be and are hereby authorised to sign on behalf of the company, cheques or any other instruments/ documents drawn on or in relation to the said account and the said signatures shall be sufficient authority and shall bind

the company in all transactions between the Bank and the company.”

### **18. Printing of Share Certificates**

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman informed the Board that it would be necessary to print share certificates for allotment of shares to the subscribers to the

Memorandum of Association as well as for any further issue of capital. A format of the share certificate in Form SH-1 in terms of Rule 5 of the Companies (Share Capital and Debentures) Rules, 2014 was placed on the table and the Board passed the following resolution:

“RESOLVED THAT 1,00,000 equity share certificates of the company be printed, in the format placed before the Meeting and initialled by the Chairman for the purpose of identification, and that the certificates bear serial Nos. 1 to 1,00,000.”

“RESOLVED FURTHER THAT the aforesaid blank share certificates be kept in safe custody with Mr....., Company Secretary.”

### **19. Issue of Share Certificates to the subscribers**

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman informed the Board that Mr....., Mr..... and Mr. ...., who are subscribers to the Memorandum of Association of the company, had each agreed to take and have taken \_\_\_\_\_ (\_\_\_\_\_) equity shares in the company. He further informed the Board that pursuant to Section 2(55) of the Companies Act, 2013, the names of the said subscribers to the Memorandum of Association have been entered in the Register of Members and that equity share certificates are required to be issued to them. The Board agreed with the same and passed the following Resolution:

“RESOLVED THAT M r. ...., M r. .... and Mr. ...., t h e subscribers to the Memorandum of Association of the company who had agreed to take and have taken \_\_\_\_\_ (\_\_\_\_\_) equity shares each of the company, be issued equity share certificates and that Mr..... and Mr....., Directors of the company, and Mr....., Company Secretary, be and are hereby authorised to sign the said certificates.”

### **20. Statement of Preliminary Expenses and Preliminary Agreements**

The Chairman placed before the Meeting a statement of expenses incurred in connection with the formation of the company and a copy of agreements entered into before the formation of the company. The Board approved the same and passed the following Resolution:

“RESOLVED THAT preliminary expenses of Rs.....incurred in connection with the incorporation of the company and the preliminary agreements entered be and are hereby approved and confirmed as per the statement submitted by the Chairman.”

“RESOLVED FURTHER THAT the preliminary expenses of Rs..... incurred by Mr....., Director of the company, be reimbursed to the said Mr..... out of the funds of the company.”

### **21. Authorisation to sign returns, forms, documents etc. filed with various regulatory authorities**

Various returns, forms, documents etc. are required to be filed with various regulatory authorities including the Ministry of Corporate Affairs by the company from time-to-time. The Board passed the following resolution in this regard:

“RESOLVED THAT ..... and ..... Director of the company be and is hereby authorised to sign on behalf of the company, various documents, forms, returns, etc. required to be filed with various

regulatory authorities under the relevant statutory provisions.”

## 22. Next Board Meeting

It was decided to hold the next Board Meeting at..... a.m./ p.m. on..... (Day), ..... (Date, Month and Year) at..... (Venue).

## 23. Conclusion of the Meeting

There being no other business, the Meeting concluded at .... (Time) with a vote of thanks to the Chair.

Place..... Chairman (DIN)

Date .....

Entered on

## Annexure VIII

### Specimen Minutes of a subsequent Board Meeting

Minutes of the ..... Meeting of the Board of Directors of ..... (Company Name) held on ..... (Day), ..... (Date, Month and Year), at ..... (Venue) from ..... (Time of Commencement) till .....(Time of conclusion)

#### **PRESENT**

A.B..... Chairman

C.D..... Directors

E.F.

I.J.

K.L. ....Managing Director

#### **IN ATTENDANCE**

X..... Secretary

#### **INVITEES**

Y..... Chief Financial Officer

Z..... Designation and Organisation

### 1. Chairman for the Meeting

Mr/Ms.....was elected as the Chairman for the Meeting.

### 2. Leave of absence

Leave of absence from attending the Meeting was granted to Mr. M.N. and Mr. O.P. who expressed their inability to attend the Meeting owing to their preoccupation.

### 3. Quorum

The business before the Meeting was taken up after having established that the requisite quorum was present.

### 4. Minutes of the previous Board Meeting

The Minutes of the ..... Meeting of the Board of Directors of the company held on ....., as circulated, were noted by the Board and signed by the Chairman.

## 5. Minutes of the Committee Meetings

The Minutes of the ..... Meeting of the ..... Committee held on ....., as circulated, were noted by the Board.

## 6. Resolution passed by circulation since the last Meeting.

The following Resolution was passed by circulation on ..... (date of passing of the Resolution) in terms of the provisions of Section 175 of the Companies Act, 2013.

“RESOLVED THAT .....  
.....”

Mr. ...., Director dissented on the Resolution.

## 7. Action Taken Report

The following action taken was noted by the Board:

Item No.	Item Action Taken
_____	_____

## 8. Register of Contracts

The Register of Contracts in which Directors are interested under Section 189 of the Companies Act, 2013 and the Rules thereunder was signed by all the Directors present.

## 9. Notices of Disclosure of Interest of Directors

- (a) The following Notices received from the Directors of the company, notifying their interest in other bodies corporate pursuant to the provisions of Section 184 of the Companies Act, 2013, were read and recorded:

Name of the Director Nature of Interest Date of Notice

- (b) A Notice dated ..... received from Mr. I.J. pursuant to the provisions of section 170 of the Companies Act, 2013, disclosing his shareholding and the shareholding of Mrs. I.J. in the company was read and recorded.

## 10. Share Transfers

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Share Transfer Register of the company was also placed before the Meeting.

The Board, after discussion, passed the following Resolution:

“RESOLVED THAT Share Transfers Nos ..... to ..... (both inclusive) consisting of ..... Equity shares of the company, be approved and the names of the transferees be entered in the Register of Members. RESOLVED FURTHER THAT Mr. X, Secretary, be and is hereby authorised to take necessary action with regard to the aforesaid transfer of shares approved by the Board.”

## 11. Interim Dividend

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The payment of Interim Dividend for the year ending ..... was considered on the basis of the unaudited Financial Statements of the company for the period from ..... to ....., as annexed to the note under reference. The Directors opined that there were adequate profits to permit payment of Interim Dividend. The Board, after discussion, passed the following Resolution:

"RESOLVED THAT an Interim Dividend of Rupee one per equity share absorbing Rs. 10,00,000, be paid on the ..... (date), out of the profits of the company for the year ending ....., on 10,00,000 equity shares, to those equity shareholders whose names appear in the Register of Members of the company on the ..... of ....., and that the transfer books and the Register of Members be closed from the ..... of ..... to the ..... of ....., both days inclusive, for the purpose of payment of such dividend."

## 12. Opening of a Bank Account for payment of Interim Dividend

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Board passed the following resolution for opening a bank account for the purpose of payment of Interim Dividend :

"RESOLVED THAT a Bank Account be opened in the name and style of '.....Limited - Interim Dividend ..... ' (Bank Account) with the ..... for payment of Interim Dividend for the financial year .....

RESOLVED FURTHER THAT the said Bank be and is hereby authorised to honour cheques / bank advices etc. drawn, accepted or made on behalf of the company and to act on any instruction(s) so given concerning the said Account by any two of the following signatories:

.....

RESOLVED FURTHER THAT the said Bank be and is hereby authorised to change the name and style of the Bank Account to '..... Limited - Unpaid Interim Dividend ..... ' on and from .....

RESOLVED FURTHER THAT the authorised signatories be and are hereby authorised, in the manner stated above, to give instructions to the said Bank to close the Bank Account on disbursement of the Interim Dividend.

RESOLVED FURTHER THAT the authorised signatories be and are hereby authorised, in the manner stated above, to sign and execute such documents, letters etc., as may be required by the said Bank."

## 13. Constitution of Share Transfer Committee

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman informed the Board that with the increasing number of share transfers, it was impractical to wait for Board Meetings to approve such transfers. He suggested that a Committee be constituted for this purpose. The Board agreed with the same and passed the following resolution:

"RESOLVED THAT a Committee of Directors named the 'Share Transfer Committee', consisting of Mr. C.D., Mr. G.H., and Mr. K.L. be and is hereby constituted to approve registration of transfer of shares received by the company and further to:

1. Approve and register transmission of shares.
2. Sub-divide, consolidate and issue share certificates in relation thereto.
3. Issue share certificates in place of those which are damaged, or in which the space for endorsement has been exhausted, provided the original certificates are surrendered to the company.

RESOLVED FURTHER THAT two Directors shall form the Quorum for a Meeting of the said Committee."

## 14. Availing Credit facilities from ..... Bank

Reference was made to Mr. ....'s note dated ..... on the subject, as circulated.

The Chairman informed the Board that the company had approached..... Bank for a loan facility of Rs. 25,00,00,000/(Rupees Twenty Five Crores only). The Bank had sanctioned the facility vide its

sanction letter dated .....; a copy of the said letter was placed before the Board. After discussion, the Board passed the following Resolution:

“RESOLVED THAT approval of the Board be and is hereby accorded to avail Demand Loan facility of Rs. 25,00,00,000/- (Rupees Twenty Five Crores only) sanctioned by..... Bank, (address) as per the terms and conditions specified by the Bank vide its letter dated ..... placed before the Board and initialled by the Chairman for the purpose of identification. RESOLVED FURTHER THAT Mr. A.B., Chairman of the company, be and is hereby authorised to execute the necessary documents in favour of .....Bank, to avail the aforesaid Demand Loan facility. RESOLVED FURTHER THAT the Company Secretary be and is hereby authorised to file the necessary forms with the Registrar of Companies for the purpose of creation of charge, and also forward a copy of this Resolution to..... Bank.”

### 15. Conclusion of the Meeting

There being no other business, the Meeting concluded at .... (Time) with a vote of thanks to the Chair.

Date .....

.....

Place .....

Chairman

(DIN)

Entered on

## SECRETARIAL STANDARD ON GENERAL MEETINGS: (SS-2)

The first version of SS-2 was applicable to General Meetings, in respect of which Notices were issued during 1st July, 2015 to 30th September, 2017. The revised version of SS-2 applies to General Meetings, in respect of which Notices are issued on or after 1st October, 2017. This Standard seeks to prescribe a set of principles for the convening and conducting of General Meetings and matters related thereto. This Standard also deals with conduct of e-voting and postal ballot.

### SCOPE

This Standard is applicable to all types of General Meetings of all companies incorporated under the Act except

- (i) One Person Company (OPC) and
- (ii) A company licensed under Section 8 of the Companies Act, 2013 or corresponding provisions of any previous enactment thereof.

However, Section 8 companies need to comply with the applicable provisions of the Act relating to General Meetings.

The principles enunciated in this Standard for General Meetings of Members are applicable mutatis-mutandis to Meetings of debenture-holders and creditors. A Meeting of the Members or class of Members or debenture-holders or creditors of a company under the directions of the Court or the Company Law Board (CLB) or the National Company Law Tribunal (NCLT) or any other prescribed authority shall be governed by this Standard without prejudice to any rules, regulations and directions prescribed for and orders of, such courts, judicial forums and other authorities with respect to the conduct of such Meetings.

**This Standard is in conformity with the provisions of the Act. However, if, due to subsequent changes in the Act, a particular Standard or any part thereof becomes inconsistent with the Act, the provisions of the Act shall prevail.**

Matters transacted at the General Meeting is classified into:

- (i) “Ordinary business” means business to be transacted at an Annual General Meeting relating to (i) the consideration of financial statements, consolidated financial statements, if any, and the reports of the Board of Directors and Auditors; (ii) the declaration of any dividend; (iii) the appointment of Directors in the place of those retiring; and (iv) the appointment or ratification thereof and fixing of remuneration of the Auditors.
- (ii) “Special Business” means business other than the Ordinary Business to be transacted at an Annual General Meeting and all business to be transacted at any other General Meeting.

An explanatory statement pursuant to section 102 of the Companies Act, 2013 shall be annexed to the notice calling general meeting w.r.t. Special Business to be transacted at the meeting.

## GUIDANCE ON THE PROVISIONS OF SS-2

### 1. General Provisions

<b>Convening a Meeting</b>	A General Meeting shall be convened by or on the authority of the Board.
<b>Notice of General Meeting</b>	<ul style="list-style-type: none"> <li>● Notice of general meeting shall be in writing.</li> <li>● Notice shall specify the day, date, time and full address of the venue of the Meeting.</li> <li>● Notice of Annual General Meeting shall also specify the serial number of the Meeting.</li> <li>● Notice shall contain complete particulars of the venue of the Meeting including route map and prominent land mark, if any, for easy location, except in case of – <ul style="list-style-type: none"> <li>➤ a company in which only its directors and their relatives are members;</li> <li>➤ a wholly owned subsidiary.</li> </ul> </li> <li>● Notice and accompanying documents shall be given at least twenty-one clear days in advance of the Meeting (A private company can have notice period as per its Articles)</li> </ul>
<b>Delivery of Notice</b>	<p>Notice in writing of every Meeting shall be given to -</p> <ul style="list-style-type: none"> <li>● Every Member of the company at the address registered with the company or depository,</li> <li>● The Directors,</li> <li>● Auditors of the company,</li> <li>● the Secretarial Auditor,</li> <li>● Debenture Trustees, if any, and,</li> <li>● Wherever applicable or so required, to other specified persons.</li> </ul>



<b>Mode of delivery of Notice</b>	<ul style="list-style-type: none"> <li>➤ Notice shall be sent by hand or by ordinary post or by speed post or by registered post or by courier or by facsimile or by e-mail or by any other electronic means.</li> <li>➤ Notice shall be sent to Members by registered post or speed post or courier or e-mail and not by ordinary post in the following cases: <ul style="list-style-type: none"> <li>✓ if the company provides the facility of e-voting ;</li> <li>✓ if the item of business is being transacted through postal ballot.</li> </ul> </li> <li>➤ If a particular mode of delivery is specified by member, notice shall be sent by that mode at the expense of the member as may be prescribed by the company.</li> <li>➤ Notice shall be sent to Members by registered post or speed post or e-mail if the Meeting is called by the requisitionists themselves where the Board had not proceeded to call the Meeting.</li> <li>➤ In case of companies having a website, the Notice shall simultaneously be hosted on the website till the conclusion of the Meeting.</li> </ul>
<b>Day and Time of conducting Annual General Meeting</b>	<p>An Annual General Meeting and a Meeting called by the requisitionists shall be called during business hours, i.e., between 9 a.m. and 6 p.m., on a day that is not a National Holiday.</p>
<b>Venue of Annual General Meeting</b>	<ul style="list-style-type: none"> <li>● Annual General Meetings shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated, whereas other General Meetings may be held at any place within India.</li> <li>● A Meeting called by the requisitionists shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.</li> <li>● In case of a Government company, the Annual General Meeting shall be held at its registered office or any other place with the approval of the Central Government, as may be required in this behalf.</li> <li>● In case of wholly owned subsidiary of a foreign company, the meeting can be held out of India also.</li> </ul>
<b>Notice to contain information about Proxy</b>	<p>Notice of a company which has a share capital or the Articles of which provide for voting at a Meeting by Proxy, shall prominently contain a statement that a Member entitled to attend and vote is entitled to appoint a Proxy, or where that is allowed, one or more Proxies, to attend and vote instead of himself and that a Proxy need not be a Member. In case of a private company, the Notice shall specify the entitlement of a member to appoint Proxy in accordance with this para, unless otherwise provided in the Articles.</p>

<p><b>Notice shall clearly specify the nature of the Meeting and the business to be transacted thereat</b></p>	<p>In respect of items of Special Business, each such item shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon.</p> <p>In respect of items of Ordinary Business, Resolutions are not required to be stated in the Notice.</p>
<p><b>Contents of explanatory statement</b></p>	<ul style="list-style-type: none"> <li>● The nature of the concern or interest (financial or otherwise), if any, of the following persons, in any special item of business or in a proposed Resolution, shall be disclosed in the explanatory statement: <ul style="list-style-type: none"> <li>(a) Directors and Manager;</li> <li>(b) Other Key Managerial Personnel; and</li> <li>(c) Relatives of the persons mentioned above.</li> </ul> </li> <li>● In case any item of Special Business to be transacted at a Meeting of the company relates to or affects any other company, the extent of shareholding interest in that other company of every Promoter, Director, Manager and of every other Key Managerial Personnel of the first mentioned company shall, if the extent of such shareholding is not less than two percent of the paid-up share capital of that company, also be stated in the explanatory statement.</li> <li>● Where reference is made to any document, contract, agreement, the memorandum of Association or Articles of Association, the relevant explanatory statement shall state that such documents are available for inspection and such documents shall be so made available for inspection in physical or in electronic form during specified business hours at the Registered Office of the company and copies thereof shall also be made available for inspection in physical or electronic form at the Head Office as well as Corporate Office of the company, if any, if such office is situated elsewhere, and also at the Meeting.</li> <li>● In case of a private company, explanatory statement shall comply with the above requirements, unless otherwise provided in the Articles.</li> <li>● In all cases relating to the appointment or re-appointment and/or fixation of remuneration of Directors including Managing Director or Executive Director or Whole - time Director or of Manager or variation of the terms of remuneration, details of each such Director or Manager, including age, qualifications, experience, terms and conditions of appointment or re-appointment along with details of remuneration sought to be paid and the remuneration last drawn by such person, if applicable, date of first appointment on the Board, shareholding in the company, relationship with other Directors, Manager and other Key Managerial Personnel of the company, the number of Meetings of the Board attended during the year and other Directorships, Membership/ Chairmanship of Committees of other Boards shall be given in the explanatory statement.</li> </ul>

	<ul style="list-style-type: none"> <li>In case of appointment of Independent Directors, the justification for choosing the appointees for appointment as Independent Directors shall be disclosed and in case of re-appointment of Independent Directors, performance evaluation report of such Director or summary thereof shall be included in the explanatory statement.</li> </ul>
<b>Attendance slip and Proxy Form</b>	Notice shall be accompanied, by an attendance slip and a Proxy form with clear instructions for filling, stamping, signing and/or depositing the Proxy form.
<b>Business to be transacted at the General Meeting</b>	<p>A Resolution shall be valid only if it is passed in respect of an item of business contained in the Notice convening the Meeting or it is specifically permitted under the Act. Items specifically permitted under the Act which may be taken up for consideration at the Meeting are :</p> <p>(a) Proposed Resolutions, the Notice of which has been given by Members;</p> <p>(b) Resolutions requiring special Notice, if received with the intention to move;</p> <p>(c) Candidature for Directorship, if any such Notice has been received.</p> <p>Where special Notice is required of any Resolution and Notice of the intention to move such Resolution is received by the company from the prescribed number of Members, such item of business shall be placed for consideration at the Meeting after giving Notice of the Resolution to Members in the manner prescribed under the Act.</p> <p>Any amendment to the Notice, including the addition of any item of business, can be made provided the Notice of amendment is given to all persons entitled to receive the Notice of the Meeting at least twenty-one clear days before the Meeting.</p>
<b>Postponement or cancellation of meeting</b>	If, for reasons beyond the control of the Board, a Meeting cannot be held on the date originally fixed, the Board may reconvene the Meeting, to transact the same business as specified in the original Notice, after giving not less than three days intimation to the Members. The intimation shall be either sent individually in the manner stated in this Standard or published in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district.

## (2) Frequency of Meetings

(i) Annual General Meeting	(ii) Extra-Ordinary General Meeting
Every company shall, in each Calendar Year, hold a General Meeting called the Annual General Meeting.	It may be held as and when required between two consecutive Annual General Meetings. Items of business other than Ordinary Business may be considered at an Extra-Ordinary General Meeting or by means of a postal ballot, if thought fit by the Board.

## (3) Quorum:

- Quorum shall be present throughout the Meeting (from the commencement as well as when the business is transacted).

- Members need to be personally present at a Meeting to constitute the Quorum.
- Proxies shall be excluded for determining the Quorum.

#### **(4) Presence of Directors and Auditors**

##### **(i) Directors**

- If any Director is unable to attend the Meeting, the Chairman shall explain such absence at the Meeting.
- Directors who attend General Meetings of the company and the Company Secretary shall be seated with the Chairman.

##### **(ii) Auditors**

The Auditors, unless exempted by the company, shall, either by themselves or through their authorised representative, attend the General Meetings of the company and shall have the right to be heard at such Meetings on that part of the business which concerns them as Auditors.

##### **(iii) Secretarial Auditor**

The Secretarial Auditor, unless exempted by the company shall, either by himself or through his authorised representative, attend the Annual General Meeting and shall have the right to be heard at such Meeting on that part of the business which concerns him as Secretarial Auditor.

### **5. Chairman**

#### **(i) Appointment**

- The Chairman of the Board shall take the Chair and conduct the Meeting.
- If the Chairman is not present within fifteen minutes after the time appointed for holding the Meeting, or if he is unwilling to act as Chairman of the Meeting, or if no Director has been so designated, the Directors present at the Meeting shall elect one of themselves to be the Chairman of the Meeting.
- If no Director is present within fifteen Minutes after the time appointed for holding the Meeting, or if no Director is willing to take the Chair, the Members present shall elect, on a show of hands, one of themselves to be the Chairman of the Meeting, unless otherwise provided in the Articles.
- If a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of the Act.
- In case of a private company, appointment of the Chairman shall be in accordance with this para, unless otherwise provided in the Articles.

#### **(ii) Role of Chairman:**

The Chairman shall explain the objective and implications of the Resolutions before they are put to vote at the Meeting.

In case of public companies, the Chairman shall not propose any Resolution in which he is deemed to be concerned or interested nor shall he conduct the proceedings for that item of business.

### **6. Proxies**

#### **(i) Right to Appoint**

- A Member entitled to attend and vote is entitled to appoint a Proxy, or where that is allowed, one or more Proxies, to attend and vote instead of himself and a Proxy need not be a Member.

- A Proxy can act on behalf of Members not exceeding fifty and holding in the aggregate not more than ten percent of the total share capital of the company carrying Voting Rights.
- This statement shall be stated with prominence in Notice calling the meeting and Notice shall be accompanied with Proxy Form as prescribed.
- Deposit of Proxies and Authorisations: This shall also be stated in the Notice with equal prominence that Proxies shall be deposited with the company either in person or through post not later than forty-eight hours before the commencement of the Meeting in relation to which they are deposited.

Form of Proxy:

- An instrument appointing a Proxy shall be in the Form prescribed under the Act.
- An instrument of Proxy duly filled, stamped and signed, is valid only for the Meeting to which it relates including any adjournment thereof.
- Stamping of Proxies: An instrument of Proxy is valid only if it is properly stamped as per the applicable law. Unstamped or inadequately stamped Proxies or Proxies upon which the stamps have not been cancelled are invalid.
- A Proxy form which does not state the name of the Proxy shall not be considered valid.
- Undated Proxy shall not be considered valid.
- A Proxy later in date revokes any Proxy/Proxies dated prior to such Proxy.

**(ii) Record of Proxies**

- All Proxies received by the company shall be recorded chronologically in a register kept for that purpose.
- In case any Proxy entered in the register is rejected, the reasons therefor shall be entered in the remarks column.

## **7. Voting**

**(i) Proposing a Resolution at a Meeting**

Every Resolution, except a Resolution which has been put to vote through Remote e-Voting or on which a poll has been demanded, shall be proposed by a Member and seconded by another Member. The fact of who proposes and who seconded the resolution shall be recorded in the minutes of the resolution.

**(ii) Method of Voting:**

- (1) E-voting:** Every company having its equity shares listed on a recognized stock exchange other than companies whose equity shares are listed on SME Exchange or on the Institutional Trading Platform and other companies as prescribed shall provide e-voting facility to their Members to exercise their Voting Rights. Every company, which has provided e-voting facility to its Members, shall also put every Resolution to vote through a ballot process at the Meeting.
- (2) Show of Hands:** Every company shall, at the Meeting, put every Resolution, except a Resolution which has been put to Remote e-voting, to vote on a show of hands at the first instance, unless a poll is validly demanded.
- (3) Poll:** The Chairman shall order a poll upon receipt of a valid demand for poll either before or on the declaration of the result of the voting on any Resolution on show of hands.

## 8. Conduct of e-voting

- Every company that is required or opts to provide e-voting facility to its Members shall comply with the provisions in this regard.
- Every company providing e-voting facility shall offer such facility to all Members, irrespective of whether they hold shares in physical form or in dematerialised form.
- The facility for Remote e-voting shall remain open for not less than three days.
- The voting period shall close at 5 p.m. on the day preceding the date of the General Meeting.
- Board Approval: The Board shall:
  - (a) appoint one or more scrutinisers for e-voting or the ballot process;
  - (b) appoint an Agency;
  - (c) decide the cut-off date for the purpose of reckoning the names of Members who are entitled to Voting Rights;
- Notice:
  - (i) *Mode of delivery of notice:* Notice of the Meeting, wherein the facility of e-voting is provided, shall be sent either by registered post or speed post or by courier or by e-mail or by any other electronic means.
  - (ii) *Advertisement:* An advertisement containing prescribed details shall be published, immediately on completion of despatch of Notices for Meeting but at least twenty one days before the date of the General Meeting, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated and having a wide circulation in that district and at least once in English language in an English newspaper, having country-wide circulation, and specifying therein, inter-alia the following matters, namely :
    - (a) A statement to the effect that the business may be transacted by e-voting;
    - (b) The date and time of commencement of Remote e-voting;
    - (c) The date and time of end of Remote e-voting;
    - (d) The cut-off date as on which the right of voting of the Members shall be reckoned;
    - (e) The manner in which persons who have acquired shares and become Members after the despatch of Notice may obtain the login ID and password;
    - (f) The manner in which company shall provide for voting by Members present at the Meeting;
    - (g) The statement that :
      - Remote e-voting shall not be allowed beyond the said date and time;
      - a Member may participate in the General Meeting even after exercising his right to vote through Remote e-voting but shall not be entitled to vote again; and
      - a Member as on the cut-off date shall only be entitled for availing the Remote e-voting facility or vote, as the case may be, in the General Meeting;
    - (h) Website address of the company, in case of companies having a website and Agency where Notice is displayed; and

- (i) Name, designation, address, e-mail ID and phone number of the person responsible to address the grievances connected with the e-voting.

Advertisement shall simultaneously be placed on the website of the company till the conclusion of Meeting, in case of companies having a website and of the Agency.

- (iii) *Notice on website:* Notice shall simultaneously be placed on the website of the company, in case of companies having a website, and of the Agency. Such Notice shall remain on the website till the date of General Meeting.

- (iv) *Contents of the Notice:*

- Notice shall inform the Members about procedure of Remote e-voting, availability of such facility and provide necessary information thereof to enable them to access such facility.
- Notice shall clearly state that the company is providing e-voting facility and that the business may be transacted through such voting.
- Notice shall describe clearly the Remote e-voting procedure and the procedure of voting at the General Meeting by Members who do not vote by Remote e-voting.
- Notice shall also clearly specify the date and time of commencement and end of Remote e-voting and contain a statement that at the end of Remote e-voting period, the facility shall forthwith be blocked.
- Notice shall also contain contact details of the official responsible to address the grievances connected with voting by electronic means.
- Notice shall clearly specify that any Member, who has voted by Remote e-voting, cannot vote at the Meeting.
- Notice shall also specify the mode of declaration of the results of e-voting.
- Notice shall also clearly mention the cut-off date as on which the right of voting of the members shall be reckoned and state that a person who is not a Member as on the cut-off date should treat this Notice for information purposes only.
- Notice shall provide the details about the login ID and the process and manner for generating or receiving the password and for casting of vote in a secure manner.

## **9. Conduct of Poll**

- When a poll is demanded on any Resolution, the Chairman shall get the validity of the demand verified and, if the demand is valid, shall order the poll forthwith if it is demanded on the question of appointment of the Chairman or adjournment of the Meeting and, in any other case, within forty-eight hours of the demand for poll.
- In the case of a poll, which is not taken forthwith, the Chairman shall announce the date, venue and time of taking the poll to enable Members to have adequate and convenient opportunity to exercise their vote. The Chairman may permit any Member who so desires to be present at the time of counting of votes.
- If the date, venue and time of taking the poll cannot be announced at the Meeting, the Chairman shall inform the Members, the modes and the time of such communication, which shall in any case be within twenty four hours of closure of the Meeting.
- Each Resolution put to vote by poll shall be put to vote separately. One ballot paper may be used for more than one item.



## **114 PP-DP&A**

- Declaration of results: The scrutiniser(s) shall submit his report within seven days from the last date of the poll to the Chairman who shall countersign the same and declare the result of the poll within two days of the submission of report by the scrutiniser, with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not.

In case Chairman is not available, for such purpose, the report by the scrutiniser shall be submitted to a person authorised by the Chairman to receive such report, who shall countersign the scrutiniser's report on behalf of the Chairman.

The result shall be announced by the Chairman or any other person authorised by the Chairman in writing for this purpose.

The Chairman of the Meeting shall have the power to regulate the manner in which the poll shall be taken and shall ensure that the poll is scrutinised in the manner prescribed under the Act.

In case of a private company, the declaration of result of poll shall be in accordance with this para, unless otherwise provided in the Articles.

- The result of the poll with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not shall be displayed for at least three days on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere, and in case of companies having a website, shall also be placed on the website.

## **10. Prohibition on Withdrawal of Resolutions**

Following resolutions cannot be withdrawn:

- (i) Resolutions for items of business which are likely to affect the market price of the securities of the company shall not be withdrawn.
- (ii) Any resolution proposed for consideration through e-voting shall not be withdrawn.

## **11. Rescinding of Resolutions**

A Resolution passed at a Meeting shall not be rescinded otherwise than by a Resolution passed at a subsequent Meeting.

## **12. Modifications to Resolutions**

Modifications to any Resolution which do not change the purpose of the Resolution materially may be proposed, seconded and adopted by the requisite majority at the Meeting and, thereafter, the modified Resolution shall be duly proposed, seconded and put to vote.

## **13. Reading of Reports**

- Auditor's Report: The qualifications, observations or comments or other remarks, if any, mentioned in the Auditor's Report on the financial transactions, which have any adverse effect on the functioning of the company shall be read at the Annual General Meeting and attention of the Members present shall be drawn to the explanations / comments given by the Board of Directors in their report.
- Secretarial Audit Report: The qualifications, observations or comments or other remarks if any, mentioned in the Secretarial Audit Report issued by the Company Secretary in Practice, which have any material adverse effect on the functioning of the company, shall be read at the Annual General Meeting and attention of Members present shall be drawn to the explanations / comments given by the Board of Directors in their report.

## **14. Adjournment of Meetings**

### *(i) Notice of adjourned Meeting:*

- If a Meeting is adjourned sine-die or for a period of thirty days or more, a Notice of the adjourned Meeting shall be given in accordance with the provisions contained hereinabove relating to Notice.
- If a Meeting is adjourned for a period of less than thirty days, the company shall give not less than three days' Notice specifying the day, date, time and venue of the Meeting, to the Members either individually or by publishing an advertisement in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district.
- However, if a Meeting is adjourned for a period not exceeding three days and where an announcement of adjournment has been made at the Meeting itself, giving in the details of day, date, time, venue and business to be transacted at the adjourned Meeting, the company may also opt to give Notice of such adjourned Meeting either individually or by publishing an advertisement, as stated above.

- (ii) Any Resolution passed at an adjourned Meeting would be deemed to have been passed on the date of the adjourned Meeting and not on any earlier date.

## **15. Passing of Resolutions by postal ballot**

Every company, except a company having less than or equal to two hundred Members, shall transact items of business as prescribed, only by means of postal ballot instead of transacting such business at a General Meeting.

The list of items of businesses requiring to be transacted only by means of a postal ballot is given at Annexure.

The Board may however opt to transact any other item of special business, not being any business in respect of which Directors or Auditors have a right to be heard at the Meeting, by means of postal ballot.

Ordinary Business shall not be transacted by means of a postal ballot.

Every company having its equity shares listed on a recognised stock exchange other than companies whose equity shares are listed on SME Exchange or on the Institutional Trading Platform and other companies which are required to provide e-voting facility shall provide such facility to its Members in respect of those items, which are required to be transacted through postal ballot.

Other companies presently prescribed are companies having not less than one thousand Members.

Nidhis are not required to provide e-voting facility to their Members.

### **Board Approval**

The Board shall:

- (a) identify the businesses to be transacted through postal ballot;
- (b) approve the Notice of postal ballot incorporating proposed Resolution(s) and explanatory statement thereto;
- (c) authorise the Company Secretary or where there is no Company Secretary, any Director of the company to conduct postal ballot process and sign and send the Notice along with other documents;
- (d) appoint one scrutiner for the postal ballot; Prior consent to act as a scrutiner shall be obtained from the scrutiner and placed before the Board for noting.

- (e) appoint an Agency in respect of e-voting for the postal ballot;
- (f) decide the cut-off date for reckoning Voting Rights and ascertaining those Members to whom the Notice and postal ballot forms shall be sent.

Only Members as on the cut-off date shall be entitled to vote on the proposed Resolution by postal ballot.

**Notice**

- Notice of the postal ballot shall be given in writing to every Member of the company. Such Notice shall be sent either by registered post or speed post, or by courier or by e-mail or by any other electronic means at the address registered with the company.
- The Notice shall be accompanied by the postal ballot form with the necessary instructions for filling, signing and returning the same.
- In case the Notice and accompanying documents are sent to Members by e-mail, these shall be sent to the Members' e-mail addresses, registered with the company or provided by the depository, in the manner prescribed under the Act.
- Such Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified recipients.
- An advertisement containing prescribed details shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having dispatched the Notice and the ballot papers.
- In case of companies having a website, Notice of the postal ballot shall simultaneously be placed on the website.
- Notice shall specify the day, date, time and venue where the results of the voting by postal ballot will be announced and the link of the website where such results will be displayed.
- Notice shall also specify the mode of declaration of the results of the voting by postal ballot.
- Notice of the postal ballot shall inform the Members about availability of e-voting facility, if any, and provide necessary information thereof to enable them to access such facility.
- In case the facility of e-voting has been made available, the provisions relating to conduct of e-voting shall apply, mutatis mutandis, as far as applicable.
- Notice shall describe clearly the e-voting procedure.
- Notice shall also clearly specify the date and time of commencement and end of e-voting, if any and contain a statement that voting shall not be allowed beyond the said date and time. Notice shall also contain contact details of the official responsible to address the grievances connected with the e-voting for postal ballot.
- Notice shall clearly specify that any Member cannot vote both by post and e-voting and if he votes both by post and e-voting, his vote by post shall be treated as invalid.

**Contents of the advertisement:**

The advertisement shall, inter alia, state the following matters:

- (a) a statement to the effect that the business is to be transacted by postal ballot which may include voting by electronic means;

- (b) the date of completion of dispatch of Notices;
- (c) the date of commencement of voting (postal and e-voting);
- (d) the date of end of voting (postal and e-voting);
- (e) the statement that any postal ballot form received from the Member after thirty days from the date of dispatch of Notice will not be valid;
- (f) a statement to the effect that Member who has not received postal ballot form may apply to the company and obtain a duplicate thereof;
- (g) contact details of the person responsible to address the queries/ grievances connected with the voting by postal ballot including voting by electronic means, if any; and
- (h) day, date, time and venue of declaration of results and the link of the website where such results will be displayed.

Notice and the advertisement shall clearly mention the cut-off date as on which the right of voting of the Members shall be reckoned and state that a person who is not a Member as on the cut-off date should treat this Notice for information purposes only.

Format of item proposed to be passed through postal ballot:

Each item proposed to be passed through postal ballot shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon.

#### **Postal ballot forms**

- The postal ballot form shall be accompanied by a postage prepaid reply envelope addressed to the scrutiniser.
- A single postal ballot form may provide for multiple items of business to be transacted.
- The postal ballot form shall contain instructions as to the manner in which the form is to be completed, assent or dissent is to be recorded and its return to the scrutiniser.
- The postal ballot form may specify instances in which such form shall be treated as invalid or rejected and procedure for issue of duplicate postal ballot forms.
- A postal ballot form shall be considered invalid if:
  - (a) A form other than one issued by the company has been used;
  - (b) It has not been signed by or on behalf of the Member;
  - (c) Signature on the postal ballot form doesn't match the specimen signatures with the company;
  - (d) It is not possible to determine without any doubt the assent or dissent of the Member;
  - (e) Neither assent nor dissent is mentioned;
  - (f) Any competent authority has given directions in writing to the company to freeze the Voting Rights of the Member;
  - (g) The envelope containing the postal ballot form is received after the last date prescribed;
  - (h) The postal ballot form, signed in a representative capacity, is not accompanied by a certified copy of the relevant specific authority;
  - (i) It is received from a Member who is in arrears of payment of calls;

- (j) It is defaced or mutilated in such a way that its identity as a genuine form cannot be established;
- (k) Member has made any amendment to the Resolution or imposed any condition while exercising his vote.

A postal ballot form which is otherwise complete in all respects and is lodged within the prescribed time limit but is undated shall be considered valid.

#### **Declaration of results**

- The scrutiniser shall submit his report within seven days from the last date of receipt of postal ballot forms to the Chairman or a person authorised by him, who shall countersign the same and declare the result of the postal ballot on the date, time and venue specified in the Notice, with details of the number of votes cast for and against the Resolution, invalid votes and the final result as to whether the Resolution has been carried or not.
- The result of the voting with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not, along with the scrutiniser's report shall be displayed for at least three days on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere, and also be placed on the website of the company, in case of companies having a website.
- The Resolution, if passed by requisite majority, shall be deemed to have been passed on the last date specified by the company for receipt of duly completed postal ballot forms or e-voting.

#### **Rescinding the Resolution**

A Resolution passed by postal ballot shall not be rescinded otherwise than by a Resolution passed subsequently through postal ballot.

#### **Modification to the Resolution**

No amendment or modification shall be made to any Resolution circulated to the Members for passing by means of postal ballot.

### **16. Minutes**

Every company shall keep Minutes of all Meetings. Minutes kept in accordance with the provisions of the Act evidence the proceedings recorded therein. Minutes help in understanding the deliberations and decisions taken at the Meeting.

#### **(i) Maintenance of Minutes**

- Minutes shall be recorded in books maintained for that purpose.
- A distinct Minutes Book shall be maintained for Meetings of the Members of the company, creditors and others as may be required under the Act.
- Resolutions passed by postal ballot shall be recorded in the Minutes book of General Meetings.
- Minutes may be maintained in electronic form in such manner as prescribed under the Act and as may be decided by the Board. Minutes in electronic form shall be maintained with Time stamp. A company shall, however, follow a uniform and consistent form of maintaining the Minutes. Any deviation in such form of maintenance shall be authorised by the Board.
- The pages of the Minutes Books shall be consecutively numbered. This shall be followed irrespective of a break in the Book arising out of periodical binding in case the Minutes are maintained in physical form. This shall be equally applicable for maintenance of Minutes Book in electronic form with Time stamp. In the event any page or part thereof in the Minutes Book is left

blank, it shall be scored out and initialed by the Chairman who signs the Minutes.

- Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.

**(ii) Contents of Minutes**

**(a) General Contents**

- Minutes shall state, at the beginning the Meeting, name of the company, day, date, venue and time of commencement of the Meeting.
- Minutes of Annual General Meeting shall also state the serial number of the Meeting.
- In case a Meeting is adjourned, the Minutes shall be entered in respect of the original Meeting as well as the adjourned Meeting. In respect of a Meeting convened but adjourned for want of Quorum a statement to that effect shall be recorded by the Chairman or any Director present at the Meeting in the Minutes.
- Minutes shall record the names of the Directors and the Company Secretary present at the Meeting.
- The names of the Directors shall be listed in alphabetical order or in any other logical manner, but in either case starting with the name of the person in the Chair.

**(b) Specific Contents**

Minutes shall, inter alia, contain:

- The Record of election, if any, of the Chairman of the Meeting.
- The fact that certain registers, documents, the Auditor's Report and Secretarial Audit Report, as prescribed under the Act were available for inspection.
- The Record of presence of Quorum.
- The number of Members present in person including representatives.
- The number of Proxies and the number of shares represented by them.
- The presence of the Chairmen of the Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee or their authorised representatives.
- The presence if any, of the Secretarial Auditor, the Auditors, or their authorised representatives, the Court/ Tribunal appointed observers or scrutinisers.
- Summary of the opening remarks of the Chairman.
- Reading of qualifications, observations or comments or other remarks on the financial transactions, which have any adverse effect on the functioning of the company, as mentioned in the report of the Auditors.
- Reading of qualifications, observations or comments or other remarks, which have any material adverse effect on the functioning of the company, as mentioned in the report of the Secretarial Auditor.
- Summary of the clarifications provided on various Agenda Items.
- In respect of each Resolution, the type of the Resolution, the names of the persons who proposed and seconded and the majority with which such Resolution was passed.
- Where a motion is moved to modify a proposed Resolution, the result of voting on such motion shall be mentioned. If a Resolution proposed undergoes modification pursuant to

a motion by shareholders, the Minutes shall contain the details of voting for the modified Resolution.

- In the case of poll, the names of scrutinisers appointed and the number of votes cast in favour and against the Resolution and invalid votes.
- If the Chairman vacates the Chair in respect of any specific item, the fact that he did so and in his place some other Director or Member took the Chair.
- The time of commencement and conclusion of the Meeting.

**(c) In respect of Resolutions passed by e-voting or postal ballot:** Following shall be recorded in the Minutes Book and signed by the Chairman or in the event of death or inability of the Chairman, by any Director duly authorised by the Board for the purpose, within thirty days from the date of passing of Resolution by e-voting or postal ballot:

- o a brief report on the e-voting or postal ballot conducted including the Resolution proposed,
- o the result of the voting thereon and the summary of the scrutiniser's report

**(d) Recording of Minutes**

- Minutes shall contain a fair and correct summary of the proceedings of the Meeting.
- The Company Secretary shall record the proceedings of the Meetings. Where there is no Company Secretary, any other person authorised by the Board or by the Chairman in this behalf shall record the proceedings.
- The Chairman shall ensure that the proceedings of the Meeting are correctly recorded.
- The Chairman has absolute discretion to exclude from the Minutes, matters which in his opinion are or could reasonably be regarded as defamatory of any person, irrelevant or immaterial to the proceedings or which are detrimental to the interests of the company.

**(e) Minutes shall be written in clear, concise and plain language.**

Minutes shall be written in third person and past tense. Resolutions shall however be written in present tense.

Minutes need not be an exact transcript of the proceedings at the Meeting.

**(f) Each item of business taken up at the Meeting shall be numbered:** Numbering shall be in a manner which would enable ease of reference or cross-reference.

**(g) Entry in the Minutes Book**

- Minutes shall be entered in the Minutes Book within thirty days from the date of conclusion of the Meeting. In case a Meeting is adjourned, the Minutes in respect of the original Meeting as well as the adjourned Meeting shall be entered in the Minutes Book within thirty days from the date of the respective Meetings.
- The date of entry of the Minutes in the Minutes Book shall be recorded by the Company Secretary.

Where there is no Company Secretary, it shall be entered by any other person authorised by the Board or the Chairman.

- Minutes, once entered in the Minutes Book, shall not be altered.

**(h) Signing and Dating of Minutes**



- Minutes of a General Meeting shall be signed and dated by the Chairman of the Meeting or in the event of death or inability of that Chairman, by any Director who was present in the Meeting and duly authorised by the Board for the purpose, within thirty days of the General Meeting.
- The Chairman shall initial each page of the Minutes, sign the last page and append to such signature the date on which and the place where he has signed the Minutes.
- Any blank space in a page between the conclusion of the Minutes and signature of the Chairman shall be scored out.
- If the Minutes are maintained in electronic form, the Chairman shall sign the Minutes digitally.

### **17. Report on Annual General Meeting**

Every listed public company shall prepare a report on Annual General Meeting in the prescribed form, including a confirmation that the Meeting was convened, held and conducted as per the provisions of the Act.

Such report which shall be a fair and correct summary of the proceedings of the Meeting shall contain:

- (a) the day, date, time and venue of the Annual General Meeting;
- (b) confirmation with respect to appointment of Chairman of the Meeting;
- (c) number of Members attending the Meeting;
- (d) confirmation of Quorum;
- (e) confirmation with respect to compliance of the Act and Standards with respect to calling, convening and conducting the Meeting;
- (f) business transacted at the Meeting and result thereof with a brief summary of the discussions;
- (g) particulars with respect to any adjournment, postponement of Meeting, change in venue; and
- (h) any other points relevant for inclusion in the report.

Such report shall be filed with the Registrar of Companies within thirty days of the conclusion of the Annual General Meeting.

### **18. Disclosure**

The Annual Return of a company shall disclose the date of Annual General Meeting held during the financial year.

In addition, Form No. MGT-7 (Format of Annual Return) prescribed by MCA for this purpose requires all companies to disclose the dates of all General Meetings held during the financial year, total number of Members entitled to attend the Meeting, and number of Members who attended the Meeting along with their total shareholding.

## **PRACTICAL ASPECTS OF DRAFTING RESOLUTIONS AND MINUTES**

### **Resolutions**

All resolutions, no matter how simple they are, should be drafted in clear and distinct terms since resolutions embody the decisions of the meetings. The following points should be remembered while drafting resolutions, both for Board and general meetings :

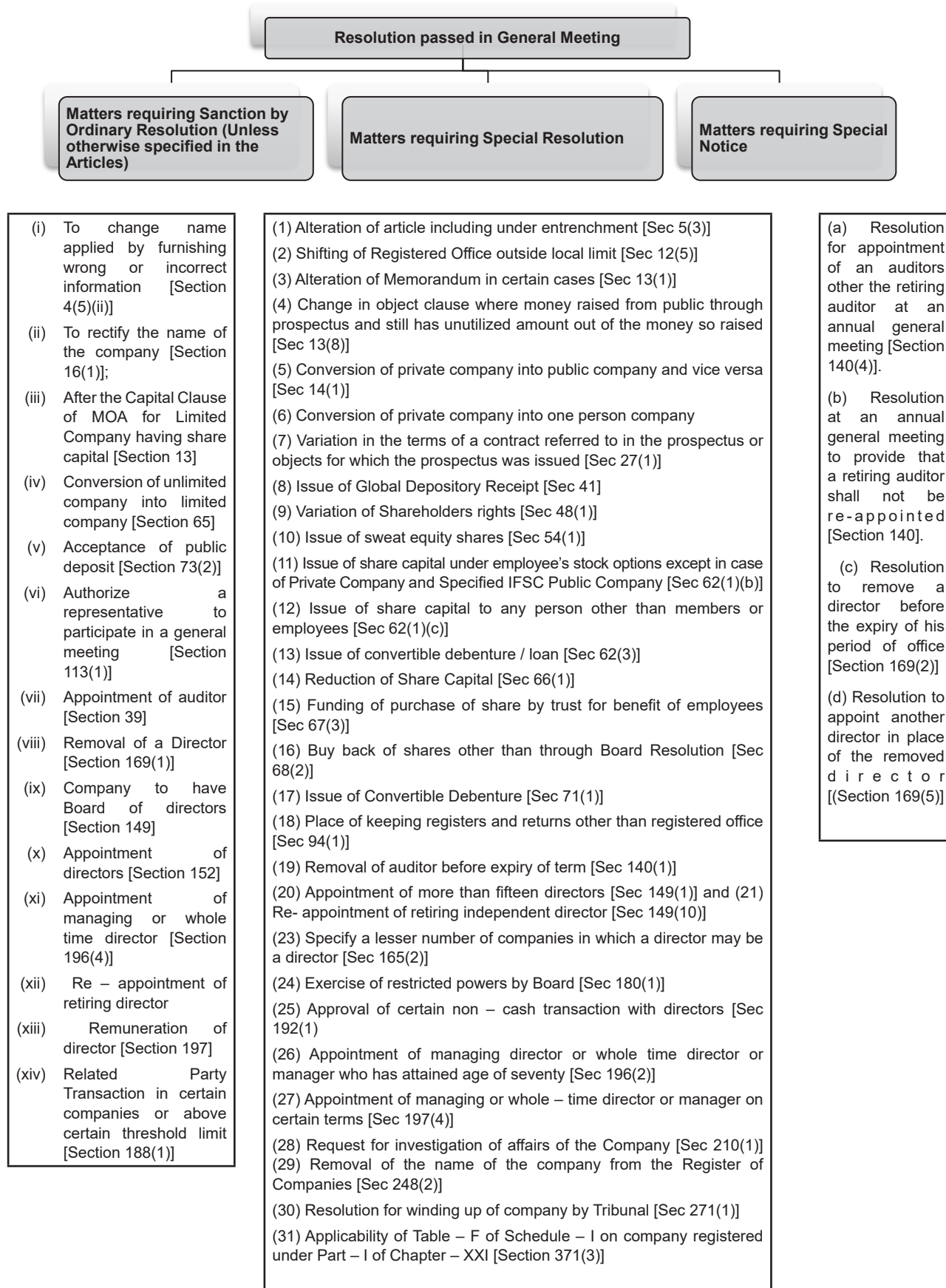
- (a) All essential facts are included in the resolution - e.g., the resolution for re-appointment of a managing director should indicate that the re-appointment is subject to the approval of the Central Government if

approval of the Central Government is required and should also cover the period of appointment, terms and conditions of such appointment.

- (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.

*How to draft a resolution? (Points to be remembered)*

- Resolutions are written within quotes.
- Resolutions begin with "RESOLVED THAT....."
- Mention the sections of Companies Act 2013, rules made thereunder or provisions of any other law pursuant to which decision is made. E.g. RESOLVED THAT pursuant to the provisions of section 161 of the Companies Act, 2013 and rules thereunder, and other applicable provisions of law for the time being in force,.....
- If resolution further requires approval of Central Govt or general meeting or any other authority, it shall specifically specify the authority whose approval is required e.g. RESOLVED THAT subject to approval of Central Govt under sec.... of Companies Act 2013 or rules made thereunder or any other law for the time being in force, .....
- In case of resolution passed at general meeting, it shall be specifically mentioned in the notice convening the meeting that whether it is Ordinary resolution or Special resolution.
- For filing forms with RoC and other authorities, authorize a person e.g. FURTHER RESOLVED THAT Mr....., director (DIN..) is authorized to execute, sign and do all other acts and deeds as may be required to give effect to this resolution.



**Annexure I****Specimen Attendance Slip****Name of the Company** .....**Registered Address** .....**CIN -** ..... **Email-** ..... **Telephone:** .....**Website:** .....**ATTENDANCE SLIP**

..... (Meeting Number) ..... (Date)

Folio No. / DP ID Client ID No.

Name of First named Member/Proxy/ Authorised Representative

Name of Joint Member(s), if any:

No. of Shares held

I/we certify that I/we am/are member(s)/proxy for the member(s) of the Company.

I/we hereby record my/our presence at the .....(Meeting number) Annual General Meeting of the Company being held on .....(Day &amp; Date) at .....(time) at ..... (Venue address).

.....

Signature of First holder/Proxy/Authorised Representative

Signature of 1st Joint holder

Signature of 2nd Joint holder

Note(s) : 1. Please sign this attendance slip and hand it over at the Attendance Verification Counter at the MEETING VENUE.

**Annexure II****Specimen Notice of Annual General Meeting****Name of the Company** .....**Registered Address** .....**CIN -** ..... **Email-** ..... **Telephone:** .....**Website:** .....

NOTICE OF ..... (Meeting Number) ANNUAL GENERAL MEETING NOTICE is hereby given that the ..... (Meeting Number) Annual General Meeting of the Members of ..... (Name of the Company) will be held on ..... (day), the ..... (date), 20....., at ..... am/ p.m. at ..... (address) to transact the following business:

**Ordinary Business:**

1. To receive, consider and adopt the standalone and consolidated Financial Statements of the Company for the financial year ended 31st March, ..... and the Reports of the Board of Directors and the Auditors.

2. To declare dividend for the financial year ended 31st March, .....
3. To appoint a Director in place of Mr. .... (DIN .....), who retires by rotation and being eligible, offers himself for reappointment.
4. To appoint a Director in place of Mr. .... (DIN .....), who retires by rotation and being eligible, offers himself for reappointment.
5. To appoint a Director in place of Mr. .... (DIN .....), who retires by rotation and being eligible, offers himself for reappointment.
6. To appoint Statutory Auditors and to determine their remuneration. For this purpose, to consider and if deemed fit, to pass, with or without modification, the following Resolution as an Ordinary Resolution:

“RESOLVED THAT pursuant to the provisions of Section 139 and other applicable provisions if any, of the Companies Act, 2013 and the Rules framed thereunder, as amended from time to time, M/s. ...., Chartered Accountants, (Firm Registration No.....) be and are hereby appointed as Auditors of the Company to hold office from the conclusion of this Annual General Meeting till the conclusion of the ..... Annual General Meeting of the Company, at a remuneration of Rs. ..../- (Rupees ..... only) for the year ..... and Rs. ..../- (Rupees ..... only) per year for the subsequent ..... years plus reimbursement of out of pocket expenses and service tax, as applicable.”

“RESOLVED FURTHER THAT the Board of Directors of the Company (including a Committee thereof), be and is hereby authorised to do all such acts, deeds, matters and things as may be considered necessary, desirable or expedient to give effect to this Resolution.”

**A company sending notices for Annual General Meeting on or after 7th May 2018 is not required to include ratification of the auditor as its agenda item. [The Companies Amendment Act, 2017 read with Notification S.O. 1833(E) dated 7th May 2018]**

OR

Approval of Remuneration of Statutory Auditors appointed by CAG

To consider and if deemed fit, to pass the following Resolution as an Ordinary Resolution:

“RESOLVED that pursuant to Section 142 of the Companies Act 2013, and other applicable provisions, if any, of the Companies Act, 2013, the remuneration of the Statutory Auditors appointed by Comptroller & Auditor General of India (C & AG) under Section 139(5) of the said Act, be and is hereby fixed at Rs. ..../- for the year 201.....-1.....”

**Special Business:**

7. To appoint Mr. .... as Director.

To consider, and if thought fit, to pass, with or without modification, the following Resolution as an Ordinary Resolution:

“RESOLVED THAT pursuant to the provisions of Section 152 and other applicable provisions of the Companies Act, 2013 read with the Companies (Appointment and Qualification of Directors) Rules, 2014, Mr. .... (DIN .....), who was appointed as an Additional Director of the Company with effect from ....., 20..... by the Board of Directors of the Company pursuant to Section 161(1) of the Companies Act, 2013 and the Articles of Association of the Company and who holds office upto the date of this Annual General Meeting, and being eligible, offer himself for appointment and in respect of whom the Company has received a notice in writing under Section 160 of the Companies Act, 2013 from a member signifying his intention to propose the candidature of Mr. .... for the

office of Director, be and is hereby appointed with effect from the date of this Meeting as a Director of the Company, liable to retire by rotation.”

### By Order of the Board of Directors

For .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Director/ Company Secretary

DIN/ACS/FCS No.

### Notes :

1. The explanatory statement setting out the material facts pursuant to Section 102 of the Companies Act, 2013, relating to special business to be transacted at the Meeting is annexed.
2. A Member entitled to attend and vote at the Meeting is entitled to appoint a Proxy to attend and, on a poll, to vote instead of himself and the Proxy need not be a Member of the Company.
3. Proxies, in order to be effective, must be received in the enclosed Proxy Form at the Registered Office of the Company not less than forty-eight hours before the time fixed for the Meeting.
4. A person can act as a proxy on behalf of Members not exceeding 50 and holding in the aggregate not more than ten percent of the total share capital of the Company carrying voting rights. A Member holding more than ten percent of total share capital of the Company carrying voting rights may appoint a single person as proxy and such person shall not act as a proxy for any other person or shareholder.
5. A Corporate Member intending to send its authorised representatives to attend the Meeting in terms of Section 113 of the Companies Act, 2013 is requested to send to the Company a certified copy of the Board Resolution authorizing such representative to attend and vote on its behalf at the Meeting.
6. Members/Proxies/Authorised Representatives are requested to bring the attendance slips duly filled in for attending the Meeting. Members who hold shares in dematerialised form are requested to write their client ID and DP ID numbers and those who hold shares in physical form are requested to write their Folio Number in the attendance slip for attending the Meeting.
7. During the period beginning 24 hours before the time fixed for the commencement of Meeting and ending with the conclusion of the Meeting, a Member would be entitled to inspect the proxies lodged at any time during the business hours of the Company. All documents referred to in the Notice and accompanying explanatory statement are open for inspection at the Registered Office of the Company on all working days of the Company between 11:00 a.m. and 1:00 p.m. upto the date of the Annual General Meeting and at the venue of the Meeting for the duration of the Meeting.
8. Route-map to the venue of the Meeting is provided at the end of the Notice / Page no. .... of the Annual Report.
9. The Register of Members and the Share Transfer Books of the Company will remain closed from ..... to ..... (both days inclusive).
10. The dividend on shares as recommended by the Board, if approved at the Annual General Meeting, will be paid within thirty days from the date of declaration to those Members or their mandatees whose names appear:
  - (a) as Members in the Register of Members of the Company on ..... , and

- (a) as beneficial owners on that date as per the lists to be furnished by ..... in respect of shares held in electronic form.

11. Unclaimed / Unpaid Dividend:

Pursuant to Section 124 of the Companies Act, 2013, dividend for the financial year ended 31st March, \_\_\_\_\_ which remains unclaimed for a period of seven years, become due for transfer on ..... (date) to the Investor Education and Protection Fund of the Central Government. Members who have not claimed their dividend for the above mentioned year are requested to make their claim to the Share Department of the Company at the Registered Office of the Company or to the Registrar and Share Transfer Agents of the Company at ..... (address) as early as possible but not later than ..... (date).

11. The Company has already transferred unclaimed dividend declared for the financial year ended 31st March, ..... and earlier periods to the Investor Education and Protection Fund. Members who have so far not claimed or collected their dividends for the said period may claim their dividend from the Registrar of Companies, ....., by submitting an application in the prescribed form.
12. The Securities and Exchange Board of India (SEBI) has mandated the submission of Permanent Account Number (PAN) by every participant in securities market. Members holding shares in electronic form are, therefore, requested to submit the PAN to their Depository Participants with whom they are maintaining their demat accounts. Members holding shares in physical form can submit their PAN details to the Company.
13. Electronic copy of the Annual Report is being sent to all the Members whose email IDs are registered with the Company/Depository Participant(s) for communication purposes unless any Member has requested for a hard copy of the same. For Members who have not registered their email address, physical copy of the Annual Report is being sent in the permitted mode. In case you wish to get a physical copy of the Annual Report, you may send your request to ..... (email) mentioning your folio/DP ID and Client ID. Annual Reports is also available in the Financials section on the website of the Company at .....
14. Members holding shares in physical mode are requested to register their email IDs with the Registrar & Share Transfer Agents of the Company and Members holding shares in demat mode are requested to register their e mail ID's with their respective DP in case the same is still not registered. Members are also requested to notify any change in their email ID or bank mandates or address to the Company and always quote their Folio Number or DP ID and Client ID Numbers in all correspondence with the Company. In respect of holding in electronic form, Members are requested to notify any change of email ID or bank mandates or address to their Depository Participants.
15. Members holding shares in electronic form may please note that their bank details as furnished to the respective Depositories will be printed on their dividend warrants as per the applicable regulations. The Company will not entertain any direct request from such Members for deletion or change of such bank details. Instructions, if any, already given by Members in respect of shares held in physical form will not be automatically applicable to the dividend paid on shares in electronic form.
16. Any query relating to financial statements must be sent to the Company's Registered Office at least seven days before the date of the Meeting.
17. With a view to serving the Members better and for administrative convenience, an attempt would be made to consolidate multiple folios. Members who hold shares in identical names and in the same order of names in more than one folio are requested to write to the Company to consolidate their holdings in one folio.



18. Members who still hold share certificates in physical form are advised to dematerialise their shareholding to avail the benefits of dematerialisation, which include easy liquidity, since trading is permitted in dematerialised form only, electronic transfer, savings in stamp duty and elimination of any possibility of loss of documents and bad deliveries.
19. Members can avail of the nomination facility by filing Form SH-13, as prescribed under Section 72 of the Companies Act, 2013 and Rule 19(1) of the Companies (Share Capital and Debentures) Rules, 2014, with the Company. Blank forms will be supplied on request.
20. In accordance with the provisions of Article ..... of the Articles of Association of the Company, Mr. ...., Mr. .... and Mr. .... will retire by rotation at the Annual General Meeting and, being eligible, offer themselves for re-election. Further, Mr. .... was appointed as an Additional Director and retires at the Annual General Meeting and the Company has received a notice for his appointment at the Annual General Meeting. Pursuant to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, additional information in respect of Directors seeking election, those retiring by rotation and seeking reappointment at the Annual General Meeting is given elsewhere in the Annual Report.
21. Voting through electronic means  

In compliance with provisions of Section 108 of the Companies Act, 2013 and Rule 20 of the Companies (Management and Administration) Rules, 2014, the Company is pleased to provide members the facility of exercising their right to vote electronically on the items mentioned in this Notice. The Company has appointed Mr. .... as scrutinizer for conducting the e-voting process in a fair and transparent manner.

The voting period begins on ....., 201.... at 10:01 hrs. and will end on ....., 201.... at 17:00 hrs. During this period shareholders' of the Company, holding shares either in physical form or in dematerialised form, as on the cut-off date of ....., 201..., may cast their vote electronically. The e-voting module shall be disabled for voting thereafter.

The Company has signed an agreement with ..... (agency) for facilitating e-voting to enable the Shareholders to cast their vote electronically. The instructions for shareholders voting electronically are given at page no. .... of the Annual Report.
22. The Results shall be declared on or after the Annual General Meeting of the Company and shall be deemed to be passed on the date of Annual General Meeting. The results alongwith the Scrutinizer's Report shall be placed on the website of the Company ..... within 2 days of passing of the resolutions at the Annual General Meeting of the Company and shall be communicated to ..... (Stock Exchange).

## EXPLANATORY STATEMENT

As required by Section 102 of the Companies Act, 2013, the following explanatory statement sets out all material facts relating to the business mentioned under Item No. 7 of the accompanying Notice dated .....

### Item No. 7

Mr. .... who was appointed as an Additional Director of the Company under Section 161(1) of the Companies Act, 2013 effective ....., holds office up to the date of this Annual General Meeting, and is eligible for appointment as Director of the Company.

The Company has received notice under Section 160 of the Companies Act, 2013 from a Member signifying her intention to propose the candidature of Mr. .... for the office of Director.

A brief profile of Mr. ...., as required to be given pursuant to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and secretarial standards, has been annexed to this Notice.

Mr. .... is not a Director of any other public limited company in India. He is a Member of the Audit Committee and the Investment Committee of ..... He does not hold any share in the Company and is not related to any Director or Key Managerial Personnel of the Company in any way. The Board of Directors considers it in the interest of the Company to appoint Mr. .... as a Director.

**By Order of the Board of Directors**

For .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Director/ Company Secretary

DIN/ACS/FCS No.

**Annexure III**

**Specimen Notice of Extra-Ordinary General Meeting**

**Name of the Company** .....

**Registered Address** .....

**CIN -** ..... **Email-** ..... **Telephone:** .....

**Website:** .....

**NOTICE OF EXTRA-ORDINARY GENERAL MEETING**

NOTICE is hereby given that an Extra-Ordinary General Meeting of the Members of ..... (name of Company) will be held on..... (day), ..... (date) at .....a.m./p.m. at ..... (address) to transact the following **special business**:

**1. Shifting of Registered Office**

To consider and, if thought fit, to pass the following Resolution as a **Special Resolution**:

“RESOLVED that pursuant to Section 13 and other applicable provisions, if any, of the Companies Act, 2013, and subject to the approval of the Regional Director, the Registered Office of the Company be shifted from the ..... (Name of State) to the ..... (Name of State).

RESOLVED FURTHER that Clause - II of the Memorandum of Association of the Company be altered by substitution of the words ..... in place of the words .....

RESOLVED FURTHER that the Board of Directors of the Company be and is hereby authorised to file the necessary petition(s) before the Regional Director, ..... Region for confirmation of the alteration of Clause - II of the Memorandum of Association of the Company as aforesaid and to carry out all other acts and deeds as are necessary in connection therewith, including compliance of directions, if any, of the concerned authorities.”

**2. Appointment of Mr. .... as Director**

To consider and, if thought fit, to pass, with or without modification, the following Resolution as an **Ordinary Resolution**:

“RESOLVED that pursuant to the provisions of Sections 149, 150(2), 152 and any other applicable provisions of the Companies Act, 2013 and the rules made there under read with Schedule IV to the Companies Act, 2013, approval of the Company be and is hereby accorded for appointment of Mr. .... (DIN No.....), as an Independent Director of the Company to hold the office for a period of 3 years i.e. up

to ....., ..... AND THAT by virtue of subsection (13) of Section 149 of the Companies Act, 2013 he shall not be liable to retire by rotation.”

**By Order of the Board of Directors**

For .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Director/ Company Secretary

DIN/ACS/FCS No.

**Notes :**

1. The explanatory statement setting out the material facts pursuant to Section 102 of the Companies Act, 2013, relating to special business to be transacted at the Meeting is annexed.
2. A Member entitled to attend and vote at the Meeting is entitled to appoint a Proxy to attend and, on a poll, to vote instead of himself and the Proxy need not be a Member of the Company.
3. Proxies, in order to be effective, must be received in the enclosed Proxy Form at the Registered Office of the Company not less than forty-eight hours before the time fixed for the Meeting.
4. A person can act as a proxy on behalf of Members not exceeding 50 and holding in the aggregate not more than ten percent of the total share capital of the Company carrying voting rights. A Member holding more than ten percent of total share capital of the Company carrying voting rights may appoint a single person as proxy and such person shall not act as a proxy for any other person or shareholder.
5. A Corporate Member intending to send its authorised representatives to attend the Meeting in terms of Section 113 of the Companies Act, 2013 is requested to send to the company a certified copy of the Board Resolution authorizing such representative to attend and vote on its behalf at the Meeting.
6. Members/Proxies/Authorised Representatives are requested to bring the attendance slips duly filled in for attending the Meeting. Members who hold shares in dematerialised form are requested to write their client ID and DPID numbers and those who holds shares in physical form are requested to write their Folio Number in the attendance slip for attending the Meeting.
7. During the period beginning 24 hours before the time fixed for the commencement of Meeting and ending with the conclusion of the Meeting, a Member would be entitled to inspect the proxies lodged at any time during the business hours of the company. All documents referred to in the Notice and accompanying explanatory statement are open for inspection at the Registered Office of the Company on all working days of the Company between 11:00 a.m. and 1:00 p.m. upto the date of the Annual General Meeting and at the venue of the Meeting for the duration of the Meeting.
8. Route-map to the venue of the Meeting is provided at the end of the Notice.
9. In compliance with provisions of Section 108 of the Companies Act, 2013 and Rule 20 of the Companies (Management and Administration) Rules, 2014, the Company is pleased to provide members the facility of exercising their right to vote electronically on the items mentioned in this Notice. The Company has appointed Mr. .... as scrutinizer for conducting the e-voting process in a fair and transparent manner.

The voting period begins on ....., ....., 201... at 10:01 hrs. and will end on ....., .....,

201... at 17:00 hrs. During this period shareholders' of the Company, holding shares either in physical form or in dematerialised form, as on the cut-off date of ....., 201..., may cast their vote electronically. The e-voting module shall be disabled for voting thereafter.

The Company has signed an agreement with .....(agency) for facilitating e-voting to enable the Shareholders to cast their vote electronically. The instructions for shareholders voting electronically are given at the end of the Notice.

### **EXPLANATORY STATEMENT**

As required by Section 102 of the Companies Act, 2013, the explanatory statement sets out all material facts relating to the business mentioned under Item Nos. 1 & 2 of the accompanying Notice dated .....

#### **Item No. 1**

The Registered Office of the Company has been situated in .....since the incorporation of the Company. The business of the Company has increased manifold since incorporation and it is expected that such growth trends will be maintained in future.

The employee strength of the Company has also increased manifold and the Company needs an area of around 50,000 square feet to accommodate the entire staff and to carry out its growing business activities efficiently. However, expansion at the present location is not possible and prevailing rents in..... render it unviable to look for additional premises in the vicinity of the Registered Office.

The Board of Directors has identified suitable premises at .....in the State of ....., not very far from the present Registered Office. Acquiring such premises, situated close to ....., is advantageous for the Company to carry on its business more conveniently, economically and efficiently.

In view of these advantages, the Board of Directors has decided to shift the Registered Office of the Company from ..... (Name of State) to the ..... (Name of State) subject to necessary approvals.

In terms of Section 13 of the Companies Act, 2013, approval of the shareholders and the Regional Director is required for the purpose of shifting the registered office of the Company from one state to another state.

A copy of the Memorandum of Association is available for inspection at the Registered Office of the Company on all working days of the Company between 11:00 a.m. and 1:00 p.m. upto the date of the Meeting and at the venue of the Meeting for the duration of the Meeting.

The Board commends the passing of the Resolution at Item No.1 as a Special Resolution.

None of the Directors and Key Managerial Personnel of the Company or their relatives is concerned or interested in the proposed Resolution.

#### **Item No. 2**

Section 149 of the Companies Act, 2013, provides that every listed public company shall have at least one third of the total number of Directors as Independent Directors. An Independent Director can be appointed for any period up to 5 years but can be reappointed for another term of not more than 5 years by passing a Special Resolution. The provisions relating to retirement of Directors by rotation shall not apply to the appointment of Independent Director.

The Board has undertaken due diligence to determine the eligibility of Mr. .... for appointment as an Independent Director on the Board, based upon his qualification, expertise, track record integrity etc. and recommends the appointment of Mr. .... to the shareholders for a period of three years, i.e. up to .....

Mr. .... will not be liable to retire by rotation during this period.

Other than Mr. ...., none of the Directors or Key Managerial Personnel of the Company or their relatives is concerned or interested in the proposed Resolution.

A brief profile of Mr. .... is given below.

**By Order of the Board of Directors**

For .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Director/ Company Secretary

DIN/ACS/FCS No

Specimen Notice in Newspapers of Annual General Meeting

**Name of the Company** .....

**Registered Address** .....

**CIN -** ..... **Email-** ..... **Telephone:** .....

**Website:** .....

NOTICE is hereby given that the ..... Annual General Meeting of the Company is scheduled to be held on .....(day) ..... (date) at ..... a.m. /p.m. at the registered office of the company situated at .....( address).

Notice of the Meeting setting out the Resolutions proposed to be transacted thereat and the Audited financial statements for the year ended at March 31, 201....., Auditors' Report and Report of the Board of Directors for the year ended on that date, have also been dispatched to the Members. Notice and the said documents are available at the Company's website ..... and copies of said documents are also available for inspection at the registered office of the Company on all working days during the business hours up to the date of Annual General Meeting. The Company has completed dispatch of Annual Report on ....., 201....

Pursuant to the provisions of Section 108 of the Companies Act, 2013 read with Rule 20 of the Companies (Management and Administration) Rules, 2014, your Company is pleased to provide remote e-voting facility to its Members to exercise their right to vote on the Resolutions proposed to be transacted at the ..... (Number) Annual General Meeting. The Company has arranged remote e-voting facility through .....(agency) at ..... (website) Notice of the Annual General Meeting is also available at the ..... (agency's) website.

A Member whose name appears in the register of members as on cutoff date i.e. ...., 201... only shall be entitled to avail the facility of remote evoting as well as voting through physical ballot at the Meeting. Members who cast their vote through remote e-voting may attend the Meeting but shall not be entitled to cast their vote again.

Any person who becomes Member of the Company after dispatch of the Notice of the Meeting and holding shares on ....., 201..., if already registered with ..... (agency), can use his/her existing user ID and password otherwise follow the detailed procedure mentioned in Notice of Meeting available at Company's website www.....com or may obtain the login ID and password by sending a request at ..... (email ID of agency) or to the Company's Registrar, M/s ..... at .....@.....com latest by ..... p.m. of ....., 201....

Remote e-voting facility shall commence on ....., 201..... at 10:00 hrs. and will end on ..... , 201... at 17:00 hrs. The remote e-voting will be disabled by ..... (agency) after the said date and time.

The Company has appointed Mr. ...., Practising Company Secretary as the scrutiniser to scrutinise the e-voting process in fair and transparent manner.

In case of any queries/grievances relating to e-voting process, the Members may contact at ..... (email ID of agency), Tel: .....or M/s. ....RTA address) at .....@..... com, Tel: 011..... or at the .....@.....com , Tel: +91 .....

Please keep your most updated email ID registered with the company/your Depository Participant to receive timely communications.

**By Order of the Board of Directors**

For .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Company Secretary

(ACS/FCS No.....)

**Annexure V**

Specimen Notice of postponed Annual General Meeting

**Name of the Company** .....

**Registered Address** .....

**CIN -** ..... **Email-** ..... **Telephone:** .....

**Website:** .....

Members are hereby informed that, due to unforeseen and unavoidable circumstances, the ..... Annual General Meeting of the Company, which was scheduled on ....., will now be held on ....., at .....p.m. at the Registered Office of the Company, to consider the business mentioned in the Notice dated ..... which had been sent to Members in connection with the Meeting originally scheduled to have been held on .....

A Member entitled to attend and vote at the Meeting is entitled to appoint a Proxy to attend and, on a poll, to vote instead of himself and the Proxy need not be a Member of the Company. Proxies, in order to be effective, should be duly completed, stamped (if applicable) and signed and must be received at the Registered Office of the Company not less than forty-eight hours before the time fixed for the Meeting.

**By Order of the Board of Directors**

**For** .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Company Secretary

(ACS/FCS No.....)

Note : Members may please immediately intimate any change in their address.

**Annexure VI**

Specimen Notice in Newspapers of postponement of Annual General Meeting

**Name of the Company** .....

Registered Address .....

CIN - ..... Email- ..... Telephone: .....

Website: .....

**NOTICE: POSTPONEMENT OF ANNUAL GENERAL MEETING**

Members are hereby informed that, due to the unforeseen and unavoidable circumstances, it has not been possible for the Company to convene the ..... Annual General Meeting of the Company, which was scheduled to be held on .....20.....

Accordingly, the Board of Directors of the Company has decided to postpone the said Annual General Meeting, which now is convened on .....20.... Notice and other documents, if any, relevant to the re-convened Meeting will be dispatched to Members shortly.

A Member entitled to attend and vote at the Meeting is entitled to appoint a Proxy to attend and, on a poll, to vote instead of himself and the Proxy need not be a Member of the Company. Proxies, in order to be effective, should be duly completed, stamped (if applicable) and signed and must be received at the Registered Office of the Company not less than forty-eight hours before the time fixed for the Meeting.

**By Order of the Board of Directors**

For .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20....

Company Secretary

(ACS/FCS No.....)

Note : Members may please immediately intimate any change in their address.

**Annexure VII****Specimen Notice by Requisitionists convening an Extra-Ordinary General Meeting**

NOTICE is hereby given that the persons named below, who are Members of ..... (Name of the Company), having its Registered Office at ....., and who have requisitioned the convening of an Extra-Ordinary General Meeting of the Company, hereby, in exercise of the powers and rights conferred by Section 100 of the Companies Act, 2013, give Notice that the said requisitioned meetings shall be held on ..... day, the .....20....., at .....a.m./p.m. at ..... (address) to consider the following proposal:

State the proposal

{OR

for considering and, if thought fit, passing the following Ordinary/ Special Resolution:

Reproduce the Resolution}

Names of requisitionists:

1. ....

2. ....

3. ....



4. ....

**Note :**

A Member entitled to attend and vote at the Meeting is entitled to appoint a Proxy to attend and, on a poll, to vote instead of himself and the Proxy need not be a Member of the Company. Proxies, in order to be effective, should be duly completed, stamped (if applicable) and signed and must be received at the Registered Office of the Company not less than forty-eight hours before the time fixed for the Meeting.

**By Order of the Board of Directors**

**For** .....

.....(Signature)

Place : .....

.....(Name)

Date : .....20

Company Secretary

(ACS/FCS No.....)

**Notes :**

1. A Member entitled to attend and vote at the Meeting is entitled to appoint a Proxy to attend and, on a poll, to vote instead of himself and the Proxy need not be a Member of the Company. Proxies, in order to be effective, should be duly completed, stamped (if applicable) and signed and must be received at the Registered Office of the Company not less than forty-eight hours before the time fixed for the Meeting.
2. The requisition dated ....., referred to above, signed by the requisite number of Members in terms of Section 100 of the Companies Act, 2013, and all documents referred to in the Notice are available for inspection by any Member at the Registered Office of the Company on any working day of the Company between the hours of 11:00 a.m. and 1:00 p.m. upto the date of this Extra-Ordinary General Meeting and at the venue of the Meeting for the duration of the Meeting.
3. Route-map to the venue of the Meeting is enclosed.

**Annexure VIII**

Specimen Notice of an Extra-Ordinary General Meeting called on the Requisition of Members

**NOTICE**

**Name of the Company:** .....

**CIN:** .....

**Registered Office :** .....

NOTICE is hereby given that, pursuant to a valid requisition under Section 100 of the Companies Act, 2013, lodged at the Registered Office of the Company by the Members whose names are annexed hereto, an Extra-Ordinary General Meeting of the Members of the Company will be held on ....., the .....20..., at a.m./p.m. at the Registered Office of the Company to consider the following proposal put forth by the requisitionists:

“RESOLVED that .....  
 .....  
 .....  
 .....”

The Board of Directors has considered the abovementioned Resolution in its Meeting held on .....  
 ....20... and submits the following observations thereon for the consideration of the Members:

..... {after stating the observations,  
 it should also be stated whether the Board supports or does not support the proposal of the requisitionists  
 contained in the aforesaid Resolution.}

### Annexure IX

#### Specimen Board Resolution for convening Extra-ordinary General Meeting on Requisition

“RESOLVED THAT pursuant to the provisions of Section 100 and other applicable provisions of the Companies Act, 2013 and rules thereunder and as per the requisition received from the Members, the Board of Directors hereby authorises calling of an Extra-Ordinary General Meeting (EGM) of the Members on .....  
 (date) at .....(time) at .....(venue).

RESOLVED FURTHER THAT the draft notice of the EGM, the explanatory statement and other ancillary documents in connection with the EGM, as placed before the Board, be and are hereby approved.

RESOLVED FURTHER THAT any one of the Directors and the Company Secretary of the Company be and are hereby authorised to sign and execute the notice and other relevant documents in connection with the EGM and circulate them to the Members of the Company and do all such acts, deeds and things as may be necessary in connection with calling and convening of EGM including appointing scrutinisers and e-voting agencies, if required.”

### Annexure X

#### Specimen of a Demand for Poll

Dated: .....

To

The Chairman of the ..... Annual General Meeting of ..... (Name of the Company) being held on ..... day, ..... 20... at ..... a.m. /p.m. at..... (address).

We the undersigned, being the holders of an aggregate of ..... equity shares of Rs.10/Re.1/- each of the Company, as per the details set out below against our respective names, demand that, pursuant to the provisions of Section 109 of the Companies Act, 2013, a poll be taken in respect of the Resolution proposed at Item No. .... of the Notice dated ..... 20..... of the ..... Annual General Meeting of the Company on which the voting is yet to be taken on a show of hands.

{OR

on which voting on a show of hands has been taken but the result thereof is yet to be announced

OR

which was declared carried on voting by show of hands.}

Sr No	Name of member	Folio No./ Client ID No.	No. of shares held	Signature of members

## Annexure XI

### Announcements by the Chairman of the Meeting in connection with a Poll

1. Immediately after a Poll is demanded:

"I request you to make your demand on the Poll Demand Sheet so that the same can be verified to ascertain the validity of the demand in terms of the Companies Act, 2013, and the Articles of Association of the Company."

2. After verification of the demand and if the demand is found to be validly made:

"I now order that the Poll on the Resolution in respect of Item No. . . . . of the Notice, on the subject of . . . . . be taken and I appoint Mr . . . . . and Mr . . . . . as the Scrutinisers.

The Poll will commence half an hour after the transaction of all the items on the Agenda for the Meeting.

The Poll will be held in a part of this Hall and will continue for half an hour or till all the Members or their valid Proxies or Authorised Representatives present and willing to cast their votes, have cast their votes, whichever is earlier.

I authorise the Scrutinisers to issue the Poll papers to Members/Proxies/ Authorised Representatives and to advise them about the procedure to be followed; and to declare the Poll as closed on conclusion thereof, after ensuring that all the Members/Proxies/Authorised Representatives present have been provided the opportunity to vote. In terms of the provisions of the Articles of Association of the Company, a Member who is in arrears of moneys payable on the shares allotted to him is not entitled to vote. The Scrutinisers can take the assistance as may be required of the officers or employees of the Company in the conduct of the poll. I request you all to extend your co-operation in the conduct of the poll.

The details of the result of the poll would be displayed on the notice board at the Registered Office of the Company not later than 11:00 a.m. on . . . . . It would also be put up on the website of the Company . . . . . under the head . . . . ."

## Annexure XIII

### Specimen Polling Record

Name of the Company : . . . . .

Registered Office : . . . . .

#### POLLING RECORD

Date of Meeting . . . . .

Item No. of the Notice dated . . . . . of the Meeting on which the poll was held : . . . . .

Subject matter on which the poll was held: . . . . .

Sr No	Particulars	Details
1.	Name of the Member	
2.	Address	
3.	Registered folio No. / *Client ID No. (*Applicable to investors holding shares in dematerialised form)	
4.	Class of Shares (Whether shares have differential voting rights)	

5.	No. of shares held	
6.	Nominal Value of Shares	

No	Item No	Assent	Dissent

Date: ..... Initials of Scrutinisers: ..... {each page should be initialed by the Scrutinisers and they should sign the last page in full}

#### Annexure XIV

Specimen Announcement on the Notice Board of the Company of the Result of the Poll

**Name of the Company** .....

**Registered Address** .....

**CIN -** ..... **Email-** ..... **Telephone:** .....

**Website:** .....

**RESULT OF THE POLL HELD AT THE ..... MEETING OF THE COMPANY HELD ON .....**

Item No. .... of the Notice dated ..... Subject: .....

Total number of votes cast : .....

Invalid votes : .....

Total number of valid votes : .....

Number of votes cast FOR the Resolution : .....

Number of votes cast AGAINST the Resolution : .....

Result : .....

Place : .....

Date : .....

C HAIRMAN

Time : .....

#### Annexure XV

Items of Business which shall be passed only by Postal Ballot

1. Alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum.
2. Alteration of articles of association in relation to insertion or removal of provisions which are required to be included in the articles of a company in order to constitute it a private company.
3. Change in place of registered office outside the local limits of any city, town or village.
4. Change in objects for which a company has raised money from public through prospectus and still has any unutilised amount out of the money so raised.
5. Issue of shares with differential rights as to voting or dividend or otherwise.
6. Variation in the rights attached to a class of shares or debentures or other securities.

7. Buy-back of shares by a company.
8. Appointment of a Director elected by small shareholders.
9. Sale of the whole or substantially the whole of an undertaking of a company or where the company owns more than one undertaking, of whole or substantially the whole of any of such undertakings.
10. Giving loans or extending guarantee or providing security in excess of the limit specified.
11. Any other Resolution prescribed under any applicable law, rules or regulations.

## **Annexure XVII**

### **Specimen Resolution Passed by Postal Ballot**

**Name of the Company** .....

**Registered Address** .....

**CIN -** ..... **Email-** ..... **Telephone:** .....

**Website:** .....

#### **RESOLUTIONS PASSED BY POSTAL BALLOT ON** .....

The Company had, on ..... dispatched to all the Shareholders, Notice dated ..... under Section 110 of the Companies Act, 2013, for obtaining the consent of the Shareholders to the following Ordinary Resolution by means of postal ballot :

“RESOLVED that the consent of the Company be and is hereby accorded pursuant to Section 180(1)(a) and other applicable provisions of the Companies Act, 2013, to the Board of Directors of the Company (the Board) to sell, lease or otherwise dispose of at such consideration and with effect from such date as the Board may think fit, the whole or substantially the whole of the undertaking of the Company at ..... engaged in the business of manufacture of .....

RESOLVED FURTHER that the Board be and is hereby authorised to do or cause to be done all such acts, deeds and other things as may be required or considered necessary or incidental thereto for giving effect the aforesaid Resolution”.

The dispatch of Notices and accompanying documents were completed on ..... (date) to all Members appearing in the records of the Company as on ..... (cut-off date). Mr. ...., was appointed as Scrutiniser on ..... (date) and ..... (name of the Agency) was appointed as an Agency on ..... (date) for providing and supervising electronic platform for e-voting.

It was mentioned in the said Notice dated ..... that the postal ballot forms sent therewith should be returned by the Shareholders duly completed so as to reach the Scrutiniser on or before ..... The Notice also indicated the date of commencement of e-voting as ..... (Day) ..... (Date) and the last date e-voting as ..... ( Day ) ..... (Date) alongwith the process and manner of voting by electronic means. The Scrutiniser was required to submit his report to the Chairman after completion of the Scrutiny.

Mr. .... (Scrutiniser) carried out the scrutiny of all the postal ballot forms and electronic votes received upto the close of working hours on

..... He submitted his Report dated ..... on ..... (date) and the Chairman accepted the said Report.

The following is the result of the postal ballot as per the Scrutiniser's Report:

Number of valid postal ballot forms received	
Number of valid votes cast by electronic means	
Votes in favour of the Resolution including votes cast by electronic means	
Votes against the Resolution including votes cast by electronic means	
Number of invalid postal ballot forms received	
Number of invalid votes by electronic means	

In view of the foregoing, the Ordinary Resolution set out in the Notice dated ..... has been therefore duly approved/not approved by the requisite majority of the Shareholders.

Place : ..... Chairman

Date : ..... Chairman

### Annexure XVIII

#### Specimen Minutes of Annual General Meeting

MINUTES OF THE PROCEEDINGS OF THE ..... ( Number of Meeting ) ANNUAL GENERAL MEETING OF ..... ( Name of the Meeting ) HELD ON ..... ( day ), ..... ( date ) 20... A T ..... ( address )

**Time of commencement** ..... a.m./p.m.

**Time of conclusion** ..... a.m./p.m.

The following were present:

1. Mr. W (in the Chair)
2. Mr. B (Director and Member)
3. Mr. C (Director)
4. Mr. D (Director and Member)
5. Mr. E. (Director and Chairman of Audit Committee)
6. Mr. F (Company Secretary)
7. .... (Members present in person) [state number]
8. .... representing ..... shares (Members present by Proxy) [state number]
9. Mr. G, Partner of M/s....., Chartered Accountants, Auditors of the Company, was present.

**Mr. H, Practising Company Secretary, Secretarial Auditor of the Company, was also present.**

#### 1. CHAIRMAN

In accordance with Article ..... of the Articles of Association, Mr. W, Chairman of the Board of Directors, took the Chair.

{OR Mr. B was elected Chairman of the Meeting, in terms of Article ..... of the Articles of Association of the Company}.

The Chairman welcomed the Members and introduced the Directors seated on the dais.

The Chairman stated that Mr..... and Mr.....Directors, could not attend the Meeting due to..... (explain the reason for absence).

Quorum was present at the commencement of the Meeting as well as at the time of consideration of each item of business.

The following documents / Registers of the Company remained open and accessible for inspection during the continuance of the AGM:

- (a) Financial Statements for the financial year ended 31st March, ....., including the Consolidated Financial Statements for the said financial year, and the Reports of the Board of Directors and the Auditors.
- (b) Register of Directors and Key Managerial Personnel and their shareholding.
- (c) Register of Contracts or Arrangements in which Directors are interested

With the consent of the Members present, the Notice convening the Annual General Meeting of the Company was taken as read.

The Chairman delivered his speech.

The business of the Meeting as per the Notice thereof was thereafter taken up item wise.

#### **1. Adoption of Consolidated and Standalone Financial Statements**

The Chairman requested Mr. .... to read the Ordinary Resolution for the adoption of the Financial Statements for the year ended 31st March, 20..... and Mr. .... read out the Ordinary Resolution as follows:

“RESOLVED that the Financial Statements of the Company for the year ended 31 st March, 20....., including Consolidated Financial Statements for the said financial year, along with the Reports of the Board of Directors and the Auditors, as circulated to the Members and laid before the Meeting, be and are hereby approved and adopted.”

After the above Resolution was proposed and seconded, but before it was put to vote, the Chairman invited Members (other than those present by Proxy) to make observations and comments, if any, on the Report and financial statements, as well as on the other Resolutions set out in the Notice convening the Meeting.

Some Members made their observations and comments and raised queries on the Annual Report and Financial Statements and other items set out in the Notice and the Chairman answered their queries.

Before putting the Resolution to vote, the Chairman reminded the Meeting that Proxies were not eligible to vote on a show of hands. Thereafter, the Chairman put the Resolution for the adoption of the Financial Statements, Consolidated Financial Statements and the Reports thereon to vote as an Ordinary Resolution.

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried by the requisite majority.

#### **2. Declaration of Dividend**

Mr. .... read out the following Resolution:

“RESOLVED that the dividend @ Rs. .... on the equity shares of Rs. 10/Re.1/- each, fully paid-up, be and is hereby declared for payment, to those Members whose names appear on the Company's Register of Members on .....20...”.

The Resolution was proposed by Mr. .... and seconded by Mr. ...., and was put to vote as an Ordinary Resolution.

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried unanimously.



**3. Appointment of Director**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded by the aforementioned two Members, was put to vote as an Ordinary Resolution:

“RESOLVED that pursuant to Section 152 of the Companies Act, 2013, Mr. A, who retires by rotation and, being eligible for re-appointment, offers himself for reappointment, be and is hereby re-appointed as a Director of the Company liable to retire by rotation.”

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried unanimously.

**4. Appointment of Director**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded by the aforementioned two Members, was put to vote as an Ordinary Resolution:

“RESOLVED that pursuant to Section 152 of the Companies Act, 2013, Mr. B, who retires by rotation and, being eligible for re-appointment, offers himself for reappointment, be and is hereby re-appointed as a Director of the Company liable to retire by rotation.”

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried unanimously.

**5. Appointment of Director**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded by the aforementioned two Members, was put to the vote as an Ordinary Resolution:

“RESOLVED that, pursuant to Section 152 of the Companies Act, 2013, Mr. C, who retires by rotation and, being eligible for re-appointment, offers himself for reappointment, be and is hereby re-appointed as a Director of the Company liable to retire by rotation.”

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried unanimously.

**6. Appointment of Auditors**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded by the aforementioned two Members, was put to vote as an Ordinary Resolution:

“RESOLVED THAT pursuant to the provisions of Section 139 and other applicable provisions if any, of the Companies Act, 2013 and the Rules framed thereunder, as amended from time to time, M/s....., Chartered Accountants, (Firm Registration No.....) be and are hereby appointed as Auditors of the Company to hold office from the conclusion of this Annual General Meeting till the conclusion of the ..... Annual General Meeting of the Company (subject to ratification of their appointment at every AGM), at a remuneration of Rs. ..../- (Rupees ..... only) for the year ..... and Rs. ..../- (Rupees ..... only) per year for the subsequent ..... years plus reimbursement of out of pocket expenses and service tax, as applicable.”

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried unanimously.

#### **7. Appointment of Director**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded by the aforementioned two Members, was put to vote as an Ordinary Resolution:

“RESOLVED THAT pursuant to the provisions of Section 152 and other applicable provisions of the Companies Act, 2013 read with the Companies (Appointment and Qualification of Directors) Rules, 2014, Mr. .... (DIN .....), who was appointed as an Additional Director of the Company with effect from ....., 20..... by the Board of Directors of the Company pursuant to Section 161(1) of the Companies Act, 2013 and the Articles of Association of the Company and who holds office upto the date of this Annual General Meeting, and being eligible, offer himself for appointment and in respect of whom the Company has received a notice in writing under Section 160 of the Companies Act, 2013 from a member signifying his intention to propose the candidature of Mr. .... for the office of Director, be and is hereby appointed as a Director of the Company, liable to retire by rotation with effect from the date of this Meeting.”

On a show of hands, the Chairman declared the aforesaid Ordinary Resolution carried unanimously.

#### **8. Delisting of Securities – Special Resolution**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded by the aforementioned two Members. was put to vote as a Special Resolution:

“RESOLVED that, subject to the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009, Securities Contracts (Regulation) Act, 1956, and the Securities and Exchange of Board of India Act, 1992, and the rules framed thereunder and other applicable laws, rules and regulations and guidelines and subject to such other approvals, permissions and sanctions as may be necessary and subject to such conditions as may be prescribed by the Securities and Exchange Board of India and Stock Exchanges while granting such approvals, permissions and sanctions, which may be agreed to by the Board of Directors of the Company, which expression shall be deemed to include any Committee of the Board for the time being, exercising the powers conferred by the Board, the consent of the Company be and is hereby accorded to the Board to voluntarily de-list the equity shares of the Company from ..... (name of stock exchanges).

“RESOLVED FURTHER that the Board be and is hereby authorised to do all acts, deeds and things as it may in its absolute discretion deem necessary and appropriate to give effect to the above Resolution.”

On a show of hands, the Chairman declared the aforesaid Special Resolution carried with the requisite majority.

#### **Vote of Thanks**

There being no other business to transact, the Meeting closed with a vote of thanks to the Chair.

Date : .....

Place: .....

CHAIRMAN (DIN...)

*Points relevant for drafting minutes:*

Under each item before proposal and seconding of the Resolutions, we should record as follows:

- “The objective and implications of the Resolution were explained by the Chairman (or at the request of the Chairman by Mr..... (designation)”
- The Chairman informed that there were no qualifications, observations or comments or other remarks, if any, mentioned in the Auditor’s Report or in the Secretarial Auditor’s Report.

OR

- The Chairman asked the auditors to read the qualifications\*/, observations\*/ comments\*/ other remarks\*, mentioned in the Auditor’s\* / Secretarial Auditor’s\* Report.
- Attention of the Members present was drawn to the explanations / comments given by the Board of Directors in their report at page.....para.....

\*as may be relevant or applicable.

## Annexure XIX

### Specimen Minutes of Extra-Ordinary General Meeting

**MINUTES OF THE PROCEEDINGS OF THE EXTRA-ORDINARY GENERAL MEETING OF .....**  
**(Name of the Company) HELD ON ..... (day), ..... (date) 20 ..... AT .....**  
**.....(address)**

The following were present:

1. Mr. A (in the Chair)
2. Mr. B (Director and Member)
3. Mr. C (Director)
4. Mr. F (Company Secretary)
5. .... (Members present in person) {state number}
6. .... (Members present by Proxy) {state number}
7. Mr. G, Partner of M/s....., Chartered Accountants, Auditors of the Company, was present.

#### **CHAIRMAN**

In accordance with Article ..... of the Articles of Association, Mr. A, Chairman of the Board of Directors, took the Chair.

{OR:

Mr. B was elected Chairman of the Meeting, in terms of Article ..... of the Articles of Association of the Company}

The Chairman welcomed the Members and introduced the Directors seated on the Dias.

The Chairman stated that Mr. .... and Mr. ....Directors, could not attend the Meeting due to.....  
(explain the reason for absence).

Quorum was present at the commencement of the Meeting as well as at the time of consideration of each item of business.

With the consent of the Members present, the Notice convening the ExtraOrdinary General Meeting of the Company was taken as read.

The business of the Meeting, as per the Notice thereof, was thereafter taken up item-wise.

### **SPECIAL BUSINESS**

#### **1. Shifting of the Registered Office**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following resolution has been proposed and seconded by the aforementioned two Members was put to vote as a **Special Resolution**:

“RESOLVED that pursuant to Section 13 and other applicable provisions, if any, of the Companies Act, 2013, and subject to the approval of the Regional Director, the Registered Office of the Company be shifted from the ..... (Name of State) to the ..... (Name of State).

RESOLVED FURTHER that Clause - II of the Memorandum of Association of the Company be altered by substitution of the word.....

RESOLVED FURTHER that the Board of Directors of the Company be and is hereby authorised to file the necessary petition(s) before the Regional Director, ..... Region for confirmation of the alteration of Clause - II of the Memorandum of Association of the Company as aforesaid and to carry out all other acts and deeds as are necessary in connection therewith, including compliance of directions, if any, of the concerned authorities.”

The Chairman enquired if there were any clarifications required on the same. Since none of the Members required any clarification, the Special Resolution was put to vote and on a show of hands declared carried by the requisite majority.

#### **2. Appointment of Independent Director**

Proposed by : Mr. ....

Seconded by : Mr. ....

The following Resolution having been proposed and seconded respectively by the aforementioned Members was put to vote as an Ordinary Resolution:

“RESOLVED that pursuant to the provisions of Sections 149, 150(2), 152 and any other applicable provisions of the Companies Act, 2013 and the rules made there under read with Schedule IV to the Companies Act, 2013, approval of the Company be and is hereby accorded for appointment of M r. E ( D I N No.....), as an Independent Director of the Company to hold the office for a period of 3 years i.e. up to ....., ..... AND THAT by virtue of sub-section (13) of Section 149 of the Companies Act, 2013 he shall not be liable to retire by rotation.”

The Chairman enquired from the members present if there were any clarifications required on the same. Since none of the Members required any clarification, the Ordinary Resolution was put to vote and on a show of hands declared carried by the requisite majority.

### **VOTE OF THANKS**

There being no other business to transact the Meeting closed with a vote of thanks to the Chair.

Date : .....

.....

Place: .....

CHAIRMAN

(DIN.....)

### LESSON ROUND UP

- A company is an artificial judicial person created by law having its own distinct entity form and capable of entering into contracts. Though company is bestowed with the characteristic of separate legal entity but it cannot take decision on its own. Since it is not a natural person, it expresses its will or takes its decisions through natural persons (i.e. directors or members) collectively which is known as “**resolutions.**”
  - There are two collective bodies in the company which take decision through resolutions:
    - (i) Board of Directors--- who manage, control and direct the business of the company
    - (ii) General body of members-- who ultimately own the company
  - Section 179 of Companies Act 2013 describes the scope of the powers of the Board of Directors as it states “The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.”
  - Board can exercise some powers only at its Meeting while some of its powers are subject to special resolution, approval of general meeting, approval of various authorities like NCLT etc.
  - The Board may, by a Resolution passed at a Meeting, delegate certain powers to , on such conditions as it may specify.
    1. any Committee of Directors,
    2. the Managing Director,
    3. the Manager or
    4. any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office,
  - Decisions are taken by general body of members either through Ordinary Resolution or Special Resolution.
  - Section 118(10) of the Companies Act, 2013, provides that every company shall observe Secretarial Standards with respect to general and board meeting specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved as such by the Central Government. The Ministry of Corporate Affairs on 10th April, 2015 accorded the approval of the Central Government to the Secretarial Standards (SS) namely
    - (i) SS-1; Meetings of the Board of Directors and
    - (ii) SS-2 General Meetings
- In terms of section 205(1)(b), it is one of the function of the Company Secretary to ensure that the company complies with the applicable Secretarial Standards.

### TEST YOURSELF

1. As a company secretary of PQR Ltd. draft a specimen of board resolution for appointment of Mr. Ankur Chawla as an additional director in PQR Limited .
2. Draft a specimen of board resolution for appointment of Mr. Shankar Roy as Company Secretary in ABC Limited.
3. Draft a specimen of Board meeting (other than first Board meeting) considering *inter alia* payment of interim dividend in XYZ Limited.







# Lesson 4

## Drafting and Conveyancing Relating to Various Deeds and Documents (I)

### LESSON OUTLINE

- Drafting of Agreements
- Important Points Regarding Drafting of Contracts
- Terms and Conditions in the Agreement to Sell /Purchase
- Building Contracts
- Commercial Agency Contracts
- Collaboration Agreements
- Guidelines for Entering into Foreign Collaboration Agreements
- Arbitration Agreements
- Guarantees
- Hypothecation Agreement
- Outsourcing Agreements
- Service Agreements
- Electronic Contract & its Essentials
- Leave and License Agreements
- Will
- Gift
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

A contract lays out the understanding between a buyer and the seller and is important that such understanding be provided clearly and unambiguously. An effective contract is not only a reflection of the parties' intention to get into a legal relationship, but clearly lays out the respective obligations of the parties with necessary safeguards and efficacious remedies. Today's world is economized by trade - domestic and international - and this trade is facilitated through contracts either domestic or international entered into by the parties.

Accelerated globalization has almost removed the disparity of required terms between the domestic and international contracts. A domestic contract is the one where both parties operate their business from one and the same country, whereas an international contract is the one where both parties operate their business from two different countries.

Drafting of contracts is a different kind of legal writing than petition writing. The goal is not to persuade someone of a position, but to specify very clearly what has been agreed between the parties.

The objective of the study lesson is to make the students understand and also learn the drafting of the various aspects of the topics mentioned in the lesson outline.

## DRAFTING OF AGREEMENTS

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. A company has to execute numerous commercial agreements and other contracts during the course of its business. But how many company executives possess the simple, easily cultivable, yet rare acumen of concluding their contracts precisely, comprehensively and unambiguously? It is very much desirable and useful to keep in view certain important points in regard to the drafting of contracts, particularly commercial and international trade contracts.

## FORM OF CONTRACT

There is no particular form prescribed for the drawing up of trade contracts, except that they must fulfil all the essential requirements of a valid contract under the law applicable to the contract. If the law requires any particular category of contracts to be in writing or to be registered, these formalities must be complied with. A contract may be hand written, type written or printed. It may be as brief or as detailed as the circumstances of a particular trade transaction demand.

However, it is extremely desirable and essential that precise and comprehensive terms and conditions relating to the subject matter and performance of the contract should be incorporated by companies in both domestic and international contracts. In sale-purchase contracts well defined provisions relating to the quality and quantity of goods, the shipment period, price (C.I.F./C&F/F.O.B., etc.), delivery, port of shipment and of destination packing and marketing, mode of payment, insurance, brokerage/commission etc. should also be stipulated. In international contracts additional provisions relating to the applicable law, licences and permits, taxes, duties and charges, exchange rate, etc. also become relevant and important. Some of the important matters that deserve to be provided for in the contract are discussed briefly hereunder:

## IMPORTANT POINTS IN REGARD TO DRAFTING OF CONTRACTS

1. *Description of Parties to the Contract:* Parties to the contract should properly be defined by mentioning their names, status and address. In case of an individual, father's name; and in case of a company, the place where registered office is situated should also be given. In case of firms and companies, the particulars of persons representing them should be invariably given, including detailed particulars of the firm.
2. *Legal Nature of the Contract:* In the title or in the introductory part of the contract, the parties should clearly indicate the legal nature of the contract as to whether it is a sale/purchase contract or a commercial agency contract or a contract for technical assistance and advice or building construction and erection contract, etc. so as to avoid any doubt as regards the nature of the contract and the legal position of the parties thereunder.
3. *Licences and Permits:* It is desirable to provide for, particularly in international trade contracts, as to which party would be responsible for obtaining export/import licences and the effects of delay, refusal or withdrawal of a license by Government authority, etc. Generally, it is the commercial practice to provide that each party to the contract may obtain the requisite licences in its own country.
4. *Taxes, Duties and Charges:* A provision regarding the responsibility for payment of taxes, duties and other charges, if any, may also be included in the contract. In international contracts, it is generally provided that the seller would be responsible for taxes, duties and charges levied in the country of export and the buyer with such charges levied in the country of import. Provision should also be made for fluctuations in the rate of taxes, duties and fees, after the conclusion of the contract and it may be agreed upon whether any increase in such rates would be borne by the buyer or the seller.
5. *Quality, Quantity and Inspection of Goods:* Quality of the goods is very important to the buyer in a sale-purchase contract and it is in this area that a number of disputes arise and, therefore, it is necessary to include

a suitable provision relating to the description and inspection of the quality and quantity of the goods in the contract. Inspection of the goods may be provided either in the seller's country before shipment or in the buyer's country after delivery of the goods, depending upon the relative convenience of the parties in this regard. Some tolerance of 10 to 15% is generally provided for in regard to the quantity of the goods stipulated in the contract. It has to be provided whether the additional quantity will be calculated at the price quoted in the contract or at a different price.

6. *Packing*: Proper packing is very important, particularly in the case of goods which have to be set over a long voyage. Sometimes goods are spoiled during the transit because of poor packing and dispute may arise regarding the responsibility for damage to the merchandise during the transit. Therefore, a proper stipulation regarding packaging of goods according to the nature of the merchandise should be included in the contract. Where the goods are of a fragile or inflammable nature, specialised packaging will have to be provided for them. Similarly, goods which require to be protected from humidity or chemical action of sea water, etc., will require to be packed suitably, to meet the requirements. Another very important matter which needs to be provided for regarding packaging in the contract is the legal specifications, if any, regarding the packing material.

For example, in certain countries, particular type of grass, etc. cannot be used for packing and if it is used, the customs authorities of the particular country may confiscate the consignment. In such cases, it should be stipulated in the contract that the buyer will inform the seller of any such legal specifications or requirements with regard to the packaging of the goods and that a damage or loss occurring for lack of such information will not be the responsibility of the seller.

7. *Shipment of the Goods*: It is desirable to stipulate precise particulars regarding the rights and duties of the parties towards shipment of the goods, i.e., the time, date and port of shipment, name of the ship and other ship particulars. It may also be stipulated as to whether and up to what time the shipment may be delayed by the seller. Sometimes, a penalty is provided for delay in shipment according to the time of delay.

8. *Insurance*: A provision regarding insurance of the merchandise is also made in the contract, as it is usual to insure the goods during transit particularly when the goods are to be shipped overseas. The insurance provision will state as to which party will be responsible for taking out insurance and what type of insurance cover has to be taken.

9. *Documentation*: In modern business transactions, it is sometimes necessary for the seller to supply detailed specifications, literature, etc. relating to the goods particularly if the goods are of scientific or technical nature. In such cases, it is usual to provide in the contract as to whether the technical documentation supplied by the seller will become the property of the buyer or it has to be returned to the seller after a stipulated time. It is also desirable to provide that the technical and confidential information contained in the documentation should be kept confidential by the buyer and that it will not be transmitted by him to a third-party without the permission of the seller.

10. *Guarantee*: Sometimes the goods sold are of such a nature that the buyer insists for guarantee regarding their use and performance for a particular period. Under a guarantee clause, the seller is held responsible for the defects appearing in the goods during the period of the guarantee. The seller is usually given an option to remove the defects in the goods either by replacement or by repair. The replaced or repaired goods will usually be given a new guarantee of the same length of time as the original goods but a different period can also be provided for the replaced goods.

11. *Passing of the Property and Passing of the Risks*: It is very important to provide for the exact point of time when the title or the property in the goods and the risk will pass from the seller to the buyer. This is important to ascertain as to whether the seller or the buyer will be responsible for the damage or loss to the goods during transit at a particular point of time. Moreover, the control over the goods will be with the person in whom the title or the property in the goods vests. Similarly, it is necessary and useful to provide for the point of time at which

the risk in the goods will pass from the seller to the buyer.

12. *Amount, Mode and Currency of Payment:* It is useful to provide for the amount, mode and currency in which the price for the goods has to be paid. Modes of payment may be on Documents Against Acceptance (D/A) or Documents Against Payment (D/P) basis or it may be a Letter of Credit or otherwise as per the agreement of the parties. One of the most important matters which needs to be provided in international contracts relates to the exchange rate. It is advisable to provide the exchange rate of the currency of payment in terms of dollar, pound or any other currency agreed to by the parties, so that if a devaluation, revaluation or fluctuation takes place before the payment of price, the liability of the buyer and the seller regarding the amount of payment may be clearly known.

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

14. *Proper Law of Contract:* When both the parties to a contract are resident in the same country, the contract is governed by the laws of the same country. However, in international contracts, the parties are subject to different legal systems and, therefore, they have to choose a legal system which will govern the rights and duties of the parties. Therefore, it is desirable and necessary to stipulate the proper law of contract in international contracts.

15. *Settlement of Disputes and Arbitration:* The last, but not the least, important is the provision regarding settlement of disputes under the contract by arbitration or otherwise. It is usual to provide for an arbitration clause in the contract, particularly under the auspices of an arbitral institution. A suitable arbitration clause may be provided by the parties by mutual agreement. It is also desirable to provide for the mode of appointment of arbitrator and also for the venue of the arbitration in the arbitration clause.

### **ADDITIONAL GUIDELINES REGARDING AGREEMENT TO SELL/PURCHASE**

In an agreement to sell/purchase, the following details must be incorporated:

- names and descriptions of the contracting parties;
- consideration and earnest money if paid;
- subject-matter of the agreement;
- time within which the agreement is to be performed; and
- special terms agreed upon between the parties.

### **Contracting Parties**

The vendor and the purchaser must be sufficiently described, irrespective of the fact that the parties know each other. There must be reciprocity of interest between the person who wants to enforce the agreement and the person against whom it is sought to be enforced. A stranger to the agreement has no enforceable claim, and as such, no court shall entertain his claim for specific performance. However, specific performance may be enforced not only against a party to the contract, but also against a person claiming title under it. If one of the parties to the agreement is acting in his representative capacity, such capacity must be clearly and precisely disclosed and his authority to act in that capacity must form part of the agreement.

Legal representatives of parties have a right to require specific performance of a contract or are bound by the promise to perform the contract in the absence of a contrary intention. This rule does not apply where the obligation is personal in nature. As a rule, obligation under a contract cannot be assigned except with the consent of the promisee. On the other hand, rights under a contract are assignable unless the contract is personal in nature or the rights are incapable of assignment either under the law or under the agreement between the parties. If one of the parties to the agreement is acting in his representative capacity, such capacity must be clearly and precisely disclosed and his authority to act in that capacity must form part of the agreement. It is, however, usual to have a clause in a deed specifically stating that the parties shall include their executors, administrations, heirs, legal representatives and assigns.

### **Consideration**

Price is the essence of an agreement of sale/purchase and unless the price is clearly and precisely disclosed in the agreement, there is no enforceable contract between the parties because if no price is named in the agreement, the law does not imply, as in the case of sale of goods, that a contract to buy/sell at a reasonable price is implied. Therefore, in all sales, the price is an essential ingredient and where it is neither ascertained nor rendered, the contract is void for incompleteness and is incapable of enforcement. Price may not necessarily be in the form of money, it may be any other consideration. The word “price” is comprehensive enough to include any other lawful consideration. If any earnest money is paid, the same should be stated and the consequences arising in breach of the agreement may be stipulated for, namely, by forfeiture of the deposit, payment of a fixed sum by the vendor, if the breach is committed by the purchaser or the vendor, respectively.

### **Subject Matter**

Property of any kind subject to the provisions of the Transfer of Property Act, 1882, and those of any other applicable law or custom may be sold/purchased. Transferability is the general rule and the right to property includes the right to transfer the property to another person. The property, i.e., the subject-matter of the agreement, must be described in detail giving its precise situation and the extent of interest agreed to be conveyed therein should be clearly stated. If the property is subject to certain charges, easements, encumbrances, restrictions, covenants etc., the same should be clearly stated so that the purchaser knows the real nature of the property he is purchasing. The vendor should not conceal any material particular with regard to the property he is selling, which the purchaser has a right to know.

### **Time for Performance**

If the time for performance is the essence of the agreement, the same should be clearly stipulated and the consequences of non-performance within the stipulated time should also be clearly and precisely declared.

### **Drafting of an Agreement**

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. The agreement should, therefore, be drafted as deeds between the parties thereto. The old practice of drafting them as Deeds Poll should be discouraged.

While preparing agreements it is necessary and important that the intention of the parties should be set forth explicitly so as not to leave any room for doubt or future controversy. The language should be simple and the words used should be definite and precise; the use of loose expressions such as “proper”, “reasonable”, should, as far as possible, be avoided.

The provisions of the Indian Contract Act, 1872 about the essential incident and legality of agreements (Sections 2 to 30) should be studied and nothing should be introduced or left out, which would make the agreement void.

But, if the material terms of an agreement are clear and specific, omission of certain details, which can be worked out by consent of the parties or in its absence be settled by court will not invalidate the agreement (*Ramchandra v. Chinnubhai*, AIR 1945 Mad. 10).

An agreement can be split into parts as any other document viz. Title, Date, Parties, Recitals, *Testatum*, Operating Clause, Schedule (if necessary), Exceptions and Reservations (if any), *Habendum*, *Covenants* (if any) and Testimonium. The above clauses were discussed in detail in Study Lesson-1 and a reference to the same may be made. However, model forms of a few general/usual clauses in agreement may assume the following forms:

**(i) Operation of Agreement:**

“THIS AGREEMENT shall come into force w.e.f. (date) and shall remain in force for a period of (period) until determined earlier by notice as hereinafter provided.”

**(ii) Termination by Notice:**

“THIS AGREEMENT shall be liable to be terminated by either party by giving (period) notice to the other party (without assigning any reason or cause)”.

**(iii) Arbitration Clause:**

“Every difference or dispute which may hereafter arise between the parties hereto or their respective representatives in relation to this agreement or arising thereout, whether as to the constructions or operations thereof, or the respective rights and liabilities thereunder or any thing done hereunder or otherwise, shall be referred to a sole arbitrator in accordance with, and subject to, the provisions of the Arbitration and Conciliation Act, 1996. His award shall be final, accepted and binding on both the parties.”

**(iv) Clause for Services of Communication:**

“Any notice may be sent through the post to the last known place of abode or business of the party to whom it is given, and if so sent under a certificate of posting shall be taken to be sufficient service thereof.”

If it is desired that each party should have a copy of the agreement, it should be executed in duplicate, either party signing one of the duplicates and such duplicates being exchanged. Thus, the duplicate signed by A is given to B and that signed by B is given to A, but it is better if both the duplicates are signed by both the parties. The duplicates must be the exact reproduction of the original and require signature and attestation in the same manner as the original.

### Attestation, Registration and Stamp Duty

**Attestation:** It is not necessary for an agreement to be attested by any witness. But agreements are usually attested by one witness. Where registration is desired, the agreement should be attested by two witnesses.

**Registration:** Agreements not relating to immovable property and agreements not creating an interest in immovable property are not compulsorily registrable. Only agreements creating an interest in immovable property worth more than Rs. 100 are required by law to be registered.

**Stamp Duty:** For the purpose of stamp duty, agreements are covered by Article 5 of Schedule I to the Indian Stamp Act, 1899. The stamp duty for different kinds of agreements varies from State to State. While drafting an agreement, the draftsman should ascertain the proper stamp duty having regard to the changes made in the Stamp Act in the State where the agreement is executed.



**TERMS AND CONDITIONS IN THE AGREEMENT TO SELL/PURCHASE**

The usual conditions in an agreement to sell/purchase are:

- (i) The vendor has a marketable title in the property agreed to be sold/ purchased and that the vendor has produced the title deeds relating to the property to the purchaser for his inspection or in any other manner. This fact, must be specifically stipulated between the parties to the agreement.
- (ii) If the property agreed to be sold is a part of a larger property, an agreement as to retention of a particular or all the title deeds to the property by a party should be arrived at and incorporated in the agreement to sell/purchase.
- (iii) If the property is subject to any prior charge or encumbrance, the parties must agree that the sale is to be subject to such encumbrance or price payable under the agreement included the sum due under the encumbrance and is required to be paid to the chargeholder at the time of registration or thereafter.
- (iv) The mode of payment of the price or the balance thereof, if some earnest money or deposit has been paid, should also be stipulated in the agreement. It should also be clearly stated whether the vendor or the purchaser shall be liable to pay rates, rents, taxes or other imposts for the period commencing from the date of execution of the agreement to sell/purchase till the execution of the conveyance deed. It should also be stated in the agreement that interest at a particular rate shall be payable by the vendor on the earnest money paid in the event of his delaying the execution of the conveyance deed or the liability of the purchaser to pay interest at a particular rate, to the vendor, if he fails to pay the balance amount of consideration at the agreed date and the execution of the conveyance deed is delayed on that account.
- (v) The parties should agree as to the point of time when possession of the property should be handed over by the vendor to the purchaser, if the vendor is in possession or how the attornment by the tenant(s) takes place, if the possession is to be effected.
- (vi) The parties should also agree as to who shall bear the cost and expense of execution and registration of the sale deed; and if both the parties have to bear the same, in what precise proportions they shall bear.
- (vii) If any broker is involved in the transaction, the agreement should clearly spell out if any brokerage is payable and by whom and at what rate, and at what point of time.

The agreement must incorporate if there are any other particular conditions attached to the transaction of sale/ purchase so that the document is complete and self-contained and nothing is left to draw inferences or to presume intentions of the parties.

**A Specimen Agreement of Sale of House Property**

THIS AGREEMENT OF SALE executed on the ..... day of .....  
 .... 2020, between AB, son of .....  
 residing at ..... hereinafter called the vendor of the one part and CD son  
 of ..... residing at ..... hereinafter called the  
 purchaser of the other part,

(The expressions “vendor” and “purchaser” wherever they occur in these presents, shall unless the context otherwise admits, also mean and include their respective heirs, executors, administrators, legal representatives and assigns).

WHEREAS the vendor is the sole and absolute owner of the property more fully set out in the Schedule hereunder:



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 WITNESSETH AS UNDER:

1. The price of the property more fully set out in the Schedule hereunder is fixed at Rs..... (Rupees.....) 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 whereof the vendor doth hereby admit and acknowledge.
3. 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.
4. The purchaser shall pay to the vendor the balance sale price of Rs..... (Rupees ..... ) before registration of the conveyance deed.
5. The vendor agrees that he will deliver vacant possession of the property to the purchaser before registration of the conveyance deed. Or alternatively, the vendor agrees that he will put the purchaser in constructive possession of the property by causing the tenants in occupation of the property to attorn their tenancy to the purchaser.
6. The vendor shall execute the conveyance deed in favour of the purchaser or his nominee as the purchaser may require.
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 vendor'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. 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.
9. If the purchaser commits a breach of the agreement, he shall forfeit the earnest amount of Rs..... (Rupees ..... ) paid by him to the vendor.
10. 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.
11. Nothing contained in paras 9 and 10 above shall prejudice the rights of the parties hereto specific performance of this agreement of sale/purchase.

*Schedule of Property*

House No. .... situated in .....

On its North is .....

South is .....

East is .....

West is .....

IN WITNESS WHEREOF the vendor and the purchaser have set their respective hands to the 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

## **BUILDING CONTRACTS**

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

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

### **Specimen of a Building Contract**

The following specimen of a building contract shall be helpful to those who are required to draw such agreements:

This agreement is made on this ..... day of ..... 2020 between ABC Ltd., a company incorporated under the Companies Act, 2013, having its Registered Office at ..... acting through Shri ....., its Company Secretary, hereinafter called "the builder", which term shall, unless repugnant to the context, include its legal representatives, of the one part and Shri ..... son of Shri ....., resident of ..... hereinafter called "the owner", which term shall, unless the context otherwise admits, include his heirs, executors, administrators, legal representatives, nominees and assigns, of the other part.

WHEREAS the owner has a plot of land measuring ..... sq. meters situated at ..... (as specified in Schedule I) duly registered in his own name with the rights, title and interest therein absolutely vesting in him;

AND WHEREAS the owner has requested the builder to build a bungalow on the said piece of land according to the plan approved by the Municipal authorities, of the area;

AND WHEREAS the builder, has agreed to build the desired bungalow.

Now this AGREEMENT is reduced into writing and respective parts thereof shall be performed by the owner and the builder in accordance with the following terms and conditions:

1. The builder will build and complete the bungalow within six months from the date of execution hereof in a thorough manner and with the best material and work as specified in Schedule II hereof on the plot of land belonging to the owner, which is more clearly and precisely described in Schedule I hereof.
2. Subject to the conditions hereinafter contained, the owner will pay to the builder a sum of Rs..... as cost of labour for construction and all other type of labour, cost of materials, electrical and sanitary fittings, wood work, doors and windows, white-washing, painting and polishing etc., as per specifications of the architect of the owner, which have been given in detail on the approved plan of the bungalow and a photo-copy whereof has already been handed over to the builder, who has received the same and has signed the original sanctioned plan in token of having received a photo copy thereof, in the following manner and at varying stages of the construction:
  - (a) Construction up to plinth level - Ten per cent of the total contract amount.
  - (b) Completion of walls up to roof level - Fifteen per cent of the total contract amount.
  - (c) Completion of roof slab of the entire structure of the bungalow - Thirty per cent of the total contract amount.
  - (d) Fixing of shutters of doors, windows, completion of wooden almirahs, pelmets and all other wood work - Twenty per cent of the total contract amount.
  - (e) Finishing of the entire construction and fixing of electrical and sanitary fittings - Fifteen per cent of the total contract amount.
  - (f) After receipt of Completion Certificate from the Municipal authorities - Balance amount of the contract money.
3. The owner shall pay to the builder a sum of Rupees ..... only immediately on execution of this Agreement in the form of earnest money, immediately on receipt whereof, the builder shall procure building materials and start construction work. The said sum of Rupees ..... shall be adjusted by the owner from the last instalment payable to the builder.
4. It is expressly, agreed between the owner and the builder that in respect of the aforesaid payments and in respect of the construction of the bungalow, time is of essence to this agreement.
5. The builder will do and perform all works incidental to the proper execution and completion of the bungalow including all works rendered necessary in consequence of the doing of the works and will supply all the required skilled, semi-skilled and unskilled labour and materials necessary for the same and no additional payment shall be made by the owner to the builder for the same.
6. The builder will permit the owner, his representatives and his architect to have access to the works while the same are under construction and to inspect the same so as to make sure that the construction work is being done according to sanctioned plan and materials are being used as per specifications given by the architect.
7. While the bungalow is in the course of construction and until the owner takes over the same, all materials used or to be used in the construction, shall remain at the builder's risk and the builder shall not be entitled to any compensation for injury/or loss/or destruction of, such works or materials arising from any cause whatsoever.
8. The owner will not be entitled to take possession of the bungalow until the entire amount is paid within the time stipulated hereinabove.
9. The owner shall make payments of all the amounts in respect of the said bungalow towards water and electricity deposits etc.
10. It is agreed by the owner that any amount that will be due and payable to the builder as mentioned in this agreement shall be treated as a charge on the bungalow till such time the same is paid in full.

11. If the owner requires any additional or extra items of work to be carried out by the builder in the bungalow, other than the above specified works, the builder should be informed by the owner in advance and the cost and/or difference of cost for such items of work as per rates mutually agreed upon should be paid by the owner to the builder in advance.

### **SCHEDULE I**

Details of the plot of land upon which the bungalow is to be built by the builder for the owner:

Plot No. .... measuring..... sq. metres

Street .....

Road .....

Bounded on East .....

West .....

North .....

South .....

Within the district of.....

### **SCHEDULE II**

#### **1. Foundation and Super-structure:**

Earth digging for foundation up to a depth of six feet. R.C.C., framed structure with R.C.C. foundation columns, beams and slabs all the partition and main walls shall be of 1<sup>st</sup> quality red bricks in cement mortar, both sides plastered and finished with snowcem painted on outer side and plastic emulsion painted inside.

#### **2. Almirahs, Doors and Windows:**

All the almirahs, doors and window frames will be of teak wood and all the window frames will be of teak board (1/2" thick) covered by kail wood frames. All the doors and window frames will be fixed with M.S. Grills and glazed shutters and wooden plank shutters. All the doors, windows, shutters etc. will be painted with synthetic enamel paint. Drawing-cum-dining room will have a sliding gate.

#### **3. Flooring:**

Entire flooring will be laid with light grey colour mosaic tiles with 6" skirting for all the rooms. Bathrooms and toilets will have square while 5" x 5" tiles to a height of seven feet.

#### **4. Electrical Fittings, etc.:**

Concealed electrical wiring will be done with best quality insulated wires and cables. Light points will be as per the specifications shown in the site plan.

#### **5. Water Supply:**

There will be an underground water storage tank which will be 10' x 10' with 4' depth fully water proof coated with a booster pump to lift water to an overhead R.C.C. water tank of similar capacity to be constructed on four R.C.C. columns. A tubewell will also be bored and fitted with a booster pump, which may be used as an alternative source of water supply in the event of Municipal Water Supply failure.

#### **6. Kitchen:**

Kitchen will be fitted with an exhaust fan of the best available make and suitable for the size of the kitchen to be constructed in the bungalow. White 4" x 4" white tiles will be fixed up to a height of 9' on all the walls. There will be raised platform on two sides as shown in the plan with tops fitted with 1/2" thick white marble slabs with a stainless steel sink at the space provided therefor.

IN WITNESS WHEREOF, the parties afore-mentioned have signed this deed in token of acceptance of the terms thereof.

Witnesses:

(1) Name :

Father's Name :

Address :

Signature : Owner

(2) Name :

Father's Name :

Address :

Signature : Builder

## COMMERCIAL AGENCY CONTRACTS

Sometimes business is 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. The rights and duties of the principal and his agent abroad would be governed by the contract of agency concluded between them. Commercial agency contracts exhibit certain peculiar characteristics of their own and their terms and conditions are substantially different from those of a sale purchase or other trade contracts.

A commercial agency contract should *inter alia* include provisions regarding the date of commencement and of termination of the agency, the goods or products to be covered by the agency, the contractual territory, the nature of the agency, e.g. sole or exclusive agency, etc. The rate and basis of commission payable to the agent should also be clearly indicated. The conditions regarding the reimbursement of expenses incurred by the agent; payment of commission on orders received directly by the principal from the agent's territory and commission on repeat orders may also be defined. The commission may be calculated on the gross amount or the net amount of the invoice. If the net amount is used as the basis, it may be further specified what elements of the cost, such as, freight, insurance, discount, taxes, packing and the like would be deducted from the sales amount for calculation of the commission. It may also be stipulated when the commission will accrue and be payable, e.g., when the order is transmitted or accepted or when the goods are delivered or when the payment is received by the principal. It may also be stipulated how far the amount of the commission would be affected by such subsequent events as cancellation of an order, reduction in price, failure to deliver the goods, bankruptcy or insolvency of the buyer and so on. The currency of payment of the commission and the rate of exchange applicable may also be mentioned. The permission of the Reserve Bank of India may be required for fixing the rate and remittance of the commission to foreign agents.

The agency contract should clearly indicate whether the agent may or may not make binding agreements on behalf of the principal in respect of orders obtained by him. The circumstances in which the principal may validity refuse to accept the orders transmitted by the agent may also be mentioned. It is usual to provide in the agency contracts that the agent shall guarantee certain minimum sales turnover over a given period. The duties of the agent would further include not to divulge confidential information of the principal to third-parties, not to make secret profits or accept bribes and to use all reasonable diligence, disclose all material facts and be accountable to the principal for all monies received by him on behalf of the principal.

In drawing up Commercial Agency Contracts between parties residing in different countries, it is essential to

ensure that nothing contained in such a contract shall be repugnant to imperative provisions of the law of any country in which such a contract or any part thereof has to be carried into effect. It is also appropriate, as stated earlier, to add a warning against the possible liability of the principal to tax in the contractual territory.

Experience has clearly shown, especially in the field of international trade the expediency of reducing to writing the commercial agency contract and any amendments thereto; in certain countries the law requires that this be done. Further, it is always advisable to seek legal and fiscal advice, not only in the country of the principal, but also in each of the countries (if more than one) wherein the commercial agent is to have authority to act in that capacity for the principal.

It is for the parties to the contract, carefully to decide, in the light of the facts of each case, the various points which should be covered therein. The points to be covered and the way in which they should be covered will depend largely upon the extent to which the law of the country or countries concerned covers these matters and the extent to which the law leaves them freely to be expressed in the contract.

The contract should clearly define the territory or territories (including or excluding any other country which may be associated with any such territory) in which the agent is entitled to act. It is important that the parties should give serious thought to this matter, as lack of precision may give rise to disputes between the agent and other agents of the principal to disputes between the agent and other agents of the principal as regards their respective territorial rights.

If the agent is to have the sole and exclusive right to represent the principal within contractual territory, the parties should agree to what extent, if any, the principal may nevertheless reserve the right to operate in the territory, either himself or by means of his employees, with or without, as the case may be, the assistance of the agent.

In addition, it may be expedient in certain cases to append to the contract a list showing the customers of the principal in the contractual territory to whom the contractual goods or any of them had been sold before the coming into force of contract, and the quantities and value of goods so sold during that twelve months (or as the case may be) last preceding such time.

The parties should always insert a suitably worded clause at the end of their contract to the effect that there are no other agreements in existence between the parties and that the whole of the terms between the parties are set out in the contract.

### **Del Credere Agency**

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

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

### **Ingredients of an Agency Contract**

The contract of agency is governed by Chapter X (Sections 182 to 238) of the Contract Act, 1872. The basic features of contract of agency are:

1. Authority should be given either expressly or impliedly to bind his principal.
2. While the principal should not be a minor, an agent could be a minor.
3. Consideration is not necessary for an agency contract.
4. For the acts of the agent, the principal is liable unless the principal has exceeded his authority.
5. The authority of an agent extends to the doing of all that is necessary and collateral to the doing of the main act.
6. The obligations under the contract of agency is not assignable unless:
  - (i) the nature of the business necessitates such assignment.
  - (ii) customs of usage of trade in the locality with regard to the business permit such assignment.
  - (iii) such assignment is expressly permitted by the contract of agency.

### A Specimen of an Agency Contract

The following specimen may serve as a model for drafting agency contracts, which may be adopted according to the requirements of each case.

An agreement made this..... day of..... between.....  
 (principal) (hereinafter called "the principal") of the one part and..... (agent) (hereinafter  
 called "the agent") of the other part.

Whereby it is agreed between the parties as follows:

1. That the agent is hereby appointed the sole agent of the principal for the town..... (in  
 the district of) (hereinafter called "the agency town") for the purpose of making sales of the principal's  
 goods for a term of..... years commencing from the date hereof on the terms and  
 conditions set forth hereunder.
2. That the agent shall not, while selling the principal's goods make any representation in the trade or give  
 any warranty other than those contained in the principal's printed price list.
3. That the agent shall be allowed to deduct and retain as his agency commission with himself.....  
 per cent of the list price of all goods sold on behalf of the principal. The agent shall keep a record of  
 all sales and shall regularly remit to the principal on each Saturday all sums received by the agent in  
 respect of such sales less..... per cent his agency commission. All sales shall be made for  
 cash against delivery of goods unless the principal's consent in writing to give credit to any particular  
 purchaser be in any case first obtained and in the case of such credit sales the principal may direct for  
 such increase in the price of his goods over and above the current list price of the principal.
4. That the agent shall not make purchases on behalf of nor in any manner pledge the credit of the  
 principal without the consent in writing of the principal.
5. That the agent shall, at the expense of the principal, take on rent and occupy for the purpose of the  
 agency, suitable premises with prior approval of the principal and shall keep insured for full value  
 against all available risks, all the goods entrusted to his custody by the principal under this agreement  
 and on request, shall produce to the principal, receipts, for the rent, rates and taxes of the said premises  
 and for the premiums on insurance policies showing that the same have been paid on or about their  
 respective due dates. That the agent shall bear all expenses relating to or incidental to the said agency.
6. That the agent, while selling to persons in the trade, shall obtain the purchaser's signature to an  
 agreement to the following effect:
  - (i) That the said principal's goods shall not directly or indirectly be re-sold outside the agency district.



- (ii) That the said principal's goods shall not be re-sold to the public below the list price for the time being.
7. That the agent shall, in all his commercial dealings and on documents and on the name-plate or letter-head indicating his place of business, describe himself as selling agent for the principal.
  8. That a breach of the condition in clause 6 hereof shall entitle the principal to put an end to this agreement forthwith and also to recover from the said agent by way of liquidated damages the sum of Rs..... for each such article sold in breach of such clause. The agent undertakes that all purchasers to whom he may sell the principal's goods shall duly enter into, and carry out the aforesaid agreement referred to in clause 6 hereof for the purposes of this agreement be deemed to be a breach of clause 6 of this agreement by the agent and give the principal the rights and remedies against the agent for breach by the agent of this agreement.
  9. That the principal shall keep with the agent a stock of his goods free of all expenses of delivery to the value of Rs..... according to the principal's current price list and the principal further undertakes to replenish such stock on the close of each month so as to keep it at the agreed value. Provided always that the agent shall have no right of action against the principal for delay resulting from shortage of stock, delays in transit, accidents, strikes or other unavoidable occurrences in replenishing such stock. The principal shall always have the right, without any prior notice, to cause a stock checking of the said goods and on any shortage or deficiency found on such stock-taking the agent shall on demand pay to the principal the list price of such shortage or deficiency less the deduction by way of commission or rebate receivable by the agent. The agent shall not alter, remove, or tamper with the marks or numbers on the goods so entrusted into his custody.
  10. That the agent shall not sell the goods of the principal to any purchaser except at current price list of the principal conveyed by him from time to time. The agent may, however, allow a discount or rebate of..... per cent.
  11. That in the event of any dispute arising between the agent and a purchaser of the principal's goods, the agent shall immediately inform the principal of the same and shall not without the principal's approval or consent in writing take any legal proceedings in respect of or compromise such dispute or grant a release to any purchaser of the principal's goods.
  12. That either party may terminate this agreement at his option at any time after the expiration of..... years by giving the other one month's notice in writing.
  13. That the benefits under this agreement shall not be assignable to any other person.
  14. That the agent shall always, during the existence of this agreement, devote his whole business time and energy for pushing the sale of the principal's goods and shall in all such dealings act honestly and faithfully to the principal and shall carry out orders and instructions and shall not engage or be interested either directly or indirectly as agent or servant in any other business or trade without the prior consent in writing of the principal.
  15. That on the termination of his agreement for any reason whatsoever, the agent shall not for the period of one year solicit trade orders from the persons who had been purchasers of the goods of the principal any time within ..... years immediately preceding the date of such termination and the agent shall not for a period of one year engage or be interested as agent or servant in any business, firm or company manufacturing, selling or dealing in goods similar to those of the principal.
  16. That all goods shall be sold by the agent for delivery at agent's place or business but the agent shall, at his own expense, have the right to deliver goods to purchasers at their places of business.
  17. That without prejudice to any other remedy he may have against the agent for any breach or non-

performance of any part of this agreement, the principal shall have the right summarily to terminate this agreement:

- (i) on the agent being found guilty of a breach of its provisions or being guilty of misconduct or negligence of his duties; or
  - (ii) on the agent absenting himself from his business duties entrusted to him under this agreement for..... days without the principal's prior permission in writing; or
  - (iii) on the agent committing an act of bankruptcy.
18. That in the event of any dispute arising out of or in relation to or touching upon the agreement, the same shall be decided by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996.
  19. That the principal shall be entitled to terminate this agreement by one month's notice in writing to the agent in the event of his ceasing to carry on the said business of the principal.
  20. That on the termination of this agreement for whatever reason, the agent shall forthwith deliver to the principal all the unsold stock of goods and shall pay to the principal for the shortages of deficiency of stock at list price less commission and rebate allowable to the agent. The agent shall also deliver to the charge of the principal all books of account and documents of the agency, cash, cheques, bills of exchange or other securities he may have received during the normal course as a result of sales of the principal's goods and shall transfer, assign or negotiate in favour of the principal all such securities on demand.

IN WITNESS WHEREOF the parties have signed this deed.

Witness:

*Principal*

Witness:

*Agent*

## 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. 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 industry, 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.

## GUIDELINES FOR ENTERING INTO FOREIGN COLLABORATION AGREEMENTS

These guidelines cover the following aspects of foreign collaboration agreements:

1. *Investment:* Where in a foreign collaboration agreement, equity participation is involved, the value of the shares to be acquired about be brought in cash.
2. *Lump sum payment:* The amount agreed to be paid by an Indian party to a foreign collaborator for technology transfer should be paid in three instalments as follows:

- (i) one-third to be paid after the agreement has been approved by the Central Government;
  - (ii) one-third on transfer of the technical documents; and
  - (iii) one-third on the commencement of commercial production.
3. *Royalty*: Royalty payable to a foreign collaborator has to be calculated on the basis of net ex-factory selling price of the product less excise duties and cost of imported components. The normal rate of royalty may be three per cent to five per cent. This rate will depend upon the nature and extent of the technology involved. Payment of a fixed royalty is preferred by the Government in certain cases. There should be no provision for payment of a minimum guaranteed royalty, regardless of the quantum and value of production.
  4. *Duration of agreement*: Normal period of a foreign collaboration agreement is eight years subject to maximum of ten years. The period is approved by the Government usually for five years from the date of the agreement in the first instance or five years from the date of commencement of commercial production; the total period, however, not exceeding eight years from the date of the agreement.
  5. *Renewal or extension of agreement*: The Central Government may consider an application for renewal of a foreign collaboration agreement or for extension of its period on merit.
  6. *Remittances*: Remittances to foreign collaborators are allowed only on the basis of the prevailing exchange rates.
  7. *Sub-licensing*: An agreement shall not normally impose any restriction on the sub-licensing of the technical know-how to other Indian parties. The terms of such sub-licensing will be as mutually agreed to between all the concerned parties including the foreign collaborator. Sub-licensing is, however, subject to the Central Government's approval.
  8. *Exports*: No foreign collaboration agreement shall be allowed to contain any restriction on the free export to all countries, except in a case where the foreign collaborator has licensing arrangements in which case the countries concerned shall be specified.
  9. *Procurement of capital goods etc.*: There should be no restriction on procurement of capital goods, components, spares, raw materials etc. by the Indian party. The Indian collaborator must be free to have control over pricing facility and selling arrangements.
  10. *Technicians*: The number, terms of service, remuneration, etc., of technicians to be deputed on either side are subject to approval of the Reserve Bank of India.
  11. *Training*: Provision shall be made in the agreement for adequate facilities for training of Indian technicians for research and development.
  12. *Exploitation of Indian patents*: Where any item of manufacture is patented in India, the payment of royalty or lump sum to the foreign collaborator should make provision for compensation for use of such patent until its expiry. There should also be provision for manufacture by the Indian company of the said item even after the expiry of the collaboration agreement without making any additional payment.
  13. *Consultancy*: If the necessity for any consultancy arises, it should be obtained from an Indian company. If, however, in the special circumstances foreign consultancy becomes essential, even then the prime consultant should be an Indian company.
  14. *Brand Name*: There should be no insistence on the use of foreign brand names on products for sale in India. There can, however, be no objection for use of foreign brand name on products to be exported to other countries.

15. *Indian Laws:* All collaboration agreements shall be subject to Indian laws.
16. *Approval of Central Government:* Every foreign collaboration agreement shall be approved by the Central Government.

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

### **A Specimen Collaboration Agreement**

Agreement executed this ..... day of ..... between M/s ....., a Foreign Company incorporated in the United Kingdom and having its registered office at ..... hereinafter called the U.K. Company of the ONE PART.

AND

M/s..... a company incorporated in India and having its registered office at ..... hereinafter called the Indian company of the OTHER PART:

WHEREAS the Indian company has been incorporated having for its object the manufacture and production of ..... ; WHEREAS the Indian company has already constructed factory buildings, installed plant and machinery and commenced manufacture and production of ..... ; WHEREAS the Indian company with a view to improve, still further, the quality of the commodities manufactured, and to increase production, is desirous of procuring the latest technique and know-how relating to the manufacture of the above said commodities; WHEREAS the Indian company, therefore, approached the U.K. company that has considerable experience in the line of manufacture engaged in by the Indian company, and requested the U.K. company to extend to the Indian company 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 company 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) provide technicians from their own staff to attend at the Indian company's factory in India whenever necessary;
- (f) 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;

- (g) advise the Indian company, promptly and to the best of their ability, in connection with any technical or manufacturing problems or difficulties which may be referred to it by the Indian company during the continuance of this agreement.

(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) one-third on approval of the agreement by the Central Government;
- (b) one-third, 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 one-third in three equal annual instalments thereafter after commencement of production.

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

(4) The Indian company may but not bound to use foreign brand names on their products for internal sale or on products to be exported.

(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.

(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.

(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 likewise bear all the expenses of the persons sent by them to the U.K. company for training in their works under clause 1(f) *supra*.

(10) The parties hereto mutually agree that they will each inform the other of any new development in design or methods of manufacture which they respectively may discover during the continuance of this Agreement in so far as such new developments are applicable to the products manufactured by the Indian company.

(11) 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.

(12) 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 the right to manufacture their products even after the expiry of this Agreement.

(13) The Indian company shall not, during the continuance of the Agreement refer any technical or manufacturing problems or difficulties to any one other than the U.K. company but shall regard and use the U.K. company as its sole technical consultant.

(14) On the expiry of the period prescribed herein or of extended period provided in clause 3 (*supra*) or upon the termination of this agreement for any reason the 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 ..... 2020 in the presence of the following:

WITNESSES:

- 1.
- 2.

**Specimen Joint Venture Agreement**  
**(Joint Venture with Foreign Company)**

THIS AGREEMENT IS MADE on this ..... day of 2020 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, 2013 having its office at 99 Chowringhee 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 and Software and has worldwide market and intends to extend its market here in India and elsewhere.

Whereas INCO LTD. (hereinafter referred to as INCO) carries on business as manufacturer of, dealer in and exporter of Computer Software and intends to expand its business in India and abroad.

Whereas AMCO and INCO intend to co-operate in manufacturing/dealing in and exporting Computers, Hardwares and Software in India and abroad for mutual benefit by setting up a new company.

NOW THESE PRESENTS WITNESSETH and the parties hereby agree as follows:

1. A Joint-stock company would be formed under the name and style of Indo-American Company Pvt. Ltd. under the Companies Act 2013 having its Registered Office at 99 Chowringhee Road, Calcutta 700 071.
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. The Memorandum and Articles of Association of the company proposed to be incorporated would be settled in mutual consultation and the same would govern the rights and obligations of AMCO and INCO in relation to the said proposed company.
5. 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. The consideration for allotment of shares to AMCO would also include the supply and transfer of technical formula, new inventions, secret processes, technical information concerning the production, manufacturing, testing, specifications, instructions and information as to the manufacture of, development, use and servicing, maintenance and improvement of quality of Computers, Hardware and Software and generally in connection with the successful carrying on of the said business by the said new company to be incorporated.
6. 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.

7. 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.
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. The new company will manufacture Computers, Hardwares and Softwares and allied accessories and products and the same would be marketed in India and exported to other countries under the Trade name or Brand name made available by AMCO and by any other name and shall obtain new Trade Mark and obtain Patents for further and better manufacturing, selling and exporting the new company's products.
10. AMCO will buy 75% of the products of new company for exporting; to other countries through its own organisations or outlets at a remunerative price not below the price at which the products are sold in India.
11. Neither party shall carry on their own business in a manner which will directly adversely affect the business and profitability of the new company.
12. The expenses for the setting up and promotion of the new company would be shared equally by AMCO and INCO.
13. 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.
14. 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 for settlement by Arbitration or Conciliation in Calcutta and the decision of the said Arbitrator shall be final and binding on both the parties.
15. This agreement is made subject to obtaining approvals of the Indian Government and other concerned authorities.
16. 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.
17. IN WITNESS WHERE OF the parties hereto have signed, sealed and delivered these presents on the day, month and year first above-written.

Signed, sealed and delivered by

Mr. ....

Pursuant to the Board Resolution



dated of AMCO Inc Signature in  
Calcutta 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 .....

## ARBITRATION AGREEMENTS

The 'arbitration agreement' under the Arbitration and Conciliation Act, 1996 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. It has to be in writing. It is in writing if it is contained in a document signed by the parties, or in an exchange of letters, telex telegrams or other means of telecommunication "including communication through electronic means" which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of agreement is alleged by one party and not denied by the other.

The important ingredient of the arbitration agreement is the consent in writing to submit dispute to arbitration. Consent in writing implies the application of mind to the reference of dispute to arbitration in accordance with Arbitration and Conciliation law and the binding nature of the award made thereunder.

An arbitration agreement stands on the same footing as any other agreement. It is binding upon the parties unless it is intended with fraud, undue influence etc., in which case it can be avoided like any other agreement.

An arbitration rests on mutual voluntary agreement of the parties to submit their differences to selected persons whose determination is to be accepted as a substitute for the judgement of a court. The object of arbitration is the final determination of differences between parties in a comparatively less expensive, more expeditious and less formal manner than is available in ordinary court proceedings.

### Pre-requisites of Arbitration

Every arbitration must have the following three pre-requisites:

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

### Submission of Dispute to Arbitration

A submission is an agreement between two contracting parties to take decision from a third mutually-agreed party, to whom they refer the dispute. The arbitration presupposes that the arbitrator must accept the office of

arbitrator to perfect his appointment.

### **Aim of Arbitration**

Civil litigation takes years and years to settle simple disputes. Arbitration is a means devised to quick and economical settlement of a dispute between two contracting parties, who also agree as part of the main agreement to refer dispute or difference arising out of or touching upon the terms and conditions of the agreement to a third person to give his judgement, which shall be binding on both the parties. Where the decision of a person is binding on only one of the parties and not on all the parties to the dispute, it cannot be said that the function, which the person giving the decision is exercising, is arbitral in character.

### **Methods of Arbitration**

The parties to the dispute will enter into an agreement to refer the dispute to arbitration and will agree on the terms of reference, that is, to state clearly and precisely the matter the arbitrator is required to decide. An arbitrator is not bound by the strict rules of evidence of courts of law. However, he does follow the practice of presentation and conduct of a case in a court of law. Most of the evidence is in writing. The party adducing evidence has to be present before the arbitrator so that he may be cross-examined on his written evidence. After hearing the evidence of both the parties, the arbitrator makes his award. The award must be within the terms of reference.

It is for the arbitral Tribunal to lay down its own procedure during the arbitration proceedings. The law should however, be fair and reasonable. The tribunal may decide to ask the parties to adduce evidence by way of affidavits. In that case, it would be fair and just to allow cross-examination of the witness whose affidavit has been filed.

#### **Requisites of an Award**

The general requisites of an award are:

- (a) it must be consistent with the submission;
- (b) it must be certain;
- (c) it must be fair to the parties;
- (d) it must be final;
- (e) its implementation must be possible.

### **Specimen of Arbitration Agreement to Refer the Dispute to two Arbitrators**

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

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

1. For the purpose of final determination of the dispute, the matter will be referred to Mr... .. nominated by one party and Mr. .... nominated by the other party as arbitrators and their award shall be final and binding on both the parties.
2. If differences should arise between the said two arbitrators on the questions referred to them, the said arbitrators shall select an umpire and the award to be given by the umpire shall be final and both the parties hereby agree that the award so given by the umpire or arbitrators shall be binding on both the parties.

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

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

Signature I

Signature II

### **Specimen of Arbitration Agreement to Refer the Dispute to a Common Arbitrator**

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

WHEREAS by an Agreement (Building contract) dated..... 2020 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.

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

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

*Signed by the within named*

*Signed by the within named*

*Mr. X..... in the presence of*

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

#### **GUARANTEES : COUNTER GUARANTEE, FIDELITY GUARANTEE, PERFORMANCE GUARANTEE, BANK GUARANTEE**

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

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

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

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

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

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

### **Purpose of a Guarantee**

The primary idea of a guarantee or suretyship is, an undertaking to indemnify the creditors in case the principal debtor does not fulfil his promise; the contract of guarantee in that sense is a contract to indemnify. The central point in such a case is to determine what was the contingency which the parties had in their minds when the contract of guarantee was entered into.

### **Form of a Guarantee**

The law does not require a contract of guarantee to be necessarily in writing. It may be either oral or in writing. It may be express or it may even be implied. It might be even inferred from the course of conduct of the parties concerned. However, whatever may be the form of the contract, it must be satisfactorily proved. Like any other contract, a contract of guarantee must be supported by consideration. It is, however, not necessary that the consideration should flow from the creditor and be received by the surety. Consideration between the creditor and the principal debtor is a valid and good consideration for the guarantee given by the surety. A contract of guarantee as specified in Section 126 of the Indian Contract Act, 1872 presupposes the existence of a principal debtor and no such contract can be made before a sale has taken place when there is no principal debtor in existence in respect of whose default the guarantee can be given.

### **Fidelity Guarantee**

A surety's liability for the faithful discharge by another of his duties depends in each case on the exact terms of that guarantee. The surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised, because the employer of the servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work.

If the employer of a servant whose fidelity has been guaranteed continues to employ him even after a proved act of dishonesty without notice to the guarantor, the surety is discharged. That is a basic principle implicit in the very nature of a fidelity guarantee. The guarantor in such a case guarantees the fidelity and ensures the loss against the risk of infidelity and not the fact of infidelity. If the employer wants to continue a dishonest servant after his dishonesty has been proved then he must give the guarantor notice of the fact of infidelity so that the guarantor may get an opportunity to say whether he would continue his guarantee or not for a man whose infidelity has been proved.

### **Construction of a Guarantee**

The terms of a guarantee must be strictly construed. The surety receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into.

In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee.

### **Consideration for a Guarantee**

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

Consideration between the principal debtor and the creditor is good consideration for guarantee given by surety. It is not necessary that the thing done or the promise made for the benefit of the principal debtor should be at the desire of the surety. The word “done” in the above definition shows that past benefit to the principal debtor can be good consideration for a bond of guarantee.

### **Surety's Liability**

According to Section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

The surety's liability is not deferred until the creditor exhausts his remedies against the principal debtor. In the absence of some special equity, the surety has no right to restrain an action against him by the creditor on the ground that the principal debtor is solvent or that the creditor may have relief against the principal debtor in some other proceedings.

The liability of the surety being co-extensive with that of the principal debtor is joint and several with the latter and, therefore, in the absence of a clear intention to the contrary it is at the option of the creditor, to decide whether he shall proceed against the surety or the principal debtor. Of course, a guarantor is prima facie entitled to have the debt proved as against him.

### **Subrogation of Surety to the Rights of Creditor on Payment**

Section 140 of the Indian Contract Act invests a surety with all the rights which the creditor has against the principal debtor, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety has made the payment or performed all that he is liable for.

### **Continuing Guarantee**

Section 129 of the Act lays down that a guarantee which extends to a series of transactions is called a continuing guarantee, and according to Section 130, a continuing guarantee may be revoked by the surety at any time as to future transactions, by notice to the creditor.

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

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

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

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

NOW THIS DEED WITNESSES AS FOLLOWS:

1. In consideration of the State of..... having agreed to advance a sum of Rs..... to the Company, through the Bank, for the purpose hereinafter indicated, the bank, does hereby guarantee that in case the Company shall fail and/or neglect to supply the State, the plant, machinery and equipment of the value of Rs..... in accordance with the terms, specifications and conditions contained in the Acceptance of Tender dated the..... subject to any amendments or modifications thereof, if any, when made, the bank shall repay to the State such amount or amounts as the bank may be called upon to pay subject to the maximum limit of Rs.....

2. This guarantee of the Bank shall be effective immediately upon receipt of the sum of..... from the State for and on behalf of the Company and shall continue in force until the supply of plant, machinery and equipment of the value of Rs..... aforesaid is fully effected.

3. The guarantee hereinbefore contained shall not be affected by any change in the constitution of the bank or of the Company nor in the event of any winding up being made against the Company.

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

For and on behalf of the Bank

Witness 1.....

.....

Witness 2 .....

For and on behalf of the State of

.....

### **Specimen Deed of Guarantee for the Performance of a Contract**

THIS DEED OF GUARANTEE made this ..... day of ..... between Shri ....., son of Shri..... resident of..... (hereinafter called "the Guarantor"), which expression shall, unless repugnant to the context, include his heirs, legal representatives, assigns etc of the one part and Shri ....., son of ..... resident of .. (hereinafter called "the Principal"), which expression shall, unless repugnant to the context, include his heirs, legal representatives, assigns etc., of the other part.

WHEREAS BY AN AGREEMENT DATED..... made between Shri..... son of Shri..... resident of..... etc., therein referred to as "the Contractor", of the one part and the said..... Shri..... herein referred to as "the Principal", of the other part, it was inter alia agreed by and between the parties as follows:

*(Here state the nature of the work to be done by the Contractor);*

AND WHEREAS the said work was entrusted to the Contractor upon the Guarantor having agreed with the Principal as to its guarantee of performance by the Contractor and to indemnify and keep indemnified the Principal against all losses, damages, costs, charges and expenses arising out of performance or non-performance thereof. Now it is agreed and declared by and between the parties as follows:

1. The Guarantor will see that the Contractor (unless relieved from the performance by operation of any clause of the contract or by statute or by virtue of the decision of any tribunal or court of competent jurisdiction, shall carry out, execute and perform the contract without any exception or reservation and in case he commits any breach thereof,



the Guarantor will indemnify and keep indemnified the Principal and his estate against all losses, damages, costs, expenses or otherwise which he may suffer or otherwise incur by reason of any act, negligence, default or error in judgement on the part of the Contractor in performing or non-performing the contract.

2. In case of any dispute or difference as regards the quantum of such losses, damages, costs, charges or expenses, the same shall be decided by reference to arbitration of one architect or engineer if the parties so agree or otherwise to two architects or engineers, one to be appointed by each, whose decision shall be final and binding on all parties.

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

Signed, sealed and delivered in the presence of

1. Guarantor
2. Principal

### **HYPOTHECATION AGREEMENT**

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

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

A hypothecation not merely of moveable existing on the premises at the time but also in respect of moveable which might be subsequently acquired and brought there, is valid though it is not governed by the Transfer of Property Act or by the Indian Contract Act, 1872. An oral or written hypothecation is permitted under the law in India.

Hypothecation is an extended form of pledge. Pledge has been codified by the Indian Contract Act. Sections 172 to 176 deal with pledge of goods. Under Section 172, a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 172 entitles a pawnee to retain the goods pledged as security for payment of a debt and under Section 175 he is entitled to receive from the pawnor or the pledger any extra-ordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawnor the pawnee has the right to sue upon the debt and to retain the goods as collateral security and to sell the goods after reasonable notice of the intended sale to the pawnor. Once the pawnee, by virtue of his right under Section 176 sells the goods, the right of the pawnor to redeem them is extinguished. However, the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawnor. So long the sale does not take place the pawnor is entitled to redeem the goods on payment of the debt. Therefore, when a pawnee files a suit for recovery of debt, though he is entitled to retain the goods, he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to re-deliver the goods on payment of the debt and, therefore, if he has put himself in a position where he is not able to re-deliver the goods, he cannot obtain a decree.

As against pledge of goods, the transfer of legal title in the goods in the case of a hypothecation, the rights of the lender and the borrower are strictly governed by the terms and conditions of the hypothecation agreement executed by the parties. No assumptions can be drawn in such a case. Hypothecation is resorted to mostly by banks and other financial institutions for securing their long-term and medium-term loans and limits of working

capital, bill discounting, letters of credit and guarantees to limited companies, partnerships etc. Alongwith the hypothecation agreements, the loaning institutions including banks have a plethora of other documents executed by the borrowing companies e.g. demand promissory note, collateral personal guarantees of managing directors, directors and other persons having substantial interest in the borrowing entities, second charge on fixed assets like land and building and plant and machinery permanently attached to land by legal or equitable mortgage and so on and so forth.

Hypothecation agreements usually cover moveable machinery, equipment, stocks of finished and semi-finished goods, raw materials, consumable stores, present and future available in factories and godowns of the borrower and also enroute to the borrower's factories and book debts. While these items as moveable assets, remain in the possession of the borrower and he has absolute right to convert them, sell them and deal with them in any manner the borrower likes in the course of his business, the legal title vests in the lending institution by virtue of the hypothecation agreement. Pledge, which is regulated by the Indian Contract Act, 1872, as stated above, technically speaking, cannot exist without bailment or possession. Though not accompanied by delivery of possession, the validity of hypothecation of moveables has been recognised in India and it has sometimes been enforced even against a bona fide purchaser without notice. Since such hypothecation is not governed by the Transfer of Property Act, 1882 or the Indian Contract Act and even the Sale of Goods Act, 1930, the Court is thrown back upon principles of equity and justice.

### **A Specimen Agreement to Hypothecate Goods to Secure Fixed Loan**

The Manager,

.....Bank,

.....

..... Sir,

In consideration of your Bank advancing to me/us on loan the sum of Rs..... I/We hereby agree to hypothecate and hold under lien to the Bank as security for the repayment as per Schedule hereto of the principal amount of the loan and payment of interest on demand at.....% per annum subject to a maximum of.....% per annum above Bank Rate.

The goods so to be held by me/us under lien to the Bank I/We declare to be my/our absolute property, and to be stored in my/our godowns at..... I/We hereby agree to furnish you at the close of business on the last day of each English calendar month so long as any money remains due in respect of the said loan with a full and correct statement of particulars of all goods so held under lien to the Bank, with the market value thereof respectively on that day.

All goods from time to time held by me/us under lien to the Bank in terms of this agreement shall be kept separate and apart from all other goods in my/our possession, and no moneys shall be borrowed by me/us from any company, firm or person on the security of such goods stored in the same godown in a way that such other goods may be mixed with the goods held under lien to the Bank nor shall I/We do any other act by means of which the Bank's lien on the goods so held shall be in any way impaired or affected.

It is understood that I/We are at liberty, from time to time in the ordinary course of business, to sell all or any of the goods from time to time held under lien to the Bank under this agreement provided that no such sale shall reduce the value of the goods held under lien below the amount of my/our said debt to the Bank plus the margin of..... per cent. In case of any goods held under lien to the Bank reducing the value of the goods held under this lien to less than the amount of my/our said debt to the Bank plus such margin, the proceeds of such sale, as soon as the same are received, shall be paid into the bank in part satisfaction of the said loan and shall in the meantime be held as specifically appropriated to payment of the amount due by me/ us on the security.

I/We empower you or any one from time to time authorised by you on behalf of the Bank to enter the godowns

in which the goods held under lien to the bank under this agreement shall be from time to time stored, for the purpose of inspecting and taking an account of the said goods.

I/We further empower you or anyone authorised by you as aforesaid so long as any money advanced by the bank under this agreement remains unpaid, to take possession of any goods from time to time held by me/us under lien to the Bank under this agreement and or any promissory notes or bazaar chits held by me/us in respect of any of the goods which may have been sold in such manner as you may think fit and on so taking possession to exercise on behalf of the Bank all the rights of a pawnee under the Indian Contract Act and failing payment of the amount under this loan on....., to sell and realise the said goods and promissory notes or bazaar chits. No notice to me/us of such sale shall be necessary, and I/We hereby agree to waive any such notice. I/We agree to accept the Bank account of such sale signed by the Manager, Accountant or other duly authorised officer of the Bank as sufficient proof of the correctness of the amount realised by the Bank and the charges and expenses incurred in connection with such realisation, and I/We hereby further agree to sign all documents, furnish all information and do all acts and things necessary for the purpose of enabling the Bank to sell any goods or realise any promissory notes or bazaar chits of which you shall so take possession.

I/We undertake to keep all held under lien to the Bank under this agreement, insured against fire to their full value, and to produce and deposit the policies with the Bank any time on demand and to hold all moneys which may become payable under any such policies in trust for the Bank so long as any money shall remain due in respect of my/our said loan. It shall be optional for, but not obligatory on the Bank, to insure the said goods in the Bank's name or to appropriate floating policies for the time being effected by the Bank towards insurance of the said goods and in either case to debit the said loan with relative premiums.

It is understood that the Bank's lien on the goods, so held under this agreement shall extend to any other sum or sums of money for which I/we or any other of us either separately or jointly with any other person or persons may be or become indebted or liable to the bank on any account.

Schedule of securities referred to in the agreement.....

Schedule of instalments for the repayment of the loan amount.....

Yours faithfully,

For A B C Ltd. (.....)

Managing Director,

New Delhi

Dated.....

## **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.

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 a 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 lawyer before finalizing any outsourcing agreement.

Before signing an outsourcing agreement, the following factors must be properly addressed:

- Duties and obligations of Outsourcer
- Duties and obligations of service receiver
- Security and confidentiality
- Legal compliance
- Fees and payment terms
- Proprietary rights
- Auditing rights
- Applicable law to outsourcing agreement
- Term of the Agreement
- Events of Defaults and Addressing
- Dispute Resolution Mechanism
- Time limits
- Location of Arbitration
- Number of Arbitrators
- Interim measures/Provisional Remedies
- Privacy Agreement
- Non-compete Agreement
- Confidentiality Agreement
- Rules Applicable
- Appeal & Enforcement
- Be aware of local peculiarities
- Survival terms after the termination of the outsourcing agreement.

Every outsourcing agreement should be modified as applicable under different circumstances. [Source: [www.madaan.com](http://www.madaan.com)]

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

This Agreement for the conversion of the book titled Intellectual Property Protection in India is executed in ..... on ..... 2020 by and between the Golden Law Publishing Co. Pvt. Ltd. having their Office at ..... represented by Mr. .... Manager, Golden Law Publishing Co. Pvt. Ltd. (hereinafter referred to as 'the GLP Pvt. Ltd.)

AND

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

WHEREAS the GLP Pvt. Ltd. has published the book Intellectual Property Protection in India it has decided to convert the hard copies of above mentioned book into a soft copy version by getting the book digitized and thereafter put the contents of the book in a CD (Compact Disc) along with a Search Engine. The GLP Pvt. Ltd. floated a tender for this book vide tender document with closing date .....2020 and after evaluating the bids of various parties, the GLP Pvt. Ltd. has decided to award the project to M/s Bluetec Pvt. Ltd. on the following terms and conditions:

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

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

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

- (8) M/s Bluetec Pvt. Ltd. would not be paid any advance money for undertaking the job. M/s Bluetec Web Services Pvt. Ltd. would however be paid 25% of the total project cost after the stage of completion of the Master CD and subject to the satisfaction of the GLP Pvt. Ltd.
- (9) M/s Bluetec Pvt. Ltd. agrees to keep the hard copies of the book given for digitization in good shape. M/s Bluetec Pvt. Ltd. has however been allowed to mark the relevant portions required for search taggings with special marks.
- (10) For updating the CD, the GLP Pvt. Ltd. reserves the right to either conduct the updation in part on its own or the GLP Pvt. Ltd. may assign this job to M/s Bluetec Pvt. Ltd. or any other agency. If the GLP Pvt. Ltd. decides to assign this job to M/s Bluetec Pvt. Ltd., the cost would be as follows:

- (a) Content assimilation, Software upgradation and Annual Maintenance charges – Rs. .... per annum
  - (b) Conversion cost of each page (in soft copy ) – Rs..... per page
  - (c) Total cost of each CD including the manual, jewel case, packing, printing and security features – Rs..... per CD (subject to a minimum lot of 1000 CDs)
- (11) Both the parties i.e. The GLP Pvt. Ltd. and M/s Bluetec Pvt. Ltd., agree to abide by all remaining terms and conditions of the original tender document floated by the GLP Pvt. Ltd. for the said job.
- (12) Any notice or request or communication given or required to be given under this contract shall be given to:
- A. In case of M/s Bluetec to:
- Mr. ...., Director, M/s Bluetec Web Services Pvt. Ltd. (Give Address).....
- B. In case of GLP Pvt. Ltd. to:
- Mr....., Manager, Golden Law Publishing Co. Pvt. Ltd. (Give Address).....
- (13) M/S BLUETEC PRIVATE LIMITED HEREBY FURTHER COVENANTS AND AGREES to indemnify and keep at all times indemnified the GLP Pvt. Ltd. against any loss or damage that the GLP may sustain as a result of the failure or neglect of M/s Bluetec to faithfully carry out its obligations under this agreement and further to pay for all losses, damages, costs, charges and expenses which the GLP Pvt. Ltd. may reasonably incur or suffer and to indemnify and keep indemnified the GLP Pvt. Ltd. in all respects.
- (14) This Agreement can be terminated by the GLP Pvt. Ltd. by giving three month's notice in writing in the event of failure of M/s Bluetec Pvt. Ltd. for adhering to time schedules / unsatisfactory execution of the conversion of the book or quality of output or requisite training not given to the people deputed by the GLP Pvt. Ltd or for any other reasonable cause and under such notice period, the performance of the project shall continue in operation by both the parties.
- (15) FORCE MAJEURE : If at any time during the continuance of this contract, the performance in whole or in part by either party or any obligation under this contract is prevented or delayed by reason of any war, hostility, acts of the public enemy, civil commotion, sabotage, fires, floods, explosions, epidemics, quarantine restrictions, strikes, lockouts, power failure or acts of God (herein after referred to as events) provided notice of the happenings of any such event is given by either party to the other within 21 days from the date of occurrence thereof, neither party shall by reason of such events, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non- performance or delay in performance, and deliveries under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, provided further that if the performance in whole or part of any obligation under this contract is prevented or delayed by reasons of any such event for a period exceeding 180 days, both parties shall consult each other regarding the termination of the contract on agreed equitable terms or otherwise devise future course of action.
- (16) All disputes, claims and demands arising under or pursuant to or concerning this contract shall be referred to the sole Arbitrator to be appointed by the Chief Manager, GLP Pvt. Ltd. The award of the sole Arbitrator shall be final and binding on both the parties. The arbitration proceedings shall be held under the provisions of the Arbitration and Conciliation Act, 1996 as amended till date. The place of arbitration shall be .....
- (17) The Courts at ..... (Mention the name of the place) alone shall have jurisdiction to adjudicate any dispute arising between the parties under this agreement.
- (18) Notwithstanding anything contained in this agreement, the parties agree that any terms of this agreement



may be varied by way of supplementary deed/agreement. Such supplementary agreement/deed shall be effective only if it is in writing and signed by duly authorised representatives of both the parties.

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

Signed and Delivered By:

On behalf of M/s Bluetec Web Services Pvt. Ltd. Name:

Designation:

Place:

On behalf of GLP Pvt. Ltd.

Name:

Designation:

Place:

In the presence of witnesses:

- 1.
- 2.

## **SERVICE AGREEMENTS**

### **Contents of a Service Contract**

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

As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man, Unlike other agreements and legal documents which need not contain matters presumed or implied by law, it is better in such an agreement to specify even such matters and all other matters so as to make it a complete code, embodying the rights and duties of each party.

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

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

*Remuneration* : Remuneration may be fixed monthly salary, or fees or commission, or salary as well as fees or



commission. Sometimes in business firms, employees are allowed a share in the profits in addition to a fixed salary. All these should be clearly provided.

*Leave* : Conditions and grounds on which, and the period for which leave may be granted as well as allowance payable during leave should be stated. In the case of Government servants engaged on contract, the leave rules applicable to permanent Government Servants in general may be applied but as there are different rules for different classes of Government Servants those applicable should be clearly referred to, or if they are not lengthy, they may be embodied in the agreement in the form of a covenant.

*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. In the case of misconduct or neglect, no notice is required, but, provision may be made for framing charges and taking defence as in the case of Government Servants. Since an employee is entitled to damages for wrongful dismissal if the termination of the service is not properly made, provision in this respect should be carefully worded.

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

While drafting restrictive covenants, it is necessary to see that they are not illegal. Agreements in restraint of trade are void under Section 27 of the Indian Contract Act, and should not be inserted in an agreement.

*Effect of Labour Laws*: Many Acts have been passed by the Central or State legislatures relating to the conditions of employment of teachers and other employees of aided schools and colleges and of universities, and of workers in factories and commercial establishments, for e.g. the Factories Act, the Industrial Employment (Standing Orders) Act, the Payment of Wages Act, the Employees' Compensation Act etc. In drawing up a service contract for such an employee, the provisions of the relevant Acts must be kept in view. Any term of contract contrary to the statutory provisions will be null and void, as it is not open to an employee to contract out of the safeguards provided by the legislature for his protection.

### **Specimen Agreement of Employment of Manager of a Business Concern**

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

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

NOW THIS AGREEMENT WITNESSES as follows :

1. The manager shall work as such for a term of..... years from the day of..... at..... or any other place as desired by the employer.
2. The manager shall give his whole time and attention to the said business and shall use his best endeavour to improve and expand the same and shall in all respects diligently and faithfully obey and observe all lawful orders and instructions of the employer in relation to the conduct of the said business and shall not without his consent divulge any secrets or dealing thereto.
3. The manager shall keep at the place of business at..... proper books of account showing all goods and moneys received and delivered and disbursed by him with necessary particulars of all such transactions and shall duly account for all moneys belonging to the employer and coming into the hands or power of the manager and shall forthwith pay the same to the employer or his bankers for the

time being except only such moneys as the manager shall be authorised by the employer to retain for immediate requirements of the said business.

4. The employer shall pay to the manager during the continuance of his engagements and provided he shall duly observe and perform the agreement herein on his part contained the salary of Rs..... per mensem on the first day of every calender month commencing from the first day of..... without any deduction except such as he will be bound to make under the Income-tax law for the time being in force, and shall also pay the manager at the end of each year during the aforesaid period a further sum equal to 5 per cent on the gross sale return for the said year (or on the net profits of the said business for the said year (if any) after making such deductions as are properly made according to the usual custom of the said business in the estimation of net profits) provided always that upon the death or termination of the engagement of the manager before the expiration of the said period of ..... years/ the employer shall forthwith pay to him or his heirs, executors, administrators or other legal representatives, as the case may be, in respect of the services of the manager of the whole or any part of the current month a due proportion of the salary of Rs..... per mensem together with such further sum in lieu of such percentage as aforesaid as shall bear the same proportion to the estimated gross return (net profits) for the then current year as the part of the said year during which he has served, shall bear to the whole year, the gross return (net profits) being calculated on average of the past three years.
5. The employer shall during the continuance of the manager's engagement provide him with a suitable furnished house for residence free of rent, rates and taxes (except the charges for electricity consumed by him or of extra water used by him) and the manager shall reside in the said house.
6. The manager shall make such tour as may be necessary in the interest of the said business or as he may be directed by the employer to make and the employer shall pay him all reasonable expense actually incurred in undertaking such tours (or a travelling allowance at per mile for all journey by road and first class fare for journeys performed by rail and a halting allowance of Rs..... per diem when a halt of not less than 8 hours is made at one place).
7. The manager shall be entitled during his engagement to leave on full pay for a period equal to 1/11th of the period of service rendered and to a further leave on half pay in case of illness or in capacity to be proved to the satisfaction of the employer for a period of 15 days in one year.
8. Either party hereto may terminate the engagement of the manager at any time before the expiration of the said term of.....years on giving or sending by registered post to the other party three calendar months, notice in writing, such notice to be given or sent in the case of the employer to his house at ..... and in case of the manager to his place of business or residence provided by the employer and on the expiration of the said three months from the date of giving or posting such notice, the said engagement shall terminate provided that the employer may terminate the said engagement at any time on payment of three months' pay in advance in lieu of such notice as aforesaid.
9. If the manager at any time willfully neglects or refuses or from illness or other cause becomes or is unable to perform any of the duties under this agreement, the employer may suspend his salary (and sum by way of percentage) during such neglect, negligence or inability as aforesaid and may further immediately terminate the engagement of the manager without giving any such notice or making such payment or salary in advance as hereinbefore provided.
10. The manager will at his own expense find and provide two respectable sureties to the amount of Rs..... each for his good conduct and for the due performance by him of this engagement and if he fails to do so for a period of three months from this date, the employer may terminate his services forthwith.

IN WITNESS WHEREOF, etc.

**Renewal of Term of Service of an Employee (Either on old terms or new terms)**

THIS AGREEMENT is made, etc.

WHEREAS the said CD has served the said AB as..... under an agreement between the parties hereto dated the.....;

AND WHEREAS the term of the said CD's engagement under the said agreement having expired on the....., it has been agreed that the said AB shall re-engage, the said CD upon the terms and conditions hereinafter appearing (or, upon the terms and conditions contained in the said agreement dated the.....).

NOW THESE PRESENTS WITNESS and the parties hereto hereby agree as follows:

(1) The said CD shall serve the said AB as..... for one year from the.....

(2) .....

(3) ..... etc.

(or, 2. The terms and conditions of the said agreement shall be the same as are contained in the aforesaid agreement of the parties dated..... in so far as they may be applicable to the employment under this agreement and all the terms and conditions contained in the said agreement shall be deemed to have been incorporated in this agreement).

IN WITNESS WHEREOF etc.

**ELECTRONIC CONTRACTS (E-CONTRACTS)**

Due to the immoderate advancement of technology E-Commerce has become a part of human daily life. E- Commerce is the selling and purchasing of goods and services using technology. E-Contracts are basically the contracts analyzed with E-Commerce and other transactions taking place in the digital environment.

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.

Electronic contracts are born out of the need for speed, convenience and efficiency. Imagine a contract that an Indian exporter and an American importer wish to enter into. One option would be that one party first draws up two copies of the contract, signs them and couriers them to the other, who in turn signs both copies and couriers one copy back. The other option is that the two parties meet somewhere and sign the contract. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a scenario.

There was initially an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. In India, Information Technology Act, 2000 governs the law relating to e-contracts substantially. The Act provides for the Attribution, Acknowledgement, Dispatch of Electronic Records, Secure Electronic Records and Secure Digital Signatures which are related to the E-Contracts [Sections: 4, 11, 12, 13, 15].

The contracts formed through electronic media are treated as the general contracts and their formation and acceptance are governed as per the Indian Contract Act, 1872.

The Indian Contract Act, 1872 governs the manner in which contracts are made and executed in India. It

governs the way in which the provisions in a contract are implemented and codifies the effect of a breach of contractual provisions. Within the framework of the Act, parties are free to contract on any terms they choose. Indian Contract Act consists of limiting factors subject to which contract may be entered into, executed and breach enforced.

The conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. The Information Technology Act (IT Act) solves 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 the electronic records as evidence in the disputed matter [Sections: 85A, 85B, 88A, 85C]

## **ESSENTIALS OF E-CONTRACT**

As per the Indian Contract Act, the essentials of a contract are:

- (i) An offer or proposal by one party and acceptance of that offer by another party resulting in an agreement consensus-ad- idem.
- (ii) An intention to create legal relations or intent to have legal consequences.
- (iii) The agreement is supported by lawful consideration.
- (iv) The parties to contract are legally capable of contracting.
- (v) Genuine consent between the parties.
- (vi) The object and consideration of the contract is legal and is not opposed to public policy.
- (vii) The terms of the contract are certain.
- (viii) The agreement is capable of being performed, i.e., it is not impossible of being performed.

Therefore, to form a valid contract there must be (1) an agreement, (2) based on the genuine consent of the parties, (3) supported by consideration, (4) made for a lawful object, and (iv) between the competent parties.

The bargaining process must satisfy two requirements to result in a valid contract: first, mutual assent as an expression of the parties' intent to contract and second, sufficiently definite terms. In arriving at such mutual assent and definite terms, the parties employ the mechanics of offer and acceptance.

## **TYPES OF E-CONTRACTS**

Generally the basic forms of e-contracts are:

- The Click-wrap or Web-wrap Agreements.
- The Shrink-wrap Agreements.
- The Electronic Data Interchange or (EDI).

### **Click-wrap or Web-wrap Agreements**

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. A click-wrap agreement is mostly found as part of the installation process of software packages. It is also called a “click through” agreement or click-wrap license.

Click-wrap agreements can be of the following types:

1. 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.

2. 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

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 (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgment of export and other official documents, leading eventually to the shipment of the goods), can be processed with virtually no paperwork. Here unlike the other two, there is exchange of information and completion of contracts between two computers and not an individual and a computer.

### On-Line Shopping Agreement

Suppose Kerry Ltd. wants to offer online shopping services to its customers. Kerry would tie-up with manufacturers of books, toys, clothes, etc., and offers their products for sale through its website. Some of the products could be stocked in Noodle’s warehouses while others could be stocked with the manufacturers.

Additionally visitors can post reviews, comments, photos etc on the Kerry website. Kerry would need to enter into a contract with all its potential customers “before” they place an order for a product using Kerry services. This contract must serve the following purposes:

1. Outline the scope of services provided by Kerry Ltd.
2. Restrict Kerry’s liabilities in case there is any defect in the products sold through the Kerry website.
3. Outline the duties and obligations of the customer.
4. Grant suitable licence to the customer to use the Kerry website.
5. Restrict Noodle’s liabilities in case of loss or damage suffered by the customer as a direct or indirect result of the Kerry website.

### IMPORTANT POINTS IN REGARD TO E-CONTRACTS

These are as under :

#### 1. *Customer’s relationship with Kerry*

The contract must specify that by using the Kerry website, the customer becomes subject to the terms of a legal agreement between the customer and Noodle. Customers must be informed that they must be of legal age to enter into the contract.

#### 2. *Acceptance of the terms of the contract*

The contract must clearly lay down that a customer cannot use the Kerry website unless he agrees with the terms of the contract. The customer can usually indicate his acceptance by clicking on an “I Accept” link or checking an “I Accept” checkbox.

### **3. Copyright**

The contract should clearly state that all content included on the Kerry website, such as text, graphics, logos, button icons, images, audio clips, digital downloads, data compilations, and software, is the property of Kerry Ltd.

### **4. Customers duties and obligations**

The contract should clearly lay down the duties and obligations of the customer. Amongst others, the customer must:

1. Not overload Noodle's systems.
2. Not download or modify the Kerry website.
3. Collect and use any product listings, descriptions, or prices.
4. Download or copy account information by data gathering and extraction tools.
5. Not frame or utilize framing techniques to enclose any trademark, logo, or other proprietary information (including images, text, page layout, or form).
6. Not use any meta tags or any other "hidden text" utilizing Noodle's name or trademarks.

### **5. License from Noodle**

The contract should specify that Kerry is giving the customer a limited, revocable, and nonexclusive right to create a hyperlink to the home page of Kerry so long as the link does not portray Noodle, or its products or services in a false, misleading, derogatory, or otherwise offensive matter. The contract must also specify that Kerry is giving the customer a personal, worldwide, royalty-free, non-assignable and non-exclusive licence to use the software provided as part of the Kerry website. The contract must clarify that this licence is for the sole purpose of enabling the customer to use the Kerry website. The contract must forbid the customer from the following acts in respect of the said software:

1. copying,
2. modifying,
3. creating a derivative work of,
4. reverse engineering,
5. decompiling or otherwise attempting to extract the source code. The contract must mention that the customer cannot assign, sub-licence or transfer his rights to use the Kerry software.

### **6. Reviews and comments**

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.

It should also be mentioned that such content should not consist of or contain software viruses, political campaigning, commercial solicitation, chain letters, mass mailings, or any form of "spam." It should also be stated that a customer who posts content grants to Kerry Ltd. non-exclusive, royalty-free, perpetual, irrevocable, and fully sub licensable right to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, and display such content throughout the world in any media.

The contract must also state that the customer posting the content indemnifies Kerry against all legal action and claims resulting from the said content



**7. Risk of loss**

Kerry has a shipping contract with various courier companies to deliver the products to the customers. The contract should clearly state that once the products are handed over to the courier company, Kerry's liability ends.

**8. Pricing**

The contract should clarify how the prices listed on the Kerry's website are computed. The various options could be:

1. The listed price represents the full retail price listed on the product itself,
2. The listed price is suggested by the manufacturer or supplier,
3. The listed price is estimated in accordance with standard industry practice, or
4. The listed price is estimated in accordance with the estimated retail value for a comparably featured item offered elsewhere.

**9. Prohibitions**

The contract must specifically prohibit the following:

1. Using "deep-link", "page-scrape", "robot", "spider" etc. to access, acquire, copy or monitor any portion of the service.
2. Reproducing the navigational structure or presentation of the service.
3. Circumventing the navigational structure or presentation of the service.
4. Attempting to gain unauthorized access to any portion or feature of the service.
5. Harvesting or collecting user names, email addresses or other member identification information.
6. Probing, scanning or testing the vulnerability of the service.
7. Tracing information relating to other users.
8. Agreeing not to use any device, software or routine to interfere or attempt to interfere with the proper working of the service or any transaction being conducted on the service, or with any other person's use of the service.
9. Using the service for any unlawful purpose.

**10. Applicable Law**

The contract should mention the city / state and country whose law will prevail in this contract. The courts having exclusive jurisdiction over the disputes should also be mentioned. Conditions relating to arbitration of disputes may also be mentioned.

**11. Limitation of liability**

The contract must clearly mention that Kerry Ltd (and its subsidiaries, affiliates, licensors etc) will not be liable to the customer for:

1. Access delays or interruptions to the Kerry web site.
2. The loss of registration or processing of an order.
3. The unauthorized use of the customer's account with Noodle.
4. Deletion of, failure to store, or failure to process or act upon email messages sent by customers to Kerry staff.



5. Errors taking place with regard to the processing of the customer's orders.
6. Any direct, indirect, incidental, special consequential or exemplary damages incurred by the customer pursuant of his use of the Kerry website.
7. Any loss of profit, any loss of goodwill or business reputation, any loss of data suffered, cost of procurement of substitute goods or services, or other intangible loss incurred by the customer pursuant of his use of the Kerry's services.
8. Any loss or damage incurred by the customer as a result of relationship or transactions with advertisers using the Noodle website.
9. Changes in or cessation of the Kerry's services.
10. Customer's failure to keep his account information, passwords etc secure and confidential.

**12. Exclusion of warranties**

The contract must clearly mention that the customer expressly understands and agrees that his use of the services is at his sole risk and that the services are provided "as is" and "as available". The contract must expressly disclaim all warranties and conditions of any kind (express and implied).

It must also be mentioned clearly that Kerry (its subsidiaries, affiliates, licensors etc.) do not represent or warrant that:

1. the Kerry's services will meet the customer's requirements,
2. the Kerry's services will be uninterrupted, timely, secure or free from error,
3. the information provided by or through the Kerry's services will be accurate or reliable, and
4. that defects in the operation or functionality of the Noodle services will be corrected.

**13. Ending the relationship between Kerry and the customer**

The contract must lay down that the customer can terminate the contract by closing his accounts with Noodle. Kerry must retain the right to terminate the contract under the following circumstances:

1. The customer breaches any provision of the contract.
2. The customer acts in a manner that clearly shows his intention to breach a provision of the contract.
3. Kerry is required by law to terminate the contract.
4. The provision of the services to the customer is no longer commercially viable.

**LEAVE AND LICENSE AGREEMENT**

Leave and License Agreements are preferred by the parties to get out of the rigours of landlord-tenant relationship. Many types of agreements are made for the occupation of property like lease deeds, lease or tenancy agreements, rental agreements, etc. Despite these agreements, most owners prefer to give their premises on leave and license basis rather than tenancy or lease basis. The process of eviction of tenants is generally difficult. The law is tilted in favour of the tenant for various purposes. Generally, it is being witnessed that a person having a vacant apartment will never rent it out fearing what if the tenant decides not to vacate and makes the apartment his own. That is why, tenancy has been put on the backburner and Leave and License is now the most popular option.

The word "leave" has many meanings. In Leave and License Agreements, it is used to indicate "permission". The occupancy is in essence a permission granted by the landlord or owner to use and occupy the property concerned.

Mention should be made that the practice of entering into “Leave and License Agreements” was adopted in Mumbai. In Mumbai, the provisions contained under the then Bombay Rents Hotel and Lodging House Rates Control Act, 1947, popularly known as the “Bombay Rent Act” were considerably in favour of the tenants. Further, Tenancy or Lease Agreement had to be stamped and registered. Even if the Agreements were duly stamped and registered, the eviction of tenants was still a very tough and time consuming procedure.

With the hope of getting over the stamp duty and registration requirements, and also with the view of not creating any tenancy that will be covered by the said Act, a practice of entering into “Leave and License Agreements” was adopted. However, by virtue of an amendment to the said Act in 1973, those who were in occupancy of premises under Leave and License Agreements as on the specified date became statutory tenants under the provisions of the said Act. Provisions were also introduced to protect the landlords, in as much as a person who was in occupation of premises under Leave and License Agreement on termination of License. Such person was liable to be summarily evicted.

### **Lease, License and Rental Agreements**

The license is not a lease. The lease and the license both are different. The word “License” under Section 52 of the Indian Easement Act, 1882 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 the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

A lease of immovable property as per Section 105 of the Transfer of Property Act is a transfer of a right to enjoy such property. It may be for a specified period, express or implied. The price or payment of money is usually referred to as the “rent”.

In a Leave and License Agreement, the juridical possession of the premises is deemed to remain with the licensor and the licensee is said to be in constructive possession of the said premises. Thus, a leave and License does not create any interest in the premises in favour of the licensee but gives the licensee the mere right to use and occupy the premises for a temporary period.

A Rental Agreement between the landlord and tenant sets down the terms which will be followed while the tenant lives in the rental unit. Month-to-Month Agreement is commonly called a “Rental Agreement”. This agreement is for an indefinite period of time, with rent usually payable on a monthly basis. The agreement itself can be in writing or oral, but if any type of fee or refundable deposit is being paid, the agreement must be in writing.

### **Lease and License: Distinction**

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

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

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

“In order to determine whether a document 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.”[See also *Rajbir Kaur & Anr. v. M/s S Chokesiri & Co.*, 1988 (2) SCJ 316]

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

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

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

### **Factors to be Considered While giving out Premises on Leave & License Basis**

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

- Possession: In a leave and license agreement, the owner is deemed to be in legal or judicial possession of the premises and the licensee is in constructive possession of the premises.
- Income Tax: In a leave and license agreement the owner has to pay the applicable rate of tax.
- Municipal Tax: In a leave and license agreement the Municipal Authorities may charge taxes as applicable in the area and if there is a security deposit amount sometimes the Municipal Authorities may calculate a notional interest on the securities deposit amount and charge tax thereon.

### **A Specimen of Leave and License Agreement**

THIS AGREEMENT is made at..... this..... day of ....., 2020, between Mr. A hereinafter referred to as ‘the Licensor’ of the One Part and Mr. B of ..... hereinafter referred to as the ‘Licensee’ of the Other Part, as follows;

WHEREAS the Licensor is the owner of a piece of land at..... bearing Survey No ... with a building consisting of ..... floor ..... having built up area of about ..... square feet.

AND WHEREAS the Licensee has approached the licensor with a request to allow the Licensee to temporarily occupy and use a portion of the..... floor of the said building, admeasuring about ..... square feet for carrying on his ..... business, on leave and license basis until the Licensee gets other more suitable accommodation.

AND WHEREAS the Licensor has agreed to grant leave and license to the Licensee to occupy and use the said ground floor portion of the said building and which portion is shown on the plan hereto annexed by red boundary line on the following terms and conditions agreed to between the parties hereto;

NOW IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS..

1. The Licensor hereby grants leave and license to the Licensee to occupy and use the said portion of the ground floor/..... floor of the said building of the Licensor (hereinafter referred to as the Licensed Premises) for a period of eleven months from ..... The Licensee agrees to vacate the said premises even earlier if the Licensee secures any other accommodation in the locality where the said premises are situated.
2. The Licensee shall pay to the Licensor a sum of Rs..... per month (calculated at the rate of Rs..... per square foot) as License fee or compensation to be paid in advance for each month on or before the..... day of each month.

3. All the Municipal taxes and other taxes and levies in respect of the licensed premises will be paid by the Licensor alone.
4. The electric charges and water charges for electric and water consumption in the said licensed premises will be paid by the Licensee to the authorities concerned and the Licensor will not be responsible for the same. For the sake of convenience a separate electric and water meter if possible will be provided in the said premises.
5. The Licensee will be allowed to use the open space near the entrance to the Licensed premises and shown on the said plan by green wash for parking cars during working hours of the Licensee and not for any other time and no car or other vehicle will be parked on any other part of the said plot.
6. The licensed premises will be used only for carrying on business and for no other purpose.
7. The licensed premises have normal electricity fittings and fixtures. If the Licensee desires to have any additional fittings and fixtures, the Licensee may do so at his cost and in compliance with the rules. The Licensee shall remove such fittings and fixtures on the termination of the license failing which they shall be deemed to be the property of the Licensor.
8. The licensed premises are given to the Licensee on personal basis and the Licensee will not be entitled to transfer the benefit of this agreement to anybody else or will not be entitled to allow anybody else to occupy the premises or any part thereof. Nothing in this agreement shall be deemed to grant a lease and the licensee agrees and undertakes that no such contention shall be taken up by the Licensee at any time.
9. The Licensee shall not be deemed to be in the exclusive occupation of the licensed premises and the Licensor will have the right to enter upon the premises at any time during working hours to inspect the premises.
10. The Licensee shall maintain the licensed premises in good condition and will not cause any damage thereto. If any damage is caused to the premises or any part thereof by the Licensee or his employees, servants or agents the same will be made good by the Licensee at the cost of the Licensee either by rectifying the damage or by paying cash compensation as may be determined by the Licensor's Architect.
11. The Licensee shall not carry out any work of structural repairs or additions or alterations to the said premises. Only such alterations or additions as are not of structural type or of permanent nature may be allowed to be made by the Licensee inside the premises with the previous permission of the Licensor.
12. The Licensee shall not cause any nuisance or annoyance to the people in the neighbourhood or store any hazardous goods on the premises.
13. If the Licensee commits a breach of any term of this agreement then notwithstanding anything herein contained, the Licensor will be entitled to terminate this agreement by fifteen days' prior notice to the Licensee.
14. On the expiration of the said term or period of the License or earlier termination thereof, the Licensee shall hand over vacant and peaceful possession of the Licensed premises to the Licensor in the same condition in which the premises now exist subject to normal wear and tear. The Licensee's occupation of the premises after such termination will be deemed to be that of a trespasser.

IN WITNESS WHEREOF the parties hereto have put their hands the day and year first hereinabove written.

Signed by the within named Licensor Shri .....

in the presence of .....

Signed by the within named Licensee Shri .....

in the presence of .....

**WILL**

'Will' means the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death [Section 2(h) of Indian Succession Act, 1925].

A Will is, therefore, the legal declaration of a man's intention which he wills to be performed after his death or an instrument by which a person makes a disposition of his property to take effect after his death.

'Will' as per General Clause Act, 1897 shall include a Codicil and every writing making a voluntary posthumous disposition of property – Section 3(64).

'Codicil' means an instrument made in relation to Will and explaining, altering or adding to its dispositions and is deemed to form part of the Will – Section 2(d) of Indian Succession Act, 1925.

Essential characteristics of will are:

- (a) The document must be in accordance with the requirements laid down under section 63 of Indian Succession Act, 1925; i.e., executed by a person competent to make Will and attested as required under the Act.
- (b) The declaration should relate to the properties of the testator, which he wishes to bequeath.
- (c) The declaration must be to the effect that it operates after the death of Testator.
- (d) It is revocable during the life time of the testator. As per section 62 of the Indian Succession Act, 1925 a Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will. Any clause in a Will that the testator cannot revoke, it will render the Will void.
- (e) It is of an ambulatory nature which can be modified or altered at any time by the testator.
- (f) After the Indian Succession Act, 1925, Wills (except made by Mohammedans) should be made in writing.

**Who can make a Will?**

Section 59 of the Indian Succession Act, provides for the persons capable of making wills. Accordingly, every person of sound mind not being a minor may dispose of his property by will. A married woman may dispose by will of any property which she could alienate by her own act during her life. (Expln. 1). Even persons who are deaf or dumb or blind can make Will provided they are able to know what they do by it. (Expln.2). Further, a person who is ordinarily insane, may make his Will during the interval in which he is of sound mind. (Expln.3). However no person can make a Will while he is in a state of mind arising from intoxication or from illness or from any other cause such that he does not know what he is doing (Expln. 4).

The testamentary capacity is recognized only in a sound disposing state of mind. Soundness of mind denotes the mental capacity of the testator as to what he is doing, his capability of understanding his extent of his property, the person who is the object of his bounty and the persons who are thereby excluded. Testamentary disposition is personal, it cannot be delegated to any other person. A testator cannot confide to another the right to make a will for him.

**Types of Wills**

Under the Indian Succession Act, Will can be Privileged Will or Unprivileged Will.

**Privileged Will**

Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a

Wills made in the manner provided in Section 66. Such Wills are called privileged Wills. Privileged Wills may be made orally and may not always be in writing. If written in handwriting of testator, it need not be signed or attested. It is governed by sections 65 & 66 of the Indian Succession Act.

### Unprivileged Will

Wills made by the persons other than stated above are Unprivileged Will. Such Wills are required to be in writing, signed by testator and attested by the two witnesses (except those made by Mohammedans). It is governed by section 63 of the Indian Succession Act.

### Language, Stamp Duty & Registration

Preparation of a Will does not require any specific legal language. Any form of writing printing or type writing may be employed. However, the language should be as simple as possible and free from technical words and easily intelligible to a layman.

### A Will does not require any stamp duty.

Registration of Will is not mandatory. It is optional. (Section 18(c) Registration Act, 1908) However a registered Will has certain advantages. Any testator may, either personally or by duly authorized agent deposit with any Registrar his Will in a sealed cover superscribed with the name of the testator and that of his agent (if any) and with a statement of the nature of the document as per Section 42 of Registration Act, 1908. The testator, or after his death, any person claiming as executor or otherwise under a Will, may present it to any Registrar or Sub-Registrar for registration under section 40 of the Registration Act, 1908.

### Attestation

The Will must be attested by two or more witnesses by complying with the following requirements:

- (i) Each of them must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or
- (ii) Each witness has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and
- (iii) Each witness must sign the Will in the presence of the testator.

However it is not necessary that more than one witness must be present at the same time, and no particular form of attestation is necessary.

### Construction of Wills

There are two cardinal principles in the construction of Wills, deeds and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression or intention. The second is, to use Lord Denham's language, that technical word or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. [*Lalit Mohan Singh Roy v. Chikkun Lai Roy*, ILR 24 Cal 834.

- (i) *Cardinal maxim*: The cardinal maxim to be observed in construing a Will is to endeavour to ascertain the intentions of the testator. This intention has to be primarily gathered from the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done, if he had been better informed or better advised. [*Gnambal Ammal v. T. Raju Iyer*, AIR 1951 SC 103, 105].
- (ii) *Relevant considerations*: In construing the language of a Will, the courts are entitled and bound to bear



in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense and many other things which are often summed up in somewhat picturesque figure. The court is entitled to put itself into the testator's arm chair. [*Venkatanarasimha v. Parthasarthy*, 41 IA 51, 70 (PC) ; *Gnambal Ammal v. T. Raju Iyer*, AIR 1951 SC 103,106].

- (iii) *Avoidance of intestacy*: If two constructions are reasonably possible and one of them avoids intestacy while the other involves it, the court would certainly be justified in preferring that construction which avoids intestacy. [*Kasturi v. Ponnammal*, AIR 1961 SC 1302]. It is settled law that words in a Will must be construed in their ordinary grammatical sense unless it is shown that a clear intention to use them in a different sense exists and is so proved. [*Guruswami Pillai v. Sivakami Ammal*, AIR 1962 Mad 236].
- (iv) *Effect should be given to every disposition*: It is one of the cardinal principles of construction of Will that to the extent that it is legally possible, effect should be given to every disposition contained in the Will unless the law prevents effect being given to it. The intention of the testator should be gathered by giving a harmonious interpretation to the various terms of the Will as a whole. [*Rampali v. Chando*, AIR 1966 All 584,586].
- (v) *Later part or last words to prevail in case parts irreconcilable or there is repugnancy*. – If several parts of the Will are absolutely irreconcilable, the part that is later has to prevail. [Section 88, Indian Succession Act, 1925; *Somasundera Mudaliar v. Ganga Bissen Soni*, 28 Mad 386]. In case of repugnancy, the last word in the Will shall prevail. [*CIT v. Indian Sugar Mills Association*, (1974) 97 ITR 486 SC].

### Probate

Probate is a certificate granted under the seal of Competent Court, certifying the Will (a copy whereof is annexure thereto) as the Will of the testator and granting the administration of the estate of the deceased in accordance with that Will to the executor named under the Will.

### Letters of Administration

A letter of administration can be obtained from the Court of competent jurisdiction in cases where the testator has failed to appoint an executor under a will or where the executor appointed under a will refuses to act or where he has died before or after proving the Will but before administration of the estate. Letters of Administration are not always necessary in cases of intestacy of Hindus, Mohammedans, Buddhists, Sikhs, Jains, Indian Christians or Parsis. Letter of Administration is always necessary where a person (governed by the Indian Succession Act) dies intestate.

### Broad Outlines

A Will is a most solemn document. It is also a sacred one as by it a dead man entrusts to the living the carrying out of his wishes and desire. The preparation of a will is an intelligent work on the part of the draftsman. He should, therefore, study carefully laws relating to Real Properties and the provisions of Part VI sections 57 to 120 of the Indian Succession Act and also Hindu Succession Act, Hindu Adoptions and Maintenance Act before drafting the Will.

The following broad outlines should be followed while drafting a Will:

- Mention the name and address of the testator;
- Mention the fact that the testator is making the will voluntarily and in sound disposing state of mind;
- The necessity or urgency, if any, for exclusion of the will;
- Enumeration of testators relatives who would be entitled to his properties on intestacy and to whom the



bequests are proposed to be made;

- Details of procedure of making bequests;
- Use of clear and unambiguous language;
- Avoidance of conflict with the rule of law. E.g., rule against perpetuity (in this connection, the provisions of sections 112-118 of the Indian Succession Act must be borne in mind)
- Appointment of executor
- Schedule of properties bequeathed;
- Attestation of will by atleast two witnesses;
- Provisions relating to bequest and trusts created by the will should be complete
- Interest conveyed by will should be clearly defined. A will or bequest not expressive of any definite intention is void for uncertainty.

## Specimen Forms

### Short Form of a Will

This is the last Will of mine, *AB*, etc., made this the ..... day of ..... at ..... which cancels my will dated ..... made in favour of ..... now deceased.

WHEREAS I had made a Will on ..... bequeathing all my property in favour of ....., my ..... (state relationship).

AND WHEREAS the said ..... died on ..... leaving behind ..... NOW I declare that:

2. I hereby revoke my former Will dated, ..... in favour of ..... aforesaid.

3. I bequeath all my properties to ..... my ..... (state relationship) absolutely.

4. I bequeath the following annuities to commence from the date of my death and to be paid in monthly instalments :

- (i) To my daughter *CD*, etc., an annuity of Rs..... to be paid during her life ;
- (ii) To my nephew *EF*, etc., an annuity of Rs..... for his life.
- (iii) To my old servant *GH*, etc., an annuity of Rs..... during his life.

IN WITNESS WHEREOF I the said *AB* have signed this Will here under the day and year first written above.

(Sd.).....

(*AB*)

Signed by the above-named *AB* in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as an attesting witness.

1.....

2.....

### Simple Will Giving All Property To Wife

*I, AB, etc* hereby revoke all former Wills and codicils made by me and declare this to be my last Will whereby I bequeath and devise all my movable and immovable property whatsoever to my wife, *CD* and appoint her sole executrix of this Will.

IN WITNESS WHEREOF. I have signed this Will hereunder on the.....day of.....

(Sd.).....

(AB)

Signed by the above-named testator in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as an attesting witness.

1.....

2.....

### **Will by a Hindu in Favour of Family**

This is the last Will of mine, *AB*, etc., a Hindu, made this the..... day of ..... voluntarily and while in sound state of mind.

WHEREAS I am now 70 years old and have been keeping indifferent health for the past few months ;

AND WHEREAS I am possessed of considerable movable and immovable properties more particularly described in the schedule annexed hereto which are my self-acquired properties and which were acquired without any detriment to the ancestral property or to the family funds and I have the absolute powers of disposal over the same ;

AND WHEREAS I am anxious to make necessary arrangements in respect of the enjoyment of my properties after my life-time so that unnecessary misunderstanding and consequential wasteful litigation between the members of my family may be avoided. Therefore, I am executing this last Will and testament of mine of my own free will voluntarily without any compulsion or pressure of any person and with a sound disposing mind and declare as follows :

1. I hereby revoke all former Wills and codicils made by me at any time heretofore.
2. I have my wife *CD*, two daughters *EF* and *GH* and two sons *KL* and *MN* who will be entitled to succeed to my properties under law in the normal course. But my daughters are all married and they are living separately with their husbands. They have been properly and well provided for during their marriage. They are therefore not given any share in my properties under this Will.
3. I bequeath the property bearing No..... described as item No. 1 in the Schedule hereto to my first son *KL* absolutely to be held and enjoyed by him with full and absolute powers of alienation.
4. I bequeath the property bearing No..... described as item No. 2 in the Schedule hereunder to my second son *MN* absolutely to be held and enjoyed by him with full and absolute powers of disposal.
5. I bequeath to my wife *CD* the property bearing No..... and described as item No. 3 in the Schedule hereto absolutely to be held and enjoyed by her with full and absolute power of alienation.
6. Any assets, movable or immovable, which might be omitted from being mentioned in this Will or which may hereafter be acquired by me shall be taken by my wife and the two sons aforesaid in equal shares absolutely.
7. Though I have bequeathed no share in my properties to my daughters aforesaid, as a token of love and affection for them I hereby direct my two sons *KL* and *MN* that each one of them will pay to each one of my daughters a sum of Rs..... and this sum shall be a charge on the properties allotted to my above sons respectively hereto.
8. All the jewellery and ornaments, gold and silver, will belong to my wife absolutely and my sons or

daughters aforesaid will have no right to the same.

9. I hereby appoint my two sons *KL and MN* as the joint executors under this Will.

SCHEDULE OF PROPERTY

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

IN WITNESS WHEREOF I, the above-named testator have signed this Will hereunder the day and year first written above.

(Sd.).....

(AB)

Signed by the above-named *AB* in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as an attesting witness.

- 1.....  
2.....

**Will in Favour Of Minor Son**

I, *AB*, etc. execute this last Will of mine this day of ..... in the city of ..... voluntarily out of my own free will without any compulsion or pressure from any person and having a second disposing mind.

WHEREAS I had made a Will dated ..... in favour of my wife *CD* bequeathing all my properties to her ;

AND WHEREAS the said wife died *ON* leaving *EF*, aged 12 years as our only son.

1. I hereby revoke the Will made in favour of my wife *CD* on .....  
..
2. I hereby declare and bequeath all my properties, movable and immovable, belonging to me or which may belong to me and remain undisposed of during my life-time unto *EF*, my son aforesaid.
3. In case I should die before the said son *EF* attains majority, I appoint *GH*, etc.. as an executor under this Will, who shall realise all my to outstanding and administer the estate left by me for the benefit of *EF*, of the said legatee after defraying all expenses of such administration. The said executor shall be entitled during such administration to charge Rs..... per month as remuneration for his service till the aforesaid *EF* attains majority. When the said *EF* attains majority, the said *GH* shall handover all the estate then in existence unto the said *EF*. During the minority of the said *EF*, the executor shall act as guardian of the said *EF* and shall look after his education and training in a be fitting and useful manner so as to earn a decent living either as an engineer or as a member of some other noble profession. However, if the said *EF* attains majority during my life-time and survives me, this provision relating to appointment of the executor shall not be operative and the said *EF* shall be entitled to receive and appropriate as owner all and every part of the estate left by me.

IN WITNESS WHEREOF I have signed this Will in the presence of witnesses hereunder who have attested the same in my presence.

(Sd.).....

(AB) Testator

Signed by the above-named AB in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as an attesting witness.

1.....

2..... I have examined the testator and found him in sound disposing mind and as having fully understood the contents of this Will.

(Sd.).....

(Doctor)

### **Relinquishment Deed**

A release or relinquishment deed is an instrument whereby a person renounces a claim upon another or against any specified property which he is or may be entitled to enforce. It may be deed poll or as a deed to which both the releaser as well as the person in whose favour the release is made are made parties.

A release is sometimes called relinquishment. When considered from the point of view of the person in whose favour the transaction operates, it is “release” as it releases him or his property from an obligation or liability. When considered from the point of view of the releaser, it may be said to be a “relinquishment” as the releaser relinquishes a certain right which he has, or may be entitled to enforce.

A release must be in writing signed by all the releasers. It can be drafted as a deed poll or as a deed. If it is drafted as a deed then all releasers and all persons having an interest in the claim or property should be made parties. If the release is of a claim under an instrument then it would require attestation, if the instrument required attestation. If the release is required to be registered it should be attested by at least two witnesses. In other cases it may be attested by one witness.

If the subject matter of the release is an immovable property the amount of value of which exceeds Rs.100, it is compulsorily registrable. The release deed should contain the recitals regarding the origin of the claim, acknowledgement of the releaser about the claim and words and expressions sufficiently clear to convey the intention of the releaser to discharge the claim.

Under Article 55, Schedule I of the Indian Stamp Act, 1899 a simple release deed is chargeable to stamp duty. The duty is the same as bond (Article 15) for such amount or value as set forth in the release. A release or discharge of an instrument mentioned in Section 23A(1) of the Stamp Act is chargeable to the same stamp duty as the instrument. Such an instrument is chargeable to duty as an agreement or memorandum of agreement under article 5(c) of the Stamp Act.

### **SPECIMEN FORMS**

#### **DEED OF RELEASE BETWEEN TWO PARTNERS ON DISSOLUTION OF PARTNERSHIP**

THIS RELEASE is made on the..... day of..... BETWEEN AB, etc., (hereinafter called the “one party”) of the first part AND CD, etc. (hereinafter called the “other party”) of the second part.

WHEREAS the said AB, and CD, were carrying on in partnership the business of..... and the said business was wound up and the partnership dissolved by deed, dated..... executed by the said parties;

AND WHEREAS the winding up of the said business was entrusted to the arbitration of EF of..... and he after realising the debts and calling in the property and assets of the said business and after paying all creditors and liquidating all the liabilities apportioned the shares of the parties, giving to the said AB a sum of Rs..... and to the said CD the sum of Rs..... ;

AND WHEREAS the parties for mutual safety are desirous of executing this deed of release so that all future disputes in regard to the said partnership or the business may be set at rest.

NOW THEREFORE THIS DEED WITNESSES that in pursuance of the said mutual desire the said AB hereby releases the said CD and also that the said CD hereby releases the said AB from all sums of money, accounts, proceedings, claims and demands whatsoever which either of them at any time had or has up to the date of the said dissolution against the other, in respect of or in relation to the said partnership or the business of the said partnership.

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

#### **RELEASE BY A WARD ON ATTAINING MAJORITY IN FAVOUR OF HIS GUARDIAN**

BE IT KNOWN TO ALL that I, AB, aged about..... years, son of..... resident of..... do hereby in the circumstances and on the assurances herein set forth release and relinquish all claims, demands, right, of action, etc., which I may have on or against CD of..... my ex-guardian.

WHEREAS the said CD was appointed guardian of the person and property of the aforesaid AB, then in his minority, by order of the District Judge of..... in Misc. Case No..... decided on.....

AND WHEREAS I, on attaining majority, have gone into the said accounts upto date and accept them as true, correct and complete ;

AND WHEREAS the said CD has handed over the properties both movable and immovable of the value of Rs..... hitherto held by him as my guardian and I have taken possession of the same ;

AND WHEREAS I am satisfied that my aforesaid guardian did not commit any waste, neglect or malfeasance in respect of the properties or in the management thereof ;

AND WHEREAS by petition moved in this behalf in the said court, the said District Judge has by order, dated..... declared the attainment of majority by me and discharge of my guardian aforesaid.

NOW THESE PRESENTS WITNESS that in pursuance of the order of the District Judge dated..... and in consideration of the attainment of majority by me on the date..... and in consideration of my satisfaction about the accounts properly maintained by the said guardian CD, I hereby release and for ever discharge the said CD from all claims, demands or accounts whatsoever pertaining to the period of management of my property during my minority aforesaid by the said CD.

WHEREFOR I, the said AB, have signed this release at., day of..... on the .....

*Witness:*

(SD) .....

(AB)

#### **RELEASE OF PROPERTY FROM CHARGE OF MAINTENANCE UNDER A WILL**

THIS RELEASE is made on the..... day of..... BETWEEN AB, etc., and CD, etc., (hereinafter called the "releasers") of the one part AND EF, etc. of the other part.

WHEREAS IN, the grandfather of the said EF executed a will on the..... day of..... providing thereunder for the payment of Rs..... per month as maintenance to each of his two daughters named OP and RS respectively and by the said will charged the payment of the said amounts of maintenance on the property described in the Schedule hereto ;

AND WHEREAS the said OP having died, the maintenance allowance of Rs..... per month allowed to her has devolved by inheritance on her daughter, the said AB;

AND WHEREAS the said RS having died, Her maintenance allowance of Rs..... per month has devolved by inheritance on her son the aforesaid CD ;

AND WHEREAS the said *EF* has entered into an agreement to sell the property described in the schedule hereto free from all encumbrances and charges ;

AND WHEREAS at the request of the said *EF* the releasors have agreed to release the said property from their claim for maintenance aforesaid.

NOW THIS DEED WITNESSES that in pursuance of the aforesaid agreement the releasors hereby release the said property described in the Schedule hereto from the charge of the maintenance allowance aforesaid created by or under the will of the said *LN* and from any claim which the releasors or any of them may have for the same.

IN WITNESS WHEREOF, etc.

### **SCHEDULE**

#### **RELEASE BY CREDITORS TO A DEBTOR**

THIS RELEASE is made this..... day of..... BETWEEN *AB*, of, etc., *CD*, of, etc., and *EF*, of, etc. (hereinafter called “the creditors”) of the one part AND *GH*, of, etc. (hereinafter called “the debtor”) of the other part.

WHEREAS the debtor is indebted to the creditors in several sums specified against their respective names in the schedule hereto ;

AND *WHEREAS* the creditors have agreed to accept a composition of. .... paisas in the rupee in full discharge of their said debts.

NOW THIS DEED WITNESSES as follows :

1. The debtor agrees on or before the..... day of..... to pay to each of creditors who shall execute this deed before that date the composition of..... paisas in the rupee on his debt specified in the Schedule hereto.
2. Each of the creditors hereby agrees to accept such composition in full satisfaction of his said debt.
3. If such composition be duly paid each of the creditors hereby releases the debtor from his said debt.
4. This release shall be binding and effectual though (not executed by all creditors and though) all or any of the non-executing creditors may be paid in full.
5. If the said composition shall not be duly paid at the time and in manner aforesaid or if before the..... day of..... the debtor shall have been adjudged insolvent then this deed shall be void.

IN WITNESS HEREOF, etc.

## **GIFT**

### **Some Basic Aspects**

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 affected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.

For the purpose of making gift of movable property, the transfer may be affected 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.

Section 126 of T.P. 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 are 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 it was obtained by fraud or undue influence [*Ganga Baksh v. Jagat Bahadure* (1896) 23 Cal - 15]. But the rules of Muslim Law are different. Section 126 of T.P. Act, 1882 for revocation of gift cannot be applied to Muslims. A Muslim can revoke a gift even after delivery of possession except in following cases (1) when the gift is made by a husband to his wife or by a wife to her husband; (2) when the donee is related to the donor within the prohibited degrees; (3) when the gift is *Sadaka* (made to a charity or for a religious cause); (4) when the donee is dead; (5) when the thing given has passed out of the donees' possession by sale, gift or otherwise; (6) when the thing given is lost or destroyed; (7) when the thing given has increased in value; (8) when the thing given is so changed that it cannot be identified; (9) when the donor has received some thing in exchange for the gift.

Transfer of Property Act describes onerous gift also. 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 provision 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.

### Deed of Gift - How Made

The gift deed should be drafted as a deed of transfer with recitals if necessary. There is no consideration involved in gift as such no mention is required to be made of the same in the gift deed. However, the words "natural love and affection" is generally expressed in all cases of gift to relations, and "consideration of esteem and regard" is expressed when the gift is in favour of same person for whom the donor has regard e.g. when the donee is his religious preceptor. But for a Company these intra-personal characteristic may be necessary. A Company may make gift to honour a person for his outstanding achievements in social life if so authorised under its memorandum and articles.



### 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* ILR 44 Allahabad 339 FB). 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.

### Specimen Forms of Gift Deeds

Having been acquainted with the relevant provisions of the law concerning “gift” the following specimen forms of gift deed are given below which can be used in different situations by making suitable modifications as per the needs:

1. Deed of gift for love and affection.
2. Deed of gift of property for particular purpose.
3. Deed of gift of land in trust to charity.
4. Grant of land for building a temple.
5. Memorandum of gift of movables.
6. Gift of business goodwill.
7. Deed of gift of immovable property in favour of one of the sons of the donor.
8. Memorandum of a completed verbal gift in favour of the sons of the donor.

#### (1) 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”).

W HEREAS 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*

AB  
CD

#### (2) Deed of Gift of Property for Particular Purpose

THIS DEED of GIFT is made the..... day of..... BETWEEN AB of, etc. (hereinafter called “the Donor”) of the one part, and CD of, etc. (hereinafter called “the Donee”) of the other part.

WHEREAS the donee intends to start a school in his village..... for the education of girls AND whereas the donor is desirous of donating the land fully mentioned and described in the Schedule hereto to be used as a site for the said School.

NOW THIS INDENTURE W ITNESSETH that in pursuance of the said pious wish and desire and as a patron of the proposed school to be started by the donee, the donor do hereby and hereunder freely and voluntarily grant, convey, transfer, give, assign and assure unto and to the use of the donee and his successor ALL THAT, etc., etc., to be used solely and exclusively for the purpose of a site for construction and accommodation of the proposed girls' school TO HAVE AND TO HOLD the same so long as the same shall be used and occupied as a site and/or building of the school AND THAT the donee accepts the gift of the said property hereunder made solely and exclusively for the purpose hereinbefore indicated subject to the condition hereunder provided.

THIS INDENTURE FURTHER W ITNESSETH that it is expressly agreed and understood by and between the parties that this gift of land will stand *ipso facto* revoked in the event the land hereunder given is not used for the purpose of the intended school for which the same is given within a period of one year from the date of these presents or in the alternative the said school is abolished or shifted elsewhere or amalgamated with some other institution when and in all or any such event or events the land with all buildings and structures, if any erected thereon, shall revert to and revest in the donor or his heirs, executors, administrators and representatives and shall form part of his former estate as if this deed of gift was never executed nor intended. And it is further agreed by and between the parties that in case the land is acquired by the Government, the donee or his successors, including any person or persons managing the school, shall invest the compensation money to be awarded in purchase of another land or building to be used solely and exclusively for the school unless otherwise directed by any court of competent jurisdiction. The estimated value of the property is Rs.....

IN WITNESS WHEREOF the donor has executed this deed of a gift and delivered the same to the donee who has also executed the same in token acceptance thereof the day, month and year first above written.

*The Schedule above referred to*

*Signed, sealed and delivered*

AB

CD

### **(3) Deed of Gift of Land in Trust to Charity**

THIS DEED OF GIFT made the..... day of..... BETWEEN AB of etc. (hereinafter called "the Donor"), of the one part, and CD of etc., and EF of, etc. (hereinafter called "the Trustees") of the other part.

WHEREAS it is proposed to erect a *serai* for the use of travellers, and a committee has been constituted to raise subscriptions for construction of the building and creation of the endowment.

AND WHEREAS the trustees are members of such committee: AND W HEREAS the donor has agreed to contribute the piece of land hereinafter described in the schedule below as a site for such *serai* :

NOW THIS DEED WITNESSES that in pursuance of such pious wish and desire and as a patron for the proposed *serai* the said AB does hereby freely, voluntarily and absolutely and subject to the condition hereunder imposed grant; convey transfer and give unto and to the use of the said CD and EF and their successors in office, as trustees as aforesaid. ALL THAT, etc., (*describe the property*) and valued at Rs..... TO HAVE AND TO HOLD the same as trustees upon trust hereinafter mentioned. And it is hereby AGREED AND DECLARED by and between the parties hereto that the trustees and their successors in office shall from time to time and at all times hereafter stand possessed of the land hereby conveyed and building or buildings to be erected thereon IN TRUST to be used solely and exclusively as a *serai* for food and shelter of the travellers

all through the year free of any charge or other contribution. AND it is hereby further agreed and declared that in case the object of the gift fails; or in the event *serai* is closed or shifted anywhere or used for any purpose contrary to law or against religion or if the object of the gift is frustrated otherwise for any reason whatsoever - this gift will stand *ipso facto* revoked and the property shall in that event revert to and revest in the donor or his descendants as may remain alive with all improvements thereon free from any claim on that account as if the gift was never made nor intended unless otherwise directed in an appropriate action by a court of competent jurisdiction.

IN WITNESS WHEREOF etc.,

*The Schedule above referred to*

*Signed, sealed and delivered*

AB

CD

EF

#### **(4) Grant of Land for Building a Temple**

THIS GRANT is made on the..... day of..... BETWEEN AB, etc. (hereinafter called "the grantor") of the one part AND CD, etc. (hereinafter called "the grantee") of the other part.

WHEREAS the grantee on the..... day of..... applied to the grantor for the grant of land for the purpose of building a temple thereon;

AND WHEREAS the grantor has agreed with the grantee to grant to 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 religious 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 the custom of succession in the management of religious endowments recognized by the religion professed by the grantee for the purpose of a temple and for no other purpose in accordance with the covenants and the provisions hereinafter contained;
2. The grantee hereby covenants with grantor as follows:
  - (1) He will within ..... years 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.
  - (2) Such temple when erected shall be open to all persons professing the religion of the grantee for worship and prayer and for no other purpose.
  - (3) The grantee and his successors will 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.
  - (4) If the grantee fails to erect a temple within the said period of..... years, the said premises shall revert to the grantor.
  - (5) 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.

IN WITNESS WHEREOF etc.,

*Signed, sealed and delivered*

AB

CD

**(5) Memorandum of Gift of Movable**

BE IT KNOWN TO ALL CONCERNED that the undersigned..... son of..... by caste..... by occupation..... residing at..... (the Donor) do hereby declare and confirm that the donor on the..... day of..... 2020 in consideration of the natural love and affection which the donor had and bear for..... son of..... residing at..... by caste..... by occupation..... (the Donee) intended for and actually gave by words of mouth and also expressed himself to give unto and to the use of the donee freely and voluntarily, absolutely and forever the several properties mentioned in the Schedule below with all beneficial interest therein and delivered possession thereof simultaneously with a view to divest himself of all ownership therein and pass title thereof unto and in favour of and/or otherwise vest them in the donee to all intents and purposes AND THAT the donee doth hereby declare that the donee did at the same time accept the gift as aforesaid and entered into possession and control of the same.

The Schedule above referred to:

Serial No.	Description	Valuation	Remarks, if any.

IN WITNESS WHEREOF the parties to these presents have hereunto set and subscribed their respective hands and seals this..... day of..... 2020.

Signed, sealed and delivered by the within-named Donor at..... in the presence of Executed by the Donee at..... in the presence of:

**(6) Gift of Business Goodwill**

THIS DEED OF GIFT is made the..... day of..... Between (donor) of etc. (hereinafter called donor) of the one part and (donees) of etc. (hereinafter called the donees) sons of the other part.

WHEREAS:

1. Grantor has for many years past carried on the trade or business of..... at..... (hereinafter called the donor's business) and in connection therewith is the registered proprietor of the trade marks relevant particulars of which are set out in the first schedule hereto.
2. The donor is the inventor and patentee of the invention described in the second schedule hereto (hereinafter called the invention) the patent in respect of which was granted and trade mark registered..... under number..... of.....
3. By articles of partnership bearing even date with and executed immediately before this deed and made between the donees respectively the donees agreed to carry on in co-partnership the trade or business of..... (hereinafter referred to as the partnership business) subject to the stipulations therein contained for a term of..... years from the date thereof.
4. With a view to setting up the donees in the partnership business the donor is desirous of assigning the goodwill of his business and the said trade marks to the donees and granting to them the license hereinafter contained.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. In consideration of his natural love and affection for the donees the donor hereby assigns unto the donees all that the goodwill of the donor in his business and also all those the trade marks specified in the first schedule hereto and all the rights and privileges incidental thereto to hold the same unto the donees absolutely as joint tenants as the property of the partnership business subject to the provisions and stipulations contained in the said articles of partnership.
2. For the consideration aforesaid the donor hereby grants unto the donees and the survivor of them personally and so that this license shall not be assignable the sole and exclusive licence to make use, exercise and send the invention in all parts of India during the residue of the term of the said letters patent and any renewal or extension of such term if the donees or such survivor shall so long continue to carry on the partnership business subject to the donees or the survivor of them at their or his own cost keeping up the said letters patent and with power to the donees or the survivor of them at the like cost to take in the name of the donor all necessary legal proceedings for effectually protecting or defending the same against infringement.

IN WITNESS WHEREOF I have executed this deed of gift which has been accepted on behalf of the donee.

*THE FIRST SCHEDULE ABOVE REFERRED TO:*

*THE SECOND SCHEDULE ABOVE REFERRED TO:*

*Signed, sealed and delivered by the donor:*

**(7) Deed of Gift of Immovable Property in Favour of One of the Sons of the Donor**

THIS DEED made this..... day of..... Between A.B. of..... (hereinafter called the donor) of the part and C, D, son of said A, B, (hereinafter called the donee) of the other part; WHEREAS the donor is the absolute owner of the property hereinafter fully mentioned and described; and

WHEREAS the donee is one of the sons of the donor and as such the donor has great love and affection for the said donee and is desirous, out of such love and affection of disposing of the said property in the manner hereinafter appearing.

NOW THE DEED WITNESSETH that in pursuance of the said intention and in consideration of love and affection, the said donor, out of his own free will and pleasure and in full possession of his senses, doth hereby give, convey, grant, transfer and confirm unto the said donee, all and singular the property known as Bungalow No..... on..... Road..... containing by estimate..... Bighas with all rights appurtenant thereto;

To have and hold the said bungalow with rights appurtenant thereto to the use of the said donee for ever.

The donor hereby covenants with the said donee that notwithstanding any act or deed, matter or thing by the said donor, donee, executed or knowingly committed or suffered to the contrary, the donor now hath in himself good rightful power and absolute authority to give, grant, convey and dispose of the said property in the manner aforesaid, and that the said donee shall and may from time to time, and at all times hereafter peaceably and quietly enter upon, have hold, occupy, possess and enjoy the said premises hereby conveyed with appurtenances, and receive and take the rents and profits thereof and every part thereof without any trouble, eviction, interruption, claim, whatsoever from or by the donor or by any person claiming from, under or in trust for him.

For the purposes of stamp duty, it is further declared that the value of the gifted property is Rs.....

IN WITNESS WHEREOF the parties aforementioned have hereunto set and subscribed their names on the date first above written.

*Signature of witnesses.*

*Signature of donor and donee.*

**(8) Memorandum of a Completed Verbal Gift in Favour of the Sons of the Donor**

Memorandum that on this..... day of..... The undersigned A of etc., in consideration of love and affection for his son B gave verbally all and singular his property and effects as specified in schedule hereto to the said B for his sole use and benefits absolutely and at the same time delivered possession thereof to him, and the said B at the same time accepted the gift of the said property and took possession of the same.

*Signed A and B*

Witnesses to the signatures of both the donor and the donee.

The schedule above referred to containing description of the property verbally gifted.

*Note : This memorandum being a record of a completed transaction does not, it is submitted, require any stamp and is not compulsorily registerable.*

### LESSON ROUND UP

- There is no particular form prescribed for the drawing up of trade contracts, except that they must fulfil all the essential requirements of a valid contract under the law applicable to the contract.
- Building contracts, being legal documents, have to be drawn in accordance with the provisions of the Indian Contract Act. Such an agreement as stated above under “dealership contracts”, must have all the essential ingredients of a contract.
- A commercial agency contract should inter alia include provisions regarding the date of commencement and of termination of the agency, the goods or products to be covered by the agency, the contractual territory and the nature of the agency.
- 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.
- 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.
- The important ingredient of the arbitration agreement is the consent in writing to submit dispute to arbitration. Consent in writing implies the application of mind to the reference of dispute to arbitration in accordance with Arbitration and Conciliation law and the binding nature of the award made thereunder.
- The parties to the dispute will enter into an agreement to refer the dispute to arbitration and will agree on the terms of reference, that is, to state clearly and precisely the matter the arbitrator is required to decide. An arbitrator is not bound by the strict rules of evidence of courts of law. However, he does follow the practice of presentation and conduct of a case in a court of law. After hearing the evidence of both the parties, the arbitrator makes his award. The award must be within the terms of reference.
- A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The terms of a guarantee must be strictly construed. The surety receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into.
- In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee.



- Hypothecation is a form of transfer of property in goods. Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass. This form of transfer is not regulated in India by any statute.
- Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing (BPO). 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 and minimizes complications when a dispute arises.
- Service contracts are drafted in the same way as other agreements. The terms of employment should be definitely fixed and clearly expressed and nothing should be left to presumptions. They are required to be both affirmative (describing the acts and duties to be performed) as well as negative (putting restrictions on the acts of the employee during and/or after the term of employment). As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man,
- Leave and License Agreements are preferred by the parties to get out of the rigours of landlord-tenant relationship. In a Leave and License Agreement, the juridical possession of the premises is deemed to remain with the licensor and the licensee is said to be in constructive possession of the said premises. Thus, a leave and license does not create any interest in the premises in favour of the licensee but gives the licensee the mere right to use and occupy the premises for a temporary period.
- Section 59 of the Indian Succession Act, provides for the persons capable of making wills. Accordingly, every person of sound mind not being a minor may dispose of his property by will.
- 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.

### TEST YOURSELF

1. Define building contract. Draft a specimen building contract including all the terms and conditions which are essential for such a contract.
2. Explain the precautions which should be taken while drafting a commercial agency contract? Draft a specimen agency contract.
3. Explain in brief as to what do you understand by 'collaboration agreement'. Discuss various guidelines which are required to be followed while entering into a foreign collaboration agreement.
4. Explain in brief counter guarantee, fidelity guarantee and performance guarantee. Draft specimen deed of guarantee by a bank on behalf of a company for the performance of a contract in favour of State Government.
5. Draft a specific arbitration agreement.
6. Draft a specimen agreement of employment of manager of a business concern.
7. What are the factors to be considered while giving out premises on leave & license basis? Draft a specimen of leave and license agreement.
8. Enumerate types of will.
9. Draft a specimen Deed of Gift for Love and Affection.





# Lesson 5

## Drafting and Conveyancing Relating to Various Deeds and Documents (II)

### LESSON OUTLINE

- Promissory Note
- Deeds of Power of Attorney
- Hire-Purchase Deeds
- Family Settlement Deeds
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

It is a common practice in business to make use of certain documents as means of making payment. Some of these documents are called Negotiable instruments. The law relating to Negotiable Instruments is contained in the Negotiable Instruments Act, 1881. It deals with promissory notes, bills of exchange and cheques - the three kinds of negotiable instruments in most common use.

A power of attorney is one of the documents which plays an important role in conveyancing. Granting a Power of Attorney is a legal process that involves the drafting of a document which assigns to another person the power to act as your legal representative.

Every person with assets needs a will. It ensures that his wishes are honoured after his death and stipulates how his estate should be managed and who should receive his assets. A will needs to be carefully drafted so as to avoid courts having to interpret what the testator actually meant.

A release or relinquishment deed is an instrument whereby a person renounces a claim upon another or against any specified property which he is or may be entitled to enforce.

Hire purchase contract affords facilities to acquire an asset to an intending purchaser who is unable to pay the full price of the asset at one time in lump sum. It is important for the students to carefully bear in mind all the legal aspects to be taken into account while drafting these documents to avoid any adverse situation in the future.

## PROMISSORY NOTE

A detailed discussion of the Negotiable Instruments Act, 1881 is not within the scope of this lesson. Students are, therefore, advised to study the Negotiable Instruments Act, 1881 in detail on their own so as to recapitulate their understanding of the provisions of the Act. However, introductory observations on promissory note are made below.

Promissory note is one of the negotiable instruments recognized under the Negotiable Instruments Act, 1881. A “promissory note” is defined under Section 4 of the Negotiable Instruments Act, 1881 as “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”.

### Illustrations:

A signs instruments in the following terms:

- (a) “I promise to pay B or order Rs.500.”
- (b) I acknowledge myself to be indebted to B in Rs. 1,000 to be paid on demand for values received.”
- (c) “Mr. B, I.O.U. (I owe you) Rs. 500”
- (d) “I have taken from you Rs. 100, whenever you ask for it have to pay”.

The instruments marked (a) and (b) are promissory notes. The instruments respectively marked (c) and (d) are not promissory notes.

## Parties to a Promissory Note

A promissory note has the following parties:

- (a) *The maker*: the person who makes or executes the note promising to pay the amount stated therein.
- (b) *The payee*: one to whom the note is payable.
- (c) *The holder*: is either the payee or some other person to whom he may have endorsed the note.
- (d) The endorser.
- (e) The endorsee.

## Essentials of a Promissory Note

To be a promissory note, an instrument must possess the following essentials:

- (a) It must be in writing. An oral promise to pay will not do.
- (b) It must contain an express promise or clear undertaking to pay. A promise to pay cannot be inferred. A mere acknowledgement of debt is not sufficient. If A writes to B  
“I owe you (I.O.U.) Rs. 500”, there is no promise to pay and the instrument is not a promissory note.
- (c) The promise or undertaking to pay must be unconditional. A promise to pay “when able”, or “as soon as possible”, or “after your marriage to D”, is conditional. But a promise to pay after a specific time or on the happening of an event which must happen, is not conditional, e.g. “I promise to pay Rs. 1,000 ten days after the death of B”, is unconditional.
- (d) The maker must sign the promissory note in token of an undertaking to pay to the payee or his order.
- (e) The maker must be a certain person, i.e., the note must show clearly who is the person engaging himself to pay.

- (f) The payee must be certain. The promissory note must contain a promise to pay to some person or persons ascertained by name or designation or to their order.
- (g) The sum payable must be certain and the amount must not be capable of contingent additions or subtractions. If A promises to pay Rs. 100 and all other sums which shall become due to him, the instrument is not a promissory note.
- (h) Payment must be in legal money of the country. Thus, a promise to pay Rs. 500 and deliver 10 quintals of rice is not a promissory note.
- (i) It must be properly stamped in accordance with the provisions of the Indian Stamp Act. Each stamp must be duly cancelled by maker's signature or initials.
- (j) It must contain the name of place, number and the date on which it is made. However, their omission will not render the instrument invalid, e.g. if it is undated, it is deemed to be dated on the date of delivery.

*[Note: A promissory note cannot be made payable or issued to bearer, no matter whether it is payable on demand or after a certain time (Section 31 of the RBI Act).]*

### Specimen Forms

#### Promissory Note Payable on Demand

On Demand we, A.B., aged about ..... years, son of Shri ..... Resident of ..... AND C.D., aged about ..... Years, son of Shri ..... Resident of ..... jointly and severally promise to pay to E.F., aged about ..... years, son of Shri ..... resident of ..... Or order the sum of Rupees

..... (Rs. ....) only, with interest at the rate of .....% per annum until repayment for value received.

DATED AND DELIVERED at ..... this the .....day of ..... 2020.

Sd. A.B.

Sd. C.D.

#### Promissory Note in Consideration of Loan

Allahabad,

June 20, 2020

Rs.....

In consideration of the loan of Rs..... advanced by CD etc. to me, I hereby promise to repay the said loan of Rs..... (in words) with interest at ..... per cent per annum to the said CD or order.

(Signed).....

#### Joint Promissory Note

New Delhi

May 5, 2020

Rs.....

On Demand (or..... months after date) (or.....days after sight) we hereby promise to pay to CD etc., or order the sum of Rs.....(in words).

Name and address of makers

Signature of makers

1.....

1.....

2.....

2.....

3.....

## DEEDS OF POWER OF ATTORNEY

### Introduction

Wharton, in his *Law Lexicon* (1953), page 784, defines a power of attorney as “a writing given and made by one person authorising another, who, in such case, is called the attorney of the person (or donee of the power), appointing him to do any lawful act in-stead of that person, as to receive rents, debts, to make appearance and application in court, before an officer of registration and the like. It may be either general or special, i.e., to do all acts or to do some particular act”.

Stroud, in his *Judicial Dictionary* (1953), page 2257, defines a power of attorney as an authority whereby one is “set in turn, stead or place” of another to act for him.

A definition of power of attorney is also contained in Section 2(21) of the Indian Stamp Act, 1899 which reads as follows:

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

In terms of Section 1A of the Powers-of-Attorney Act, 1882 (7 of 1982) as amended by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982), a power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney.

A power of attorney executed for the purpose of a specific act is called a “special power of attorney”. 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. A power of attorney executed for the purpose of generally representing another person, or for performing more than one act, is called a ‘general power of attorney’.

A power of attorney can be executed in favour of more than one person. If a power of attorney is executed in favour of more than one person, it would be desirable to provide whether such donees will act jointly or severally. In the absence of such an express provision authorising them to act severally, they will be entitled to act only jointly.

The law relating to the powers of attorney is governed by “Powers-of-Attorney Act, 1982” as amended by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982). A copy of the Act is reproduced at *Annexure I*.

Since the donee of a power of attorney is an agent of the donor, it is essential to know about the law of agency. Several matters concerning agency are dealt with, not in the Powers-of-Attorney Act, but in the Indian Contract Act, 1872 (sections relating to agency). Important amongst these are:

- (a) who may execute a power;
- (b) who may become an attorney;
- (c) when is a power terminated; and
- (d) whether a power coupled with interest is revocable.

The reason, obviously, is that these matters would be governed by the general principles of the law of agency. A power of attorney is an authority in writing to another person to act for and in the name of the person

who executed the power. Therefore, speaking generally, the law relating to authority, that is, agency, would be attracted when a power of attorney is executed.

**Note:** *The students are, therefore, advised to refer Chapter X of the Indian Contract Act, 1872 with a view to acquainting themselves with the rights and liabilities of an agent. For the authority of a partner in a firm, the provisions of the Indian Partnership Act, 1932, may be looked into.*

### **Who can Execute Power of Attorney**

A power of attorney can be executed by any person, who can enter into a contract, i.e., a person of sound mind who has attained majority. A power of attorney can be executed only in favour of a major. 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. Thus, in such cases, there is relationship of agent and principal and such relationship can be entered into by majors and not by minors.

Section 2 of the Powers-of-Attorney Act, 1882, in its operative part provides that the donee of a power of attorney may execute or do any assurance, instrument or thing in his own name and signature, and an instrument or thing so executed or done shall be as effectual in law as if it had been executed or done “by the donee of the power in the name and with the signature and seal of the donor thereof”. Simply stated, the section provides that the signature of the agent will be deemed to be the signature of the principal.

Section 5 of the Powers-of-Attorney Act, 1882, relating to married women’s power to execute a power of attorney provides that a married woman of full age shall, by virtue of this Act, have power, as if she were unmarried, by a non testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers-of-attorney, shall apply thereto.

### **Form of Deed of Power of Attorney**

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

The powers conferred on the attorney should be specifically stated after the appointment, preferably, in separate paragraphs. Sometimes, after giving specific powers, a general clause empowering the attorney to do all such lawful acts as the attorney should think reasonable is added, but this is not ordinarily necessary, as according to authorities such a clause does not extend or widen the authority. For specimen forms of the special powers of attorney, see *Annexure II*. Specimen forms of some of powers of attorney relevant for companies are given at *Annexure IV*.

### **Authentication of Power of Attorney**

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. If a power of attorney is so authenticated, the courts shall presume 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.

Under Section 57(6) and (7) of that Act, the seals of Notary Public are taken judicial notice of.

Under Section 32(c) of the Indian Registration Act, 1908, a power of attorney can be granted to an agent to present a document for registration; but, under Section 33(1) of that Act, only certain powers of attorney are recognised. But 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.

### Duration of Power of Attorney

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

### Revocable and Irrevocable Power of Attorney

A power of attorney executed in favour of a person can always, at the discretion of the donor thereof, be revoked. As we have seen earlier, 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 draft of the irrevocable power of attorney is given at *Annexure III*. Such a power of attorney will need registration.

### Power of Attorney by a Company

A company being an artificial person can act through agents, i.e., its officers. Powers are delegated by companies to the agents through Board resolutions or through powers of attorney. Delegation of powers through a power of attorney is resorted to in view of the fact that it will be very easy to prove the execution thereof. In the case of a resolution, it would be necessary to produce the Minutes Books, etc., to prove the passing of the resolution of delegation of the powers. Further, under Section 22 of the Companies Act, 2013, a company may, by writing under its Common Seal if any, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in India or outside India.

As we have seen that companies act through agents, powers to the agents of a company, i.e., officers of the company, are delegated through powers of attorney. Generally, a detailed power of attorney is executed



in favour of the managing director or chief executive of the company delegating to him all the powers which under the Companies Act, directors of a company can delegate/sub-delegate. In regard to routine matters, like execution of excise documents, and execution of various deeds and documents in connection therewith, the powers relating to court cases are delegated to various officers of the company. Form of such powers of attorney are given at *Annexure IV*. A specimen of a special power of attorney filed with the Registrar at the time of incorporation of a company is given at *Annexure V*. A delegate unless expressly authorised by the principal cannot sub-delegate the powers. If the intention is to empower the delegate to sub-delegate his powers, then it should be specifically mentioned in the power of attorney.

### **Stamp Duty on Power of Attorney**

Power of attorney is liable to stamp duty under the provisions of the Indian Stamp Act, 1889. Duty varies from State to State. The exact amount of the duty will depend upon the State in which the power of attorney is executed. Further, if a power of attorney executed in one State has to be sent to another State where the stamp duty payable is higher, for use, then the power of attorney should be stamped with the difference in the duty before it is so used. Otherwise, the power of attorney could be impounded.

If a power of attorney is executed in a foreign country, it should be stamped within three months of its being received in India. If it is not so stamped within the period of three months of it being brought to India, then the same will be deemed to be unstamped and cannot be acted upon.

The proxy lodged with the Company under Section 105 of the Companies Act, 2013, is also a power of attorney. In that case, a shareholder who is not able to attend the meeting authorises another person on his behalf to attend and vote at the meeting. It is a particular power of attorney.

In connection with the registration/subscription of shares or debentures or transfer of shares/debentures invariably companies receive powers of attorney executed by certain non-resident shareholders or resident shareholders or by companies. These powers of attorney generally provide for making of investment and varying the investments so made and empowering the attorney to sign the transfer deeds for transfer of shares from or to the name of the principal.

### **Construction of a Power of Attorney**

As a rule, a power of attorney, should be construed strictly and general words must be interpreted in the light of the special powers, although they include incidental powers necessary for carrying out the authority. The general words used in the subsequent clauses of a power of attorney must be read with the special or specific powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers mentioned in the powers of attorney.

The following two well known rules of construction should be borne in mind while interpreting a power of attorney (Mulla: *Contract Act*, Page 539):

1. That regard must be had to the recitals, if any, as showing the scope and object of the power, as such recitals will control any general terms in the operative part of the instrument. Thus, when it was recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority continued only during the principal's absence.
2. Where special powers are afforded by general words, the general words are to be construed as limited to what is necessary for the exercise of the special power and as enlarging those powers only when necessary for the carrying out the purposes for which the authority is given.

Any power which has not been expressly delegated should not be implied. For instance, if a delegate has been authorised to invest in shares in a company, it should not be implied that the power to sell has been delegated unless the authority for varying the investment has also been delegated to the attorney.

Similarly, the power of investment in shares does not automatically confer the power of transfer the shares purchased in exercise of the power. The power delegated for investment in shares or transfer of shares should not be deemed to include the power of investment in debentures of a company. Great care has, therefore, to be taken in interpreting a power of attorney.

Precisely, some of the principles governing the construction of a power of attorney are:

- (1) the operative part of the deed is controlled by the recitals;
- (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts;
- (3) the general words do not confer general powers, but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose;
- (4) a power of attorney is construed so as to include all incidental powers necessary for its effective execution [A.I.R. 1972 Gauhati 122 (125)].

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within four corners of the instrument, either in express terms or by necessary implication (*Bank of Bengal v. Ramanathan Chetty*, 43 I.A. 48, 55).

### Registration of Power of Attorney

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) I.L.R. 35 Cal. 845, 848].

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 T.C. 10, 17) since it does not come under any of the documents specified in the Indian Registration Act as requiring registration.

### Letters of Authority

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

## ANNEXURE I

### THE POWERS-OF-ATTORNEY ACT, 1882

(ACT 7 OF 1882)

[24<sup>th</sup> February, 1982]

An Act to amend the law relating to Powers-of-Attorney.

For the purpose of amending the law relating to Powers of Attorney, it is hereby enacted as follows:

**1. Short title:** This Act may be called THE POWERS-OF-ATTORNEY ACT, 1982.

*Local Extent:* It applies to the whole of the India <sup>1</sup>[except the State of Jammu and Kashmir];

*Commencement* and it shall come into force on the first day of May, 1882.

<sup>2</sup>**[1A. Definition:** In this Act “Power-of-attorney” includes any instrument empowering a specified person to act for and in the name of the person executing it].

**2. Execution Under Power-of-Attorney:** The donee of a power of attorney may, if he thinks fit, execute or do any <sup>3</sup>[.....] instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and things executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force.

**3. Payment by Attorney Under Power, Without Notice of Death, etc., Good** - Any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reasons that, before the payment or act, the donor of the power had died or become <sup>4</sup>[.....] of unsoundness of mind <sup>4</sup>[.....] or insolvent, or had revoked the power, if the fact of death <sup>4</sup>[.....] unsoundness of mind <sup>4</sup>[.....] insolvency or revocation was not at the time of the payment or act, known to the person making or doing the same.

But this section shall not affect any right against the payee of any person interested in any money so paid, and that person shall have the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

This section applies only to payments and acts made or done after this Act comes into force.

**4. Deposit of Original Instruments Creating Powers-of-Attorney:** (a) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence may, with the affidavit or declaration, if any, be deposited in the High Court <sup>5</sup>[..... or District Court] within the local limits of whose jurisdiction the instrument may be.

(b) A separate file of instrument so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and a certified copy thereof shall be delivered out to him on request.

(c) A copy of an instrument so deposited may be presented at the office and may be stamped or marked, as a certified copy, and, when so stamped or marked, shall become and be a certified copy.

(d) A certified copy of an instrument so deposited shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court <sup>5</sup>[or District Court].

(e) The High Court may, from time to time, make rules for the purposes of this section, and prescribing, with the concurrence of the State Government, the fees to be taken under clauses (a), (b) and (c).

(f) (\* \* \* \* \*)<sup>6</sup>

(g) This section applies to instruments creating powers-of-attorney executed either before or after this Act comes into force.

1. Substituted for the words ‘except Part B States’ by the Part B States (laws) Act, 1951 (3 of 1951) Section 3 and Schedule (1.4.1951).

2. Inserted by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982) Section 2 (22.10.1982).

3. “Assurance”, omitted by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982) Section 3 (22.10.1982).

4. Words “Lunatic”, “or bankrupt”, “Lunacy” and “Bankruptcy” omitted by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982) Section 4 (22.10.1982).

5. Inserted by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982) Section 5 (22.10.1982).

6. Clause (f) was omitted by the Lower Burma Courts Act, 1900 [(vi) of 1900] (Section 48 and Schedule II).

**5. Power-of-Attorney of Married Women:** <sup>7</sup>[A married woman of full age shall, by virtue of this Act, have power, as if she were unmarried] by a non testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act, relating to instruments creating powers-of-attorney, shall apply thereto.

This section applies only to instruments executed after this Act comes into force.

**6. Act XXVIII of 1866 Section 39, Repealed [Repealed by the Amending Act, 1891 (XII of 1891)].**

## ANNEXURE II

### SPECIMEN FORMS OF SPECIAL POWER-OF-ATTORNEY

#### (a) Power-of-Attorney to Present Document for Registration

BY THIS POWER OF ATTORNEY, I, AB of etc., do hereby appoint CD of, etc., my attorney for me and on my behalf, to appear for and represent me before the Sub-Registrar of..... of all times as may be necessary and to present before him for registration the..... deed dated the..... day of..... made between, etc., to admit the execution of the said deed by me (*if necessary to admit the receipt of consideration*), to do any act, deed or thing as may be necessary to complete the registration of the said deed in the manner required by law and when it has been returned to him after being duly registered, to give proper receipt and discharge for the same.

And I, the said AB, do hereby agree and declare that all acts, deeds and things done, executed or performed by the said CD shall be valid and binding on me to all intents and purposes as if done by me personally which I undertake to ratify and confirm whenever required.

*Signed, sealed and delivered*

*Witnesses*

AB

#### (b) Power-of-Attorney to Sell a Particular Property

BY THIS POWER OF ATTORNEY, I, AB, of etc., hereby appoint CD of, etc., my attorney, in my name and on my behalf to do *inter alia* the following acts, deeds and things, viz.:

1. To negotiate on terms for and to agree to and sell my house No..... (*or, etc.*) situate at, etc., fully mentioned and described in the *Schedule* hereto to any purchaser or purchasers at such price which my said attorney, in his absolute discretion, thinks proper, to agree upon and to enter into any agreement or agreements for such sale or sales and/or to cancel and/or repudiate the same.
2. To receive from the intending purchaser or purchasers any earnest money and/or advance or advances and also the balance of purchase money, and to give good, valid receipt and discharge for the same which will protect the purchaser or purchasers without seeing the application of the money.
3. Upon such receipt as aforesaid in my name and as my act and deed, to sign, execute and deliver any conveyance or conveyances of the said property in favour of the said purchaser or his nominee or assignee.
4. To sign and execute all other deeds, instruments and assurances which he shall consider necessary and to enter into and/or agreement to such covenants and conditions as may be required for fully and effectually conveying the said property as I could do myself, if personally present.
5. To present any such conveyance or conveyances for registration, to admit execution and receipt of

7. Substituted for the words "A married woman, whether a minor or not, shall by virtue of this Act, have power, as if she were unmarried and of full age" by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982) Section 6 (22.10.1982).

consideration before the Sub-Registrar or Registrar having authority for and to have the said conveyance registered and to do all acts, deeds and things which my said attorney shall consider necessary for conveying the said property to the said purchaser or purchasers as fully and effectually in all respects as I could do the same myself.

And I hereby agree to ratify and confirm all and whatever other act or acts my said attorney shall lawfully do, execute or perform or cause to be done, executed or performed in connection with the sale of the said property under and by virtue of this deed notwithstanding no express power in that behalf is hereunder provided.

IN W ITNESS WHEREOF I, the said AB, have hereto signed (or, put my signature, or set hand and seal at..... this..... day of.....

Schedule of the property to be sold.

*Signed, sealed and delivered*

AB

**(c) Power-of-Attorney to Advocate for Court Case**

In the Court of etc.

Suit (or Case) No..... of 2020

Plaintiff (or Applicant, Complainant) -

AB, son of....., of, etc. versus

Defendant (or Non-applicant, or Accused), -

CD, son of....., of, etc.

Claim for (or, in the matter of), etc.

BY THIS POWER OF ATTORNEY, I, CD, defendant (or, etc.), in the above suit (or case), do hereby nominate, constitute and appoint EF, advocate etc., my attorney, for me, in my name and on my behalf to appear, act and plead in the said case, to make or present written statements, applications or petitions to the court, to withdraw and receive documents and any money from the court or from the opposite party, either in execution of the decree or otherwise, and on receipt thereof, to sign and deliver for me proper receipts and discharges for the same, and to do all other lawful acts, deeds and things in connection with the case as effectually as I could do the same, if I were personally present; to engage and appoint any other advocate or advocates whenever my said advocate thinks proper to do so.

Provided, however, that, if any part of the advocate's fee remains unpaid before the first hearing of the case (or, etc.), or if any hearing of the case be fixed beyond the limits of this town, then and in such an event my said advocate shall not be bound to appear before the court; Provided also that if the case be dismissed by default, or if it be proceeded *ex parte*, the said advocate shall not be held responsible for the same except in case of gross negligence, wilful default. And all whatever my said advocate shall lawfully do, I do hereby agree to and shall in future ratify and confirm.

*Signed, sealed and delivered*

CD

Accepted, subject to the aforesaid conditions.

EF, Advocate.

**IRREVOCABLE POWER-OF-ATTORNEY**

(To be stamped as a General Power of Attorney)

THIS POWER OF ATTORNEY granted at this..... day of..... 2020 by 'A Limited' a company within the meaning of the Companies Act and having its registered office at..... (hereinafter referred to as 'the Borrower' which expression shall, unless excluded by or repugnant to the context include its successors and assigns) in favour of..... a corporation constituted by..... and having its Head office at..... (hereinafter referred to as "the LENDER", which expression shall, unless excluded by or repugnant to the context, include its successors and assigns).

1. WHEREAS by an Agreement dated the..... day of..... 2020 (hereinafter referred to as "the said Agreement") made between the 'Borrower' and the 'Lender'. 'Lender' has agreed to grant the 'Borrower' financial assistance by way of a term of Rs..... (Rupees.....) (hereinafter referred to as "the financial assistance") for the purposes and on the terms and conditions set out therein.

2. 'Lender' has stipulated, *inter alia*, that if so required by 'Lender' at any time, the 'Borrower' shall secure Lender's loan of Rs..... (Rupees.....) together with interest, commitment charge, additional interest by way of liquidated damages, costs, charges, expenses and other moneys payable by the Borrower to Lender under the said Agreement by a registered legal mortgage in English form of all the properties of the Borrower immovable and movable, present and future and other assets, including uncalled capital and the charge in favour of the Lender to rank *pari passu* with the charge or charges created and/or to be created by the Borrower in favour of the Lender, AND the charge of Lender on movables to be subject to the charge or charges created and/or to be created by the Borrower in favour of its bankers on stocks of raw-materials, semi-finished and finished goods and consumable stores and book debts and such other movables as may be permitted by Lender in writing to secure borrowings for working capital requirements.

3. Lender has also stipulated that the Borrower shall, for the aforesaid purpose, execute an undertaking in favour of the Lender and shall simultaneously with the execution of such undertaking, grant an irrevocable power of attorney to the Lender, being these presents, authorising the Lender to execute in favour of itself a first legal mortgage in English form for and on behalf of the Borrower in the event of the Borrower failing, when required by the Lender, to duly execute and register a first legal mortgage in English form of all its immovable and movable properties as aforesaid.

4. The Lender has called upon the Borrower to execute these presents which the Borrower has agreed to do in the manner hereinafter expressed.

NOW THIS DEED WITNESSETH THAT in consideration of the Lender having sanctioned the said financial assistance to the Borrower, the Borrower hereby *irrevocably* appoints the Lender to be the true and lawful attorney of the Borrower in the name and for and on behalf of the Borrower to do, execute and perform the following acts, deeds and things, namely:

- (i) To make, execute, sign, seal and deliver in favour of the Lender, at the expense of the Borrower, in all respects, a first legal mortgage in English form of all its immovable and movable properties, present and future, including lands, here-ditaments and premises and fixed plants and machinery and uncalled capital agreed to be mortgaged to the Lender, with all such covenants, conditions, provisions, and stipulations, as may, in the absolute discretion of the Lender, be deemed necessary or expedient and in particular granting in favour of the Lender a right to take over the management of the Borrower, a right to appoint a receiver of the undertaking of the Borrower and a right to sell the Borrower's properties without intervention of the Court, for the purposes of securing to the Lender all the moneys payable by the Borrower's under the said Agreement, as aforesaid, the charge of the Lender to rank *pari passu* with the charge or charges created and/or to be created by the Borrower in favour of the Lenders for



the purposes and in the manner mentioned therein. PROVIDED THAT the charge of the Lender on movables shall be subject to the charge or charges created and/or to be created by the Borrower in favour of its bankers on its stocks of raw materials, semi-finished and finished goods and consumable stores and book debts and such other movables as may be permitted by the Lenders in writing to secure borrowings for working capital requirements.

- (ii) To investigate or cause to be investigated, at the expense of the Borrower in all respects, the Borrowers' title to the immovable properties agreed to be mortgaged by the Borrower to the Lender and to take all steps to make out title to the said properties to the satisfaction of the Lender as and when required by the Lender.
- (iii) To apply for and obtain necessary clearance certificates under Section 230A of the Income Tax Act, 1961.
- (iv) To do or cause to be done all such acts, deeds and things as may be necessary or proper for the effectual completion and registration of the said mortgage.
- (v) AND GENERALLY to do or cause to be done every other act, matter or thing which the LENDER may deem necessary or expedient for the purposes of or in relation to these present.
- (vi) The Borrower hereby agrees to deposit in advance with the Lenders sufficient sums to cover the expenses to be incurred on investigation of title, stamp duty and registration charges and other miscellaneous expenses for the purpose of and in connection with the execution and registration of the said mortgage deed in English form.

In the event of failure on the part of the Borrower to deposit sufficient amounts with the Lenders, the Lenders may, but shall not be obliged to, incur the expenditure for the said purposes and the Borrower shall, on receipt of notice of demand from the Lenders, reimburse the same to the Lenders together with interest at the rate stipulated by the Lender from the date of payment by the Lender.

- (vii) The Borrower hereby agrees that all or any of the powers hereby conferred upon the Lender may be exercised by any officer or officers of the Lender nominated by the Lender in that behalf.
- (viii) AND the Borrower does hereby declare that all and every receipts, documents, deeds, matters and things which shall by the Lender or by any of its officers appointed by the Lender in that behalf, be made, executed or done for the aforesaid purposes by virtue of these presents shall be as good, valid and effectual to all intents and purposes whatsoever as if the same had been made, executed or done by the Borrower in its own name and person. The Borrower hereby agrees to ratify and confirm all that the Lender or any of its officers appointed by the Lender in that behalf shall do or cause to be done in or concerning the premises by virtue of this power of attorney.
- (ix) AND the Borrower does hereby declare that this Power of attorney shall be irrevocable.

IN WITNESS WHEREOF the Borrower company has caused its Common Seal to be hereunto affixed the day and year first hereinafter written.

The Common Seal of the Borrower Company was hereunto affixed pursuant to the resolution of its Board of Directors passed on the..... in the presence of Shri..... Director and Shri..... Director who have signed these presents in token thereof.



**SPECIMEN FORMS OF POWER-OF-ATTORNEY**

(Relevant for Companies)

**(a) General Power-of-Attorney**

KNOW ALL MEN BY THIS POWER OF ATTORNEY:

WHEREAS..... a Company registered under the Companies Act, 2013, and having its registered office at..... (hereinafter called the 'Company') has from time to time to institute and defend civil, criminal and revenue suits, appeals, revisions and other legal proceedings in various courts, offices and before other authorities in India and outside;

AND WHEREAS the Company has to enter into various agreements and contracts and execute various sorts of documents, including leases, guarantees and counter guarantees, indemnity bonds etc.;

AND WHEREAS it is considered necessary and expedient to execute a General Power of Attorney in favour of..... and....., Managing Directors of the Company;

AND WHEREAS the Board of Directors of the Company, by resolution No..... passed in their meeting held on..... have resolved to execute and register a General Power of Attorney in terms of the draft placed before the Board in favour of Shri..... and Shri....., Managing Directors of the Company and have authorised Shri....., Director, to execute, sign, seal, register and deliver the said Power of Attorney:

NOW THIS POWER OF ATTORNEY WITNESSES AS FOLLOWS:

The Company hereby appoints Shri..... and Shri....., as its Attorneys (hereinafter collectively called "the Attorneys") so long as they or any of them are/is the Managing Director/..... of the Company to do severally, the following acts, deeds and things in the name and on behalf of the Company:

1. To take decision for instituting and defending legal proceedings and to institute and defend legal proceedings - civil, criminal or revenue, including Income-tax, Sales tax and Excise and confess judgement or withdraw, compromise, compound or refer any matter or dispute to arbitration, as they or either of them may think fit;
2. To sign, verify and file in all or any courts and offices in India and outside, in all or any cases, whether original or appellate revision or review, plaints, complaints, written statements, affidavits, applications, review or revision petitions, statutory returns and memoranda of appeals or cross objections;
3. To engage and appoint advocates, vakils, solicitors, pleaders and mukhtars, as the case may be;
4. To appoint special agents or attorneys on such terms and conditions as they or either of them may deem fit;
5. To appear in all or any courts and offices to represent the Company in all proceedings and make statement on oath or otherwise for and on behalf of the Company;
6. To file in and receive back from any or all courts or offices documents of all kinds and to give receipts therefor;
7. To deposit or obtain refund of stamp duty or court fee or to repay the same;
8. To deposit in or withdraw from any or all courts or other offices moneys and give receipts therefor;
9. To apply for copies of documents or other records of courts or offices;
10. To apply for inspection of and to inspect records of which inspection is allowed;

11. To execute decrees, receive moneys and obtain possession of properties in execution of decrees, give receipts and discharges therefor and compromise or compound any such decrees;
12. To realise and collect all outstandings and claims of the Company and to give effectual receipts and discharges;
13. To execute, sign, seal and where necessary to register all documents including deeds, leases, agreements, contracts, letters of appointments, powers of attorneys;
14. To sign, seal and execute bonds, indemnity bonds, guarantees and counter-guarantees;
15. To execute, endorse and negotiate Bills of Exchange, Hundies, promissory notes and negotiate or otherwise deal with Government Promissory Notes or any securities of the Central or State Government or any local authority;
16. To acquire, buy, purchase within limits prescribed by the Bonds, or sell, transfer pledge or otherwise negotiate shares and/or debentures held by the Company in other joint stock companies or statutory corporation and for that purpose to sign and execute transfer deeds or other instruments, collect dividends and bonuses falling due thereon and otherwise deal in such shares/debentures;
17. To sign, discharge receipts, transfer forms and any other documents required by the Post Office in connection with the Post Office National Saving Certificates;
18. And generally to do all such acts, deeds or things as may be necessary or proper for the purposes mentioned above.

AND the Company hereby agrees that all acts, deeds or things lawfully done by the said Attorneys or either of them under the authority of this power shall be construed as acts, deeds and things done by the Company and the Company hereby undertakes to confirm and ratify all and whatsoever the said Attorneys or either of them shall lawfully do or cause to be done by virtue of the powers hereby given.

IN WITNESS WHEREOF this deed has been signed and sealed by Shri....., Director, authorised in this behalf vide Board's Resolution No..... dated..... on this..... day of..... 2020, in presence of:

WITNESSES:

1. \_\_\_\_\_ Director
2. \_\_\_\_\_ for (Name of the Company)

**(b) General Power-of-Authority in Another Form**

KNOW ALL MEN BY THIS POWER OF ATTORNEY:

WHEREAS 'A LIMITED' a Company registered under the Companies Act, 2013, and having its registered office at..... (hereinafter called the "Company) are the proprietors of..... (Name of the unit);

AND WHEREAS the Company has from time to time to institute and defend civil, criminal and revenue suits, appeals, revisions, and other legal proceedings in various courts, tribunals, offices and before any other authority in India;

AND WHEREAS the Company has to submit and file statutory returns, letters, forms, maintain registers and make applications for licences and renewals etc., to the Excise Authorities, from time to time, in connection with Company's business concerning the.....;

AND WHEREAS the Company has from time to time, to execute and register contracts, agreements, lease deeds etc.;

AND WHEREAS it is considered necessary and expedient to execute a General Power of Attorney in favour of

Shri.....;

AND WHEREAS the Board of Directors of the Company by resolution No..... passed in their meeting held on..... have resolved to execute and register a General Power of Attorney in terms of the draft placed before the Board in favour of Shri..... (name of the person) ..... (with designation and name of the unit) ..... (hereinafter called the "Attorney") so long as he is in the service of the Company and notwithstanding any change in his designation and have authorised Shri..... director, to execute, sign, seal register and deliver the said Power of Attorney:

NOW THIS POWER OF ATTORNEY WITNESSETH AS FOLLOWS:

The Company hereby authorises Shri..... to do the following acts, deeds or things in the name and on behalf of the Company:

1. To take decisions for instituting and defending legal proceedings and to institute and defend legal proceedings - civil, criminal or revenue, including Income tax, Sales tax, Agricultural tax, and Excise matters and confess judgements or withdraw, compromise, compound or refer any matter of dispute to arbitration, as he may think fit.
2. To sign, verify and file in all or any courts and offices in India and outside, in all or any cases, whether original or appellate, revision or review, plaints, complaints, written statements, affidavits, applications, review or revision petitions, statutory returns and memorandum of appeals or cross objections etc.
3. To engage and appoint advocates, vakils, solicitors, pleaders and mukhtars, as the case may be.
4. To appoint special agents or attorneys on such terms and conditions as they or either of them may deem fit.
5. To appear in all or any courts and offices to represent the Company in all proceedings and make statement on oath or otherwise for and on behalf of the Company.
6. To file in and receive back from any or all courts or offices documents of all kinds and to give receipts thereof.
7. To deposit or obtain refund of stamp duty or court fee or to repay the same.
8. To deposit in or withdraw from any or all courts or other offices moneys and give receipts therefor.
9. To apply for copies of documents or other records of courts or offices.
10. To apply for inspection of and to inspect records of which inspection is allowed.
11. To execute decrees, receive moneys and obtain possession of properties in execution of decrees, give receipts and discharges therefor and compromise or compound any such decrees.
12. To sign, execute, register and seal all contracts, agreements and other documents including lease deeds in respect of any buildings, shops, godowns, or premises taken on lease by the Company by any of its branches, depots, offices or for the residence of its officers.
13. To prepare, sign, execute, submit and file all statutory returns, letters, forms, registers and applications, including applications for licences and renewals, bonds for clearance of excisable goods required, from time to time, to be executed, filed and submitted to any Central Excise authority in connection with the business of the Company.
14. To deposit and obtain refunds, by cheques drawn in the name of the Company, of excise duty or any charges or fees and to file claims with any Central Excise authority or other concerned officers.
15. To effectually discharge the statutory duties imposed upon the Company by the Excise Law and Rules in force, from time to time, in connection with the work of the Company.

16. And generally to do all such acts, deeds or things as may be necessary or proper for the purposes mentioned above.
17. And the Company hereby agrees that all acts, deeds or things lawfully done by the said Attorneys under the authority of this Power of Attorney shall be construed as acts, deeds and things done by the Company and the Company hereby undertakes to confirm and ratify all and whatsoever the said Attorneys shall lawfully do or cause to be done by virtue of the powers hereby given.

IN WITNESS WHEREOF this deed has been signed and sealed by Shri....., Director, authorised in this behalf vide Board Resolution No. .... dated ..... on this ..... day of ..... 2020, in presence of:

WITNESSES:

1. DIRECTOR
- 2.

**(c) Power-of-Attorney for Leasing Contracts**

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS 'A LIMITED' a Company registered under the Companies Act, 2013, and having its registered office at..... (hereinafter called the "Company");

AND WHEREAS the Company proposes to instal plant and machinery through Leasing arrangements;

AND WHEREAS it is desirable to authorise Shri..... of the Company to negotiate the lease arrangements, finalise and sign the Lease Deeds and other relevant papers for getting machinery for installation at the works of the Company;

AND WHEREAS the Board of Directors of the Company vide Resolution No..... passed in their meeting held on..... have resolved to execute and register a General Power of Attorney in terms of the draft placed before the Board in favour of Shri....., of the Company and have authorised Shri....., director, to execute, sign, seal and if necessary register and deliver the said Power of Attorney.

NOW THIS POWER OF ATTORNEY WITNESSETH AS FOLLOWS:

That the Company hereby appoints Shri..... of the Company as its 'Attorney' so long as he is in the services of the Company and notwithstanding any change in his designation to do severally the following acts, deeds or things in the name on behalf of, and at the expenses of the Company:

1. To negotiate with any Leasing Company for leasing arrangements for taking plant and machinery on lease basis for installation at the Works of the Company;
2. To finalise, settle, execute and sign, and where necessary seal Lease Arrangements, other deeds and papers in connection therewith;
3. And generally to do all acts, deeds and things, as may be necessary for the above purpose;
4. And the Company hereby agrees that all acts, deeds or things lawfully done by the said Attorney under the authority of this Power of Attorney hereby given shall be construed as acts, deeds and things done by the Company and the Company undertakes to lawfully do or cause to be done by virtue of the powers hereby given.

IN WITNESS WHEREOF this Power of Attorney has been signed and sealed by Shri....., director, authorised in this behalf vide Board Resolution No..... dated..... on this..... day of 2020, in respect of:

WITNESSES:

- 1.
- 2.

DIRECTOR

**ANNEXURE V**

**SPECIAL POWER-OF-ATTORNEY FILED WITH THE REGISTRAR AT THE  
TIME OF INCORPORATION OF A COMPANY**

Shri....., Secretary, ..... to represent us before the Registrar of Companies in connection with the incorporation of our Company under the name of..... He is authorised to make any modification, alteration, correction, additions, in the Memorandum and Articles of Association and other documents filed with the Registrar of Companies for the registration of the Company. He is also authorised to collect the certificate of incorporation.

Station:

Date:

Directors

Accepted.

S/o

Secretary

## HIRE-PURCHASE DEEDS

### Introduction

A contract of hire is a contract of bailment and is governed by the provisions of Chapter IX of the Indian Contract Act, 1872. Students are advised to study on their own relevant provisions of Chapter IX of the Indian Contract Act, 1872 and relevant provisions of the Sale of Goods Act, 1930 since both these Acts are relevant for and applicable to the transaction of hire-purchase. Students are also advised to refer Study II on to recapitulate their understanding of some of the basic aspects of contract.

The system of acquiring ownership through an agreement of hire purchase helps in promoting sales especially consumer durables. It affords facilities to acquire an asset to an intending purchaser who is unable to pay the full price of the asset at one time in lumpsum. After making the payment of an initial amount in the form of part payment of the cost of the article, the purchaser pays the balance consideration money in monthly/quarterly instalments as may be settled. This initial payment generally covers 20 to 25 per cent of the value of the article being purchased on hire-purchase basis. On payment of all the instalments, the property in the article automatically passes on to the hirer. He has an option to return the article during the period of hire. The essential terms of hire purchase agreement are (1) a clause by which the owners agree to let and hirer agrees to hire the goods; and (2) a clause giving to the hirer a right to determine the hiring or return the goods; and (3) a clause giving the hirer a right or option to purchase the goods for a nominal sum at the end of the hiring.

### Deeds of Hire-Purchase Agreements

The document for causing the transaction of hire is drafted in the form of an agreement. The statutory rights and obligations provided in the Indian Contract Act, 1872 need not be provided in the agreement. All other conditions agreed upon between the seller and hirer should be mentioned in the agreement. In law the transaction of hire purchase is treated as an act of bailment and the provisions of the Contract Act are available to protect the rights and obligations of the hirer and the seller. But it should be drafted in conformity with the provisions of Indian Contract Act.

Two things that distinguish the hire-purchase agreement from an ordinary contract of sale are (i) payment of instalments and (ii) option to purchase the goods hired. Such agreements should be drafted like hire contracts with the usual conditions, but with a clause or clauses providing for the said option to purchase. The additional clause should be carefully drafted so as to provide for that option or for the property in the goods passing to the hirer on the payment of all the instalments and on the hirer duly observing the conditions of hire contract. Two points should be carefully borne in mind in drafting this clause, viz.,

1. It should not amount to an agreement to buy but should only give the hirer an option to purchase, for under the agreement to buy the hirer having got possession of the goods would be able to give good title to any one who takes the goods on sale or pledge from him without notice of the hire-purchase contract [vide Section 30(2) Indian Sale of Goods Act, 1930] and the intention of the owner will thereby be defeated. But if the agreement does not amount to an agreement to buy and gives the hirer only an option to buy the hirer cannot give a valid title to any one, even if the latter takes the goods without notice.
2. There should be an express stipulation that the property in the goods shall not pass to the hirer until all the instalments have been paid. In the absence of this clause, the power to seize the goods in default of payment of instalments might be held to make the agreement a contract of sale. The owner has in him vested not only his contractual right under the agreement but also a reversionary interest in the goods which form the subject of agreement. Similarly, the agreement confers two distinct sets of rights on the hirer, viz., the benefit of the hiring-which constitutes the bailment part of the contract-and the option to purchase which it is now established constitutes a separate and proprietary right. Each of the two interests of both the owner and the hirer, is capable of separate assignment. But the legal position of hirer shall be of bailee towards the goods as well as to the seller.

### **Minimum Payment Clause**

In order to provide for depreciation of the article taken under the hire purchase agreement, it is usual to insert a “minimum payment” clause which provides that in the event of the determination of the agreement by the hirer or the owner the hirer shall be liable to pay 50 per cent of the total price after deduction of the instalments already paid by the hirer.

### **Types of Hire-Purchase Agreements.**

The Hire-purchase agreements, ignoring variations of detail, broadly takes one or other of two forms.

1. When the owner is unwilling to look to the purchaser of goods to recover the balance of the price, and the financier who pays the balance undertakes the recovery. In this form, goods are purchased by the financier the dealer, and the financier obtains a hire-purchase agreement from the customer under which the latter becomes the owner of the goods on payment of all the instalments of the stipulated hire and exercising his option to purchase the goods on payment of a nominal price.
2. In the other form of transactions, goods are purchased by the customer, who in consideration of executing a hire-purchase agreement and allied documents remains in possession of the goods, subject to liability to pay the amount paid by the financier on his behalf to the owner or dealer, and the financier obtains a hire-purchase agreement which gives him a license to seize the goods in the event of failure by the customer to abide by the conditions of the hire-purchase agreement.

Generally there is a guarantor who also signs the agreement as a surety.

### **Stamp Duty and Registration**

A deed of hire-purchase is liable to stamp duty as an agreement under Article 5 of the Indian Stamp Act, 1899. Registration is not compulsory.



### The Hire-Purchase Act, 1972

The Hire-Purchase Act, 1972 passed by the Parliament received the assent of the President on June 1972 and was to have come in force on September 1, 1973, but operation was postponed *sine die* by a Notification in the *Gazette of India* on 30<sup>th</sup> August, 1973.

The provisions of the Hire-Purchase Act, 1972, although the Act has not been enforced as law, still provide ample guidance and the same should be adhered to in providing a legal cover to the transaction of hire-purchase. Some of the important aspects of the Act, relevant to hire-purchase agreements, are given below:

*Hire-Purchase agreement to be in writing and signed by parties thereto:*

(1) Every hire-purchase agreement shall be:

- (a) in writing, and
- (b) signed by all the parties thereto.

(2) A hire-purchase agreement shall be void if in respect thereof any of the requirements specified in (1) above has not been complied with.

(3) Where the hire-purchase is associated with a contract of guarantee, the hire-purchase agreement shall be signed by the surety also, and if the hire-purchase agreement is not so signed, the hire-purchase agreement shall be voidable at the option of the owner.

*Important Contents of hire-purchase agreements:*

(1) Every hire-purchase agreement shall state:

- (a) the hire-purchase price of the goods to which the agreement relates;
- (b) the cash price of the goods, that is to say, the price at which the goods may be purchased by hirer for cash;
- (c) the date on which the agreement shall be deemed to have commenced;
- (d) the number of instalments by which the hire-purchase price is to be paid, the amount of each of those instalments, and the date, or the mode of determining the date, upon which it is payable and the person to whom and the place where it is payable; and
- (e) the goods to which the agreement relates, in a manner sufficient to identify them.

(2) Where any part of the hire-purchase price is, or is to be, paid otherwise than in cash or by cheque, the hire-purchase agreement shall contain a description of that part of the hire-purchase price.

(3) Where any of the requirements specified in (1) and (2) above has not been complied with, the hirer may institute a suit for getting the hire-purchase agreement rescinded; and the court may, if it is satisfied that the failure to comply with any such requirement has prejudiced the hirer, rescind the agreement on such terms as it thinks just, or pass such other order as it thinks fit in the circumstances of the case.

*Two or more agreements when treated as a single hire-purchase agreement:* As provided in the above referred Hire-Purchase Act, 1972, where by virtue of two or more agreements in writing, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and the bailee has an option to purchase the goods and the requirements of Section 3 and Section 4 of the Hire-Purchase Act, 1972, are satisfied in relation to such agreements, the agreement shall be treated for the purposes of that Act as a single hire-purchase agreement made at the time when the last of the agreements was made.

*Warranties and conditions to be implied in hire-purchase agreements:*

(1) Notwithstanding anything contained in any contract, in every hire-purchase agreement there shall be an implied warranty:



- (a) that the hirer shall have and enjoy quiet possession of the goods; and
  - (b) that the goods shall be free from any charge or encumbrances in favour of any third party at the time when the property is to pass.
- (2) Notwithstanding anything contained in any contract, in every hire-purchase agreement there shall be:
- (a) an implied condition on the part of the owner that he has a right to sell the goods at the time when the property is to pass;
  - (b) an implied condition that the goods shall be of merchantable quality, but no such condition shall be implied by virtue of this clause:
    - (i) as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made, or
    - (ii) as regards defects specified in the agreement (whether referred to in the agreement as defects or by any other description to the like effect), or
    - (iii) where the hirer has examined the goods, or a sample thereof, as regards defects which the examination ought to have revealed, or
    - (iv) if the goods are second-hand goods and the agreement contains a statement to that effect. (3) Where the hirer, whether expressly or by implication:
      - (a) has made known to the owner the particular purpose for which the goods are required, or
      - (b) in the course of any antecedent negotiations has made that purpose known to any person by whom those negotiations were conducted, there shall be an implied condition that the goods shall be reasonably fit for such purpose.
- (4) Where the goods are let under a hire-purchase agreement by reference to a sample, there shall be:
- (a) an implied condition on the part of the owner that the bulk will correspond with the sample in quality, and
  - (b) an implied condition on the part of the owner that the hirer will have reasonable opportunity of comparing the bulk with the sample.
- (5) Where the goods are let under a hire-purchase agreement by description, there shall be an implied condition that the goods will correspond with the description; and if the goods are let under the agreement by reference to a sample as well as by description, it shall not be sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.
- (6) An owner shall not be entitled to rely on any provision in a hire-purchase agreement excluding or modifying the condition set out in Sub-section (3) above, unless he proves that before the agreement was made, the provision was brought to the notice of the hirer and its effect made clear to him.
- (7) Nothing shall prejudice the operation of any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

*Passing of Property:* The property in the goods to which a hire-purchase agreement relates shall pass to the hirer only on the completion of the purchase in the manner provided in the agreement, subject of course to the other terms in the hire-purchase agreement and in case of doubt to the provisions of the Hire-Purchase Act, 1972.

*The hirer to purchase at any time with rebate:*

- (1) The hirer may, at any time during the continuance of the hire-purchase agreement and after giving the owner not less than fourteen days' notice in writing of his intention so to do, complete the purchase of the goods

by paying or tendering to the owner the hire-purchase price or the balance thereof as reduced by the rebate calculated in the manner provided in the relevant clause of the hire-purchase agreement.

(2) The rebate for the purposes of the above Sub-section (1) could normally be equal in two-thirds of an amount which bears to the hire-purchase charges in the same proportion as the balance of the hire-purchase price not yet due bears to the hire-purchase price.

*Explanation:* "Hire-purchase charges" mentioned in this clause mean the difference between the hire-purchase price and the cash price as stated in the hire-purchase agreement."

(3) It should be ensured that the provisions contained hereinabove shall have effect notwithstanding anything to the contrary contained in the hire-purchase agreement, but where the terms of the agreement entitled the hirer to a rebate higher than that allowed by the proviso mentioned hereinabove, the hirer shall be entitled to the rebate provided by the agreement.

*Right of hirer to terminate agreement any time:*

(1) Normally the hire-purchase agreement provides that the hirer may, at any time before the final payment under the hire-purchase agreement falls due, and after giving the owner not less than fourteen days' notice in writing of his intention so to do and re-delivering or tendering the goods to the owner, terminate the hire-purchase agreement by payment or tender to the owner of the amounts which have accrued due towards the hire-purchase price and have not been paid by him, including the sum, if any, which he is liable to pay under the above referred Sub-clause (2).

(2) Where the hirer terminates the agreement under the above referred Sub-clause (1) and the agreement provides for the payment of a sum named on account of such termination, the liability of the hirer to pay that sum shall normally be made subject to the following conditions, namely:

- (a) where the sum total of the amounts paid and the amounts due in respect of the hire-purchase price immediately before the termination exceeds one-half of the hire-purchase price, the hirer shall not be liable to pay the sum so named;
- (b) where the sum total of the amounts paid and the amounts due in respect of the hire-purchase price immediately before the termination does not exceed one half of the hire-purchase price, the hirer shall be liable to pay the differences between the said sum total and said, one half, or the sum named in the agreement, whichever is less.

(3) Nothing contained in the immediately preceding paragraph shall relieve the hirer from any liability for any hire which might have accrued due before the termination.

(4) Any provision in any agreement, whereby the right conferred on a hirer to terminate the hire-purchase agreement before the completion of the full payment, is excluded or restricted, or whereby any liability in addition to the liability imposed by the hire-purchase agreement itself is imposed on a hirer by reason of the termination of the hire-purchase agreement by him under this early termination clause shall be void.

(5) Nothing herein shall prejudice any right of a hirer to terminate a hire-purchase agreement otherwise than by virtue of such early termination clause.

*Rights of hirer to appropriate payment in respect of two or more Agreements:* As provided in the Hire-Purchase Act, 1972, a hirer who is liable to make payments in respect of two or more hire-purchase agreements to the same owner shall, notwithstanding any agreement to the contrary, be entitled on making any payment in respect of the agreements which is not sufficient to discharge the total amount then due under all the agreements, to appropriate the sum so paid by him in or towards the satisfaction of the sums due under any one of the agreements, or in or towards the satisfaction of the sums due under any two or more of the agreements in such proportions as he thinks fit, and if he fails to make any such appropriation as aforesaid, the sum so said shall, by virtue of this clause, stand appropriated towards the satisfaction of

the sums due under the respective hire-purchase agreements in the order in which the agreements were entered into.

*Assignment and transmission of hirer's right or interest under hire-purchase agreements:*

(1) The Hire-Purchase Act provides that the hirer may assign his right, title and interest under the hire-purchase agreement with the consent of the owner, or, if his consent is unreasonably withheld, without his consent.

(2) Except as otherwise provided in the preceding paragraph, no payment or other consideration shall be required by the owner for his consent to an assignment under the clause referred to in the preceding paragraph and where an owner requires any such payment or other consideration for his consent, that consent shall be deemed to be unreasonably withheld.

(3) Where on a request being made by a hirer in this behalf, the owner fails or refuses to give his consent to an assignment under clause (1) the hirer may apply to the Court for an order declaring that the consent of the owner to the assignment has been unreasonably withheld, and where such an order is made, the consent shall be deemed to be unreasonably withheld.

*Explanation:* In this agreement wherever the word "Court" occurs, it should mean a Court which would have jurisdiction to entertain a suit for the relief claimed in the application.

(4) As a condition of granting such consent, the owner may stipulate that all defaults under the hire purchase agreement shall be made good and may require the hirer and the assignee to execute and deliver to the owner an assignment agreement, in a form approved by the owner, whereby without affecting the continuing personal liability of the hirer in such respects, the assignee agrees with the owner to be personally liable to pay the instalments of hire remaining unpaid and to perform and observe all other stipulations and conditions of the hire-purchase agreement during the residue of the term thereof and whereby the assignee indemnifies the hirer in respect of such liabilities.

(5) The right, title and interest of a hirer under a hire-purchase agreement shall be capable of passing in by operation of law to the legal representative of the hirer but nothing in this clause shall relieve the legal representative from compliance with the provisions of the hire-purchase agreement.

*Explanation:* In this Agreement the expression "legal representative" has the same meaning as in Clause (11) of Section 2 of the Code of Civil Procedure, 1908 (5 of 1908) and the provision of that section shall apply notwithstanding anything to the contrary contained in the hire-purchase agreement.

*Obligations of hirer to comply with agreement:* Subject to the provisions of the Hire-Purchase Act, a hirer shall be bound:

- (a) to pay the hire in accordance with the agreement, and
- (b) otherwise to comply with the terms of the agreement.

*Obligation of hirer in respect of care to be taken of goods:*

(1) A hirer in the absence of a contract to the contrary:

- (a) shall be bound to take as much care of the goods to which the hire-purchase agreement relates as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value;
- (b) shall not be responsible for the loss, destruction or deterioration of the goods, if he has taken the amount of care thereof described in clause (a).

(2) The hirer shall be liable to make compensation to the owner for any damage caused by failure to take care of the goods in accordance with the provisions of Sub-section (1) hereof.

*Obligation of hirer in respect of use of goods:* If the hirer makes any use of the goods to which the hire-purchase agreement relates which is not according to the conditions of the agreement, the hirer shall be liable to make compensation to the owner for any damage arising to the goods from or during such use.

*Obligation of hirer to give information as to whereabouts of goods:*

(1) Where by virtue of hire-purchase agreement a hirer is under a duty to keep in his possession or control the goods to which the agreement relates, the hirer shall, on receipt of a request in writing from the owner, inform the owner where the goods are, at the time when the information is given or, if it is sent by post, at the time of posting.

(2) If the hirer fails without reasonable cause to give the said information within fourteen days of the receipt of the notice, he shall be punishable with fine which may extend to two hundred rupees.

*Rights of hirer in case of seizure of goods by owner:* Where the owner seizes the goods let under a hire-purchase agreement, the hirer may recover from the owner the amount, if any, by which the hire-purchase price falls short of the aggregate of the following amounts, namely:

- (i) the amounts paid in respect of the hire-purchase price up to the date of seizure; (ii) the value of the goods on the date of seizure.

For the purposes mentioned hereinabove the value of any goods on the date of seizure is the best price that can be reasonably obtained for the goods by the owner on that date less the aggregate of the following amounts, namely:

- (i) the reasonable expenses incurred by the owner for seizing the goods;
- (ii) any amount reasonably expended by the owner on the storage, repair or maintenance of the goods;
- (iii) (whether or not the goods have subsequently been sold or otherwise disposed of by the owner) the reasonable expenses of selling or otherwise disposing of the goods; and
- (iv) the amount spent by the owner for payment of arrears of taxes and other dues which are payable in relation to the goods under any law for the time being in force and which the hirer was liable to pay.

(3) If the owner fails to pay the amount due from him under the provisions stated hereinabove, or any portion of such amount, to the hirer within a period of thirty days from the date of notice for the payment of the said amount is served on him by the hirer, the owner shall be liable to pay interest on such amount at the rate of twelve per cent per annum from the date of expiry of the said period of thirty days.

(4) Where the owner has sold the goods seized by him, the onus of proving that the price obtained by him for the goods was the best price that could be reasonably obtained by him on the date of seizure shall lie upon him.

*Rights of owner to terminate hire-purchase agreement for default in payment of hire or unauthorised act or breach of express conditions:*

(1) Where a hirer makes more than one default in the payment of hire as provided in the hire-purchase agreement then, subject to the provisions of Section 21 of the Hire-Purchase Act, 1972 and after giving the hirer notice in writing of not less than:

- (i) one week, in a case where the hire is payable at weekly or lesser intervals; and
- (ii) two weeks, in any other case;

the owner shall be entitled to terminate the agreement by giving the hirer notice of termination in writing:

Provided that if the hirer pays or tenders to the owner the hire in arrears together with such interest thereon as

may be payable under the terms of the agreement before the expiry of the said period of one week or, as the case may be, two weeks, the owner shall not be entitled to terminate the agreement.

(2) Where a hirer:

- (a) does any act with regard to the goods to which the agreement relates which is inconsistent with any of the terms of the agreement; or
- (b) breaks an express condition which provides that, on the breach thereof, the owner may terminate the agreement,

the owner shall, subject to the provisions of Section 22 of the Hire-Purchase Act, 1972 be entitled to terminate the agreement by giving the hirer notice of termination in writing.

*Rights of owner on termination:* Where a hire-purchase agreement is terminated then the owner shall be entitled:

- (a) to retain the hire which has already been paid and recover the arrears of hire due:  
Provided that when such goods are seized by the owner, the retention of hire and recovery of the arrears of hire due shall be subject to the provisions of Section 17 of the Hire-Purchase Act;
- (b) to forfeit the initial deposit subject to the conditions specified in Clause (a) and (b) of Sub-section (2) of Section 10 of the Hire-Purchase Act, and provided in the agreement;
- (c) subject to the provisions of Section 17 and Section 20 of the Hire-Purchase Act and subject to any contract to the contrary, to enter the premises of the hirer and seize the goods;
- (d) subject to the provisions of Section 21 and Section 22 of the Hire-Purchase Act, to recover possession of the goods by application under Section 20 or by suit;
- (e) without prejudice to the provisions of Sub-section (2) of Section 14 and of Section 15 of the Hire-Purchase Act to recover damages for non-delivery of the goods, from the date on which termination is effective, to the date on which the goods are delivered to or seized by the owner.

### **Model Forms of Hire-Purchase Agreements**

Four model forms of the higher-purchase agreements are given below which could be adopted with suitable modifications suiting to the circumstances of each case.

#### **1. Agreement for Hire Purchase**

THIS AGREEMENT made this..... day of..... between..... (hereinafter called the owners which expression shall include the successors and assigns where the context so admits) of the one part AND..... (hereinafter called the hirer) of the other part.

WHEREAS, the owner is engaged in the business of manufacturing..... and has agreed to let to the hirer..... and the hirer has agreed to take on hire the said goods more particularly described in the Schedule A hereto for the term of..... years from..... 2020 on the terms hereby agreed to between the owner and hirer as follows:

1. *Hire:* The hirer shall pay to the owner on the execution of this agreement the sum of Rs..... the hire for the first month and on the first day of every calendar month or year during the hiring the sum of Rs..... by way of hire for the said goods, or shall pay the rent specified in Schedule-B hereto and payable without demand on the day therein mentioned.

2. *Option to purchase:* The hirer shall at any time during the hiring have the option of purchasing the said goods for Rs..... and in that event, the hirer shall receive credit for all sums previously paid by him under the preceding clause. Until a purchase shall have been effected, and the price fully paid, the said goods shall remain the property of the owner.

3. *Hirer's covenants:* During the hiring tenure, the hirer will:

- (a) not sell, pledge, hypothecate, charge or in any manner encumber the goods or part with possession of the said goods or any of them;
- (b) not without the consent in writing of the owner, remove the said goods or any part thereof from the premises of the hirer at..... and shall keep the owner informed forthwith of any charge in address or shift of place;
- (c) will not lend or transfer the goods to any other person without the previous sanction in writing of the owner;
- (d) will keep the goods in good order and condition and will, on the expiry of years or earlier termination of this agreement, return the same to owner in the same condition in which it has been lent, reasonable wear and tear excepted, and all loss or damage due to breakage or any other cause shall be made good by hirer at his own cost;
- (e) pay all taxes, fees, duties, fines, registration charges, other expenses, payable in respect of the assets - when the same shall become due;
- (f) permit the owner or his authorised agent or nominee at all reasonable times to inspect and examine the condition of the said goods;
- (g) shall keep the goods insured against all losses or damage by fire, tempest or theft upto the value of Rs..... with an Insurance Company to be approved by the owner and shall punctually pay all premia and produce to owner when so required the receipts for the last premium payable and keep the insurance alive during the continuance of the agreement. If the said hired goods is injured or destroyed by fire or lost by theft all moneys received in respect of such insurance shall be paid forthwith to the owner and the hirer shall pay to the owner all sums of money received in respect of such insurances who shall apply such money in making good the loss by replacement of such damaged part or parts or the entire goods of similar description and value whereupon such substituted part or parts or goods shall become subject to this agreement in the same manner as the original goods;
- (h) in case of default by hirer in payment of any insurance premium as mentioned in sub-clause (g) or the charges mentioned in sub-clause (e) above, the owner may pay the same or any part thereof and any sum so paid by them shall be reimbursed by the hirer together with interest thereon at the rate of 15% p.a. from the date of payment by the owner;
- (i) the hirer shall indemnify the owner against claims by third parties arising by accident caused by user of the asset until the determination of this agreement;
- (j) the hirer shall not use or permit or suffer the asset to be used in contravention of any statute and regulations for the time being in force or otherwise in any way contrary to law excepting as permitted under this agreement.

(Other conditions settled as may be or prescribed by the owner and necessary according to the nature of the hired goods be incorporated here). The clauses should invariably cover *inter alia* the following matters:

- (i) Hirer agrees to make good to the owner all damages to the asset (fair wear and tear excepted) and pay the owner the full value of the asset in event of a total loss, whether the damage or loss be caused accidentally or otherwise and by any reason whatsoever and to keep the asset at the sole risk of the hirer, until the hirer purchases the asset or returns it to the owner.
- (ii) Hirer agrees to pay expenses for repair deemed necessary by the owner, replace any damaged parts and not make any alteration or addition without previous written approval of the owner.



- (iii) Hirer has examined or caused to be examined the asset and the receipt by him of the same shall be conclusive evidence that the asset has been accepted duly in perfect order and working condition, etc.)

4. *Change in address:* The hirer shall forthwith intimate the owners any change of address of the hirer and of the address of the premises where the asset is kept and shall further more forthwith notify the owner in writing of any loss or damage to the said asset.

5. *Default clause:* If the hirer shall make default in the punctual payment in full, of the said monthly hire or in the observance or performance of any of the provisions of this agreement, on his part to be observed and performed the hiring shall immediately determine (specify here other conditions stipulated by the owner).

6. *Owner to make possession:* On the determination of the hiring, the owner may without notice or demand retake possession of the said goods and for that purpose may by himself or by his agent or servants enter into or upon any premises occupied by the hirer and search the same if necessary for the hired goods.

7. *Option to terminate hiring:* The hirer may terminate this agreement at any time by returning the said goods at the owner's place of business.

8. *Rights of damages not affected:* If the hiring is terminated by the hirer under clause 8 such termination shall not prejudice the owner's right to recover the hire upon the date of such termination nor his right to recover damages for any prior breach of this agreement by the hirer, and the hirer shall not be allowed credit or set off for on account of any payments previously made by him.

9. *Compensation for depreciation:* At the termination of this agreement either at the instance of the hirer or the owner, the hirer shall pay to the owner by way of compensation for depreciation of the said article such sum as with the amount previously paid for hire shall make up a sum equal to not less than one half of total amount payable under the agreement.

10. Any time or other indulgence granted by the owner shall not prejudice or affect his strict rights under this agreement.

### **SCHEDULE A**

(Above referred to)

#### *Description of Assets*

1. Name.
2. Accession No.
3. Mark/Trade Name.
4. Year of Manufacture.
5. Type of Machine.
6. No. of Machine.
7. Other description:  
... ..  
... ..  
... ..
8. Accessories affixed to the asset:  
... ..



... ..  
 ... ..  
 ... ..

### SCHEDULE B

The amounts payable under this Agreement are as under:

<i>Due Date</i>	<i>Amount (Rs.)</i>
...	...
...	...
...	...

IN WITNESS WHEREOF the parties hereunto have set and subscribed their hands the day, month and year hereinbefore mentioned and bind themselves their heirs, successors and administrators and assigns.

Witness: 1.

Signature of Hirer

Witness: 2.

Signature of Owner

### **(2) Agreement for Hire-Purchase - Another Form - Financier with a Guarantor**

(Three Party Agreement)

THIS AGREEMENT made this day..... BETWEEN the..... (hereinafter called "the Owner") which expression..... of the first part and the..... (hereinafter called the "Hirer" which expression.....) of the second part and the..... (hereinafter called "the guarantor" which expression.....) of the third part.

WHEREAS the owner on the request of the hirer has purchased the goods described in the Schedule A hereto from the dealer in order to let the same to the hirer on the terms and conditions hereinafter appearing and the guarantor has agreed to guarantee the payment of the hire and performance of other conditions by the hirer in accordance with the terms of this agreement.

WHEREBY in consideration of the above it is agreed between the parties as follows: Paras 1, 2, 3, 4, 5, 6, 7, 8 and 9 same as in Form No. 1.

10. *Consequences of breach:* The guarantor further agrees that in consideration of the premises, and in case of breach of the terms of this contract by the hirer, he shall restore possession of the asset to the owner and shall pay such sums of hire of the asset as may have fallen due to the owner alongwith any other sum that may become payable to the owner.

Para 11 the same as para 10 in Form No. 1. Schedule A & B as in Form No. 1.

IN WITNESS WHEREOF, etc. same as in Form No. 1. With suitable change for guarantor.

### **(3) Agreement for Hire-Purchase of Printing Machinery**

This AGREEMENT is made on this..... day of..... 2020 BETWEEN..... (hereinafter called "the Company") of the one part AND..... (hereinafter called "the hirer") of the other part.

WITNESSETH:

1. That the company hereby agrees to let to the hirer and the hirer hereby agrees to take on hire from the company the (*description of the printing machinery*) (referred to as "*the machinery*") for the purpose of carrying on the hirer's business of printers at (*place*) for..... months from the date of delivery of the same upon the terms and conditions herein contained.

2. That the hirer shall pay to the company as hire of the machinery the sum of Rs..... as follows; viz., the sum of Rs..... to be paid on the execution of this agreement and the balance of Rs..... to be paid in..... equal monthly instalments of Rs..... each, the first of such instalments to be paid on the..... day of 2020 and the remaining instalments on the (date) of every succeeding calendar month thereafter.
3. That if the hirer shall fail to pay any of the said stipulated instalments on the respective dates on which the same should be paid as hereinbefore mentioned then the hirer shall pay interest on the amount in arrears until payment thereof at the rate of..... per cent, per annum.
4. That the hirer shall, on the execution of this agreement, execute and deliver to the company promissory notes or bills of exchange for the respective amounts of the said instalments payable hereunder and such notes or bills shall respectively be made payable on the dates on which such instalments are respectively payable under this agreement and shall bear interest at the said rate of..... per cent, per annum after the due dates. The said bills shall be deemed to be collateral security for the payment of the said instalments and shall not suspend or affect any other remedy or remedies of the company hereunder.
5. That the hirer shall not, during the continuance of this agreement, in any way sell, assign, sublet or otherwise part with the possession of the machinery or any part or parts thereof or remove the same from one building to another or attempt so to do or part with possession of their interest in the premises where the machinery is kept, without first informing the company of such intended removal and receiving its consent in writing to do so. The machinery shall at all times be at the risk of the hirer who shall bear any loss arising from destruction, loss thereof or damage thereto howsoever caused and who shall take all reasonable care thereof so long as the agreement for hiring remains in force and shall permit the company or its agents at all reasonable times to inspect the same; and if at any such inspection any part or parts of the machinery shall be found broken, damaged or destroyed, the hirer shall forthwith at his own expenses, and to the satisfaction of the company, replace and repair the part so broken, damaged or destroyed. The hirer shall not any time during the said period purchase any parts as may be required to be used with or in connection with the machinery except from the company, who shall from time to time supply the same at their ordinary prices current in (*name of place*) at the respective dates when such parts are required.
6. That the hirer shall punctually pay all rents, rates and taxes payable in respect of the premises wherein the machinery or any part thereof is kept and shall, upon demand, produce to the company or its agents the receipts for the said rents, rates and taxes and in the event of the same being in arrears, the company is hereby empowered to pay the same together with any expenses necessary for the purpose and the hirer shall on demand repay the company any sums so paid.
7. That the hirer shall at all times during the continuance of the hiring keep in a conspicuous position on the machinery such plate or plates as the company may approve of for denoting that the machinery is the property of the company and the hirer shall not remove or obliterate any such plates or allow the same to be removed or obliterated.
8. That the company/hirer shall insure the machinery against fire in a recognised fire insurance office in the sum of Rs..... and shall if required produce to the..... for his or its inspection the policy of insurance and the receipts of the premiums paid (and the hirer shall on demand repay to the company the premiums paid by it).
9. That if any of the instalments of hire or any part thereof shall be in arrear and unpaid for one calendar month after the same shall have become due, or if the hirer shall at any time fail or neglect to perform or observe any of the stipulations or provisions herein contained and on his part to be performed and observed, or if a warrant of attachment or seizure shall be issued or executed against any of the property of the hirer, or if a receiver shall be appointed of any of the assets of the hirer, then and in any such case the company may even without notice to the hirer terminate the agreement of hiring hereby made and may by its servants or agents, without

any previous notice to the hirer, enter upon and into any premises or building where the machinery or any part or parts thereof may be and seize and take possession of and remove the same to such place as the company may think fit notwithstanding any payments previously made by the hirer; and for that purpose leave and licence are hereby given to the company, its agents and servants or any other person employed by it, to break open and enter any building, premises or place where the said machinery may be or be supposed to be and take possession of the same without being liable to any suit, action or other proceeding by the hirer or any other person claiming under him.

10. That if the agreement of hiring shall be determined under the preceding clause hereof, the company shall not be liable to any claim or demand at the instance of any person whosoever in respect of any payments previously made by the hirer, all of which shall in every such case as aforesaid be absolutely forfeited to the company and the company shall further be entitled to recover from the hirer or his estate all such instalments (if any) or hire aforesaid as may then be in arrears with interest thereon as aforesaid and also the instalment payable during the month in which the determination shall take place and in addition thereto such sum (if any) as shall be required with the money so to be paid for hire (exclusive of interest) and the sum previously paid for hire (exclusive of interest) to make up a sum equal to 60 per cent, of the said amount of Rs..... payable as hire under clause 2 hereof and the company shall also be entitled to recover from the hirer or his estate all costs and expenses incurred in or about the entry, seizure and removal as hereinbefore provided under this agreement and the hirer shall not nor any person claiming through him, commence or maintain any action or proceeding against the company, its servants or agents by reason of the company taking possession of the machinery or the temporary possession of the premises where the machinery or any part thereof may then be for such time as may be reasonably required in the removal of the same.

11. That the hirer may determine the agreement of hiring hereby made upon giving to the company one calendar month's previous notice in writing of his intention so to do specifying the date on which the hiring is to terminate and upon delivering up at his own cost the machinery to the company on or before that date in good repair at the godown of the company at (place); provided that the hirer shall at the same time pay to the company all moneys payable hereunder up to that date and in addition such sum (if any) as with the sums then and previously paid for hire (exclusive of interest) shall be required to make up a sum equal to 60 per cent of the total amount of Rs..... payable as hire under clause 9 hereof.

12. That if the hiring hereby constituted shall be determined under clause 2 or clause 11 hereof, the company shall, upon payment by the hirer of all sums payable under clause 10 or 11 hereof, as the case may be, return to the hirer duly cancelled such of the notes and bills mentioned in clause 4 hereof as shall not at the time of such payment have fallen due.

13. That upon payment by the hirer to company of the full sum of Rs..... and interest (if any) payable hereunder on the days and in manner aforesaid, the hiring shall cease and determine and the machinery shall thenceforth be and become the sole and absolute property of the hirer; but until such payment the machinery shall remain the sole and absolute property of the company but let on hire to the hirer.

Signed by the said..... (company) by and through..... duly authorised in that behalf under a power-of-attorney/resolution (date and description of the power-of-attorney or the resolution) in the presence of:

- 1.
- 2.

Signed by the said..... (hirer) in the presence of

- 1.
- 2.

**(4) Agreement for Hire-Purchase of Motor Vehicle**

THIS AGREEMENT made this ..... day of..... between carrying on business at..... (hereinafter called the Owners, which expression shall include their successors and assigns where the context so admits) of the First part and..... (hereinafter called the Hirer) of the Second part and..... (hereinafter called the Guarantor) of the Third part.

WHEREAS the Hirer has completed and signed a proposal form (which is to be regarded as the basis of this contract) it is hereby agreed as follows:

1. The Owner will let and the Hirer will take on hire upon the terms and conditions hereinafter expressed the Motor Vehicle with body, equipment and accessories described in the Schedule 'A' hereto (hereinafter called "the Vehicle") for the term of..... months from the (date) at the rent specified in the Schedule 'B' hereunder and payable without demand on the date therein mentioned.

**SCHEDULE 'A'**

No.	New used	or Make Trade Name	Model Year	Type of Body	H.P. Chasis Number	Engine Number	Registration Number

2. It is agreed between the parties that on account of the expected depreciation in the price of the Vehicle, the hire for the first month is fixed at Rs..... and the hire for future months shall be as mentioned in the Schedule 'B' of this agreement.

3. The Hirer and the Guarantor hereby expressly agree to execute jointly and deliver to the Owners at their option either a Demand Promissory Note or Usance Hundies and by way of collateral security for the due payment of the Hire and they further agree that the Owners shall be entitled to negotiate the Promissory Note or Hundies and also to sue upon the same. They further agree that any such negotiation of suits upon the Promissory Note or Hundies which have already become due or any judgement on the Promissory Note or the Hundies obtained by the Owners Will in no way prejudice the right of the Owners to repossess the Vehicle under this Agreement, provided always that in case such court action results in the Owners realising more than the amount justly due to them including interest, all costs and damages, such surplus shall be paid by them to the Hirer or Guarantor from whom it is realised.

4. The Hirer will, during the tenure of hire:

- (a) Punctually pay the said rent specified in the Schedule 'B' hereto as the same shall become due respectively.
- (b) Register the Vehicle in the name of the Owners, and the Hirer shall not represent or hold himself out as or to or suffer anything whereby he may be required to be the Owner of the said Vehicle.
- (c) Keep the Vehicle in good and serviceable repair, order and condition to the satisfaction of the Owners.
- (d) Authorise the Owners to insure and keep insured the Vehicle against loss or damage by fire, accident third party risks and riot risks for the sum of Rs..... at least, in the name of the Owners with the..... Insurance Company and pay punctually the premium and all money payable in respect of such insurance.
- (e) Authorise the Owners in selecting the Insurance Company for insuring the Vehicle described in Schedule 'A' hereto and the option made by the Owners is final and the Hirer or the Guarantor will under no circumstance raise objection for insuring the Vehicle with any Insurance Company selected by the Owner.

- (f) Pay all taxes, fees, duties, fines, registration charges and other charges payable in respect of the Vehicle and all rents and outgoings payable by the Hirer in respect of the premises where the Vehicle shall for the time being be kept or garaged when the same shall respectively become due.
- (g) Further agrees that the hire payments to be made by the Hirer are not subject to any suspensions or delay by reason of the Vehicle suspended by any Traffic authority or of the any pending insurance claim or due to any other cause or reason whatsoever.
- (h) On demand produce to the Owners the Policy of Insurance in respect of the Vehicle and receipts for the last premium and the last payments due towards the said taxes, license fees, duties, registration charges, rent and outgoings mentioned above.
- (i) Not sell, charge, pledge, assign or part with possession of the Vehicle.

5. In case of default by Hirer in payment of any insurance premium under sub-clause (d) or the charges mentioned in sub-clause (f) of the preceding clause, the Owners may pay the same or any part thereof, and any sum so paid by them shall be paid by the Hirer together with interest thereon at the rate of 15%. (Flat) per annum from the date of payment by the owner.

6. The Hirer agrees to make good to the Owner all damages to the Vehicle (fair wear and tear excepted) and pay the Owner the full value of the Vehicle in the event of a total loss, whether the damage or loss be caused accidentally or otherwise and by any reason whatsoever and to keep the Vehicle at the sole risk of the Hirer until the Hirer purchases the Vehicle or returns the Vehicle to the Owner.

7. The Hirer shall:

- (i) Permit the Owner, their agents and servants to examine the Vehicle at any time during the currency of this Agreement;
- (ii) Pay expenses for repairs deemed necessary by the Owners, replace any damaged parts and not to make any alteration or additions without previously obtaining the written permission of the Owners.

8. It is agreed and declared that any accessories which shall be fixed and additions, renewals and replacements which shall be made to the Vehicle shall for all purposes be deemed to have become part of the Vehicle and be subject to the provisions of this Agreement.

9. The Hirer has examined or caused to be examined the Vehicle, and the receipt by him of the same shall be conclusive evidence that the Vehicle has been accepted duly fitted and equipped according to the contract. No claim or objection thereafter shall be admissible and no warranty on the part of the Owners as to the quality or state of the Vehicle or accessories or spare parts supplied (thereto or as its or their fitness for any purpose or as to tradeworthiness is herein made implied and any implied warranty is hereby expressly excluded).

10. The Hirer shall forthwith intimate the Owners of any change of address of the Hirer and of the address of the premises where the Vehicle is kept and shall furthermore forthwith notify the owners in writing of any loss or damage to the Vehicle.

11. The granting of time or any other indulgence or the acceptance of any other payment after the due date or otherwise than at the Owner's Office at..... shall in no way or manner prejudice, alter or be deemed to vary any right, or claim vested in the Owner under this Agreement.

12. The Hirer shall indemnify the Owner against claims by third parties arising out of accident caused by the Vehicle until the Vehicle is returned to the Owner or purchased by the Hirer.

13. The Hirer shall not use or permit or suffer the Vehicle to be used in contravention of any statute and regulations for the time being in force or otherwise in any way contrary to the law, except described in the relative proposal for hire purchase.

14. The Vehicle being the property of the Owners shall not be subject to any lien, charge or claim in respect of any rent due by the Hirer to the landlord in respect of the premises where the Hirer is residing or where he is carrying on business or in respect of the premises where the Vehicle is garaged or placed at any time.

15. If the Hirer shall:

- (a) make default in payment of any rent specified in the Schedule 'B' hereto or any part thereof within seven days after the same shall become due whether the same shall have been demanded or not; or
- (b) make default in payment of the insurance premium, taxes, license, fees, fines, duties, registration charges, other charges, rents or outgoings; or
- (c) become insolvent or make any arrangement with the creditors; or
- (d) suffer any distress or execution to be levied upon any of his property; or
- (e) fail to observe or perform any stipulation or condition contained in this Agreement and on his part to be observed and performed, then and in any such case and so often as any such event shall happen, the hiring shall immediately be determined and the Owners may without notice or demand retake possession of the Vehicle whether the same shall be in the possession of the Hirer or of any other person and for that purpose the Owners, their Agents or Servants may enter the premises where the Vehicle shall for the time being parked, garaged or kept for the purpose of such retaking possession of the Vehicle. It shall, however, be at the option of the owner to reinstate this contract on such conditions as they deem fit after the determination of the hiring aforesaid.

16. Upon the determination of the hiring under the last preceding clause herein, all arrears of hires specified in the Schedule 'B' hereto and apportioned parts thereof to the date of determination and all costs and expenses incurred by the Owners in the exercise of the powers conferred by this Agreement shall forthwith be paid by the Hirer to the Owners and the Hirer shall not be entitled to any repayment of credit or allowance of any sum previously paid and all such hire and sum shall belong to the Owners absolutely.

17. The Hirer shall pay the Owner all expenses, costs or expenses incurred in ascertaining or endeavouring to ascertain the whereabouts of the Hirer or the Vehicle or in recovering or in endeavouring to recover any hire specified in the Schedule 'B' hereto and all other amounts payable by the Hirer in and by this Agreement.

18. All moneys payable to the Hirer by any insurer for loss or damage to the Vehicle are hereby assigned to the Owner who may notify the insurer of this condition.

19. The Hirer may determine the hire at any time by (a) delivering the Vehicle to the Owner during ordinary business hours at the premises of the Owner and (b) paying to the Owners, as apportioned, part of the current hire due upto the date of such delivery and all other sums, if any, which upto such date, the Hirer may have become liable to pay to the Owner under the provisions of this Agreement.

20. All sums due from the Hirer to the Owners under this Agreement will carry interest at the rate of 15% per annum from the due date until the date of payment by the Hirer.

21. If the Hirer shall duly observe and perform all the conditions and stipulations herein contained and on his part to be observed and performed, shall duly pay to the Owner all hire hereby reserved during the term of hiring together with all other sums, if any, payable by him to the Owners under the provisions of this Agreement, then and at the termination of hiring, the Hirer may purchase the Vehicle from the Owners provided the Hirer pays the Owner the price of Rs..... and also any sums chargeable, due, collected or recovered as and for Sales Tax under the provisions of the Sales Tax Law in force in respect of the transaction of Hire-Purchase Agreement entered into herein, (the liability for which shall always rest and remain on the Hirer whether the same be demanded or collected before or after the Hirer exercises his option to purchase the Vehicle).

22. The Hirer may at any time determine the hiring and become purchaser of the Vehicle by paying to the



Owner such a sum as together with the sums previously paid will amount to the total sum payable by way of hire hereunder together with all sums, if any, payable by him to the Owners under the provisions of this Agreement and in addition a sum of Rs..... together with any sums chargeable, payable, due, collected or recovered as and for Sale Tax under the Provisions of the Sales Tax Law in respect of the transaction of Hire-Purchase Agreement entered into herein (the liability for which always rest and remain on the Hirer whether the same be demanded or collected before or after the Hirer exercises his option to purchase the Vehicle).

23. If the Hirer fails to observe and perform the conditions and stipulations herein contained and fails to exercise the option of purchasing the Vehicle in accordance with the termination of the hiring, the Hirer shall pay the Owners a sum of Rs..... every month until the Vehicle is handed over to the Owners by the Hirer.

24. Until the Vehicle shall have become the property of the Hirer under the provisions of this Agreement it shall remain the absolute property of the Owner and the Hirer shall have no right or interest in the same other than Hire under this Agreement.

25. The agreement is personal to the Hirer and the rights of the Hirer shall not be assignable or chargeable by him.

26. It is expressly agreed that any Motor Dealer or anybody else by or through whom this transaction may have been introduced, negotiated or conducted is not an authorised Agent of the Owner and the owner has no liability for any representation or statements not made directly by the Owner to the Hirer.

27. Any letter, notice or other communication despatched to the Hirer or the Guarantor, whether through Post or Telegraph Office or through Owners representative at the address last notified to the Owners by the Hirer or the Guarantor shall be deemed to have been delivered or served on them respectively although returned with the remarks 'refused', 'whereabouts not known' or words to that effect, or for any other reason whatsoever.

28. The Owners agree to permit the Hirer to have the registration of the Vehicle, in his own name, for the purpose of conforming with the provisions of Motor Vehicle Acts (Act IV of 1939)<sup>8</sup> and the Rules framed thereunder, provided that the Hirer shall transfer the registration in the name of the Owner whenever required to do so by them especially when the Hirer commits a breach of any of the conditions of this Agreement stated supra, and the Owners are obliged to take possession of the Vehicle.

29. This Agreement has been accepted and executed by the Owners at and it has been agreed between the parties here that all the CLAUSES, TERMS AND CONDITIONS of this Agreement shall be observed and performed at..... and the Hirer and the Guarantor specifically agree and undertake that they or their representatives and agents shall institute any arbitration or other legal proceedings in..... Courts only which shall have the exclusive jurisdiction to try any arbitration or legal proceedings, or any suit, in respect of any matter, claim or dispute arising out of this Agreement and the Motor Vehicle hired out.

30. The Hirer and the Guarantor hereby admit that this Agreement has been fully explained to them and that they have fully understood the meaning of each and every CLAUSES, TERMS AND CONDITIONS and they have signed this Agreement, with full knowledge and understanding of the obligations herein willingly undertaken, agreed and accepted. This Agreement contains the entire undertaking of respective PARTIES and there is no other understanding or representation, express or implied. It is further expressly agreed that no employee of the Owners is authorised to alter or modify this Agreement in any way.

31. The Hirer further agrees with the Owner that in case of litigations all parties shall submit to the Jurisdiction of Courts in the City of.....

32. The amounts payable under this Agreement are payable at the Owners Office at.....

<sup>8</sup> Refer to Section 31A of the Act.



**SCHEDULE 'B'**

- |     |     |
|-----|-----|
| 1.  | 2.  |
| 3.  | 4.  |
| 5.  | 6.  |
| 7.  | 8.  |
| 9.  | 10. |
| 11. | 12. |
| 13. | 14. |
| 15. | 16. |
| 17. | 18. |
| 19. | 20. |
| 21. | 22. |
| 23. | 24. |
| 25. | 26. |
| 27. | 28. |
| 29. | 30. |
| 31. | 32. |
| 33. | 34. |
| 35. | 36. |

IN WITNESS WHEREOF the parties hereunto have set and subscribed their hand the day, month and year herein before mentioned and bind themselves, their heirs, successors, administrators and assigns.

*Witness:*

1. ....

2. ....

Signature of Hirer/s .....

Signature of Guarantor/s .....

Signature of the Owners .....

## **FAMILY SETTLEMENT DEEDS**

### **Concept of Family Arrangement**

Halsbury's Laws of England, 4th Edn. Vol. 18 at 135, Para 301 mentions:

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour."

It has been pointed out by Halsbury that though the agreement may be implied, it is more usual to embody or to effectuate the agreement by a deed to which the term "family arrangement" is applied.

Further, it says “family arrangements are governed by principles which are not applicable to dealings between strangers. When deciding the rights of parties under a family arrangement or a claim to upset such an arrangement, the Court considers what, in the broadest view of the matter, is most in the interest of the family, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matter which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements. Conversely, an intention to create a legally enforceable contract may be negatived more readily where the parties to an arrangement are members of the same family than where they are not.” [Halsbury’s Laws of England, 4th Edn. Vol. 18 at 137, Para 304]

The concept of family arrangement in England has been accepted by Courts in India, adopting the concept to suit the family set up in our country. The Supreme Court has generally taken a broad view of the matter and leaned heavily in favour of upholding any such arrangement. According to the Supreme Court, a family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of few, is undoubtedly a milestone in the administration of social justice. The object of such arrangement is to protect the family from long drawn litigation or perpetual strife’s which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family.

### Essentials of Family Settlement

The principles, which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.

In *Kale v. Dy. Director of Consolidation*, AIR 1976 SC 807 the Supreme Court has laid down the following propositions to put the binding effect and the essentials of a family settlement in a concretised form:

- (1) The family settlement must be a *bona fide* one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family.
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence.
- (3) The family arrangement may be even oral in which case no registration is necessary.
- (4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case, the memorandum itself does not create or extinguish any rights in immovable properties and, therefore, does not fall within the mischief of Section 17 (2) (*sic*) (Section 17 (1) (b)) of the Registration Act and is, therefore, not compulsorily registrable.
- (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest or even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties of the settlement has no title but, under the arrangement, the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same.
- (6) Even in *bona fide* disputes, present or possible, which may not involve legal claims are settled by a

*bona fide* family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement.

The fifth proposition quoted above clearly contemplates that even if a party to the settlement had no title but, under the arrangement, the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same. [*CIT v. R. Ponnammal*, (1987) 164 ITR 706 (Mad)].

### **Family Arrangement When Enforceable?**

No doubt, a family arrangement, which is for the benefit of the family generally, can be enforced in a court of law. But before the court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon. [*Lakshmi Perumallu v. Krishnavenamma*, AIR 1965 SC 825 : 1965 (1) SCR 261.]

### **SPECIMEN FORM**

#### **Settlement of Family Business**

This Deed of Family Arrangement is executed on this ..... in the year 2020 between :

A B 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 'C' 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 'D' and the second party shall hold the share in business and properties described in Schedule 'E'.
- (3) The movable and immovable properties, which is also described in Schedule 'C' 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 'E' 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 'D' 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 'D'.

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 .....

Witnesses

- |    |              |
|----|--------------|
| 1. | Signatures   |
| 2. | First Party  |
|    | Second Party |

Schedule 'C'

Schedule 'D'

Schedule 'E'

### LESSON ROUND UP

- A promissory note is defined by Section 4 of the Negotiable Instruments Act, 1881 as “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”.
- A power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney. It may be either general or special, i.e., to do all acts or to do some particular act”.
- A power of attorney can be executed in favour of more than one person. A power of attorney can be executed only in favour of a major.
- 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.
- Unless expressly or impliedly limited for a particular period, a general power of attorney will continue to be in force until expressly revoked or determined by the death of either party.
- Registration of a power of attorney is not compulsory.
- A contract of hire is a contract of bailment and is governed by the provisions of Chapter IX of the Indian Contract Act, 1872. Two things that distinguish the hire-purchase agreement from an ordinary contract of sale are (i) payment of instalments and (ii) option to purchase the goods hired. Such agreements should be drafted like hire contracts with the usual conditions, but with a clause or clauses providing for the said option to purchase.

A deed of hire-purchase is liable to stamp duty as an agreement under Article 5 of the Indian Stamp Act, 1899. Registration is not compulsory.

- A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

### TEST YOURSELF

1. Define 'Irrevocable Power of Attorney'. Draft a specimen Irrevocable Power of Attorney to be executed

by a borrower company in favour of Lender Company. Whether it is necessary to get such a Power of Attorney registered?

2. Define 'General Power of Attorney'. Draft a specimen General Power of Attorney on behalf of a company.
3. 'Powers of Attorney' are strictly construed'. Comment.
4. Draft a special Power of Attorney to be filed with the Registrar of Companies at the time of incorporation of a company.
5. Explain the essential features of hire-purchase? Do you feel any difference between hire-purchase and sale?
6. Draft an agreement for selling the goods on hire-purchase basis to a company

[illegible]



# Lesson 6

## Drafting and Conveyancing Relating to Various Deeds and Documents (III)

### LESSON OUTLINE

- Essential Requirements of Sale of Immovable Property
- Drafting of Deed of Sale of Immovable Property
- Mortgage & its Types
- Drafting of Deed of Mortgage
- License
- License when Transferable
- Revocation of License
- Form of Deed of License
- Lease
- Essential Points to be observed for Drafting of Lease Documents
- Drafting of a Lease
- Distinction between License and Lease
- Specimen Forms of Leases
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

The law relating to transfer of property is governed by the Transfer of Property Act, 1882. Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more other living persons, or to himself, and one or more other living persons. 'Living person' includes a company or association or body of individuals, whether incorporated or not. Property has, always, been on the fundamental elements of socio economic life of an individual.

Consequently, the law relating to transfer of property is not only an important branch of civil law but also one that demands proper elucidation due to its complexity.

Therefore, while drafting sale deeds relating to immovable property, students should be well versed in this subject so as to understand the intricacies involved in the transfer of property.



## DEEDS OF SALE OF LAND AND BUILDING

### Introduction

Sale of immovable property is governed by the provisions of Transfer of Property Act, 1882. Chapter-III of the said Act deals with the sale of immovable property exclusively. Section 54 of the said Act defines sale.

*“Sale” defined* - “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

*Sale how made* - Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

*Contract for sale* - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on, such property. Besides, Transfer of Property Act, legislation like Income-Tax Act, FEMA, Urban Land Ceiling Act and some other laws affect the free transfer of immovable property.

### Essential Requirements of Sale of Immovable Property

The following are the essential requirements of sale of an immovable property:

- (1) Transfer of ownership in exchange of price paid or promised or part paid or part promised.
- (2) Parties to transaction of sale are known as seller and buyer.
- (3) Subject-matter of sale is immovable property which is sold by seller and purchased by buyer.
- (4) Delivery of possession of property to the buyer by seller may be made as under:
  - (i) Property of the value of less than Rs. 100/- may be transferred merely by delivery of physical possession;
  - (ii) Property of the value exceeding Rs. 100/- may be transferred under a written instrument known as ‘Sale Deed’ which should be registered under the Registration Act, 1908.
- (5) Sale of immovable property attracts stamp duty under the Indian Stamp Act.
- (6)
  - (i) Clearance certificate from the Income-tax Officer
  - (ii) General permission of RBI is available if the property acquired is owned by Non-resident as per the Provisions of FEMA.
  - (iii) It may also be borne in mind by the draftsman to recite for all the above permissions, approvals, or exemptions obtained under different acts in the document.
- (7) The rights and obligations of the buyer and seller in the transaction of sale emerge as provided under Section 55 of the Transfer of Property Act.

### Rights and Liabilities of Buyer and Seller

Section 55 of the Act prescribes the rights and liabilities of buyer and seller, which can be modified by the parties to a contract by mutual consent and contract to the contrary of these provisions. The seller, under Sub-section (1), is bound to (a) disclose to the buyer any material defect in the property or in his title to such property, (b) to give title documents to buyer for investigation of seller's title to the property under transaction of sale, (c) to answer the question put to him by the buyer and provide all necessary information to him in regard to the property, (d) to execute the conveyance document on payment of consideration money in favour of the buyer, (e) pay all public dues on the property till the date of conveyance and take due care as a man of ordinary prudence to protect the title of the property till it is passed on to the genuine buyer. The buyer is also duty bound under the provisions of the Act to do the following things (a) to disclose to seller the interest of the seller in the property of which he is aware and believes that the seller is not aware and this information is likely to affect the price of the property, (b) to pay or tender the purchase money to the seller or such person as he directs, (c) where the ownership of property has passed to buyer he has to bear the full responsibility including any loss to the property etc., (d) to pay public dues from the date of transfer of ownership of the property.

Besides the above noted duties or obligations of the buyer and seller as covered under the provisions of the Act, there are certain rights and entitlements also. For example, the seller is entitled to following benefits:

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
- (b) where the property has passed to the buyer before payment of the whole of the purchase moneys the seller is entitled to a charge upon the property in the hands of the buyer. He is also entitled for the interest on the amount of unpaid consideration money for the property.

Similarly, the buyer is also entitled to the following benefits viz., (a) where the ownership of the property has passed to him, to the benefit of any improvement in it which may be in any shape of increase in value of the property or its rent or profit; (b) he is entitled to charge upon the property to the extent of entitlement etc.

### Documentation

Usually a transaction of a sale of immovable property involves two 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 (e.g., stamp duty or registration fees).

The Apex Court held that such transactions are illegal and cannot be recognized as valid under law. Hon'ble Supreme Court further sought to distinguish these illegal transactions from genuine transactions entered into by parties in good faith. While referring to Sections 53A and 54 of the Transfer of Property Act and its decisions in earlier cases, it 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.

### Drafting of Deed of Sale of Immovable Property

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

### **Acquisition of Immovable Property by a Company**

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

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

Some of the important conditions as contained in the said Act which a draftsman should bear in mind while drafting a Sale Deed are very precisely noted below:

**(a) *Lawful Consideration and Object***

The property must be purchased as a part of legal transaction having paid the consideration as required under the provisions of the Indian Contract Act, 1872 for a valid contract. Besides, the objectives for which the property is being purchased by the buyer should be lawful i.e., not forbidden by law, not to defeat the provisions of any law, not to be fraudulent, not to involve or impart injury to the person or property of another and should not be regarded by the court of law as immoral or opposed to public policy.

**(b) *Competence of Person to Transfer***

For a company, the test of competence to enter into a transaction of sale or purchase is that its Board of Directors should authorise a person under the resolution passed in their meeting held in conformity with the Articles of Association and having object clause to sell or purchase immovable property under its Memorandum of Association. In case the other party is an individual who is either selling to the company or purchasing from the company any land or immovable property such individual should be considered competent to transfer if it fulfils the necessary conditions prescribed under the Indian Contract Act, 1872 viz., (i) should be of the age of majority, (ii) be of sound mind; (iii) not be disqualified from contracting by any law to which such individual is subjected. Further, the draftsman should ensure that where a transaction is being made involves a person whose competence is derived in pursuance of following or adhering a prescribed procedure under any special or general law, such procedure should be followed invariably. For example, a minor though incompetent to enter into a transaction under the Law of Contract but becomes competent if the procedure laid down under the Law of Minority and Guardianship is followed i.e. through the natural guardian or ward the minor can lawfully enter into the transaction of transfer of immovable property with the company.

**(c) *Transfer of All Interest - in the Property***

All interests which a transferor is capable of passing in the property as legal incident of the transfer should be explained in the document, for example, if it is transfer of land, the easements annexed thereto, the rents of profits thereof, things attached thereto etc.

**(d) *Absolute Transfer***

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

**(e) *Absolute Interest in the Property***

The interest being transferred in the property should not be conditional which may restrict full enjoyment of the property by the transferee.

**(f) Justification for Transfer**

Cogent reasons for the transfer be given so as to establish *bona fide* base for the transaction and to avoid eventualities of fraud and multiple litigation therefrom.

**(g) Protection of Creditors' Interest**

Law protects creditors' interest in the transferred property.

**(h) Enforcement of Rights Attached to Property on Valid Transfer**

If a transferee is aware of such rights attached to the property and the transfer is gratuitous then the person can enforce such rights against transferee. But this could be avoided if the transferee has no notice about such rights attached to property and also has paid full consideration for the transaction.

**(i) Property to be Free from Conditions**

The property being transferred should be free from any rights or obligations which a third person can enforce legally against transferee for enjoying any benefits.

**(j) Transfer in Good Faith and with Full Authority**

Where the property is transferred by a person not to be the real owner, it is necessary to make such transfer valid for the transferor should have the authority to transfer and he must exercise this authority in good faith.

**(k) Protection for Defective Title**

Law protects the transferee who acquires the immovable property under good faith and for *bona fide* consideration but by any circumstance unknown to him is rendered to have defective title, Section 51 of the Transfer of Property Act, provides such protection to *bona fide* transferees acquiring properties in good faith.

**(l) Precautions**

The draftsman should know beforehand that the property under transfer is free from encumbrances and no litigation questioning such property or rights or interest connected therewith is pending in any court. To avoid fraudulent transfers, the draftsman should ensure that the title to such property has been investigated by competent advocate and he has certified the title free from any encumbrance whatsoever.

In the case of a company, it must be ensured that the Board of Directors have requisite powers under Companies Act, 2013 to sell, lease or otherwise dispose of the property of company.

### Specimen Forms for Deeds of Sale of Immovable Property

Some specimen forms for sale deeds of immovable properties are given below representing different situations. These forms can be adopted in different situations by making suitable modifications.

**(1) Simple Deed of Sale of a House, without Recitals**

THIS DEED OF SALE is made at Delhi on this the..... day of.....2020....

BY AND BETWEEN AB, etc., (hereinafter called "the seller") which expression shall unless repugnant to the context shall include its successors, legal representatives, assigns of the ONE PART

AND

CD, etc, (hereinafter called "the buyer") which expression shall unless repugnant to the context shall include its successors, legal representatives, assigns of the OTHER PART .

NOW THEREFORE IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. In consideration of the sum of Rs..... paid by the buyer to the seller on the..... day of..... (the receipt of which the seller hereby acknowledges) the seller as owner hereby transfers to the buyer by way of sale ALL that pucca house standing on the land measuring 27 metres by 10 metres fully described in the schedule hereto annexed and thereon shown with its boundaries coloured red (hereinafter referred to as "Premises") TO HOLD the same to the buyer as absolute owner.
2. The seller hereby covenants with the buyer as follows:
  - (a) The said Premises shall be quietly entered into and upon and held and enjoyed and the rents and profits received therefrom by the buyer without any interruption or disturbance by the seller or any person claiming through or under him and without any lawful disturbance or interruption by any other person whomsoever;
  - (b) The seller will at the cost of the person requiring the same, execute and do every such assurance or thing necessary for further more perfectly assuring the said premises to the buyer, as may reasonably be required;
  - [(c) The interest hereby transferred subsists and the seller has power to sell the same;
  - (d) The property hereby sold is free from all encumbrances, charges, mortgages, liens, prior agreement to sell, court proceedings, gifts, of any nature whatsoever..
  - (e) That the construction existing on the said Premises is in accordance with the sanctioned plan.
3. If any of the foregoing including the representations and warranties are found to be false in any manner and/or if the buyer is deprived of the said Premises at any time, in future after execution of this Sale Deed in full or in part thereof, owing to the above reason or reasons whatsoever in respect of the said Premises, the Seller hereby undertakes that he will entirely remain liable and responsible to indemnify the buyer for the same in all manners, including but not limited by all his moveable and immoveable properties and all other assets.
4. That the Seller has delivered the peaceful physical vacant possession of the said Premises under sale alongwith all its rights of ownership and also delivered all the previous original documents of the said Premises to the buyer at the time of execution and registration of this Sale Deed.
5. That the buyer can get the said Premises under sale mutated in its own name in the record of M.C.D. and/or any other concerned authority by presenting this Sale Deed or its true copy.
6. That from the date of execution of this Sale Deed the buyer becomes the sole and absolute owner of the said Premises under sale and shall be at full liberty to use, enjoy and utilize the said Premises under sale and also have right, power, absolute authority and be fully competent to sell or dispose off the same to anyone in any manner as he may like.
7. That after the execution of this Sale Deed neither the buyer nor his legal heirs, may raise any objection or create any charge or demand any share in the said Premises under sale here-after.

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

Witness

Vendor

Witness

Purchaser

*The schedule herein referred to*

(Description of the property)

**(2) An Agreement of Sale of Immovable Property**

THIS AGREEMENT OF SALE executed on this the..... day of..... 2020 between S son of SF, resident of....., hereinafter called vendor of the ONE PART and P son of PF, resident of..... hereinafter called the purchaser of the other part. (The expression “Vendor” and “Purchaser” wherever they occur in these presents, shall also mean and include their respective heirs, executors, administrator, legal representatives and assigns).

WHEREAS the vendor is the sole and absolute owner of the property more fully set out in the Schedule hereunder:

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

NOW THIS AGREEMENT OF SALE WITNESSES AS FOLLOWS:

1. The price of the property more fully set out in the Schedule is fixed at Rs..... (Rupees.....) free of all encumbrances.
2. The purchaser has paid to the vendor this day the sum of Rs..... (Rupees.....) by way of earnest money for the due performance of the agreement, the receipt of which the vendor doth hereby admit and acknowledge.
3. The time for performance of the agreement shall be..... months from this date, and it is agreed that time fixed herein for performance shall be the essence of this contract.
4. The purchaser shall pay to the vendor the balance sale price of Rs. .... (Rupees.....) before registration of the sale deed.
5. The vendor agrees that he will deliver vacant possession of the property to the purchaser before registration of the sale deed.

*Alternatively*

The vendor agrees that he will put the purchaser in constructive possession (if vacant possession is not possible) of the property by causing the tenant in occupation of it to attorn their tenancy to the purchaser.

6. The vendor shall execute the sale deed in favour of the purchaser or his nominee or nominees as purchaser may require.
7. The vendor shall hand over all the title deeds of the property to the purchaser or his advocate nominated by him within..... days from the date of this Agreement for scrutiny of title and the opinion of the vendor’s Advocate regarding title of the property shall be final and conclusive. The purchaser shall duly intimate the vendor about the approval of the title within..... days after delivering the title deeds to him or his Advocate.
8. If the vendor’s title to the property is not approved by the purchaser, the vendor shall refund to the purchaser the earnest money received by him under this Agreement and on failure of the vendor to refund the earnest money within..... days he shall be liable to repay the same with interest thereon at..... per cent per annum.
9. If the purchaser commits a breach of the Agreement, he shall forfeit the earnest amount of Rs..... (Rupees.....) paid by him to the vendor.
10. 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.

11. Nothing contained in paras 9 and 10 supra shall prejudice the rights of the parties hereto, to specific performance of this Agreement of sale.

**(Schedule of Property)**

IN WITNESS W HEREOF the vendor and the purchaser have set their hands to the Agreement of sale the..... of..... 2020 in the presence of the witnesses:

Witness:

Vendor

Witness:

Purchaser

**(2A) Specimen Schedule of the Property**

1. Municipal No./Ward No./Plot No./Khasra No.:
2. Location: Street No.:  
Street Name:
3. Place/Area North:  
South:  
East:  
West:
4. Sub-District Hqrs./Tehsil/Taluka:
5. Police Station:
6. District/State:
7. Exact Measurement:  
Total Area: Measurement of all sides:  
Plinth area/floor area: Sketch/plan:  
Carpet area:
8. Fixtures & Fittings:
9. Any other items to be covered in sale deed.
10. Permitted use of the land/building:

In case of agricultural land, the schedule may be modified to include the Khasra Nos./Plot Nos. with area and location as per the revenue records supplied by the Patwari or revenue office of the Sub-District/Tehsil/Taluka.

It is also a requirement that a survey is done as to ascertain the exact measurement of area and compare it with what is mentioned in the title deed. Buyer can make sure that he is buying a property of a particular measurement.

**(3) Deed of Sale by a Certificated Guardian of a Hindu Minor**

THE DEED OF SALE is made on this..... day of..... BETWEEN AB of, etc. (vendor) of one part and CD of, etc. (purchaser) of the other part.

WHEREAS by an order made by the District Judge of..... in Case No..... of under Act VIII of 1890 (cause title) the said AB was appointed certificated guardian of XY who was then and is still now a minor under the age of 21 years.



AND WHEREAS by an order dated..... the..... day of..... made by the District Judge of..... in Misc. Judicial Case No. ... of..... the said AB was authorised to sell the lands, hereditament and tenement belonging solely and exclusively to the said minor on terms thereunder contained which property is fully mentioned and described in the Schedule hereto.

AND WHEREAS the said order is still in full force and virtue.

AND WHEREAS in pursuance of the said order the said AB as such certificated guardian has contracted with the said CD for absolute sale of the said property at and for the sum of Rs.....

NOW THE INDENTURE WITNESSETH that for the consideration as aforesaid and in exercise of the powers, authorities and liberties conferred upon and vested under and by virtue of the hereinbefore recited order dated..... and all other powers and authorities enabling him in that behalf the said AB do hereby grant, convey, sell, transfer, assign and assure as certificated guardian of the said minor the said property and every part whereof unto and to the use of the said CD, To Have and To Hold the same absolutely and for ever.

AND THIS INDENTURE FURTHER WITNESSETH that the said AB do hereby covenant with the said CD that the said AB has not heretobefore done, executed, performed or knowingly suffered to the contrary any act, deed or thing whereby or by reason or means whereof the said property or any part thereof may in any way be encumbered or prejudiced in title or estate or the said AB may be hindered or prevented from granting, transferring, conveying, selling, assigning or assuring the same in the manner hereinbefore indicated.

The Schedule above referred to

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered*

.....AB

.....CD

#### **(4) Sale Deed of Agricultural Land**

THIS DEED OF SALE is made on this..... day of..... Two Thousand..... BETWEEN..... hereinafter called the vendor of the one part AND..... hereinafter called the vendee of the OTHER PART.

AND WHEREAS the vendor is lawfully seized and possessed of or otherwise sufficiently entitled to the property described fully in the Schedule below.

AND WHEREAS the vendor (or vendor's) predecessor-in-interest exercised his option to retain the said property in terms of local land laws having effect on such land or whereas the property described in the schedule below stands retained by reason of the then raiyat not having agricultural lands beyond the ceiling of the predecessor-in-interest as the case may be.

AND WHEREAS the land described in the Schedule below has been recorded in the finally published Khanda-Khatian of the vendor or vendor's predecessor-in-interest as the case may be.

AND WHEREAS the land fully described in the Schedule below stands retained by the vendor through operation of family ceiling as envisaged in Chapter II-B, W.B., Land Reforms Act.

AND WHEREAS the vendor has obtained previous permission in writing.

NOW THIS DEED WITNESSES THAT in consideration of a sum of Rs..... paid by the vendee or promised to be paid by the vendee or a sum of Rs..... paid by the vendee out of the total agreed sum of Rs..... being agreed as the price of the property, and the receipt whereof being acknowledged by the vendor do hereby and hereunder grant, convey, sell, transfer, assign and assure all his estate and

interest in the schedule property with all appurtenances, together with all homestead, trees, tanks, hedges, ditches, ways, waters, watercourse, lights, liberties, privileges easements whatever to the land described in the Schedule.

AND ALL the estates, right, title, interest, claim and demand whatsoever of the vendor into or upon the same and every part thereof: TO HAVE AND TO HOLD the same unto and to the use of the purchaser, his heirs, executors, administrators, assigns absolutely and forever together with title deeds, writings, muniment and other evidences of title AND THE VENDOR do hereby covenant with the purchaser, his heirs, executors, administrators representatives and assigns that notwithstanding any acts, deed or things hereto before done, executed or knowingly suffered to the contrary the vendor is now lawfully seized and possessed of the said property free from any encumbrances, attachments or defect-in title whatsoever and that the vendor has full power and absolute authority to sell the said property in the manner aforesaid AND the purchaser shall hereafter peaceably and quietly hold, possess and enjoy the said property in khas without any claim or demand whatsoever from the vendor or any person claiming through or under him. AND FURTHER THAT the vendor, his heirs, executors, administrators or assigns, covenant with the purchasers, his heirs, executors, administrators and assigns to save harmless indemnify and keep indemnified the purchaser, his heirs, administrators or assigns from or against all encumbrances, charges and equities whatsoever. AND the vendor, his heirs, administrators or assigns further covenant that he or they shall at the request and cost of the purchaser, his heirs, executors, administrators or assigns do or execute or cause to be done or executed all such lawful acts, deeds and things whatsoever for further and more perfectly conveying and assuring the said property and every part thereof in manner aforesaid according to the true intent and meaning of this deed.

#### *Schedule of Property*

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered*

by the vendor in the presence of:

#### **(5) Deed of Sale of Property, Mortgagee - Joining**

THIS INDENTURE IS MADE on this..... day of....., 2020 BETWEEN AB of etc. (vendor and mortgagor), of the first part, CD of..... etc. (mortgagees), of the second part, and MN of, etc., etc., (purchaser) of the third part.

WHEREAS by Deed of Mortgage dated..... day of..... made between the said AB described therein as mortgagor of the one part and the said CD described therein as mortgagee of the other part and registered in Book I, Vol..... Pages..... to..... in the office of..... it was witnessed that the said AB did for the consideration mentioned therein grant, convey, sell, transfer, assign and assure unto and to the use of the said CD the property fully mentioned and described in the Schedule thereto and also particularly written in the Schedule below subject to the proviso for redemption as therein contained.

AND WHEREAS there is now due and payable to the said CD by the said AB a sum of Rs..... as principal and a further sum of Rs..... as interest making thus an aggregate of Rs..... which sum the said AB has no resources to repay except by sale of the said property as hereunder mentioned.

AND WHEREAS in the circumstances aforesaid the said AB has agreed with the said MN for sale of the said property at and for the sum of Rs.....

AND WHEREAS the said CD has agreed to join with the said AB in effecting such sale and assuring the same so as to pass an absolute title in the said property unto the said MN free from encumbrances.

NOW THIS INDENTURE WITNESSETH that in consideration of the said sum of Rs..... out of which a sum of Rs..... has been paid to the said CD in satisfaction and discharge of the mortgage debt and the balance retained by the said AB the receipts whereof they, viz., the said AB and CD do hereby and hereunder respectively admit, acknowledge and confirm he, the said AB, doth hereby and hereunder grant, convey, sell, transfer, assign and assure and the said CD join with the said AB and convey, sell, transfer and release unto and to the use of the said MN the said property and every part thereof TO HAVE HOLD AND POSSESS the same absolutely and forever freed and released from the said mortgage and all moneys due and payable thereunder together with buildings etc. (as usual in the conveyance) (usual covenants on the part of the vendor e.g., covenant as to good title, peaceful possession, non-encumbrances except the mortgage, further assurance and indemnity).

AND that the said CD do hereby covenant with the said MN that he has not done any act, deed or thing, nor suffered anything to the contrary whereof or by reason or means whereof the said property or any part thereof may be in any way affected or prejudiced in title or estate. And that he has full power and absolute authority to grant, convey, sell, transfer, assign and release the same in the manner hereinbefore indicated.

Schedule above referred to

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered*

.....AB

.....CD

.....MN

#### **(6) Deed of Sale by Co-owners of Undivided Property**

THIS DEED OF SALE is made on the..... day of....., 2020 BETWEEN AB of, etc. and CD of, etc. (vendors), of the one part, and EF of, etc. (purchaser), of the other part.

WHEREAS one PQ late of, etc. who was a Hindu governed by the Dayabhaga or Bengal School of Hindu Law died on the..... day of..... intestate, leaving his surviving only two sons viz., the said AB and CD as his heirs and legal representatives under the said school.

AND WHEREAS the said PQ left *inter alia* the following property as part of his estate. AND WHEREAS the estate of the said PQ has been fully administered.

AND WHEREAS the said AB and CD are in joint possession and enjoyment of the property hereinafter described as co-owners in equal shares without effecting any partition or division thereof.

AND WHEREAS the said AB and CD have agreed to sell the said properties free from encumbrances, to the said EF for the sum of Rs.....

NOW THIS DEED WITNESSES that in pursuance of the said agreement and in consideration of the sum of Rupees....., paid to the said AB and CD by the said EF at or immediately before execution of these presents the receipts whereof the said AB and CD hereby admit, acknowledge and confirm, they, the said AB and CD and each as beneficial owner of one equal undivided moiety thereof, do hereby and hereunder grant, convey, sell, transfer, assign and assure unto and to the use the said EF ALL THAT, etc. (parcel, etc., as in a conveyance); TO HAVE and TO HOLD the same unto and to the use of the said EF, his heirs, executors, administrators, representatives and assigns absolutely and for ever.

(Vendor's usual covenants as in a conveyance)

*Schedule of the Property*

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered*

.....AB

.....CD

.....EF

**(7) Deed of Sale of Joint Family Property for Legal Necessity**

THIS DEED OF SALE made on this..... day of..... BETWEEN AB for self and as Karta of and representing all other coparceners, viz., his sons named..... all constituting a Hindu Mitkshara 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 part of its estate.

AND WHEREAS the said joint family also carried on and still carries on business as dealers and suppliers of..... at No..... under the name and style of..... which suffered a heavy loss of its capital and reserves estimated at Rs..... in the year..... owing to out-break of fire..... at its godown at No..... on the day of.....

AND WHEREAS the joint family could not also pay its income-tax 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 capital loss and to pay the liability of the family as regards the said income-tax 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 joint family has by an agreement in writing 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 to 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 necessity for the sale.

NOW THIS, INDENTURE WITNESSETH 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 doth 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. (as usual in a conveyance) unto and to the use of the said CD absolutely and for ever.

Usual covenants on the part of a vendor as in a conveyance.

*Schedule above referred to*

IN WITNESS ETC.

*Signed, sealed and delivered*

.....AB

.....CD

### **Sale by Liquidator of a Company in Voluntary Liquidation**

Liquidation means winding of the company and Liquidator is the officer appointed to conduct the winding up of a company. Winding up is a proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realised and applied in payment of its debts and when these are satisfied, returning to its members the sums which they have contributed to the company or paying them other moneys due to them in their character of members.

Voluntary winding up is one of the following modes of winding up recognised under Section 270 of Companies Act, 2013, which includes liquidation by Tribunal or voluntary.

Sale Deed to be drafted for being executed by the Liquidator of a company in voluntary liquidation assumes the following form:

### **A Specimen of Deed of Sale by Liquidator of a Company in Voluntary Liquidation**

THIS SALE DEED is made on this..... day of..... by voluntary liquidator of..... Co. Ltd., (in voluntary liquidation) (hereinafter called "the vendor") of the one part, in favour of Shri....., son of Shri....., Occupation....., resident of..... (hereinafter called "the purchaser") of the other part, under the terms and conditions mentioned below:

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

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

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

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

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

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

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

Witness: 1.

Vendor

Witness: 2.

Purchaser

#### Schedule

Item Nos.	1.	2.
	3.	4.

### A Specimen of Deed of Sale by an Administrator under Orders of the Court

Administrator is appointed by the Court for the administration of the properties of a deceased person who has made a will and probate is granted by the Court in favour of a person who claims the right to succession to the properties of the deceased.

Form of the Sale Deed to be executed by Administrator is given below:

THIS DEED OF SALE is made on the..... day of..... by the Administrator/appointed Administrator in Administration Suit No. .... of..... in the Court of..... (hereinafter called "the vendor") of the first part in favour of Shri....., son of..... Occupation....., resident of..... (hereinafter called "the purchaser") of the second part.

WHEREAS D, son of Shri....., of..... died on..... having an estate comprising movable and immovable properties but without appointing a successor under his will dated.....

AND WHEREAS in Administration Suit No..... of..... decided by the Court of....., the vendor was appointed as Administrator to administer the estate of the said D in accordance with the terms of the will aforementioned;

AND WHEREAS the said vendor as such Administrator obtained sanction for the sale of the properties more particularly described in the Schedule I annexed hereto, in an Order dated....., a copy whereof is also attached as Schedule II hereto;

AND WHEREAS the vendor advertised for receipt of tenders for the purchase of the said properties;

AND WHEREAS the said vendor has, pursuant to such tenders agreed to sell and purchaser as one of the tenders to the property mentioned in the Schedule I, agreed to purchase the Items Nos..... of the properties mentioned in Schedule I on the terms and conditions mentioned in the advertisement for sale agreed to be embodied in this Deed.

NOW THIS DEED OF SALE WITNESSES AND IT IS HEREBY AGREED BETWEEN THE PARTIES AFOREMENTIONED AND DECLARED AS UNDER:

That in consideration of the receipt of Rs..... (Rupees.....) paid by the purchaser to the vendor along with the tender dated..... (the receipt whereof the vendor hereby acknowledges) and on payment by the purchaser to the vendor of the sum of Rs..... (Rupees.....) before the Sub-Registrar, .....at the time of presentation of this Deed of Sale for registration (the receipt whereof the vendor hereby acknowledges), the vendor hereby transfers by way of sale and conveys unto the said purchaser, all that property originally belonging to the said..... mentioned in the item No..... in the Schedule I attached hereto unto the purchaser, his heirs and assigns to have and to hold the same as an absolute owner thereof for ever.



The possession of the said property conveyed under this Deed has been delivered to the purchaser on the date of the presentation of this Deed for registration before the Sub-Registrar, .....together with title-deed relating to the said item No..... with a stipulation that the vendor shall at all reasonable times allow inspection of the other documents of title, viz., partition deed between....., father of D, and..... dated..... along with the deed of reconveyance by the mortgage dated..... relating to the item No..... mentioned in the Schedule I attached hereto as well as item Nos. 2, 4 and 7 mentioned in the Schedule and to produce the said documents of title so retained by the vendor when required by the purchaser at his expense before any Court or arbitrator or authorities.

(Any other agreed terms may be added here)

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

*Witness:*

*Vendor*

*Witness:*

*Purchaser*

Schedule

Item Nos.	1.	2.
	3.	4.

### **Sale of Business and Assignment of Goodwill**

Wharton's Law lexicon defines goodwill as the advantage or benefit which is required by a business, beyond mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers.

Supreme Court of India in *Khushall Khengar Shah v. Khorshedbanu*, AIR 1970 SC 1147, had opined goodwill of a business as an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make the connections durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features.

Specimen Form of the Sale Deed for sale of a business and assignment of goodwill is given below\* :

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

THIS INDENTURE made the..... day of..... BETWEEN AB of, etc. (vendor), of the one part, and CD of, etc. (purchaser) of the other part.

WHEREAS the said AB has been carrying on the trade and business of, etc. etc., at premises No..... under the name and style of.....

AND WHEREAS the said AB has contracted with the said CD for the sale to him of all his stock-in-trade and other assets and goodwill of the said trade of and the business in entirety as a going concern together with all book debts and other debts and all rights and benefits of all pending contracts, orders, securities, etc., full particulars whereof are contained in the books of the said business and all money due and payable to the said AB on account therefor whether adjusted or unadjusted subject however to all contracts, orders and engagements which are still to be executed or for which the said AB is otherwise liable; at and for the sum of Rs..... upon the terms hereinafter mentioned;

AND WHEREAS the said AB has delivered to the said CD the books of account and other books relating to the said business containing full particulars of the debts, respectively due and owing to and from the said



AB and also the particulars of the contracts and engagements to which he is liable in respect of the said business.

NOW THIS DEED OF SALE WITNESSES that in pursuance of the said agreement and in consideration of the sum of Rupees..... paid by the said CD to the said AB (the receipt whereof the said AB hereby admits and acknowledges), and also in consideration of the covenants and conditions thereunder contained to be observed and performed on the part of the said CD the said AB do hereby and hereunder grant, convey, sell, transfer, assign and assure unto and to the use of the said CD all that the trade or business carried under the name and style of..... at premises No..... with ALL beneficial interest and goodwill of the said AB, in the said trade and business of, etc., so carried on by him as aforesaid, and also all the books and other debts now due and owing to him on account of the said trade and the business and all securities for the same, and also all contracts and engagements and benefits and advantages thereof which have been entered into with the said AB and also all the stock-in-trade goods, fixtures, articles and things which, at the date of this deed, belong to the said AB on account of the said trade and business, and all the rights, title and interest of the said AB to and in the said premises; TO HAVE AND TO HOLD the same to the said CD absolutely.

AND THAT THE SAID AB does hereby covenant with the said CD that he, the said AB, will not at any time hereafter, either by himself or in collaboration with any other person or persons, or as a partner or as a director of any limited company carry on the said trade and business of, etc., within a radius of..... miles of, etc.

AND that the amount and particulars of the debts respectively due and owing to and from the said AB on account of the said trade and business and the particulars of the contracts and engagements to which he is liable with respect to the said trade and business, are correctly stated in the books of account and other books delivered by the said AB to the said CD.

AND further that the said AB will pay or cause to be paid all and every sum to the said trade and business in excess of the amount or amounts which by the said books appear to be so due and owing.

AND furthermore that the said AB has good right, full power, absolute authority and title to grant, convey, sell, transfer, assign and assure the trade or business of "....." unto and to the use of the said CD in the manner hereunder indicated together with the benefit of the tenancy according to the nature and tenure of the contract.

AND THIS INDENTURE ALSO WITNESSES that in pursuance of the said agreement in this behalf and in consideration of the premises, the said CD do hereby agree with the said AB that he, the said CD, shall and will from time to time and at all times hereafter execute and perform all outstanding contracts and orders and engagements and/or otherwise save harmless, indemnify and keep indemnified the said AB and his estate and effects against all losses, claims, demands, costs, charges and expenses as against the several sums of money which by the said books appear to be due and owing from the said AB in respect or the said trade and business, and also from and against the contracts and engagements to which by the said books the said AB appears to be now liable and or performance or non-performance thereof.

AND THIS INDENTURE ALSO WITNESSES that the said AB do hereby irrevocably nominate, appoint and constitute the said CD as his attorney for him and in his name to do, execute and perform all acts, deeds, and things as shall be necessary or requisite to carry on the said business as his successor and for that purpose to represent him before all appropriate authorities and in all courts of law and to sue for, recover, realise and to give good valid discharges for all moneys due and payable to him on account of or in connection with the said trade or business hereby assigned and appropriate the same for his use and purposes.

IT IS FURTHER AGREED that the names of the parties hereto shall, unless inconsistent with the context, include as well the heirs, administrators or assigns of the respective parties as the parties themselves.

IN WITNESS, etc.

*Signed, sealed and delivered*

.....AB

.....CD

## MORTGAGE AND ITS TYPES

### Mortgage

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

The Transfer of Property Act, 1882 deals with the mortgage of immovable property alone. It does not deal with movable at all. Therefore, it cannot be regarded as forbidding the mortgage of movable property. A mortgage of movables, such as plant and machinery, stock in trade, policy is perfectly a valid transaction even though the possession is not delivered and the mortgage is only a hypothecation. The hypothecation of movables is increasingly resorted to in the case of borrowings by companies for financing and implementation of its various investment proposals.

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

### Types of the Mortgages

The following are different kinds of mortgages in effect in India:

#### (a) Simple Mortgage

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

#### (b) Mortgage by Conditional Sale

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

#### (c) Usufructuary Mortgage

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

#### (d) English Mortgage

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

**(e) Mortgage by Deposit of Title Deeds**

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

1. Debt even time barred, present and future advances are covered under the equitable mortgage. In other types of mortgage, future advances are not covered.
2. Delivery of title deeds is required to be made in Bombay, Madras and Calcutta and other specified towns to which the facility is extended by State Government from time to time through Gazette notification.  
  
It is not necessary for creation of mortgage that the property be located in the specified town or the company making deposit should have its registered office in that town.
3. This deposit can be made by the company through its nominee or agent duly authorised.
4. Intent to create security by deposit of title deeds should be present at the time of such deposit in the mortgagor.
5. Neither ownership nor possession of the property passes to the mortgagee under the equitable mortgage.

Equitable mortgage is preferred by the lenders/banks/creditors as well as the commercial enterprises because of the inherent advantages viz. (a) to save time and avoid inconvenience of documentation, and registration; (b) to minimise cost of creating mortgage and cost of borrowed funds by saving stamp duty; (c) to maintain secrecy of the debt transaction; (d) section 180 of the Companies Act, 2013.

**(f) Anomalous Mortgage**

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

**Who can be Mortgagor and Mortgagee?**

Any living person, company, or association or body of individuals, who has an interest on immovable property can mortgage that interest. In the case of a company mortgage of the property should be duly authorised by 'Object Clause' of the Memorandum of Association and approved by a resolution of the Board of directors.

Further, for creation of a mortgage, the Financial Institutions usually insist on a resolution of the shareholders under Section 180 of the Companies Act, 2013.

Any person capable of holding property may take a mortgage unless he is dis-qualified by any special law from doing so. A minor may be a mortgagee but as he cannot enter into a contract, the mortgage should not involve any covenants by him.

Thus, as we have seen above, any interest in any property which is capable of being transferred may be a subject of mortgage.

Generally the mortgage is associated with immovable property; 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. When the principal money secured is Rs.100/- or more a mortgage other than a mortgage by deposit of title deeds, can be effected only by a Registered instrument signed by the mortgagor and attested by at least two witnesses.

### Rights of Mortgagee

- Right to Sell

If borrower fails to return the loan in time then the mortgagee has the right to sell the property of the mortgagor, but the same can only be sold through auction subject to approval from the Court.

- Right to Recover Shortfall

In case the amount to be recovered falls short after selling the property, mortgagee shall have the right to recover the balance due.

- Refusal of Debt

Mortgagee shall have the right to get a foreclosure decree from the court.

### Liabilities of Mortgagee

- Property should be protected to the best possible extent.
- No alteration to the property.
- Proper Insurance Cover against the Property.
- All taxes, revenues levied by government should be paid.

### Rights and Liabilities of Mortgagor

- Right to redeem the Property on payment of dues.
- Right to Claim Damages in case the Property is damaged in the custody of Mortgagee.
- Right to lease the property in case the property is in possession of Mortgagor.
- Liability to pay taxes, revenues levied by government in case the property is in custody of Mortgagor.

### Drafting of Deed of Mortgage

A deed of mortgage may be drafted either as a name change deed or Deed Poll on behalf of the mortgagor in favour of the mortgagee or as a deed between the mortgagor and mortgagee as parties. In the case of an equitable mortgage, as we have seen earlier, it is prudent to execute a memorandum referred to the deposit of title deeds to secure a specific mortgage money.

The following points should be borne in mind while drafting a Deed of Mortgage:

- Parties:** There should be two parties, the mortgagor and the mortgagee. The former is usually defined as the borrower. The Indian practice of having a deed of mortgage executed by the mortgagor only is unscientific, because the mortgage deed usually contains covenants by both the parties.
- Recitals:** These are of two kinds. Firstly, recital as to the title of the mortgagor, such as "Whereas the borrower is the absolute owner of the property hereby mortgaged free from encumbrances". The second form of recital is as to the agreement for loan, such as: "And Whereas the mortgagee has agreed with the borrower to lend him the sum of Rs. .... upon having the re-payment thereof with interest hereinafter mentioned secured in manner hereinafter appearing".
- Covenant for re-payment:** This clause usually recites that in pursuance of the said agreement and in consideration of the receipt of the mortgage money the mortgagor covenants to pay the mortgage money with interest at the stipulated rate in the manner agreed upon.

- (d) *Mortgage clause:* This clause describes the property mortgaged. In case of simple mortgage, the property is charged and assured as security for re-payment of mortgage debt. In an English mortgage it is absolutely sold to the mortgagee, subject to the covenants as to re-conveyance upon repayment of debt with interest. A thorough investigation of the titles upto 60 years and preparation of an abstract of title to ensure that mortgagor has an absolute right over the property is recommended.
- (e) (i) *Covenants by the mortgagor:* To repair the mortgaged property, in default the mortgagee is given power to enter into possession without being liable as a mortgagee in possession, with a view to effect repairs. Mortgagee's expenses for this purpose are considered properly incurred.
- (ii) *Covenant to insure:* The mortgagor covenants to insure the mortgage property in the name of the mortgagee of an insurance office approved by the mortgagee. In default, the mortgagee is entitled to insure and the costs incurred are to be charged to the mortgagor.
- (iii) *Covenant not to grant leases or accept surrender thereof:* It often happens that the mortgagor while in possession, grants long term leases to the detriment of the mortgagee. To guard against such a contingency, it is agreed that the mortgagor shall not grant leases of mortgaged property for a period exceeding one year without the written permission of the mortgagee or accept surrender of existing leases without like permission. (See Section 65A of the Transfer of Property Act)
- (iv) *Covenant to pay outgoings:* The borrower undertakes to pay and discharge and indemnify the mortgagee against all rates, taxes, duties, charges, assessments, outgoings, whatever.
- (f) *Period fixed for the mortgage:* Under this clause, the parties enter into a covenant by which mortgagor is debarred from redeeming the security before lapse of a certain period. This should not be unnecessarily a long period, as otherwise the Court might hold it as clogging equity of redemption and unenforceable. The mortgagee may also enter into a covenant not to call in his money before the lapse of certain period provided that:
- (i) If the mortgagor is declared insolvent;
  - (ii) If he alienates the mortgage property or creates a subsequent mortgage in favour of a third person without consent of mortgagee,
- the mortgagee may call in his dues even before the expiry of the term agreed upon.
- (g) *Power of sale:* Under this clause, the mortgagee is entitled to recover his dues by sale of the mortgaged property, and if the sale proceeds are insufficient, to recover the balance from the person and other property of the mortgagor.
- (h) *Power to appoint Receiver:* Under this clause, the mortgagee is given power to appoint a Receiver of the mortgaged property in case the payment of interest for two or more instalments is in arrear under Section 69A of Transfer of Property Act.
- (i) *Power to sell given to mortgagor with the consent of the mortgagee:* The mortgagor is authorised to sell the whole or part of the mortgaged property with the consent of the mortgagee provided the sale proceeds are paid to the credit of the mortgage account.
- (j) *Proviso for redemption:* Under this clause, the mortgagee covenants and declares that on payment of his dues, he shall re-transfer the mortgaged property to the mortgagor or his nominee at his expense. (See Section 60A of the Transfer of Property Act)
- (k) *Possession:* In English mortgage, the mortgagee has a right to take possession of the property. In usufructuary mortgage, the possession of the property is given to the mortgagee.

- (l) *Attestation & Execution*: Attestation is compulsory in every mortgage. In case where the mortgagor does not know the language, deed must be explained to him by some competent person.
- (m) Registration & Stamp duty is compulsory in case of mortgage value of Rs.100/- and above.
- (n) Mortgagee is entitled to all the title deeds of the mortgaged property. If for any reason they are left with the mortgagor through inadvertance or negligence he can manipulate a prior equitable mortgage by depositing the same elsewhere.
- (o) The application of any other law either to the mortgage or to the property under mortgage has to be ascertained. For example: Urban Land Ceiling Regulation Act.

In Drafting of Memorandum of Mortgage by deposit of title deeds, the following information is invariably included:

I. *Preliminary information*:

- (1) Caption
- (2) Name and address of the borrower/mortgagor Company
- (3) Name and address of Mortgagee
- (4) Amount of loans made available/sanctioned
- (5) Date of creation of mortgage by deposit of title deeds.

II. Memorandum record note to contain brief information covering creation of deposit, date of deposit, name and authorisation of person who created deposit, name of the lender in whose favour deposit was made, description of title deeds is to be given in the Schedule to be appended thereto, and reference of property with situation and location briefly described thereto.

III. Consideration for creation of equitable mortgage i.e. the description of the property offered with title deeds with full description in a different schedule, the amount of loans against and for which the security is created, this..... by coverage of other cash charges, expenses, interests, liquidated damages, etc.

IV. Description of Board Resolution to create equitable mortgage by the person authorised therein. V. Declaration of clear and marketable title to the property.

VI. Witnessing clause - Mention of the name of the person in whose presence the deposit of title was made. VII. (Schedule I - List of document of title and evidence)

(Schedule II - Details of property).

VIII. Date and Signature.

### **Further Charge**

Sometimes, the mortgagee advances further sums of money to the mortgagor on the same security and on the same condition. The deed executed to secure the advance of further sums of money is called "Deed of Further Charge". The deed so executed would make a reference to the first mortgage and would also set out the new loan/s, terms of its/their repayment and would make the principal and interest further charged on the same security to be endorsed in the same manner as per the original mortgage.

### **Appointment of Receiver under Mortgage**

Under Section 69A of the Transfer of Property Act, a mortgagee having the right to exercise the power to sell is entitled to appoint by writing signed by him or on his behalf a Receiver of the income of the mortgaged property or any part thereof. Any person who has been named in the mortgage deed and is willing and able to act as a Receiver may be appointed by a mortgagee. If any person has been so named or if the person or



persons are not capable and unwilling to act or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees. Failing such an agreement the mortgagee shall be entitled to apply to the Court for appointment of a Receiver and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

The powers and functions of the Receiver have been set out in the Section and the Receiver is required to apply all money received by him as follows:

- (i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
- (ii) in keeping down all annual sums or other payments, and the interest on all principals sums, having priority to the mortgage in right whereof he is Receiver;
- (iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- (iv) in payment of the interest falling due under the mortgage;
- (v) in or towards discharge of the principal money, if so directed in writing by the mortgagee.

### **Release and Reconveyance of Mortgaged Assets**

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 repositing 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.

***Forms of various Deeds hereinbefore discussed are as follows:***

### **Deed of Simple Mortgage**

THIS DEED of Mortgage is made on the..... day of ..... 2020, BETWEEN 'AB' of..... etc. (hereinafter called "the Mortgagor"), of the One Part and 'CD' of, etc. (hereinafter called the "Mortgagee"), of the Other Part.

WHEREAS the Mortgagor is absolutely seized and possessed of or otherwise is well and sufficiently entitled the property intended to be hereby mortgaged which is free from all encumbrances and attachments.

AND WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs..... to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed.

NOW THIS DEED WITNESSES, that in pursuance of the said agreement and in consideration of the sum of Rs. .... paid to the Mortgagor by the Mortgagee simultaneously with the execution of these presents the receipt whereof the Mortgagor do hereby admit, acknowledge and confirm, the Mortgagor do hereby agree with the Mortgagee that the Mortgagor will on or before the ..... day of ..... 2020, pay or cause to be paid to the Mortgagee the sum of Rs..... with interest for the same in the meantime at the rate of Rs..... per cent, per annum, such interest to be paid monthly and every month on the 7<sup>th</sup> of each following month without any delay or default.



AND THIS DEED FURTHER WITNESSETH that as a security for the repayment of the said loan with interest, the said 'AB' do hereby charge, assure and mortgage, by way of simple mortgage, upto and in favour of the said 'CD' all property specifically described in the Schedule hereto annexed, and charge and assure the same by way of security for the repayment of the said sum of Rs. .... together with interest thereon at the rate of..... per cent, per annum;

AND THE Mortgagor does hereby agree and covenant with the Mortgagee that he will pay or cause to be paid to the

Mortgagor the principal sum aforesaid, together with the interest then due, on or before the ..... day of..... 2020, without delay or default;

AND THE INDENTURE FURTHER WITNESSETH and it is hereby agreed and declared by and between the parties that in case the said sum of Rs..... with interest thereon at the stipulated rate is not paid within the time and in the manner as aforesaid, it shall be lawful for the Mortgagee to enforce this mortgage and to cause the property or any portion sold and appropriate the proceeds towards satisfaction of the mortgage debt provided, however, that in the event of any short-fall or deficiency, i.e. should the claim be not then satisfied, the Mortgagee shall be entitled

to recover the balance personally as against the Mortgagor who shall be entitled to redeem the said mortgage at his option by payment of the amount of mortgage debt inclusive of interest at any time before the..... day of..... 2020.

AND THIS INDENTURE FURTHER WITNESSETH that the Mortgagor do hereby covenant with the Mortgagee that notwithstanding any act, deed or thing herebefore done, executed, performed or suffered to the contrary, the Mortgagor has good title, full power and absolute authority to charge, assure and mortgage the said property in the manner hereunder effected and that the same is free from all encumbrances and attachments.

The Schedule above referred to

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

1. .... MORTGAGOR
2. .... MORTGAGEE

### Deed of Mortgage by Conditional Sale

THIS DEED of Mortgage made the..... day of..... 2020, 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 in consideration of the sum of Rs..... paid to the Mortgagor by the Mortgagee (the receipt whereof the Mortgagor hereby acknowledges) the Mortgagor do hereby grant, transfer, convey, assign and assure to the Mortgagee ALL that etc. To Have and To Hold the same absolutely and for ever subject to the condition hereby expressly declared, namely, that if and when the Mortgagor shall repay or cause to be repaid the said sum of Rs..... with interest thereon at the rate of..... per cent per annum on or before..... day of..... 2020, time for which purpose shall be deemed as essence of contract then and in such an event the sale hereby effected shall stand void and shall be of no effect to all intents and purposes and the Mortgagee shall at the costs of the Mortgagor reconvey and retransfer the said property and every part thereof as then existing to the Mortgagor provided, however, that if the Mortgagor shall fail and/or neglect to repay the said sum with interest at the said rate on or before the said date, or any portion thereof the sale hereby effected shall become absolute and the Mortgagee shall be entitled to foreclose the mortgage when and in such an event the Mortgagee shall be the absolute owner of the property free and discharged from all the right of equity of redemption of the Mortgagor.

AND IT IS HEREBY FURTHER AGREED AND DECLARED that notwithstanding anything hereinbefore contained the Mortgagor shall remain in possession of the said property and pay all rents, cess, taxes, rates and other impositions which are now or may hereafter be imposed on the said property and in case the Mortgagor fails and/or neglects to make such payments on or before the due date of payments therefor, the Mortgagee shall be at liberty to pay the same and add such sum or sums to the principal money hereby secured which shall carry interest at the aforesaid rate. And that the Mortgagor do hereby covenant with the Mortgagee that he has good title to the property and absolute authority and power to transfer the same in the manner hereinbefore indicated and that the property is free from all encumbrances and attachments whatsoever.

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

Witnesses:

*Signed, sealed and delivered*

1. .... MORTGAGOR 'AB'
2. .... MORTGAGEE 'CD'

The Schedule above referred to

### **Deed of Usufructuary Mortgage**

THIS MORTGAGE, made..... day of..... 2020, 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..... 2020, of the principal sum secured, with the interest thereon at Rs..... 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.

AND LASTLY, the Mortgagor also agrees that if he, the Mortgagor, does not pay the principal sum with the interest then due on the stipulated date, this conveyance will become absolute and the Mortgagee will be entitled to foreclose the mortgaged property, and thereafter the Mortgagor, his heirs, executors, administrators or assigns shall be absolutely debarred of all the rights to redeem the same.

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'

*The Schedule above referred to*

### Deed of English Mortgage

THIS MORTGAGE made the..... day of ....., 2020, 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 WHEREAS the Mortgagor is absolutely seized and possessed or is otherwise well and sufficiently entitled to an absolute estate of inheritance or an estate equivalent thereto free from encumbrances to the lands, hereditaments..... fully mentioned and described in the Schedule hereto AND whereas the Mortgagor having occasion to borrow a sum of Rs. .... approached the Mortgagee which the Mortgagee has agreed to lend and advance on having repayment thereof with interest at..... per cent per annum and secured by a conveyance by way of mortgage of the said property.

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of Rs..... this day paid to the said 'AB' by the said 'CD' (the receipt whereof the said 'AB' hereby acknowledges), the Mortgagor here by agrees with the covenant to pay to the Mortgagee on the ..... day of..... the sum of Rs..... with interest thereon in the meantime at the rate of Rs..... per cent per annum computed from the date of this deed such interest to be paid monthly and every month on the 15<sup>th</sup> of every current month.

NOW THIS INDENTURE also witnesses that for the consideration aforesaid the said 'AB' as the beneficial owner, do hereby grant, transfer convey unto and to the use of the said 'CD' all that etc. (describe the property): TO HAVE AND TO HOLD the same absolutely and for ever PROVIDED ALWAYS that if the Mortgagor shall pay or cause to be paid the sum of Rs..... with interest thereon, on the..... day of....., according to the foregoing agreement in that behalf, the Mortgagee, his heirs, representatives or assigns shall, at the request and costs of the Mortgagor, his heirs, representatives or assigns, reconvey to him or them as he or they shall direct, the said property. AND THAT the Mortgagor do hereby covenant unto the Mortgagee that the Mortgagor has absolute title to the land, hereditaments, messuages and premises hereby granted and conveyed and that the Mortgagor has good right, full power, absolute authority and indefeasible title to grant, convey, transfer, assign and assure the same unto and to the use of the Mortgagee in the manner hereinbefore indicated and further the Mortgagor and all persons having lawfully or equitably any estate or interest in the same shall at all time hereafter during the continuance of the security do execute or perform or cause to be done, executed and performed all such further or other acts, deeds and things as may be reasonably required for further and more perfectly assuring the same unto and in favour of the Mortgagee.

Provided, however, and it is further agreed by and between the parties that if the Mortgagor commits any default in payment of the principal amount on the due date or any three instalments of interest, whether they have been demanded or not it shall be lawful for the Mortgagee to institute a suit for sale and to have a Receiver appointed over the mortgaged property.

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'

*The Schedule above referred to*

*Signed, sealed and delivered*

*Memo of consideration.*

### **Deed of Further Charge**

This Further Charge made the..... day of..... 2020, Between 'A' of..... etc. (hereinafter called "the borrower" which expression shall also, where the context so admits, include persons entitled to redeem the security) of the One Part and 'B' of..... etc. (hereinafter called "the mortgagee") of the Other Part.

WHEREAS by a mortgage deed dated..... the property mentioned therein and described in the Schedule attached hereto was mortgaged by the borrower with the mortgagee and the sum of Rs..... remains to the mortgagee on the security of the said mortgage but all interest for the same has been paid upto the date of this Deed.

AND WHEREAS the mortgagee has agreed to advance to the borrower the further sum of Rs..... upon terms and conditions and secured in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Rs..... now paid by the mortgagee to the borrower the receipt whereof the borrower hereby acknowledges:

1. The borrower hereby covenants with the mortgagee to pay to the mortgagee on the..... day of..... 2020 next the sum of..... principal amount with interest at the rate of..... per cent per annum, and if the said moneys are not paid on the aforesaid date, to pay interest at the said rate until payment.
2. The borrower as beneficial owner hereby declares that all and singular the property mortgaged under the aforesaid deed dated..... and more particularly described in the schedule attached hereto shall be security, and stand charged with the payment to the mortgagee of the sum of Rs..... the present advance with interest at the rate of..... per cent per annum, from the date of execution of these presents as well as the sum of Rs..... due on the recited mortgage together with interest thereon and shall not be redeemable until on payment to the mortgage deed dated..... and the present deed.
3. It is further agreed and declared that the provisions contained in the mortgage deed dated..... shall operate and take effect in like manner for securing payment or the money hereby secured as if the same had formed part of the money secured by the said recited mortgage.

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

*Witnesses:*

1. .... MORTGAGOR
2. .... MORTGAGEE

*Schedule* referred to containing description of the mortgaged property.

**Note:** Stamp duty chargeable on a deed of further charge is provided for by Article 31 of the Indian Stamp Act.

### **Memorandum of Mortgage by Deposit of Title Deeds**

Memorandum that this..... day of..... 2020, 'AB' of, etc. (the mortgagor), as beneficial owner, has deposited with 'CD' of, etc. (the mortgagee), the original title deeds comprised in the Schedule A hereto, relating to the premises belonging to the said 'AB' and situate at..... etc., described in Schedule B with intent to create a charge thereon for securing repayment to the said 'CD' of the sum of Rs..... this day lent and advanced

by the said 'CD' to the said 'AB' on demand with interest for the same from this date at the rate of Rs. .... per cent per annum.

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

Dated this..... day of..... 2020.

*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.*

### **Mortgage by a Limited Company in favour of a Bank for Securing the Amount due on Cash Credit Account**

THIS MORTGAGE made the..... day of..... 2020, Between 'AB' a Limited Company, having its Head Office at..... (hereinafter called "the borrower") of the One Part and the..... Bank Limited, having its Head Office at..... (hereinafter called "the Mortgagees") of the Other Part.

WHEREAS the borrowers are a Limited Company having their Head Office at..... and are carrying on the business of Sugar Manufacturers at their factory known as..... and situate at..... in the State of.....

AND WHEREAS the borrowers are absolute owners of the said factory free from encumbrances.

AND WHEREAS the borrowers have a cash credit account with the mortgagees for the purposes of their business. AND WHEREAS the mortgagees have already granted and may hereinafter grant accommodation to the borrowers, and it has been agreed that all moneys now owing and which shall hereafter become owing on the said cash credit account or otherwise from the borrowers to the mortgagees should be secured in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the mortgagees granting the aforesaid accommodation to the borrowers.

1. The borrowers hereby covenant with the mortgagees that the borrowers will on demand pay to the mortgagees the balance which shall be owing on the said cash credit account or any other account or for bills or drafts accepted, paid or discounted or advances made for the accommodation of the borrowers upto the limit of Rs. .... together with interest at the rate of..... per cent per annum from the date of the said loan or advance until payment.
2. The borrowers as beneficial owners hereby mortgage their property known as..... Sugar Mill, situate at..... together with all the machinery, engine, boiler etc., and buildings, land attached and appurtenant thereto, and more particularly described in the schedule attached hereto as security for payment of the mortgagees of all principal moneys and interest at the aforesaid rate and other moneys hereby secured.
3. The borrowers further covenant with the mortgagees that all accessories to the mortgaged property shall be liable for the amount due under this Deed from the borrowers to the mortgagees.
4. The borrowers hereby further covenant with the mortgagees that the borrowers will during the continuance of this security keep the mortgaged property in good and substantial repairs and insured against loss or damage by fire for Rs. .... in General Insurance Corporation of India in the

name of the mortgagees, and will duly and punctually pay all premiums and other moneys necessary for effecting and keeping up such insurance. And if default shall be made by the borrowers in keeping the mortgaged property in good and substantial repairs or in effecting or keeping up such insurance, the mortgagees may repair (with power to enter upon the mortgaged premises for that purpose and without becoming liable as mortgage in possession) or may insure and keep the same insured in any sum not exceeding Rs. .... and that all moneys expended by the mortgagees under this provision shall be deemed to be properly paid by them.

5. The borrowers further covenant with the mortgagees that the borrowers shall not lease the mortgaged property for any term exceeding one year or accept, surrender of any existing lease without the previous consent in writing of the mortgagees.
6. And it is hereby further agreed and declared that if the borrowers fail to pay the mortgage money with interest as agreed upon, the mortgagees shall be entitled to realise their dues by sale of the mortgaged property and, if the sale proceeds thereof are insufficient to satisfy the mortgagees' dues, to recover the balance from the person and other property of the mortgagors.
7. It is hereby further agreed and declared that if interest for any two instalments remains in arrears, the mortgagees shall be entitled to have a Receiver appointed of the mortgaged property.
8. Provided always that if the borrowers shall pay to the mortgagees the sum of Rs. .... or the amount due on said account with interest thereon from the date hereof at the stipulate rate, the mortgagees will at any time thereafter at the request and cost of the borrowers execute a receipt of the mortgage amount or a deed of redemption and surrender the premises before mortgaged to the borrowers.
9. By a Resolution of the Board of Directors of the 'AB' Company Limited dated..... Mr..... one of the Directors has been authorised to execute this Deed on behalf of the Company.

IN WITNESS WHEREOF the parties hereunder have set their hands on the date and year hereinabove mentioned.

The Schedule above referred to containing description of the machinery and plant, and all buildings and land appertaining thereto.

*For and on Behalf of 'AB Co. Ltd.',*

*Director*

*For and on Behalf of the..... Bank Ltd.,*

*Secretary*

### **Deed of Redemption or Reconveyance of Mortgaged Property by the Mortgagee in favour of the Mortgagor**

THIS DEED is made the..... day of..... 2020 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. The 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 upto 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.

## **LICENSE**

Chapter VI of the Indian Easements Act, 1882 (hereinafter referred to as 'The Act') contains the statutory provisions governing licenses. This chapter comprises of Sections 52 to 64. The students are advised to be thorough with the provisions contained in these Sections. In States where the aforesaid Act does not apply, Courts rely upon English Law and the principles of the Act also (*Sohan Lal Naraindas v. Laxmidas Reghunath*, 1971 (1) SCC 276).

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

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

A license may be granted by any one in the circumstances and to the extend in and to which he may transfer his interest in the property affected by the license (Section 54). The grant of license may be expressed or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license. (Section 54)

### **License when Transferable**

A license ordinarily carries with it the incident of non-transferability. A license cannot be transferred by the licensee or exercised by his servants or agents. The only exception to this rule is that, unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee. (Section 56 of the Act)

### **Revocation of License**

The revocation of license may be expressed or implied.

The general rule is that subject to the agreement between the parties, all licenses are revocable at the will of the licensor. However, following are two exceptions to this rule:

- (a) a license which is coupled with a transfer of property and such transfer is in force, and
- (b) a license acting upon which the licensee has executed a work of permanent character and incurred expenses in the execution cannot be revoked.

Section 62 of the Act provides that a license is deemed to be revoked:

- (a) when, for a cause proceeding the grant of it, the grantor ceases to have an interest in the property affected by the license;
- (b) the licensee releases it, expressly or impliedly, to the grantor or his representative;
- (c) where it has been granted for a limited period or acquired on condition that it shall become void on performance or non-performance of a specified act, and the period expires, or the condition is fulfilled;
- (d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;
- (e) where the licensee becomes entitled to the absolute ownership of the property affected by the license;



- (f) where the license is granted for a specified purpose and the purpose is attained or abandoned, or becomes impracticable;
- (g) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;
- (h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between grantor and the licensee;
- (i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist (Section 62).

### Form of Deed of License

No special form of grant is prescribed. It may be granted orally or by an agreement in writing or by a covenant contained in any other deed, e.g. lease, sale, etc. If it is granted in writing, the writing should be in the form of a deed or agreement or in the simple form of a deed poll. If no fee is to be paid and the licensee has not to enter into any covenants, the form of deed poll would be suitable, but if the licensee is to pay any fee and the license is for a fixed term or revocable only by notice, a deed or agreement is preferable. The deed may be described as "THIS LICENSE" or "THIS DEED OF LICENSE" or simply as "THIS DEED" and the parties as "Licensor" and "Licensee" or "Owner" and "Licensee" or "Grantor" and "Grantee".

The operative words may be "License and authorizes to do" or "grants liberty and license to do etc.", or "grants leave and license to do etc." The exact liberty given, the property on which it is to be exercised, and the conditions imposed on the exercise should be clearly expressed in the deed. If there is a long list of the powers and authority given by the license the same may be incorporated in a schedule to be referred to in the deed. The deed should make it clear that it is a license and not a lease or a grant.

In a simple deed recitals will be rarely necessary. A license may be for consideration though this is not necessary. If so, it should be mentioned.

If the license is granted by an instrument it need not be bilateral unless mutual covenants for observance and breach thereof have to be incorporated.

### Registration and Stamp Duty

A mere deed of license need not be registered unless any right, title or interest in immovable property of the value of Rs. 100 or more is created, declared, assigned, limited or extinguished. (Section 17, Registration Act, 1908)

If a license is contained in any deed such as in a deed of sale or lease, no separate stamp duty is required in respect of the covenants relating to the license, but if a separate deed is executed it will be chargeable with the same duty as an agreement under Article 5, Schedule I of the Indian Stamp Act, 1899.

### Specimen Forms of Licenses

The specimen forms of some of license documents are given hereinbelow which can be adopted in different situations by making suitable modifications as per the needs of an organisation:

- (1) Deed of License for use of wall of a Building for Publicity and Advertisement for Goods, etc.
- (2) Agreement of License for use of a House Property to a Company for Office Accommodation.

#### **(1) Deed of License for use of wall of a Building for publicity and advertisement for goods, etc.**

THIS DEED OF LICENSE is made on the..... day of .....2020, BETWEEN AB of, etc. (the Licensor) of the one part and CD of, etc. (the Licensee) of the other part.

WHEREAS the said CD has applied to AB for the use of the eastern outside wall of his building being premises No..... for the purposes of utilising the same for publicity and advertisement of his goods, a specimen copy whereof with type and design shall be delivered to the licensor, for a period of two years.

AND WHEREAS the said AB has agreed to grant the license on the following terms and conditions:

1. That the said CD shall be entitled to use the said outer wall of premises No..... for the purpose of advertisement of his goods by coloured signs, marks, letters or other representations for two years from the date, in dimensions measuring..... and not contrary to any regulations of the Municipality or other public body or authority.
2. That the said CD shall pay Rs..... as such advertisement charges per month in advance within the 5<sup>th</sup> day of every current month.
3. That in the event the said outer wall or the plaster thereof is damaged on account of any act, default or negligence or omission on the part of CD, he shall forthwith execute all the necessary repairs thereto or in the alternative pay adequate compensation to AB on that account.
4. That the said CD shall pay for all taxes and impositions on account of such advertisement.
5. That the said AB shall be entitled to revoke this license within the said period of two years only on failure to pay regularly the fees or taxes or impositions as aforesaid.
6. That the said CD shall not be entitled to affix on the said wall any representation of other goods nor have any interest in the said wall and further shall indemnify the said AB against any damage suffered in case such display or advertisement is found to be in breach of statutory rules or authoritative order.

IN WITNESS WHEREOF the parties have executed this Deed the day and year above written.

Witnesses:

Signature

(1) ..... AB

(2) ..... CD

**(2) Specimen Agreement of License for use of a House Property to a Company for Office Accommodation**

This AGREEMENT is made on this..... day of..... 2020, BETWEEN AB son of..... by faith..... by occupation..... herein after referred to as the "owner" of the ONE PART AND CD represented ..... by 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 a portion of his property, viz. premises No. .... fully mentioned and described in the Schedule hereto for a period not exceeding eleven months only from the date of signing of this agreement which the owner has agreed to grant reserving for himself the care, maintenance and services to property and on the basis of leave and license only (which will stand *ipso facto* revoked on the expiry of the said term). Now, it is hereby expressly agreed and declared by and between the parties as follows:

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 for which purpose the owner shall retain ..... rooms, viz., one in the ground floor and another in the first floor. The owner shall have his own staff in the said rooms for the care and supervision and maintenance of and services to the property.

2. The occupiers shall, in consideration of such accommodation as hereunder provided, pay to the owner a fixed sum of Rs. .... as charges for such temporary occupation for the period of ..... months which sum will be paid at the rate of ..... per month on the ..... of every current month without delay or default and a further sum of Rs. .... for service charges and also use of fittings and fixtures making thus a sum total of Rs..... per month. The two last mentioned amounts shall also be paid on the..... of every current month.
3. The occupiers shall also pay to the owner on account of Corporation of Calcutta all existing and future occupiers' share of rate and taxes of the property and also the enhancement in the owner's share, if any, during the period of their occupation and shall otherwise keep the owner and his estate indemnified as against any loss, if any, arising out of such non-payment or non-observance of any of the covenants herein contained.
4. The occupiers have as security deposit for such payments and observance of the covenants hereunder contained, kept with the owner a sum of Rs..... 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 provided in Clause 2, unpaid taxes, electric bills, etc., as hereunder provided or otherwise permitted in law.
5. The occupiers shall on expiry of the period of..... and license hereunder granted or earlier revocation thereof, surrender the property and deliver the same to the owner when and in such an event he will be entitled to the refund of Rs..... subject to deductions provided in Clause 4 hereof.
6. Provided, however, and notwithstanding anything hereinbefore contained, it is hereby expressly agreed by and between the parties hereto that in default of any payment on the dates hereinbefore referred to above to the owner or the Corporation of Calcutta 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 on that account and notwithstanding any intermediate negotiations or waiver of breach thereof when and in such an event the occupiers shall surrender the occupied portion of the property as hereunder contemplated.
7. The occupiers shall have no right to make any addition or alteration to the property except temporary removable walls by way of adjustments 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 said portion of the property on expiry of the term of the license hereby granted or earlier revocation thereof and repairs all the damages, if any caused to the property.

IN WITNESS WHEREOF the parties have executed this Agreement this..... day of ..... 2020

*Signed, sealed and delivered at Calcutta*

*In the presence of*

(1)

(2)

(3)

## LEASE

According to Section 105 of the Transfer of Property Act, 1882, a lease of immovable property is a transfer of a right to enjoy property. It is the method of acquiring the right to use equipment or real property for consideration.

Lease is a contract between lessor and lessee for the fixed term for the use on hire of a specific asset selected

by lessee. Lessor retains ownership of the assets and lessee has possession and use of the asset on payment of specified rental over a period. It is a sort of contractual arrangement between the two parties whereby one acquires the right to use the property called “lessee” and the other who allows the former the right to use his owned property, called the “lessor”. Thus, lease is a contractual arrangement, it originates from a contract between the lessor and 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 owner of the assets i.e. the lessor and the user of the assets i.e. ‘the lessee’. The lessee does not get the final ownership. In other words, leasing involves the use of an asset without assuming, or intending to assume, ownership.

### **Essential Points to be Observed for Drafting of Lease Documents**

Before taking up drafting of the lease documents, one is expected to be thorough with all the essential legal aspects involved in a lease transaction.

The essential legal elements of lease are (i) the parties, i.e., lessor or lessee; (ii) the subject matter of lease i.e. the property to be leased; (iii) demise or partial transfer of such property; (iv) the term and period of lease; and (v) the consideration or rent. Law requires that the lease of real estate should be expressed and duration of the lease should be pre-settled under the written contract. The circumstances in which the lease shall be determined be also specifically reduced to writing to avoid complications of mis-conceptions. It should also state the mode of service of notice and the period within which the notice could be served for determining the lease both by the lessor and the lessee. However, in the absence of the contract or special law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purpose shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six months notice expiring with the end of a year of the tenancy and the lease of immovable property for any other purpose shall be deemed to be lease from month to month, terminable on the part of either lessor or lessee, by fifteen days’ notice expiring with the end of a month of the tenancy.

The main document to complete the leasing transaction between the lessor and the lessee is the lease agreement or lease deed which contains all the conditions and covenants binding the parties to the lease transaction. In the case of equipment lease, some leasing companies in the text of lease agreement provide for the guarantee provisions by the guarantors to indemnify the lessor of the involved risk of non-payment of lease rents and non-compliance of terms and conditions of the lease agreement by lessee. Thus, the lease agreement is entered into between lessor, lessee and guarantors covering suitable covenants for each of the parties. Such guarantee can be obtained separately from the guarantors even if guarantors are made party in the lease agreement.

The lessor or leasing company, in addition to the lease agreement and the guarantee or in substitution of guarantee, may also accept pledge of the shares or assignment of insurance policies of the promoters of the business.

Before taking up drafting of the lease documents both the leasing company and the lessee should have the information to have a birds-eye view of the existing charges, mortgages, encumbrances or lien on the property proposed to be leased by lessor or where the leased assets are proposed to be kept by the lessee. Generally in cases of plant and machinery etc. which are affixed in the land or kept in factory premises become part of immovable assets which are mortgaged to the banks and or financial institutions for availing of financial facilities from them. In such cases, the leasing company should have full details of these existing charges so as to take other precautionary measures by providing suitable clauses in lease documents to safeguard its own interest, i.e. where the leasing company has charged the leased property to bank as security for the due discharge by the leasing company of its obligations in the form of payment of interest instalments and the repayment of the principal sum borrowed. The mortgagee bank requires all these details from the leasing company about the lessee despite the fact that there is no privity of contract between the lessee and the bank. Such information

provides full exposure to risk, if any, involved in the transaction for which bank finance is being utilized.

With a view to avoid ambiguity and uncertainty with regard to the nature of the lease, due care should be taken to create distinction in the lease agreement i.e. whether the lease is a finance lease or operating lease. In case of “finance lease”, provision of non-cancellability should invariably be set forth in the lease agreement. In “operating lease” the provision of cancellability is provided with responsibility of the lessor for repairs and maintenance, technology transfer and change of know-how and providing knowledge of running the equipment leased out to lessee. All these aspects, *inter alia* should be well provided in the document. In “operating lease” it is the responsibility of the lessor to provide the lessee the benefits of innovations, change in technology of the equipment and the related know-how required for.

Notwithstanding the remedies available to the parties in case of breach of the agreement and defaults in payments of lease rentals, other dues should be clearly expressed in terms of money, time and space. Both the contractual as well as legal remedies be properly spaced in the lease agreement. Arbitration clause provides a better way for settlement of mutual misunderstandings and disputes and suggests a rapid course to seek remedy, the contractual remedy. Both lessor and the lessee have, therefore, to take all due precautions in the drafting of the lease agreement and other auxiliary documents. The legal remedy available in the lease document is by way of specific relief by applying to the Court of law for the same under the Specific Relief Act. But an aggrieved party can choose only one course of action for seeking redressal to its grievances i.e. either by way of arbitration or specific performance at a time. Seeking one course of action stands a bar for the other course of action.

In every State, there is a legislation providing for the rights of lessors and lessees of residential and commercial buildings. They override the provisions of the Transfer of Property Act. Legislation in one State differs from that in another, but all such legislations control and restrict the rent payable and the grounds on which a tenant may be evicted. Some enactments regulate the duration of a lease, some forbid the payment of premium and some even control the letting out to the extent that this function is exercised by the authorities. It is, therefore, desirable to study the local rent control and eviction legislations before entering into a transaction of lease and before taking any action on the basis of a lease.

### Drafting of a Lease

A deed of lease should be drafted as a deed between the landlord and the tenant. They should be called “the lessor” and “the lessee” as these are the terms used in the Transfer of Property Act, 1882. While drafting a lease, following points may be noted:

1. *Generally, recitals* are not necessary and material facts are mentioned in the operative part.
2. *Consideration* – Reserved rent is mentioned in the beginning of the *Testatum*. The entire consideration, including premium, etc., should be mentioned.
3. *Operative Part* – It shows clearly the lessor divesting himself of possession and the lessee coming into possession, e.g. by the use of such words as “The lessor hereby lets, or demises or grants a lease of, etc., etc. with effect from the ..... day of .....”
4. *Habendum* – The nature of the lease, commencement and duration of the term are specified here.
5. *Reddendum* – This is peculiar to a deed of lease. Here is mentioned the mode and time fixed for payment. It begins with the word rendering or paying with reference to the reserved rent. Rent is payable during the term of the lease. Place where payable and instalments are mentioned. If there is apportionment of rent that is also mentioned.
6. *Covenants* – Terms and conditions are mentioned in several paragraphs. The usual covenants are to be found in Section 108 of the Transfer of Property Act; other important covenants generally refer to payment of taxes, repairs, insurance, subletting purpose of the lease, e.g. residential purpose, renewal, forfeiture.



### Sub-Lease

A sub-lease is a demise by a lessee (or his assignee) for a less term than he himself has. Every lessee, however short his term may be, make a sub-lease unless he is refrained by the contract of the tenancy from subletting. If the demise is for the whole term or for a period beyond the term, it amounts to assignment. If the lessee divests himself he becomes a stranger to the demised property and he has no right to have possession delivered up to him. It is true that a covenant against subletting will restrain the assignment, but a mere covenant against subletting does not prohibit underletting a part of the premises. As long as the lessee remains in possession he may permit another person to use the demised premises without committing a breach of covenant, namely not to assign, underlet or part with the possession of the demised premises.

The Privy Council pointed out in *Hunsrai v. Bejoylal Seal*, (1930) 57 Cal 1176, that in India a sub-lease is not an absolute assignment and it was further held in *Akshoy Kumar v. Akman Molla*, (1915) 19 CWN 1197, that there is no privity of estate as between the lessor and the sub-lessee, who does not step into the shoes of the lessee. A sub-lease is not prejudiced by the surrender of the head lease (Section 115 of Transfer of Property Act) but the position is different in the case of forfeiture which annuls all sub-leases except in case of fraud as between the lessor and lessee. A sub-lessee is entitled to relief against forfeiture under Section 114 of the Transfer of Property Act, 1882, which is applicable only in the case of non-payment of rent. No relief is open to the sub-lease in case of transfer of breach of covenant in restraint of transfer.

### Surrender of Leases

Surrender of lease is not a transfer but mere yielding up by the lessee of his interest under the lease to the lessor by mutual agreement. It is in effect merger of the estate of the lessee into the reversion. It is not a transfer or an assignment of any right or estate within the meaning of Section 5 of the Transfer of Property Act (*Makhanlal v. Nagendranath*, (1933) 60 Cal 379). The person who surrenders is called the surrenderer and the person to whom surrender is made is called the surrenderee. A surrender must be made with clear intention to yield up as mere non-payment of rent for years together or abandonment of the site does not amount to surrender (*Misri Lal v. Durga Narain*, AIR 1940 All. 317). A Requisition Order by the Government does not amount to any surrender (*Torabai v. Padan Chand*, 62 CWN 176). It may be expressed or implied. Except in a case of some special kinds of lease as required by special Act, no writing or registration is necessary. A surrender may be oral, if accompanied by delivery of possession.

### Registration and Stamp Duty

Section 107 of the Transfer of Property Act, 1882 and Section 17(1)(d) of the Registration Act, 1908 require that all leases from year to year, or for a term exceeding a year, or reserving a yearly rent must be registered. Other leases, if governed by the Transfer of Property Act, must be registered except that Local Government may direct them to be made by unregistered instruments. (Proviso to Section 107)

For the stamp duty of a lease, including an under-lease or sub-lease and agreement to let or sub-let, Article 35 of the Indian Stamp Act, 1899 is to be followed.

### Distinction between License and Lease

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

Sl. No.	License	Lease
1.	A personal non-heritable right.	An heritable right <i>in rem</i> .
2.	Creates no interest in the guarantee.	Interest created in the lessee.

3.	Non assignable .....	Usually assignable.
4.	Always permissive and normally revocable.	Permissive but not normally revocable.
5.	Not exclusive user .....	Exclusive user.
6.	A positive right.	A positive right.
7.	Denial of grantor's title does not necessarily result in forfeiture.	Denial of lessor's title results in forfeiture.
8.	Remedy for breach is damages.	Specially enforceable.
9.	No notice necessary to terminate relationship.	Notice necessary to terminate relationship.
10.	Instrument granting right does not require registration.	Instrument creating right requires registration.
11.	Does not entitle licensee to sue strangers in his own name.	Can sue in his own name.
12.	A licensee does not qualify for a vote.	May qualify for a vote.
13.	Not liable for rents .....	Liable.
14.	User not liable for public nuisance.	Liable.

A lease of immovable property is a transfer of a right to enjoy the property for a certain time in consideration for a price paid or promised. The price paid is called "rent". In the case of a license one person grants another a right to do or continue to do in or upon immovable property of the grantor, something which would, in the absence of such a right be unlawful, and such right does not amount to an easement or an interest in the property. The underlying assumption in the case of a license remains that the owner continues to be in possession and control of the property, and it is non-transferable, and not exercisable even by servants or agents. A licensor's transferee of the property is not bound as such by the license, it is revocable except in certain cases.

### Specimen Forms of Leases

The specimen forms of some of lease documents are given hereinbelow which can be adopted in different situations by making suitable modifications as per the needs of an organisation:

1. Deed of sub-lease.
2. Deed of lease of land with forfeiture clause and covenants for renewal.
3. Surrender of lease.
4. Deed altering conditions/covenants in a lease.
5. Deed modifying terms of lease.
6. Lease agreement with lessor, lessee and Bank as financing party.
7. Lease Agreement for a house (Premises).
8. Lease Agreement for Plant and Machinery.

#### (1) Deed of Sub-Lease

THIS LEASE made this ..... day of ..... 2020 between AB of, etc. (hereinafter called "the sub-lessor"), of the one part, and CD of, etc. (hereinafter called "the sub-lessee"), of the other part.

WHEREAS By a lease (hereinafter referred to as "the original lease") dated..... the day of ..... and made between XY as owner and AB as lessee and registered in Book I, Vol. .... pages ..... to



being No ..... for the year ..... in the Office of Sub-Registrar of ..... etc., the premises (or, etc.) described in the original lease were demised to the said original lessee for a period of ..... years with effect from the ..... day of ..... on a yearly rent and subject to the covenants and conditions to be performed and observed as therein contained.

AND WHEREAS the original lessee has agreed to grant and the sub-lessee has agreed to accept a sub-lease of the premises (or, etc.) hereinafter described upon the conditions hereinafter contained:

NOW THIS DEED WITNESSES that in consideration of the rent hereinafter reserved and the covenants by the sub-lessee hereinafter contained, the original lessee do hereby grant to the sub-lessee a lease of ALL THAT premises (or, etc.) known by the name of, etc., and situate at, etc., together with the appurtenances; TO HOLD the same unto and to use of the sub-lessee for the period of ..... years, commencing with effect from the ..... day of ..... at the monthly rent of Rupees ..... SUBJECT to the following conditions:

1. The sub-lessee hereby agrees with and covenants with its lessor, viz., the lessee as follows:
  - (a) To pay the said rent, clear of all deductions, on the ..... day of ..... every current month in advance during the term of the lease.
  - (b) To pay all taxes and outgoings now payable or hereafter to become payable in respect of the leased premises (or, etc.).
  - (c) To keep the said premises (or, etc.) in good and tenantable repair, and not to make any alteration therein without the written consent of the landlord.
  - (d) To perform all the covenants, conditions and stipulations contained in the original lease affecting the property hereby leased and to be observed and performed by the original lessee except payment of rent and not to do, execute or perform any act, deed or thing or suffer anything to the contrary whereby or by reason or means whereof the original lease may be avoided or forfeited and to allow the original lessee to enter upon the leased premises (or, etc.) for the purpose of inspection of the premises and performing any of such terms of agreement contained in the original lease, which may be necessary to prevent its forfeiture.
  - (e) To keep the original lessee indemnified against all actions, claims, demands and expenses on account of performance or non-performance by the sub-lessee (of any of the terms, conditions and stipulations of this agreements).
2. The original lessee does agree and covenant with the sub-lessee as follows:
  - (a) That upon the sub-lessee paying the rent hereby reserved and observing and performing the conditions and covenants herein contained, shall quietly and peacefully possess and enjoy the property, hereby leased during the said term without any interruption and disturbance by the original lessee or any person claiming under or in trust for him, provided that in case of any breach of any of the conditions and covenants to be observed and performed by the sub-lessee, the lease shall, at the option of the original lessee, stand determined who shall be entitled to repossess the property as his former estate without prejudice to his right to recover all arrears of rent and/or any damages for breach of such conditions or covenants.
  - (b) The original lessee shall duly and punctually pay the rent reserved, observe and perform all the covenants and conditions contained in the original lease, and keep the same alive and in full force and virtue and will further, ..... times, keep the sub-lessee and his estate indemnified against all actions, claims, proceedings and demands on account of any breach of any of the conditions and covenants contained in the original lease.
  - (c) The original lessee acknowledges the right of the sub-lessee as to production of the original lease and to delivery of copies thereof and undertakes for the safe custody thereof.

3. It is further agreed that the terms "the original lessee" and "sub-lessee" used herein shall, unless inconsistent with the context, include as well their respective successors and assigns.

IN WITNESS, etc.,

*Signed, sealed and delivered*

AB

CD

**(2) Deed of Lease of Land with Forfeiture Clause and Covenant for Renewal**

This LEASE is made on the..... day of..... 2020 BETWEEN AB of, etc.: (hereinafter called "the lessor") of the one part and CD of, etc., (hereinafter called "the lessee") of the other part, WITNESSES as follows:

1. In consideration of the rent hereinafter reserved and the covenants and conditions hereinafter contained to be observed and performed on the part of the lessee, the lessor does hereby grant, transfer, demise by way of lease to the lessee ALL THAT piece or parcel or parcels of land described in the schedule below TO HAVE AND TO HOLD the same unto and to the use of lessee for the term of..... years commencing from the..... day of..... 2020 at the annual rent of Rupees.....
2. The lessor hereby covenants with the lessee as follows:
  - (a) The lessor shall put the lessee in possession of the said land on the said..... day of ..... 2020.
  - (b) Upon the lessee paying the rent hereby and hereunder reserved and observing and performing the covenants and conditions herein contained the lessee shall quietly and peacefully hold, possess and enjoy the said land during the said term without any claim, interruption or disturbance by the lessor or any person claiming under or in trust for him.
  - (c) The lessor has good right, full power and absolute authority to grant a lease of the demised premises in the manner hereunder effected.
3. The lessee hereby covenants with the lessor as follows:
  - (a) The lessee shall pay the said rent without abatement or deductions on or before the..... day of..... every year and the first of such payments shall be made on the..... day of..... 2020.
  - (b) The lessee shall bear and pay all rents, taxes and other assessments and outgoings which are now or may hereafter be imposed or assessed on the said land except those which are payable in law by the lessor.
  - (c) The lessee shall not use and occupy the said land for any purpose other than private residence for himself and the member of his family by construction of temporary structures according to the plan approved by the Municipal Authority.
  - (d) The lessee shall not, except with the consent in writing of the lessor first had and obtained, assign, underlet or part with the possession of the said land or any portion thereof or of the structures to be constructed thereon or any portion thereof which consent the lessor may at his absolute discretion withhold.
  - (e) That if the lessee shall pay the rent punctually and regularly and duly observe and perform the conditions and covenants herein contained and apply in writing to the landlord not less than..... months prior to the expiration of the term herein reserved for renewal of the lease, the lessor shall then and in such an event grant to the lessee a new lease of the said land

for a further period of..... years on the same terms and conditions as are herein contained except the covenant for renewal and subject to such variations as may be mutually agreed.

- (f) On the determination of the lease, the lessee shall deliver peaceful vacant possession of the land hereby demised as also the structures to be erected by the lessee without claiming any compensation or value thereof.

IN WITNESS, etc.,

*Signed, sealed and delivered*

AB

CD

*The Schedule above referred to*

**(3) Deed of Surrender of Lease**

THIS DEED OF SURRENDER OF LEASE made the..... day of..... BETWEEN AB of, etc. (the lessee), of the one part and CD of, etc. (the lessor) of the other part.

WHEREAS by an Indenture dated..... made between the parties hereto and registered in..... it was witnessed that the said CD, did in consideration of the rent thereby and thereunder reserved and of the covenants and conditions to be observed and performed on the part of the said AB as therein contained granted and demised by way of lease the property fully mentioned and described in the schedule hereto for a term of..... years.

AND WHEREAS such lease is in full force and virtue and all rents and conditions reserved by and contained thereunder on the part of the lessee to be paid, observed and performed by the said AB upto the date of these presents.

AND WHEREAS the lessee was at all material times and is presently in possession of the property since the execution of the lease.

AND WHEREAS for personal reasons and consideration, the said AB having desired to be relieved from any further payment of such rent and performance of the covenants and conditions approached the said CD for a surrender of the said lease and delivery of the possession of the property.

AND WHEREAS the said CD has agreed to accept from the said AB a surrender of the aforesaid lease of the said premises.

NOW THE DEED WITNESSES that in pursuance of the said agreement and in consideration of a sum of Rs..... being the token consideration paid by the said CD to AB, the said AB as beneficial user of the said property do hereby give up and relinquish all his leasehold estate and interest in and surrender and deliver possession to the said CD of the premises (or, etc.) comprised in and by the said deed of lease TO HOLD the same as before execution of the lease by the said CD TO HOLD THE INTENT and object that the same shall stand determined to all intents and purposes and that the residue of the said term of..... years created by the said deed of lease, and all other rights and interests of the said AB in the said premises (or, etc.) under or by virtue of the said deed shall stand extinguished and merged in the reversion freehold and inheritance of the premises with immediate effect as if the said lease was never granted nor intended.

AND THIS INDENTURE further witnesses that in consideration of the surrender of the lease which is accepted by the lessor he the said CD do hereby release and discharge the lessee AB, his successor and estate from all claims, demands and liabilities on account of future rent and or arising out of performance or non-performance or hereinbefore recited Indenture of lease.

IN WITNESS WHEREOF the parties above named have put their signatures the day and year above.

*Signed, sealed and delivered*

AB

CD

*The Schedule above referred to*

#### **(4) Deed Altering Conditions in a Lease**

THIS DEED made the..... day of..... BETWEEN AB of, etc. (hereafter called "the landlord") of the one part and CD of, etc. (hereinafter called "the tenant"), of the other part.

WHEREAS by a lease (hereinafter called "the principal deed"), dated the..... day of..... and made between the parties hereto and registered at..... Registration office in Book No..... Volume No..... pages..... to..... Being No..... for the year....., the said AB granted and demised to CD the house (or, etc.) situate at, etc.

AND WHEREAS the parties hereto have agreed to alter and modify the terms and conditions of the principal deed in the following manner.

NOW THIS DEED WITNESSES as follows:

1. Sub-clause (e) of clause 2 (or, etc.) of the principal deed, the following sub-clause shall be omitted and shall cease to have any effect.
2. For sub-clause (b) of clause 2 (or, etc.) of the principal deed, the following sub-clause shall be substituted, namely:

(Set out the new sub-clause)

3. That as altered and modified as aforesaid the principal deed shall remain in full force and effect.

IN WITNESS WHEREOF etc.,

Witnesses:

..... AB

..... CD

#### **(5) Deed Modifying Terms of Lease**

THIS DEED made the..... day of..... BETWEEN AB of, etc. (hereinafter called "the lessor"), of the one part and CD of, etc. (hereinafter called "the lessee") other part being supplemental to the deed of lease (hereinafter called "the Principal Deed"), dated the..... day of..... and made between the same parties being a lease of a house (or, etc.) situate at etc.

NOW THIS DEED WITNESSES as follows:

1. The lessor shall forthwith erect and construct and will complete on or before the..... day of..... to the reasonable satisfaction of the lessee, a room (or, etc.) and other additions to the premises leased under the Principal Deed, in accordance with the plans and specifications, copies whereof have for the purpose of identification been signed by the lessor and the lessee.
2. In consideration of the premises, the lessee hereby agrees with the lessor that as from the..... day of..... he, the lessee will pay to the lessor during the residue of the term granted by the lease under the Principal Deed, the additional yearly rent of Rs....., such additional rent to be paid by equal quarterly (or monthly) payments on the same days and in the same manner as are provided by the Principal Deed for the payment of rent thereby reserved, the first of such payment to be made on the rights and remedies of the lessor shall be applicable to the said additional rent.

3. From and after the completion of the said additions and works to be erected and constructed by the lessor as aforesaid, the agreements and conditions contained in the Principal Deed shall apply thereto in the same manner as if the said additions and works had been completed prior to the grant of the lease by the Principal Deed.

IN WITNESS WHEREOF etc.,

*Signed, sealed and delivered*

..... CD

..... AB

*The Plans, etc. above referred to*

**(6) Lease Agreement with Lessor, Lessee and Bank as Financing Party**

THIS TRIPARTITE AGREEMENT is made on this ..... day of..... (month) ..... (year in words) ..... BETWEEN..... an existing Company within the meaning of the Companies Act, 2013 and having its registered office at..... (hereinafter called “the Lessor Company” which expression shall unless excluded by or repugnant to the context be deemed to include its successors and assigns) of the first part, .....a Company incorporated under the Companies Act, 2013 and having its registered office at..... (hereinafter called “the Lessee Company” which expression shall unless excluded by or repugnant to the context be deemed to include its successors and assigns) of the second Part AND..... a nationalised Bank carrying on business amongst other places in India at..... (hereinafter called “the Bank” which expression shall unless excluded by or repugnant to the context be deemed to include its successors and assigns) of the third part;

WHEREAS under an Agreement for Hypothecation dated..... executed by the Lessor Company in favour of the Bank, the Bank granted to the Lessor Company a sum of Rs..... as and by way of advance in current account to enable the Borrower to purchase..... (hereinafter referred to as “the said equipment”) for the purpose of leasing out the said equipment to the Lessee Company, *inter alia*, secured by hypothecation of the said equipment upon the terms and conditions therein contained;

AND WHEREAS the Lessor Company has entered into an Agreement for Lease with the Lessee Company on the..... day of..... for leasing out the said equipment to the Lessee Company subject to the payment of rent/hire charges thereby reserved and also subject to the other terms and conditions therein contained;

AND WHEREAS in terms of the sanction of the Bank, the Bank will allow the Lessor Company to grant lease of the said equipment to the Lessee Company, *inter alia*, upon the following conditions:

- (a) that the lease of the said equipment is to be granted by the Lessor Company to the Lessee Company with the consent of the Bank and the Lessee Company should confirm that the said equipment is subject to the Bank’s charge under the said Agreement for Hypothecation dated.....;
- (b) the Lessee Company should undertake the Bank that it would not assign the leasehold interest of the said equipment for any reason whatsoever;
- (c) that the Lessee Company shall undertake the Bank that the Lessee Company shall not have any claim on the moneys to be realised under the insurance policies to be taken out in respect of the said equipment;
- (d) that the Lessee Company should directly pay to the Bank the rent/hire charges and interest payable by the Lessee Company to the Lessor Company in terms of the said Agreement for Lease dated.....;
- (e) the Bank through its officers, agent and nominee be entitled to inspect the said equipment at such time as the Bank may think fit;

- (f) that the Lessor Company shall execute a Deed of Assignment in favour of the Bank irrevocably authorising the Bank to collect rent/hire charges to be paid by the Lessee Company to the Lessor Company towards liquidation of the moneys advanced by the Bank to the Lessor Company and all interest accrued thereon.

AND WHEREAS with a view to recording the conditions hereinbefore provided, the parties hereto have agreed to enter into an agreement being these presents in the manner hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH and it is hereby agreed and declared by and between the parties hereto as follows:

1. The lessee Company hereby confirms that the said equipment is subject to the hypothecation/ charges created by the Lessor Company in favour of the Bank under the Agreement for Hypothecation dated.....
2. The Lessee Company hereby undertakes the Bank not to deal with the said equipment which will prejudice the interest of Bank and not to assign or transfer the benefit of the said Agreement of Lease dated.....
3. The Lessee Company hereby undertakes the Bank that the Lessee Company shall not have any claim on the moneys to be realised under the insurance policies to be taken out in respect of the said equipment.
4. That the Lessor Company hereby irrevocably and unconditionally authorises the Lessee Company to pay all the rent/hire charges payable by the Lessee Company to the Lessor Company in terms of which the Lessee Company hereby confirms and acknowledges.
5. The Lessee Company hereby irrevocably and unconditionally agrees, confirms and declares that irrespective of any disputes between the Lessor Company and the Lessee Company as regards terms, conditions and covenants contained in the Agreement for Lease dated....., the Lessee Company shall directly pay to the Bank rent/hire charges and interest thereon payable by the Lessee Company to the Lessor Company in terms of the Agreement for Lease dated.....
6. The Lessor Company and the Lessee Company hereby jointly declare and confirm that the Bank through its officers, agent and nominees will be entitled to inspect the said equipment which will be in the possession of the Lessee Company in terms of the Agreement of Lease dated..... and to take possession thereof if the Bank so thinks fit.
7. That the Lessor Company and the Lessee Company hereby also jointly agree and confirm that it would not amend, alter and/or modify any of the terms, conditions and covenants contained in the said Agreement for Lease dated..... without the prior permission of the Bank in writing.
8. The Lessee Company hereby also confirms and declares that if the Lessee Company fails to pay the rent/ hire charge to the Bank in terms of these presents, the Bank will be at liberty to take possession of the said equipment if the bank so desires to protect the interest of the Bank.
9. The Lessee Company hereby agrees that the said equipment will bear the seal "hypothecated ..... Bank".

NOW THIS AGREEMENT FURTHER WITNESSETH as follows:

- (a) That in pursuance of the said agreement and in consideration of the premises aforesaid, the Lessor Company as beneficial owner hereby transfers and assigns up to the Bank all the rent/ hire charges payable to the Lessor Company by the Lessee Company under the Agreement for the Lease dated..... together with power for the Bank to sue, call up or recover and give effectual discharge for the same in the name of the Lessor Company or otherwise.



- (b) That the Lessee Company hereby agrees to pay duly and punctually all rents/hire charges payable by the Lessee Company to the Bank under the said Agreement for Lease dated..... and upon such payment to the Bank the Lessee Company shall be fully discharged from its obligation for payment of the rents/hire charges to the Lessor Company under the said Agreement for Lease dated.....
  - (c) That the Bank upon receipt of the rents/hire charges mentioned above shall be at liberty to adjust and appropriate the said rents/hire charges in liquidation of the amounts due and payable for principal and interests for the loan granted under the said Agreement for Hypothecation dated.....
  - (d) That the Lessor Company hereby covenants with the Bank that the Lessor Company has not received any rent/hire charges in advance nor any deposit or advance or premium from the Lessee Company adjustable against the said rents/hire charges.
10. It is hereby expressly agreed and declared by and between the parties hereto that all the terms, conditions and covenants herein contained shall override the terms, conditions and covenants contained in the Agreement for Hypothecation dated..... and the Agreement of Lease dated..... to the extent the same are inconsistent.

IN WITNESS WHEREOF the parties hereto have executed these presents on the day, month and year first above written.

THE COMMON SEAL OF..... has hereunto been affixed pursuant to the resolution passed by the Board of Directors of the Company on the day of..... in the presence of Mr..... and Mr..... two of the directors of the Company who have executed these presents in token of their presence in the presence of:

SIGNED AND DELIVERED for and on behalf of..... by Mr..... Constituted Attorney under the Power of Attorney dated..... in the presence of.....

**(7) Lease Agreement for a House (Premises)**

THIS LEASE made on..... day of..... between AB..... (hereinafter called "the lessor") (the expression shall include the owner for the time being of the lessors' interest in demised premises) of the One Part and CD..... (hereinafter called "the lessee") (the expression shall include his heirs, executors, administrators and permitted assigns) of the other.

THE DEED THEREFORE WITNESSETH AS FOLLOWS:

1. The lessor hereby demises to the lessee all that dwelling house with the land fully described in the Schedule hereto together with all out houses, wells, motor garage, kitchen, pathways, passage, garden and other appurtenances thereof situate at..... to hold the same to the lessee from the..... day of ..... for the term of..... years (or year to year) paying therefor during the said term the monthly rent of Rs..... (Rupees.....) payable on the first day of the month succeeding that for which the rent is due.
2. Lessee's obligation:
  - (i) The lessee hereby agrees that he will, during the said term (tenancy), pay all rents, taxes and other charges excluding the house tax which now are or may hereafter become payable in respect of the demised property;
  - (ii) Pay Municipal charges including water bills and electric bills, etc.
  - (iii) That he will not without the previous consent in writing of the lessor transfer or sublet or otherwise part with possession of the demised premises.



- (iv) That he will, without the consent in writing of the lessor, use the demised premises for residential purposes and for no other purpose.

3. Lessor's obligations:

- (i) That he will during the said term (tenancy) maintain the demised premises in good and habitable condition and shall execute all necessary repairs including annual white-washing and colour washing, plastering, painting, etc. and shall renew all broken panes, fittings, bolts, etc. and on lessee's giving the lessor notice in writing of any decay, defects, disorders, will, within one calendar month from the receipt of such notice, repair and amend the same.
- (ii) That he will, during the said term (tenancy), maintain the electric installation in the said premises and supply at his own expense such electric fans as may be required by the lessee.
- (iii) That he will carry out all immediate necessary repairs to the said premises to the entire satisfaction of the lessee.
- (iv) That the lessor shall repair, when necessary, the well, the passages, pathways and the road connecting the public road with the bungalow hereby demised.

4. Provided always and it is hereby agreed as follows:

- (i) That whenever any part of the rent hereby reserved shall be in arrears for..... months after due date or there shall be a breach of any of the covenants by the lessee hereincontained, the lessor may re-enter on the demised premises and determine this lease.
- (ii) That the tenancy hereby created shall be determinable at the option of the lessor/lessee (or either party) by giving to the lessor/lessee (or the other party) ..... calendar months notice in writing.

5. It is hereby agreed between the parties as follows:

That the demand for payment or notice required to be made upon or given to the lessee shall be sufficiently made or given if sent by the lessor or his agent through the post by registered letter addressed to the lessee at the demised premises (or, at.....) and, that notice requiring to be given by the lessor shall be sufficiently given if sent by the lessee through the post by registered letter addressed to the lessor at his usual or last known place of residence or business (or, at.....) and that any demand or notice sent by post in either case shall be assumed to have been delivered in the usual course of post.

IN WITNESS WHEREOF the parties hereto have hereunder signed this deed on the dates mentioned against their respective signatures.

*Signed, sealed and delivered*

..... AB

..... CD

**(8) Lease Agreement for Plant and Machinery**

LESSOR; (insert name and address) LESSEE; (insert name and address) DATE:

1. **LEASE:** The lessor hereby agrees to lease to Lessee and the Lessee hereby agrees to take on Lease from Lessor, subject to the terms of this Lease Agreement (herein after referred to as the "AGREEMENT")..... (write brief title of the asset) (hereinafter referred to as the "EQUIPMENT") described in the Schedule annexed hereto.
2. **PERIOD:** The Lessee shall take the equipment for its use on lease for the term to commence from the

date of payment by the Lessor to the supplier and to terminate at the end of ..... months from the date of such commencement. The period of lease may be extended for such period and on such terms and conditions as may be agreed upon by and between the parties hereto. (Subject to the concurrence of Lessor's Bankers).

3. **RENTAL:** In consideration of the above, the Lessee shall pay to the lessor, Lease rent at the rate specified in the Schedule hereunder written for the entire period of the Lease. Such rent shall be payable by the Lessee to the Lessor's [designated Bankers..... (insert the name of bankers) for and on behalf of the Lessor] within seven days of the same becoming due and payable. The lease rent shall be due and payable on the first day of each calendar month, commencing from the calendar month in which the period of lease commences, provided that the lease rent for the calendar month in which the period of lease commences shall become payable on the commencement of the lease period. Lessee will pay on demand as late charges, an amount equal to two per cent (2%) per month of each instalment of lease rent or part thereof that remains unpaid for a period of more than seven (7) days. It is expressly understood by the parties hereto that time shall be the essence of this Agreement, in so far as it relates to the obligations or commitments of the lessee.
4. **WARRANTIES:** The Lessee has made the selection of the Equipment based upon its own judgement prior to the purchase thereof by the Lessor and expressly declares that it has not relied upon any statements or representations made by Lessor, makes no express or implied warranties including those of merchantability or fitness for particular use of the Equipment and hereby disclaims the same. The Lessor shall not be responsible for any repairs, service or defects in the Equipment or the operation thereof. However, the Lessor agrees that Lessee shall be entitled to the benefits of the manufacturer's warranties in respect of the Equipment.
5. **TITLE, IDENTIFICATION, OWNERSHIP OF EQUIPMENT:** No right, title or interest in the Equipment shall pass to Lessee by virtue of these presents. Conditioned upon Lessee's compliance with and fulfilment of the term of conditions of this Agreement, the Lessee shall have the right to have and retain possession and use of the Equipment for the full term of lease including the extended term if agreed to. Lessor may require plates or makings to be affixed to or placed on the Equipment, indicating Lessor's interests therein (and the interests of its Bankers). Lessor and Lessee hereby confirm that their intent is that the Equipment shall at all times remain the property of the Lessor. Lessee also agrees and undertakes not to sell, assign, sublet, pledge, hypothecate or otherwise encumber or suffer a lien upon or against any interest in this Agreement or the Equipment, or to remove except for the purposes of repairs with prior intimation to the Lessor the Equipment from the factory or office site where originally put to use or allow any third person to use the equipment without the prior consent of the Lessor in writing.
6. The equipment hereunder leased, will be delivered by the manufacturers/suppliers to the location specified by Lessee. Lessor shall not be responsible for any damage incurred to the Equipment during delivery. Lessor will request the manufacturers/suppliers to effect delivery on or before the date of commencement of the rentable, but if for whatever reasons, delivery is not affected by the manufacturers/suppliers by the date, lessor shall not be liable for any loss suffered by the Lessee thereby. Lease rentals shall be deemed to commence from the date of disbursement for the actual purchase made with the consent of the lessee.
7. **INDEMNITY:** Lessee agrees to comply with all laws, regulations and orders relating to the possession, operation, and use of the Equipment and assumes all risks and liabilities arising from or pertaining to the possession, operation or use of the Equipment. Lessee does hereby agree to indemnify and keep indemnified and hold safe and harmless the Lessor from and covenants and undertakes to defend Lessor against any and all claims, costs, expenses, damages and liabilities whether civil or criminal, of any nature whatsoever, arising from or pertaining to the use, possession, operation or transportation of

the Equipment. Any fees, taxes or other lawful charges paid by Lessor upon failure of Lessee to make such payments, shall become immediately due from Lessee to make such payments, shall become immediately due from Lessee to Lessor. Lessee further covenants and undertakes to indemnify and keep indemnified the Lessor against loss of Equipment by seizure by any person other than the Lessor for any reason whatsoever, or resulting from any form of legal process initiated by any person other than the Lessor, provided that such indemnity shall not cover such loss as arises out of any neglect or default on the part of the Lessor. Lessee further agrees to indemnify and keep indemnified the lessor against all risks and liabilities whether civil or criminal, arising from the possession, use, operation or storage of the Equipment and for injuries or deaths of persons or damage to property arising from the above.

8. *USE, INSPECTION:* Lessee will cause the Equipment to be operated in accordance with manufacturers' manuals or instructions, if any, and in so far as applicable by competent and duly qualified personnel only and in accordance with applicable Government regulations, if any, and for business purposes only. Lessor shall have the right from time to time during the normal business hours on any working day to enter upon Lessee's premises or elsewhere after prior notice for the purpose of confirming the existence, condition and proper maintenance of the Equipment.
9. *REPAIRS, LOSS AND DAMAGE:* During the term of the Lease and any renewal thereof, Lessee, at its own cost and expenses will keep all Equipments in good repair, condition and working order and shall furnish all parts, mechanisms, devices and servicing required thereof. All such parts, mechanisms and devices shall immediately be deemed part of the Equipment for all purposes hereof and shall become the property of the Lessor. In the event, any item of Equipment is lost, stolen or destroyed or damaged beyond repair for any reason, Lessee shall promptly pay the Lessor the instalments of lease rentals then remaining unpaid less insurance claims received by Lessor, in respect of insurance effected in pursuance of this Agreement, whereupon Lessor will transfer to Lessee, without recourse of warranty, all of Lessor's right, title and interest, if any, in such items. If, however, the insurance claim received by the Lessor exceeds the amount of unpaid rentals, the Lessor shall forthwith pay the difference to the Lessee.
10. *INSURANCE:* Lessee shall obtain and maintain for the entire term of this Agreement at its own expense, comprehensive insurance against loss or destruction or damage to the Equipment including without limitations destruction or loss by fire, theft and such other risks or loss as are customarily insured against on the type of Equipment leased hereunder and by businesses in which Lessee is engaged and in such amounts as shall be satisfactory to lessor, provided however that the amount of insurance against loss or destruction or damage to the Equipment shall not be less than the greater of the full replacement value of the Equipment or the instalments of lease rentals then remaining unpaid hereunder plus any renewal options entered into pursuant to this Agreement. Each insurance policy will name Lessee as insured and note Lessor's (and its Bankers') interests as loss payee. Lessee shall furnish to Lessor a certificate of insurance or other satisfactory evidence that such insurance coverage is in effect.
11. *FURTHER ASSURANCE:*
  - (a) During the term of this Agreement, Lessee shall provide if so asked for by Lessor annual audited accounts of the Lessee.
  - (b) Lessor hereby covenants that the Equipment is the absolute property of the Lessor and undertakes not to sell or transfer the same to any party except as to hypothecate, mortgage or create a charge in favour of a Bank or Financial Institution. The Lessor shall inform the Lessee of any such mortgage or hypothecation.
  - (c) Lessee irrevocably agrees that the lease rentals will be increased by any incremental taxes, if any, whether Sales Tax or Excise Duties or any other related and consequential charges, if any, levied on this transaction now or hereafter as also by any increase in purchase price of the asset in the intervening period between placement of the order and its acceptance and the eventual

delivery of the Equipment. The lease rentals have been stipulated in the assumption that the lessor shall be entitled to claim in his income tax assessment investment allowance @25% of the cost of Equipment and depreciation @..... in the first year, and .....% every year subsequently on reducing balances. The lessee agrees that the lease rentals shall be suitably increased if such investment allowance or depreciation is not allowed at all or at rates given above or due to any changes in the tax laws in respect thereof.

- (d) Lessee further irrevocably stipulates that at no time during the period of this lease agreement will the Lessee attempt to capitalise the leased asset on Lessee's balance sheet and Lessee and Lessor irrevocably agree that ownership of the Equipment during the tenure of the lease as specified herein and inclusive of any renewal options that the parties hereto may concur to indisputably vests with the Lessor.
  - (e) The Lessor does hereby agree to indemnify and keep indemnified and hold safe and harmless the Lessee from and against any loss or damage caused to or suffered by the Lessee on account of any action taken by the Bank or Financial Institution for non-satisfaction or breach of the conditions of the loan granted by the Bankers to the Lessor. In case of Lessor's failure to make payment of principal and/ or interest of the loan and on being called upon by the Bank or Financial Institution to pay to them all or any instalments of rental and the Lessee making such payment the Lessor agrees that such payment to the Bankers or Financial Institution made by the Lessee of the sums due under this Agreement, shall be considered as having been paid to the Lessor, towards the Lessor's dues hereunder. In that event, the Bank shall have no right of recourse to possession of Equipment so long as the Lessee meets with lease rental payments falling due under this Agreement.
  - (f) The Lessor hereby agrees to inform its Bankers about this arrangement and obtain their confirmation to the same.
12. **SURRENDER:** Upon expiration or earlier termination of the lease, Lessee shall deliver to the Lessor the said Equipment at such a place as Lessor may specify in good repairable condition and working order, normal wear and tear resulting from the proper use of the Equipment and damage by fire not caused by the negligence of the Lessee shall be excepted.
13. **EVENTS OF DEFAULT:** An event of default shall occur hereunder if Lessee:
- (a) fails to pay any instalment of lease rentals or part thereof or other payment required hereunder when due and such failure continues for a period of 10 days after written notice is sent from Lessor; or
  - (b) fails to perform or observe any other covenant condition or agreement to be performed or observed by it hereunder or breaches any representation or provision contained herein or in any other document furnished to the Lessor in connection herewith and such failure or breach continues unremedied for a period of ten days (if such breach is capable of being remedied within ten days) after written notice is sent from the Lessor; or
  - (c) without Lessor's consent, attempts to remove (except for repairs), sell, transfer, encumber, part with possession or sublet any item of Equipment; or
  - (d) shall commit an act of bankruptcy or become insolvent or bankrupt or make an assignment for the benefit of creditors, or consent to the appointment of a Trustee or Receiver or either shall be appointed for Lessee or for substantial part of its property without its consent, or bankruptcy, reorganisation or insolvency proceedings shall be instituted by or against Lessee; or
  - (e) shall suffer an adverse material change in the financial condition from the date hereof, and as a result thereof Lessor deems itself or any of its equipment to be insecure; or

(f) shall be in default under any other agreement at any time executed with Lessor.

14. **REMEDIES:** Upon the occurrence of any default and at any time thereafter the Lessor would declare all future rentals due and to become due hereunder for the full term of the lease immediately due and payable and on such declaration being made by Lessor, Lessee shall forthwith provide to the Lessor the present value of the said sums due discounted at the rate of 12% per annum and upon Lessee failing to make the said payment within 30 days thereof Lessor may in its discretion do any one of the following:

- (a) Take action for recovery as liquidated damages for loss of bargain and not as penalty, of any amount equal to all unpaid lease rental payment which in the absence of a default would have been payable by Lessee hereunder for the full term thereof plus interest thereon at the rate of 2% p.m. for the period until receipt of the said amount;
- (b) Upon notice to Lessee terminate this Agreement and all Schedules executed pursuant hereto and forfeit the amounts paid by Lessee by way of rentals and demand the Lessee to return all equipment to Lessor at Lessor's own risk and expenses in the same condition as delivered, ordinary wear and tear and damage by fire not caused by the negligence of Lessor excepted, at such location as the Lessor may designate and upon failure of Lessee to do so within 14 days from the date of demand, enter upon premises where such Equipment is located and take immediate possession of and remove the same, all without liability to Lessor or its Agent for such entry or for damage to property or otherwise. Lessor may detach and dismantle the Equipment from any part of the freehold or process machinery to which it may be affixed without the written permission of Lessee;
- (c) Sell all the Equipments at public or private sale or lease to others with 7 days' Notice on account and at the risk of Lessee and appropriate the net sale proceeds or realisation of rental towards the present value of all the future rentals declared to be immediately due and payable at the rate of 12% per annum as aforesaid and to recover from the Lessee the shortfall or deficit together with interest thereon at the rate of 2% p.m. but the Lessor shall not in any such action or for duty to account to Lessee for such action or for any surplus realised by the Lessor by sale or lease.

The remedy referred to hereinabove is intended to be in addition to any other remedy available to Lessor at law provided however that on the Lessee making payment to the Lessor at any time before action under Clauses (a) or (b) above taken by Lessor of the present value of all future lease rentals as provided herein before, the Lessee shall retain all the equipment leased hereunder for its own use and the Lessor further undertakes to transfer all its title and interest on the said Equipment to the Lessee on receipt of payment as referred to hereinabove.

- 15. **WAIVER:** Any expressed or implied waiver by the Lessor of any default shall not constitute a waiver of any other default by Lessee or a waiver of any of Lessor's right. All original rights and powers of the Lessor under this Agreement will remain in full force, notwithstanding any neglect, forbearance or delay in the enforcement thereof, by the Lessee of this Agreement shall not be deemed as waiver of any continuing or recurring breach by the Lessee of this Agreement.
- 16. **NOTICES:** Any notices or demands required to be given herein shall be given to the parties hereto in writing and by post or by hand delivery at the address herein set forth or to such other addresses as the parties hereto may hereafter substitute by written notice given in the manner prescribed herein above.
- 17. This Agreement and other contracts executed between the parties hereto pursuant to this Agreement cannot be cancelled or terminated except as expressly provided herein. Lessee hereby agrees that Lessee's obligations to pay all lease rentals and any other amounts owing hereunder shall be absolute and unconditional. This Agreement cannot be amended except in writing and shall be binding upon and to the benefit of the parties hereto their permitted successors and assigns.

18. The captions in this Agreement are for convenience only and shall not define or limit any of the terms hereof.
19. **ARBITRATION:** All disputes, differences, claims and questions, whatsoever, which shall arise either during the subsistence of this Agreement or afterwards between the parties and/or their respective representatives touching these presents or any clause or thing herein, contained or otherwise in any way relating to or arising from these presents shall be referred to the arbitration of two Arbitrators, one to be appointed by each party to the dispute and such arbitration shall be in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force.
20. By execution hereof, the signor hereby certifies that he has read this Agreement, including the Schedule hereto and that he is duly authorised to execute this Agreement on behalf of the Lessee.

IN WITNESS WHEREOF each of the parties hereto has caused this agreement to be executed in duplicate on this..... (date) by its duly authorised officers.

*Signed for and on behalf of:*

*For.....*

*In the presence of:*

*Witness No. 1*

*Witness No. 2*

*Signed for and on behalf of:*

*For.....*

*In the presence of:*

*Witness No. 1*

*Witness No. 2*

*The Schedules above referred to*

### **LESSON ROUND-UP**

- Sale of immovable property is governed by the provisions of Transfer of Property Act, 1882. A transaction of a sale of immovable property usually involves two 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.
- Before drafting the conveyance or sale deed for the immovable property, it is necessary that the title of the property be investigated and it should be ensured that the title to the property is proved as good and marketable.
- A sale deed must be properly drafted adhering to all the principal conditions prescribed under the Transfer of Property Act to acquire a perfect title to the property being purchased by the company.
- The Transfer of Property Act, 1882 deals with the mortgage of immovable property alone. It does not deal with movable at all. Therefore, it cannot be regarded as forbidding the mortgage of movable property.
- The transferor in the case of a mortgage is called a 'mortgagor' and the transferee as 'mortgagee', the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument, if any, by which a transfer is effected is called a "mortgage deed".



- A deed of mortgage may be drafted either as a deed poll on behalf of the mortgagor in favour of the mortgagee or as a deed between the mortgagor and mortgagee as parties.
- The Indian Easements Act, 1882 contains the statutory provisions governing licenses. Under the Act, a license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interest in the property affected by the license.
- A license ordinarily carries with it the incident of non-transferability. A license cannot be transferred by the licensee or exercised by his servants or agents. The only exception to this rule is that, unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee.
- The revocation of license may be expressed or implied. The general rule is that subject to the agreement between the parties, all licenses are revocable at the will of the licensor. However, there are certain exceptions to this rule.
- A mere deed of license need not be registered unless any right, title or interest in immovable property of the value of Rs. 100 or more is created, declared, assigned, limited or extinguished.
- Lease is a contract between lessor and lessee for the fixed term for the use on hire of a specific asset selected by lessee. Lessor retains ownership of the assets and lessee has possession and use of the asset on payment of specified rental over a period. It is a sort of contractual arrangement between the two parties whereby one acquires the right to use the property called “lessee” and the other who allows the former the right to use his owned property, called the “lessor”.
- Before taking up drafting of the lease documents one is expected to be thorough with all the essential legal aspects involved in a lease transaction. The essential legal elements of lease are (i) the parties i.e. lessor or lessee; (ii) the subject matter of lease i.e. the property to be leased; (iii) demise or partial transfer of such property; (iv) the term and period of lease; and (v) the consideration or rent.
- The main document to complete the leasing transaction between the lessor and the lessee is the lease agreement or lease deed which contains all the conditions and covenants binding the parties to the lease transaction.

### TEST YOURSELF

*(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)*

1. What precautions will you take while drafting a deed of sale of immovable property? Discuss in brief various components of a sale deed of immovable property.
2. Draft a specimen deed of sale by an administrator under orders of the Court.
3. Can you tell the difference between license and lease? How does this difference is reflected in drafting a License Deed and a Lease Deed?
4. Draft a Deed of Surrender of Lease.
5. Draft a specimen Deed modifying terms of Lease.
6. Write short notes on the following:
  - (a) Lease and License
  - (b) Importance of covenants in Lease Deed
  - (c) Surrender of Lease
  - (d) Covenant for alteration in Lease Deed.



[illegible]



# Lesson 7

## Drafting and Conveyancing Relating to Various Deeds and Agreements-IV

### LESSON OUTLINE

- Deeds of Assignment
- Assignment of Business Debt
- Assignment of Shares in a Company
- Assignment of Policies of Insurance
- Assignment of Patents,
- Assignment of Trade Marks
- Assignment of Copyrights
- Assignment of Business and Goodwill
- Partnership Deeds
- Trust Deeds
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

The deed of assignment stipulates what kinds of rights have been assigned. An important aspect of intellectual property laws deals with assignment agreements. An assignment agreement is an intellectual property (IP) transaction that deals with the ownership and disposition of intellectual property rights as well as with the control over the use of or access to intellectual property.

A partnership deed is a document that outlines in detail the rights and responsibilities of all parties to a business. It has the force of law and is designed to guide the partners in conducting the business.

Trusts continue to form an important role in the wealth management strategy of many people in India and abroad. The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty.

A gift is a common mode of transfer of property. It is the transfer of certain existing moveable or immoveable property by one person to another.

The transfer should be made voluntarily and without consideration. A detailed discussion on assignment, partnership, trust and gift has been given in the study lesson to disseminate information about the essential requirements that need to be considered while drafting assignment deeds, partnership deeds, trust deeds and gift deeds.

## DEEDS OF 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.

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

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

The term assignment is, however, of wider import. It is well settled that a transfer of property clearly contemplates that the transferor has an interest in the property which is sought to be conveyed. Section 130 of the Transfer of Property Act, 1882 lays down the mode of transfer of actionable claim. It prescribes:

- (1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not;

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

- (2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.”

Every notice of transfer of an actionable claim must be in writing signed by the transferor or his agent duly authorised in this behalf, or in case the transferor refuses to sign, by the transferee or his agent, and must state the name and address of the transferee. (Transfer of Property Act, 1882, Section 131).

## ASSIGNMENT OF BUSINESS DEBT

A sum due is the same thing as a debt due. It may be now payable or will become payable in future by reason of a present obligation. There must be an existing obligation to pay a sum of money now or in future. It includes book debts, debts due on a bond, provident fund, arrears of rent, amount due on settlement of account between principal and agent, master and servant, wages which have accrued due, money due under an insurance policy, claim to money deposited for the due performance of a duty, surplus left with the vendee of property, etc. A debt is property. It is an actionable claim and is heritable and assignable and it is treated as property under the Transfer of Property Act, 1882 and is known as “actionable claim”.

## Consideration for Assignment

A debtor cannot claim or take advantage of non-payment of consideration for assignment. Section 130 of the Transfer of Property Act, 1882 specifically lays down that an assignment of an actionable claim may be with or without consideration. Passing of the property in the assigned property does not depend on the payment of consideration. The question of payment of consideration is in fact one between the assignor and the assignee.

### Liability of Transferee of an actionable claim

Section 132 of Transfer of Property Act provides that the transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transfer was subject in respect thereof at the date of transfer.

### Warranty of Solvency of a Debtor

Section 133 of Transfer of Property Act provides that solvency of the debtor at the time of transfer is to be taken into account for purposes of warranty by the transferor. In case the transfer has been made for consideration, the warranty is limited to the amount or value of such consideration.

### A Specimen of Deed of Assignment of Business Debts

THIS DEED OF ASSIGNMENT made this..... day of..... between..... son of..... resident of..... (hereinafter called "the Assignor") of the one part, and....., son of....., resident of....., (hereinafter called "the Assignee") of the other part.

WHEREAS the assignor has, for some time been carrying on the business of....., in the course whereof the several persons whose names, addresses and occupations are mentioned in the Schedule appended hereto, have become lawfully debtors to him and so for the several sums of money set opposite to their respective names;

AND WHEREAS the assignor has contracted with the assignee for the absolute sale to him of the said business debts at..... and for the sum of Rs..... (Rupees.....).

NOW THIS DEED WITNESSES that in consideration of the sum of Rs..... (Rupees.....) now paid to the assignor by the assignee (the receipt whereof the assignor hereby acknowledges), the said assignor, as beneficial owner, does hereby transfer, sell and assign unto and to the use of the said assignee, all the several said debts, and sums of money specified in the said Schedule which are now due and owing to the assignor to have and to receive them for his absolute use and benefit with absolute power, authority and liberty to enforce payment thereof by suit or otherwise and that the assignor does hereby covenant with the assignee that all the several debts are lawfully due to him and the parties by whom they are payable are alive, and further that he has not entered into any arrangement with any of them and that the assignor shall at all times hereafter do, execute and perform all such and other acts, deeds, things, or writings as may be reasonably required for realization of the said debts, and further and better and more effectively transferring and/or assuring them or any of them in favour of the assignee.

*Schedule above referred to*

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their signatures on the day, month and the year above mentioned at..... (place).

Witness: (Assignor)

Witness: (Assignee)

### ASSIGNMENT OF SHARES IN A COMPANY

Section 44 of the Companies Act, 2013 defines the nature of property in the shares of a company. It lays down: "The shares or debentures or other interest of any member in a company shall be movable property transferable in the manner provided by the articles of the company."

The definition of "goods" in the Sale of Goods Act, 1930, specifically includes stocks and shares. Hence, it is necessary to provide by the articles the manner in which transfer of shares are to be affected.

A "share" in a company is a right to a specified amount of the share capital of the company, carrying with it

certain rights and liabilities, while the company is a going concern and in the winding up. It represents the interest of the holder measured for purposes of liability and dividend by a sum of money.

A company cannot refuse to transfer shares except as provided by its articles. It is well settled that unless the articles otherwise provide, a shareholder has a free right to transfer his shares to whom he chooses. It is not necessary to look to the articles for a power to transfer, since that power is given by the Act. It is only necessary to look to the articles of association to ascertain the mode of transfer and the restrictions upon it.

As between buyer (transferee) and seller (transferor) of shares, the buyer is entitled to all dividends declared after the contract of sale, unless otherwise agreed. Whatever may be the agreement, a transfer of shares after declaration of dividend, does not, as against the company, carry the dividend, even though the transfer may be cum-dividend.

### **A Specimen of Deed of Assignment of Shares in a Company**

THIS ASSIGNMENT is made this ..... day of ..... between AB, son of ....., resident of..... (hereinafter called "the Assignor") of the one part, and CD, son of....., resident of ..... (hereinafter called "the Assignee") of the other part.

THE DEED WITNESSES:

That in consideration of the sum of Rs..... (Rupees.....) paid by the assignee to the assignor, the receipt whereof the assignor hereby acknowledges, the said AB hereby assigns, sells and transfers to the said CD..... Equity Shares of Rs..... each, fully paid up, bearing consecutive Nos..... to..... (inclusive), which stand in the name of the assignor in the Register of Members of..... Co. Ltd. TO HOLD the same to the assignee absolutely, subject nevertheless to the conditions on which the assignor held the same up to date.

AND the assignee hereby agrees to take the said Equity Shares subject to such conditions.

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their respective signatures on the day, month and the year stated above.

*Witness:*

*Assignor*

*Witness:*

*Assignee*

### **ASSIGNMENT OF POLICIES OF INSURANCE**

Policies of insurance are principally of two types (1) insuring risk to life of a person, and (2) covering various risks relating to goods. Under the former, a sum of money is secured to be paid on the death of the person whose life is insured. The latter is a contract whereby an insurer undertakes to indemnify the assured, his nominees, assigns, heirs and legal representatives against the loss of and/or damage to goods. A contract of insurance is complete when the proposal of the assured is accepted by the insurer, whether the policy of insurance is issued or not. For the purpose of showing when the proposal was accepted, a reference has to be made to the insurance cover or other customary memorandum of the contract; although it may be unstamped.

Insurable interest in the subject-matter insured is a pre-requisite of a contract of insurance and for the success of an insurance claim the assured or the claimant, as the case may be, must be interested in the subject-matter insured at the time of the loss.

An insurable interest in the subject-matter insured is a right which is capable of assignment. An insurance policy may be transferred by assignment unless it contains terms expressly prohibiting assignment. It must be assigned before death in the case of a life insurance policy and it may be assigned either before or after loss in the case of a marine or good policy. The assignee can sue on the policy of insurance in his own name and can defend an action on any ground available to the assignor. The policy may be assigned by endorsement

thereon or in other customary manner. An assured who has no insurable interest in the subject-matter insured cannot assign. Where an assured who has lost interest in the subject matter by transfer, and has not, before or at the time of transferring the subject matter, expressly or impliedly, agreed to assign the policy, any subsequent assignment of the policy is inoperative.

### A Specimen of Deed of Assignment of Policy of Life Assurance

THIS ASSIGNMENT made this..... day of..... between AB, son of....., resident of..... (hereinafter known as “the assignor”) of the one part and CD, son of..... resident of..... (hereinafter known as “the assignee”) of the other part.

WHEREAS a policy of assurance being No..... for Rs ..... (Rupees.....) was issued by the Life Insurance Corporation of India on the life of the assignor on the..... day of..... to be paid to the assignor or to his executors, administrators or assigns after his death, subject to the annual premium of Rs.....;

AND WHEREAS the said AB has agreed to transfer and assign to the said CD the said policy of assurance of a sum of Rs..... (Rupees.....); THIS DEED WITNESSES that in consideration of the sum of Rs..... (Rupees.....) the receipt whereof the said AB hereby acknowledges, the said AB as beneficial owner, hereby transfers and assigns unto and to the use and for the benefit of CD the hereinbefore recited policy of assurance, and the sum of Rs..... (Rupees.....) hereby assured and all the other moneys, benefits and advantages to be had, recovered or obtained under or by virtue of the said policy:

TO HOLD the same unto and to the use of the said CD absolutely, subject to the conditions as to payment of future premiums and otherwise to be henceforth observed in receipt of the said policy:

AND the said AB hereby covenants with the said CD that he, the said AB, shall not do, or knowingly suffer anything to be done, whereby the said policy may be rendered void or voidable or the said CD or his heirs, executors, administrators or assigns may be prevented from receiving the said sum of Rs..... (Rupees.....) or any benefit thereunder.

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their respective signatures on the day, month and the year stated above.

Witness: Assignor  
Witness: Assignee

## ASSIGNMENT OF PATENTS

Patent is a right, granted by the Government under the Patents Act, 1970 to the grantee, of exclusive privileges of making or selling a new invention or process protected under the patent. The Act confers upon the patentee the right to safeguard his property in the patent and sue the person who infringes upon his patent right.

After a complete specification in pursuance of an application for a patent has been accepted and on the request of the applicant, the Controller shall cause the patent to be sealed with the seal of the Patent Office under Section 43 of the Patents Act, 1970. Section 48 of the Act, confers upon the Patentee where the subject matter of the patent is a product, the exclusive right to prevent third parties who do not have his consent from the act of making, using, offering for sale, selling or importing for those purposes that product in India. Where the subject matter of the patent is a process, the patentee is given exclusive right to prevent third parties who do not have his consent from the act of using that process and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India provided that the product obtained is not a product in respect of which no patent shall be granted under this Act.

Section 68 of the Act makes provision with regard to the assignment of patents. The Section lays down:



“An assignment of a patent or of a share in a patent, a mortgage, licence or the creation of any other interest in a patent shall not be valid unless the same were in writing and the agreement between the parties concerned is reduced to the form of a document embodying all the terms and conditions governing their rights and obligations and the application for registration of such document is filed in the prescribed manner with the Controller within six months from the execution of the document or within such further period not exceeding six months in the aggregate as the Controller on application made in the prescribed manner allows:

Provided the document shall, when registered, have effect from the date of its execution.”

Section 69 of the Act dealing with registration of assignments prescribes: “Where any person becomes entitled by assignment, transmission or operation of law to a patent or to a share in a patent or becomes entitled as a mortgagee, licensee or otherwise to any other interest in a patent, he shall apply in writing in the prescribed manner to the Controller for the registration of his title, or, as the case may be, of notice of his interest in the register.”

Section 70 of the Act empowers the person or persons registered as grantee or proprietor of a patent to assign, grant licences under, or otherwise deal with, the patent and to give effectual receipts for any consideration for any such assignment, licence or dealing. The Section further lays down that any equities in respect of the patent may be enforced in like manner as in respect of any other moveable property.

#### **A Specimen of Deed of Assignment of a Patent**

THIS DEED OF ASSIGNMENT is made on this ..... day of ..... between AB son....., resident of..... (hereinafter called the “assignor”, which term shall include his heirs, executors and assigns) of the one part and CD, son of..... resident of..... (OR IN THE ALTERNATIVE IF THE PATENTEE ASSIGNEE IS A COMPANY)..... and..... Co. Ltd. (hereinafter called the “assignee”/“company” incorporated under the Companies Act, 2013 having its Registered Office at.....) of the other part under the terms and conditions set hereunder:

WHEREAS the assignor has invented a process for the manufacture of..... which was duly registered and entered in the Register of Patents bearing No..... dated..... and duly sealed in the Patent Office:

AND WHEREAS the company is a company limited by shares incorporated under the Companies Act on..... with an Authorised Share Capital of Rs..... divided into..... Equity Shares of Rs..... each;

AND WHEREAS it had been agreed between the parties to this Deed that in consideration of the assignment to be made by the assignor of his rights under the said Patent to the Company in the terms mentioned hereunder, for the sum of Rs..... (Rupees.....) to be satisfied by allotment of..... Equity Shares to the assignor and/or his nominees as fully paid up:

AND WHEREAS the directors of the Company in part-performance of the said agreement resolved in a Board meeting held on the..... to allot the requisite number of Equity Shares at the direction of the assignor as specified in the Schedule attached hereto:

NOW THIS DEED OF ASSIGNMENT WITNESSES:

That in consideration of the premises and in accordance with the agreement aforementioned and on payment of the sum of Rs..... (Rupees.....) satisfied by the allotment of..... Equity Shares in the Company as specified in the Schedule attached hereto at the direction of the assignor by the Company, each Share being credited as fully paid up (the allotment of which shares credited as aforesaid the assignor hereby acknowledges) the assignor, as beneficial and sole owner, hereby assigns unto the Company his title to the said patent and all benefits and advantages accruing therefrom and all rights and privileges attached thereto to hold unto the Company absolutely.

The assignor covenants with the Company that he has not assigned or otherwise dealt with the said patent and that his title to the said patent subsists and that he has done nothing to prejudice the rights of the Company as transferee thereof to use the said patent exclusively.

The assignor further covenants with the Company that he shall join the Company in applying to the Central Government or other authority at the expenses of the Company, for extension of the said patent and shall do his utmost in obtaining such extension to ensure for the benefit of the Company and shall do nothing to prevent the Company from securing the extension and user of the patent in the manner prescribed by law, without the payment of any further consideration by the Company to the assignor.

The assignor further covenants with the Company that if during the currency of the said patent and the operation of the Company as a going concern, the assignor shall discover, invent or make any improvements in respect of the said invention or shall discover any other process or method for the manufacture of....., he will disclose the same to the Company and explain the new method of discovery to the Company and at the cost of the Company give such full particulars and exhibit and make such experiments as may enable the Company to make practical use of such method and discovery and join the Company in applying for patent for such new invention at the option of the Company and do all other acts and execute all such deeds as may be requisite therefor to vest in the Company all rights, title and interest in such new invention or improvement for the use and benefit of the Company.

IN WITNESS WHEREOF the parties aforesaid have set their respective hands in the presence of the witnesses hereunder.

Witness:

Assignor

Witness:

Assignee/Company

**Note :** In case the assignee is not a company the word 'assignee' will be substituted for 'company' and other suitable modifications will have to be made.

## ASSIGNMENT OF TRADE MARKS

A trade mark is visual symbol in the form of a word, a device or a label applied to articles of commerce with a view to indicate to the purchasing public that the goods manufactured or otherwise dealt in by a particular person are distinguished from similar goods manufactured or dealt in by other persons. By virtue of such an affixture of the trade mark the person who sells his goods under the particular trade mark acquires an exclusive right subject to certain conditions, to the use of the mark in relation to those goods. Such a right acquired by use is recognised as a form of property in the trade mark, and protected under Common Law. A person can also acquire a similar right over a trade mark, not so far used but only proposed to be used, by registering it under the Trade Marks Act, 1999. It may be pointed out here that prior to Trade Marks Act, 1999, the law governing trade marks was stipulated under the Trade and Merchandise Marks Act, 1958. In view of the developments in trading and commercial practices increasing globalisation of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management and to give effect to important judicial decisions, the said Act was amended and the new Trade Marks Act, 1999 was passed to provide for registration of trade marks for goods as well as services including prohibition to the registration of imitation of well known trade marks and expansion of grounds for refusal of registration.

A trade mark is property, but its precise nature differs substantially from other forms of property with which most people are familiar. It is not necessary that the trade mark chosen by a trader should be the result of inventive skill or intellectual labour. The word or device adopted for a trade mark may be some common place or thing. Subject to certain minimum conditions, the owner of the mark, whether registered or unregistered, theoretically at least, gets a perpetual right to the exclusive use of it in relation to the particular goods in respect of which it is registered or used.

The object of trade mark law is to deal with the precise nature of the right which a person can acquire in respect of trade marks; the mode of acquisition of such rights, the method of transfer of those rights to others, the precise nature of infringement of such rights, and the remedies available in respect thereof. This branch of commercial law has undergone changes from time to time, with the changing pattern of business methods and practices. Even the very concept of a trade mark and its functions have changed. One can, therefore, expect more changes to take place in course of time.

Section 37 of the Trade Marks Act, 1999 deals with the power of registered proprietor of a trade mark to assign his rights in the trade mark. The Section lays down: "The person for the time being entered in the register as proprietor of a trade mark shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power to assign the trade mark, and to give effectual receipts for any consideration for such assignment."

Section 38 of the Act further lays down:

"Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assignable and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods or services in respect of which the trade mark is registered or of some only of those goods or services."

An unregistered trade mark, according to Section 39 of the Act, may be assigned or transmitted with or without the goodwill of the business concerned.

#### **A Specimen of Deed of Assignment of a Registered Trade Mark**

THIS DEED OF ASSIGNMENT made between AB, son of....., resident of..... (hereinafter called the "assignor") of the one part and CD, son of..... resident of..... (hereinafter called the "assignee") of the other part.

WHEREAS the said AB is the owner of a Trade Mark Number..... duly registered in the Register of Trade Mark maintained by the Trade Marks Registration Office at.....;

AND WHEREAS the said AB has made actual and *bona fide* use of the said Trade Mark in India in relation to the toiletry goods manufactured by him at his factory in.....

NOW THIS DEED OF ASSIGNMENT WITNESSES that in pursuance of the said agreement and in consideration of the said sum of Rs..... (Rupees.....) paid by the said CD to AB, the receipt whereof the said AB hereby admits/acknowledges and confirms, he the assignor AB do hereby grant, transfer and assign upon the terms hereinafter mentioned, the exclusive use and all benefits of the aforesaid Trade Mark in relation to the goods of toiletry manufactured by him at his factory at.....

AND the said assignor hereby covenants with the assignee that he will not infringe nor use a mark identical with the Trade Mark hereby assigned nor use another Trade Mark nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to the goods in respect of which it is registered and in a manner as to render the use of this Trade Mark likely to be taken either as being a use of the said Trade Mark or to import a reference to the assignor.

AND the assignor further covenants that he, the assignor shall, at the cost of CD or any person claiming through him, do or cause to be done any other act, deed or thing as may be required for more perfectly assuring the aforesaid assignment.

IN WITNESS WHEREOF the parties aforesaid have set their respective hands in the presence of the witnesses hereunder.

Witness:

Assignor

Witness:

Assignee

## ASSIGNMENT OF COPYRIGHTS

Section 14 of the Copyright Act, 1957 defines “copyright” as an exclusive right subject to the provisions of the Act to do or authorise the doing of any of the acts stated thereunder in respect of a work or any substantial part thereof with regard to original literary dramatic, musical and artistic works; the cinematograph films and sound recording. The rights granted under Section 14 of the Act relate to reproduction, publication, performance, production, translation, making film or sound recording, selling or giving on hire film or sound recording, communicate film or sound recording to public and to make adaptation of the copyright work.

Section 18 of the Act deals with the assignment of copyrights. The Section lays down:

- “(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof;

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

- (2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

- (3) .....

With regard to the mode of assignment, Sub-section (1) of Section 19 of the Act prescribes: “No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.”

### A Specimen of Deed of Assignment of Copyright of a Book

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

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

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

NOW THIS DEED OF ASSIGNMENT WITNESSES as follows:

1. In consideration of an subject to the covenants on the part of the publishers as hereinafter contained, the author does hereby grant, convey, transfer, sell, assign and assure unto and to the use of the publishers all that copyright as defined in Section 14 of the Copyright Act, 1957, of the book entitled..... on the subject of..... to have and hold the same as absolute owners thereof for the full term of copyright as prescribed by law.
2. The publishers shall so long as the said work or any adaptation, modification or translation thereof is published and sold, submit to the author twice every year once during the month of January and the other during the month of June, a statement of account showing details of copies printed, published, held in stock and sold or disposed of (Except otherwise by sale of damaged or destroyed copies) and of the profits, if any, earned thereunder.
3. The publishers shall pay or cause to be paid to the author or his nominee or nominees a royalty at the rate of..... per cent on the sale proceeds of the copies of the work or adaptations or translations thereof that may be actually published and as disclosed in the statement of account

referred to in clause (2). No royalty shall be payable on any copies of the work that may be damaged or destroyed or disposed of otherwise than by regular sale.

4. That the publishers shall also pay to the author half the net profits earned by them, if any, from any transfer, sale or assignment of any of the rights comprising the copyright or from grant of any interest or license therein: provided that the publishers shall not be entitled to and shall not do or cause anything to be done in derogation of the author's rights, particularly the right to royalty reserved hereunder.
5. That the author does hereby agree to revise the work and bring it up to date or otherwise modify, alter, adapt or translate it or get it translated whenever reasonably required by the publishers provided also that the publishers will not normally require the author to do so more than once in two years; provided further that in case the author shall fail and/or neglect, and/or refuse, to revise, modify, alter, translate the work or get it translated as and when reasonably required by the publishers, they shall be at liberty to get the same done on his account by any person or persons of their choice after due notice to the author and deduct all costs, charges and expenses out of moneys payable to the author: provided also that in selecting the person proposed to revise, modify, alter, adapt or translate the work and in fixing the remuneration to be paid therefor, the author's wishes, if any, shall so far as possible, be respected by the publishers.
6. That the author has delivered (or shall deliver within a period of.....) the manuscript of the said work to the publishers.
7. That the author does hereby declare that the work of which the copyright is being hereunder assigned is entirely the original work of the author and that the same does not in any manner whatsoever violate or infringe any existing copyright or any other right of any other person or other persons; and further that it does not contain anything which may be considered as obscene, libellous, scandalous or defamatory.
8. The author hereby agrees to indemnify and keep the publishers indemnified against all claims, demands, suits and other actions and proceedings, if any, that may be instituted or taken and also against all damages, costs, charges, expenses which the publishers shall or may suffer, on account of printing, publication or sale of the said work or any part thereof, or by reason of such printing, publication and/or sale being an infringement of some other person's copyright or other rights in the work or by reason of its containing anything which may in any sense be obscene, libellous, scandalous or defamatory.
9. The publishers shall print and publish the work or cause the same to be printed and published as soon as practicable within a period of twelve months from the date of this contract, and in default thereof, the author may, by a notice in writing, call upon the publishers to print and publish the work within two months of the receipt of the said notice; and if the publishers shall still fail and/or neglect to print and/or publish the work within the said period, save and except in so far as they are prevented from doing so by circumstances beyond their control, the author shall be at liberty to rescind the contract on giving a notice to that effect to the publishers when the copyright shall revert fully to the author and all the rights of publishers shall as from that date stand determined.
10. That in case of a dispute or difference arising between the parties touching the meaning, construction, interpretation, breach or fulfilment or non-fulfilment of the terms of these presents or any clause or condition thereof, the same shall be referred to the decision and arbitration of two arbitrators, one to be nominated by each party and in case of difference of opinion between the two arbitrators to an umpire to be nominated by the arbitrators before the commencement of the reference; and the award of such arbitrators, as the case may be, shall be final and binding on both the parties and this clause shall be deemed as of submission within the meaning of the Arbitration & Conciliation Act, 1996 and its statutory modification and re-enactment.
11. That the words "author" and "publishers" or "parties" used hereinabove shall unless there be something

contrary to the context, include their respective heirs, survivors, successors, representatives, executors, administrators and assigns and successors in business.

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

*Witness:*

*Author*

*Witness:*

*Publisher*

## **ASSIGNMENT OF BUSINESS AND GOODWILL AND OTHER RIGHTS AND INTERESTS**

Goodwill is an intangible asset. It is easy to describe but difficult to define. It represents the value to a business attaching to all the factors, internal and external, which enable it to earn a differential return of profit on the capital employed; that is, a better return than that which arises in other comparable businesses, having regard to the nature, size, location and risk inherent in such a business, and which is capable of being enjoyed by a successor.

Goodwill has been variously defined by different commercial pundits. Some definitions are: "The goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on, and being entitled to represent to the outside world that he is carrying on a business, which has been carried on for some time previously."

"The attractive force which brings in custom."

"The benefit of a good name, reputation and connection of a business."

"The one thing which distinguishes an old-established business from a new business at its first start." "The monetary measurement of the benefits attaching to the ownership of a successful business." "The capitalized value attaching to the differential profit-capacity of a business."

"The whole advantage, whatever it may be, of the reputation and connection of the firm which may have been built up by years of honest work orgained by lavish expenditure of money."

Goodwill is an intangible, but not necessarily a fictitious asset, representing the value - however difficult its appraisalment may be - to its owner, of benefits arising from the business in question, such as the sole right to enjoy the profits of the business, and, where goodwill has been acquired, the sole right of succession to the advantages of the business which have been built up in the past. Goodwill arises mainly:

- (a) by personal reputation of the owners;
- (b) by reputation of the goods dealt in;
- (c) by site monopoly or advantage;
- (d) by access to sources of supply, e.g., large quotas;
- (e) for patent and trade-mark protection;
- (f) effectiveness of publicity;
- (g) reputation of the first's goods and methods;
- (h) relationship between firm and personnel; and
- (i) growth element.

The purchaser of goodwill acquires the trade marks, patents, copyrights etc. of the business as well as the benefits of contacts and all the benefits accruing from the location, reputation, connections, organisation and other exceptional features of the business. The purchaser will seek to express the sum payable in terms of the



compound or capitalised value of an annuity of future differential or “super” profits that is those profits in excess of the marginal return normally arising.

No formula can be laid down for the accurate measurement of the value of goodwill, and in practice a purchaser will be prepared to pay a sum representing a number of years’ purchase of recent annual average profits, e.g. three years’ purchase, according to the estimated worth to the buyer of the future earning capacity of the business, the risk of the discontinuance or diminution in true profits being duly considered.

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

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

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

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

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

NOW THIS DEED WITNESSES:

- (1) In pursuance of the said agreement and in consideration of the sum of Rs..... (Rupees.....) paid by the said purchaser to the said vendor (the receipt whereof the said vendor hereby acknowledges), and also in consideration of the agreement hereinafter contained on the part of the said purchaser, the said vendor does hereby convey, assign and make over to the said purchaser, all the beneficial interest and goodwill of the said vendor in the said business..... so carried on by him as aforesaid, and also all the book and other debts now due and owing to him on account of the said business and all securities for the same, and also all contracts and engagements, benefits and advantages which have been entered into with the said vendor and also all the stock-in-trade, goods, fixtures, articles and things which, at the date of this Deed belong to the said vendor on account of the said business and all the rights, title and interest of the said vendor to and in the said premises, to have and to hold the premises hereby conveyed to the said purchaser absolutely;
- (2) The said vendor does hereby agree with the said purchaser that he, the said vendor, will not at any time hereafter either by himself or in collaboration with any other person or persons, carry on the said business of..... within..... kilometers of.....;
- (3) The amounts and particulars of the debts respectively due and owing to and from the said vendor on account of the said business and the particulars of the contracts and engagements to which he is liable with respect to the said business, are correctly stated and set forth in the books of account and other books delivered by the said vendor to the said purchaser;
- (4) The said vendor will pay all the sums (if any) which may now be due and owing from the said business in excess of the amounts which in the said books appear to be so due and owing;
- (5) The said vendor has full right to sell and assign the said premises hereby sold and assigned to the said purchaser and will not at any time hereafter revoke, annul and make void the aforesaid power or authority hereby given to the said purchaser, or do or execute or knowingly or willingly suffer any act, deed or thing, whereby the said purchaser may be prevented from having and receiving the said premises or any part thereof, to and for his own use and benefit, or by means whereof the said purchaser shall be injured in the said business; and



- (6) The said vendor will, from time to time and at all times hereafter, use his best endeavours to promote the said business and to give to the purchaser full advantage of the connections and customs of the said vendor, in the said business.

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

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

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

Witness:

Vendor

Witness:

Purchaser

## PARTNERSHIP DEEDS

### Introduction

A detailed discussion of the Partnership Act, 1932 is not within the scope of this Study. Students are, therefore, advised to study the Indian Partnership Act, 1932 in detail on their own so as to acquaint themselves, *inter alia*, with the nature, formation, registration and dissolution of partnership. However, introductory observations on some of the relevant aspects of the partnership are made below.

### Partnership - Its Nature and Meaning

Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits. However, in any business enterprise the possibility of its incurring loss cannot be ruled out. Therefore, all partners of a firm mutually agree to share all profits and losses of the business amongst them according to their predetermined shares/proportions fixed by them in the partnership agreement.

Partnership is defined in Section 4 of the Partnership Act, 1932 as a relation between persons who have agreed to share profits of business carried on by all or any one of them acting for all. Partnership requires three elements – (a) an agreement entered into by all persons concerned; (b) distribution of the profits of business; and (c) management of the business by all or any one or more of them acting for all, i.e., mutual agency. Out of these three, the third element, i.e., the element of mutual agency, is most essential and it distinguishes partnership from other type of contractual relationship between the parties. If this element is absent the partnership fails. One partner is not only an agent of the firm but also of the other partners and, if so, can bind another which falls within the scope of partnership subject to limitation under Section 20 of the Act.

A partnership is distinguishable from associations e.g., clubs, societies, co-operative bodies and incorporated companies.

The real intention and conduct of the parties appearing from the (a) written agreement, or (b) verbal agreement together with surrounding circumstances are the tests of partnership [*Cox v. Hickman* (1860) 8 HLC 268].

Persons who have entered into partnership with one another are called individually partners and collectively

a firm, and the name under which their business is carried on is called the firm name (Section 4 of the Indian Partnership Act, 1932).

A partnership agreement usually makes provisions for the duration of the partnership or for its determination. Where no such provision is made the partnership is “partnership at will”.

### Who can be Partners

The word “person” in Section 4 of the Indian Partnership Act, 1932 contemplated only natural and legal persons. (*Duli Chand v. C.I.T.*, AIR, 1956 SC 354). Partnership relation is one of contractual nature. Therefore, such persons who are competent to contract can enter into partnership. A firm or a Hindu Undivided Family is not a legal person and cannot enter into partnership with any person. When the Karta of a Joint Hindu Family enters into a partnership with strangers the other members of the family do not *ipso facto* become partners (*Firm Bhagat Ram v. Comm. of Excess Profits Tax*, AIR 1956 SC 374).

A minor cannot be a partner in a firm but, with the consent of all the partners, he can be admitted to the benefits of partnership (Section 30). He is entitled to share in the profits and his share is liable for the acts of the firm, but he is not personally liable. He cannot be made liable for the losses of the firm. Within six months of attaining majority or obtaining knowledge of his admission, whichever is later, the minor may elect to become or not to become a partner in the firm.

A person may be an active partner in the firm or he or she may choose to remain a dormant or a sleeping partner only. It all depends on the contract between the parties.

Two partnership firms cannot enter into partnership as such but its partners can certainly form a new partnership. However, a partnership firm may be a member of an association or company licenced under Section 8 of the Companies Act, 2013. The limited company of which a firm may be a member should be one formed for promoting Commerce, Art, Science, Religion, Charity or any other useful object without any profit making motive. On dissolution of the firm, its membership of the association or company shall cease.

While considering applications for registration of firms with bodies corporate as partners under the Indian Partnership Act, 1932, the State Government should examine the applications before them and find out whether the memorandum and articles of association of the applicant incorporated companies contain any special article which authorise the incorporated companies to enter into partnership.

### Registration of Partnership Firm

Registration of partnership firm has been made optional under the provisions of Section 58 of the Indian Partnership Act, 1932. Consequences of non-registration of a partnership firm are set out in Section 69 of the Partnership Act. An unregistered firm cannot enforce a right or claim arising out of a contract against any third party. However, if the firm obtains registration on the date of institution of the claim against third person, the said claim or right would be perfectly maintainable. Since the blow of the consequences of non-registration is very severe, it is advisable to get the partnership registered under the Partnership Act, 1932 immediately on its incorporation.

### Registration of Partnership Firm under the Income-tax Law

Registration of partnership under the Income-tax Law is distinct from registration of firm under the Partnership Act. Rule 22 of Income-tax Rules, 1962 provides that an application for registration of partnership firm should be accompanied with an instrument of partnership specifying the apportionment of shares of profit and losses of the business amongst the partners of the firm. This registration is required to be renewed every year under the orders of the concerned Income-tax Officer.

### Partnership Deed/How Made

The partnership is based on contract. This contract may be made either orally or in writing or even may be inferred from the course of dealing between the partners. In order to avoid all disputes relating to terms of partnership, it is suggested that a written document containing terms and conditions of partnership be executed between the partners. The deed is executed by all the partners and is drafted as an agreement to carry on certain business in partnership on certain terms and conditions. Some of the terms are indicated above.

While drafting partnership deed we should incorporate all terms and conditions that govern a particular partnership business. Partners of any partnership business are normally interested in settling certain terms amongst them before they join hands to carry on business in partnership. As a draftsman of the partnership deed one should be extra careful to understand and properly incorporate in partnership deed the terms relating to the following:

- (1) Name and place of business.
- (2) Duration of the partnership.
- (3) Shares of each partnership in the profits and losses of the business.
- (4) The management of the business.
- (5) Nature of principal work agreed to be carried on in partnership.
- (6) Number of partners and initial capital employed by each one of them.
- (7) Provision and the manner for raising future capital, if required.
- (8) Work distribution, if any, of each of the partners.
- (9) Obligation of partners who are members of a partnership firm.
- (10) Operation of Bank Accounts.
- (11) Withdrawal by partners.
- (12) Accounting system of the business.
- (13) Whether place of business belongs to partnership or any individual partner.
- (14) Division/Devolution of goodwill of the business in case of dissolution of partnership.
- (15) Distribution of assets and liabilities amongst partners at the time of dissolution.
- (16) Provisions for bringing in or admitting new partners.
- (17) The effect of the death of a partner, whether his heirs will take his place, or the partnership will be continued by the remaining partners or it will stand dissolved.
- (18) Provision for resolving disputes relating to partnership if arises amongst the partners. If all partners agree to settle their partnership disputes through the intervention of some named person who may act as an arbitrator for them or even otherwise by arbitration, it is always advisable to include an arbitration clause in the partnership stating that all disputes that may arise between the partners will be resolved by reference to arbitrator under the provisions of the Arbitration and Conciliation Act, 1996.

Besides the above conditions, if there are any other particular conditions which partners want to include in the partnership deed the same may suitably be incorporated therein. Language used in the partnership deed must be such that it may avoid all possible confusion relating to terms of partnership and should be easily understandable.

A draft of model partnership deed executed between two partners is given at *Annexure I*. A specimen form of deed extending period of partnership is given at *Annexure II*.

### Introduction of a New Partner

Introduction of a new partner is a matter of agreement between the partners (vide Section 31 of the Partnership Act, 1932. Also see Section 42 of the said Act).

Introduction of a new partner in the existing partnership brings in a change in the constitution of the firm. A new partner cannot be admitted to the existing partnership except with the consent of all the existing partners of the firm but subject to any contract to the contrary between such partners. The person so admitted as a new partner in the existing partnership shall not be liable for any act of the firm done before he became a partner. Where the articles of partnership provide in express terms for the retirement and admission of partners, the right of retiring and introducing new partners under the agreement are fixed thereby except so far as they may be modified by the terms of a subsequent agreement. If a person enters an existing firm without specifying the terms upon which he becomes a partner, it is presumed that he accepts the terms of the original partnership articles, except as they are modified by the introduction of a new member.

A draft of model deed of agreement on admission into firm of a new partner is given at *Annexure III*.

### Retirement and Expulsion of Partners

These matters can be regulated by the terms incorporated in a deed of partnership. Sections 32 and 33 of the Partnership Act, 1932 also make provision for these matters.

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

### Nomination of Successor

It is not uncommon in partnership agreements to find a clause as to nomination of a successor who has the right to be declared and admitted as partner in the event of death or retirement of a partner. It was, however, held by the Supreme Court in *Commissioner of Income Tax v. Govindram Sugar Mills*, AIR 1966 SC 24, that the nomination is not effective in case of partnership firm consisting of two partners only as it stands dissolved on the death of a partner; nevertheless, in view of the rights and obligations of a person to be nominated as under Section 31 of the Act, the same principle in case of agreement between two persons is applicable in case of partnership between two partners.

### Purchase of Business by a Partner

When a partnership ceases to exist and partnership business is closed its assets and liabilities are valued and thereafter every partner or his representative is entitled as against all the other partners or their representatives to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.

### Dissolution of Partnership

When jural relation between all the partners *inter se* is snapped, this constitutes dissolution of the firm. Dissolution of a firm may take place:

- (1) Without the intervention of the Court.

(2) With the intervention of the Court.

Dissolution without the intervention of the Court may take place:

- (a) by agreement between the parties,
- (b) by the adjudication as insolvent of all the partners or of all the partners but one.
- (c) by the business of the firm becoming unlawful,
- (d) subject to agreement between the partners:
  - (i) by the expiry of the term fixed,
  - (ii) by the death of a partner,
  - (iii) by the insolvency of a partner,
- (e) by notice in writing in case of partnership at will.

Dissolution with the intervention of the Court may be made on any of the grounds contained in Section 44 of the Partnership Act.

The mere incoming or outgoing of partners does not dissolve the firm.

A draft model each of deed of dissolution of partnership, and deed of dissolution of partnership by which one partner sells his share in partnership property to the other partner are given at *Annexure IV & V* respectively. Different forms of notices to dissolve partnership are given at *Annexure VI*.

### Execution and Attestation: Registration

A deed of partnership, or of dissolution of partnership, must be executed and attested as a bond on a non-judicial stamp paper of proper value, and its registration is not compulsory; but where a deed of dissolution of a firm involves transfer of immovable property worth Rs. 100 or upwards, the deed is compulsorily registrable.

No law requires that a deed of partnership should be attested, but it is desirable that it should be attested by at least two partners. Stamp duty on an instrument of partnership and on a deed of dissolution is payable under Article 46. Schedule I to the Indian Stamp Act, 1899.

## ANNEXURES

### (MODEL FORMS)

#### ANNEXURE I

#### Deed of Partnership between two Partners

*(To be executed on Rs. 15/- Non Judicial Stamp Paper)*

THIS INDENTURE OF PARTNERSHIP IS MADE ON the..... day of..... 2020 Between A.B. .... S/o..... R/o..... aged..... (hereinafter called the 'First Party') AND C.D..... aged..... years, son of..... resident of..... (hereinafter called the 'Second Party').

WHEREAS the parties hereto have agreed to commence business in partnership and it is expedient to have a written instrument of partnership.

WHEREAS the parties hereto have mutually agreed to carry on the business of..... (here describe the business) at..... (here specify the place or the principal place of business) and to share the profits and losses of the said business in partnership between themselves and they have with that object

constituted themselves into a firm of partners under the name and style of M/s..... (here give the name of the firm).

The terms and conditions agreed to by and between the parties hereto witnesses:

1. The duration of the firm shall be, to begin with, a period of..... years or such further or lesser period as the parties may choose to mutually agree.
2. The capital of the firm for the time being is fixed at Rs..... (Rupees.....) only which has been contributed by the partners as follows namely:  
First Party..... Second Party.....  
(In case minor is admitted to the benefits of the partnership the capital contributed by him, if any) Provided that the partners may by mutual agreement increase or decrease the capital and their respective contributions thereto. The partners by mutual consent may raise capital by way of loans if considered expedient.
3. The partners shall distribute the net profits and bear the losses in the following ratios:  
First Party.....  
Second Party.....
4. The partner, shall be entitled to withdraw out of the profits, money not exceeding Rs..... in each month adjustable against the account of the respective partners at the time of annual accounting.
5. The First party shall make available to the firm the shop premises in which the business of the firm shall be carried on, situated at..... and which shop or premises is in his occupation as a tenant from month to month paying a monthly rent of Rs..... to Shri..... and shall hereafter hold the said shop or premises in trust for the partnership for which rent shall be paid out of the partnership from the date mentioned in para 1 above.
6. The said rent, and all taxes, duties, repairs and outgoings in respect of the said shops or premises or other place or places of business of the partnership shall be paid out of the partnership.
7. No apprentice, clerk or servant shall be employed or dismissed without the consent of all the partners.
8. The firm shall regularly maintain in the ordinary course of business a true and correct account of all its incoming and outgoings and also all its assets and liabilities in proper books of accounts which shall ordinarily be kept at the firm's place of business.
9. Immediately after each..... day of..... in every year, the partners shall take an account and valuation of the effect, credits and liabilities of the partnership. Such accounts and valuations shall after mutual examination be drawn up in duplicate and signed by the partners, we shall each retain a copy. The entries in such signed accounts shall be final and binding between the parties. The profits or loss, as the case may be, shall be divided as aforesaid, after the signing of such account.
10. The authority of the partners, individually shall be limited to the following:
  - (a) No partner shall individually purchase goods for the partnership without consulting the other and obtaining his consent for purchases of the value exceeding Rs.....
  - (b) No partner shall singly bind the partnership by taking any loan or raising any money whether with or without security to the extent of more than Rs.....
  - (c) No partner shall commit the partnership without obtaining the written consent of the other, to any undertaking which involves the partnership financially to the extent of more than Rs.....
  - (d) All law suits shall be filed and defended by the partnership by the partners acting jointly in all

cases which involve the partnership financially to the extent of more than Rs. ....

11. The partnership shall be deemed to be continuing on the admission of a fresh partner or partners, provided the admission is on the terms herein laid down and is approved by all the partners.
12. Every partner shall be entitled to dissolve the partnership in the event of the other committing breach of the conditions herein covenanted. The partnership may be dissolved by a notice in writing sent by registered post to the address herein given or such address as may be registered from time to time with the Registrar of Firms. On the dissolution of the firm under this clause the expelled partners shall not be liable for any loss incurred as from the date of dissolution. But no profit or loss shall be paid or become payable except at the time of annual accounting.
13. On the bankruptcy of any partner or on notice being given to either partner under clause 12 above or on the death and there being no major legal representative willing or capable to take the place of the deceased partner the partnership shall terminate. The share of such partner may be purchased by the remaining partner(s) at a valuation to be made by arbitrators or their umpire as hereinafter mentioned. The price shall be paid in 3 equal six monthly instalments. The tenancy right of the first party shall be valued at..... years' rental.
14. Upon the determination of the partnership by afflux of time, or upon its determination by any other partner then, as soon as convenient, a full and general account of valuation shall be taken of the property and assets and liabilities of the partnership and the property and the assets put to sale and the debts realised and the creditors paid. The net proceeds in cash shall be equally divided between the then partners or the partners and the legal representative or representatives of the deceased partner; PROVIDED always, that if the proceeds are less than the liabilities the loss shall be made good in equal shares by the then partner, or the legal representative or representatives of any deceased partner.
15. If at any time any dispute, doubt or question shall arise between the partners, or their representatives either on the construction of these presents, or respecting the accounts, transaction, profits or losses of the business or otherwise in the relation to the partnership then every such dispute, doubt or question shall be referred to arbitrators chosen by each of the partners and the representatives of their umpire to be appointed in the manner provided by law and such reference shall in all respect, as to the mode and consequence thereof conform to the provisions in that behalf contained in the Arbitration and Conciliation Act, 1996 or any statutory modification thereof.

IN WITNESS WHEREOF the said A.B. and C.D. have hereto at..... signed the day and the year first above mentioned.

WITNESSES:

Sd/- A.B.  
Sd/- C.D.

**Note :** *There may be more than two partners in a firm. In that case, the number of parties may be accordingly increased in the first para of the partnership deed and the said para may be drafted as given below:*

"THIS DEED OF PARTNERSHIP is made the..... day of..... 2020  
Between A.B., aged..... etc. (hereinafter called the "First Party") AND C.D., aged..... etc. (hereinafter called the "Second Party") of the second part AND E.F., aged..... etc. (hereinafter called the "Third Party") of the Third Part."

Thereafter, the terms and conditions as mentioned in the above Model Form, with suitable modifications, should be given.



**ANNEXURE II****Deed extending Period of a Partnership**

THIS DEED OF AGREEMENT is made the..... day of..... 2013

BETWEEN A.B., C.D. and E.F. AND WITNESSES as follows:

That each of the said A.B., C.D. and E.F. do hereby agree with the others of them, jointly and severally, in the manner following, that is to say:

That the said A.B., C.D. and E.F. will remain and continue partners together in the said trade or business of..... for the further term of..... years to be counted from the..... day of..... 2020 the day on which the original deed of partnership shall expire, upon such and the same terms and conditions, and with, under and subject to such and the same covenants, provisions and agreements as are expressed and contained in the said original deed of partnership to which this agreement is appended, and to which the said partners hereto, their respective legal representatives would have been subject or liable, if the said deed of partnership and the partnership thereby created, and the several covenants, declarations, provisions and agreements therein mentioned and contained had been made or entered into for the term of ten years instead of the term of five years.

IN W ITNESS whereof the said A.B., C.D. and E.F. have hereto at..... by way of a supplementary deed executed these presents on the day and the year first above mentioned and appended the same to the original deed of partnership, deed.....

WITNESSES:

Sd/- A.B.

Sd/- C.D.

Sd/- E.F.

**ANNEXURE III****Deed of Agreement of Admission into Firm of a New Partner**

THIS DEED OF AGREEMENT IS made the ..... day of ..... 2020 BETW EEN AB ..... son of ..... aged ..... R/o ..... and CD ..... son of ..... aged ..... R/o ..... partners in the firm CD & CO. of the one part, AND EF ..... son of ..... aged ..... years resident of ..... of the other part.

WHEREAS the said AB and CD are partners in the firm CD & Co. situated in..... and are bound as such under a deed partnership executed by them on the..... day of..... 2020 hereinafter referred to as the "partnership deed".

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

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

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

2. The capital mentioned in the partnership deed shall hereafter be changed to the sum of Rupees..... only and the partners shall hereafter have the undernoted shares in the capital.  
AB shall have Rs..... in the said capital;  
CD shall have Rs..... in the said capital; and  
EF shall have Rs..... in the said capital.
3. The profits and losses of the partnership shall continue to be borne by the partners hereto in proportion to their above named respective shares.

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

WITNESSES:

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

**ANNEXURE IV**

**Deed of Dissolution of Partnership**

*(To be executed on Rs. 10/- Non Judicial Stamp Paper)*

THIS DEED OF DISSOLUTION OF PARTNERSHIP made the..... day of..... 2020

BETWEEN.....

WHEREAS the partners hereto under a deed of partnership dated..... made between them formed themselves into a business firm and carried on business under the name and style of..... pursuant to the covenants, stipulations and provision contained in the said deed;

AND WHEREAS it has been mutually decided between the parties that the said partnership shall be dissolved, and the said trade and business shall be wound up and the stock-in-trade, assets and credits realized and called in, and the net proceeds after payment and satisfaction of all debts and liabilities divided between the partners according to the covenants in this behalf appearing in the deed of partnership.

NOW THIS DEED WITNESSES that in pursuance of the said agreement it is hereby declared and agreed by and between the parties hereto as follows, that is to say:

1. The said partnership between the partners hereto under the deed, dated..... hereunto appended shall be determined and stand dissolved as from the..... day of..... 2020. And the parties hereto singly or jointly shall not carry on the business of the said firm of..... under the said name and style for a period of..... years hence.
2. The parties hereto shall on the aforesaid date of..... sign notices of the dissolution and forthwith advertise in the local Official Gazette the fact of dissolution as required by Section 45 of the Indian Partnership Act AND shall also intimate the fact of dissolution to the Registrar of Firms under the provision of Section 63 of the said Act.
3. Within..... days after the dissolution of the partnership a full and general account and balance sheet shall be taken and made of the property, assets and liabilities of the partnership; and a full and particular inventory and valuation of all the machinery, plants, tools, utensils, stock in hand, office equipment, materials and effects belonging to the firm shall be made by the parties or such other person as the partners may choose to appoint, whose decision shall be final and binding upon

the partners, and all debts owing to the firm shall be collected and got in by the parties or such other persons as the parties may by instrument in his behalf appoint.

4. That as soon as may be, after the property, assets and liabilities have been got in and disbursed the parties or such other person or persons whom the parties may have appointed under the foregoing clause shall divide and apportion the share of the parties, in the proportion of the contribution of the parties towards the capital. In such division any amounts paid earlier or due to the parties according to the books of the partnership shall be taken into account. That the cost of liquidation proceedings shall also be deemed to be a liability of the partnership and paid from the funds of the partnership.
5. That in case the winding up shows a loss or the assets of the partnership are insufficient to meet the liabilities and debts of the partnership then the partners shall forthwith pay such losses in the proportion of their contribution to the capital.
6. Each of the parties shall, so soon as the others or any of them, or their or his representatives, shall have executed and done all the assurances, acts or things hereby agreed to be done by them respectively and at the request and cost of such other or others, or their or his representatives execute to them or him such releases, indemnifies, and assurances as may be reasonable and proper;

IN WITNESS WHEREOF the said AB, CD and EF have hereto signed and executed this agreement of dissolution and appended it to the said deed of partners, dated.....

WITNESSES:

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

#### **ANNEXURE V**

#### **Deed of Dissolution of Partnership by which one Partner Sells his Share in Partnership Property to the other Partner**

THIS DEED made the..... day of..... BETWEEN A....., S/o....., aged....., R/o..... (hereinafter called "the retiring partner") of the first part and B of....., S/o..... aged....., R/o..... (hereinafter called "the continuing partner") of the second part.

1. The parties hereto have been carrying on as partners the business of..... under the firm or style of..... and under Deed of Partnership dated.....
2. The parties hereto are beneficially entitled to the property mentioned in the Schedule attached herewith as their partnership property.
3. The parties have agreed to dissolve the said partnership upon the following terms:
  - (a) The continuing partner shall purchase from the retiring partner his share in the partnership property for Rs..... which amount shall be paid as mentioned hereafter;
  - (b) The continuing partner shall discharge the liabilities and debts due from the partnership. AND WHEREAS for the purpose of the stamp duty it has been agreed that the sum of Rs..... part of the said sum of Rs..... shall be the price of the share of the retiring partner in the immovable property and that the sum of Rs..... shall be the price of the share of the said partner in cash in hand and with bankers and moveable property passing by delivery belonging to the partnership and that the sum of Rs..... balance out of said sum of

Rs..... shall be the price of the share of the said retiring partner in the goodwill and the residue of the assets of the partnership property.

AND WHEREAS by a conveyance of even date executed between the parties the share of the retiring partner in the immovable property of the firm has been conveyed to the continuing partner on payment of the price of Rs.....

AND WHEREAS the cash in hand and with Bankers and other moveable property of the partnership passing by delivery has been delivered to the continuing partner who has paid to the retiring partner Rs..... the apportioned price thereof.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. The said partnership shall stand dissolved as from the day of.....
2. In consideration of the sum of Rs..... now paid by the continuing partner to the retiring partner, the receipt of which sum the latter hereby acknowledges, the retiring partner as beneficial owner hereby assigns and transfers unto the continuing partner all the share and interest of the retiring partner in the said partnership and the business, goodwill, book debts, and property other than the property separately conveyed as mentioned above.
3. That the said retiring partner irrevocably appoints the said continuing partner as his attorney to demand, call in and receive from all persons all and singular the debts, credits, moneys and effects of the said partnership, to give effectual receipts and discharges for the same and to bring and institute suits and proceedings against debtors of the firm and to compromise with them in any manner he deems fit.
4. The continuing partner shall in due course pay all debts and discharge all the liabilities of the said partnership and shall indemnify the retiring partner against all actions, proceedings, costs and expenses in respect thereof.
5. That the retiring partner shall not carry on any competing business in any capacity whatever within the radius of..... kilometres from the place of business of the said partnership for a period of two years.
6. Each of the parties hereto releases and discharges the other from all actions, proceedings, claims and demands on account of the said partnership without prejudice to any rights and remedies herein contained.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands in the presence of witnesses.

WITNESSES:

1. Sd/- A.
2. Sd/- B.

**Receipt executed by Retiring Partner acknowledging to have received the amount due to him on account of his share in the Partnership Property**

I, A of..... aged....., S/o..... (the retiring partner) hereby acknowledge to have received from B of..... (the continuing partner) the sum of Rs..... being the full amount of all moneys due or owing to me in respect of my share as partner in the business of..... carried on under the name of..... by me in partnership with the said B up to day of..... under the Deed of Partnership Dated.....

As witness my hand this..... day of.....

To

.....  
.....

Sd/-

**ANNEXURE VI**

**No. 1**

**Notice to Dissolve Partnership**

Pursuant to the articles of the partnership entered into between yourself and me on..... I hereby give you notice that I intend to terminate the partnership now subsisting between us with effect from.....

Dated:

Place:

**No. 2**

**Notice to Dissolution of Partnership for Insertion in a Newspaper**

Notice is hereby given that the partnership lately subsisting between us the undersigned (A, B & C of etc.) carrying business as..... at..... under the style or firm of A, B & C has this day been dissolved by mutual consent (or is dissolved by effluxion of time). All debts due to and owing by the said late firm will be received and paid by the said A, who will continue to carry on the said business under the same style and firm.

Dated:

Sd/- A, B and C.

**No. 3**

**Notice to Determine Partnership at Will**

To

Messrs C and D of.....

I hereby give you notice that I intend to dissolve the partnership, subsisting between us under the Articles of Partnership dated..... from the day of.....

Sd/-

**TRUST DEEDS**

**Introduction**

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

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

The subject matter of the trust is called the 'trust property' or the 'trust money'. The person or persons who manages/manage the trust property or trust money is/are called the 'trustee/trustees' of the trust. The author of the trust himself or any other person can be the trustee of the trust.

The beneficial interest or interest of the beneficiaries is/are his/their right(s) against the trustee as owner of the

trust property; and the instrument by which the trust is declared is called the 'instrument of trust'.

The breach of any duties imposed on the trustee by any law for the time being in force is called 'breach of trust'.

The person creating the trust must be legally competent to contract and a trust may be created on behalf of a minor with the permission of the Civil Court of the original jurisdiction. (Section 7)

Every person capable of holding property may be a trustee. But if the trust involves exercise of discretion then he cannot execute it unless he is competent to contract. (Section 10)

A trust is, in effect, the gift by the author of property or an interest in property to a person or institution (the beneficiary) by or through the intervention of trustee. The trust property vests in the trustee and he holds it for the benefit of the beneficiary and cannot use it for his own benefit. A 'trust' is a confidence and the confidentee is the trustee.

His position is fiduciary *vis-à-vis* the *cestui que trust* (beneficiary). In a trust the author vests the property in the trustee charging him to utilise it or the income or profits arising therefrom for the benefit of the beneficiary.

A corporate body, for example, a bank or a company can both create a trust and be a trustee. In such a case it has to act through its officers/duly constituted nominees. An insolvent can also be a trustee and the trust property is not affected by his insolvency.

### **Objects of Trust**

Section 4 of the Indian Trusts Act, 1882 provides that the object of the trust must be lawful. The purpose of the trust is lawful unless it is:

- (i) forbidden by law, or
- (ii) is of such a nature that, if permitted, it would defeat the provisions of any law, or
- (iii) is fraudulent, or
- (iv) involves or implies injury to the person or property of another, or
- (v) the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Any property which is transferable can be a subject of a trust whether it be immovable or movable. But mere beneficial interest not subsisting trust cannot be made a subject of the trust. The beneficiary of the trust may be any person capable of holding property. Such person may be a sentient being or a juristic person or even a deity.

Examples of illegal trust are - trust in restraint of marriage, trust creating a perpetuity by settlement of properties intended for maintenance of persons born or to be born indefinitely. Trust to defraud a creditor.

Every trust of which the purpose is unlawful will be void and if the object is both lawful and unlawful and the two operations cannot be separated the whole trust would be void. Otherwise it will be void as far as the unlawful part of the object which can be separated. Any property which is transferable can be a subject of a trust whether it be immovable or movable. But mere beneficial interest not subsisting trust cannot be made a subject of the trust.

### **Public and Private Trusts**

In a public trust the beneficiary is the general public or a specified section of it. In a private trust the beneficiaries are defined and ascertained individuals. In a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons. The nature of the trust may be proved by the evidence of dedication or by user and

conduct of parties. Where a trust is created for the benefit of the members of the settlor's family, it is a private trust and not a public trust. Every charitable trust is only a public trust as benefit to the community at large or to a section of the community is of the essence of a valid charitable trust. But a religious trust need not necessarily be a public trust as there can be a private religious trust also.

### Trusts among the Hindus and the Muslims

Though Hindu religious and charitable endowments sometime partake of the nature of trusts, the Indian Trusts Act does not apply to them. Property can be dedicated to the beneficiary either by giving it to the trustee and executing a trust in the usual way or by directly dedicating it to the beneficiary.

Though *wakfs* are trusts, the Indian Trusts Act does not apply to *wakfs* under the Muslim Law. However, it is open to a Muslim to create a secular trust of a public and religious character. Such a trust would be governed by the Indian Trusts Act, 1882.

### Creation of Trust

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

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

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

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

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

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

### Instrument of Trust: How it is Drafted

An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustee. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll. No specific words are necessary, but, whatever the words used, the deed should contain with reasonable certainty the matters mentioned under the heading 'Creation of Trust'.



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

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

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

### **Acceptance of Trust**

Acceptance of trust by trustee may be either express, e.g. by executing the deed of trust or by verbal assent, or inferred from conduct, e.g., by entering into possession of the property and on the duties as trustee. But it is always safer to have the deed of trust executed by the trustee also.

### **Registration and Stamp Duty**

A trust created by will requires neither registration nor stamp duty. But a trust in relation to movable or immovable property which is declared by a non-testamentary instrument must be registered, irrespective of the value of the property. Deeds of *wakf* or of religious and charitable endowments must be registered if they relate to immovable property worth Rs. 100 and upwards.

A trust declared otherwise than by a will is chargeable to stamp duty under Article 64, Schedule I of the Indian Stamp Act, 1899. The stamp duty varies from State to State.

### **Revocation and Extinction of Trusts**

A trust cannot be revoked unless (1) all the beneficiaries consent; (2) a power of revocation has been reserved in the deed; and (3) in case of a trust for payment of debts, it has not been communicated to the creditors. If the trust property is to be applied for the author's own benefit the trust can be revoked. A power of revocation may with advantage always be reserved in the deed. The declaration of trust for creating provident fund, pension fund, superannuation fund, gratuity fund etc. should be irrevocable. If they are otherwise the recognition under the Income Tax Act, 1961 will not be available to such trusts and in consequence the payment made to such funds will not be allowed as deduction in the hands of the authors of the trusts in their income tax assessments.

A trust is extinguished:

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise;  
or
- (d) when the trust, being revocable, is expressly revoked.

### A Specimen Deed of Revocation of a Trust

THIS DEED is made on the..... day of..... by A.B. etc. (hereinafter called "the Settlor") of the one part AND C.D. etc. (hereinafter called "the Trustee") of the other part.

WHEREAS by a deed of trust dated..... the Settlor transferred him property specified therein to the Trustee upon trust to sell the same and with the proceeds of the sale to pay the debts due from the Settlor to the several creditors named in the said deed;

AND WHEREAS the trust created as aforesaid has not yet been communicated to any of the aforesaid creditors;

AND WHEREAS the Settlor now desires to revoke the said trust and to make other arrangements for the discharge of his aforesaid debts.

NOW THIS DEED WITNESSES that the Settlor hereby revokes the trust created by the aforesaid deed of trust. IN WITNESS WHEREOF parties have signed this deed on the..... day of.....  
Signed by.....

In the presence of.....

and of.....

### Debenture Trust Deeds

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

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

1. The trust deed usually gives a legal mortgage on block capital and a floating security on the other assets of the company in favour of the trustee on behalf of the debenture holders.
2. The trust deed gives in detail the conditions under which the loan is advanced.
3. The trust deed should specify in some detail the remuneration payable to the trustee, their duties and responsibilities in relation to the trust property.
4. It also gives in detail rights of debenture holders to be exercised through the trustees in case of default by the company in payment of interest and principal as agreed upon

For detailed reference, see precedent given in *Annexure IV*.

The duty chargeable on a debenture is provided for by Article 27, Schedule I of the Indian Stamp Act, 1899. The stamp duty varies from State to State. But when a trust-deed accompanying a series of debentures is duly stamped, no stamp is necessary to be affixed on the debentures if they are expressed to be issued in terms of the said trust deed. See exceptions to the Article referred to.

The debenture trust deed is registrable and can be registered with the Registrar of Assurances at the place where the registered office of the company is situated or at the place where a part of the immovable property proposed to be given in the mortgage is situated or at the metropolitan cities, namely, Delhi, Bombay, Calcutta and Madras.

### Trust Deeds Constituting Provident Fund, Superannuation Fund, Pension Fund, etc.

The companies create provident fund, superannuation fund, pension fund, gratuity fund etc. through declaration of trust for the benefit of their employees. Such funds, as we have seen earlier, will have to be irrevocable and

should be drafted, keeping in view the provisions of Schedule IV appended to the Income Tax Act, 1961 and the provisions of the Income Tax Rules, 1962 made thereunder.

It is essential that there should be a clause in the trust deed giving necessary powers to the trustees to make Rules for the smooth functioning of the trust on residuary matters not provided in the trust deed.

A company cannot create a provident fund trust to cover the employees governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees provident Fund Scheme, 1952 framed thereunder unless exemption has been obtained from the appropriate Government for establishing such a fund. Therefore, the provident fund trust established by the company should ordinarily cover only those employees who are not governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952. Likewise the gratuity fund established by companies should ordinarily cover only those employees who are not governed by the Payment of Gratuity Act, 1972. If any company wants to have a gratuity fund covering even employees who are governed by the Payment of Gratuity Act, 1972 then they will have to obtain the approval of the appropriate Government for this purpose.

The companies so creating the trusts will have to make an application to the Commissioner of Income-tax for recognition of the respective funds. Only on receipt of the recognition from the Commissioner of Income-tax the contribution made by a company to these will be allowed as a deduction in its assessment(s).

Various forms for trust deeds constituting Provident Fund (Annexure I), Pension Fund (Annexure II), Superannuation Fund (Annexure III) and the Debenture Trust Deed (Annexure IV) are given

## ANNEXURES

### ANNEXURE I

#### DRAFT TRUST DEED

##### (Provident Fund)

DECLARATION OF TRUST is made this..... day of..... 2020, between..... having its registered office at..... (hereinafter called 'the Company') of the One part and (1) Shri....., (2) Shri..... and, (3) Shri..... (hereinafter called 'the Trustees') of the Other Part.

W HEREAS THE COMPANY intends to creating a Provident Fund for the benefit of the employees; AND WHEREAS it is necessary to execute a declaration of trust in respect of the contribution of the company and of the members to the fund.

THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That the above-named persons, namely (1) Shri....., (2) Shri..... and, (3) Shri..... are hereby appointed as the first trustees for administering the Provident Fund of the Company and the income thereof as provided in the Provident Fund Rules of the Company (hereinafter called the Rules) in force for the time being.
2. That the trustees shall stand possessed of the existing fund as also all contributions made in future time to time with all accumulation to the said fund upon trust for the benefit of the employees of the company who are covered under the Rules.
3. In these presents, unless there is anything repugnant to the subject or context:
  - (a) "The Fund" means the Provident Fund constituted by these presents.
  - (b) "Member" means an employee of the company subscribing to the Fund.
  - (c) "Subscription" means any sum credited by or on behalf of a member out of his salary to his

individual account but does not include any sum credited as interest.

The company by way of employer's contribution for credit to the member's account, but does not include any sum credited as interest.

- (d) "The Balance to the Credit of a Member" means the total amount to the credit of a member to the Fund at any time.
  - (e) "The Accumulated Balance due to a member" means the balance to the credit of the Member's Provident Fund Account or such portion thereof as may be claimable by him on the day he ceases to be a member of the Fund.
  - (f) "Year" means the period of twelve calendar months from the 1st of July to the 30th June or such other period of twelve months as the Company may from time to time adopt for making up its own accounts.
  - (g) "Salary" includes dearness allowance and commission, if the terms of employment so provide, but excludes all other allowances and perquisites.
4. That this Trust shall not be revocable except with the consent of all the members to the Fund.
  5. That the money for the time being constituting the Fund shall be invested by the Trustees in such manner as may be specified from time to time by the Income-tax Rules, 1962.
- Provided that in execution of the Trust and in the performance of his duties and powers hereunder conferred no trustee shall be made liable for any loss caused to the trust arising by reason of any improper investment made *bona fide* and in good faith or for the negligence or fraud of any agent employed by them or by reason of any error of judgement or act, default, mistake or omission done in good faith and under *bona fide* relief by any trustee or by reason of any other matter or thing except wilful and individual wrong or fraud on the part of the Trustee or for breach of trust who is sought to be made liable.
6. (i) The number of trustees at all times shall be three.
    - (ii) One of the trustees shall be nominated by the Board of directors of the company, who may be either a director or an officer of the company. The other two trustees shall be elected from among the members of the Provident Fund.
    - (iii) The nominees of the Board of directors of the company shall be the Chairman of the Trust.

The Trustees other than the nominee of the Board of directors shall be elected by ballot by members hereof and shall hold office as Trustees for 3 years, unless their seat become vacant earlier under Clause 7 hereafter.

    - (iv) The nominee of the Board of directors of the company shall hold office until a new representative is appointed by the Board of directors to take his place.
  7. The place of a trustee shall become vacant if a Trustee (a) dies, or (b) resign his office, or (c) is adjudged an insolvent, or (d) becomes of unsound mind, or (e) is convicted of an offence involving moral turpitude, or (f) in the case of a nominee of the Board of directors of the company ceases to be a director or an officer of the company and in the case of an elected trustee ceases to be a member of the fund, or (g) fails to attend three consecutive meetings of the trustees for any reason which the trustees do not consider to be satisfactory.
  8. (i) Any casual vacancy under Clause 7 above shall also be filled by holding a fresh election, in case the vacancy occurs in a seat held by an elected trustee.
    - (ii) If a seat of an elected trustee remains vacant for more than one month, the Board of directors of the

company may fill the casual vacancy by appointing a trustee from among the members for such period as the election does not take place.

(iii) The person elected or nominated to a casual vacancy shall be a trustee for the residue of the term for which the person whose place he fills would have been a trustee.

9. (i) The trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. The Chairman and an elected trustee shall form a quorum. Questions arising at any meeting shall be decided by a majority of votes and in case of equality of votes the Chairman of the Trust shall have a casting vote.

(ii) A resolution in writing signed by all the trustees for the time being shall be as valid and effectual as if it had been passed at a meeting of the Board of Trustees duly called and constituted.

10. (i) The Board of Trustees shall be authorised to delegate any of their powers to such one or more of themselves as they may think fit, from time to time, and they may vary, alter, or rescind such powers or any of them as they from time to time think fit.

(ii) No act or proceedings of the trustees shall be invalidated merely by reason of the existence of a vacancy among the trustees.

(iii) The trustees shall cause proper minutes to be kept and entered in hand, in a book provided for the purpose, of all their resolutions and proceedings and any such minutes of any meeting of the trustees, if purporting to be signed by the Chairman of the trustees shall be receivable as *prima facie* evidence of the matters stated in such minutes.

11. The Fund shall be exclusively managed and administered by the Trustees in accordance with these rules, and the decision of the trustees upon any question relating to the fund or any rights or benefits in connection therewith or generally upon the interpretation of any provision of these rules shall be absolutely final and binding on all members, their executors, administrators, representatives, widows, or relatives and the employers.

The costs, charges and expenses of administering the fund and of the determination of any question arising under these rules or otherwise, including expenses incurred by the trustees in the discharge of their duties shall be charged to the fund and may be properly paid therefrom, from time to time.

Any decision of the trustees may be given under the hand of any one or more of them.

12. The trustees shall have power to employ any person or persons (including any one or more of their numbers) to do any secretarial, legal, accountancy or other work which they may consider necessary or expedient in connection with the management of the fund and to pay therefor in addition to all other proper disbursements, all ordinary or reasonable charges out of the fund.

13. (i) Every member shall subscribe to the fund at the rate of 10 per cent of his monthly salary and such percentage shall be deducted from his salary, at the time of payment thereof and shall, as soon as practicable, be paid to the trustees who shall credit the same to the account of the member in the books of the Fund.

(ii) The monthly contribution payable by the company in respect of each member shall be equal to the subscription payable by each member.

(iii) It shall be open for members to pay additional subscription to the Fund which shall be a definite proportion of his salary for that year as provided in the "Rules".

14. Subject to the previous approval by the Commissioner of Income tax, the trustees shall, with the approval of the Board of directors, be competent to vary, alter, omit, modify or add to the "Rules" of the Provident Fund.

15. The Trustees shall maintain an account of provident fund for each member of the fund and it shall include the particulars prescribed in sub-rule (2) of Rule 74 of the Income-tax Rules, 1962, and such other particulars as the Trustees hereof may, from time to time, deem necessary and expedient.

The Trustees shall furnish a statement of Provident Fund account to each member at such interval, not exceeding 12 months, in such form as the Trustees may prescribe. It shall be the duty of every member to verify the correctness of the statement as and when it is furnished to him and to bring the discrepancy, if any, to the notice of the Trustees. Such a statement shall be signed by the Trustees or by any other person specially authorised by the Trustees in this behalf.

16. The accounts of the Provident Fund Trust shall be made for each year and shall be duly audited by the auditors appointed by the Trustees with the approval of the Board of directors of the company. There shall be an annual meeting of the trustees after the close of the year and at such annual meeting of the trustees the audited accounts of the previous year of the Fund shall be presented and passed.
17. All matters of procedures and other ancillary matters not herein specifically provided for and requiring the framing of rules shall be regulated by such rules as the trustees may, in consultation with the Board of directors of the company, from time to time, make in that behalf.

Without prejudice to the general powers conferred or implied in the last preceding sub-clause, the Trustees may, in consultation with the Board of directors of the company make rules:

- (i) regarding the advance of loans to the members,
- (ii) regarding the mode of election of the Trustees, and
- (iii) regarding the conduct of the meetings of the Trustees.

18. The Trustees shall respectively be indemnified for and against all liabilities incurred by them in *bona fide* execution of the Trust hereof

IN WITNESS WHEREOF the parties hereto have duly executed this Trust on the date, month and year first above written.

The Common Seal of the above named company was, pursuant to the resolution of the Board of Directors of the Company passed in this behalf on....., affixed hereunto in the presence of the authorised director of the company, who has hereunto set his hands in the presence of:

WITNESS:

for COMPANY (DIRECTOR)

SIGNATURE OF TRUSTEES

1.

2.

3.

**ANNEXURE II**

## **DRAFT TRUST DEED**

### **(Pension Fund)**

DECLARATION OF TRUST is made this..... day of..... 2020, between....., having its registered office at..... (hereinafter called 'the Company') of the One Part and (1) Shri....., (2) Shri....., and (3) Shri..... (hereinafter called 'the Trustees') of the Other Part.

WHEREAS THE COMPANY intends to creating a Pension Fund for the benefit of the employees; AND



WHEREAS it is necessary to execute a Declaration of Trust in respect of the contribution of the Company.

THIS DEED WITNESSES AND IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES THERETO AS FOLLOWS:

1. That the above named persons, namely (1) ....., (2) ..... and (3) ..... are hereby appointed as the first trustees for administering the Pension Fund of the Company and the income thereof as provided in the rules in force for the time being.
2. That the Trustees shall stand possessed of the existing Fund, Investments, as also all contributions made in future, from time to time, with all accumulations to the said Fund upon trust for the benefit of the employees of the Company.
3. In these presents, unless there is anything repugnant to the subject or context:
  - (a) "The Fund" means the Pension Fund constituted by these presents.
  - (b) "Member" means an employee of the Company who has been admitted to the benefits of the membership of the Fund. Provided however that a director of the company may be admitted to the benefits of membership of the fund only if he is a whole-time *bona fide* employee of the Company and does not beneficially own shares in the company carrying more than 5% of the total voting power.
  - (c) "Salary" includes dearness allowance if the terms of employment so provide but excludes all other allowances and perquisites.
  - (d) "Service" means the period of paid employment with the company which has been specifically declared by the company as having been satisfactory. Leave sanctioned without pay except on grounds of sickness or study will not count towards the total service, but the period of such leave will not be treated as an interruption in the continuity of service.
  - (e) "Wife" means a woman to whom the member of the fund was married on the date of his becoming eligible to a pension and in whose favour a nomination has been lodged with the Trust.
  - (f) "Completed Years of Service" - 'N' is the integral quotient obtained by dividing by 12 the total service as an employee in terms of months, leave without pay other than on grounds of sickness or study for total service, if any, not counting.
  - (g) "Terminal Leave" means leave as defined in Rule (.....) of the "Company Leave Rules 19.....".
  - (h) "Year" means the period of 12 calendar months from 1st July to 30th June or such other period of 12 months as the company may, from time to time, adopt for making up its own accounts.
4. This Trust shall not be revocable except with the consent of the members of the fund.
5. That the money for the time being constituting the fund shall be invested by the trustees in such manner as may be specified, from time to time, by the Income-tax Rules, 1962.
6. The Employee permitted to retire at any age after attaining the age of 55 (fifty five) years shall be eligible for pension provided he has rendered not less than 120 calendar months of continuous service with the company as an employee. The Pension to the employee shall commence from the date immediately following the expiry of the period of any *terminal leave* where it is granted to him on full pay or from the date immediately following his retirement where it been granted cash compensation for the said leave.
7. The amount of pension payable to an employee shall be a monthly pension of N/60 of the average monthly salary drawn by him during the 36 complete calendar months preceding the date of retirement,



'N' as defined in para 3(f) above being limited to 30. The amount of pension shall not exceed the monthly ceiling of Rs.....

8. The pension granted by the company shall be for life. However, where an employee, who has been granted a pension dies before the expiry of 20 years from the date of the commencement of pension, the pension from the date of his death for the balance of 20 years shall be paid firstly to his wife provided she does not re-marry, and, secondly, if she re-marries or dies, to his children at the rate at which the deceased employee was entitled.
9. An employee who having served the company for not less than 10 completed years of service as an employee becomes mentally or physically incapacitated and is medically declared unfit for further service with the company, may be granted by the company an invalid pension calculated on the same basis as provided under clause 7 hereof and subject to the same monthly ceiling as provided in the said clause, even though the employee has not attained the age of 55 years. Such an invalid pension will be subject to review every year and may be reduced or stopped at the sole discretion of the Board of directors of the Company.
10. If an employee dies while in service but after 10 years of completed service as an employee or dies while in receipt of invalid pension then his wife or minor children may at the sole discretion of the Board of Directors be sanctioned by the company a family pension of an amount not exceeding the pension which the employee would have been eligible to have had he retired after attaining the age of 55 years and having rendered the same number of completed years of service as provided under clause 7 hereof and subject to the same monthly ceiling as provided in the said clause. Such a pension shall be subject to review every year and may be reduced/ stopped at the sole discretion of the Board of directors of the company.
11. The trustees may allow commutation of pension granted under clauses 6 and 7 hereof in the following manner:
  - (a) in a case where the employee receives any gratuity, the commuted value of one-fourth pension which he is normally entitled to receive, and
  - (b) in any other case, the commuted value of one-third of such pension;such commuted value being determined having regard to the age of the recipient, state of his health, the rate of interest, and officially recognised tables of mortality.
12.
  - (i) The number of trustees at all times shall be three.
  - (ii) One of the Trustees shall be nominated by the Board of directors of the Company, who may be either a director or an officer of the company. The other two trustees shall be elected from amongst the members of the Pension Fund.
  - (iii) The nominee of the Board of directors of the company shall be the Chairman of the Trust.

The trustees other than the nominee of the Board of directors shall be elected by ballot by members hereof and shall hold office as trustees for 3 years, unless their seat becomes vacant earlier under Clause 13 hereafter.
  - (iv) The nominee of the Board of directors of the company shall hold office until a new representative is appointed by the Board of directors to take his charge.
13. The place of trustee shall become vacant if a trustee (a) dies, or (b) resigns his office, or (c) is adjudged an insolvent, or (d) becomes of unsound mind, or (e) is convicted of an offence involving moral turpitude, or (f) in the case of a nominee of the Board of directors of the company ceases to be a director or an officer of the company and in the case of a elected trustee ceases to be a member of the fund, or (g)

fails to attend three consecutive meetings of the trustees for any reason which the trustees do not consider to be satisfactory.

14. (i) Any casual vacancy under clause 13 above shall also be filled by holding a fresh election, in case the vacancy occurs in a seat held by an elected trustee.  
  
(ii) If a seat of an elected trustee remains vacant for more than one month, the Board of directors of the company may fill the casual vacancy by appointing a trustee from among the members for such period as the election does not take place.  
  
(iii) The person elected or nominated to a casual vacancy shall be a trustee for the residue of the term for which the person whose place he fills would have been a trustee.
15. (i) The trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. The Chairman and an elected trustee shall form a quorum. Questions arising at any meeting shall be decided by a majority of votes and in case of equality of votes the Chairman of the Trust shall have a casting vote.  
  
(ii) A resolution in writing signed by all the trustees for the time being shall be as valid and effectual as if it had been passed at a meeting of the Board of Trustees duly called and constituted.
16. (i) The Board of Trustees shall be authorised to delegate any of their powers to such one or more of themselves as they may think fit, from time to time, and they may vary, alter or rescind such powers or any of them as they from time to time think fit.  
  
(ii) No act or proceedings of the trustees shall be invalidated merely by reason of the existence of a vacancy among the trustees.  
  
(iii) The trustees shall cause proper minutes to be kept and entered, in a book provided for the purpose, of all their resolutions and proceedings and any such minutes of any meeting of the trustees, if purporting to be signed by the Chairman of the trustees shall be receivable as *prime facie* evidence of the matters stated in such minutes.
17. The Fund shall be exclusively managed and administered by the trustees in accordance with these rules, and the decision of the trustees upon any question relating to the fund or any rights or benefits in connection therewith or generally upon the interpretation of any provision of these rules shall be absolutely final and binding on all members, their executors, administrators, representatives, widows or relatives and the employers.  
  
The costs, charges and expenses of administering the fund and of the determination of any question arising under these rules or otherwise, including expenses incurred by the trustees in the discharge of their duties shall be charged to the fund and may be properly paid therefrom, from time to time.
18. The trustees shall have power to employ any person or persons (including any one or more of their numbers) to do any secretarial, legal, accountancy or other work which they may consider necessary or expedient in connection with the management of the fund and to pay therefore in addition to all other proper disbursements, all ordinary or reasonable charges out of the fund.
19. The trust property shall consist of such yearly and other contribution as the company may make to the trust or such other sums as the company shall from time to time, determine provided that the annual contribution by the company to the fund in respect of any particular employee shall not exceed 25% of his salary for each year as reduced by the company's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.

Interest, dividend or other accretions from investments and deposits of the Fund hereby established; and Any Securities or other investments of the Trust money.

**340 PP-DP&A**

20. Subject to the previous approval by the Commissioner of Income-tax, the trustees shall, with the approval of the Board of directors, be competent to vary, alter, omit, modify or add to the rules of the Pension Fund.
21. The accounts of the Pension Fund shall be made for each year and shall be duly audited by the auditors appointed by the Trustees with the approval of the Board of directors of the company. There shall be an annual meeting of the trustees after the close of the year and at such annual meeting of the trustees the audited accounts of the previous year of the Fund shall be presented and passed.
22. All matters of procedures and other ancillary matters not herein specifically provided for and requiring the framing of rules including for the election of trustees and for conduct of their meetings shall be regulated by such rules as the trustees may, in consultation with the Board of directors of the company, from time to time, make in that behalf.
23. The Trustees shall respectively be indemnified for and against all liabilities incurred by them in *bona fide* execution of the Trust hereof.

IN WITNESS WHEREOF the parties hereto have duly executed this Trust on the date, month and year first above written.

The Common Seal of the above named Company was, pursuant to the resolution of the Board of Directors of the Company passed in this behalf on....., affixed hereunto in the presence of the authorised director of the company, who has hereunto set his hands in the presence of:

WITNESS:

for COMPANY

- 1.
- 2.
- 3.
- 4.

(DIRECTOR)

SIGNATURE OF TRUSTEES

- 1.
- 2.
- 3.

**ANNEXURE III**

**DRAFT TRUST DEED**  
**(Superannuation Fund)**

The Superannuation Fund Trust Deed should also be drafted on the same lines as Pension Fund Trust Deed except for the following changes.

Clauses relating to the benefit accruing to the members of the fund, namely, Clauses 6 to 10, must be replaced as below:

6. On a member being permitted to retire from the service of the Company, at or after the age of 55 years, of being permitted to retire before the age of 55 years upon his being incapacitated, the Trustees shall, by payment of the amount lying at his credit in the Fund made up to the date of retirement, purchase from the Life Insurance Corporation of India an annuity for him for his life in the event of there being no nominee, or for a duration of not less than ten years certain, on either or survivors basis, jointly with the nominee(s) named in the declaration of nominations.

7. Nothing contained in this Trust Deed shall be deemed to restrict in any way the rights of the Company to terminate the employment of a member at any time nor shall his being a member be used by him as a ground for increasing damages in any action brought by him against the company in respect of termination of his employment and no expression of intention on the part of the Company herein contained shall create for the benefit of the member any legal obligation or impose any legal liability on the company.
8. Should a member die while in employment, the Trustees shall, by payment of the amount lying at his credit in the Fund made-up to the date of death, purchase from the Life Insurance Corporation of India an annuity for the first named nominee in the declaration of nominations for a duration of not less than ten years certain, on either or survivors basis, jointly with other nominees, if any.
9. If a member dies while in service without making a nomination or resigns with or without due notice from the employment of the Company or is discharged for reasons of fraud, dishonesty, criminal charges, or other misconduct inconsistent with due and faithful discharge of duty, the gross annual contribution to be made by the Company to the Fund under the provisions of clause 15(ii) above for the relevant year shall be reduced by the amount lying at the credit of such member in the Fund and the Trustees shall thereupon by cancellation of the individual account of such member utilise the credit alongwith the annual contribution by the Company, so reduced, for making up the individual accounts of the members.
10. No member shall assign, or create a charge upon his beneficial interest in or under the Fund, and if such assignment or charge is made or created, such assignment or charge shall be invalid.

In addition the Superannuation Fund Trust Deed should have the following clause:

“The Trustees shall maintain individual accounts for each member and credit thereto the contributions received, from time to time, from the Company in respect of that member. The yield from investment of funds or capital gains shall be credited to the individual members’ accounts at the end of each year pro-rata to the amount and the duration in the year of the credits in such accounts.”

#### **ANNEXURE IV**

##### **DRAFT DEBENTURE TRUST DEED**

THIS TRUST DEED is made this..... day of..... 2020, between..... incorporated under the Companies Act, 2013 with its registered office at..... (hereinafter called “the Company”) of the One Part, and Mr..... and Mr..... (hereinafter called “the Trustees”) of the Other Part.

WHEREAS by Sub-Clause..... of Clause..... of its Memorandum of Association, the company is authorised to borrow or raise and secure the payment of money by the issue of debentures charged upon any of the company’s property.

AND WHEREAS the Directors of the company being duly empowered in that behalf by Article No. .... of the Articles of Association of the company have decided by a resolution passed in pursuance to Section 179 of the Companies Act, 2013 by the Board of directors in the meeting of the Board held on..... to raise a sum of Rs..... by issue of..... First Mortgage Debentures of Rs..... each, bearing interest at..... per cent per annum framed in accordance with the forms set for in the *First Schedule* hereto and to secure the same by mortgaging with the trustees the properties described in the *Second Schedule* hereto.

AND WHEREAS the trustees above mentioned have consented to act as trustees for the debenture holders.

NOW THIS DEED WITNESSETH AND IT IS HEREBY MUTUALLY AGREED TO AND DECLARED BY AND BETWEEN THE PARTIES HERETO 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.
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 debentureholders 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 lumpsum 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 Accountant 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 no. 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 first 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 trustees hereof being a corporate body may, in the execution and exercise of all or any of the trusts powers, authorities and discretions vested in them by these presents act by responsible officers or a responsible officer for the time being of the trustees and the trustees may also whenever they think it expedient in the interests of the debenture-holders delegate by power of attorney or otherwise to any such officer or officers all or any of the trusts power, authorities, and discretions vested in them by these presents and any such delegations may be made upon such terms and conditions and subject to such regulations including power to sub-delegate as the trustees may, in the interest of the debentureholders, think fit and the trustees shall not be bound to supervise the proceedings of or be in any way responsible for any loss incurred by reason of any misconduct or default or any mistake, oversight, error of judgement, forgetfulness or want of prudence on the part of any such delegate.

**Note:** *This clause is suitable where the trustees is a bank. In case of individual this be modified suitably.*

17. 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.
18. 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 trustee or trustees shall be appointed by the company until his appointment has been approved by an ordinary resolution of the debenture holders.
19. 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.
20. 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.
21. 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.

22. 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 of  
the..... *Witnesses:*  
affixed in the presence of (DIRECTOR)

### THE FIRST SCHEDULE

#### Form of Second Debenture

#### Name of the Company

(Incorporated Under the Companies Act, 2013)

Registered Office.....

Issue of..... Secured non-convertible debentures of Rs..... each of aggregate face value of Rs..... (Rupees.....) carrying interest at the rate of..... per cent per annum ranking *inter se pari passu* and numbered as Nos. .... to..... (both inclusive) made under the Authority of Clause..... of the Memorandum of Association of the Company and Article/ Articles..... of the Articles of Association of the Company and the Resolution passed at the Annual General Meeting held on....., under the provisions of Section 96 of the Companies Act, 2013, and in terms of the Letter of Offer/Prospectus dated..... issued by the Company, and made in terms of and secured under Debentures Trust Deed dated..... (hereinafter called the Trust Deed) and made between..... (hereinafter called the Company) of the One Part and..... (hereinafter called the Trustees) of the Other Part.

---

15% Secured Non-Convertible Debentures of Rs. 100/- each Amount Paid up on each Debenture is Rs. 100/-

---

Registered Folio No.      Certificate No.

Name(s) of Holder(s)

Interest Scheme

No. of Debenture(s) held

Distinctive No.(s)

---

1. The Company will during the continuance of this security pay to such registered holder(s) interest thereon at the rate of 15% per annum on the paid-up value of the debentures, (subject to deduction of Income-tax at the rate of the time being prescribed under the Income Tax Act, 1961, or any statutory modification or re-enactment thereof for the time being in force) by half-yearly payments on the..... and..... every year in respect of the half-year period ending on that date.
2. The company shall pay the face value of the non-convertible debentures at the expiry of the..... year from the date of allotment at a premium of.....% of the face value of the debentures, together with the interest due as above stated.
3. During the continuance of the security under the Trust Deed, the Company shall be entitled to make further issue of Debentures and/or raised further term loans and/or avail of further Deferred Payment/ Guarantee facilities and/or other form of borrowings from time to time from any Financial Institution/ Bank/Body corporate or other person whomsoever by creation of such prior or *pari passu* security on the mortgaged premises or any part thereof without requiring any sanction from the holders of the Debentures but subject to the consent of the Trustees.
4. The Debenture is issued subject to the provisions of the Trust Deed whereby all remedies for the recovery of the principal moneys and interest secured by the Debentures are vested into Trustees on behalf of the debenture-holders and shall operate only according to the tenure thereof.
5. The notices may be served on the Debenture-holders either by the Company or by the Trustees in accordance with the provisions of the Companies Act, 2013.

Given under the Common Seal of the Company this the..... day of..... Two thousand.....

Director

Director

Authorised Signatory.

PART A

PART B

## LESSON ROUNDUP

- 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 moveable property. A transfer of an actionable claim is usually called an assignment thereof.
- A debt is property. It is an actionable claim and is heritable and assignable and it is treated as property under the Transfer of Property Act, 1882 and is known as “actionable claim”.
- A debtor cannot claim or take advantage of non-payment of consideration for assignment.
- The Companies Act, 2013 while defining the nature of property in the shares of a company provides that “the shares or other interest of any member in a company shall be moveable property, transferable in the manner provided in the articles of the company.”
- Provisions have been envisaged under Patents Act, Copyright Act, and Trade Marks Act pertaining to the assignment of patents trademarks and copyrights.
- Goodwill is an intangible asset. It represents the value to a business attaching to all the factors, internal and external, which enable it to earn a differential return of profit on the capital employed.

- Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits.
- The partnership is based on contract. This contract may be made either orally or in writing or even may be inferred from the course of dealing between the partners. In order to avoid all disputes relating to terms of partnership, it is suggested that a written document containing terms and conditions of partnership be executed between the partners. The deed is executed by all the partners and is drafted as an agreement to carry on certain business in partnership on certain terms and conditions.
- While drafting partnership deed we should incorporate all terms and conditions that govern a particular partnership business.
- An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustee. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll.
- While drafting a trust deed, it should be seen that every clause in the deed is clear in its meaning. If there is any reference to any article, documents, rules, statutory Acts etc., the same are properly applied out.
- The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty. No particular or technical words are necessary but the words used must be definite and unequivocal.

### TEST YOURSELF

1. Draft a specimen Deed of Assignment of policy of life assurance.
2. Define 'patent'. Discuss in brief legal provisions governing assignment of patents. Draft a specimen Deed of Assignment of a patent.
3. Can you tell what is a 'trade mark'? Discuss in brief legal provisions governing assignment of trade marks. Draft a specimen Deed of Assignment of a registered trade mark.
4. How 'copyright' has been defined? Discuss in brief legal provisions governing assignment of copyrights. Draft a specimen Deed of Assignment of the copyright of a novel.
5. Draft a specimen Deed of Agreement on admission into firm of a new partner. What extra care should be taken while drafting such a deed?
6. Explain the important points you will keep in view while drafting a Trust-Deed?

---



---



---



---



---

# Lesson 8

## Drafting of Agreements under the Companies Act

### LESSON OUTLINE

- Promoters' Contract-Pre- Incorporating Contracts
- Memorandum of Association
- Drafting of Memorandum
- Articles of Association
- Drafting of Articles
- Underwriting and Brokerage Agreements
- Underwriting Contract
- Shareholders Agreement
- Contract of Appointment with Managing Director
- Contract of Appointment with Manager
- Contract of Appointment with Secretary
- Deeds of Amalgamation of Companies: Transfer of Undertakings
- Compromise, Arrangements and Settlements
- Slump Sale Agreement
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre incorporation contracts. Memorandum of Association of the company is the fundamental formation document. It is the constitution and charter of the company. Articles are rules and regulations for management of internal affairs of the company.

Corporate professionals like Company Secretaries have to advise the companies in drafting various documents as well as to undertake legal documentation pertaining to a range of other functions.

The objective of this lesson is to make the students appreciate the skills involved and the important requirements to be borne in mind in the drafting of memorandum of association, articles of association, company's agreements in particular shareholders agreements, agreements for the appointment of managing director & manager etc.

## PROMOTER

As per Section 2(69) of the Companies Act, 2013, Promoter” means a person –

- (a) Who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;

Generally Promoter of a company is a person who does the necessary preliminary work in connection with the formation and the establishing of the company. Promoter conceives an idea, develops it, formulates a scheme or project and takes all the necessary steps for the formation of a company to implement the project or the scheme.

Before the company is registered by the Registrar promoters continue to be known as promoters. They gather funds for meeting the expenses in connection with the formation of the company and spend them, which are known and designated as “*preliminary expenses*” and usually a provision is made in the articles of association of the company authorising the company and its directors to reimburse promoters the preliminary expenses incurred by them, and also a provision for the formalisation of the contracts which the promoters of the company had entered into with third parties prior to the company coming into existence. Promoters usually enter into contracts with the prospective directors, solicitors, bankers, brokers, underwriters, auditors, secretary, manager and with those who offer to sell land, plant, machinery equipment etc. for implementing the proposed project. Such contracts are known as “*promoters’ contracts*” which are not binding on the company because the company had not come into existence when they were entered into with third parties by the company’s promoters. However, as a matter of practice, the company, on its incorporation enters into fresh contracts with the third parties on the lines of the promoters’ contracts, which then become binding on the company.

## PROMOTERS’ CONTRACT – PRE-INCORPORATION CONTRACTS

Companies Act, 2013 does not contain any provisions about Promoter’s Contract. The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called *preliminary or pre-incorporation contracts*. The promoters generally enter into such contracts as agents for the company about to be formed. The legal position is that since presence of two consenting parties is necessary for a contract, and the company before incorporation is a non-entity, the promoters cannot act as agents for the company, which has yet to come into existence. As such, the company is not liable for the acts of the promoters done before its incorporation.

When the company comes into existence, it is not bound by the pre-incorporation contracts even when it takes the benefit of the work done on its behalf. However, specific performance of a contract between a third party and the promoters may be successfully claimed by the third party against the company, when the company enters into possession of the property on the faith of the promoters’ contract.

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

A company also cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit of the contract purporting to have been made on its behalf before it came into existence, as ratification by the company when formed is legally impossible.

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

The essential feature of novation is that the right under the original contract is relinquished and a new right referable to a new contract is created. The substituted contract must, in order to effect a novation, be enforceable one.

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

### **A Specimen of Promoters' Contract for the Purchase of an Industrial Plot for setting up Industrial Unit of the Proposed Company ABC Ltd.**

THIS AGREEMENT is made on this ..... day of ..... between Mr. A, son of Mr..... resident of....., Mr. B, son of Mr..... resident of..... and Mr. C, son of Mr....., resident of.....' (hereinafter referred to as "promoters") of the one part which expression shall, unless repugnant to the context include their heirs, legal representatives and assigns and Mr. "V" son of Mr..... resident..... (hereinafter referred as "Vendor") of the other part, which expression shall, unless repugnant to the context, include his heirs, legal representatives and assigns.

WHEREAS the promoters have been engaged for quite sometime in the past in promoting and forming a company to be known as ABC Ltd., which name has been made available to the promoters by the Registrar of Companies....., consequent upon which they have filed with the Registrar memorandum of association and articles of association for registration of the company;

AND WHEREAS the memorandum and articles of association of the proposed ABC Ltd., empower the company and its directors to enter into agreements on its incorporation on the lines of the agreement entered into by the promoters for the purchase of land, plant, machinery, equipment and for hiring the services of persons required for and in connection with the formation and incorporation of the company;

AND WHEREAS the Vendor is the absolute owner of industrial plot of land measuring..... and situated at..... and is desirous of selling the same;

AND WHEREAS the promoters are desirous to buy the said plot of land for the proposed company ABC Ltd. to set up an industrial unit on its incorporation.

NOW IT IS AGREED AND DECLARED BETWEEN AND BY THE PARTIES AS FOLLOWS:

1. That the said vendor shall sell and the promoters shall purchase the industrial Plot No..... situated in the..... Industrial Area, ..... bounded on North by....., on South by....., on East by....., and on West by..... in consideration of the payment, by the promoters on the date of this agreement, of the sum of Rs..... and the balance of Rs..... on the date of the appearance of the vendor and the promoters before the Sub- Registrar..... at the time of registration of the deed of sale to this agreement.
2. The vendor shall satisfy the promoters or ABC Ltd., if incorporated by then, about the title of the vendor to the aforesaid piece of land within one month of the execution of this agreement and the promoters or their attorney shall be entitled to ask for such information as may be necessary to ascertain the title



of the vendor and the vendor shall be bound to allow inspection of the title deeds relating to the plot of land at his place within two months of the date of this agreement. On the satisfaction of the promoters as to the title of the vendor in respect of the said plot of land, the parties shall complete the transaction of the sale within six months of the date of this agreement.

3. The parties shall bear the expenses of sale equally. The purchaser shall pay to the vendor the expenses for purchase of stamp, a fortnight before the expiry of the period fixed for this agreement for completion of the sale and the promoters shall also at the same time deliver to the vendor a draft of the deed of sale which the vendor shall, if in proper form, execute at his expense in favour of the purchasers and present the same for registration on or before the date fixed for the completion of the sale transaction.
4. The vendor shall deliver actual possession of the plot of land to the promoters or the company on the date of payment of the balance of the price aforementioned and shall do all other acts that may be necessary or requisite to effectually put the promoters or ABC Ltd., as the case may be, in such possession.
5. In case there found to be any error or misdescription in area or the boundaries or the other specifications of the plot of land agreed to be conveyed to the promoters of ABC Ltd. or ABC Ltd., as the case may be, corresponding decrease or increase in price relating to the area and rectification of misdescription of the specification relating to boundaries etc. shall be permissible, and shall not form any ground for avoiding this agreement for sale of the plot of land.

IN WITNESS WHEREOF the parties aforementioned have signed this deed of acceptance of the terms thereof.

- |            |  |
|------------|--|
| 1. Witness | Vendor   |
| 2. Witness | Purchasers/Promoters of the Company<br>ABC Limited, under incorporation. |
| 3. Witness | A  |
| 4. Witness | B  |
|            | C  |
|            | (Schedule of Land)   |

**A Specimen of Agreement entered into by and between ABC Ltd. on its Incorporation and Mr. .... Vendor of Industrial Plot No..... Situated..... who had earlier entered into an Agreement dated..... for the Sale of the said Plot of land to the Promoters of the Company.**

THIS AGREEMENT is made and entered into the..... day of..... between Mr. 'V' son of Mr....., resident of..... (hereinafter called "the vendor") which expression shall, unless, repugnant to the context, include his heirs, legal representatives and assigns of the one part and ABC Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter known as "the company") which expression shall, unless repugnant to the context, include its legal representatives, of the other part.

WHEREAS the company was incorporated on..... under the Companies Act, 2013 as a public limited company with a nominal share capital of Rs..... divided into..... equity share of Rs..... each;

AND WHEREAS Mr. A, Mr. B and Mr. C have been engaged for quite sometime in the past in promoting and forming this company;

AND WHEREAS the said promoters of the company, Mr. A, Mr. B and Mr. C had entered into agreement with the vendor on the....., for the purchase of industrial plot of land No..... situate at....., a copy of the plan whereof is annexed hereto as Annexure-I;

AND WHEREAS the memorandum and articles of association of the company empower the company and its directors to enter into agreements with third parties on the terms and conditions of the agreements entered into by and between the promoters and the third parties for the purchase of land, plant, machinery, equipment etc. for the company;

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES OF ONE PART AND PARTY OF THE OTHER PART:

1. That the said vendor shall sell and the company shall purchase the industrial plot No..... situate in the..... Industrial Area, .....more precisely described in the Schedule hereto in consideration of payment by the company on the date of this agreement of the sum of Rs..... and the balance of Rs..... on the date of the appearance of the vendor and the company before the Sub-Register, .....at the time of registration of the deed of sale pursuant to this agreement.
2. The company has already satisfied itself with regard to absolute title of the vendor in the said plot of land and has already given to the vendor a draft of the deed of conveyance and the vendor hereby agrees and undertakes to execute the same in favour of the company within a period of a fortnight of the date of execution hereof and present the same for registration within the said period of fortnight.
3. The vendor shall deliver actual possession of the plot of land to the company on the date of payment of price aforementioned and shall do all other acts that may be necessary or requisite to effectually put the company in such possession.

Signed and delivered by within named vendor in presence of:

Witness - 1.....

Witness - 2.....

Signature of Vendor Signed, sealed and delivered by within named company (purchaser)

(Name of the Company)

Through its Director

Shri.....

Signature..... In presence of:

Witness - 1.....

Witness - 2.....

*(Annexure or Schedule of Land)*

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

This Agreement made at New Delhi on this..... day of..... 2020 between Shri A of the 1st part, Shri B of the Second part and AB & Co. Ltd. (hereinafter referred to as 'the company') of the third part.

Whereas after the execution of the contract on 10th July, 2020 (hereinafter referred to as "the said contract") between Shri A, the vendor, and Shri B, on behalf of the company, the said company AB & Co. Ltd. has been incorporated under the Companies Act, 2013.

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

1. The said contract dated 10th July, 2020 is hereby adopted by the company and shall be binding on

the said Shri A and on the company in the same manner and shall take effect in all respects as if the company had been in existence at the date of the agreement.

2. Shri B who actually signed on behalf of the proposed company shall be discharged from all liability under the said contract as the company had adopted and ratified the said contracts.

In witness whereof the parties hereunto have put their hands and signatures and the company has caused its common seal affixed in the presence of Shri..... and Shri..... two directors who have set their respective hands and signatures the day and year first herein above written in terms of the Resolution passed in its Board of Directors in their meeting held on.....

*Common Seal*

*Witnesses:*

..... (Signature)

1.....

*Director*

2.....

..... (Signature) *Director*

*Signatures of A* .....

*B* .....

## MEMORANDUM OF ASSOCIATION

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world.

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Companies Act, 2013 (hereinafter referred to as 'Act'). This is evidenced in Section 3 of the Act, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is a public company; two or more persons, where the company to be formed is a private company; or one person, where the company to be formed is a One Person Company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of its registration.

Memorandum of association of the company is the fundamental formation document. It is the constitution and charter document of the company. It contains the basic conditions on the strength of which the company is incorporated. Thus, it defines and confines the area of operation of the company. It lays down the area, beyond which the action of the company cannot go. Section 4 of the Companies Act, 2013 and Table A, B, C, D and E of Schedule I as may be applicable to such company deal with contents, form and printing and signature of memorandum of association. Students are advised to be conversant with the above sections, as they are very relevant to drafting.

The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

## Drafting of Memorandum

It is pertinent to note that memorandum is the main edifice upon which the whole structure of the company is erected. It is the basic document fundamental to its existence. Further, it is also to be noted that as it is the charter of the company defining scope of its activity and extent of power it could exercise, so that its shareholders, creditors, bankers and other third parties who deal with the company could know the range of the company's enterprise. Based on the provisions of Section 4 of the Companies Act, 2013, the main drafting requirements of contents of a Memorandum are summarized below:

## 1. Name of the company

As per Section 4(1) (a) of the Companies Act, 2013, in the case of a public limited company the name of the company should last with the word “Limited”, or in the case of a private limited company, the name of the company should last with the words “Private Limited. In case of Companies Registered under Section 8 of the Companies Act, 2013 these provisions does not apply. The name of a one person company should contain the words OPC or One person Company within brackets.

As per Section 4(2) of the Companies Act, 2013, the name stated in the memorandum shall not –

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or
- (b) be such that its use by the company –
  - (i) will constitute an offence under any law for the time being in force; or
  - (ii) is undesirable in the opinion of the Central Government.

## 2. Registered Office of the Company

As per Section 4(1) (b) the memorandum of the company should mention the State in which the registered office of the company is to be situated;

## 3. Objects of the Company

The third compulsory clause in the memorandum sets out the objects for which the company has been formed. Under section 4(1)(c) of the Act, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The objects clause is of great importance because it determines the purpose and the capacity of the company. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified. The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities.

The memorandum of the company should state the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;

An act beyond the objects mentioned in the memorandum is *ultra vires* and void and cannot be ratified even by all members of the company. There is no restriction on objects except it should be legal and lawful. While drafting the objects, care should be taken to see that:

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

#### 4. The Liability of Members

This clause of memorandum should state the liability of members of the company, whether limited or unlimited, and also state, –

- (i) In the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
- (ii) In the case of a company limited by guarantee, the amount up to which each member undertakes to contribute –
  - (A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
  - (B) To the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

#### 5. Capital Clause

This clause of memorandum of association of company should include in the case of a company having a share capital, the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and

#### 6. Subscription Clause

This clause of memorandum of association of company should include in the case of a company having a share capital the number of shares each subscriber to the memorandum intends to take, indicated opposite his name.

In the case of One Person Company, the memorandum of association of a company should contain the name of the person who, in the event of death of the subscriber, shall become the member of the company.

Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

### ARTICLE OF ASSOCIATION

According to Section 2(5) of the Companies Act, 2013, ‘articles’ means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table F in Schedule I of the Act, in so far as they apply to the company.

In terms of section 5(1), the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company *inter se*. They are subordinate to and are controlled by the memorandum of association.

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

Memorandum. The articles of a company contains the regulations for management of the company and other such matters, as may be prescribed.

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with. However the provisions for entrenchment referred above shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in the form and manner prescribed.

### **ENTRENCHMENT PROVISIONS**

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. [Section 5 (3)]

The Companies Act 2013, recognizes an interesting concept of entrenchment. Essentially, the entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions greater than those prescribed under the Act (such as obtaining 100% consent of members). This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

The provisions for entrenchment referred to in section 5(3) shall be made either (a) on formation of a company, or (b) by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. [Section 5 (4)]

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in the form no. INC-32(SPICe) along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 at the time of incorporation of a company or in the case of existing companies the same shall be filed in Form No. MGT-14 within 30 days from the date of the entrenchment of the articles, as the case may be along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014. [Section 5 (5)]

### **Contents of Articles**

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F.
2. Adoption of preliminary contracts.
3. Share Capital, variation of rights, Number and value of shares.
4. Issue of preference shares.
5. Allotment of shares.
6. Calls on shares.
7. Lien on shares.
8. Transfer and transmission of shares.
9. Nomination.

## 358 PP-DP&A

10. Forfeiture of shares.
11. Alteration of capital.
12. Buy back.
13. Share certificates.
14. Dematerialisation.
15. Conversion of shares into stock.
16. Voting rights and proxies.
17. Meetings and rules regarding committees of the Board.
18. Directors, their appointment and delegations of powers.
19. Nominee directors.
20. Issue of Debentures and stocks.
21. Audit committee.
22. Managing director, Whole-time director, Manager, Secretary, Chief Executive Officer and Chief Financial Officer.
23. Additional directors.
24. Seal, if any.
25. Remuneration of directors.
26. General meetings, proceedings at general meetings, adjournment of meeting.
27. Board of Directors, Proceedings of the Board meetings.
28. Borrowing powers.
29. Dividends and reserves.
30. Accounts and audit.
31. Winding up.
32. Indemnity.
33. Capitalisation of profits, reserves.
34. Secrecy

### Drafting of Articles

Utmost care is required to be taken to draft the Articles. It should contain strictly only relevant and necessary matters. In its draft, efforts must be made to incorporate comprehensive provisions so as to cover all statutory requirements and all possible contingencies. Any alteration requires cumbersome procedure to be followed which is expensive and time consuming.

Articles, as a public document of the company, have evidentiary value in matters which involve dealing of the company with its own members or third parties. Any outsider has constructive notice of the contents of Articles and expected to inspect before entering into any transaction with the company. Articles must be signed by the subscribers of the Memorandum and be registered along with the Memorandum. In case of drafting the articles for a company limited by shares, the draftsman can follow the following alternatives:

- (i) Adopt Table F of Schedule 1 in Companies Act, 2013 in full; or



- (ii) Exclude Table A wholly and register own Articles suiting its requirements; or
- (iii) Register own articles and in addition thereto allow Table F to apply so far as it is not modified or excluded by the articles.

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

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

1. Share capital, its kinds rights attached to different kinds of shares or any special privileges attached thereto should be considered and incorporated in Articles.
2. Directors – appointment of directors, their voting rights, resignation, termination etc. should be given due consideration and their rights, powers and privileges should be incorporated in Articles Proportional representations may also be looked into.
3. In Government Companies, Joint Venture Companies, Joint Ventures with foreign companies, joint venture with Government Companies, the main terms of their partnership in Share Capital as well as the management of the affairs of the company with power and authority delegation be relevantly discussed in the Articles with scope and limitations thereto to avoid any misinterpretation.
4. As far as possible, regulation given in Table F may be borrowed, even if it is not made applicable so that Article may conform to the intent and spirit of law.
5. Efforts should be made to make each article self explanatory and self interpretative to avoid misleading conclusions. Coherence and sequence of the contents should be maintained at any costs.
6. Any items which are already mentioned in Memorandum and is to be mentioned in Articles, it is better that it is put in words such as “as mentioned in Memorandum of Association” which will skip the requirement of altering Articles when Memorandum is altered.
7. No provision which a company cannot do either as per Memorandum or Companies Act or any other law, should find a place in articles: e.g. expulsion of members. This is opposed to Company Jurisprudence and is *ultra vires* of the Act.
8. Where the company would require assistance from financial Institutions, provisions be made for appointment of nominee directors, conversion of loans from financial institutions into equity etc.
9. Exemptions available to private companies by virtue of their Articles need to suitably addressed in the Articles as also the powers which can be exercised by the Board/ Company only if Articles contain provision to that effect.

After drafting a proper balancing should be done with Memorandum's contents, as to coverage, inconsistencies with it, contradictions occurred etc. to enable proper modification in time. It is better to have an Article of an existing company in the same field of activity, either to modify it or at least to know the relevant matters which can be included in the Draft.

## UNDERWRITING AND BROKERAGE AGREEMENTS

Underwriting is an insurance against risk. When shares or debentures of a company are issued to the public, they are, by and large, underwritten to ensure that all the shares or debentures issued are taken up and thus the required capital is raised. Before entering into an underwriting arrangement with a member of any recognised stock exchange, it is the duty of the directors of the concerned company to ensure that the underwriter has sufficient financial resources to meet any obligation which may devolve upon him in the event of the issue not being fully subscribed by public.

### Power of a Company to Pay Brokerage/Underwriting Commission

Section 40 of the Companies Act, 2013 permits a company to pay certain commissions and prohibits the payment of all other commissions, discounts etc.

- (i) The company may exercise the powers of paying commissions conferred by sub-section (6) of section 40, provided that the rate per cent. or the amount of the commission paid or agreed to be paid shall be disclosed in the manner required by that section and rules made thereunder.
- (ii) The rate or amount of the commission shall not exceed the rate or amount prescribed in rules made under sub-section (6) of section 40.
- (iii) The commission may be satisfied by the payment of cash or the allotment of fully or partly paid shares or partly in the one way and partly in the other.

As per Rule 13 of the Company (Prospectus and Allotment of Securities) Rules, 2014 a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions, namely:-

- (a) The payment of such commission shall be authorized in the company's articles of association;
- (b) The commission may be paid out of proceeds of the issue or the profit of the company or both;
- (c) The rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;
- (d) the prospectus of the company shall disclose –
  - (i) the name of the underwriters;
  - (ii) the rate and amount of the commission payable to the underwriter; and
  - (iii) the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.
- (e) there shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;
- (f) a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

### Specimen Agreement for Acting as Broker to an Issue

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

Ref. No.....

Date..... The Board of Directors

(Name and address of the company for whose public issue the firm agrees to act as broker)

Dear Sir(s),

Re: Proposed public issue of..... (type of security) Shares/ Debentures of Rs..... each for cash at par of.....Ltd.

We, the undersigned, hereby testify and consent to act as Brokers to the Issue of..... Shares/Debentures of Rs..... each for cash at par as captioned above by..... Ltd. and to our name being inserted

as Brokers in the prospectus which the company intends to issue in respect of the proposed issue of capital and we hereby authorise the said company to deliver this consent to the Registrar of Companies..... pursuant to Section 40(6) of the Companies Act, 2013.

As required under Rule 13 of the Company (Prospectors and Allotment of Securities) Rules, 2014, we are agreeable to accept one and a half per cent on the issue price as brokerage on allotment made in respect of applications bearing our rubber stamp as brokers.

Thanking you,

Yours faithfully,

For.....

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

(Letter form)

### Specimen Underwriting Agreement

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 term 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 Rule 13 of the Company (Prospectors and Allotment of Securities) Rules, 2014. Sufficient number of copies of the prospectus and application forms shall be printed and made available to the underwriters, brokers and members of the public who intend to apply for the Equity Shares as soon as possible thereafter.
2. Underwriters shall be entitled to arrange sub-underwriting with respect to their respective commitments for their own account on terms to be arranged at their discretion with their sub-underwriters.
3. If by the closing date of the subscription list or such earlier date as may be agreed to by the underwriters, the Equity Shares offered to the public are not subscribed in full by the public and the application money payable in respect thereto is not received by you, you will within 14 days or such extended time as may be agreed to by the underwriters, notify the underwriters in writing as to the amount/number of Equity Shares which have not been so subscribed. The underwriters shall within 21 days after the receipt of such intimation apply for and subscribe such unsubscribed amount/number of Equity Shares and pay or procure to be paid the money payable on application in respect of such Equity Shares in proportion that the amount underwritten by each of them bears to the total amount of the issue.
4. In determining the amount/number of Equity Shares to be taken up by the underwriters the following factors shall be taken into consideration:

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

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

Thanking you,

Yours faithfully,

For.....

### Underwriting Contract

This AGREEMENT is made on the..... day of..... 20..... between..... of..... (hereinafter called the underwriters) of the one part, and .....Ltd. whose registered office is situate at..... (hereinafter called the 'the company') of the other part:

Whereas the company is about to offer for public subscription as issue of..... shares of..... each in accordance with the terms of the draft prospectus a copy of which is annexed hereto, or with such modifications therein as may be mutually agreed upon between the company and the underwriters:

Now it is hereby agreed as follows:

1. If the said..... shares shall on or before the..... day of..... 20..... (or

such latter date as shall be mutually agreed upon by the parties hereto not after than the..... day of..... 20.....) be offered by the company for subscription by the public at par on the terms of such prospectus as aforesaid, the underwriters shall on or before the closing of the subscription list apply at par for the said..... shares.

The said prospectus shall be issued in the form already approved by the underwriters or with such modification, if any, as shall mutually agreed between the company and the underwriters.

2. If on the closing of the lists under the said prospectus the said..... shares shall be allotted in respect of applications from the public the responsibility of the underwriters is to cease and no allotment is to be made under this agreement but if the said..... shares shall not be allotted to the public but any smaller number of such shares is so allotted, the undertaking of the underwriters is to stand for the difference between the said..... shares and the number of the shares allotted to the public.
3. The company shall pay to the underwriters in cash within..... days from the allotment of the said..... shares a commission at the rate of p.c. on the nominal value of the shares.
4. This agreement is to be irrevocable on the part of the underwriters and is to be sufficient in itself to authorise the company in the event of the underwriters not applying for the said..... shares to cause application to be made for such shares or any part thereof in the name and on behalf of the underwriters in accordance with the terms of the said prospectus and authorise the directors of the company to allot the said..... shares of the company or any part thereof to the underwriters (but subject to the provisions of this agreement) and in the event of the company causing an application to be made for such shares in the name of the underwriters, the underwriters shall hold the company and the said applicants harmless and indemnified in respect of such application.

### Shareholders' agreements

Shareholders' agreements (SHA) are quite common in business. In India shareholder's agreement have 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. SHAs are the result of mutual understanding among the shareholders of a company to which, the company generally becomes a consenting party. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act. A SHA creates personal obligation between the members signing such agreement however, such agreements do not become a regulation of the company in the way the provisions of Articles are unless the Articles are amended to incorporate the provisions of the SHA.

### Enforceability of the Shareholder's Agreement

Though the international view is split but to a large extent courts are inclined towards favouring SHA as long as they are not found to be detrimental to the minority stakeholder's rights. In the leading case of *Russell v. Northern Bank Development Corporation Ltd* [1992] BCC 578; [1992] 1 WLR 588, the House of Lords found that though a company cannot deprive itself of its power to alter its constitution, the members of the company could agree in a shareholders' agreement as to how they will exercise their voting rights on a resolution to alter the articles/constitution. The US Courts have largely accepted shareholder agreements. [*Blount v. Taft* [246 S.E.2d 763 at 769 (1978)]]

While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India courts have either refused to recognize clauses in shareholders agreements or, even when consistent with company legislation, enforced such clauses only if

they have been incorporated in the articles of association of the company. There is a series of rulings where the courts have upheld that in case of any conflict between the Articles and the SHA, the former will always prevail. Some of these are:

- V.B. Rangaraj v. V.B. Gopalakrishnan (AIR 1992 SC 453)
- Shanti Prasad Jain v. Kalinga Tubes Ltd., (35 Com. Cas. 351 SC)
- Mafatlal Industries Ltd., v. Gujarat Gas Co. Ltd (97 Comp Cas 301 Guj),
- Pushpa Katoch v. Manu Maharani Hotels Limited ([2006] 131 Comp Cas 42 (Delhi))

The Supreme Court in *V.B. Rangaraj v. V.B. Gopalakrishnan*, AIR 1992 SC 453 held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders. This decision was reiterated by the Bombay High Court in *IL & FS Trust Co. Ltd. v. Birla Perucchini Ltd* [2004] 121 Comp Cas 335 (Bom).

However, the Supreme Court in 2003 in its decision in *M.S. Madhusoodhanan v. Kerala Kaumudi Pvt. Ltd.* (2003 117 CompCas 19 SC ) not disagreeing with the decision in *V.B Rangaraj* case mentioned above, but distinguishing itself from the facts in that judgment, held that a restriction in relation to identified members on identified shares of a private company did not amount to restriction of transferability of shares per se.

In *Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd* [(2010) 154 Company Cases 593 (Bom)], it was held that such clauses are to hamper the free transferability of shares and in violation of the Companies Act, and hence, are not enforceable. Subsequently in the case of *Messer Holdings Limited v. Shyam Madanmohan Ruia and Ors* [(2010) 98 CLA 325] the Division Bench of Bombay High Court overruled its judgement in *Western Maharashtra Development Corporation Ltd* and provided a more liberal interpretation and recognised the rights inter se among shareholders in case of restrictions on transfer of shares.

In Indian context, while the landmark decision of the Supreme Court in *V.B. Rangaraj* case mentioned above is often cited in the context of shareholders' agreements, most other decisions have been rendered by the High Courts in various states especially the Bombay High Court. The decisions on shareholders' agreements are not uniformly inclined in a direction. The High Court decisions are limited in their applicability as they are susceptible to disagreements by other High Courts, thereby conferring limited precedential value. It is difficult to come to clear and crisp answers as to enforceability of shareholders' agreements

### **Specimen Shareholders Agreement**

THIS AGREEMENT made on the ..... day of ....., 2018 BETWEEN MR. A residing at (hereinafter referred to as "A") (which expression shall, unless repugnant to the context or meaning hereof, mean and include his heirs, executors, administrators and assigns) of the First Part.

And

MR. B residing at (hereinafter referred to as "B") (which expression shall, unless repugnant to the context or meaning hereof, mean and include his heirs executors, administrators and assigns) of the Second Part.

And

.....(P) LTD., a Company incorporated under the Companies Act, 2013 and having its registered office at herein represented by its (hereinafter referred to as "XYZ") which expression shall, unless repugnant to the context or meaning hereof, include its successors and assigns) of the Third Part;

WHEREAS:

- (A) A and B hereto have agreed to jointly manage a company in India named "XYZ Pvt Ltd.";
- (B) A and B have agreed to become Equity Partners by investing in the shares of the Company subject to



the condition that they shall enter into a Shareholders Agreement in terms of these presents;

(C) The Company “XYZ PVT. LTD. “ has been requested to, and has agreed to, join in the execution of these presents and to take this Agreement on record so that it is aware of the rights and obligations of A AND B, the parties hereto and ensure that they comply with the same;

(D) The parties hereto are desirous of recording the terms and conditions of their Agreement in writing;

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:-

1. (a) A and B shall jointly invest in the Company which is an existing company limited by shares under the Companies Act, 2013 and known as “XYZ PVT LTD”.

(b) The registered office of the Company shall be situate at....., or at such other places as may be mutually agreed upon between the parties in writing.

(c) The Company shall carry on the business of running and managing restaurants and (Description of the business and complete address), either by itself or through other agencies or company industries and may carry on any other business as may be decided by B hereto and shall ensure that no other business activity is undertaken by the Company at any time without the consent of A hereto.

2. The authorised share capital of the Company is Rs./- (Rupees only) consisting of (..) equity shares of Rs.10/- (Rupees ten) each.

3. The subscription by A hereto to the aforesaid authorised share capital of the Company shall be 1,00,000 (One lakh) equity shares of Rs.10/- (Rupees ten only) and the subscription by B to the aforesaid authorised share capital of the Company shall be 1,00,000 (One lakh) equity shares of Rs.10/-(Rupees ten only).

4. There shall be no further issue of capital without the consent of both the parties hereto, and unless otherwise agreed upon in writing further investment shall be as mutually decided by both parties.

5.(a) The Board of Directors of the Company shall consist of A and B

(b) A shall have the right to nominate two (2) Additional Directors onto the Board and B shall have the right to nominate three or more Additional Directors on the Board. Both parties shall be entitled at any time to remove any of the representatives on the Board by written notice to the other party and to appoint another or other/s in their place.

(c) The day to day management of the Company shall be looked after by a Managing Director to be appointed with the consent of B hereto. Any major acquisition of property, substantial expansion of business activities or diversification or matters of policy shall be with the prior consent of B.

(d) It is agreed as between the parties hereto that the position of Chairperson of the Company shall be held by B or a nominee of B. The Chairman of the Board shall also be the Chairman of all general meetings of the Company.

6. A and B hereto jointly and severally shall vote and act as members of the Company and with respect to the shares of the Company held by them, so as to ensure that Directors of the Company are at all times appointed and maintained in office in conformity with the provisions of this Agreement. If at any time the provisions of this Agreement are not fully complied with, A and B jointly and severally agree to promptly take all necessary steps to ensure that the provisions of this Agreement hereof are fully implemented in letter and spirit.

7. (a) The Auditors of the Company shall be M/s.\_.

(b) The Auditors of the Company shall not be changed without the prior written consent of both A and B.

8. Any sale or transfer of shares in the Company by either party shall be as provided in Clause 9. If at any time during the continuance of this Agreement either A or B, desire to sell or transfer all or any of their respective



shares held by them in the Company, they shall do so strictly in accordance with the provisions hereinafter written.

9. If either A or B desires at any time to sell the whole or part of their shares in the Company, he shall first offer such shares in writing to the other. If the other does not accept in writing the offer within 15 days of receipt of the offer, the first party shall then be at liberty within 30 days thereafter to sell the shares so offered to any other persons of its choice at the same price and on the same terms and conditions as contained in its written offer to the other party hereto in the first instance, failing which the procedure contained in this sub-clause will have to be repeated by a party desiring to sell his shares.

10. B will bring in further working capital to run an F & B Unit(s) at (Address of registered office). \_ Bank had advanced loans of about Rs. 1,10,00,000/-(Rupees One Crore Ten Lakhs Only) to XYZ which loans have to be repaid by them. B will be bringing further moneys upto Rs. \_ (Rupees Only) to repay the loan. The Balance Rs. /- has been secured with the collateral security provided B. XYZ have entered into a Management and Royalty Agreement with \_\_\_\_\_ (P) Ltd., for the operation and management of the F & B unit(s) of XYZ and are entitled to receive their share of profit. A and B are equally entitled to this share of profit being equal shareholders of XYZ. It is hereby agreed that A shall not be entitled to a percentage of the profit which shall not exceed Rs. \_\_\_\_\_ /-(Rupees Only) per month from XYZ out of his share of profit subject to the terms contained herein and/or in any other document executed by him on behalf of XYZ. The balance money attributable to A shall be utilized to repay the loans and interest outstanding to Bank, and the amount of Rs. /- brought in by B and interest thereon, and towards the working capital brought in by B and interest thereon and any other loans of the XYZ. This arrangement will continue till the entire sums (liabilities) together with the interest thereon have been repaid. However B will be entitled to withdraw the profit attributable to his share.

11. B will be entitled to interest at the rate of 12% per annum on the sums brought in by him or his Associates / concerns / businesses.

12. A and B agree and undertake not to disclose or divulge directly or indirectly to any third party any trade or business secret or other secret or confidential information pertaining to the business, affairs or transactions of each other or of the Company or of their clients or customers, that may have been disclosed, imparted to or acquired by either of them from the other or from the Company.

13. A and B jointly and severally undertake:-

- (a) that they shall ensure that they, their representatives, proxies and agents representing them at general meetings of the shareholders of the Company shall at all times exercise their votes in such manner so as to comply with, and to fully and effectually implement, the provisions of this Agreement.
- (b) that if any resolution is proposed contrary to the terms of this Agreement, the parties, their representatives, proxies and agents representing them shall vote against it. If for any reason such a resolution is passed, the parties will, if necessary, join together and convene an extraordinary, general meeting of the Company in pursuance of section 100 of the Companies Act, 2013 for implementing the terms of this Agreement.

14. A and B shall jointly and severally procure and/or ensure that the Director or Directors of its choice on the board of the Company shall at all times fully and effectually implement and comply with (including by exercise of voting rights at meetings of the Board or resolutions by circulation and on resolutions passed at a meeting of any Committee of the Directors) the provisions of this Agreement.

15. If either A or B shall commit a breach of any of the terms or provisions of this Agreement and shall fail to rectify such breach within Sixty (60) days from the receipt of written notice from the party complaining of the breach, then the latter shall be entitled, without prejudice to its other rights and remedies under this Agreement or at law, to terminate the Agreement recorded herein by written notice.

16. No modification or alteration of this Agreement or any of its terms or provisions shall be valid or binding on A and/or B unless made in writing duly signed by both.

17. This Agreement is personal to A and B and shall not be transferred or assigned in whole or in part by either party without the prior written consent of the other.

18. If any dispute or difference shall at any time arise between A and B as to any terms, provisions or matters contained herein on as to their respective rights, claims, duties or liabilities hereunder or otherwise, howsoever in relation to or arising out of or concerning this Agreement, such dispute or difference shall be referred to the arbitration. The venue of such arbitration shall be in Bangalore unless otherwise agreed in writing. Such arbitration shall be held under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

19. This Agreement represents the entire agreement between the parties hereto on the subject matter hereof and cancels and supersedes all prior agreements, arrangements or understandings, if any, whether oral or in writing, between the parties hereto on the subject matter hereof.

IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first hereinabove written.

SIGNED AND DELIVERD by MR. A

in the presence of

.....

SIGNED AND DELIVERD by MR.B

in the presence of

.....

SIGNED AND DELIVERD for and on behalf of XYZ

By its SHAREHOLDERS AND AUTHORISED DIRECTORS

MR. A

MR. B

in the presence of

.....

### Contract of Appointment of Managing Director

According to Section 2(54) of the Companies Act, 2013, “managing director” means “a director who, by virtue of the article of a company an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company, and includes a director occupying the position of a managing director, by whatever name called.”

While drafting a contract of appointment, the following points have to be taken care of:

- The person who is being appointed as managing director must be a director of the company; and
- He must be entrusted with substantial powers of management.

Usually the articles of association of companies empower the Board of directors to appoint one or more of the directors as managing director(s) and fix their remuneration subject to the provisions of Sections 196, 197, 198, 199, 200 and other applicable provisions of the Act and Rules make thereunder. The Board of directors while appointing a director as managing director, critically examines the draft agreement prepared by the secretary for

the appointment of the managing director and after having approved the same with or without any modification, authorises one of its directors to sign and execute for and on behalf of the company, the agreement for the appointment of the managing director. It should, therefore, be made sure that the person executing the agreement on behalf of the company is duly authorised by the Board of directors in this regard.

Being a contract, such an agreement must have all the essential ingredients of a contract under the Indian Contract Act, 1872, namely,

- (i) free consent of parties;
- (ii) competence to contract;
- (iii) for a lawful consideration;
- (iv) with a lawful object; and
- (v) are not expressly declared to be void in the Act (Section 10).

Section 11 of the Contract Act lays down that “every person is competent to contract who is of the age of majority, according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

Section 12 of the said Act provides that a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

According to Section 14 of the Contract Act, consent is said to be free when it is not caused by –

- coercion;
- undue influence;
- fraud;
- misrepresentation; or
- mistake.

### **Specimen Agreement of Service as a Managing Director of a Company**

THIS AGREEMENT is made on the..... day of..... 2020 between..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter called “Company” of the one part and Mr..... son of Mr..... resident of..... (hereinafter called “the Managing Director” of the other part).

It is hereby agreed as follows:

1. The company hereby appoints under Section 203 of the Companies Act, 2013, Mr..... as Managing Director of the company for period of five years with effect from..... and the Managing Director hereby agrees to serve the company in such capacity for a period of five years with effect from.....
2. The Managing Director shall exercise and perform such powers and duties as the Board of directors of the company (hereinafter called “the Board”) shall, from time to time, determine, and subject to any directions and restrictions, from time to time, given and imposed by the Board and subject to the restrictions contained hereinafter, he shall have the general control, management and superintendence of the business of the company with power to appoint and dismiss employees (other than officers of the company drawing a basic pay of Rs. 3,000 and above per month) and to enter into contracts on behalf

of the company in the ordinary course of business and to do and perform all other acts and things, which in the ordinary course of business he may consider necessary or proper or in the interest of the company.

3. Without prejudice to the generality of the powers vested in the Managing Director under the preceding clause hereof, the Managing Director shall be entitled to exercise the following powers –
  - (a) With Board's approval singly or together with other authorised officer(s) of the company, to open and operate on any banking or other account and to draw, make, accept, execute, endorse, discount, negotiate, retire, pay, satisfy and assign cheques, drafts, bills of exchange, promissory notes, hundis, interest and dividend warrants and other negotiable or transferable instruments or securities;
  - (b) Together with other authorised officer(s) of the company to borrow moneys with or without security, but not exceeding Rs. five lakhs at a time from one party;
  - (c) To incur capital expenditure up to a sum of Rs. five lakhs during any financial year;
  - (d) Together with other authorised officer(s) of the company, to invest funds of the company in approved securities (other than in shares of other companies) and on fixed deposit with the company's bankers provided that such investments in any one financial year shall not exceed Rs. twenty lakhs;
  - (e) To engage employees and other servants for the company at a basic salary not exceeding Rs. 3000/- per month within the budget sanctioned by the Board;
  - (f) To increase the salary or the remuneration of any employee or servant of the company whose basic salary does not exceed Rs. 2,000/- per month. General increments must be with the Board's approval;
  - (g) Together with other authorised officer(s) of the company, to enter into contracts for the purchase of goods and hiring of services for the company which contracts do not extend over a period of one year or exceed in value the sum of Rs. ten lakhs;
  - (h) To institute, prosecute, defend, oppose, appear or appeal, to compromise, refer to arbitration, abandon subject to judgment, proceed to judgment and execution or become non-suited in any legal proceedings relating to customs or excise duties, tax on income, profits and capital and taxation generally or otherwise.
4. The Managing Director shall, throughout the said term, devote the whole of his time, attention and abilities to the business of the company, and shall obey the orders, from time to time, of the Board and in all respects conform to and comply with the directions and regulations made by the Board, and shall faithfully serve the company and use his utmost endeavour to promote the interest thereof.
5. The company shall pay to the Managing Director during the continuance of this agreement in consideration of the performance of his duties –
  - (a) a salary at the rate of Rs. .... per month;
  - (b) the actual travelling expenses incurred by the Managing Director in or about the business of the company;
  - (c) the actual entertainment expenses and approved club membership fees reasonably incurred by the Managing Director in or about the business of the company;
  - (d) the actual hospital and medical expenses which have been incurred by the Managing Director for

himself, his wife, dependent parents and his minor children, provided that such expenses during the three consecutive financial years shall not exceed Rs.....

- (e) The Managing Director shall be entitled to use the company's car, all the expenses for maintenance and running of the same including salary of the driver to be borne by the company;
  - (f) The company shall provide the Managing Director with rent free furnished accommodation and will pay electricity and water charges;
  - (g) He shall also be entitled to use the company's telephone at his residence, the charges whereof shall be borne by the company;
  - (h) The Managing Director shall be entitled to participate in any provident fund and gratuity fund or scheme for the employees which the company may establish;
  - (i) The Managing Director shall be entitled to such increments from time to time as the Board may in the discretion determine;
  - (j) The Managing Director shall be entitled to privilege annual leave on full salary for a period of one month, such leave to be taken at such time to be previously approved by the Board; Provided that the Board shall be entitled, at its sole and uncontrolled discretion, to permit the Managing Director to accumulate such leave for not more than three months; provided further that any leave not availed of by the Managing Director shall be encashable.
6. The Managing Director shall not during the period of his employment, and without the previous consent in writing of the Board, engage or interest himself either directly or indirectly in the business or affairs of any other person, firm, company, body corporate or concern or in any undertaking or business of a nature similar to or competing with the company's business and further shall not, in any manner, whether directly or indirectly, use, apply or utilise his knowledge or experience for or in the interest of any such person, firm, company, body corporate or concern as aforesaid or any such competing undertaking or business as aforesaid.
  7. The Managing Director shall not, during the continuance of his employment or any time thereafter, divulge or disclose to any person, firm, company, body corporate or concern, whatsoever or make any use whatever for his own or for whatever purpose of any confidential information or knowledge obtained by him during his employment of the business or affairs of the company or of any trade secrets or secret processes of the company and the Managing Director shall, during the continuance of his employment hereunder, also use his best endeavours to prevent any other person, firm, company, body corporate or concern from doing so.
  8. Any property of the company or relating to the business of the company, including memoranda, notes, records, reports, plates, sketches, plans, or other documents which may be in the possession or under the control of the Managing Director or to which the Managing Director has at any time access, shall at the time of the termination of his employment be delivered by the Managing Director to the company or as it shall direct and the Managing Director shall not be entitled to the copyright in any such document which he hereby acknowledge to be vested in the company or its. assigns and binds himself not to retain copies of any of them.

The Managing Director shall, from time to time, during his employment hereunder, fully disclose to the company the progress of his investigation and any discoveries he may make himself or in conjunction with others and if at any time hereafter he shall make himself or in conjunction with others any improvement, invention or discovery arising out of or in connection with the said employment he shall forthwith disclose to the Company or any patent agent appointed by it a full and complete description of the nature of the said improvement, invention or discovery and the mode of performing the same.

9. The whole interest of the Managing Director in the said improvement, invention or discovery and in all future improvements thereon at any time discovered or invented by the Managing Director alone or in conjunction as aforesaid, shall be the sole and absolute property of the Company and the Managing Director, if and whenever required by the Company during the period of employment or after the termination thereof shall at the expense of the Company, join with the Company in applying for letters patent, design registration or other forms of protection in India and in such other countries as the Company may direct for the said improvement, invention or discovery or any such improvement thereon and shall, on the request by, and at the expense of the Company, execute, sign and do all applications, assignments, instruments and things necessary to vest the whole of his interest in the said improvements, invention or discovery or improvement thereon and any letters patent or other protection that may be obtained in respect thereof, in the Company or person or persons appointed by it.
10. If the Managing Director shall at any time be prevented by ill-health or accident from performing his duties hereunder, he shall inform the Company and if he shall be unable by reason of ill-health or accident for a period of sixty days in any period of twelve consecutive calendar months to perform his duties hereunder, the Company may terminate his employment.
11. The Company shall be entitled to terminate this agreement in the event of the Managing Director being guilty of misconduct or such inattention to or negligence in the discharge of his duties or in the conduct of the Company's business or of any other act of omission or commission inconsistent with his duties as the Managing Director or any breach of his agreement.
12. If before the expiration of this agreement the tenure of office of the Managing Director shall be determined by reason of a reconstruction or amalgamation whether by the winding up of the Company or otherwise, the Managing Director shall have no claim against the Company for damages.
13. The Company shall be at liberty from time to time to appoint a person or persons to be Managing Director(s) jointly with the Managing Director.

The Managing Director hereby agrees that he will not, at any time, after the termination of this agreement, represent himself as being in any way connected with or interested in the business of the company.

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

Witnesses:

*for and on behalf of the company*

1.

2.

*Managing Director*

### Contract of Appointment of Manager

Section 2(53) of the Companies Act, 2013 defines "Manager" means an individual who, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of the company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not.

The above definition highlights the following points, which must be borne in mind by the secretary while drafting an agreement for the appointment of a manager:

- (1) a manager has to be an individual only;
- (2) a manager has the management of the whole, or substantially the whole, of the affairs of the company;
- (3) a manager functions subject to the superintendence, control and direction of the Board of directors of the company;



- (4) a manager may be under a contract or not.

If, for the appointment of a manager, an agreement is not drawn and executed, then the secretary must draft a detailed Board resolution approving the appointment of a manager, making it very clear that the manager shall have the management of the whole or substantially the whole of the affairs of the company, and shall function under the superintendence, control and direction of the Board of directors, which means that he shall act under the directions of the Board, his actions shall be subject to the scrutiny and supervision of the Board and finally the Board shall direct the manager in his day-to-day management of the affairs of the company. As against a managing director, who is entrusted by the Board of directors with substantial powers of management, a manager by virtue of his appointment, has the power of management. A managing director after the powers of management have been entrusted to him performs his day-to-day functions independently according to the mandate of the Board, whereas a manager acts under the superintendence, control and direction of the Board. Keeping the above subtleties between the two managerial personnel in view, the secretary shall proceed to draft an agreement for the appointment of a manager.

### **Specimen Agreement for the Appointment of a Manager in a Company**

This AGREEMENT is made on this..... day of..... between..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at....., (hereinafter referred to as the Company, which expression shall, unless repugnant to the context or contrary to the meaning thereof include its legal representatives) of the one part and Mr....., son of Mr....., resident of..... (hereinafter called the manager) of the other part.

WHEREAS the company intends to appoint a Manager and Mr....., has been considered as a suitable and competent person for the said post;

AND WHEREAS the said Mr..... has agreed to accept his appointment as the Manager of the Company.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. The said Mr..... is hereby appointed on the terms and conditions hereinafter provided, as the Manager of the Company for a term of five years commencing..... on a monthly remuneration of Rs. ... subject to the approval of his appointment by the Central Government under Section 203 of the Companies Act, 2013 and also subject to the approval of his remuneration by the Central Government pursuant to the provisions of Sections 196, 197, 198, 199 and 200 and other applicable provisions of the Act.
2. The Manager shall be entitled to other pecuniary benefits which are enjoyable by other employees of the company.
3. The Manager shall be paid travelling allowance for the tours he makes in connection with the, business of the company to perform his duties or to carry out the directions of the Board of Directors of the company.
4. The Manager shall be entitled to bonus in accordance with the provisions of the law.
5. The Manager shall be entitled to annual increment of his remuneration at the rate of Rs..... per annum.
6. The Manager shall be on probation for a period of six months. If his work is found satisfactory, his appointment shall continue for a full term of five years including the period of probation.
7. Either the company or the Manager shall be entitled to terminate this agreement by, giving the other, notice in writing of sixty days but the company may terminate this agreement by paying two months' remuneration to the Manager in lieu of the notice.



8. If the Manager dies during his continuance of service, his salary, remuneration, bonuses, allowances etc. for the current financial year shall be paid to his heirs, legal representatives, executors, administrators in a rateable proportion of what he would have received if he had lived and had continued in the service of the company for the whole of that year.
9. The Manager shall not be entitled to make any claim for damages against the company other than liquidated damages, if his services are determined on account of a reconstruction or amalgamation whether by the winding up of the company or otherwise before the expiration of this agreement.
10. The Manager shall devote the whole of his time and attention to the business of the company during the term of his service with the company and shall work with due diligence and using his abilities to his best. He shall comply with the directions issued by the Board of Directors of the company from time to time. He shall obey the orders issued by the Board of Directors. He shall do his best to promote the interest of the company and shall faithfully serve the company.
11. The Manager shall perform the duties towards the company and exercise the powers assigned to or vested in him by the Articles of Association of the company or by the Board of Directors of the company.
12. The Manager shall not disclose during the term of his service any information obtained by him in relation to the business of the company while attending to his duties and discharging his functions or exercising his powers as the Manager even to such employees of the company as have no concern with the information or to any person not connected with the company.
13. The Manager shall not divulge any secret relating to any working process, improvement in the working process used by the company, invention leading to improvement in the working process or introduction of a new working process usable in the business of the company, invention relating to any of the articles connected with the business of the company, business matters, administrative affairs of the company, to any person not connected with such process, invention, matter and affairs either during the period of his employment in the company or any time after he has left the company.
14. The Manager shall be entitled neither to make use of any of the inventions in relation to the business of the company made by him during the employment in the company, nor to derive any benefit of all the patents whether obtainable in respect thereof in India or abroad, as such inventions and patents shall belong to the company. The Manager shall do at the expense of the company all that is necessary to give full benefit of such invention and patents whenever he is required to do so.
15. The Manager shall be bound not to do himself or participate or associate in any capacity with others in doing the business in which the company is engaged during the period of his employment with the company and for a period of six years after he has left the services of the company.
16. The Manager shall never make use of the working process used by the company even after he has left the services of the company and he shall not employ any invention relating to the business of the company either made by him during the period of his employment in the company or invention relating to the business of the company made by other employees of the company at any time.

IN WITNESS WHEREOF the parties hereto have set their hands on the day, month and year above written.

Witnesses:

For..... Ltd.

1.

2.

Manager

### Contract of Appointment of Company Secretary

The position of Secretary in a company is a very important one. He is the person who acts as liaison between

the Board of Directors and the shareholders on the one hand, with the Departmental Division heads and with the world at large on the other hand. Every information from various departments, divisions, branches, executives, departmental heads, shareholders, creditors, debtors, bankers, financial institutions, Government departments and others concerned with the company converges in his office. He gathers all the information, arranges it in a useful manner, furnishes it with explanations etc. on the company's long-term policies and short-term plans as formulated by the Board of directors to the concerned persons. He collects, arranges and presents the desired/required information to the Board on the progress in the implementation of the various decisions of the Board so that whenever and wherever some corrective or preventive actions are to be taken, the same be taken in time by the Board.

The Company Secretary is expected to be expert in all the aspects of corporate management viz., Company Law and Practice Income-tax Law and Practice, Excise, Sales tax, Import and Export and Industrial Licensing Law and Practice, various types of insurance-covers, Patents, Trade Marks, Design and Copyright Law and procedure, Industrial Law, Shops and Commercial Establishments Law and Essential Commodities Act and the Orders issued thereunder, drafting of various corporate documents, reports etc. and, accounts, audit, banking and finance.

The appointment of a Company Secretary is done by the Board of Directors and he functions at the pleasure of the Board. He acts under the Board's instructions but at the same time he is adviser to the Board in all corporate matters. Therefore, the relationship between the Board and the Company Secretary has to be very cordial and there must be perfect understanding between the two, particularly with the Chairman/Managing director, executive director and other Chief Executive Officers.

Usually the appointment of a Company Secretary is made by an appointment letter signed and issued by the Chief Executive Officer, who may be the managing director, executive director, whole-time director etc. under specific authority of the Board.

This letter is an offer by the company to the prospective Company Secretary and when he accepts the same it become a binding contract between him and the company and their relationship is governed by the terms and conditions thereof. "company secretary", according to Section 2(24) of the Companies Act, 2013 means a company secretary as defined in clause (1) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed to perform the functions of company secretary under this Act.

As per Section 205(1) of the Companies Act, 2013, the functions of the company secretary shall include,—

- (a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
- (b) to ensure that the company complies with the applicable secretarial standards;
- (c) to discharge such other duties as may be prescribed.

Therefore, even if the letter of appointment of a Company Secretary or an agreement between the company and the Company Secretary is silent on those statutory duties and functions, a Company Secretary is bound by law to perform them strictly. Therefore, the letter of appointment or the agreement need not detail all those duties. Usually it contains the fact of offer by the company, the date on or before which he is required to join the service of the company, his salary and 'perks', his answerability to the Board of Directors and/or other senior executives of the company, his relationship with other departmental heads, his leave eligibility and other benefits, commitment on his part not to divulge the secrets of the company, so on and so forth.

### A Specimen of the Letter of Offer to the Prospective Company Secretary

Name and Address of the company.

Ref. No.....

Date: .....

Mr.....

.....

Dear Sir,

I have been directed to advise you that the Board of Directors of the company have decided to appoint you as Secretary of the company and the said assignment is hereby offered to you. You are requested to join the service of the company on or before..... and contact the undersigned so that you may be introduced to the concerned persons before you start functioning.

You will be considered to have been appointed with effect from the day you actually join duty.

2. The company shall pay to you a monthly basic salary of Rs..... in the time scale of pay of Rs..... with other allowances as are applicable to other employees of the company in the same time scale of pay.

3. You will enjoy other benefits like the medical expenses reimbursement, leave travel allowance, bonus etc. as may be permissible under the company's service rules.

4. You shall be allowed casual leave/sick leave/festival holidays, weekly off days and earned leave as per rules of the company.

5. You will be on probation for a period of six months and on your services during the said probation period being found satisfactory the Board of Directors may consider you for confirmation in the said post.

6. During the period of your probation, your services may be terminated by the company without any notice and you may also leave the service of the company at twenty-four hours' notice. On confirmation, however, the contract of employment may be terminated by either party by giving the other, thirty days' written notice or paying thirty days' salary in lieu thereof.

7. The company may terminate your services even after confirmation without giving you any notice if you are found by the Board of Directors of the company not performing your assigned duties and your statutory duties properly and to the satisfaction of the Board.

8. As Company Secretary you shall be exclusively responsible:

- (a) for complying with all the provisions of the Companies Act and the various Rules framed thereunder and other laws applicable to the company;
- (b) maintaining all the statutory and non-statutory essential registers, books, files, records, papers etc.;
- (c) preparing and filing with the Registrar of Companies and other concerned authorities the required reports, returns, documents, papers etc. complete in all respects and within the prescribed periods of time; and
- (d) for carrying out the instructions, directions and advice of the Board of Directors of the company given to you from time to time.
- (e) ensuring the adherences of applicable secretarial standards.

9. You shall devote your whole time and attention to the work of the company during your tenure as Company Secretary and shall work with due diligence and using your abilities to your best. You shall obey the orders of the Board of Directors of the company. You shall do your best to promote the interest of the company and shall faithfully serve the company.

10. You shall not disclose to any unauthorised person during your employment as Secretary of the company an information obtained by you in relation to the business and corporate policies of the company with special reference to the company's policy regarding the issue of rights shares, bonus shares, time and quantum of payment and/or declaration and payment of dividends from time to time.

Please convey your acceptance of the offer and the terms and conditions attached thereto by signing the carbon copy of this letter and returning the same to the company within a period of seven days from the receipt hereof.

Thanking you.

Yours truly

For.....Ltd.

(.....)

Managing Director

I accept the above offer of the post of Company Secretary with all the terms and conditions attached thereto and shall join on.....

(.....)

Company Secretary

## DEEDS OF AMALGAMATION OF COMPANIES: TRANSFER OF UNDERTAKINGS

An amalgamation may be defined as an arrangement whereby the assets of two companies become vested in, or under the control of one company, which may or may not be one of the original two companies. Such a company has as its shareholders all, or substantially all, the shareholders of the two companies. An amalgamation is effected by the shareholders of one or both of the amalgamation companies exchanging their shares either voluntarily or as a result of operation of law, for shares in the other or a third company. The arrangement is frequently effected by means of a take-over offer by one of the companies for the shares of the other, or of a take-over offer by a third company for the shares of both.

### Specimen Agreement between two Companies to Amalgamate by Sale of one to the other

This AGREEMENT is made on this..... day of..... between..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter referred to as the "Vendor", which expression shall, unless repugnant to the context or contrary to the meaning thereof, include its successors and assigns) to the one part and..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter referred to as "the company", which term shall, unless repugnant to the context or contrary to the meaning thereof, include its successors or assigns) of the other part.

WHEREAS the vendor was incorporated in the year..... with an authorised share capital of Rs. ten lakhs divided into one lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company shall have the power to sell, transfer or otherwise dispose of the whole or any part of the business and undertaking of the vendor company and to accept in consideration, cash or shares or debentures or debenture stock or other securities of any other company and to distribute among the members in specie or otherwise any surplus assets remaining in the winding-up of the vendor company.

AND WHEREAS the company was incorporated under the Companies Act, 2013 in the year..... with an authorised share capital of Rs. fifty lakhs divided into five lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company may acquire by purchase or otherwise the business and undertaking, in part or whole of any other company or companies having any of the purposes or objects same or similar to those of the company.

AND WHEREAS the Articles of Association of the company also provide that the company is empowered to increase its share capital.

IT IS HEREBY AGREED AS FOLLOWS:

1. The vendor shall sell and the company shall purchase the whole of the business undertaking, assets and property of the vendor, benefits of all securities which shall include cheques and bills given to the vendor from time to time in consideration or payment thereof, benefits of subsisting contracts, and debts due to the vendor relating to the business of the vendor as a running concern from the day of..... The said purchase shall not include the uncalled capital of the vendor. Up to the aforesaid date for the aforesaid purchase the vendor shall continue to carry on the business for the benefit of the company.
2. From the aforesaid date of the aforesaid purchase the company shall be liable for all the debts and liabilities of the vendor and shall be liable to perform all its engagements. The vendor shall be indemnified by the company against all claims and demands. The company shall defend all actions and proceedings against the vendor who shall also be indemnified in respect of such actions and proceedings.
3. The company shall pay to the vendor Rs. seven lakhs as consideration for the aforesaid purchase and out of the aforesaid consideration Rs. five lakhs shall be paid in cash and the balance of Rs. two lakhs shall be paid to the vendor by allotment of twenty thousand Equity Shares of Rs. ten each in the capital of the company credited as fully paid-up shares. For the allotment of the aforesaid shares, the vendor has conveyed its acceptance, vide its letter No..... dated.....
4. The company shall create and issue five lakh Equity Share of Rs. ten 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.
5. For the purpose of Stamp Duty, the value of the immoveable properties of the vendor shall be fixed for Rs..... and the goodwill benefits of contracts and securities, debts, stock, fittings and fixture and all other properties of the vendor shall be valued at Rs.....
6. The title deeds to all the immoveable and other properties of the vendor and an abstract of all the properties of the vendor, the sale of which is hereby agreed shall be handed over to the company within thirty days from this day..... of..... The company shall accept the same titles sufficient in all respects.
7. On the..... day of....., the vendor shall be paid Rs. five lakhs in cash and shall be delivered the certificates showing that the company shall have allotted twenty thousand Equity Shares of Rs. 10 each fully paid- up of the share capital of the company.
8. Thereupon, the purchase shall be deemed to have been completed and the vendor 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 hereto have set their hands and seals. Signatures and seals of the parties.

## COMPROMISE AND ARRANGEMENTS

During its life time a company may find it necessary to reorganise itself. Such a re-organisation may be for many reasons. When a company is financially weak, it requires to reach a compromise with its members and/or creditors. It may wish to take over the business of another running but endangered .company. It may wish to restructure its share capital.

Sections 230 to 240 of the Companies Act, 2013 provide various methods of company re-organisation or

reconstruction. The various terms used for reorganisation are arrangement, reconstruction, amalgamation, merger, take-over, etc. They are distinct terms but they have many common features and to a great extent they overlap. The expression “arrangement” is of wider import and include reconstruction and amalgamation. “Arrangement” has been defined in explanation to section 230(1) of Companies Act, 2013 as including a reorganisation of the company’s share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods.

“Arrangement” has a wider interpretation and includes reconstructions and amalgamations.

“Reconstruction” has not been defined in the Act. A reconstruction normally entails the transfer of an undertaking to another company, consisting substantially of the same shareholders with a view to its being continued by the transferee company, and usually resorted to for achieving one or more of the following objects:

- (a) For the purpose of raising fresh capital by issuing partly paid shares in the new company in exchange for fully shares in the old company, and calling up the balance on new shares as and when required;
- (b) For extending the company’s objects;
- (c) For reorganising or rearranging the capital structure and the rights of members as between themselves; and
- (d) For effecting a compromise with creditors, or the allotment to them of shares or debentures in settlement of their claims.

A reconstruction may, however take place, without the promotion and incorporation of new company, by compromise with members involving alterations of various rights between each class, usually also involving the writing down of the amount of share capital (as in a reduction of capital, which is a special form of reconstruction) and by a compromise with creditors (including debenture holders).

Amalgamation usually covers a situation where two or more companies join forces either under the name of one of them or in a new company formed for the purpose. This is a blending of two or more existing undertakings into one, the shareholders of each company becoming substantially the shareholders in the company which is to carry on the blended undertakings.

Amalgamation will usually require the consent of the directors of both the companies and may also be described as “Merger”. On the other hand, the word “take-over” is usually used to describe the acquisition by one company of sufficient number of shares in another company so as to give the purchaser company control over that company.

Amalgamations and take-overs are resorted to for any one or more of the following purposes:

- (a) For saving overheads and working expenses and for improving efficiency in the management, production and marketing by reason of unified control;
- (b) For reduction or elimination of competition, and some times for securing the advantages of vertical combination by an amalgamation of companies to secure a linking of different stages or processes of production back to raw materials and forward to the finished product; and
- (c) For obtaining greater facilities possessed by one large company, as compared with a number of smaller companies, for raising additional capital, for buying raw materials, etc. and for securing better credit facilities on the most favourable terms, and, what is, of increasing importance now a days, for carrying out research work on a large and co-ordinated scale and basis.

The memorandum of association of almost every company permits it to amalgamate with another company. In case there is no such provision, it will be necessary to alter the memorandum before any scheme of amalgamation is drawn up.



### Arrangement

Section 230 of the Companies Act, 2013 provides that when a compromise or arrangement (the word compromise implies the existence of some dispute, but the word arrangement is of wider application) is proposed between a company and

- (a) its creditors or any class of them; or
- (b) its members or any class of them,

then the Tribunal may, on the application of the company, or any creditor or member, or, if the company is being wound up, the liquidator, order a meeting to be called of the creditors or class of creditors, or of the members or class, of members, as the case may be.

The compromise or scheme of arrangement will then be binding upon:

- (a) all the creditors or class of creditors;
- (b) the members or class of members;
- (c) the company; and
- (d) in the case of a company being wound up, upon the liquidator and contributories. Provided that:
  - (1) it is approved by a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members as the case may be, present and voting in person or by proxy; and
  - (2) it is sanctioned by the court.

### SLUMP SALE AGREEMENT

Slump sale is one of the widely used ways of business acquisitions. In simple words, 'slump sale' is nothing but transfer of a whole or part of business concern as a going concern; lock, stock and barrel. The concept of 'slump sale' was incorporated in the Income Tax Act, 1961 ("IT Act") by the Finance Act, 1999 with the inclusion of section 2(42C). The term 'slump sale' is defined as transfer of one or more undertakings as a result of the sale for a lump-sum consideration without values being assigned to the individual assets and liabilities in such sales.

For looking at the meaning of word 'undertaking' resort has to be made to Explanation 1 to section 2(19AA). Section 2(19AA) defines "demerger" in relation to companies. Explanation 1 to Section 2(19AA) defines "undertaking" to be any part of an undertaking or a unit or division of an undertaking or a business activity taken as a whole but does not include individual assets or liabilities. As per definition of 'undertaking' even any part/division of an undertaking or business activity as a whole can be considered.

Explanation 2 to S. 2(42C) clarifies that the determination of value of an asset or liability for the payment of stamp duty, registration fees, similar taxes, etc. shall not be regarded as assignment of values to individual assets and liabilities. Thus, if value is assigned to land for stamp duty purposes, the transaction will not cease to be a slump sale.

The basic condition to be satisfied to qualify as a slump sale is that the transaction relating to transfer of business should be a transfer of undertaking and not transfer of individual assets and liabilities consisting of the business activity. This has been expressly provided in the Explanation 1 to Section 2(19AA) stated above. In case of transfer of individual assets and liabilities consisting of the business activity, the same would not imply transfer of undertaking [*Duchem Laboratories Ltd. v. ACIT*, ITA No. 3332/Mum/2004 June 12, 2009].

Given the high figures involved in such transactions, taxation is one of the key elements of consideration for both the buyer as well as the seller. With increase in slump sale deals, several rulings and judicial precedents



have emerged over the years. The following is an illustrative list of cases *where sale of an undertaking was held to be a slump sale* :

- (a) Land development business – *CIT v. Mugneeram Bangur & Co.*, [57 ITR 299 (SC)]
- (b) Sale of cement unit, which was transferred as a functional productive unit – *Coromandel Fertilisers v. DCIT*, [90 ITD 344 (Hyd.)]
- (c) Sale of branch – *CIT v. Narkeshari Prakashan Ltd.*, [196 ITR 438 (Bom.)] Slump sale is carried out through following steps:

**1. Find Buyer:** The seller has to find the potential buyers.

Before opting for slump sale there are various issues that needs to be analyzed especially the impact of capital gain tax to the seller and stamp duty to the buyer in the light of business strategies.

*Short listing of buyer:* The buyer or transferee companies needs to be shortlisted by refining the business and tax objectives.

*Primary Valuation:* This valuation enables the seller to get a better idea about value of the business to be sold.

*Analyse and Finalise buyer:* Analysis of shortlisted buyer should consider objective of the deal, cost and time required for execution and structure of the deal. This helps to get a better idea about the deal before finalisation.

**2. Sign MoU/Term sheet:** Once the buyer company is selected, there is need to sign MoU [Memorandum of Understanding] which helps the buyer company to get access to seller entities information for making due diligence, valuation etc.

**3. Make Valuation:** Valuation is a process of determining the value of assets and liabilities of business. It is one of the most important aspects of slump sale process, as seller wants maximum valuation for its business whereas buyer wants it at lowest end. Valuation of business is mandatory for listed company.

**4. Deal Structuring:** A deal should be structured considering agreement between buyer and seller. It should be time, cost and compliance effective. While structuring a deal following factors must be taken into consideration:

*Objective of the deal:* This includes the core objective set for deal of slump sale. While structuring the deal it must be taken into consideration that objective is getting achieved fully. As post deal factors such as ownership and control, financial impact depends on structuring of the deal.

*Transaction cost:* Transaction cost under slump sale majorly involve capital gain tax to the seller, stamp duty tax to the buyer and withdrawal of exemption deduction, and allowances, and apart from these professional fees to the consultants. Transaction costs involved in slump sale can go upto 5-10% of deal size.

*Discharge of consideration:* Lump sum consideration may be discharged by payment in cash or by way of issue of debentures and or both. Consideration being imperative aspect of slump sale should be discharged by taking in to consideration future financial, legal and strategic impact on transacting companies.

**5. Slump sale agreement:** Deal needs to be executed through agreement, capturing all slump sale clauses, effecting objectives predetermined and executed by both parties. The executed agreement needs to be registered as per applicable Stamp Act.

## LESSON ROUND UP

- The promoter of a company is a person who does the necessary preliminary work in connection with and incidental to the formation and the establishing of the company.
- The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre-incorporation contracts. The promoters generally enter into such contracts as agents for the company about to be formed.

- When the company comes into existence, it is not bound by the pre-incorporation contracts even when it takes the benefit of the work done on its behalf. However, specific performance of a contract between a third party and the promoters may be successfully claimed by the third party against the company, when the company enters into possession of the property on the faith of the promoters' contract.
- The pre-incorporation agreements entered into by the promoters acting on behalf of the intended company with third party cannot always be avoided for various reasons. These agreements affect the operations of the incorporated company.
- Memorandum of Association of the company is the fundamental formation document. It is the constitution and charter of the company. Draftsmen should know that Memorandum is the main edifice upon which the whole structure of the company is erected. Based on the provisions of Section 4, the main drafting requirements of contents of a Memorandum should be kept in mind.
- Articles are rules and regulations for management of internal affairs of the company. It constitutes a contract between the company and its members and members *inter se*. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum.
- 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. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act.
- While drafting a contract of appointment for the appointment of a managing director of a company, certain important points have to be taken care of, i.e., the person who is being appointed as managing director must be a director of the company and must be entrusted with substantial powers of management.
- The Board of Directors while appointing a director as managing director, critically examines the draft agreement prepared by the Secretary for the appointment of the managing director and after having approved the same with or without any modification, authorises one of its directors to sign and execute for and on behalf of the company, the agreement for the appointment of the managing director.
- Being an agreement, such a contract must have all the other essential ingredients of a contract under the Indian Contract Act, 1872.
- Likewise, the Secretary has to bear in mind important points while drafting an agreement for the appointment of a manager.
- The appointment of a Company Secretary is done by the Board of Directors and he functions at the pleasure of the Board. Usually the appointment of a Company Secretary is made by an appointment letter signed and issued by the Chief Executive Officer, who may be the managing director, executive director, whole-time director etc. under specific authority of the Board.
- This letter is an offer by the company to the prospective Company Secretary and when he accepts the same it becomes a binding contract between him and the company and their relationship is governed by the terms and conditions thereof.
- During its life time a company may find it necessary to reorganise itself. Such a re-organisation may be for many reasons. When a company is financially weak, it wishes to reach a compromise with its members and/or creditors. It may wish to take over the business of another running but endangered company. It may wish to restructure its share capital.
- The Companies Act, 2013 provides various methods of company re-organisation or reconstruction. The various terms used for reorganization are arrangement, reconstruction, amalgamation, merger, take-over, etc.

*(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)*

- 
- This image shows a single sheet of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

# Lesson 9

## Pleadings

### LESSON OUTLINE

- Introduction
- Fundamental Rules of Pleading
- Complaint Structure
- Description of the Parties
- Written Statement
- Requirement of Written Statement
- How to draft a Written Statement
- Interlocutory Application
- Affidavit
- Execution Petition
- Memorandum of Appeal and Revision
- Revision
- Various types of suits under C.P.C
- Complaint & Bail Application
- Application under Section 125 of Cr.P. C
- First Information Report
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

Pleadings generally mean either a plaint or a Written statement. The main objective behind formulating the rules of pleadings is to find out and narrow down the controversy between the parties.

Drafting of plaints, applications, reply/written statement require the skills and knowledge of a draftsman. These should be drafted after looking into the provisions of law so that no relevant detail is omitted.

The objective of the study lesson is to disseminate information to the students about the legal provisions relating to drafting of pleadings. Besides, students will be familiarized with the drafting of various petitions/applications under the Civil Procedure Code, appeals and revision applications etc.

## BACKGROUND OF INDIAN SYSTEM

In the ancient times when the king was the fountainhead of all justice, a petitioner used to appear before the king in person and place all facts pertaining to his case before His Majesty. After such oral hearing, the King used to summon the other party and thereafter listen to the defence statements put forward by the person so summoned. There used to be same sort of cross examination or cross questioning of the parties by the King himself. Thereafter, the decision was announced. There was hardly any system of written statements; all the same “pleadings” did exist, although they were oral. The King and his courtiers kept on what may be called a mental record of the proceedings. Perhaps only few serious and otherwise significant cases, the decisions were recorded. Similarly during the Mughal period also pleadings were oral in form. During British period with the establishment of Diwani Courts, High Courts etc. and with the passage of time, judicial system underwent a change. The administration at justice was separated from the executive and assigned to the court of law. Complexity of resulted in enormous litigation, and oral hearing of the ancient times became almost impossible. Scribes used to keep records of all the proceedings. Gradually this procedure was also abandoned and the litigants were allowed to bring their claims and contentions duly drawn up to file them before the Hon’ble courts. When this change exactly happened, it is difficult to say. Experience was a better teacher; and the changes in court procedure took place not only in the light of the past experience but also in the face of expediency. Written proceedings made the task of the courts of law easier and less complicated than the earlier oral proceedings. By the turn of 19th century the procedure of pleadings has become fairly elaborate and systematized.

## INTRODUCTION

When the civil codes came to be drafted, the principles of pleadings were also given statutory form. Vide Order VI Rule 1 of the Code of Civil Procedure, 1908 “Pleading” shall mean ‘plaint’ or ‘written statement’. Mogha has elaborated this definition when he remarked that “pleadings are statements, written, drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer”.

Before the trial of a civil suit starts, it is highly desirable that the Court should know exactly what it has to decide upon and the parties should know exactly what they are contesting about. The most, satisfactory method of achieving this object would be one by which each party in turn is obliged to state his own case, and answer the case of the opponent before the trial comes on. Such statement of the parties and the replies to them are known as pleadings. The present day system of pleadings in our country is based on the provisions of the Civil Procedure Code, 1908 supplemented from time to time by rules in that behalf by High Courts of the States. There are rules of the Supreme Court and rules by special enactments as well. For one, words ‘plaints’ and ‘complaints’ are nearly synonymous. In both, the expression of grievance is predominant. Verily, when a suitor files a statement of grievance he is the plaintiff and he files a ‘complaint’ containing allegations and claims remedy. As days passed, we have taken up the word ‘Plaint’ for the Civil Court and the word ‘Complaint’ for the Criminal Court. Section 26 of the Code of Civil Procedure, 1908 states that every suit shall be instituted by the presentation of a Plaint or in such other manner as may be prescribed. Order IV Rule 3 states “every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf”. Similarly Order VIII Rule 1 defines that when a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant.

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”. The written statement is filed by the defendant as an answer to the contentions of the plaintiff and it contains all materials and other objections which the defendant might place before the court to admit or deny the claim of the plaintiff.

Pleadings are, therefore, the foundation of any litigation, and must be very carefully drafted. Any material

omission in the pleading can entail serious consequences, because at the evidence and argument stages, parties are not permitted to depart from the points and issues raised in the pleadings, nor can a party be allowed to raise subsequently, except by way of amendment, any new ground of claim or any allegation of fact inconsistent with the previous pleadings of the party pleading the same. In some cases, the court may allow amendment of the plaint or the written statement on the application of a party to the suit. This can be done by taking recourse to order VI Rule 17 of Civil Procedure Code, 1908. Another case of departure is where the defendant pleads for set-off or that of the counter-claim under order VIII of the Code of Civil Procedure, 1908.

Pleadings contain material facts, contentions and claim of the plaintiff, and the material facts, contentions, denials or admissions of claims by the defendants. There may also be counter claims by the defendant which may of two categories - (i) a claim to set-off against the plaintiff's demand is covered by order 8 Rule 6, and (ii) and independent counter claims which is not exactly set off but falls under some other statute. While the former is permitted to be pleaded by the courts, the latter is not, but when the defendant files such counter claims, the written statements is treated as a plaint.

### Object of Pleadings

The whole object of pleading is to give a fair notice to each party of what the opponent's case is. Pleadings bring forth the real matters in dispute between the parties. It is necessary for the parties to know each other's stand, what facts are admitted and what denied, so that at the trial they are prepared to meet them. Pleadings also eliminate the element of surprise during the trial, besides eradicating irrelevant matters which are admitted to be true. The facts admitted by any parties need not be pursued or proved. Thus the pleadings save the parties much bother, expense and trouble of adducing evidence in support of matters already admitted by a party, and they can concentrate their evidence to the issue framed by the Court in the light of the facts alleged by one party and denied by the other. There is another advantage of the pleadings. The parties come to know beforehand what points the opposite party will raise at the trial, and thus they are prepared to meet them and are not taken by surprise, which would certainly be the case if there were no obligatory rules of pleadings whereby the parties are compelled to lay bare their cases before the opposite party prior to the commencement of the actual trial.

Odgers in his "Pleading and Practice" (14<sup>th</sup> Ed. At p 65) observes:

*"The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a cross claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know exactly what they are fighting about, otherwise they may go to great expense in procuring evidence to prove at the trial facts which their opponents will at once concede. It has been found by long experience that the most satisfactory method of attaining this object is to make each party in turn state his own case and answer that of his opponent before the hearing. Such statements or answers to them are called the pleadings."*

The object of the pleadings is three fold. They are

- a. to define the issues involved between the parties;
- b. to provide an opportunity to the opposite party or other side to meet up the particular allegation raised against him or her, and
- c. to enable the Court to adjudicate the real issue involved between the parties.

### Fundamental Rules of Pleadings

It is a rule to observe in all Courts that a party complaining of an injury and suing for redress, can recover only

*secundum allegata et probata*<sup>1</sup>. The provisions of law under which the suit has been instituted should also be mentioned<sup>2</sup>. The pleas should be specifically mentioned, as the evidence cannot be looked into in the absence of a specific plea or point. The Court will however see the substance, if the plea is not properly worded. The four fundamental rules of pleadings are:

- 1) That a pleading shall contain, only a statement of facts, and not Law;
- 2) That a pleading shall contain all material facts and material facts only.
- 3) 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,
- 4) That a pleading shall state such material facts concisely, but with precision and certainty.

**Rule I: Facts and not Law:** One of the fundamental rules of pleadings embodied in Order VI Rule 2 is that a pleading shall contain and contain only a statement of facts and not law. The duty of the pleader is to set out the facts upon which he relies and not the legal inferences to be drawn from them. And it is for the judge to draw such inferences from those facts as are permissible under the law of which he is bound to take judicial notice. A judge is bound to apply the correct law and draw correct legal inferences and facts, even if the party has been foolish to make a written statement about the law applicable of those facts. If a plaintiff asserts a right in him without showing on what facts his claim of right is founded or asserts that defendant is indebted to him or owes him a duty without alleging the facts out of which indebtedness or duty arises, his pleading is bad.

The parties should not take legal pleas but state the facts on the basis of which such legal conclusions may logically follow and which the court would take a judicial notice of. Thus where a party pleads that the act of the defendant was unlawful, or that the defendant is guilty of negligence, or that the defendant was legally bound to perform specific contract, such a pleading would be bad. In such cases, the plaintiff must state facts which establish the guilt or negligence of the defendant, or how the particular act of the defendant was unlawful, of the fact leading to the contract which thus bound the defendant. The plaint should only contain the recitals that would form the basis of the claim. The legal position created thereby need not be described.

Thus in a declaratory suit, it is not enough to plead that the plaintiff is the legal heir of the deceased for this is an inference of law. The plaintiff must show how he was related to the deceased, and also show the relationship of other claimants, and other material facts to show that he was nearer in relation to the deceased than the other claimants.

Similarly on money suit it is not enough that the plaintiff is entitled to get money from the defendant. He must state the facts showing his title to the money. For example, he should state that the defendant took loan from the plaintiff on such and such date and promised to return the money along with specified interest on a particular date, and that he requested the defendant to return the said amount after the date but that he refused to return the money. If some witnesses were present when the money was lent or when the demand was made or when the refusal by the defendant was made, the fact should be stated specifically, for at the time of the trial the court may order the plaintiff to adduce evidence in support of his statement, and then he can rely on the evidence of the witnesses in whose presence he had lent money or in whose presence he had made a demand for the return of the money.

In a matrimonial petition, it is not enough to state that the respondent is guilty of cruelty towards the petitioner-wife and that she is entitled to divorce. The petitioner must state all those facts which establish cruelty on the part of the respondent. She may state that her husband is a drunkard and used to come home fully drunk and in a state of intoxication he inflicted physical injuries on her, she should specify dates on which such incidents took place; or that the husband used to abuse her or beat her in the presence of her friends and relations or that after her marriage she was not allowed to visit her parents or that he was forcing her to part with her dowry,

1. *William Maleomson v. Glayton* 14 Moore PC 128.

2. *Lalta v Ambika* 1968 All LJ 1133.



giving threats of physical beating; or that immediately after her marriage till date the respondent did not even talk to her nor he cohabited with her. It is such facts which can establish physical or mental cruelty.

In another example plaintiff files a suit for negligence and damages. It is not enough for him to state negligence. First of all the plaintiff must state those facts which establish the defendant's duty towards the plaintiff. Thereafter, he must state how and in what manner the defendant was guilty of negligence. Thus he must state all the facts on which his plaint is based. The inference of law to the breach of duty should be left to the court because the correct legal principles will be applied by the court and the plaintiff cannot even add any prayer that a particular legal conclusion which follows must be applied. The only prayer that he may add is that the relief may kindly be granted to him.

Omission to state all the fact renders the pleading defective whatever inferences of law might otherwise have been pleaded. Such a plaint may be rejected on the ground that it discloses no cause of action. The plaintiff or the defendant as the case may be, and his counsel must be on their guard not to omit any facts and straight-away jump to pleading containing legal interference without stating such facts.

For example, in a suit for recovery of money for the goods sold, the defendant should not just take the plea that he is not liable. Such a statement is a plea of law, and can hardly stand and in spite of his good defence his case will fail. In such a case the defendant must clearly state that he did not purchase any goods from the plaintiff nor was there an agreement to do so. He may also state that though the goods were sent to him, but he did not take the delivery as he had placed no order therefore or that the goods were sold to him on credit and the money was to be paid to the plaintiff after the sale of such goods and the goods were still lying with him unsold, and that he was willing to return the goods to the plaintiff in accordance with the written or oral understanding that in case of the goods remaining unsold the same shall be taken back by the plaintiff. Such facts would be valid pleas.

In another example of a suit for defamation and damages, it is not sufficient for the plaintiff to state that the defendant defamed him and therefore he was entitled to damages or special damages. The plaintiff must state all the facts of the defendant act or acts such as his public utterances in which he named the plaintiff and made remarks about his character or profession or the publications in which he was painted in a manner as would in the opinion of a common man lower him in the eyes or estimation of society. Wherever possible the plaintiff must give the exact words spoken or used in the entire sentence or statement and also give the general, grammatical or implied meaning of such words spoken or used. Wherever there is any ambiguity, he may take the plea of "inuendo" and state how such a remark was commonly understood by persons known to him. Thus the plaintiff should build his case on facts from which the conclusion would naturally and logically follow.

The rule that every pleading must state facts and not law is subject to the following exceptions:

- i. Foreign Law
- ii. Customs
- iii. Mixed question of law and fact
- iv. Legal Pleas
- v. Inferences of law

**Rule II: Material Facts:** When a litigant comes to a legal practitioner, he brings all facts and circumstances pertaining to a case. In fact, he tries to narrate each and every event which may possibly have a remote bearing upon the case. Not all such facts are important. If everything were to be included in the plaint, then the plaint is likely to become so voluminous that the learned judge is likely miss the essential track and be guided by the inessentials.

What is necessary therefore are the facts which are material; facts which have a direct and immediate bearing on the case, facts which are secondary or incidental may easily be omitted. Of course, the lawyer must weigh each fact and test its significance and relevance in relation to the given case. Marshalling of facts is what a good

lawyer would always do before he sets them down in form of a plaint.

The second fundamental rule of pleading is therefore, that every pleading shall contain and contain only, a statement of the material fact as on which the party pleading relies for his claim or defence. This rule is embodied in Order VI Rule 2 and it requires that –

- I. The party pleading must plead all material facts on which he intends to rely for his claim or defence as the case may be; and
- II. He must plead material facts only, and that no fact which is not material should be pleaded, nor should the party plead evidence, nor the law of which a Court may take a judicial notice<sup>3</sup>.

The rule is indeed a strict one. The question would naturally arise: what are the material facts? Indeed every fact on which the cause of action or the defence is founded is material fact. The purpose entertained by the rule is that every unnecessary and irrelevant fact need not be brought on record, and the rule acts as a damper to the litigants, habit of stating all details that strike their mind, whether such details are relevant or not, it necessitates the process of elimination on the part of the litigant. All facts which will be required to be proved at the trial in order to establish the existence of a cause of action or defence are material facts. Then there are other facts which do not directly establish the cause of action or defence but which nonetheless are material facts in that the party pleading them has an inherent right to prove them at the trial.

Whether a particular fact is material or not will depend upon the circumstances of the case. A fact may not appear to be material at the initial stage but it may turn out to be material at the time of the trial. Thus if a party is not able to decide whether a fact is material or not, or if he entertains a reasonable doubt as to the materiality of a particular fact, it would be better to include than to exclude, because if a party omits to state or plead any material fact, he will not be permitted to adduce evidence to prove such a fact at the trial unless the pleading is amended under Order VI Rule 17. The general rule is that a party cannot prove a fact which he has not pleaded.

The task of a lawyer is therefore rather difficult. He must observe the rule that only material facts are to be pleaded, and, at the same time, he must not exclude any fact which may seem apparently unnecessary but which may turn out to be material as the trial progresses. Thus he must visualize all the possible directions or dimensions which the pleadings are likely to assume. An experienced lawyer would marshal all the facts placed before him by his client and by correlating them, and after carefully examining the interplay between such facts, decide what facts are material to establish the cause of action or defence. There after he would prepare or rough or a mental outline of the pleading and submit all such facts to a close analysis in order to make sure whether if he is able to prove all such material facts he would succeed. By a process of elimination he must also see whether by excluding certain seemingly immaterial facts from the outline he has prepared, he would still succeed. If he can return an affirmative answer, he should exclude such irrelevant facts, but if the answer be in the negative, then he must include them another way of testing the materiality of the facts would be to ask whether by proving a particular fact, he would certainly establish the cause of action or the defence.

The idea is that the pleading should not include any fact which would not assist the party even if such a fact is proved. And why at all waste energy, time and money in establishing the correctness or otherwise of a fact which does not advance the party's case? One of the reasons why the litigation drags on for years is that the litigants do not come to the point, there being much about nothing. In India the courts are filled with all sorts of litigation. The lawyers are taking briefs of all sorts and they are extremely busy. They have hardly any time to examine the materiality of the facts narrated to them by their clients. The pleadings, therefore, become unwieldy and voluminous, so much so that at the time of framing the issues, the matter becomes really a hard nut to crack. The litigation drags on withstanding the wishes of the parties to the contrary. It is the duty of the lawyers to ensure that the pleadings conform to the rules laid down in the code of civil procedure. They should be guided more by their own sense of proportion rather than succumb to every whim or eccentricity of their clients.

3. *Hari Shankar Jain v. Sonia Gandhi* AIR 2001 SC 3689.

**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.

In a suit for ejectment of a trespasser from the land and for injunction it is material to allege that defendant “threatens and intends to repeat the illegal act” similarly if a party seeks a stay order against any authority’s act of demolition his premises, shop or building he must allege that he is owner of the property and the plans or the map thereof was duly sanctioned by the appropriate authority. Or if a government land, he must allege that he has been in undisturbed possession thereof for over twelve years. Such facts are material, because if proved, they will establish the cause of action.

In a suit for defamation, it is material to allege that the words were intended to defame the plaintiff or at least they were so understood by men at large, if the words are ambiguous, then “innuendo” must be pleaded that they were ironically used or were intended so to be understood.

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. For example where a marriage between two spindas or between two persons within the degrees of prohibited relationship is challenged in some property matter, the party is challenging the validity of the marriage must allege that there was no custom governing the parties which permitted or sanctioned such a marriage between spindas. It is material to allege the existence of a long established family or caste custom governing the parties to the marriage which permitted or sanctioned such a marriage.

In a money suit, it is material to allege part-payment of the loan and also any other fact which gives a new lease of three 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.

In a suit for specific performance of a contract it is material to allege that the plaintiff has always been willing and is willing to perform his part of the contract.

### **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.

Similarly 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.

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. Therefore, it will have to be proved at the trial that the plaintiff suffered the loss and also that the conduct of the defendant resulted in the loss so suffered by the plaintiff. In such cases the proof of special damages is essential to sustain an action. A person has no right of action in respect of a public nuisance unless he can show some special injury to himself which is over and above what is common to others.

Thus, it is clear that whereas general damages may not be pleaded the special damages must be alleged, and all facts on which such special damages are based are material to the pleading. They are material because they will have to be proved. All such facts must, therefore, be mentioned or stated with necessary particulars to show what special damage the plaintiff suffered. For example in a suit for defamation it will have to 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.

**Exception to the General Rules:** The second fundamental rule of pleading, namely, that every pleading must state all the material facts and the material facts only is subject to the following well known exceptions:

- i. **Condition Precedent:** The performance or occurrence of any condition precedent need not be pleaded as its averments shall be implied in the pleading. But where a party chooses to contest the performance or occurrence of such condition, he is bound to set-up the plea distinctly in his pleading. This follows from the provision contained in Order VI Rule 6 C.P.C. which runs thus:

“Any condition Precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.”

For example, X agrees to build a house for Y at certain rates. A condition of the contract is that payment should only be made upon the certificate of Y's architect that so much is due. If X desires to file a suit for money against Y, the obtaining and presenting of the certificate from Y's architect is a condition precedent to X's right of action. Here it is not necessary of Y to state in his plaint that he has obtained the said certificate. He can draft a plaint showing a good prima facie right to the agreed amount without mentioning any certificate. It will be for Y to plead that the architect has never certified that the amount is due.

- ii. **Presumption of Law:** Order VI 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. For example in a suit on a promissory note the plaintiff need not allege consideration as Sec.118 of Negotiable instruments Act, 1881 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. In *Sethani v. Bhana*<sup>4</sup>, a sale deed was executed by tribal a woman who was old, illiterate and blind, in favour of one of her relatives with whom she was living till her death and was dependent on him. It was held that it was upon that relative to prove that the sale-deed was executed under no undue influence. A party should not plead anything which the law presumes in his favour.

Regarding legal presumptions the exception applies to only such facts as the court “shall presume” and not to those facts which the court may presume”, and therefore the facts falling under the latter class must be pleaded.

- iii. **Matters of Inducement:** Another exception to the general rule is regarding facts which are merely introductory. Such facts only state the names of the parties, their relationships, their professions and such circumstances as are necessary to inform the court as to how the dispute has arisen. Such facts are hardly necessary or material to the pleading, but they are generally tolerated and are set in the pleadings by both the parties in order to facilitate the court to take a stock of the situation of the parties. It is better if such prefatory remarks are cut down to the minimum.

**Rule III: Facts not Evidence:** The third fundamental rule of pleadings is that only facts must be stated and not the evidence there of as there is a tendency among the litigants to mix up the bare facts with the facts which are in reality the evidence. At the stage of pleading, the court and the opposite party should be supplied with the facts and such contentions on which the claim is founded; the plaintiff must keep the facts in evidence for a

<sup>4</sup> AIR 1993 SC 956.

later stage of evidence. Order VI Rule 2 of C.P.C. enjoins that every pleading shall contain a statement of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved. While drafting a plaint, a lawyer must distinguish between facts which are asserted and which have to be established through evidence whether documentary or oral, and facts which are, by themselves, in the nature of evidence. At the initial stage only the former facts have to be narrated, and when the state of evidence comes, then the other facts will be represented as a part of evidence in order to establish the first set of facts. The reason behind the rule stating evidence is that if the evidence were also allowed to be stated in the pleading that there shall remain no limit of details and the chief object of the pleading would disappear. Evidence also consists of facts. How then to distinguish between the two kinds of facts (i.e. material facts and evidence)? Long back in *Ratti Lal v. Raghu* AIR 1954 VP 53, the question was answered thus: 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 to be proved are called *facta probantia*.

- (a) **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.
- (b) **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 probanda* are not facts in issue, but they are relevant in that at the trial their proof will establish the existence of facts in issue. No doubt in certain cases both the facts in issue and these facts in evidence are mixed up and are almost indistinguishable. They should not be stated in the pleading. For ex., A was married to B in accordance with a particular custom governing marriage between A and B. In this case the “custom” is a both fact in issue and a fact in evidence, because once the custom is proved, then the marriage also, stands proved. In the pleading it is sufficient to allege that the marriage was celebrated in accordance with a particular custom. At the evidence stage, it will be sufficient to refer to the manual of customary law which records customs.

The following rules have been enacted under the Code of Civil Procedure, 1908 and hereunder we elaborate them with the help of suitable illustrations:

- a. **Mental Condition :** Order VI Rule 10 clearly says that wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. Thus it is sufficient to allege that the defendant has cheated the plaintiff to the extent of Rs. 10,000/-. It is not necessary, nor would it be in order, to plead how the defendant has cheated the plaintiff. The “how” part would be evidentiary and should not be pleaded. In a suit for malicious prosecution the plaintiff should only allege that the defendant was actuated by malice in prosecuting him. It should not state the details of any previous hostility of the defendant’s previous conduct towards the plaintiff.
- b. **Notices:** Rule 11 of Order VI lays down that wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or the precise terms of such notice or the circumstances from which such notice is to be inferred, are material. In many cases notice has to be alleged as a material fact. For ex., in a suit to recover trust property from a person to whom a trustee has given it in breach of the trust or in a suit where priority for subsequent transfer is claimed. In such cases, it is sufficient to allege notice as a fact. It is not necessary to state the entire form or precise words of the note, nor any other circumstances from which such a notice could be inferred sometimes, however, the form or the precise words of the notice are material under must be alleged. For ex., where the plaintiff claims to have determined the monthly tenancy by 15 days notice to quit the pleading should state “On 14th Jan. dated, the plaintiff served upon the defendant a written



notice calling upon him to vacate the house and deliver up possession to him on the expiry of January the 31st In such cases the precise form and words of the notice are material and must therefore be clearly stated in the pleading.

- c. **Implied Contract or Relation:** Order VI Rule 12 directs that wherever any contract or any relation between any persons is to be implied from a series of letter or circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters conversations or circumstances without setting them out in detail. And if in such case the person pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances he may state the same in the alternative. The reason for this rule is that what is really material is the effect of the letter or conversation etc. which are only a part of evidence. Take the case of carrier's contract. The moment the goods are accepted to be carried to a particular destination and the receipt is issued, there is an implied contract, and the receipt for the goods is an evidence of the contract. In this case, it would be sufficient to plead the implied contract by making a reference to the receipt issued. The evidence of the receipt and other matters will come up later. If any contract is to be inferred from letters, the dates of the letters must be given.
- d. **Presumptions of Law:** Order VI Rule 13 states that neither party need in any pleading allege any matter of fact which the law presumes in this favour or as to which the burden of proof lies up-on the other side unless the same has first been specially denied.

**Exception:** The only exception to the third fundamental rule of pleadings is to be found in the case of writ-petitions and election-petitions. In such petitions it is necessary to state matters of evidence in support of the allegations made therein.

**Rule IV: Facts to be stated concisely and precisely:** Order VI Rule 2 enjoins that every pleading must state the material facts concisely, but with precision and certainty. This rule is that the material rule is that the material facts should be stated in the pleading in a concise form but with precision and certainty the pleading shall be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figure. What this rule means is that the pleading should be brief and to the point. There should be no obscurity or vagueness or ambiguity of any sort otherwise the very purpose of pleading will be defeated. Another point to remember is that no doubt brevity and conciseness are the rule, but brevity should not be at the cost of precision or clarity. Thus where brevity and precision cannot be achieved without clarity, prolixity in pleading would be justified. If the facts stated in the pleading are all material, then they all must be alleged notwithstanding the prolixity that might cause.

In order to bring precision, conciseness and clarity, a lawyer should have a good command over the language and grammatical structure, and should know the exact meaning of the words. Longer and complex sentence which is likely to become ambiguous should be avoided.

**The following points should be kept in mind while drafting a pleading: -**

- a) The names of persons and places should be accurately given and correctly spelt; spellings adopted at one place should be followed throughout the pleading.
- b) Facts should be stated in active and not in the passive voice omitting the nominative.
- c) All circumstances and paraphrases should be avoided.
- d) 'Terse', 'Short', 'Blunt' sentences should be used as far as possible. All 'its' and 'buts' should be avoided.
- e) Pronouns like "he" "she" or "that" should be avoided if possible. Anyway such pronouns when used should clearly denote the person or the thing to which such pronouns refer.
- f) The plaintiff and the defendant should be referred not only by their names. It is better to use the word "plaintiff" or "defendant".

- g) Things should be mentioned by their correct names and the description of such things should be adhered to throughout.
- h) Where an action is founded on some statute, the exact language of the statute should be used.
- i) In any pleading, the use of “if”, “but” and “that” should be, as far as possible, avoided. Such words tend to take away the “certainty” and can cause ambiguity.
- j) Necessary particulars of all facts should be given in the pleading. If such particulars are quite lengthy, then they can be given in the attached schedule, and a clear reference made in the pleading. Repetitions should be avoided in pleadings.
- k) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph (Order VI Rule 2). The division of the pleading into paragraphs should be so done as to endure that each paragraph deals with one fact. At the same time, the entire pleading should appear a running and well knit matter, must not look like isolated fact placed together. Inter-relations ships of paragraphs must seem to exist. All the relevant facts must be stated in strict chronological order.
- l) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

**Pleading must be Signed:** Order VI Rule 14 makes it obligatory that the pleading shall be signed by the party and his pleader (if any). Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

The main purpose of this rule is to prevent any possible denial by any party that he did not authorize the proceedings. Thus even if pleader produces the vakalat-nama duly authorizing him to fight or defend the suit, the signature of the pleader alone would not do. The pleading must bear the signature or thumb impression or any other identification mark of the party concerned. The only exception the party is unable to sign by reason of absence or any other good cause. Mere absence would sufficient; “absence” in this context means such as would not enable the party to be present. Where the party is unable to sign the pleading as aforesaid, then a person duly authorized by him will sign the pleading. Such authority to sue or defend must be produced before the court.

**Verification of Pleading:** Order VI Rule 15, states every pleading shall be verified at the foot by the by any of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The person verifying shall specify, by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verified upon on received and believed to be true. The verification shall be signed by the person making it and the date on which and the place at which it was signed. The aim of verification is only to fix responsibility of the statements made in the pleading upon same one before the court proceeds to adjudicate upon them.

A person making a false verification is liable to be punished under the Indian Penal Code, 1860 as making a false statement is by itself an offence. Therefore the responsibility of verifications is very great and its significance and the consequences thereof must be realized. After the signature to the pleading some space may be left out and then verification should begin.

## Pleading Civil

**1. Classes of Civil Courts** – Besides the Supreme Court, High Courts there are Civil Courts at District level. Highest among them is Court of District Judge, followed by Additional District Judges. The lower Civil Courts are divided in two forms e.g., one by territorial limits and secondarily pecuniary limit. The territorial limit is by jurisdiction of the court and by pecuniary limit it is divided into Civil Judge (Senior Division), Civil Judge (Junior Division) and Small Cause Court. When a suit is filed, if it is of civil in nature, it is filed by a complaint which is



submitted to computerized filing centre of a District.

**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.

2. **In money suits:** Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed: But where the plaintiff sue for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, [136][or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for].

3. **Where the subject-matter of the suit is immovable property:** where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

4. **When plaintiff sues as representative:** Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject- matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

### Plaint Structure

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. For example:

**IN THE COURT OF CIVIL JUDGE (Senior Division), .....**

**OR**

**IN THE JUDICATURE OF HIGH COURT ..... Original Jurisdiction**

Before the heading of the plaint proper space should be left for affixing court-fee stamp. Just below the name of the court, a space should left for the number of the suit. It is as such

..... Suit No. .... of .....(Year)

Thereafter the names of the parties to the suit with all necessary particulars should be given. For ex.:

AB s/o CD aged.....yrs, Resident of..... Plaintiff

..... Versus

PQ s/o RS aged .....Yrs, Resident of ..... Defendant

If there are more plaintiff or defendant than the names of all plaintiffs/and defendant should be given in plaint as plaintiff No. 1/defendant No.1 and so on.

After the names of the parties the title of the suit should be given for example.

“Suit for specific performance and damages”

Or

“Suit for Recovery of money”

Or

“Suit for damages for malicious prosecution”

Or

“Petition for Restitution of Conjugal Rights u/s 9 of the Hindu Marriage Act, 1955”

Where the plaintiff or defendant is a minor or a person of unsound mind, the fact should be mentioned in the cause-title. At the same time the name and description to the person through whom such person sues or sued should also be given in the cause-title. The forms given at No. 2 in Appendix A to the First Schedule of C.P.C. would be of special assistance in framing cause-titles in particular cases. For example, if plaintiff or defendant is:

- 1) **Individual person** - AB S/o.....Aged..... Res. of.....
- 2) **Proprietary concern** - AB S/o.....Aged..... Res. of.....proprietor of M/s XYZ and carrying on business at .....
- 3) **Partnership firm** – M/s XYZ, a partnership firm registered under the Indian partnership Act, 1932 with its principal place of business at .....
- 4) **A company** - M/s XYZ, Pvt. Ltd. A company incorporated under the companies Act having its registered office at.....
- 5) **Company in Liquidation** - M/s XYZ Ltd. In liquidation through liquidator Mr. ABC having office at .....
- 6) **Statutory Corporation** - The Life Insurance Corporation of India established and constituted under the Life Insurance Act, having its registered office at .....
- 7) **Municipality** – Municipal Corporation of Delhi through its Chairman, Town Hall, Delhi.
- 8) **Minor** - AB S/o.....Aged..... a minor through his father and natural guardian S/o.....Aged..... Res. of.....

**2. 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 body of plaint usually begins thus:

‘The above named plaintiff states as follows:

1. That .....

Mogha in ‘The Law of Pleading in India has divided the body of the plaint into two parts (1) Substantive portion and (2) Formal portion.

- (1) **Substantive portion** of the body of plaint is devoted to (i) statement of all facts constituting the cause of action and (ii) the facts showing the defendant's interest and liability. But, as already noted, often it is desirable to start the plaint with certain introductory statements, called 'matters of inducement'.
- (2) **Formal portion** of the plaint shall state the following essential particulars:
  - (i) Date when the cause of action arose;
  - (ii) Statement of facts pertaining to jurisdiction;
  - (iii) Statement as to valuation of the suit for the purpose of jurisdiction and court fees and it should be stated that the necessary court fee has been affixed to the plaint;
  - (iv) Statement as to minority or insanity of a party or if he is representing some other body then statement as to plaintiff's representative character;
  - (v) When a suit is filed after the expiry the period of limitation a statement showing the ground or grounds on which he has claimed exemption or condonation of delay in Limitation Law;
  - (vi) Every relief sought for by the plaintiff should be accurately worded. Rule 7 says that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement. The plaintiff can claim more than one relief, in the suit. He can seek reliefs alternatively. A plaintiff is entitled to claim more than one relief in respect of the same cause of action should sue for all of them because he is debarred from bringing a fresh suit in respect to the omitted reliefs except when the omission in the first suit was with the permission of the court [Order 2. Rule 2 (3) of C.P.C.];
  - (vii) Signature and Verification: The plaint must be signed by the plaintiff through advocate. But if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it must be signed by any person duly authorized by him to sign the same. The verification is done by the plaintiff himself.

#### Verification

I..... (Name), S/o Sri..... (Father's name), the aforesaid plaintiff do hereby verify that the contents of paragraphs ..... to .... of the above plaint are true and correct within my personal knowledge and that the contents of paras.....to ..... (mention the paras by their number in the pleading) I believed to be true on information received.

*Signed and verified this at .....(Place) on this ..... (Date) day of month/years.*

*Sd/- (Plaintiff)*

Affidavit should also be enclosed with plaint as provided under Order 6 Rule 15 (4) CPC, 1908. All documents on which the plaintiff relies for his claim should be enclosed with a separate List of Documents according to Order 7 Rule 14 (1) CPC, 1908.

#### Written Statement

A written statement is required to be filed by the defendant in answer to the claim made by the plaintiff in his plaint which is delivered to the defendant along with the summons to attend at the first hearing of the suit. Written statement is the statement or defence of the defendant by which he either admits the claim of the plaintiff or denies the allegations or averments made by the plaintiff in his plaint. The written statement must specifically

deal with each allegation of fact in the plaint and when a defendant denies any fact, he must not do so evasively but answer the same in substance. Before proceeding to draft a written statement, it is always necessary for a pleader to examine the plaint very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the claim and drawing up the defence is available. If any particulars are wanting, he should apply that the plaintiff be required to furnish them before the defendant files his written statement. If he cannot make a proper defence without going through such particulars and/or such documents referred to in the plaint, and that the defendant is not in possession of such copies, or the copies do not serve the required purpose, the defendant should call upon the plaintiff to grant him inspection of them and to permit him to take copies, if necessary, or, if he thinks necessary, he may apply for discovery of documents. If he thinks any allegation/allegations in the plaint are embarrassing or scandalous, he should apply to have it struck out, so that he may not be required to plead those allegations. If there are several defendants, they may file a joint defence, if they have the same defence to the claim. If their defences are different, they should file separate written statements, and if the defences are not only different but also conflicting, it is not proper for the same pleader to file the different written statements. For instance, if two defendants, executants of a bond, are sued on the bond, and their plea is one of satisfaction, they can file a joint written statement. If the plaintiff claims limitation from the date of certain acknowledgement made by one defendant and contends that the acknowledgement saves limitation against the other also, the defendants may file separate written statements. In a suit on a mortgage deed executed by a Hindu father, to which the sons are also made parties on the ground that the mortgage was for a legal necessity, if the sons want to deny the alleged legal necessity, they should not only file a separate defence from their father's but should also preferably engage a separate pleader.

- (1) **Formal Portion of Written Statement:** A written statement should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants, the name of only one may be written with the addition of "and another" or "and others", as the case may be. The number of the suit should also be mentioned after the name of the court. After the name of the parties and before the actual statement, there should be added some words to indicate whose statement it is, e.g., "written statement on behalf of all the defendants" or "written statement on behalf of defendant No. 1", or "written statement on behalf of the plaintiff in reply to defendant's claim for a set off" or "written statement (or replication) on behalf of the plaintiff filed under the order of the court, dated....." or "written statement on behalf of the plaintiff, filed with the leave of the court". The words "The defendant states....." or "The defendant states as follows" may be used before the commencement of the various paragraph of the written statement but this is optional.

No relief should be claimed in the written statement, and even statements such as that the claim is liable to be dismissed should be avoided. But when a set off is pleaded or the defendant prefers a counter-claim for any excess amount due to him, a prayer for judgment for that amount in defendant's favour should be made.

- (2) **Body of the Written Statement:** The rest of the written statement should be confined to the defence.

**Forms of Defence:** A defence may take the form of (i) a "traverse", as where a defendant totally and categorically denies the plaint allegation, or that of (ii) "a confession and avoidance" or "special defence", where he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, as where he admits the bond in suit but pleads that it has been paid up, or that the claim is barred by limitation, or that of (iii) "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. 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, C.P.C., or that the suit has not been properly framed, there being some defect in the joinder of parties or cause of action and the case cannot be decided until those defects are removed. These pleas are called (a) "dilatatory

pleas" in contradistinction to the other pleas which go to the root of the case and which are therefore known as (b) "peremptory pleas" or "pleas in bar". Some dilatory pleas are not permitted in pleadings, but must be taken by separate proceedings. Others may either be taken in the written statement under the heading "Preliminary Objections", or by a separate application filed at the earliest opportunity, as some pleas, such as that of a mis-joinder and non-joinder, cannot be permitted unless taken at the earliest opportunity (O. 1, R. 7 and 13).

A defendant may adopt one or more of the above forms of defence, and in fact he can take any number of different defences to the same action. For example, in a suit on a bond he can deny its execution, he can plead that the claim is barred by limitation, he can plead that, as no consideration of the bond is mentioned in the plaint, the plaint does not disclose any cause of action, he can plead that the bond being stated to be in favour of two persons the plaintiff alone cannot maintain the suit. He can as well plead one form of defence to one part of the claim, and another defence to another part of it. He can take such different defences either jointly or alternatively, even if such defences are inconsistent. But certain inconsistent pleas such as those which depend for their proof, on entirely contradictory facts, are generally not tenable. A ground of defence, which has arisen to the defendant even after the institution of the suit, but before the filing of his written statement, may also be raised (O.8, R.8).

All defences which are permissible should be taken in the first instance, for, if the defendant does not take any plea, he may not be allowed to advance it at a later stage, particularly when it involves a question of fact.

### How to Draft a Written Statement

When the defendant relies on several distinct grounds of defence or set off, founded upon separate and distinct facts, they should be stated in separate paragraphs (O.8, R.7), and when a ground is applicable, not to the whole claim but only to a part of it, its statement should be prefaced by words showing distinctly that it is pleaded only to that part of the claim, thus: "As to the mesne profits claimed by the plaintiff, the defendant contends that, etc." or "As to the price of cloth said to have been purchased by the defendant, the defendant contends that, etc."

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas:

- (i) **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: a. Denials must be specific, b. Denials must not be evasive.
- (ii) **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.
- (iii) **Objections to point of law:** By such an objection the defendant means to say that even if the allegations of fact (made in the plaint) be supposed to be correct, still the legal inference which the plaintiff claims to draw in his favour from those facts is not permissible.
- (iv) **Special defence** (confession and avoidance): Special defence is more appropriately called the plea of confession and avoidance. It is a plea whereby the defendant admits the allegations made in the plaint but seeks to destroy their effect by alleging affirmatively certain facts of his own, showing some justification or excuse of the matter charged against him or some discharge or release from it.

- (v) **Set off and counter-claim:** 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. Where the plaintiff sues a defendant for the recovery of money the defendant can defend that suit and he can 'claim a set-off in respect of any claim of his own'. An analysis of sub-rule (1) of Rule 6 of Order VIII would reveal that a claim by way of a set-off is allowed in the following conditions: a. the sum claimed must be ascertained sum of money, b. it must be legally recoverable, c. it must be recoverable by the defendant, d. it must be recoverable from the plaintiff, e. the sum claimed by the defendant must not exceed the pecuniary limits of the jurisdiction of the Court, both parties must fill the same character as they fill in the plaintiff's suit. Set-off may be of two kinds: legal set-off and equitable set-off. Etymologically the counter claim is the claim made by the defendant against the averments made by the plaintiff in his plaint. Black's Law Dictionary defines it as a claim for relief asserted against an opposing party after an original claim has been made, especially a defendant's claim in opposition to or as a set-off against the plaintiff's claim. Counter claim must be treated as a plaint. It shall have the same effect as a cross suit so as to enable the Court to pronounce judgement in the same suit, both on the original claim and on the counter claim.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admissions or denial, than to reserve them until after the admissions or denials have been recorded. If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should preferably be pleaded before the latter.

### Drafting of Reply/Written Statement – Important Considerations

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

- (i) One has to deny the averment of the plaint/petition which are incorrect, perverse or false. In case, averment contained in any para of the plaint are not denied specifically, it is presumed to have been admitted by the other party by virtue of the provisions of Order 8, Rule 5 of the Code of Civil Procedure. It must be borne in mind that the denial has to be specific and not evasive (Order 8, Rule 3 & 4 CPC) [1986 Rajdhani Law Reporter 213; AIR 1964 Patna 348 (DB), AIR 1962 MP 348 (DB); *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.]
- (ii) If the plaint has raised a point/issue which is otherwise not admitted by the opposite party in the correspondence exchanged, it is generally advisable to deny such point/issue and let the onus to prove that point be upon the complainant. In reply, one has to submit the facts which are in the nature of defence and to be presented in a concise manner. [*Syed Dastagir v. T.R. Gopalakrishnan Setty* 1999 (6) SCC 337.]
- (iii) Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the plaint;
- (iv) The reply to each of the paras of the plaint be drafted and given in such a manner that no para of the plaint is left unattended. The pleadings are foundations of a case. [*Vinod Kumar v. Surjit Kumar*, AIR 1987 SC 2179.]
- (v) After reply, the same is to be signed by the constituted attorney of the opposite party. If the opposite party is an individual, it could be signed by him or his constituted attorney or if the opposite party



is a partnership firm, the same should be signed by a partner who is duly authorised under the Partnership Deed, because no partner has an implied authority to sign pleadings on behalf of the partnership firm by virtue of Section 22 of the Indian Partnership Act, 1932. In case of a body corporate, the same could be signed by any Director, Company Secretary, Vice-President, General Manager or Manager who is duly authorised by the Board of Directors of the company because any of the aforesaid persons per se are not entitled to sign pleadings on behalf of the body corporate. [Order 29 of Code of Civil Procedure.]

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.*, AIR 1991 Delhi 25; *Raghuvir Paper Mills Ltd. v. India Securities Ltd.* 2000 Corporate Law Cases 1436]. However, at the time of filing of petition, if the pleadings are signed by a person not authorised, the same could be ratified subsequently. [*United Bank of India v. Naresh Kumar*, AIR 1997 SC 2.]

- (vi) The reply/written statement is to be supported by an Affidavit of the opposite party. Likewise, the Affidavit will be sworn by any of the persons aforesaid and duly notarised by an Oath Commissioner. The Affidavit has to be properly drawn and if the affidavit is not properly drawn or attested, the same cannot be read and the petition could be dismissed summarily. [Order 6, Rule 15 CPC]. The court is bound to see in every case that the pleadings are verified in the manner prescribed and that verifications are not mere formalities.
- (vii) The reply along with all annexures should be duly page numbered and be filed along with authority letter if not previously filed.
- (viii) At the time of filing of reply, attach all the supporting papers, documents, documentary evidence, copies of annual accounts or its relevant extracts, invoices, extracts of registers, documents and other relevant papers.
- (ix) It may be noted that if any of the important points is omitted from being given in the reply, it would be suicidal as there is a limited provision for amendment of pleadings as provided in Order 6, Rule 17 CPC, and also the same cannot be raised in the Affidavit-in-Evidence at the time of leading of evidence. Because if any point has not been pleaded in the pleadings, no evidence could be led on that point. General rule is that no pleadings, no evidence. [*Mrs. Om Prabha Jain v. Abnash Chand Jain*, AIR 1968 SC 1083; 1968 (3) SCR 111.]
- (x) If a party is alleging fraud, undue influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however, strong the language in which they are couched may be, and the same applies to undue influence or coercion. [*Afsar Shaikh v. Soleman Bibi*, AIR 1976, SC 163; 1976 (2) SCC 142]. While pleading against fraud or misrepresentation, party must state the requisite particulars in the pleadings. [*K Kanakarathnam v. P Perumal*, AIR 1994 Madras 247.]
- (xi) It is well settled that neither party need in any pleadings allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. [Order 6, Rule 13 CPC; Sections 79 and 90 of Indian Evidence Act.]
- (xii) In every pleading, one must state specifically the relief which the party is claiming from the court or tribunal or forum. While framing the prayer clause, one should claim all possible relief as would be permissible under the pleadings and the law [Order 7, Rule 7 CPC]. The general principle is that the relief if not prayed for, will not be allowed. [*R Tiwary v. B Prasad*, AIR 2002 SC 136.]



**Format of Plead****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 ..... 20 ..... the defendant became a monthly tenant to the plaintiff in respect to the house described in paragraph 1 above at the rent of Rupees ..... Per month and has been in occupation of the said house as such tenant since the above mentioned date of the agreement.
3. That the defendant has not paid the rent from June 1, 20.. or any part thereof.
4. That the plaintiff duly determined the said tenancy by serving on the defendant, by registered post on October 1, 20.. a notice to quit the said house within thirty days of the receipt of the notice and pay the entire arrears of rent from June 1, 20... That the said notice was served upon the defendant on October 7, 20.. 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 Ejectment under section 20 of the U.P. 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 June 1, 20.. to November 7, 20.. , and Rupees ..... On account of damages for use and occupation from November 8, 20.., to 20.., the date of filing the suit.
6. That the cause of action for the said arose on November 8, 20.., 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 Ejectment 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 June 1, 20.. to November 7, 20.. 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 June 1, 20.. , to November 7, 20.. , the date of suit, be passed in favour of the plaintiff as against the defendant.

**402 PP-DP&A**

- d) That a decree for further damages for use and occupation at the aforesaid rate till the Ejectment 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: .....

AB

Date: .....

Plaintiff

Through

Advocate

**Verification**

I, AB, he aforesaid, plaintiff, do hereby verify 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 information received.

Signed and verified this ..... day of . 20.. ....., at .....

AB

Plaintiff

**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 on behalf of the defendant to the suit 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 his occupation of the said house as alleged therein.
3. That the defendant denies that he has not paid the rent from June 1, 20.. , 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 6 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. However, it is submitted that the jurisdiction of this Hon'ble Court has been wrongly invoked by the plaintiff.
8. That paragraph 8 of the plaint relates to valuation of the suit and payment of court fee which is matter of record.

#### Additional Pleas

9. That the defendant has paid the rent for the months May, June, July, August and September, 20..., 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 October, 20.. , 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 herein before this Hon'ble Court.
12. That the notice mentioned in paragraph 4 of the plaintiff is invalid in that it did not purport to give sufficient period of time to 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: .....

AB

Date: .....

Defendant

Through

Advocate

#### Verification

I, AB, the aforesaid, defendant, do hereby verify 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 information received.

Signed and verified this ..... day of . 20.. ....., at .....

AB

Defendant

#### 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.

#### Interlocutory Application

"Interlocutory" means not that decides the cause but which only settles some intervening matter relating to the cause. After the suit is instituted by the plaintiff and before it is finally disposed off, the court may make interlocutory orders as may appear to the court to be just and convenient. The power to grant Interlocutory orders can be traced to Section 94 of C.P.C. Section 94 summarizes general powers of a civil court in regard

to different types of Interlocutory orders. It provides for supplemental proceedings. The detailed procedure has been set out in the Schedule I of the C.P.C which deals with Orders and Rules.

Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit e.g. Applications for appointment of Commissioner, Temporary Injunctions, appointment of Receivers, payment into court, security for cause etc. The Supreme Court in *Rashtriya Ispat Nigam Ltd. V. Verma Transport Company*, AIR 2006 SC 2800, placing reliance upon its earlier judgment in *Vareed Jacob V. Sosamma Geevarghese*, AIR 2004 SC 3992 explained the distinction between incidental and supplemental proceedings explaining that incidental proceedings are those which arise out of the main proceedings.

### Original Petition

Suits are filed to lodge money claims in civil courts working under District Courts while petitions are filed in High Courts which are above District Courts seeking some directions against the opposite party; mostly the Government.

There is no legal term like original suit or original petition. Suit of a civil nature is ordinarily tried in civil court. Every person has a right to bring a suit of a civil nature and civil court has jurisdiction to try the suits of a civil nature. Due to increasing litigation and delays in civil suits, parliament and state legislative created special courts and Tribunals with special enactments. The reason behind this exercise is for speedy disposal of cases of various types. For ex. Cases of ejectment in respect of urban buildings between the land lord and tenant are now dealt with by special courts created under various state legislations. Railway accidents claims are decided by railway claim Tribunals, claims by Industrial woken for payment of wages are entrusted to prescribed authorities. So is the case with the workman's compensation claims. In some states and in center also service tribunal have been created for adjudication of cases of public servants in disputes arising out of their employment, including dismissal, terminator of service, etc. At many places family courts have been established to deal with matrimonial disputes. In such cases which are dealt with by special courts under special enactments the party aggrieved expected to approach such special courts or tribunal and the jurisdiction of the civil courts under sec. 9 CPC is barred. However, in practice, the words 'petitions' and 'suits' are generally used to mean formal applications for seeking legal remedy The suit which is initially filed in the first court for the first time is referred as original suit. Petitions are Writ Petitions, Arbitration Petitions, Miscellaneous Petitions etc. & not the original petition.

After judgment in suit or petition, if any aggrieved party challenges it then it is by filing appeal in the higher court which is ordinarily called as Appeal but often in some court it is termed as Letters Patent Appeal (LPA) & as Special Leave Petition (SLP) in Supreme Court.

### Affidavit

An affidavit is a sworn statement in writing made specially 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)].

Affidavits to be produced in a Court must strictly conform to the provisions of order XIX, Rule 1 of the Code of Civil Procedure, 1908 and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which, on the basis of information received and believed to be true. In the latter case, the source of information must also be disclosed. Order XIX Rule 3 provides that affidavit should be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory application, on which statements on his belief may be admitted; provided that the grounds of such belief are stated. 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.

#### **Specimen Affidavit of Creditor in proof of his debt in Proceeding for the Liquidation of a Company**

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

In the matter of Companies Act, 1956

And

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

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

1. That the above named company was on the..... day of....., 20...., the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of Rupees..... (Rs.....) only in account of (describe briefly the nature of the debt).
2. That in proof of the aforesaid debt I attach hereto the documents marked A, B and C.

3. That I have not, nor have any person or persons by my order or to my knowledge or belief for my use, received the aforesaid sum of Rupees..... or any part thereof, or any security or satisfaction for the same or any part thereof except the sum or security (state the exact amount of security).
4. That this my affidavit is true and, that it conceals nothing and no part of it is false.

Sd/- A.B.

Dated

Deponent

### Verification

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

Dated.....

I,.....S/o.....R/o.....declare, from a perusal of the papers produced by the deponent before me that I am satisfied that he is Shri A.B.

Sd/-.....

Solemnly affirmed before me on this..... day of..... 20..... of..... (time) by the deponent.

Sd/-.....

(Oath Commissioner)

## Execution Petition

### Application for Execution

#### Execution of decree

Application for execution of a decree shall be made by a holder of a decree who desires to execute it to the appropriate court which passed it or to the officer appointed in this behalf. In case the decree has been sent to another court than the application shall be made to such court or the proper officer thereof. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible.

Application for execution of a decree may be either (1) Oral; or (2) written.

**(A) Oral Application:** Where a decree is for payment of money the court may on the oral application of the decree holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgement debtor, prior to the preparation of a warrant if he is within precincts of the court.

**(b) Written Application:** 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 :

- (a) the No. of the suit;
- (b) the name of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;

- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) 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;
- (h) the amount of costs (if any) awarded;
- (i) the name of the person against whom execution of the decree sought; and
- (j) 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 attainment 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. Some High Courts in different States have framed additional rules in this regard may also be taken care by the draftsman or the executing lawyer.

### Memorandum of Appeal and Revision

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. 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. Appeal from original decree is known as first appeal. Second appeal means the appeal from the decree or judgement from the appellate Court. Second appeal only lies to the High Court. First appeal lies to any appellate Court. First appeal lies on the ground of question of law as well as question of facts. Second appeal can only lie on the ground of substantial question of law. 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 re-heard there. An appeal is essentially a continuation of the original proceedings.

In *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors.*, (1999) 4 SCC 468, 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. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a



Court or Authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance of the conditions mentioned in the provision that creates it.

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).

(1) Appeals from original decrees may be preferred from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court on points of law as well as on facts.

(2) Second Appeals lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

Under Section 100 to the Code, an appeal may lie from an appellate decree passed *ex parte*. The memorandum of appeal shall precisely state the substantial question of law involved in the appeal. The High Court, if satisfied, that a substantial question of law is involved, shall formulate that question. The appeal shall be heard on question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. An application which was dismissed on the application of the appellant himself that he wished to withdraw, it cannot be restored even if he was acting under a misapprehension or a mistake of law (*Ram Lal Sahu v Dina Nath AIR 1942 Oudh 50*).

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

- (a) which has not been determined by the Lower Appellate Court or both by the Court of first instance and the Lower Appellate Court, or
- (b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred in Section 100 of the Code (Section 103).

(3) Appeals from, Orders under Sections 104 to 106 would lie only from the following Orders on grounds of defect or irregularity of law:

- (a) An Order under Section 35A of the Code allowing special costs;
- (b) An Order under Section 91 or Section 92 refusing leave to institute a suit;
- (c) An Order under Section 95 for compensation for obtaining arrest, attachment or injunction on insufficient ground;
- (d) An Order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree; and
- (e) Appealable Orders as set out under Order XLIII, Rule 1.

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

- (1) Section 109 of the Code of Civil Procedure, 1908 provides:

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

order in a civil proceeding of a High Court, if the High Court certifies:

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

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

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

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

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

These conditions are:

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

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

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

- (1) Without a certificate of the High Court.
- (2) With a certificate of the High Court.
- (3) Appeal by Special Leave. (*Discussed in this study lesson under the heading “Special Leave Petition”.*)

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

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

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

The appellate judgement must include the following essential factors:

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

### Drafting of Appeals

An appeal may be divided into three parts: (1) formal part, known as the memorandum of appeal, (2) material part, grounds of appeal, and (3) relief sought for.

The memorandum of appeal should begin with the name of the Court in which it is filed. After the name of the Court, number of the appeal and the year in which it is filed are given. As the number is noted by the officials of the Court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. It should be indicated against the names of the parties as to what character each party had in the lower Court, i.e. whether he was a plaintiff or a defendant, or an applicant or an opposite party, as:

A.B., son of etc. *(Plaintiff) Appellant*

Versus

C.D., son of etc. *(Defendant) Respondent*

Or

A.B., son of etc. *(Decree-holder) Appellant*

Versus

C.D., son of etc. *(Judgement-debtor) Respondent*

After the names of the parties, an introductory statement giving the particulars of the decree or order appealed from (viz., the number and date, the court which passed it, and the name of the presiding officer), should be written in some such form as:

“The above-named appellant appeals to the Court of..... from the decree of..... Civil Judge at..... in Suit No..... passed on the..... and sets forth the following grounds of objections to the decree appealed from, namely”.

This may also be written in the form of a heading as:

“Appeal from the decree of..... Civil Judge of..... at..... in Suit No..... passed on the.....”.

Thereafter, the grounds of appeal be given under the heading “Grounds of Appeal”. The grounds of appeal are the grounds on which the decree or the order appealed from is objected to or attacked. As a general rule, in the grounds of appeal, the following points may be raised:

- (a) any mistake committed by the lower Court in weighing the evidence;
- (b) any mistake in the view of law entertained by the lower Court;
- (c) any misapplication of law to the facts of the case;
- (d) any material irregularity committed in the trial of the case;
- (e) any substantial error or defect or procedure;

- (f) and the defect, error or irregularity of any inter-locutory order passed in the case, whether the same was appealable or not.

A ground taken but not pressed in the first Appellate Court cannot be revived in second appeal. A defendant can question the propriety of *ex parte* proceedings in an appeal from the decree.

The general rule, besides being subject to Section 100 of the Code, is also subject to two conditions:

- (1) that the mistake of the lower Court should be material i.e., it should be such as affects the decision, and
- (2) that the objection taken must be such as arises from the pleadings and evidence in the lower Court.

### Drafting Grounds of Appeals

- (i) Grounds of objection should be written distinctly and specifically;
- (ii) They should be written concisely;
- (iii) They must not be framed in a narrative or argumentative form; and
- (iv) Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.

These rules are simple but are most important and must be carefully remembered and observed while drafting Grounds of Appeal.

### Relief Sought in Appeal

It is nowhere expressly provided in the Code that the relief sought in appeal should be stated in the memorandum of appeal. The absence of prayer for relief in appeal does not appear to be fatal and the Court is bound to exercise its powers under Section 107 of the Code and to give to the appellant such relief as it thinks proper. However, it is an established practice to mention in the memorandum of appeal, the relief sought by the appellant.

### Signature

A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his counsel but if there are several appellants and they have no counsel, it must be signed by all of them. It is not required to be verified.

### Specimen Form of Appeal to the High Court

IN THE HIGH COURT OF..... AT.....

CIVIL APPELLATE JURISDICTION

REGULAR CIVIL APPEAL NO..... OF

IN THE MATTER OF:

A.B.C. Company Ltd. a company incorporated under the provisions of the Companies Act and having its registered office.....

*Appellant*

Versus

M/s..... a partnership concern (or XYZ company Ltd., a company incorporated under the Companies Act and having its registered office at.....)

*Respondents*

May it please the Hon'ble Chief Justice of the High Court of..... and his Lordship's Companion Justices,

## The appellant-company

*MOST RESPECTFULLY SHOWETH:*

1. That the appellant herein is a company duly registered under the provisions of the Companies Act , 2013 and the registered office of the appellant is at..... and the company is engaged in the business of manufacturing.....
2. That the respondents who are also doing business of selling goods manufactured by the appellants and other manufacturers approached the appellant for purchasing from the appellant-company the aforesaid manufactured goods. An agreement was reached between the parties which were reducing into writing. The appellant supplied goods worth Rs. 15 lacs over a period of ..... months to the respondents. A statement of account regarding the goods so supplied is annexed hereto and marked as *ANNEXURE A-1*.
3. That the respondents have made a total payment of Rs. 6 lacs on different dates. The statement of the said payments made by the respondents is appended and is marked as *ANNEXURE A-2*.
4. That the remaining amount has not been paid by the respondent despite repeated demands and issuance of a legal notice by the appellant through advocate.
5. That the appellant filed a suit for recovery of the aforesaid balance amount of Rs. 9 lacs together with interest at the rate of 12% per annum and the cost of the suit. The suit was filed on..... in the court of the learned District Judge.
6. That upon being summoned by the said court the respondents appeared through counsel and filed their written statement to which appellant-plaintiff also filed replication.
7. That the parties led evidence. After hearing the counsel for the parties the learned District Judge has by his judgement and decree passed on..... dismissed the appellant's suit on the ground that the evidence led by the parties does not establish the claim of the appellant-plaintiff. Copies of the judgement and decree of the court below are annexed hereto and are marked as *ANNEXURE A-3 AND A-4*, respectively.

Aggrieved by the aforesaid judgement and decree of the court below dismissing the suit of the plaintiff, this appeal is hereby filed on the following, amongst other,

*GROUND*

- A. That the judgement and decree under appeal are erroneous both on facts as well as law.
- B. That the learned trial court has failed to properly appreciate the evidence, and has fallen into error in not finding that the preponderance of probability was in favour of the plaintiff-appellant.
- C. That there was sufficient evidence led by the plaintiff to prove the issues raised in the suit and the defendant-respondent has failed to effectively rebut the plaintiff's evidence, more particularly the documentary evidence.
- D. ....
- E. ....
- F. ....
8. That the valuation of this appeal for the purposes of payment of court-fee is fixed at ₹..... and the requisite court fee is appended to this memorandum of appeal.
9. That this appeal is being filed within the prescribed period of limitation, the judgement and decree under appeal having been passed on.....

In the above facts and circumstances the appellant prays that this appeal be allowed, the judgement and decree under appeal be set aside and the decree prayed for by the appellant in his suit before the court below be passed together with up-to-date interest and costs of both courts.

APPELLANT

(.....)

#### VERIFICATION

Verified at..... on this, the..... day of....., 20..... that the contents of the above appeal are correct to the best of my knowledge and belief and nothing material has been concealed therefrom.

THROUGH

APPELLANT

#### 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, deals with revisionary jurisdiction of the High Courts. The Section lays down:

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

- (a) to have exercised a jurisdiction not vested in it by law; or
- (b) to have failed to exercise a jurisdiction so vested; or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

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

- (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or
- (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this Section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.”

#### REVISION (CIVIL)

Section 115 of the Code of Civil Procedure, 1908 provides for the remedy of revision. In a case where an appeal does not lie against a final order the aggrieved party can file a revision before the High Court (an no other court). There are certain orders passed by the Civil Courts subordinate to the High Court against which the remedy of appeal is not available, even through such orders finally decide an important question involved in the suit or substantially affect the right or interest of a party to the suit. In such cases the High Court can entertain a revision and quash or modify the order of the court below.

# **SPECIMEN FORM OF REVISION**

In the High Court of.....

Civil Appellate Jurisdiction

Civil Revision No..... of 20.....

*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, IST CLASS..... IN THE SUIT ENTITLED ABC -VS.- XYZ (CIVIL SUIT NO. .... OF 2013)

May it please the Hon'ble Chief Justice, High Court of..... and his companion Justices.

The petitioner most respectfully sheweth:

- 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 Ist 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....., 20....., two witnesses 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 witnesses 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.



*[Affidavit to be filed in support of the fact that the contents of the accompanying revision petition are true and correct to the best of the deponent's knowledge and that nothing has been kept back or concealed].*

## Complaint

Complaint under section 2(d) of the Criminal Procedure Code means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report. The petition of complaint must be submitted to the Magistrate. If it is submitted to some other official it is not a complaint. In order to be a complaint the petition must make allegations about occurrence of some offence. The object of the petition of complaint submitted before the Magistrate must be with a view to his taking action. Mere information to a Magistrate is not a complaint. A petition to Civil Court complaining some obstruction is not complaint within the meaning of the Criminal Procedure Code. A petition submitted before the District Magistrate or Superintendent of Police is not a complaint.

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

- (i) an oral or a written allegation;
- (ii) some person known or unknown has committed an offence;
- (iii) it must be made to a magistrate; and
- (iv) it must be made with the object that he should take action.

There is no particular form for narration of the incident in the body of complaint. It is sufficient if it contains a vivid and correct description how and in what manner the offence was committed. Only facts which are connected with the incident have to be stated in the complaint. Facts which can prove involvement of the accused in the offence should also be mentioned. The petition of complaint must disclose the names of the witnesses of the offence. The petition of complaint shall thus set out in clear and unambiguous terms all the points essential for establishing the case. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprit be suitably dealt with is a complaint. (*Mohd. Yousuf v. Afaq Jahan*, AIR 2006 SC 705). Complaint need not be presented in person. A letter to a magistrate stating facts constituting an offence and requesting to take action is a complaint. Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Subsection (2) of Section 173.

Section 133 of Cr.P.C. deals with removal of public nuisance. Strictly speaking information regarding existence of a public nuisance is not a complaint but for all practical purposes it is a complaint. Even a private individual can lodge the information. The Magistrate on receiving such an information or complaint shall pass a conditional order of removal.

## Criminal Miscellaneous Petition

The Criminal Miscellaneous Petitions are one of the important tasks of the Judge in the Criminal Court. The filing of Criminal Miscellaneous Petition will start even before registering the case by way of anticipatory bail

application. According to Oxford Dictionary meaning, Miscellaneous means consisting of mixture of various things that are not usually connected with each other. When a petition is filed seeking interim relief, it is registered as miscellaneous petition. A Memo filed before the Court of Law need not be treated as Petition. The main difference between Petition and Memo is that Memo is nothing but bringing a fact to notice before a Court of Law and no relief can be sought for in a Memo and notice to the opposite party is not required. However, where a Petition is filed requiring some relief from the court, a notice to opposite party is mandatory in most of the cases. No order be passed on Memo (Held in a decision held in between Syed Yousuf Ali Vs. Mohd. Yousuf and Others reported in 2016 (3) ALD 235).

In nut-shell it can be called a Petition other than a main case. When a Miscellaneous Petition is filed in Criminal cases, it is registered as Criminal Miscellaneous Petition. As soon as a Petition is filed, primary duty of the Court is to see whether the relief sought is provided under Criminal Procedure Code or not. If it is provided, the Petition shall be called in Public Court by assigning a particular miscellaneous number and notices shall be ordered to the opposite party. Having heard both the parties, a speaking order has to be pronounced. In day to day, Criminal Courts come across several Miscellaneous Petitions seeking different reliefs. The petitions filed U/sec.239 Cr.P.C, Sec.227 Cr.P.C, Sec.311 Cr.P.C, Sec.319 Cr.P.C, Sec.451 Cr.P.C and Sec.457 Cr.P.C and also used to file applications U/sec.90 and 91 Cr.P.C and Sec.125(3) Cr.P.C for necessary reliefs.

The other Miscellaneous Petitions which are filed before the Criminal Courts regularly are the petitions under sections 256 and 317 of Cr.P.C. In addition to the above Miscellaneous Petitions, another important Miscellaneous Petitions used to be filed by the accused in criminal cases are the bail petitions U/sec.436 Cr.P.C and Sec.437 Cr.P.C before the Judicial Magistrate of I Class Courts and Sec.438 Cr.P.C. and 439 Cr.P.C. before the Sessions Court for seeking the bail.

## Bail

Bail means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date. Bail is liberty to the accused to remain at large till the investigation, inquiry and trial is over. Section 436 of the Code of Criminal Procedure relates to bail in bailable offence. Under this section an accused in a bailable case can get bail as a matter of course. Section 437 of Cr.P.C. deals with non-bailable cases. When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant or appears or is brought before a Court such person may be released on bail by the Court under section 437 (1) Cr.P.C.

An “*anticipatory bail*” is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (*State of Assam v. R.K. Krishna Kumar* AIR 1998 SC 144).

### Specimen Bail Application under Section 437, Cr.P.C. 1973

In the Court of..... Magistrate .....

..... State .....

Versus

Accused AB son of TZ, Aged: ..... R/o .....

Police Station: .....

FIR No.: .....

In the matter of petition for bail of accused AB, during police enquiry

The humble petition of AB the accused above-named

Most respectfully sheweth:

1. That your petitioner was arrested by the police on 5th March 20..... on mere suspicion. That nearly a month has passed after the arrest but still the Investigating Police Officer has not submitted a charge-sheet.
2. That your petitioner was not identified by any inmate of the house of CM where the burglary is alleged to have taken place, nor was any incriminating article found in his house.
3. That your petitioner has reason to believe that one GS with whom your petitioner is on bad terms and who is looking after the case for complainant has falsely implicated your petitioner in the case out of grudge.
4. That your petitioner shall fully co-operate with the police/Investigating Agency, if any.
5. That your petitioner is not likely to abscond or leave the country. The petitioner further undertakes to comply with other conditions of grant of bail passed by this Hon'ble Court.

Your petitioner prays that your Honour may be pleased to call for police papers and after perusing the same be pleased to direct the release of your petitioner on bail.

And your petitioner, as in duty bound, shall ever pray.

..... Petitioner

..... Through

Advocate AB

#### Verification

I, AB, son of TZ, residing at..... by occupation business, do hereby solemnly affirm and say as follows:

1. I am the petitioner above-named. I know and I have made myself acquainted with the facts and circumstances of the case and I am able to depose thereto.
2. The statements in paragraphs 1 to 5 of the foregoing petition are true and correct to my knowledge and belief.
3. I sign this verification on the ..... day of ..... 20.....

Solemnly affirmed by the said AB on ..... at the Court

House at..... AB

Before me

Oath Commissioner / Notary / Magistrate.

#### Specimen Petition by Wife under section 125, Cr.P.C. 1973 for Maintenance

In the Court of ..... Judicial Magistrate 1st Class

Case No. .... under s. 125, Cr.P.C.

Petitioner W (wife)

Opposite Party H (husband)

Daughter of.....

versus

Son of.....

Village .....

Village.....

Thana .....

Thana .....

Occupation.....

Occupation.....

In the matter of petition for maintenance of petitioner W from the husband H under S.125, Cr.P.C.

The humble petition of W (wife), the petitioner above-named

Most respectfully Sheweth:

1. Your petitioner W is the married wife of the opposite party. The marriage between them was solemnized according to the Hindu rites on ..... at .....
2. The opposite party H is a clerk on the staff of AB & Co. Ltd. holding a responsible position and drawing salary of Rs. 15,000 per month.
3. The opposite party severely assaulted the petitioner on ..... and drove her away from the matrimonial house on ..... in presence of several gentlemen of the locality.
4. That the opposite party leads a life of drunkenness and debauchery. He is besides a man of uncertain temperament and would fly into rage in season and out of season without any reason whatsoever. He has lost all sense of decorum and would use extremely filthy language.
5. Your petitioner after being driven out of the house by the opposite party came over to her father's place on the same day and has been staying at father's house with his family members.
6. The opposite party was served with a pleader's notice to send your petitioner Rs. .... every month for her maintenance but with no result. Having regard to the violent temper of H and his inhuman way of beating your petitioner she does not venture to go back to the place of the opposite party.

Your petitioner, therefore, prays that Your Honour may be pleased to issue notice on the opposite party and after taking evidence of both sides be pleased to order the opposite party to pay the petitioner maintenance at the rate of Rs. .... per month.

And your petitioner, as in duty bound, shall ever pray.

..... Petitioner

..... Through

Advocate AB

#### AFFIDAVIT

I, W daughter of MN resident at ..... do hereby solemnly affirm and say as following:

1. I am the petitioner above-named and I know the facts and circumstances of the case and I am able to depose thereto.
2. The statements in the paragraphs 1, 2, 3, 4, 5 and 6 of the foregoing petition are true to my knowledge and that I have not suppressed any material fact.

Solemnly affirmed by the said

Mrs. W on the ..... day of ..... 20..... in the Court House at .....

Before me

Oath Commissioner / Notary / Magistrate.

#### First Information Report (FIR)

Section 154 Cr.P.C 1973 deals with information in cognizable cases. Section 154 reads:

- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in

charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

- (2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.
- (3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

In *Lallan Chaudhary and Ors v. State of Bihar*, AIR 2006 SC 3376, the Supreme Court held that section 154 of the Code thus casts a statutory duty upon police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.

The provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case. [*Ramesh Kumari v. State (NCT of Delhi) and Ors*, 2006 Cri.LJ 1622].

### Specimen Form of First Information Report

To

The Officer-in-Charge

..... (Name of the Police Station)

Sir

This is to inform you that my cycle has been stolen from the cycle stand in the daily market last evening. Last evening, before I went to the market, I placed my green model Hero Cycle in the cycle stand No. 1 as usual.

I had locked the cycle. The cycle bears the No. .... I had bought it only a month ago and it was almost new. The cycle had a full gear case, a carrier and a side basket. When such mishap occurred I was buying vegetables in the market. I asked everybody who were present there about the cycle. It was all in vain.

I request you to kindly register a case of theft and initiate the necessary investigation to recover the stolen cycle.

Yours faithfully,

\_\_\_\_\_ (Your Name)

Application under Section 156 (3) Cr.P.C.

In the Court of Chief Judicial / Metropolitan Magistrate at .....

Complainant

'X'

W/o

D/o

Accused

(1) "Y"

S/o .....

(2) "Z"

At present residing at her father's place,

At .....

Distt.

S/o .....

all of .....

....P.S. .... District ....

Witnesses: (1).....

(2) .....

Under section 498 A/406 of the Indian Penal Code

The complainant above-named begs to state as follows:

1. The complainant was married to the accused no. 1 .....(Name) according to Hindu rites and customs at her father's place at .....(Place) P.S. ....
2. That at the time of the marriage the father of the complainant apart from arranging for a large gathering gave in stridhan gold ornaments worth Rs. ...., a Swift car worth Rs. .... and .....(mention all other items)
3. That after marriage the complainant was first taken to her matrimonial home where the in-laws were residing and after spending a month complainant and accused (1) and (2) were shifted to .....
4. That after six months of the marriage, the complainant was subjected to mal treatment, both physically and mental at the hands of accused (1) and encouragement of the accused (2) for demand of dowry of Rs. 20 lacs. Having failed to meet such demand she was tortured continuously and torture by accused (1) and (2) were unabated.
5. That the offence under section 498 –A, Indian Penal Code is a continuing offence and on some occasions both accused (1) and (2) had taken part in inflicting tortures on the complainant and on other occasion accused (1), husband had taken part of the said offence and as such ..... (P.S.) has jurisdiction to investigate into the matter under Clause (C) of Section 178 of the Cr.P.C. and this Court has jurisdiction to try this case.
6. That there is prima facie case under sections, 498 A/406 of the Indian Penal Code against all the accused persons.
7. That the incident was reported to the .....(P.S.), they did not take any action against the accused and refused to report a FIR against them, hence the Complaint is filed in this Hon'ble Court.

#### Prayer:

It is therefore, prayed that the complaint be forwarded to the Officer-in-charge, ..... (P.S.) to investigate the matter and to lodge an FIR in the above case and report may be called from the SHO ..... (P.S.) under Section 156 (3 of Cr.P.C.) in the interest of Justice.

*Sd. Complainant*

*Through Counsel*

### LESSON ROUND-UP

- Pleadings generally mean either a plaint or a written statement. A suit is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which he seeks the assistance of the court.
- The four fundamental rules of pleadings are:
  - 1) That a pleading shall contain, only a statement of facts, and not Law;

- 2) That a pleading shall contain all material facts and material facts only.
  - 3) 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,
  - 4) That a pleading shall state such material facts concisely, but with precision and certainty.
- It is incumbent on 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, make such order in relation to the suit as it deems fit.
  - When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleadings. All the rules relating to defendant's written statement apply, mutatis mutandis to such written statement of the plaintiff also. One has to keep in view various points at the time of drafting the reply or written statement.
  - Pleadings filed by a defendant/respondent in answer to the claims set out by the plaintiff/petitioner in the form of an affidavit and/or supported by an affidavit are referred to as a counter affidavit.
  - A written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent, is termed as a rejoinder or replication.
  - The provisions of Sections 101, 102, 103, 106, 109, 110 and 111 of the Indian Evidence Act must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings.
  - It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party.
  - 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.
  - 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
  - An affidavit being a statement or declaration on oath by the deponent is an important document and the consequences of a false affidavit are serious. Therefore, great care is required in drafting it.
  - Complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report. A complaint in a criminal case is what a plaint is in a civil case.
  - Bail means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

### TEST YOURSELF

1. Can you explain what is meant by pleadings? What is the objective behind formulating the rules of pleadings? Explain the fundamental rule of pleadings.
2. Explain the important considerations while drafting Affidavit in Evidence.
3. Briefly outline various components of an appeal.



4. Draft a Specimen of Appeal to the High Court.
5. Define 'affidavit'. What rules and guiding principles should be followed while drawing up an affidavit?
6. Your friend has been arrested on a mere suspicion. Draft a bail application to get him released on bail.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

# Lesson 10

## Art of Writing Opinions

### LESSON OUTLINE

- Introduction
- Case for opinion writing
- Types of Legal Opinion
- Quality of Writing
- Form and Elements of the Opinion Letter
- Research on Relevant Case Laws
- Expression of the Opinion
- Qualifications
- Special Matters
- Things to be kept in mind while preparing for opinion letter
- Standards Applicable to Preparation of an Opinion
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

An opinion is a professional's written response to client's instructions to advise in writing. It follows that it must contain advice. Professionals do not advise someone simply by telling them what to do, but supplement it with the basic reasoning behind it. Advising is inextricably bound up with and is part of the mental attitude with which professionals approach opinion writing, with the thinking process that precedes the actual writing of the opinion, and with the writing process itself.

Any legal opinion should be written with the reader in mind. It should be clear, well-reasoned and as concise as possible without sacrificing completeness. A logical structure based on the legal principles being discussed is vital to clarity. Any piece of legal writing should be read before submission to ensure against grammatical or typographical errors which will detract from the communicative value of the work. Above all, the advisory purpose of a legal opinion should be borne in mind at all times.

The objective of the lesson is to impart knowledge to the students about the drafting of legal opinion.

## A. INTRODUCTION

A legal opinion is a written statement by a judicial officer or a legal expert based on giver's professional understanding of a particular aspect of any matter based on legal principles. A person might want to know the correct legal position on a matter of interest or the likelihood of his winning a case if he initiates legal proceedings based on the information that he has supplied to the expert. Lawyers may also from time to time be asked to render a legal opinion to their own clients. Example, a client (querist) may request a tax opinion from its counsel to provide a basis for the avoidance of penalties if the tax aspects of a transaction are later challenged.

The term "opinion" can be defined in a variety of ways, depending upon the context in which it is used. In business transactions, a legal opinion regarding a particular issue is customarily presented in an opinion letter and is widely understood to express the opinion giver's professional understanding of the legal principles generally applicable to a specific transaction or applicable to a particular aspect of the transaction. Many commentators view an opinion letter as a document that provides the opinion recipient with the opinion giver's professional judgment about how the highest court of the jurisdiction whose law is being addressed would resolve the issues covered by the opinion letter on the date of the opinion. It is widely recognized that neither an opinion letter nor any particular legal opinion expressed in it is intended to be or is a guarantee of a particular outcome.

## B. CASE FOR OPINION WRITING

An effective and legally sound legal opinion has an immense value. It can show where a party stands in a given factual matrix when looked from a legal perspective and also save time and money spent in futile litigation proceedings. Business savvy clients do not want to litigate, defend or enter into transactions without obtaining a written opinion from at least one legal expert if not more. Some of the common purposes for which legal opinion are sought are as follows:

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. **Answer questions:** A client may be confused about an issue and they want professional guidance in the area. They also address the question raised by other professionals. Legal opinions provide an authoritative basis for reports, opinions, and reports on matters where other professionals lack the professional capability to make judgments. For example, an opinion regarding local law provided to foreign counsel.
4. **Regulatory requirements:** Sometimes legal opinion has to be sought because it is mandated by law to get the opinion of outside legal expert.
5. **Compliance:** A legal opinion can be sought for assessing the requirements of the regulatory regime so that the querist can meet the compliance requirement.
6. **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.
7. **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.
8. **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.
9. **Due Diligence:** Lawyers and clients often cite due diligence as the principal reason for requesting opinion letters in business transactions.

There are as many ways of approaching the writing of an opinion as there are problems to be solved.

### C. TYPES OF LEGAL OPINION

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. Quite often however one forms a value judgment as to what the conclusion ought to be from first principles and moral feelings and then searches for the authorities to support this conclusion. 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 opposition's. 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.

### D. QUALITY OF WRITING

The primary purpose of a legal opinion is communication of advice to either a lay or professional client. It is therefore of the utmost importance that it is clear and in plain, understandable English. Every word of the legal opinion should be chosen because it communicates precisely the advice which the writer intends to convey.

It is important to write in plain English wherever possible. A **good legal opinion** will avoid archaic language and legalese. It will no doubt be conveying specialised legal advice and must therefore be as detailed as the writer thinks necessary. The use of plain English simply involves saying what needs to be said in the clearest way possible and avoiding unnecessary verbosity. There are times where technical terms will have to be used if they carry the precise meaning of the advice being delivered. This should not be shied away from. Perfect grammar, punctuation and precision of language are essential.

A legal opinion will often contain a complicated set of facts which will have to be sorted into specific legal issues and defined in legal terms. Clarity of expression is therefore vital. Clarity of expression can only be achieved through thorough planning and thought.

A thorough plan will lead to a logical structure. Any legal opinion will be conveying a particular point, but that point will inevitably need to be broken down into sections. Clarity of legal writing also requires conciseness. This does not necessarily imply brevity, but once the point has been made, nothing more need be said. Having said that, completeness and total accuracy is vital and conciseness should not come above giving full and precise advice.

Most of the time, the clients approach the expert with an unclear question. So, when drafting the questions, they

need to be made more sensible. It must be ensured that the questions are phrased in a way that communicates the client's issues but in a more clear and understandable way.

## E. FORM AND ELEMENTS OF THE OPINION LETTER

There is no form for a legal opinion prescribed by law or rule. Opinion letters, however, have developed a certain uniformity because of their repeated use. In general, a legal opinion will cover the following: (1) 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; (2) 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; (3) the legal conclusions expressed in the opinion, and any qualifications to the legal conclusions; (4) 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; and (5) the signature of the opinion giver.

There is likely to be some resistance to a high fee charged for a short opinion. The work that the legal expert has done may not be obvious and therefore very short legal opinions are rare to find.

### 1. Introductory Matters

- i. **Title:** It should be entitled OPINION or ADVICE and contain the title of the case in the heading.
- ii. **Date.** The opinion speaks as of the date mentioned on the opinion letter and need not state separately the effective date of the opinion. If for some reason a conclusion expressed in the opinion is reached as of a date prior to the delivery of the opinion, the opinion giver may so specify in the opinion letter.
- iii. **Addressee.** The opinion is normally addressed to a specified party in an individual capacity, to a party as representative of a larger group, or to an identified class of persons. In all cases, it is customary practice for the opinion recipient to be clearly identified in the opinion letter.

Generally, the only person or persons entitled to rely on an opinion are the person or persons to whom the opinion letter is specifically addressed. No additional limitation need be expressed in the opinion letter. As a matter of prudence, however, many lawyers include a sentence at the conclusion of the opinion letter to the following effect:

*The opinions set forth herein are rendered solely for your use in connection with the above transaction and may not be relied upon, delivered to or quoted by any other person or for any other purpose without our prior written consent.*

In some limited instances, an opinion letter is intended to be relied upon by persons other than the stated addressee(s). Examples include an opinion letter addressed to an underwriter concerning the validity of a proposed stock issuance that is also to be relied on by the issuer's transfer agent, and an opinion letter of local counsel on which the principal opinion giver will rely to render its opinion. In those cases, the opinion letter normally states specifically who, in addition to the addressee, is entitled to rely upon the opinion.

2. **Introduction:** The first paragraph should serve as an introduction to the legal opinion, laying out the salient facts and what the expert has been asked to advise about. An opinion must set out the questions on which it is sought very clearly and unambiguously. If the Querist (which is what we call a person who seeks the opinion) is himself confused, his questions will be equally mindless. It is your duty as a lawyer to unravel his tangled skein of thought, identify the issues that are material and on which the relief he wants depends, and then frame them as questions. Of course, these must resemble the original questions, because otherwise the Querist will feel that you have not answered him, however stupid his questions might have been.

3. **Definitions.** For purposes of brevity and clarity, it is advisable to define the principal terms used in the opinion. Whenever a term utilized in an opinion letter is derived from statutory law, the opinion customarily uses that term or provides an express definition. Terms that are defined in the underlying Agreement are most often given the same definitions in the opinion, either by defining each term in the opinion or by a reference to the Agreement, such as:

*The terms used in this opinion letter that are defined in the Agreement have the same definitions when used herein, unless otherwise defined herein.*

4. **Understanding facts of the case**

The obligation of an opinion giver to exercise diligence in determining the factual and legal bases for an opinion is implicit in every opinion letter. The first rule is always to commence the opinion by setting out the facts that have been given or have been presumed from the instructions given. Adopting the practice of commencing opinion by outlining the facts upon which one is advising serves another purpose as well. It crystallises those facts in one's mind, visualises any gaps as to which one may need to take further instructions or make assumptions and, where issues of fact are involved, suggests areas which need attention.

Any fact that has not been supplied should not be included in the narration. However, any inference or presumption one has made from the facts must be included and should not forget to mention that the inference or presumptions are his personal opinions. Facts should be stated in a manner which brings out the materials that will become material for answering questions, whether with an "yes" or a "no".

The advantage of listing down the facts is that if the ultimate conclusion is wrong, or inapposite, because the facts are wrong, the fault will be that of the client for giving the wrong data or at least the error may be veiled by the failure of the client or solicitor to adapt opinion to the true facts.

The opinion giver must be satisfied that he has reviewed or assumed (expressly or implicitly) sufficient facts to support each of the legal conclusions expressed in the opinion letter. In case of legal opinion in business transaction, in most instances the opinions in an opinion letter can be supported by an examination of documents, either in their original form or copies identified to the satisfaction of the opinion preparers, or of certificates of public officials or officers of the Company relating to factual matters.

Some opinion givers preface their opinion letters with a reference to a detailed list of the documents and certificates examined, together with either a statement that they have examined such other documents and have made such further legal and factual investigation as they consider necessary for purposes of rendering the opinion or, alternatively, a specific disclaimer to the effect that they have not made any other examination or factual investigation. Other opinion givers prefer to deliver opinion letters that merely set forth language to the following effect:

*We have been furnished with and have examined originals or copies, certified or otherwise identified to our satisfaction, of all such records of the Company, agreements and other instruments, certificates of officers and representatives of the Company, certificates of public officials and other documents as we have considered necessary to provide a basis for the opinions hereinafter expressed. We have not independently established the facts stated therein.*

At times, the decision whether to set forth a list of documents and certificates reviewed by the opinion giver is dictated by the opinion recipient. Certain lending institutions and securities underwriters desire the 'long-form' opinion letter containing such a list to provide the additional comfort that the opinion giver has reviewed the listed documents for purposes of its opinion. In most instances, however, the decision is based on the preference of the opinion giver. If the opinion giver intends to limit the scope of the opinion to the documents and certificates listed, it should include an express statement to that effect in the opinion.

- a. 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 maybe 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.

- b. Officers' Certificates:** In business transactions opinion preparers typically obtain two somewhat analogous types of officers' certificates: (1) certificates verifying the authenticity of referenced documents; and (2) certificates relating to factual matters not readily verifiable by the opinion preparers or only verifiable at considerable cost. A common example of the first type of certificate is a certificate of the secretary of the Company certifying that, attached to the certificate, is a true copy of the articles, bylaws and corporate minutes or resolutions pertaining to the transaction.

The second type of officers' certificate relates to factual matters not readily verifiable or only verifiable at considerable cost by the opinion giver when preparing the opinion. These certificates are used as factual support for legal conclusions expressed in the opinion. The need for them arises, for example, when an opinion giver renders an opinion that the transaction will not cause a breach of the terms of any loan agreement to which the client is a party. The opinion giver is competent to review the loan agreements but may need an officers' certificate to identify the loan agreements to which the client is a party since, typically, the opinion giver is not in a position to know what agreements to review.

The opinion giver must use its own judgment in determining under what circumstances (and to what extent) reliance on factual matters contained in the certificates can be justified. The opinion giver should also exercise its own judgment in determining those circumstances and matters which reasonably should be supported by an officers' certificate.

- c. Documentary Examination Assumptions:** Opinion givers customarily assume that the signatures on all documents examined are genuine, that copies of documents examined conform to the originals, and that such documents are binding on the other parties. Opinion givers often state these assumptions expressly, although by customary usage, they are implicit and need not be expressly stated. If stated, a common formulation of the assumption is as follows:

In rendering this opinion, we have assumed the authenticity of all documents submitted to us as originals; the conformity to originals of all documents submitted to us as copies; and the accuracy, completeness and authenticity of all certificates of public officers.



## 5. Research on Relevant Case Laws

After the facts are over the opinion giver may begin his analysis on which the opinion depends. There is no need to set out basic principles of law with which the opinion recipient will be familiar. Otherwise, authorities should be cited to support propositions of laws and when doing so a full citation should be given. It is important to prioritise the authorities cited in a legal opinion in order of importance to the point being addressed. If a particular case is central to the reasoning, the basis on which the case was decided should be set out fully in the legal opinion. It may even be appropriate to quote directly from the judgment although often paraphrasing the effect of the decision will usually suffice. The case being cited must always be referred back to the facts being dealt with in the legal opinion. The most authoritative case on the point of law being dealt with must always be cited. For example, there is no point citing a High Court judgment which has been overruled by a subsequent judgement of the Supreme Court.

An easy way of analysing is to first set out the law and the provisions of the law (or laws) that are applicable. Then go on to summarize the binding precedents (judgments of the Supreme Court and the High Court of the State exercising jurisdiction over the subject matter) with full citations. If the choice of extracts is precise enough, the ultimate opinion will almost automatically appear from the extracts of the judgments that have been quoted.

With regard to statute, much of the same advice will apply. If there is a statutory provision which deals directly with the subject of the legal opinion then this should be clearly stated and its effects fully explained. Care must be taken to ensure that any statutory provision being cited is in force at the time of writing the legal opinion.

In case of business transactions an opinion letter covers only law that a lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the opinion giver's client, the transaction or the Agreement to which the opinion relates.

## 6. Expression of the Opinion

Once the facts are organised, a legal framework needs to be constructed into which these facts can be logically slotted. A legal opinion in a personal injury action for example will be based on negligence and therefore will usually be structured along the lines of duty, breach, damage, causation, foreseeability and contributory negligence. In a negligence legal opinion it will be vital to assess the level of damages that the client can expect to receive or pay out. This will be at the forefront of the client's mind.

The substantive portion of the opinion normally begins with an introductory statement referring to matters upon which the opinion giver has relied. This introductory statement is generally phrased in a manner that does not limit the opinion giver's investigation to the matters specifically described, but rather indicates that the opinion giver has made such further investigation as it considers appropriate under the circumstances. An example of such an introductory statement reads as follows:

*Based on the foregoing and upon such further investigation as we have considered necessary, it is our opinion that:*

The opinion can be in the form of summary statement of conclusions or, where a series of discrete questions have been asked, precise answers to the particular questions asked. If the argument has been properly conducted these answers may well be monosyllabic. "Yes", "no", or "does not arise". However, when the monosyllabic answers cannot apply, the answers must be kept short and to the point. Where the querist has asked "Is the transaction a valid mortgage", the answer can be "Yes" or "No", followed by "in view of what has been said in paragraphs such and such of the facts and paragraphs such and such of the analysis". However, where the question is "Why is this not a valid mortgage" the opinion giver cannot answer with 'yes' or 'no' but must explain, though with reference to what has been written in the analysis sections.

7. **Qualifications.** In practice, opinions are frequently subject to qualifications that narrow their apparent scope. Some opinions may be qualified by assumptions or exceptions. Opinions also may be qualified as to scope, particularly when the opinion covers a specialized area of the law. Qualifications take various forms, depending upon the opinion giver's preference and the length of the qualification. If the qualification is short and applies only to one portion of the opinion letter, it often will be included in the operative language of the specific opinion by the reference "subject to \_\_\_\_\_" or "except \_\_\_\_\_". If the qualification pertains to more than one portion of the opinion letter or is lengthy, it will usually appear separately from the operative opinion clauses. Typical clauses introducing such qualifications include the following: "our opinion in paragraph \_\_\_\_ is subject to;" or "we express no opinion on the effect of;" or "in rendering our opinion in paragraph \_\_\_\_ we have assumed that \_\_\_\_\_."

To simplify the analysis process, number all previous paragraphs. This will relieve you of the burden of repeating previously written information.

## 8. Special Matters

- a. **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.

- b. **Reliance on Opinion of ‘Special’ Counsel:** Considerations similar to those arising in the selection and use of local counsel apply in the retention of special counsel. A lawyer who has no expertise in a specialized matter should not render an opinion in the specialized area, and should refer the matter to a lawyer qualified in that field. The principal opinion giver normally does not furnish an opinion on the same matters as the specialist, even an opinion rendered solely in reliance on the specialist’s opinion. The specialist customarily is retained specifically because the principal opinion giver does not have sufficient expertise to render the opinion in question.

## 9. Signature

The procedure typically followed by most law firms is for the opinion letter to be manually signed in the name of the firm. Some law firms follow different practices, such as “XY&Z by A, a partner” or “A on behalf of XY&Z.”

10. **Usual disclaimers:** Disclaimers can save the opinion giver from being reported for malpractice if the opinion is wrong. Under the disclaimer, it is written that the opinions provided are based on the law as per the time of drafting the opinion. Moreover, it is also indicated that the opinion is also based on the documents and facts provided. All the documents that the clients provided for the sake of drafting the legal opinion can also be listed.

## F. THINGS TO BE KEPT IN MIND WHILE PREPARING FOR OPINION LETTER

Differences between opinion givers and opinion recipients generally arise over (1) the time and expense required to render an opinion on a matter that is peripheral to the primary concerns of the opinion recipient, (2) the appropriate scope of a particular opinion, (3) whether the opinion will cover matters that are essentially factual in nature, (4) whether the opinion will cover matters about which there is some recognized legal uncertainty, and (5) requests for what historically were referred to as “comfort opinions” but are more properly referred to as “negative assurances.”

### 1. 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, lawyers 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. In determining whether a particular opinion is appropriate under the circumstances and, if so, what the nature and scope of that opinion should be, the opinion giver must consider the costs of giving the opinion relative to the benefits to the client of satisfying the request of the opinion recipient.

### 2. 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 of such opinions include the following:

- 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.

### 3. **Confirmations of Fact; Negative Assurance**

Opinion givers should take care that the opinion letter makes a clear distinction between those portions that constitute actual opinions on matters of law and other portions (including confirmations of a purely factual nature) that do not.

Opinion givers generally decline to provide confirmations of purely factual matters. Although often characterized as an opinion, these confirmations in essence ask the opinion giver to express a view not founded on professional competence. The function of a legal opinion is to provide informed judgments on matters of law, not assurance regarding factual statements that the parties to a transaction are in a better position to verify. An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters. Opinion givers generally should not be asked for opinions on the outcome of pending or threatened claims or legal actions.

### 4. **Opinions Regarding Issues of Significant Legal Uncertainty**

A fourth common area of disagreement involves legal issues that, although potentially appropriate for inclusion in an opinion, are subject to significant legal uncertainty. If the uncertainty extends only to one of the opinions expressed, the question is frequently resolved by a “qualification” to that opinion. The “qualification” may be a statement that the particular opinion does not cover the effect of a certain law or laws or may identify the uncertainty. Such qualifications are usually acceptable if they relate to demonstrable legal uncertainties.

An opinion giver should not render an unqualified opinion on an issue as to which there is significant uncertainty. If there is disagreement regarding the existence or degree of the legal uncertainty, a compromise is sometimes reached in the form of a “reasoned” opinion. In that situation, the opinion giver does not simply express a legal conclusion but also presents a discussion of relevant statutory and judicial authorities, often (but not always) indicating that the matter is uncertain or “not free from doubt,” and stating a prediction of the likely judicial resolution of the matter if the issue were appropriately presented to a court of competent jurisdiction. By their nature, these opinions can require substantially more time and effort in their preparation than would ordinarily be the case.

Where an issue of legal uncertainty exists, the opinion giver should discuss the matter with its client before agreeing to issue the requested opinion because the opinion may influence the form or even the viability of the business transaction as proposed.

### 5. **Fraudulent or Misleading Opinions and the Limits of Professional Competence**

A lawyer should not render an opinion that the lawyer knows would be misleading. In addition, a lawyer should not render an opinion based on factual assumptions if the lawyer knows that the assumptions are false or that reliance on those facts is unreasonable. In addition, a lawyer should not be asked to render opinions on matters that are outside his or her area of professional competence. Where an opinion is appropriate but beyond the competence of the opinion giver, then the opinion giver should associate competent counsel to render the opinion. In no event should a lawyer be asked for opinions that are beyond the professional competence of lawyers generally, such as financial statement analysis or valuation.

### 6. **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 or more often because either the lawyer or professional client has delayed moving for advice until the last possible moment. In such a case one should qualify the opinion with a disclaimer.

Sometimes the reason for urgency might be of one's own making. 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. Further the desire of opinion giver to make the final opinion accord with his interim one will destroy his objectivity.

### G. STANDARDS APPLICABLE TO PREPARATION OF AN OPINION

1. **Generally:** A lawyer is expected to be well informed and to exercise such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. When a matter falls within a recognized area of legal specialty, such as tax or securities law, it is advisable to take that assignment only if it falls within the competence of the professional.
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.*

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.

#### 3. **Fraudulent or Misleading Opinions**

An opinion giver may be liable for an opinion that constitutes fraudulent misrepresentation. A lawyer 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 lawyer should not render an opinion that the lawyer recognizes would be misleading to the opinion recipient.

#### 4. **Ethical Issues Relating to the Provision of Opinions to Non-clients**

A lawyer 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.

### WRITS

For enforcement of Fundamental Rights as conferred on the citizens of India and others under the Constitution of India, Article 32 of the Constitution confers on the Supreme Court of India power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warrant* and *certiorari*, whichever may be appropriate, for the enforcement of any of the said rights.

The Constitution also confers power on the High Courts to issue certain writs. Article 226 of the Constitution lays down : “Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III (Fundamental Rights) and for any other purpose”.

### Types of Writs

As mentioned in Articles 32 and 226 of the Constitution, writs are in the nature of *habeas corpus*, *mandamus*, *prohibition*, *certiorari* and *quo warranto*. A brief discussion of each is as follows:

**Habeas Corpus** : The writ of habeas corpus is a remedy available to a person who is confined without legal justification. The words “Habeas Corpus” literally mean “to have a body”. This is an order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for his detention. This writ has to be obeyed by the detaining authority by production of the person before the Court. Under Articles 32 and 226 of the Constitution, any person may move the Supreme Court and the High Court of competent jurisdiction respectively, for the issue of this writ. The applicant may be the prisoner himself moving the Court or any other person may move the Court on his behalf to secure his liberty praying for the issue of the writ of habeas corpus. No person can be punished or deprived of his personal liberty except for violation of any law and in accordance with the due process of law. Dis-obedience to the writ of habeas corpus attracts punishment for contempt of Court under the Contempt of Courts Act, 1971.

**Mandamus**: The expression “mandamus” means a command. The writ of mandamus is, thus, a command issued to direct any person, corporation, inferior Court or Government authority requiring him to do a particular thing therein specified which pertains to his or their office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction. Mandamus can be issued against any public authority. The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed. Mandamus is not issued if the public authority has a discretion.

Mandamus can be issued by the Supreme Court and all the High Courts to all authorities. However, it does not lie against the President of India or the Governor of a State for the exercise of their duties and powers (Article 360). It also does not lie against a private individual or body except where the State is in collusion with such private party in the matter of contravention of any provision of the Constitution or of a Statute. It is a discretionary remedy and the Court may refuse if alternative remedy exists except in case of infringement of Fundamental Rights.

**Prohibition** : The writ of prohibition is issued by the Supreme Court or any High Court to an inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. It compels courts to act within their jurisdiction when a tribunal acts without or in excess of jurisdiction or in violation of rules or law.

The writ of prohibition is available only against judicial or quasi-judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent this writ may be prayed for as a matter of right and not a matter of discretion. The Supreme Court may issue this writ only in case of Fundamental Rights being affected by reason of the jurisdictional defect in the proceedings. This writ is available during the pendency of the proceedings and before the order is made.

**Certiorari** : The writ of certiorari is available to any person whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of its legal authority. The writ removes the proceedings from such body to the High Court in order to quash a decision that goes beyond the jurisdiction of the deciding authority.



**Quo warranto** : The writ of quo warranto is prayed, for an inquiry into the legality of the claim which a person asserts to an office or franchise and to oust him from such position if he is an usurper. The holder of the office has to show to the Court under what authority he holds the office. This writ is issued when:

- (i) the office is of a public and of a substantive nature;
- (ii) the office is created by a Statute or by the Constitution itself; and
- (iii) the respondent must have asserted his claim to the office. It can issue even though he has not assumed charge of the office.

The fundamental basis of the proceedings of quo warranto is that the public has an interest to see that no unauthorised person usurps a public office. It is a discretionary remedy which the Court may grant or refuse. When an applicant challenges the validity of an appointment to a public office, it is maintainable whether or not any fundamental or other legal right of such person has been infringed. This writ is intended to safeguard against the usurpation of public offices.

### Specimen Form of a Writ Petition

In the High Court of..... at.....

Civil Original (Extra-ordinary) Jurisdiction

Civil Writ Petition No..... of 2020

In the matter of:

JKL S/o..... R/o..... former employee (Inspector Grade-I) in the Respondent-Company.

...Petitioner

1. XYZ Company Ltd., a company wholly owned by the Govt. of India and having its registered office at..... through its Chairman.

2. Managing Director of the above Company

...Respondents

Civil Writ Petition against the order dated..... passed by the Managing Director, respondent No. 2 herein, by which the services of the petitioner as an employee of the respondent-company have been terminated.

May it please the Hon'ble Chief Justice of the High Court of ..... and His Lordship's companion Judges.

The Petitioner

MOST RESPECTFULLY SHOWETH:

1. That the petitioner is a citizen of India and is therefore entitled to enjoy all the rights guaranteed by the Constitution of India.
2. That respondent No. 1 is a company registered under the Companies Act, 2013 having its registered office at.....

The respondent-company is wholly owned by the Government of India and is, thus, an instrumentality of State defined in Article 12 of the Constitution of India.

3. That the petitioner was an employee of the respondent-company, having been appointed as a Sub Inspector Grade-I on..... 2018 and he continued to work, earning one promotion also.



4. That on..... 2020, the respondent No. 2 herein abruptly issued the impugned order dated..... terminating the services of the petitioner and the petitioner was relieved of his duties the same day. A copy of the impugned order is annexed hereto and marked as ANNEXURE-1.
5. That on a bare reading of the impugned order it becomes clear that the order has been issued on the basis of some alleged misconduct on the part of petitioner, but no inquiry under the relevant rules has been held before the passing of the order.
6. That the petitioner states in all categorical terms that he has not committed any act that could be termed to be an act constituting misconduct.
7. That the petitioner is assailing the impugned order on the following, amongst other,

#### GROUNDS

- 7.1 That the petitioner being a permanent employee of the respondent-company, his services could not be terminating without holding an enquiry under the rules applicable to the employees of the company.
- 7.2 That the principles of natural justice have been contravened by the respondents in not giving to the petitioner any opportunity of being heard.
- 7.3 That the impugned order is otherwise also erroneous and unsustainable, as it does not contain any reason and is a non-speaking order.
- 7.4 That the impugned order is arbitrary and contravenes Article 14, 16 and 21 of the Constitution of India.
- 7.5 .....
- 7.6 .....
8. That the petitioner has not filed any other petition or that of any proceeding relating to the matter at this petition in any other court.

#### PRAYER

In the facts and circumstances stated above the petitioner prays that a direction in the form of a writ of mandamus or any other appropriate writ be issued quashing the impugned order and reinstating the petitioner in service with all consequential benefits including back wages.

It is further prayed that the respondent be burdened with costs.

PETITIONER

THROUGH

DATED.....

COUNSEL

MR.....

The Writ petition must be supported by an affidavit of the petitioner.

#### Special Leave Petitions

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

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

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

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

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

Section 112 of the Code of Civil Procedure, 1908 keeps the powers of the Supreme Court under Article 136 of the Constitution to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India, beyond the scope of the provisions of the Code.

Section 112 lays down:

- (1) “Nothing contained in this Code shall be deemed:
  - (a) to affect the powers of the Supreme Court under Articles 136 or any other provision of the Constitution;
  - or
  - (b) to interfere with any rule, made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before that Court; .....

### **Special Leave Petition (SLP) to the Supreme Court under Article 136**

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.

### **Specimen Form of a Petition for Special Leave**

#### **IN THE SUPREME COURT OF INDIA**

#### **CIVIL APPELLATE JURISDICTION**

(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (C) NO. \_\_\_\_\_ OF 20\_\_

(Arising out of the final judgment and order dated ..... passed by the Hon’ble High Court of \_\_\_\_\_ in Writ Petition No. \_\_\_\_\_ of .....)

IN THE MATTER OF:

# Position of Parties

..... In High Court

..... In Supreme Court

ABC .....

..... Petitioner

Versus

Government of .....

..... Respondent

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION ON BEHALF OF THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The present Special Leave Petition has been filed under Article 136 of the Constitution of India against the judgment and final order dated ..... passed by the Division Bench of Hon'ble High Court of ..... in Writ Petitionl No. .... of ..... whereby the petition filed by the petitioner herein was dismissed.

2. QUESTIONS OF LAW:-

- A. Whether the land acquisition of land of the petitioner by the respondent is for a Private Company or for a public purpose ?
- B. Whether the acquisition is malafide being in colourable exercise of power and fraud on the statute and in sheer abuse of power of eminent domain?

3. DECLARATION IN TERMS OF RULE 3(2):

That no other Petition seeking leave to Appeal has been filed by the Petitioner against the final judgment and order dated ..... passed by the Ld. Division Bench of High Court of .....in Writ Petitionl No. .... of .....

4. DECLARATION IN TERMS OF RULE 5:

That the Annexures filed with the Present Petition are true copies of the pleadings/ documents forming part of the records before courts below.

5. GROUNDS:

That the present special leave to Appeal is being filed on the following, amongst other, grounds without prejudice to each other;

- i. Because the Division Bench of the Hon'ble High Court failed to appreciate that the procedure for acquiring land for a public purpose cannot be adopted for acquiring land for a private company. The acquisition in the instant case was clearly an acquisition for a private company and the respondent State had undertaken a colourable exercise of power by stating it to be an acquisition for a public purpose.

6. GROUNDS FOR INTERIM RELIEF

That the Petitioner has a good case on merits and that there are fair chances of success in the matter before this Hon'ble Court. The acquisition in the instant case was clearly an acquisition for a private company and the State had undertaken a colourable exercise of power by stating it to be an acquisition for a public purpose. If no stay is granted then that would cause serious prejudice to the petitioner.

## 7. MAIN PRAYERS:

In view of the facts and circumstances as mentioned above, it is most humbly prayed that this Hon'ble Court may graciously be pleased to :

- i. Grant Special Leave to Appeal against the order passed by the Division Bench of the Hon'ble High Court of ..... in Writ Petition No. .... of ....., titled as .....
- ii. Pass such other or any further order(s) as may be deemed fit and appropriate by this Hon'ble Court in the facts and circumstances of the present case.

## 8. INTERIM PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court be pleased to:

- a) stay the impugned judgment dated ..... passed by the Division Bench of the Hon'ble High Court of ..... in Writ Petition No. \_\_\_\_ of \_\_\_\_, titled .....
- b) pass such other and further orders as this Hon'ble Court may deem fit and proper in the interests of justice.

FILED BY:

Advocate for the petitioner

Drawn By:

Drawn on:

Filed on:

New Delhi

## AFFIDAVIT

### IN THE HON'BLE SUPREME COURT OF INDIA

IN THE MATTER OF:

..... Petitioner

Versus

..... Respondent

I, .....s/o.....Aged.....yrs R/o ..... the petitioner in the Special Leave Petition titled as above do hereby solemnly affirm and state as under:

1. That I am the petitioner 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 S.L.P. ....

I, further solemnly affirm at..... (place) this the..... day of..... that the above averments are true and correct. Nothing has been concealed therefrom.

DEPONENT

### LESSON ROUNDUP

- The term “opinion” can be defined in a variety of ways, depending upon the context in which it is used. In business transactions, a legal opinion regarding a particular issue is customarily presented in an opinion letter and is widely understood to express the opinion giver’s professional understanding of the legal principles generally applicable to a specific transaction or applicable to a particular aspect of the transaction.
- The primary purpose of a legal opinion is communication of advice to either a lay or professional client. It is therefore of the utmost importance that it is clear and in plain, understandable English. Every word of the legal opinion should be chosen because it communicates precisely the advice which the writer intends to convey.
- There is no form for a legal opinion prescribed by law or rule. Opinion letters, however, have developed a certain uniformity because of their repeated use. In general, a legal opinion will cover the following: (1) 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; (2) 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; (3) the legal conclusions expressed in the opinion, and any qualifications to the legal conclusions; (4) 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; and (5) the signature of the opinion giver.
- The obligation of an opinion giver to exercise diligence in determining the factual and legal bases for an opinion is implicit in every opinion letter.
- Differences between opinion givers and opinion recipients generally arise over (1) the time and expense required to render an opinion on a matter that is peripheral to the primary concerns of the opinion recipient, (2) the appropriate scope of a particular opinion, (3) whether the opinion will cover matters that are essentially factual in nature, (4) whether the opinion will cover matters about which there is some recognized legal uncertainty, and (5) requests for what historically were referred to as “comfort opinions” but are more properly referred to as “negative assurances.”
- For enforcement of Fundamental Rights as conferred on the citizens of India and others under the Constitution of India, Article 32 of the Constitution confers on the Supreme Court of India power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the said rights.

### TEST YOURSELF

1. Discuss the common purposes for which legal opinion are sought.
2. The primary purpose of a legal opinion is communication of advice to a client. Comment.
3. Enumerate the types of legal opinion.
4. Explain what are the things to be kept in mind while preparing for opinion letter?
5. Draft a specimen of writ petition before the high court.







# Lesson 11

## Appearances and Art of Advocacy

### LESSON OUTLINE

- Introduction
- Right to legal representation
- Appellate authorities under the Companies Act, 2013
- Appellate authorities under TRAI Act, 1997
- Appellate authorities under SEBI Act, 1992
- Appellate authorities under the Competition Act, 2002
- Drafting of Affidavit in Evidence
- Arguments on Preliminary Submissions
- Arguments on Merits
- Legal Pleadings and Written Submissions
- Dress Code
- Etiquettes
- Court Craft
- LESSON ROUND UP
- TEST YOURSELF

### LEARNING OBJECTIVES

A Company Secretary has been recognized under various Acts to appear as an authorized representative before various tribunals/quasi judicial bodies such as National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), Securities Appellate Tribunal, Competition Commission of India and Competition Appellate Tribunal etc. Apart from being conversant with the provisions of various corporate and other laws, rules and regulations, it is equally important for professionals to possess a professional look and demeanor to project a professional and competent image in the corporate world as well as while appearing before the tribunals and other quasi judicial bodies.

The objective of this study lesson is to acquaint the students with the legal provisions pertaining to appearance before various tribunals/quasi judicial bodies as well as the drafting of written submissions, affidavit of evidence etc. Further the students will also be acquainted with the importance of dress code for professionals, etiquettes and court craft.

## INTRODUCTION

The corporate sector has recognized the role of the Company Secretaries as a compliance officer and as a nodal point of contact between the company and its shareholders, debenture holders, depositors, financial institutions and the Government. 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.

## 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.

### Under the TRAI Act, 1997

Section 17 of the Telecom Regulatory Authority of India (TRAI) Act, 1997 authorizes Company Secretaries to present his or its case before the Appellate Tribunal. As per the Explanation appended to the Section 'Company Secretary' means a Company Secretary as defined in clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act.

### Under the SEBI Act, 1992

Securities and Exchange Board of India (SEBI) Act, 1992 under Section 15V 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 Tribunal.

### Under the 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 effective competition compliance programmes.

Sections 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.

### 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 applicant or appellant 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.

## APPELLATE AUTHORITIES UNDER THE COMPANIES ACT, 2013

### Constitution of National Company Law Tribunal

As per Section 408 of the Companies Act, 2013, the Central Government constituted Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under the Act or any other law for the time being in force.

### Constitution of Appellate Tribunal

Under Section 410 of the Companies Act, 2013, the Central Government constituted an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a Chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification, for hearing appeals against, –

- (a) the order of the Tribunal under the Act; and
- (b) any direction, decision or order referred to in section 53N of the Competition Act, 2002 in accordance with the provisions of that Act.

### 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 forty-five 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 forty-five days from the date aforesaid, but within a further period not exceeding forty-five 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

### Appeal to Supreme Court

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 Supreme Court within sixty 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:

It may be noted that 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 sixty days.

## **Registrars of Companies**

Registrars of Companies (ROCs) appointed under Section 396 of Companies Act, 2013 are vested with the primary duty of registering companies in States and Union Territories and ensuring that such companies comply with statutory requirements under the Act. These offices function as a registry of records, relating to the companies registered with them. The records are available for inspection by the public on payment of the prescribed fee. The Central Government exercises administrative control over these offices through the respective Regional Directors

## **Regional Directors**

The Regional Directors supervise the working of the offices of the Registrars of Companies and Official Liquidators located in different locations in the country. They also maintain liaison between the respective State Governments and the Central Government on matters relating to the administration of the Companies Act. The Regional Directors have been delegated powers to directly take up work and dispose off certain business under the provisions of Companies Act.

## **APPELLATE AUTHORITIES UNDER SEBI ACT**

### **Appeal to the Securities Appellate Tribunal.**

As per Section 15T of the SEBI Act, 1992, any person aggrieved by an order of the Board made under the Act, or the rules or regulations made thereunder; or by an order made by an adjudicating officer under the 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.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board 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 may be noted that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

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

The Securities Appellate Tribunal shall send a copy of every order made by it to the Board, 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.

The appeal filed before the Securities Appellate Tribunal 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.

## **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 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.

### **Appeal to Commissioner (Appeals)**

Section 246 A (1) of the Income-tax Act provides that any assessee aggrieved by any order of an Income-tax Officer, as prescribed in the section may appeal to the Commissioner (Appeals) against such order.

Every appeal against an order specified in sub-section (2) which is pending immediately before the appointed day before a Deputy Commissioner (Appeals) and any matter arising out of or commenced with such appeal and which is so pending shall stand transferred on that day to the Commissioner (Appeals) and the Commissioner (Appeals) may proceed with such appeal or matter from the stage at which it was on that day:

Provided that the appellant may demand that before proceeding further with the appeal or matter, the previous proceeding or any part thereof be re-opened or that he be re-heard.

### **Appeal by Person Denying Liability to Deduct Tax**

Section 248 of the Act states that where under an agreement or other arrangement, the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.

### **Appeals to Appellate Tribunals**

According to Section 253 of the Act:

- (1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -
  - (a) an order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may be, a Commissioner (Appeals) under section 154, section 250, section 271, section 271A or section 272A; or
  - (b) an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or
  - (ba) an order passed by an Assessing Officer under sub-section (1) of section 115VZC; or
  - (c) an order passed by a Commissioner under section 12AA or under clause (vi) of sub-section (5) of section 80G or under section 263 or under section 271 or under section 272A or an order passed by him under section 154 amending his order under section 263 or an order passed by a Chief Commissioner or a Director General or a Director under section 272A;
  - (d) an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or section 153A or section 153C in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order.
  - (e) an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or section 153A or section 153C with the approval of the Commissioner as referred to in sub-section (12) of section 144BA or an order passed under section 154 or section 155 in respect of such order.

Sub-section (2) of the section allows an Income-tax officer, on the direction of the Commissioner, if he objects to any order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may

be, a Commissioner (Appeals) under section 154 or section 250, to appeal to the Appellate Tribunal against the order.

Sub-section 2A lays down that the Commissioner may, if he objects to any direction issued by the Dispute Resolution Panel under sub-section (5) of section 144C in respect of any objection filed on or after the 1st day of July, 2012, by the assessee under sub-section (2) of section 144C in pursuance of which the Assessing Officer has passed an order completing the assessment or reassessment, direct the Assessing Officer to appeal to the Appellate Tribunal against the order.

Sub-section (3) lays down that every such appeal shall be filed within sixty days of the date on which the order sought to be/ appealed against is communicated to the assessee or to the Commissioner, as the case may be.

In accordance with the Sub-section (6) of the Section, an appeal to the Appellate Tribunal shall be in the prescribed form (Form No. 36 and Form 36 A) and shall be verified in the prescribed manner and shall except in the case of an appeal referred to in Sub-section (2) or a memorandum of cross-objections referred to in Sub-section (4) be accompanied by a fee of:-

- (a) where the total income of the assessee as computed by the Assessing Officer, in the case to which the appeal relates, is one hundred thousand rupees or less, five hundred rupees,
- (b) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than one hundred thousand rupees but not more than two hundred thousand rupees, one thousand five hundred rupees,
- (c) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than two hundred thousand rupees, one per cent of the assessed income, subject to a maximum of ten thousand rupees,
- (d) where the subject matter of an appeal relates to any matter, other than those specified in clauses (a), (b) and (c), five hundred rupees.

### **Statement of the Case to the High Court**

Section 256(1) of the Act lays down : "The assessee or the Commissioner may within sixty days of the date upon which he is served with notice of an order under Section 254, by an application in the prescribed form (Form No. 37) accompanied where the application is made by the assessee by a fee of two hundred rupees require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this Section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court.

Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding thirty days.

Sub-section (2) of the section lays down that if, on an application made under Sub-section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may, within six months from the date on which he is served with notice of such refusal apply to the High Court, and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition, the Appellate Tribunal shall state the case and refer it accordingly.

### **Statement of Case to the Supreme Court**

Section 257 of the Act makes provisions for reference of a case by the Appellate Tribunal to the Supreme Court. It lays down: "If, on an application made under Section 256 of the Act, the Appellate Tribunal is of the opinion

that, on account of a conflict in the decisions of High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to the Supreme Court, the Appellate Tribunal may draw up a statement of the case and refer it through its President direct to the Supreme Court.”

### Appeal to the Supreme Court

According to Section 261 of the Act, an appeal shall lie in Supreme Court from any judgment of the High Court delivered on a reference made under Section 256 or an appeal made to High Court in respect of an order passed under Section 254 in any case which the High Court certifies to be a fit one for appeal to the Supreme Court.

## APPELLATE AUTHORITIES UNDER REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

### 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 85 the Regulatory Authority is required to notify Regulations within 3 months of establishment.
- g) 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.

## DIRECTORATE OF ENFORCEMENT

Directorate of Enforcement is a Multi-Disciplinary Organization mandated with the task of enforcing the



provisions of two special fiscal laws – Foreign Exchange Management Act, 1999 (FEMA) and Prevention of Money Laundering Act, 2002 (PMLA).

The main functions of the Directorate are as under

- Investigate contraventions of the provisions of Foreign Exchange Management Act, 1999 (FEMA) which came into force with effect from 1.6.2000. Contraventions of FEMA are dealt with by way of adjudication by designated authorities of ED and penalties upto three times the sum involved can be imposed.
- Investigate offences of money laundering under the provisions of Prevention of Money Laundering Act, 2002 (PMLA) which came into force with effect from 1.7.2005 and to take actions of attachment and confiscation of property if the same is determined to be proceeds of crime derived from a Scheduled Offence under PMLA, and to prosecute the persons involved in the offence of money laundering. There are 156 offences under 28 statutes which are Scheduled Offences under PMLA.
- Processing cases of fugitive/s from India under Fugitive Economic Offenders Act, 2018. The objective of this Act is to provide for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian Courts and to preserve the sanctity of the rule of law in India.
- Sponsor cases of preventive detention under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) in regard to contraventions of FEMA.
- Render cooperation to foreign countries in matters relating to money laundering and restitution of assets under the provisions of PMLA and to seek cooperation in such matters.

### **DRAFTING OF AFFIDAVIT IN EVIDENCE – IMPORTANT CONSIDERATIONS**

The provisions of Sections 101, 102, 103, 106, 109, 110 and 111 of the Indian Evidence Act, 1872 must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly according to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings (*Habib Khan v. Valasula Devi*, AIR 1997 A.P 52). The following must be kept in mind while preparing the affidavit-in-evidence by the parties –

- (i) The best evidence is that of a person who was personally involved in the whole transaction. In case, that person is not available for any reason, then any other person who has joined in his place to make deposition by way of his affidavit.
- (ii) In case, the petitioner himself was involved in the execution of a contract, he should file affidavit-in-evidence.
- (iii) The allegations or charges or grounds relating to facts should be re-produced duly supported by documentary evidence.

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

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

statement/reply, if possible, the party who is filing the affidavit-in-evidence should also file documents, papers or books or registers to demolish the defence or case set up by the opposite party.

- (vi) It is also permissible for any party to bring any outside witness (other than the expert witness) in support of his case if the facts and circumstances of the case so warrant and permitted by the Court/ Tribunal.
- (vii) At the time of tendering affidavit-in-evidence, the party must bring alongwith it either the original of papers, documents, books, registers relied upon by it or bring with it the carbon copy of the same.

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

Evidence, as defined in Section 3 of the Evidence Act, 1872 means and includes—

- (1) 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;
- (2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

### Rule of Adverse Inference

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 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 Apollo Hospital & Anr., 2003 NCJ 787 (NC)].

It is equally incumbent upon a party to produce evidence of some expert where the issue involved is a complex or difficult one as for instance, issues pertaining to engineering, medical, technology or science etc. Since the court cannot constitute itself into an expert body and contradict the claim/proposition on record unless there is something contrary on the record by way of expert opinion or there is any significantly acclaimed publication or treatise on which reliance could be based. [Dr. Harkanwaljit Singh Saini v. Gurbax Singh & Anr., 2003 NCJ 800 (NC)].

### ARGUMENTS ON PRELIMINARY SUBMISSIONS

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 eg., 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

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, lead 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. Similarly, where notice is alleged to have been served prior to filing of the case and there is no documentary evidence like postal receipt/courier receipt placed on record by the opponent, it should be pointed out that the opponent has failed to establish that the notice had actually been served. 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.

## LEGAL PLEADINGS/WRITTEN SUBMISSIONS

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:

- (i) Suit is not maintainable for want of statutory notice etc.
- (ii) Complaint does not disclose cause of action.
- (iii) Plaintiff has no right to sue.
- (iv) Suit barred by principles of res-judicata.
- (v) Suit barred by principles of waiver, estoppel, acquiescence.
- (vi) Suit is barred by special enactment.
- (vii) Court has no jurisdiction.
- (viii) Suit is barred by limitation.
- (ix) Suit is premature, and so on.

Some of these are known technically as ‘special defences’. In a suit based on contract, defendant may admit that he made the contract, but may avoid the effect of admission by pleading performance, fraud, release, limitation etc.

## DRESS CODE

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 cute or 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 if allowed the aforesaid professional dress.

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

### **PROFESSIONAL ETIQUETTES**

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

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

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

Dealing a client with confidence, acting appropriately at business interactions and knowing the proper table manners at a business dinner are just some of the necessary skills today's professionals must have in an increasingly competitive environment, and that will leave a lasting impression – good or bad. Some manners and behaviour remain constant. Nonetheless, other etiquette moments require you to conduct yourself differently than you do when you are with professional colleagues or clients at any business meeting/get-together. It is in these moments that you need to understand the particulars of etiquette. Being corporate professionals, you must practice some basic etiquette tips that would help you to go up the ladder of success in the workplace. These include Dressing Etiquette; Introduction and Greeting Etiquettes; Conversation Etiquette; Communication Etiquettes; Invitation Etiquette and Dining Etiquettes etc.

### **Dressing Etiquette**

With every organization program comes the inevitable question: What do I wear? Knowing what to wear, or how to wear something, is key to looking great in any event.

- Always wear neat and nicely pressed formal clothes. Choose corporate shades while you are picking up clothes for your office wear.
- Ties for men should compliment.
- Women should avoid wearing exposing dresses and opt for little but natural make-ups. Heels should be of appropriate or modest height.
- Men need to keep their hair (including facial hair) neatly trimmed and set.
- Always polish your shoes.
- Keep your nails clean.
- Wear clothes which you are comfortable in and can carry well. This is very important while you are in a business meeting or client presentation.

### **Handshake Etiquette**

Etiquette begins with meeting and greeting. A handshake is a big part of making a positive first impression. A firm shake is an indication of being confident and assertive. The following basic rules will help you get ahead in the workplace:

- Always rise when introducing or being introduced to someone.
- Shake hands with your right hand.
- Shake hands firmly (but not with a bone crushing or fish-limp grip), and with only one squeeze.
- Hold it for a few seconds (only as long as it takes to greet the person), and pump up and down only once or twice.
- Make eye contact while shaking hands.

### Communication Etiquettes

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

### Invitation Etiquette

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

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

### Dining Etiquettes

- Always be courteous while official dinners. Offer the seat to your guest first. If you are the guest, be punctual and thank the host for the dinner.
- Wait until you receive your host's signal.
- Initiate conversations while waiting for the food.
- Never begin eating any course until everyone has been served or the host/hostess has encouraged you to do so.
- Chew quietly; don't speak with your mouth full.
- Avoid pointing the knife or fork towards the other person while eating and speaking.
- Allow your guest to select the menu and wine.



- If something unwanted has gone to your mouth, place the napkin in front of your mouth tactfully and bring it out instead of putting your hand inside the mouth to get rid of it.
- Learn the basic table manners before you go out to dine with a potential client or an important business meet.

That apart, you must pay special attention to the following general etiquettes: Always be punctual at your workplace; During a meeting, turn off your mobile phone or put it on silent mode. It is considered extremely impolite to allow a mobile phone to ring during a meeting and take a call while sitting in a meeting. In case it is a must to receive a phone call, it is best to discreetly excuse yourself from the meeting and take it out into the hall or private area; When in a meeting room, always stand up to greet the seniors if they arrive after you; Try to ignore and overlook funny or embarrassing sounds when in a meeting or official conversation; If you have forgotten somebody's name ask him/her politely saying that you are sorry that you cannot remember the name; Always keep a comfortable distance while conversing with others; Avoid standing or sitting too close to the other person. An arm's length would be ideal to maintain the comfort zone.

## COURT CRAFT

Practicing these etiquettes in your professional life, will make a great impact on everyone you are associated with. You must always be conscious that your mannerisms reflect on your professionalism and your company.

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

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

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

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

## Preparatory Points

There are certain basic preparatory points which a Company Secretary should bear in mind when contacted by a client.

- Take minute facts from the client;
- Lend your complete ears to all that client has to say;
- Put questions to the client while taking facts so that correct/relevant facts can be known;
- Convey to the client about exact legal position in context of relief sought by the client;
- Give correct picture of judicial view to the problem posed by the client.

## Drafting of Pleadings

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



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

If you are opponent

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

If you are for the petitioner

- File your rejoinder upon receiving the reply at the earliest opportunity 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.

### **Oral Pleadings**

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

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

### **While Presenting Your Case**

- Submit a list of citations to the Court Master before opening of case; Start your address to the Court / Tribunal with humble note;
- Refer to the order sought to be challenged or reliefs sought to be prayed;
- State brief facts;
- Formulate issues/points, categorise them and address them one by one;
- Take each point, state relevant facts, provisions of law and relevant binding decisions;
- Hand over xerox copies of binding decisions to the Court Master while placing reliance;
- Refer to relevant pages of the compilation, provisions of law and judgements;
- Complete all points slowly but firmly;
- Conclude your arguments by reiterating your points in brief;
- Permit the opponent counsel uninterruptedly. However, if facts are being completely twisted, interrupt depending upon the relevant circumstances and that too only with the permission of the Court / Tribunal;

- Take instructions from client in advance with respect to alternative reliefs.

### **As Regards Advocacy**

Advocacy is the presentation of logical facts of any dispute in a right perspective. It employs the noblest faculties of the human mind by differentiating between right and wrong, just and unjust, equitable and inequitable. This could be done only by applying the knowledge of law acquired by extensive and intensive learning. Company Secretaries should be able to formulate and present a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner. They should understand the crucial importance of preparation and the best way to undertake it and be able to demonstrate an understanding of the basic skills in the presentation of cases before the tribunals. They should be able to:

- Identify the client's goals and should continue to enjoy the confidence of his client;
- Identify and analyse factual material;
- Identify the legal context in which the factual issue arises;
- Relate the central legal and factual issues to each other;
- State in summary from the strengths and weaknesses of the case from each party's perspective;
- Develop a presentation strategy;
- Outline the facts in simple narrative form;
- Structure and present in simple form the legal framework of the case;
- Structure the submission as a series of propositions based on the evidence;
- Identify, analyse and assess the specific communication skills and techniques;
- Demonstrate an understanding of the purpose, techniques and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify evidence;
- Demonstrate an understanding of the professional ethics, etiquette and conventions of advocacy.

## **CONDUCT AND ETIQUETTE**

### **Duty to the Court**

- (i) A Company Secretary shall, during the presentation of his case and while otherwise acting before a Court/Tribunal, conduct himself with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial officer, it shall be his right and duty to submit his grievance to proper authorities.
- (ii) A Company Secretary shall maintain towards the Courts a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community and legal system.
- (iii) 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.
- (iv) A Company Secretary shall use his best efforts to restrain and prevent his client from resorting to sharp and unfair practices or from doing anything in relation to the Court, opposing counsel or parties which the Company Secretary himself ought not to do. A Company Secretary shall refuse to represent the client who persists in such improper conduct. He shall not consider himself a mere mouthpiece of the client, and shall exercise his own judgment in the use of restrained language in correspondence, avoiding scurrilous attacks in pleadings, and using intemperate language during arguments in Court.

- (v) A Company Secretary shall not enter appearance, act, plead or practice in any way before a Court/ Tribunal or any other Authority, if the sole or any member thereof is related to the Company Secretary.
- (vi) A Company Secretary shall not appear in or before any Court or Tribunal or any other Authority for or against an organization or an institution, society or corporation, if he is a member of the Executive Committee of such organization or institution or society or corporation.
- (vii) A Company Secretary should not act or plead in any matter in which he is himself pecuniarily interested.

### **Duty to Client**

- (i) A Company Secretary shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.
- (ii) A Company Secretary shall not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear if he can retire without jeopardizing his client's interest.
- (iii) A Company Secretary shall at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either him or continuing the engagement.
- (iv) It shall be the duty of a Company Secretary to fearlessly uphold the interest of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.
- (v) A Company Secretary shall not at any time, be a party to fomenting of litigation. A Company Secretary shall not act on the instructions of any person other than his client or his authorized agent.
- (vi) A Company Secretary shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client.

### **Duty to Opponent**

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

### **Important Principles**

Some of the important principles of advocacy a Company Secretary should observe include:

1. Act in the best interest of the client;
2. Act in accordance with the client's wishes and instructions;
3. Keep the client properly informed;
4. Carry out instructions with diligence and competence;
5. Act impartially and offer frank, independent advice;
6. Maintain client confidentiality.

### Advocacy Tips

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

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

### LESSON ROUND-UP

- A Company Secretary can act 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/quasi judicial bodies.
- The provisions of Sections 101, 102, 103, 106, 109, 110 and 111 of the Indian Evidence Act must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings.
- It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party.
- 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.
- 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.
- 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.
- Some of the perceptions people can form solely from your appearance are: your professionalism; your level of sophistication; your intelligence and your credibility.

- Besides legal profession, professional dress code standards are established in major business organizations and these have become more relaxed in recent decades.
- 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 guidelines for professional dress for members while appearing before judicial/quasi-judicial bodies and tribunals.
- Practicing good professional etiquette is necessary for professional success in the emerging business scenario which is constantly changing and making the market place more competitive and contestable.
- Corporate professionals must practice some basic etiquettes tips that would help them to go up the ladder of success in the workplace. These include dressing etiquette; introduction and greeting etiquettes; conversation etiquette; communication etiquettes; invitation etiquette and dining etiquettes etc.
- For winning a case, art of advocacy is important which in essence means to convince the judge and others that my position in the case is the proper interpretation. Art of advocacy/court craft is learned when we enter the practising side of the profession.
- There are certain basic preparatory points which a Company Secretary should bear in mind when contacted by a client.
- Company Secretaries should be able to formulate and present a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner. They should understand the crucial importance of preparation and the best way to undertake it.

### TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain the Appellate Authorities under the Companies Act and SEBI Act.
2. Explain the general rules of drafting in respect of applications and petitions.
3. Explain what are the important considerations to be kept in mind while drafting a reply/written statement?
4. Explain the important considerations while drafting Affidavit in Evidence.
5. What is a dress code and what is its significance for professionals in the changing global scenario?
6. What is meant by etiquette? Why practicing good professional etiquette is necessary for professional success?

---

---

---

---

---

---

---

---



## PRACTICAL EXERCISES

*For the information of the students it may be mentioned that most of the practical exercises have been covered at relevant places in the study material. Only those exercises which have not been covered elsewhere in the study material have been given hereunder.*

### Notice to Quit Premises Held by Monthly Tenancy by Landlord to Tenant

Dear Sir,

Under instructions from my client A. B. of etc., your landlord, you notice to quit deliver to him on the 16th day after expiry of 15 full days from the date of receipt of this notice by you and handover possession of (description of premises) situate at..... held by you of him as a monthly tenant.

Dated the ..... day of ..... 20 .....

Signed

Advocate for .....

To

(Name and address of Tenant)

### Notice of determination of a tenancy-at-will on behalf of the landlord

(Under section 106 of T.P. Act, 1882).

Dated .....

The .....20....

To

The .....

.....

Dear Sir,

Under instructions from my client ..... (name, description and address) I call upon you to deliver up possession of the premises, detailed below, within 30 days hereof which you now hold of my client as a tenant.

2. In default of your compliance your occupation of the premises, after the period allowed hereinabove, will be wrongful and an act of trespass and you will be liable to pay damages to my client at the rate of Rs.....per each day of your wrongful occupation of the same till you are ejected therefrom and that my client will sue you for your eviction and for recovery of damages.

3. A copy of this notice is being kept in my office for future use, if necessary. Schedule of premises.

Yours faithfully

### Notice by Tenant to His Landlord to Determine the Tenancy

Dear Sir,

Under instructions from my client A. B. of etc., your tenant, I hereby give you notice that in pursuance of a power contained in the lease dated..... day of ..... made between you of the one part and the said A. B. of the other part, it is his intention to determine the said lease with the expiry of the 15th day from the date of receipt of the legal notice by you and that he shall deliver up to you the possession therein comprised on the next day after such 15th day.

Dated.....day of.....

Signed.....

Advocate for the said A.B.

(C.D. landlord).



**Notice of suit under s. 80, C.P.C. for suing the State Government :**

**Notice to the Collector of a district**

(Simple Form)

Notice under s. 80, C.P. Code

Registered with A/D

Dated.....

The..... 20...

To

The Collector of the District of.....

P.O.....

Dt.....

Sir,

Under instructions from my client Sri....., son of....., by caste.....  
by occupation....., residing at.....P.O.....P.S.....Dt..... I give you this notice  
under s. 80, C.P.C. and state that my aforesaid client intends to sue the Government of West Bengal (or,  
name the State) on expiry of two months, after service of this notice, on the cause of action and for reliefs  
appearing hereinbelow :

- (a) Cause of action (give in brief/acts giving rise to cause of action).
- (b) Reliefs claimed (give here reliefs which the plaintiff would sue for).

Yours faithfully,

**Notice of suit under s. 80, C.P. Code against a Public Officer of a State Government or Central Government**

Registered with A/D

Dated .....

The.....20.....

To

.....

(Name & official designation)

P.O. ....

Dt. ....

Notice under s. 80 of the Code of Civil Procedure

Dear Sir,

Please take notice that my client..... son of..... residing at.....intends to bring a suit  
against the (state here the office the intended defendant holds), a public officer of the Government of (state the  
name of the province or simply, of the Government of India, as the case may be) in a competent court of law on  
the cause of action stated herein-under and for reliefs appearing below:

Cause of action for the intended suit.....

Reliefs sought for.....

Yours faithfully,

Advocate.

**Notice on behalf of the vendee to comply with terms of agreement for sale with threat of suit for specific performance of contract**

Dated .....

The ..... 20.....

Registered with A/D

To

Sri

*(Name and address of the vendor)*

Sir,

Under instructions from my client Sri.....son of ..... residing at.....I hereby give you this notice as follows:

You contracted by executing on..... a Bainanama to sell to my client your property described in the Schedule below at a total consideration of Rs.....and took from my client a sum of ₹..... as advance on the occasion of execution of the said Bainanama. You agreed therein to complete the sale on accepting from my client the balance of consideration money within.....

My client had tendered to you the balance of the consideration on .....and required you to complete the sale. You did not accept the money and have been avoiding compliance with the terms of the agreement. My client was always willing and is so even now to complete the purchase by payment of the balance of the consideration subject to performing your part of the said agreement (Bainanama).

Take notice that you are requested to complete the sale of the said property by executing a proper deed in favour of my client after accepting from him the balance of the consideration money within..... and register the same.

In default, my client shall sue you in a court of law for specific performance of the said contract.

*Schedule*

Yours faithfully,

**Application under section 5 of the Limitation Act for condonation of delay in preferring an appeal**

In the High Court at Calcutta

(Civil Appellate Jurisdiction)

In the matter of No.....of 20.....

A.B. Versus C.D.

And

In the matter of an application under s. 5 of the Limitation Act for condoning delay in filing the appeal

And

In the matter of

A.B. ....Appellant-Petitioner

Versus

C.D. ....Opposite-Respondents

E.F.

Valued at Rs.....

To

The Hon'ble Mr..... Chief Justice and His companion Justices of the said Hon'ble Court

The humble petition of the petitioner above-named

Most respectfully sheweth:

1. .... (State the facts of the case and subject-matter leading upto filing of the appeal on .....)
2. ....
3. The appeal is out of time by ..... days. Your petitioner has filed a petition under Or. 43, r. 3A(1), C.P.C. along with memo of appeal.
4. That your petitioner could not prefer the appeal because of..... Your petitioner submits that there was sufficient cause namely,..... for which the appeal could not be preferred in time.

In the premises aforesaid it is humbly prayed that Your Lordships would be pleased to issue a Rule on the Respondent to show cause why the delay in filing the appeal should not be condoned.

And, on hearing the cause shown, if any, to make the Rule absolute.

### **Petition for grant of probate of a will**

(Under s. 276 of the Indian Succession Act 1925)

In the Court of the District Judge/District Delegate

at.....

Act 39 of 1925 Case (Or. Misc. Judicial Case) No. ....of 20.....

A.B. son of C.D.

(State here description and address)

..... Petitioner.

In the matter of grant of a probate of the will of E.F., deceased, under s. 276 of the Indian Succession Act.

The above-named petitioner states as follows:

1. That E.F., since deceased of .....P.S. .... Dist.....died at his residence at.....

on.....(date of death) and the writing annexed, in sealed cover, is his last will, duly executed by the deceased on.....

2. That the petitioner was named as the executor in the said will.

3. That the amount of assets which is likely to come to the petitioner's hand is estimated at Rs.....as described in Schedule 'A' below (when necessary – and the amount of debts are shown in Schedule 'B' below).

4. That the said deceased left behind the following relations, besides the petitioner :

(i) G..... Son of .....

(State residence)

Brother

(ii) H..... widow of

(State residence)

Widow

of the deceased.

(iii) M.....Daughter of

(State residence)

Daughter

5. That at the time of his death the deceased had his fixed abode at..... (or the deceased had his immovable properties at village – P.S. – Dist.-) within the jurisdiction of this court.

6. That to the best of the petitioner's belief no application has been made to any other court for a probate of the said will (see s. 279 of the Indian Succession Act).

7. (Where necessary) That the petitioner has paid off Estate Duty on the estate of E.F. – deceased.

The petitioner, therefore, prays that the court may be pleased to grant to the petitioner probate of the said will of the deceased.

#### *Verification*

I, (A.B.), the petitioner in the above petition, declare that statements made in paras 1 to 7 hereinabove are true to my knowledge and belief and I sign this verification this the .....day of ..... 20..... at the Bar Library, ..... (place) (see s. 280 of the Indian Succession Act).

A.B.

I, Sri.....one of the witnesses to the last will of E.F. deceased, declare that I was present and saw the said testator affixing his signature in the said will. (See s. 281 of the Indian Succession Act).

#### Schedule 'A'

(State here assets likely to come to the hand of the executor).

#### Schedule 'B'

(State here liabilities, debts, if any – where necessary).

#### **Petition for Letters of Administration (without will annexed)**

(Under s. 278 of the Indian Succession Act 1925).

In the Court of the District Judge/District Delegate at.....

Act 39, 1925 Case No.....of 20.....

In the matter of grant of Letters of Administration to the estate of A.B.– deceased.

1. That A.B., lately of.....P.S. ....Dist. ....died on.....at..... within the jurisdiction of this court.

2. That the deceased left behind him the following near relations or next of kin besides the petitioner.

- (a) |  
(b) | (Name and residence) ..... (State relationship with the deceased).

3. That the petitioner being the only son is entitled to grant of letters of administration to the estate of the said A.B. – deceased.

4. That the amount of assets which are likely to come to the petitioner's hand is Rs. ....as shown in Schedule A below and the amount of (on the property) liabilities of the deceased is shown in Schedule B below.

5. That the deceased had his fixed place of abode at.....within the jurisdiction of this court.

6. That the deceased died intestate and to the best of the petitioner's belief no application has been made for letters of administration to the estate of the deceased.

Your petitioner, therefore, prays that letters of administration to the estate of A.B. may be granted to the petitioner.

*Schedule 'A'*

(State here particular of property)

*Schedule 'A'*

(State here particular of assets)

**Petition for Letters of Administration (with will annexed)**

(Under s. 278 of the Indian Succession Act 1925).

In the Court of the District Delegate/Munsiff (Sadar) at.....

Act 39. Case No. ....20.....

Applicants :

(1) A.B. son of E.F.

of.....

P.S. .... Dist. ....

In the matter of grant of Letters of Administration with the will annexed, of the estate of G.H. – deceased, under s. 276 of the Indian Succession Act.

The above-named applicants beg to state as follows :

1. That G.H. died at her residence at.....Town on the ..... day of ..... 20..... and that the writing annexed is her last will and testament, which was duly executed by her.

2. That by the said will, G.H. made a scheme for worship of an idol "Sree Sree Radha Govinda Vighraha" and bequeathed properties in Schedule A below to the deity and by the said will constituted the applicants as joint shebaites of the said deity. The applicants since after death of the said G.H. have been discharging their duties as shebaites.

3. That by the said will the said G.H. bequeathed her dues, from the State of West Bengal, as compensation for vesting of her intermediary rights in equal shares to her three daughters, P.W. and R.

4. That the amount of assets, which are likely to come to the applicants' hands is Rs. 14,157 as shown in Schedule B below.

5. That the deceased left no debts.

6. That the applicants are sons of the deceased. That no executor having been appointed by the said will, the applicants apply for letters of administration with the will annexed.

7. That the testatrix left behind her the following near relations, besides the applicants:

(1) M		Sons.
(2) N		
(3) O		

(State here description and address).

(4) P		Daughters and Legatees.
(5) Q		
(6) R		

(State individual description and respective address).

8. That the deceased, at the time of her death, had her fixed residence at..... within the jurisdiction of this court.

9. That to the best of the applicants' belief, no application has been made to any other court for letters of administration of the said estate.

10. (Where necessary) That the Estate Duty on the estate of the late G.H. has been duly paid.

The applicants, therefore, pray that the court may be pleased to grant to them letters of administration with the will annexed to the estate of the said deceased.

*Verification*

I, A.B., applicant No. 1, declare that the above statements contained in paras 1 to 9 are true to my knowledge and I sign this verification this the day of May, 1981, at.....

Dated.....

The.....20.....

Sd/-

I, Sri.....one of the witnesses to the last will and testament of the testatrix mentioned in the above application, declare that I was present and saw the said testatrix affixed her signature thereto.

Sd/

**Application for appointment of a Receiver (in a partition suit)**

(Under Or. 40, r. 1 of the Code of Civil Procedure).

In the Court of the Asst. District Judge.....

Title Suit No.....of 20...

A.B. .... Plaintiff.

Versus

C.D. and 10 others ..... Defendants.

Petition under Or. 40, r. 1 of C.P. Code

The above-named plaintiff states as follows:

1. That the plaintiff is the owner of .66 acres of land (vide Schedule "C" of the plaint) by purchase by a registered Kobala from Defendant No. 2, a co-sharer of the holding.
2. That the said land in Schedule C is separated from the rest of the holding by clear and defined boundaries and is so mentioned in the plaintiff-petitioner's title deed.
3. That the plaintiff has been in possession thereof. All the defendants excepting Defendants No. 5 to 8 have submitted a joint written statement confirming plaintiffs possession over the "C" Schedule land.
4. That Defendants No. 5 to 7 are denying the plaintiff's possession. The plaintiff has sought for relief of partition in the above suit.
5. That for undue interference by Defendants No. 5 to 7, the plaintiff apprehends breach of peace and molestation if cultivation by the plaintiff is resorted to. On the contrary, the plaintiff would lose crops if the land is not cultivated and tilled immediately.
6. That in the circumstances of the case, a Receiver should be appointed for bringing the land in Schedule C under cultivation and to reap and harvest the future crop under the court's orders, even if the said Defendants No. 5 to 7 claim falsely possession over the land in Schedule C.

*Affidavit*

I, A.B. ....aged.....years, son of late.....by caste Hindu, by occupation ..... –agriculturist, residing at village ..... P.S. .... Dist. .... solemnly declare and affirm as follows :

(a) That I am the plaintiff of the above numbered title suit. I know facts of the case and I am competent to swear this affidavit. This is true to my knowledge.

(b) That the contents in paras 1 to 6 herein above are true to my knowledge.

Declared by Sri A.B., before the Commissioner of Affidavits.

Declarant is identified by me:



**Petition for appointment of a guardian of a minor**

In the Court of the District.....

Misc. (Guardianship) Case No. ....of.....

(Or. Act VIII Case No. .... of 20.....).

In the matter of appointment of Guardian of

(A)		Minors.
(B)		
(C)		

Under s. 10 of the Guardians and Wards Act

And

In the matter of 'X', widow of late.....

by caste Muslim,

residing at village.....

P.S..... Dt.....

.....Petitioner.

The humble petition of the aforesaid petitioner respectfully sheweth:

1. That A.B. and C, sons of late "D", ordinarily residing at VIII..... P.S.

..... District .....within the jurisdiction of this court, were born respectively in..... B.S.....

B.S..... B.S. and by religion are ..... and by sex are.....

2. That the said minors are entitled to certain property; nature, situation and approximate value of which are:

Locality	Khatian No.	Area	Jama	Approx. value
Mouja.....				
Thak No.....				
J.L. No.....				
P.S.....				
District.....				

.....

Total

Total Rs.

3. That the said property is in the possession of one 'X', grandfather of minors, residing at Vill..... P.S.....

Dt. ....

4. That..... mother of minors, has the custody of the person of the said minors.

5. That the minors have the following near relations:

(i) P son of late Q.

Grandfather of minors residing at Vill. ....

P.S.....Dt. ....

(ii) S.S./of T.

Maternal grandfather of minor, residing at Vill.....

	P.S.....Dt.....
(iii) E.	
(iv) F.	
(v) G.	
	Sons of Z—Maternal uncles of minors residing
	at Vill.....P.S.....Dt.....

6. That no application has at any time been made to this court, or to any other court, with respect to the guardianship of the persons and property of the said minors.

7. That no guardian of the person or property of the said minors has been appointed by any person entitled or claimed to be entitled by the law to which the minors are subject to make such appointment.

8. That this application is for the appointment of a guardian to the person and property of the said minors.

9. That your petitioner is the mother of minors. The minors were so long living in the same mess along with their mother with grandfather P. The said P was neglecting the welfare of the minors and appropriated to himself all the returns from minors' properties. Of late he stopped payment of tuition fees of private tutor of minors A and B. In last.....B.S. the said P managed to transfer minors'..... bighas of land in the name of his daughter..... by a fraudulent and forged kobala after the death of minors' parents. Besides, he is selling the produce of the lands of the minors and appropriating proceeds to himself. He has kept the revenue in arrear for.....years for which minors' properties are liable to be sold for threatened Certificate Proceedings. To recover possession of the land, to manage properties, for the welfare of minors the situation requires that the mother petitioner be appointed guardian for minors without further delay.

(Or, that the appointment is necessary for sale of a portion of minors' property for meeting debts left by the deceased father of minors).

That your petitioner, therefore, prays that an order appointing the petitioner a guardian for the person and property of minors be issued under s. 7 of the Guardians and Wards Act 1890.

And your petitioner, as in duty bound, shall ever pray.

I, Achhimon Bewa, petitioner named in the above petition do solemnly affirm that what is stated therein is true to the best of my information and belief.

L.T.I, of petitioner.

Signed in the presence of

(1)

(2)

I, Achhimon Bewa, the guardian proposed in the above application do hereby declare that I am willing to act as such.

Signature of proposed guardian.

Signed in presence of

(1)

(2)

**Application to sue as an indigent-person**

In the Court of the Sub-Judge at.....

Misc. Judicial Case No. .... /20.....

Title Suit No. .... /20..... (New)

A.B. .... Plaintiff.

Versus

C.D. .... Defendant.

Suit for title and Khash possession Valued at Rs. ....

The above-named plaintiff states as follows:

(Here insert the pleadings)

Then add:

The plaintiff petitioner is an indigent person. He is not possessed of sufficient means to enable him to pay the said court-fees of Rs. .... prescribed by law for the plaint of the above suit.

(Or, where no such fee is prescribed – The plaintiff petitioner is an indigent person. He is not entitled to property worth Rs. 1,000 other than the subject-matter of this suit).

The petitioner has not entered into any agreement with anybody in respect of the subject-matter of the suit. He has not transferred any of his property within two months next before presentation of this application, either fraudulently or in order to be able to apply for permission to sue as an indigent person.

The properties owned and possessed by the petitioner, with estimated value thereof, are specified below.

*List of properties with value thereof.*

(a) ..... Rs. ....

(b) ..... Rs. ....

(In words) Rs. ....

It is, therefore, prayed that the plaintiff petitioner may be permitted to sue as an indigent person.

**Memo of Appeal from a Decree of a lower court (Original Decree)**

In the Court of the District Judge, Allahabad.

Title Appeal No. .... of 20.....

..... Plaintiff-Appellant.

Versus

..... Defendant-Respondent.

The appellant appeals to the Court of the District Judge, Allahabad from the judgment and the decree passed by Mr. .... Subordinate Judge..... in Title Suit No. .... of 20..... dated the..... day of..... 20..... dismissing the appellant's suit on the following grounds of objection:

1. Because the findings of the lower Court.
2. Because.....
3. Because.....

Value of the appeal – Rs. 5,000.

Relief: To set aside the decree of the lower Court and to decree the plaintiff's suit with costs of both Courts.

.....

Advocate for the Appellant

**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/decreed by law. (Or, no appeal has been preferred against the said decree/judgment).

3. That the defendants are aggrieved with the said judgment/decreed and pray for review of the said judgment/decreed on the following, amongst others,

*Grounds*

(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.

**Application for a caveat (s. 148A)**

In the Court of the .....

Money Suit No...../20.....

In the matter of Money Suit No. .... /20.....

between A.B. S/o of C.D.

.....etc.

Versus

P.Q.S/o of M.N.

.....etc.

And

In the matter of caveat

P.Q., son of M.N.

residing at.....

.....

Caveator-Petitioner

The above-named petitioner states:

1. That Mr. A.B. named above has instituted the above money suit against Mr. P.Q. and the said suit is pending. The summons has not been served on the petitioner as yet.
2. That as far as the petitioner could know, the said Mr. A.B. is contemplating to file a petition under Or. 38, r. 5 of the C. P. Code for attachment of your petitioner's properties before judgment.
3. That your petitioner has every right to appear before the court on the hearing of such application, if any.
4. That your petitioner hereby lodges a caveat to the effect:

'Let nothing be done in the matter of application under Or. 38, r. 5, C.P. Code, if any, touching properties of the petitioner without notice to the petitioner'.

### **Model Limited Liability Partnership Agreement or LLP Agreement**

[See Section 23(4) of the LLP Act, 2008 (6 of 2009)]

THIS AGREEMENT of Limited Liability Partnership (LLP) is made at ..... this ..... day of ..... 20.....

#### *BETWEEN*

- (1) ..... a company registered under the Companies Act, 1956, having its Registered Office at..... through its authorised representative ..... which expression shall, unless it be repugnant to the subject or context thereof, include their legal heirs, successors, nominees and permitted assignees and hereinafter called the FIRST PARTY,
- (2) ..... S/o, D/o, W/o ..... R/o ..... which expression shall, unless it be repugnant to the subject or context thereof, include their legal heirs, successors, nominees and permitted assignees and hereinafter called the SECOND PARTY, and
- (3) ..... S/o, D/o, W/o ..... R/o ..... which expression shall, unless it be repugnant to the subject or context thereof, include their legal heirs, successors, nominees and permitted assignees and hereinafter called the THIRD PARTY, and

(All the PARTIES hereto, i.e., the FIRST PARTY, the SECOND PARTY and the THIRD PARTY shall be collectively called or referred to as the PARTNERS).

WHEREAS the First Party is .....

WHEREAS the Second Party is .....

WHEREAS the Third Party is .....

NOW the First Party, the Second Party and the Third Party are interested in forming a Limited Liability Partnership (LLP) under the Limited Liability Partnership Act, 2008 and intend to write down the terms and conditions of the said LLP as below.

IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES/PARTNERS HERETO AS FOLLOWS:

#### **Name of the LLP**

1. A Limited Liability Partnership (LLP) shall be carried on in the name and style of M/s. .... LLP and hereinafter called as the LLP.

#### **Registered Office**

2. The LLP shall have its Registered Office at ..... and/or at such other place or places, as shall be agreed to by the majority of the partners from time to time.

### Capital Contribution

3. The Capital Contribution of the LLP shall be Rs. .... (Rupees ..... only) which shall be contributed by the partners in the following proportions:

First Party .....% i.e. Rs. .... (Rupees ..... only)

Second Party .....% i.e. Rs. .... (Rupees ..... only)

Third Party.....% i.e. Rs..... (Rupees..... only)

The further Contribution if any required by the LLP shall be brought by the partners in their profit sharing ratio.

### Profit sharing ratio (PSR)

4. All the Partners of the LLP are entitled to share Profits & Losses in the ratio of their respective Capital Contribution in the LLP. The net profits & losses of the LLP shall be arrived at after providing for payment of Remuneration to the Designated and working partners and Interest on Partners' Contribution in the LLP or Loan given by them to the LLP.

### Business and Objects of the LLP

5. The objects, business and activities of the LLP shall be under :

.....  
.....  
.....  
.....

and other incidental and ancillary business more particularly described in the Schedule 'A' annexed herewith or any other business in any other manner as may be decided by the majority of the Partners.

### Common Seal

6. The LLP shall have a common seal to be affixed on documents as defined by partners under the signature of any of the Designated Partners.

7. That the immovable properties purchased by the LLP shall be clear, marketable and free from all encumbrances.

### Admission of New Partner

8. 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.

9. 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).

10. Profit Sharing Ratio (PSR) of the incoming partner will be in proportion to his capital contribution in the LLP.

### First Schedule of LLP Act not to apply

11. Provisions of First Schedule to the Limited Liability Partnership Act, 2008 (the LLP Act, 2008 (6 of 2009)) will not apply to the LLP as the LLP will be governed by the terms of this LLP Agreement.

### Remuneration & Interest to Partners

12. The LLP shall pay such Remuneration to the Designated Partners and working partners as may be decided by the majority of the Partners, for rendering his/her/its services.

13. The LLP shall pay such Interest to the Partners on Capital Contribution in the LLP as may be decided by the majority of the Partners.

14. If any partner advances any sum of money to the LLP over and above his Capital Contribution, the same shall be a debt due from the LLP to the said partner and shall carry simple interest at the rate of .....% per annum or any other rate decided by the partners by majority/unanimously.

### **Rights of the Partners**

15. All the partners hereto shall have the rights, title and interest in all the assets and properties in the said LLP in the proportion of their Capital Contribution.

16. All the partners of the LLP shall be the working partners and each of the partners shall give time and attention as may be required for the fulfillment of the objects of the LLP business.

17. Every partner has a right to have access to and inspect and have copy any of the books of the LLP.

18. Each of the parties hereto shall be entitled to carry on their own, separate and independent business as they might hitherto be doing or may hereafter do as they deem fit and proper and other partners and the LLP shall have no objection thereto, provided that the said partner has intimated the said fact to the LLP before starting or commencing the independent business and in case of a business directly or indirectly competing with that of the LLP taken written consent of the LLP, provided also that he/she/it shall not use the name of the LLP to carry on the said business.

19. The LLP shall have perpetual succession and the death, retirement or insolvency of any partner shall not dissolve the LLP.

20. On retirement of a partner, the retiring partner shall be entitled to full payment in respect of all his rights, title and interest in the partnership as herein provided. However, upon insolvency of a partner his or her rights, title and interest in the LLP shall come to an end.

21. Upon the death of any of the partners herein any one of his or her or its heirs will be admitted as a partner of the LLP in place of such deceased partner. The heirs, executors and administrators of such deceased partners shall be entitled to and shall be paid the full payment in respect of the right, title and interest of such deceased partner.

22. On the death of any partner, if his or her or its heirs opt not to become the partner, the surviving partners shall have the option to purchase the contribution of the deceased partner in the LLP.

### **Duties of the Partners**

23. Every partner shall account to the limited liability partnership (LLP) for any benefit derived by him without the consent of the LLP from any transaction concerning the LLP, or from any use by him of the property, name or any business connection of the LLP.

24. Each Partner shall be just and faithful to the other partners in the conduct of business and all the transactions relating to the LLP.

25. Every partner shall indemnify the limited liability partnership (LLP) and the other existing partners for any loss caused to it by his/her/its fraud in the conduct of the business of the limited liability partnership (LLP).

26. Each partner shall render true accounts and full information of all things affecting the LLP to any partner or his legal representatives.

27. In case any of the Partners of the LLP desires to transfer or assign his, her or its interest or share in the LLP



he has to offer the same to the remaining partners by giving 15 days notice. In the absence of any communication by the remaining partners the concerned partner can transfer or assign his share in the market.

28. No partner shall without the written consent of the LLP, –

- (1) Engage any employee or dismiss any employee of the LLP except for gross misconduct.
- (2) Employ any money, goods or effects of the LLP or pledge the credit thereof except in the ordinary course of business and upon the account or for the benefit of the LLP.
- (3) Lend money or give credit on behalf of LLP or have any dealings with any person, company or firm whom the LLP has previously in writing forbidden it to trust or deal with. Any loss incurred through any breach of the provisions shall be made good to the LLP by the partner incurring the same.
- (4) Enter into any bond, bail or become guarantor, surety or security with or for any person or knowingly do, cause or suffer to be caused anything whereby the LLP property or any part thereof may be seized or endangered.
- (5) Assign, mortgage or charge his/her/its share in the LLP or any asset or property of the LLP or make any other person a partner or sub-partner therein.
- (6) Compromise or compound or release or discharge any debt due to the LLP (except upon payment in full).
- (7) Engage directly or indirectly in any business competing with that of the limited liability partnership (LLP).

#### **Meetings of Partners of the LLP**

29. All matters related to the LLP as mentioned in Schedule B to this LLP Agreement shall be decided by a Resolution passed by majority in number of the partners & for this purpose each partner shall have one vote.

30. The meeting of the Partners may be called by sending 15 days prior notice to all the partners at their residential address or by mail at the e-mail ID provided by the individual Partners in written to the LLP. In case any partner is a foreign resident the meeting may be conducted by serving 15 days prior notice through e-mail. Provided that the meeting may be called at shorter notice, if the majority of the partners agree in writing to the same either before or after the meeting. In case, any urgent meeting is called, the notice requirement may be ratified by all the Partners.

31. Meetings of the Partners shall ordinarily be held at the Registered Office of the LLP or at any other place as per the convenience of partners.

32. With the written Consent of all the partners, a Meeting of the Partners may be conducted through Tele-Conferencing or Video-Conferencing.

33. The limited liability partnership (LLP) 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 LLP.

#### **Duties of Designated Partners**

34. Authorised representatives of the First Party and the Second Party shall act as the Designated Partners of the LLP in terms of the requirements of the Limited Liability Partnership Act, 2008 (6 of 2009).

35. Designated Partners shall be responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership (LLP) in respect of compliance of the provisions of the LLP Act including filing of any Document, Return, Statement and the like Report pursuant to the provisions of Limited Liability Partnership Act, 2008.

36. The Designated Partners shall be responsible for the doing of all acts and deeds arising out of this LLP Agreement.

37. Each partner shall punctually pay and discharge the separate loans and debts and indemnify the other

partners and the LLP assets against any loss caused or suffered by the LLP and all proceedings, costs, claims and demands from the LLP in respect thereof.

### **Books of Account**

38. Books of Accounts of the limited liability partnership (LLP) shall be kept at the registered office of the LLP for reference, access, inspection and having copies of by all the partners.

39. The accounting year of the LLP shall be the Financial Year, i.e., from 1st April of the year to 31st March of the subsequent year. The first accounting year shall be from the date of commencement of the LLP till 31st March of the subsequent year.

### **Bank Accounts**

40. Bankers of the partnership shall be ..... Bank, ..... Branch and/or such other Bank or Banks as the partners may from time to time be agree upon by majority/ unanimously.

41. Bank Accounts of the LLP including Loans, Advances & Credit Limits, if any, from the Banks and Financial Institutions taken by the LLP, may be opened and operated by the Designated Partners and other Partners either singly or jointly as may be agreed upon from time to time by the partners by majority/ unanimously.

### **Extent of Liability of the LLP**

42. 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.

### **Indemnity**

43. The limited liability partnership (LLP) shall indemnify each partner in respect of payments made and personal liabilities incurred by him –

- (1) in the ordinary and proper conduct of the business of the limited liability partnership (LLP); or
- (2) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership (LLP).

44. The LLP shall indemnify and defend its partners and other officers from and against any and all liability in connection with claims, actions and proceedings (regardless of the outcome), judgment, loss or settlement thereof, whether civil or criminal, arising out of or resulting from their respective performances as partners and officers of the LLP, except for the gross negligence or willful misconduct of the partner or officer seeking indemnification.

### **Arbitration**

45. 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 (26 of 1996).

### **Cessation of existing Partners**

46. Any partner may cease to be a partner of the LLP by giving a notice in writing of not less than 30 days to the other partners of his intention to resign as partner.

47. No majority of Partners can expel any partner except in the situation where any partner has been found guilty of carrying of activity/business of the LLP with fraudulent purpose.

### **Winding up of the LLP**

48. The LLP can be wound up with the consent of all the partners subject to the provisions of the Limited Liability

**480 PP-DP&A**

Partnership Act 2008.

IN WITNESS WHEREOF the parties have put their respective hands the day and year first hereinabove written.

Signed and delivered by

For and on behalf of ..... (Name of the LLP)

(Partner)

(Partner)

(Partner)

Witnesses:

1. Name: .....

Address: .....

Signature: .....

2. Name: .....

Address: .....

Signature: .....

*SCHEDULE A*

**Incidental, Ancillary or Other Business of the LLP**

(1) THE OBJECTS OR BUSINESS INCIDENTAL OR ANCILLARY TO THE ATTAINMENT OF THE MAIN OBJECTS OR BUSINESS ARE:

(2) THE OTHER BUSINESS ARE:

*SCHEDULE B*

MATTERS TO BE DECIDED BY A RESOLUTION PASSED BY A MAJORITY IN  
NUMBER OF THE PARTNERS

**PROFESSIONAL PROGRAMME**  
**DRAFTING, PLEADINGS AND APPEARANCES**

**PP-DP&A**

**WARNING**

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

“27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as student, or debar him from re-registration as a student, or take such action as may be deemed fit.

## PROFESSIONAL PROGRAMME

### DRAFTING, PLEADING AND APPEARANCES – TEST PAPER

*[This Test Paper is for recapitulate and practice for the students. Students need not to submit responses/ answers to this test paper to the Institute.]*

*Time Allowed: 3 Hours*

*Maximum Marks: 100*

• All questions are compulsory

• Marks for each question is indicated alongside of the question.

1. (a) What is meant by 'pleadings'? Explain the fundamental rules of pleadings.  
(b) Drafting of document is skilled man's job. Explain this statement with some Do's and Don'ts in drafting.  
*(10 marks each)*
2. (a) Briefly explain Special Leave petitions under the Constitution of India.  
(b) Discuss the essential points to be observed for drafting of lease documents. Distinguish between license and lease.  
*(10 marks each)*
3. (a) Second Board Meeting of Alpha Company is scheduled to be held on 27th of June 20XX. Draft a specimen notice of board meeting with the illustrative list of agenda items which would be discussed during meeting. Also provide option for attending the meeting through video conferencing in the notice.  
(b) The primary purpose of a legal opinion is communication of advice to a client. Comment.  
*(10 marks each)*
4. (a) What is a "collaboration agreement". Mention important guidelines which are required to be followed while entering into a foreign collaboration agreement.  
(b) "Practising of good professional etiquettes is necessary for professional success in the emerging business scenario." Discuss.  
*(10 marks each)*
5. Write short note on:
  - (a) Recital
  - (b) Continuing Guarantee
  - (c) Rule of adverse inference
  - (d) Extinction of a trust*(5 marks each)*