

SUGGESTED ANSWERS

PROFESSIONAL PROGRAMME

DRAFTING, APPEARANCES AND PLEADINGS (PP-DA&P/2013)



**THE INSTITUTE OF
Company Secretaries of India**

IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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These answers have been written by competent persons and the Institute hopes that the **SUGGESTED ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model and not exhaustive answers and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

The Suggested Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

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TEST PAPER 1/2013

Time allowed : 3 hours

Max. Marks : 100

NOTE : Answer ALL Questions.

Question No. 1

- (a) *What is meant by 'recitals' as a component in a deed ? What is its evidentiary value ?* (10 marks)
- (b) *Explain the difference between the 'writ of prohibition' and 'writ of certiorari.'* (10 marks)

Answer to Question No. 1(a)

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

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.

Answer to Question No. 1(b)

Writ of 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 as 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.

Writ of 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.

Question No. 2

- (a) *Draft a specimen of memorandum of mortgage by deposit of title deeds.*
(10 marks)
- (b) *Discuss Irrevocable Power of Attorney. Draft a specimen Irrevocable Power of Attorney to be executed by a borrower company in favour of lender company. Whether is it necessary to get such a power of attorney registered ?*
(10 marks)

Answer to Question No. 2(a)

Specimen of Memorandum of Mortgage by Deposit of Title Deeds

Memorandum that this..... day of..... 2013, '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.

Date this..... day of..... 2013.

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.

Answer to Question No. 2(b)

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. 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. Such a power of attorney will need registration.

IRREVOCABLE POWER-OF-ATTORNEY

(To be stamped as a General Power of Attorney)

THIS POWER OF ATTORNEY granted at this..... day of..... 2013 by 'A Limited' a company within the meaning of the Companies Act, 1956, 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..... 2013 (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.

Question No. 3

- (a) Define building contract. Draft a specimen building contract including all the terms and conditions which are essential for such a contract. (10 marks)
- (b) What is meant by pleadings? What is the objective behind formulating the rules of pleadings? Explain the fundamental rule of pleadings. (10 marks)

Answer to Question No. 3(a)

Building Contracts

Building contracts, being legal documents, have to be drawn in accordance with the provisions of the Indian Contract Act. Such an agreement must have all the essential ingredients of a contract.

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 this..... day of.....2013 between ABC Ltd., a company incorporated under the Companies Act, 1956, 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 twenty thousand 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 twenty thousand 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 the essence of 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 on 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 1st 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 white 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

Answer to Question No. 3(b)

The present day system of pleadings in our country is based on the provisions of the Civil Procedure Code, 1908 (as amended) supplemented from time to time by Rules in that behalf by High Courts of the States. There are rules of the Supreme Court and Rules by special enactments as well. Pleadings generally mean either a plaint or a written statement. The main objective behind formulating the rules of pleadings is to find out and narrow down the controversy between the parties. Provisions relating to pleadings in civil cases are meant to give each side intimation of the case of the other so that it may be met to enable courts to determine what is really at issue between parties, and to

prevent deviations from the course which litigation on particular cause of action must take ('*Canesh Trading vs. Mojiram*', AIR 1978 SC 484). The whole object of pleading is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate (*Lakshmi Narayan v. State of Bihar*, AIR 1977 Patna 73).

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

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

According to their dictionary meanings "applications" and "petitions" are interchangeable terms. But in practice, the expression, "Petitions" is normally used to indicate formal applications for seeking a remedy provided by law. The two may be classified into:

- (1) Applications under the provisions of the Code of Civil Procedure.
- (2) Petitions under other Statutes.
- (3) Petitions under the Constitution.

Question No. 4

- (a) *Aman Ltd. has entered into a contract with Gopal for supply of original equipments needed for their main product sold in the market. They have further agreed to resolve any difference/dispute that may arise in the course of their dealings by resorting to arbitration. You are asked to draft an arbitration agreement for execution by the parties. (10 marks)*
- (b) *How is the difference between licence and lease reflected in drafting license deed and lease deed? And what precaution should be kept in mind while drafting such deeds? (10 marks)*

Answer to Question No. 4(a)

Specimen of Arbitration Agreement

This agreement made and entered into between Aman Ltd. and Gopal on this 9th day of June, 2013 witnesseth as follows:

WHEREAS differences and disputes that may arise between the parties above-mentioned regarding the matter of difference/dispute in respect of their business dealings and the parties would like to mutually settle the matter by arbitration. 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

Answer to Question No. 4(b)

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 licence 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 licence 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 licence, it is revocable except in certain cases.

Distinction between Licence and Lease

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.

Question No. 5

Differentiate between the following terms :

- (i) *Testatum and Testimonium Clause*
- (ii) *Affidavit and Petition*
- (iii) *Counter Guarantee and Fidelity Guarantee*
- (iv) *English Mortgage and Simple Mortgage.* (5 marks each)

Answer to Question No. 5(a)(i)

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 Follows" are put in the beginning and then paragraphs are numbered.

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 day on the date above written".

Thus *testimonium* clause can be worded according to the status and delegation of executants.

Answer to Question No. 5(a)(ii)

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

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

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

Answer to Question No. 5(a)(iii)

Counter Guarantee : A guarantee given by the principal debtor to the surety providing him continuing indemnity against any loss or damage that the surety may suffer on account of default on the part of the principal debtor, is called "counter-guarantee".

Fidelity Guarantee : A guarantee, guaranteeing an employer against the misconduct of an employee or to answer for the debt or default of another, is called a "fidelity guarantee".

Answer to Question No. 5(a)(iv)

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.

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.

TEST PAPER 2/2013

(This Test Paper is based on entire Study Material)

Time allowed : 3 hours

Max. Marks : 100

NOTE : Answer ALL Questions.

Question No. 1

- (a) *Discuss the points to be considered in drafting of a mortgage deed.*
(10 marks)
- (b) *Explain 'supplemental deeds' and 'endorsements'. How do they differ from each other?*
(5 marks)

Answer to Question No. 1(a)

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. In the case of an equitable mortgage, 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:

- (a) *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.
- (b) *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".
- (c) *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.

Answer to Question No. 1(b)

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.

Question No. 2

- (a) *Why is art of advocacy important? What are the important factors which Company Secretaries should borne in mind while making written pleadings ? (10 marks)*
- (b) *How a trade mark has been defined? Draft a specimen deed of assignment of registered trade mark. (10 marks)*

Answer to Question No. 2(a)

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.

Points to be kept in mind while drafting written 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;
- Meet clearly with the specific points raised by the opponent in the reply affidavit.

Oral Pleadings

Effective oral pleadings are relevant both at the stage of preparation of the case

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

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

While Presenting Your Case

- Submit a list of citations to the Court Master before opening of case; Start your address 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;
- Take instructions from client in advance with respect to alternative reliefs.

Answer to Question No. 2(b)

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.

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 manners 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.

Question No. 3

- (a) *“Practising of good professional etiquettes is necessary for professional success in the emerging business scenario.” Discuss. (10 marks)*
- (b) *What important points you will keep in view while drafting articles of association of a public limited company or object clause in Memorandum of Association? (10 marks)*

Answer to Question No. 3(a)

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

In today’s world of business, professionals need to know how to conduct themselves within the 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.

Answer to Question No. 3(b)

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.

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

- (i) Adopt Table A in full; or
- (ii) Exclude Table A wholly and register own Articles suiting its requirements; or
- (iii) Register own articles and in addition thereto allow Table A to apply so far as it is not modified or excluded by the articles.

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

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

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

2. Directors – appointment of directors, their noting rights, resignations, termination etc. should be given due consideration and their rights, powers and privileges should be incorporated in Articles. Proportional representations may also be looked into.
3. In Government Companies, Joint Sector Companies, Joint Ventures with foreign companies, joint venture with Government Companies, the main terms of their partnership in Share Capital as well as the management of the affairs of the company with power and authority delegation be relevantly discussed in the Articles with scope and limitations thereto to avoid any misinterpretation.
4. As far as possible, regulation given in Table A may be borrowed, even if it is not made applicable so that Article may conform to the intent and spirit of law.
5. Efforts should be made to make each article self explanatory and self interpretative to avoid misleading conclusions. Coherence and sequence of the contents should be maintained at any costs.
6. Any items which are already mentioned in Memorandum and is to be mentioned in Articles, it is better that it is put in words such as “as mentioned in Memorandum of Association” which will skip the requirement of altering Articles when Memorandum is altered.
7. No provision which a company cannot do either as per Memorandum or Companies Act or any other law, should find a place in articles: e.g. expulsion of members. This is opposed to Company Jurisprudence and is ultra vires of the Act.
8. Where the company would require assistance from financial Institutions, provisions be made for appointment of nominee directors, conversion of loans from financial institutions into equity etc.
9. Sections 3(2)(iii), 274(3) among other sections specifies some prohibitions, limitations and restrictions in case of Pvt. Ltd. Companies should be taken care of in drafting articles.
10. After drafting a proper balancing should be done with Memorandum’s contents, as to coverage, inconsistencies with it, contradictions occurred etc. to enable proper modification in time.

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

The object clause defines the very objects of its formation, existence and operations and powers which a company has towards the attainment of the objectives. 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.

Prior approval of the competent authority is obtained wherever necessary for carrying out any objective.

Question No. 4

- (a) *What is meant by 'pre-incorporation contracts' ? Can a company ratify a contract entered into by the promoters on its behalf before its incorporation? Explain with reasons. (10 marks)*
- (b) *Enumerate the procedure of compounding of offences under the Companies Act, 1956 and Foreign Exchange Management Act, 1999. (10 marks)*

Answer to Question No. 4(a)

Pre-Incorporation Contracts

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

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.

Answer to Question No. 4(b)

Compounding of offences under Companies Act, 1956

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

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

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

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

Compounding of contravention under Foreign Exchange Management Act, (FEMA) 1999

Persons who have flouted the Foreign Exchange Management Act (FEMA) will be allowed to settle the offence by paying monetary penalty and will not have to go for litigation if such a person acknowledges having committed the contravention. This, however, will not apply to hawala transactions.

The Government has, in consultation with the Reserve Bank of India, reviewed the procedures for compounding of contravention under FEMA. The procedures have been reviewed to provide comfort to the citizens and corporate community by minimising transaction costs, while taking severe view of wilful, malafide and fraudulent transactions. Accordingly, the responsibility of administering compounding of contravention cases under FEMA has been vested with the Reserve Bank with exception of hawala transactions. The Directorate of Enforcement would continue to deal with these cases.

As per the new norms announced on 1st February 2005, the RBI will be required to conclude case proceedings within 180 days from the receipt for application for compounding and the sum worked out after compounding has to be paid within 15 days from the order of compounding.

The order passed by RBI will be applicable for a period of three years. If a second offence is committed after the expiry of three years, it will be deemed as a fresh contravention and not a repetition of the earlier one.

Question No. 5

(a) *What is a "collaboration agreement". Mention important guidelines which are required to be followed while entering into a foreign collaboration agreement.*
(10 marks)

(b) *Write short notes on the following:*

(i) *Del Credere Agency*

(ii) *Usufructuary Mortgage*

(iii) *Power of Attorney and Letter of Authority.*

(iv) *Deed Escrow*

(v) *Arbitration Award*

(3 marks each)

Answer to Question No. 5(a)**Collaboration agreement**

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 should be brought in cash.
2. *Lump sum payment* : The amount agreed to be paid by an Indian party to a foreign collaborator for technology transfer should be paid in three instalments as follows:
 - (i) one-third to be paid after the agreement has been approved by the Central Government;
 - (ii) one-third on transfer of the technical documents; and
 - (iii) one-third on the commencement of commercial production.
3. *Royalty* : Royalty payable to a foreign collaborator has to be calculated on the basis of net ex-factory selling price of the product less excise duties and cost of imported components. The normal rate of royalty may be three per cent to five per cent. This rate will depend upon the nature and extent of the technology involved. 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".

Answer to Question No. 5(b)(i)

Del credere agent

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 authorized to make for his principal and be bound as soon as he receives the money, to hand it over to the principal. He is distinguished from other agents simply in this that he guarantees that those persons to whom he sells perform the contracts which he makes with them.

Answer to Question No. 5(b)(ii)

Usufructuary Mortgage

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

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

Answer to Question No. 5(b)(iii)

Power of Attorney and Letter of Authority

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”.

In terms of Section 1A of the Powers-of-Attorney Act, 1882 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.

Letters of Authority

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

Answer to Question No. 5(b)(iv)

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

Answer to Question No. 5(b)(v)

An award is a document incorporating the adjudication or determination of a matter in dispute by the person competent to adjudicate and determine the dispute. An arbitration award is such adjudication by the arbitral Tribunal to whom dispute is referred. The definition of arbitral award under Section 2(1)(c) of the Arbitration and Conciliation Act, 1996 does not give much details of an arbitral award. It says “arbitral award” includes an interim award.

Requisites of an Award

The general requisites of an award are:

- (a) the law requires that the award shall be made in writing and signed by all the members of the arbitral tribunal or by the majority of them if the reason for any omitted signature is stated, stating its date and the place of arbitration;
- (b) it must be consistent with the submission;

- (c) it must be certain;
 - (d) it must be fair to the parties;
 - (e) it must be final;
 - (f) its implementation must be possible;
 - (g) the award must state the reasons upon which it is based.
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TEST PAPER 3/2013

(This Test Paper is based on entire Study Material)

Time allowed : 3 hours

Max. Marks : 100

NOTE : Answer ALL Questions.

Question No. 1

- (a) *What is a deed of assignment ? Draft a specimen deed of assignment of copyright of a novel. (10 marks)*
- (b) *Explain briefly the various types of writs provided under the Constitution of India for the enforcement of fundamental rights. (10 marks)*

Answer to Question No. 1(a)

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.

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 or umpire, 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 and Conciliation Act, 1996 and its statutory modification and re-enactment.
11. That the words "author" and "publishers" or "parties" used hereinabove shall unless there be something contrary to the context, include their respective heirs, survivors, successors, representatives, executors, administrators and assigns and successors in business.

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

Witness: Author

Witness: Publisher

Answer to Question No. 1(b)

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.

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, quo warranto and certiorari. 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. Disobedience 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.

Prohibitions : 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, 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.

Question No. 2

- (a) *How can the exact value of goodwill be determined? Draft a specimen Deed of Sale of a business and assignment of goodwill.* (10 marks)
- (b) *Discuss in brief the Appellate Authorities under the Income Tax Act, 1961.* (10 marks)

Answer to Question No. 2(a)

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 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 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 ₹..... 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

Answer to Question No. 2(b)

Appellate Authorities under the Income-Tax Act, 1961

Appeal against the order of the Income-tax Officer lies with the Appellate Assistant Commissioner or the Commissioner (Appeals) or Commissioner of Income-tax. Appeal against the order of the Appellate Assistant Commissioner or the Commissioner (Appeals) can be preferred by the assessee or the income-tax department and such appeal lies with the Appellate Tribunal. Appeal against the order of the Appellate Tribunal by way of reference by the Tribunal can also be preferred by the assessee or the income-tax department and such appeal lies to the High Court. The Order of the High Court on the reference can be challenged either by the assessee or by the income-tax department by preferring an appeal to the Supreme Court which is the final appellate authority.

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.

Such an appeal shall be in the prescribed Form No. 35.

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.

Question No. 3

- (a) *What are the important points that should be taken into consideration while drafting contracts ?* (10 marks)
- (b) *Draft specimen notices (i) to determine partnership at will; and (ii) to dissolve partnership.* (5 marks each)

Answer to Question No. 3(a)

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. 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.

Some of the important matters which 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 giving 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 be also given. In case of firms and companies the particulars of persons representing them be invariably given including details of 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 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. It is generally 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 for 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 the 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

requirement 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 D/A or 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 matter 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 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.

Where Company is a Party to an Agreement

A company being a legal person has to act through the Board of directors who under Section 291 of the Companies Act can exercise all such powers and do all such acts which company can exercise and do subject to the provisions of the Memorandum and Articles and subject to restrictions under the Companies Act. Thus, any agreement on behalf of the company can be signed by any director, officer or any other person so specifically or generally authorised by the Board of directors. The putting of seal of the company on agreements entered on behalf of the company is governed by the provisions in the Articles of Association of the company and/or by the resolution of the Board authorising the entering of the agreement. However, non putting of seal or an agreement may not invalidate the agreement if it has otherwise been properly executed. However, if a document purported to be sealed or signed on behalf of the company is proved to be forged, it does not bind the company. But the company may be stopped from disclaiming document as a forgery, if it has been put forward as genuine by an official acting within his actual, usual, or apparent authority [*Naguneri Peace Memorial Cooperative Urban Bank Ltd. v. Alamelu Ammal*, (1961) 31 Com. Cases 705 (Mad.)].

Where the Companies Act requires certain clauses to be included or not to be included in agreements entered into by the companies, this should be strictly followed, say, Sections 119(1) and 294(2) of the Companies Act.

Answer to Question No. 3(b)**(i) Notice to Dissolve Partnership**

To

.....

.....

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 :

(ii) Notice to Dissolution of Partnership

Notice is hereby given that the partnership lately subsisting between us the undersigned A.B. & Co. carrying on business as..... at..... under the style or firm of ABC and 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.

Question No. 4

- (a) *Define Gift. Discuss procedure for making a gift. Draft a specimen deed of gift for love and affection. (10 marks)*
- (b) *'The objects of the trust must be lawful'. Comment in the light of the provisions of the Indian Trust Act, 1882. Distinguish between a 'public trust' and a 'private trust'. (10 marks)*

Answer to Question No. 4(a)

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.

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

Deed of Gift for Love and Affection

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

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

NOW THIS DEED WITNESSES AS FOLLOWS:

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

IN WITNESS WHEREOF, etc.

The Schedule above referred to

Signed, sealed and delivered

AB

CD

Answer to Question No. 4(b)

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 confidantee 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. However, a trust created for the benefit of the debenture holders of a company, holding irredeemable debentures or debentures redeemable only on the happening of a contingency, however, remote, or on the expiration of a period, however long, shall be quite legal under Section 120 of the Companies Act, 1956.

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.

Question No. 5

- (a) *Explain in brief the essentials of a hypothecation agreement. Draft a specimen agreement on behalf of a firm M/s ABC to hypothecate goods to execute fixed loan from XYZ Bank. (10 marks)*
- (b) *Briefly explain the contents of a service contract. Draft a specimen agreement of employment of manager of a business concern. (10 marks)*

Answer to Question No. 5(a)

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. Along with 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.....

Answer to Question No. 5(b)**Contents of a Service Contract**

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

As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man, 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. Service under Government¹ or a statutory corporation² is primarily a matter of status, even though its origin be contractual, and the employer generally has the statutory power to alter the conditions of service unilaterally though subject to certain limitations.[*Roshan Lai Tandon v. Union of India*, (1968) 1 SCR 125; A 1967; SC 1889. *Sirsi Municipality v. Tellis*, A 1973 SC 855; *Sukhdeo Singh v. Bhagatram*, A 1975 SC 1331]

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. It is not permissible, where the employer is Government or a statutory corporation or other instrumentality of the State, to provide for termination of services of a permanent employee by a mere notice without formal inquiry into the charges against him (see footnote below precedent No. 4).

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.

The grounds on which the employment may be determined. Determination of during the term are generally misconduct, negligence, or want of Employment.

Specimen Agreement of Employment of Manager of a Business Concern

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

WHEREAS

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

NOW THIS AGREEMENT WITNESSES as follows :

1. The manager shall work as such for a term of..... years from the day of..... at..... or any other place as desired by the employer.
2. The manager shall give his whole time and attention to the said business and shall use his best endeavour to improve and expand the same and shall in all respects diligently and faithfully obey and observe all lawful orders and instructions of the employer in relation to the conduct of the said business and shall not without his consent divulge any secrets or 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.
