

## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY I - GENERAL PRINCIPLES OF DRAFTING-I**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to acquaint the students with the:

- Meaning of drafting and conveyancing
- Distinction between drafting and conveyancing
- General principles of drafting of deeds
- Some *do's* and *don'ts* in drafting
- Use of appropriate words and expressions
- Aids to clarity and accuracy
- Legal implications and requirements

#### **INTRODUCTION**

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

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

With the knowledge of drafting and conveyancing, better interaction could be had by the corporate executives while seeking legal advice from the legal experts in regard to the matters to be incorporated in the documents, to decide upon the coverage and laying down rights and obligations of the parties therein. Knowledge in advance on the subject matters facilitates better communication, extraction of more information, arriving on workable solutions, and facilitates settlement of the draft documents, engrossment and execution thereof.

Knowledge of drafting and conveyancing for the corporate executives is also essential for doing documentation departmentally. An executive can make a better document with all facts known and judging the relevance and importance of all aspects to be covered therein.

A number of documents are required to be studied and interpreted by the corporate executives. In India, in the absence of any legislation on conveyancing, it becomes imperative to have knowledge about the important rules of law of interpretation so as to put right language in the documents, give appropriate meaning to the words and phrases used therein, and incorporate the will and intentions of the parties to the documents.

## **DRAFTING — ITS MEANING**

Drafting may be defined as the synthesis of law and fact in a language form [Stanley Robinson: *Drafting Its Application to Conveyancing and Commercial Documents* (1980); (Butterworths); Chapter 1, p.3]. This is the essence of the process of drafting. All three characteristics rank equally in importance. In other words, legal drafting is the crystallization and expression in definitive form of a legal right, privilege, function, duty, or status. It is the development and preparation of legal instruments such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts and leases, etc. The process of drafting operates in two planes: the conceptual and the verbal. Besides seeking the right words, the draftsman seeks the right concepts. Drafting, therefore, is first thinking and second composing.

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

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

## **CONVEYANCING — ITS MEANING**

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

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

Stamp Act, 1899, "includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided by Schedule I" of the Act." Section 5 of the Transfer of Property Act, 1882 (Indian) makes use of the word "conveyance" in the wider sense as referred to above.

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

### **DRAFTING AND CONVEYANCING: DISTINGUISHED**

Both the terms "drafting and conveyancing" provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas "drafting" gives a general meaning synonymous to preparation of drafting of documents. Document may include documents relating to transfer of property as well as other "documents" in a sense as per definition given in Section 3(18) of the General Clauses Act, 1897 which include any matter written, expressed or described upon any substance by means of letters, figures or mark, which is intended to be used for the purpose of recording that matter. For example, for a banker the document would mean loan agreement, deed of mortgage, charge, pledge, guarantee, etc. For a businessman, document would mean something as defined under Section 2(4) of the Indian Sale of Goods Act, 1930 so as to include a document of title to goods i.e. "Bill of lading, dock-warrant, warehouse-keepers' certificate, wharfingers' certificate, railway receipt multi-modal transport document warrant or order for the delivery of goods and any other document used in ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." The Companies Act, 1956 defines vide Section 2(15) the term "document" in still wider concept so as to include "summons, notices, requisitions, order, other legal process, and registers, whether issued, sent or kept in pursuance of this or any other Act, or otherwise". Thus, drafting may cover all types of documents in business usages.

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

## **DISTINCTION BETWEEN CONVEYANCE AND CONTRACT**

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

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

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

When the draftsman has digested the facts, he should next consider as to whether those intentions can be given effect to without offending against any provision of law. He must, therefore, read the introductory note, or, if time permits, the literature on the subject of the instrument. A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Validity of document in the eye of law cannot be ignored and at the same time the facts which should be disclosed in the document cannot be suppressed. Nothing is to be omitted or admitted at random. Therefore, knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the

applicable law are not violated or avoided. For example, in cases where a deed to be executed by a limited company, it is necessary to go into the question as to whether the company has got power or authority under its memorandum to enter into the transaction. A limited company can do only that much which it is authorised by its memorandum. Further, a company being a legal entity, must necessarily act through its authorised agents. A deed, therefore, should be executed by a person duly authorised by the directors by their resolution or by their power of attorney.

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

[*Piesse and Giechrist Smith book on The Elements of Drafting*, 2nd Ed. pp. 7-12]. Document should be supported by the schedules, enclosures or annexures in case any reference to such material has been made in that.

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

*i. Fowlers' five rules of drafting*

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

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

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

It is always advisable to sketch or outline the contents of a document before taking up its drafting. This rule is suggested by Mr. *Davidson*, a celebrated

authority on conveyancing in his book on *Conveyancing*, 4th Ed., Vol. I, p. 20, where the learned author says as follows:

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

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

*iii. Skelton draft and its self-appraisal*

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

*iv. Special attention to be given to certain documents*

Certain documents require extra care before taking up the drafting. For example, it must be ensured that contractual obligations are not contrary to the law in the document, where the facts so warrant to ensure. Further, in all the documents where transfer of immovable property is involved through any of the prescribed legal modes, it is necessary to ensure the perfect title of the transferor to such property proposed to be transferred by causing investigation and searches in relation to such title done through competent lawyers or solicitors in the concerned offices of Registrar of Assurance, local authorities, Registrar of Companies (in the case of the vendor being a corporate unit) etc. In addition, the requisite permissions required under different enactments viz., Income-tax Act, Land Ceiling Laws, Companies Act, 1956, Lessor's consent in the case of leasehold land, or any compliance desired under other Central or State Laws or personal laws etc. should be planned to be obtained in advance and recited in the documents wherever thought necessary.

*v. Expert's opinion*

If the draft document has been prepared for the first time to be used again and again with suitable modification depending upon the requirements of each case it should be got vetted by the experts to ensure its suitability and legal

fitness if the corporate executive feels it so necessary.

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

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

### **SOME DO'S**

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

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

### **SOME DON'TS**

The following things should be avoided while drafting the documents:

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

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

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

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

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

1. For general words refer to ordinary dictionary for ascertaining the meaning of the words. For example, *Oxford Dictionary* or *Webster's Dictionary* or any other standard dictionary may be referred to for this purpose.
2. For legal terms refer to legal dictionary like *Wharton's Law Lexicon* or other dictionaries of English Law written by eminent English Lexicographers as Sweet Cowel, Byrne, Stroud, Jowit, Mozley and Whiteley, Osborn etc. In India, *Mitra's Legal and Commercial Dictionary* is quite sufficient to meet the requirements of draftsman.
3. As far as possible current meaning of the words should be used and if necessary, case law, where such words or phrases have been discussed, could be quoted in reference.

4. Technical words may be used after ascertaining their full meaning, import of the sense and appropriate use warranted by the circumstances for deriving a technical or special meaning with reference to the context.
5. The choice of the words and phrases should be made to convey the intention of the executor to the readers in the same sense he wishes to do.
6. The draftsman should also use at times the recognised work of eminent legal expert on the interpretation of statutes. In *Maxwell's Interpretation of Statutes* use of some of the words is explained for the guidance of the readers.

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

### **USE OF APPROPRIATE WORDS AND EXPRESSIONS**

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

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

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

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

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

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

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

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

*"AT", "NEAR", "ON", "in the vicinity" and the like:* In construing a description, the

word "at" when applied to a place, is less definite in meaning than "in" or "on". Primarily, "at" signifies nearness, and is thus a relative term. When used in describing the location of real estate the word "near" signifies relativity in a greater or less degree. It may be equivalent to "at" or it may import the sense of "at" or "along" as in the expression "along the sea shore".

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

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

The word "adjoining" does not necessarily import that the boundary of the land conveyed is conterminous with the boundary of the adjoining land, for all that the word implies is contiguity, and hence it is equally applicable where one boundary is shorter than the other. It has been held that a common corner will make two tracts of land "contiguous".

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

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

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

"And", "Or": As used in deeds, the word "and" ordinarily implies the conjunctive, while "or" ordinarily implies the alternative or is used as a disjunctive to indicate substitution. There is a presumption that when the word "or" is used in the

habendum of deed, the grantor intended it to express its ordinary meaning as disjunctive, and that he did not intend to use the word "and" which will be read "or" and "or" will be read "and" but such construction is never resorted to for the purpose of supplying an intention not otherwise appearing.

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

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

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

the recited and the actual area. When used with reference to the quantity of land conveyed, the words "estimated" and "about" are synonymous with the phrase "more or less".

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

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

### **AIDS TO CLARITY AND ACCURACY**

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

#### **Interpretation of Deeds and Documents**

In India, in the absence of any legislation on conveyancing, it becomes imperative to have knowledge about the important rules of law of interpretation so as to put right language in the documents, give appropriate meaning to the words and phrases used therein, and incorporate the will and intention of the parties to the documents. There is no law in India on the interpretation of documents also. On the subject of interpretation of statutes Maxwell's works published by Butterworth commands wide acceptance by the judiciary all over India. Based on the said work a set of principles has been evolved for the interpretation and construction of documents, assessing the language and assigning the exact meaning to the words and phrases to be used in the documents. *For a detailed study of such principles, students are advised to refer "Study II" on "Interpretation of Statutes" of the "General and Commercial Laws" Module I of the Executive Programme under the New Syllabus.* However, some of the relevant principles of interpretation of deeds and documents are discussed below:

A. *Informal Agreements:* In interpretation of informal agreements, the rule to be applied is that of reasonable expectation; that is to say, the agreement is to be interpreted in the sense in which the party who used the words in question should reasonably have apprehended that the other party may apprehend them. If the intention is manifested ambiguously, the party manifesting the same in an ambiguous manner ought to have had reason to know that the manifestation may reasonably bear more than one meaning and the other

party believes it to bear one of those meanings, having no reason to know that it bears another meaning that is given to it.

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

1. A deed constitutes the primary evidence of the terms of a contract, or of a grant, or of any other disposition of property (Section 91 of the Evidence Act). The law forbids any contradiction of, or any addition, subtraction or variation in a written document by any extrinsic evidence, though such evidence will be admissible to explain any ambiguity (Section 92 of the Evidence Act). The document should, therefore, contain all the terms and conditions, preceded by recital of all relevant and material facts.
2. In cases of uncertainty, the rules embodied in provisos 2 and 6 of Section 92 of the Evidence Act can be invoked for construing a deed. The sixth proviso enables the court to examine the facts and surrounding circumstances to which the language of the document may be related, while the second proviso permits evidence of any separate oral agreement on which the document is silent and which is not inconsistent with its terms.
3. The cardinal rule is that clear and unambiguous words prevail over any hypothetical considerations or supposed intention. But if the words used are not clear and unambiguous the intention will have to be ascertained. In other words, if the intention of the parties can be gathered from the words and expressions used in a deed, such an intention does not require to be determined in any other manner except giving the words their normal or natural and primary meanings. It is the dominant intention of the document as disclosed from its whole tenor, that must guide the construction of its contents.
4. In case the terms are not unambiguous it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties. The social milieu, the actual life situations and the prevailing conditions of the country are also relevant circumstances.
5. Sometimes a contract is completed in two parts. At first an executory contract is executed and later on an executed contract. In case of any difference between the preliminary contract and final contract the terms of the latter must prevail.
6. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the latter clause is to be rejected as repugnant and the earlier clause prevails.
7. The court must interpret the words in their popular, natural and ordinary sense, subject to certain exceptions as,
  - i. where the contract affords an interpretation different from the ordinary meaning of the words; or

- ii. where the conventional meanings are not the same with their legal sense.
8. Hardship to either party is not an element to be considered unless it amounts to a degree of inconvenience or absurdity so great as to afford judicial proof that such could not be the meaning of the parties.
9. All mercantile documents should receive a liberal construction. The governing principle must be to ascertain the intention of the parties through the words they have used. The Court should not look at technical rules of construction, it should look at the whole document and the subject matter with which the parties are dealing, take the words in their natural and ordinary meaning and look at the substance of the matter. The meaning of such a contract must be gathered by adopting a commonsense approach and it must not be by a narrow, pendent and legalistic interpretation.
10. No clause should be regarded as superfluous, since merchants are not in the habit of inserting stipulations to which they do not attach some value and importance. The construction adopted, should, as far as possible, give a meaning to every word and every part of the document.
11. Construction given to mercantile documents years ago, and accepted in the mercantile world should not be departed from, because documents may have been drafted in the faith thereof.
12. If certain words employed in business, or in a particular locality, have been used in particular sense, they *must prima facie* be construed in technical sense.
13. The ordinary grammatical interpretation is not to be followed, if it is repugnant to the general context.
14. Antecedent facts or correspondence, or words deleted before the conclusion of the contract cannot be considered relevant to ascertain the meaning.
15. Evidence of acts done under a deed can, in case of doubt as to its true meaning, be a guide to the intention of the parties, particularly when acts are done shortly after the date of the instrument.
16. Unless the language of two documents is identical, and interpretation placed by courts on one document is no authority for the proposition that a document differently drafted, though using partially similar language, should be similarly interpreted. However, judicial interpretation of similar documents in the past can be relied on, but as the effect of the words used must inevitably depend on the context and would be conditioned by the tenor of each document such decisions are not very useful unless words used are identical.
17. If the main clause is clear and the contingency mentioned in the proviso

does not arise, the proviso is not attracted at all and its language should not be referred to for construing the main clause in a manner contradictory to its import.

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

apparent on the face of the deed and does not otherwise prejudice the party liable thereunder will not make the deed void.

### **Legal Implications and Requirements**

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

- a. Double and doubtful meaning of the intentions given shape in the document.
- b. Inherent ambiguity and difficulties in interpretation of the documents.
- c. Difficulties in implementation of the objectives desired in the documents.
- d. Increased litigation and loss of time, money and human resources.
- e. Misinterpretation of facts leading to wrongful judgement.
- f. Causing harm to innocent persons.

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

### **LESSON ROUND-UP**

- Drafting, in legal sense, means an act of preparing the legal documents like agreements, contracts, deeds etc.
- Importance of drafting and conveyancing for a company executive could be well imagined as the company has to enter into various types of agreements with different parties and have to execute various types of documents in favour of its clients, banks, financial institutions, employees and other constituents.
- Drafting of legal documents requires, as a pre-requisite, the skills of a draftsman, the knowledge of facts and law so as to put facts in a systematised sequence to give a correct presentation of legal status, privileges, rights and duties of the parties, terms and conditions, breaches and remedies etc. in a self-contained and self-explanatory form without any patent or latent ambiguity or doubtful connotation.
- Conveyancing is the art of drafting of deeds and documents whereby land or interest in land i.e. immovable property, is transferred by one person to another; but the drafting of commercial and other documents is also commonly understood to be included in the expression.
- Drafting of legal documents is a skilled job. A draftsman, in the first instance, must ascertain the names, description and addresses of the parties to the instrument. The duty of a draftsman is to express the intention of the parties clearly and concisely in technical language.
- A corporate executive must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject.
- All the time the draftsman must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words and choose his

phraseology to fit them. Apart from the above facts, there are certain rules that should also be followed while drafting the documents.

- For using particular words and phrases in the conveyancing, the draftsman must be cautious about the appropriate use of the words and should be clear of its meaning.
- Drafting of documents is very important part of legal documentation. Documents are subject to interpretation when no clear meaning could be inferred by a simple reading of the documents.

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## **DRAFTING, APPEARANCES AND PLEADINGS** **STUDY II - GENERAL PRINCIPLES OF DRAFTING-II**

### **(Basic Components of Deeds)**

#### **LEARNING OBJECTIVES**

The basic objective of this study lesson is to acquaint the students with the:

- Definition of a deed
- Kinds of deeds
- Components of a deed
- Engrossment and stamping of a deed

#### **INTRODUCTION**

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

#### **DEED**

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

For such an instrument covering so wide field it is difficult to coin a suitable definition. A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title, or interest. Many authorities have tried to define the deed. Some definitions are very restricted in meaning while some are too extensive definitions. The most suitable and comprehensive definition has been given by Norton on 'Deeds' as follows:

A deed is a writing—

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

In *Halsbury's Laws of England*, a deed has been defined as "an instrument written on parchment or paper expressing the intention or consent of some person or

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

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

Deeds are in writing, signed, sealed and delivered.

Deeds are instruments, but all instruments are not deeds.

## **DOCUMENT**

"Document" as defined in Section 31(18) of General Clauses Act, 1894 means any matter expressed or described upon any substance by means of letters, figures or marks, or by the more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

*Illustration:*

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document. A caricature is a document.

Thus document is a paper or other material thing affording information, proof or evidence of anything.

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

## **VARIOUS KINDS OF DEEDS**

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

A good deed is one which conveys a good title, not one which is good merely in form.

A good and sufficient deed is marketable deed; one that will pass a good title to the land it purports to convey.

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

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

A lawful deed is a deed conveying a good or lawful title.

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

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

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

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

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

*i. Deed Pool*

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

*ii. Deed Poll*

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

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

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

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

*iv. Deed Escrow*

A deed signed by one party will be delivered to another as an "escrow" for it is not a perfect deed. It is only a mere writing (Scriptum) unless signed by all the parties and dated when the last party signs it. The deed operates from the date it is last signed. Escrow means a simple writing not to become the deed of the

expressed to be bound thereby, until some condition should have been performed. (*Halsbury Laws of England*, 3<sup>rd</sup> Edn., Vol. II, p. 348).

## **COMPONENTS OF DEEDS**

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

A deed is divided into different paragraphs. Under each part relevant and related information is put in paragraph in simple and intelligible language as explained in the earlier chapter. If a particular part is not applicable in a particular case that part is omitted from the document. The usual parts or components or clauses of deeds in general are mentioned as follows:

1. Description of the Deed Title.
2. Place and Date of execution of a Deed.
3. Description of Parties to the Deed.
4. Recitals.
5. Testatum.
6. Consideration.
7. Receipt Clause.
8. Operative Clause.
9. Description of Property.
10. Parcels Clause.
11. Exceptions and Reservations.
12. Premises and Habendum.
13. Covenants and Undertakings.
14. Testimonium Clause.
15. Signature and Attestation.
16. Endorsements and Supplemental Deeds.
17. Annexures or Schedules.

The above parts of the deeds are described as under:

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

The deed should contain the correct title such as "This Deed of Sale", "This Deed of Mortgage", "This Deed of Lease", "This Deed of Conveyance", "This Deed of Exchange", "This Deed of Gift" etc. These words should be written in capital letters in the beginning of document. Where it is difficult to locate the complete transaction out of number of transactions covered under the deed, it may not be possible to give single name to the deed like 'Deed of Gift' and as such it would be better to describe the deed as "This Deed" written in capital letters like "THIS DEED".

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

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

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

We first highlight the importance of "date". The date on which the document is executed comes immediately after the description of the deed. For example, "This Deed of Mortgage made on the first day of January, 1986". It is the date of execution which is material in a document for the purpose of application of law of limitation, maturity of period, registration of the document and passing on the title to the property as described in the document. Thus, the "date" of the document is important.

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

If no date is given oral evidence will always be admissible to prove the date of execution only it leaves necessary to prove it. However, it is of great importance to know the date from which a particular deed operates. In India there is a short period of 4 months (Section 23 of Registration Act) for its registration from the date of execution within which a deed must be presented for registration. The date is important for application of law of limitation also. In view of the extreme importance of date of execution of deed it should be regarded as an essential requirement. The date of deed is the date on which parties sign or executing it. If several parties to a deed sign the deed on different dates, in such cases, the practice is to regard the last of such dates as the date of deed.

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

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

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

### 3. *Description of Parties*

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

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

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

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

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

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

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

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

The form is illustrated as under:

"This lease deed at New Delhi on the....."

day of....., 2002 between Shri Vinod resident of.....  
(Hereinafter called *lessor*) of the one part and Shri Dinov resident of..... (hereinafter called *lessee*) of the other part.

It is also necessary that refusee of heirs, executors, assigns liquidators, successors etc. should be made against each party's name after putting labels. It shall safeguard the interest of the parties. Legal heirs of the property of the party can take benefit on death of the original party when the easy identification of the party is done by giving the notation of the "one part" and "of other part" will be written as of first part 'for party one', 'of the second part' for party two and 'of the third part' for party three and so on, the likewise illustrating this.

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

#### 4. *Recitals*

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

#### 5. *Testatum*

This is the "witnessing" clause which refers to the introductory recitals of the agreement, if any, and also states the consideration, if any, and recites acknowledgement of its receipt. The witnessing clause usually begins with the words "Now This Deed Witnesses". Where there are more than one observations to be put in the clause the words, "Now This Deed Witnesses as Follows" are put in the beginning and then paragraphs are numbered.

#### 6. *Consideration*

As stated above, consideration is very important in a document and must be expressed. Mention of consideration is necessary otherwise also, for example, for ascertaining stamp duty payable on the deed under the Indian Stamp Act, 1899. There is a stipulation of penalty for non-payment of stamps, but non-mention of consideration does not invalidate the document.

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

#### 7. *Receipt*

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

"Now this Deed witnesses that in pursuance of the aforesaid agreement and in consideration of sum of Rs. 100,000/- (Rupees One Lakh Only) paid by the transferor to the transferee before the execution thereof (receipt of which the transferee does hereby acknowledge)".

#### 8. *Operative Clause*

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

#### 9. *Description of Property*

Registration laws in India require that full description of the property be given in

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

#### 10. *Parcels Clause*

This is a technical expression meaning methodical description of the property. It is necessary that in case of non-testamentary document containing a map or plan of the property shall not be accepted unless it is accompanied by the True Copy. Usually the Parcel Clause starts with the words "All Those..... And further or description covers as per the type of property subjected to transfer under the deed. This clause includes words such as: Messuages, Tenements, Hereditaments, Land, Water etc. But use of these now has been rendered unnecessary in view of Section 8 of Transfer of Property Act given herein below.

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

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

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

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

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

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

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

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

It refers to admission of certain rights to be enjoyed by the transferor over the property to be agreed to by the transferee. All exceptions and reservations out of the property transferred should follow the parcels and operative words. It is the contractual right of the parties to the contract or to the document to provide exceptions and reservations which should not be uncertain, repugnant or contrary to the spirit of law applicable to a particular document or circumstances.

For example, Section 8 of the Transfer of Property Act, 1882 provides for transfer of all the interest to the transferee in the property and any condition opposing the provisions of law will be void. Further, Section 10 of the said Act provides that any condition or limitation restraining the transferee of property in disposing of his interest in the property is void. So, nothing against the spirit of law can be provided in the document.

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

#### 12. *Premises and Habendum*

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

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

#### 13. *Covenants and Undertakings*

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

#### 14. *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.

#### 15. Signature and Attestation Clause

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

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

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

It is essential that the attesting witness should have put his signature, *amino attestandi*, intending for the purpose of attesting that he has seen the executant

sign or has received from him, a personal acknowledgement of his signature.

#### 16. *Endorsements and Supplemental Deeds*

Endorsement means to write on the back or on the face of a document wherein it is necessary in relation to the contents of that document or instrument. The term "endorsement" is used with reference to negotiable documents like cheques, bill of exchange etc. For example, on the back of the cheque to sign one's name as Payee to obtain cash is an endorsement on the cheque. Thus, to inscribe one's signatures on the cheque, bill of exchange or promissory note is endorsement within the meaning of the term with reference to the Negotiable Instrument Act, 1881. Endorsement is used to give legal significance to a particular document with reference to new facts to be added in it. Endorsement helps in putting new facts in words on such document with a view to inscribe with a title or memorandum or to make offer to another by inscribing one's name on the document or to acknowledge receipt of any sum specified by one's signatures on the document or to express definite approval to a particular document. Thus, endorsement is an act or process of endorsing something that is written in the process of endorsing when a provision is added to a document altering its, scope or application. Under the Registration Act, 1908 the word 'endorsement' has significant meaning and it applies to entry by the Registry Officer on a rider or covering slip tendered for registration under the said Act.

Supplemental deed is a document which is entered into between the parties on the same subject on which there is a prior document existing and operative for adding new facts to the document on which the parties to the document have agreed which otherwise cannot be done by way of endorsement. Thus, supplemental deed is executed to give effect to the new facts in the deed. When a deed or document is required to be supplemented by new facts in pursuance of or in relation to a prior deed this can be affected by either endorsement on the prior deed when short writing would be sufficient, or by executing a separate deed described as supplemental deed. For example, if lessee transfers his right in the lease to another person such transfer may be done by way of endorsement. On the other hand, if the terms of the lease document are to be altered then it becomes necessary to give effect to such alteration through a supplementary deed. In case the alteration to be made in the terms and conditions and is of minor nature and can be expressed by a short writing execution of supplementary deed may not be considered necessary as this can be done by endorsement only. Thus, this is a matter of convenience which of the two alternatives whether endorsement or a supplementary deed is to be used by the parties to a particular document.

In conveyancing practices endorsements which are of general use and for which no supplementary deed is necessary are those which relate to part payment or acknowledgement of a debt by a debtor. The main stress is that endorsement should represent or exhibit the intention of the parties to the document. Thus, in

the context of negotiable instruments, endorsements which are made on the document will definitely differ with reference to the nature and content of the prior document and will be added to the endorsement explained above. Endorsements are common for negotiating a negotiable document or instrument or transfer of bill of exchange or policy or insurance or Government securities and there is no particular form of endorsement prescribed in such cases. Endorsements follow the forms by customs, conventions and trade practices or banking norms. The following forms of endorsement and supplemental deed respectively could be used by business executives while facing a situation of altering the documents:

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

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

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

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

2. For giving effect to the supplemental deed the form of the deed of agreement will be more or less the same as the prior document with the difference that with the other names of the parties the words, "Supplemental (intended to read as annexed) to a deed of..... dated..... made between the parties thereto (or between.....) hereinafter called the principal deed", shall be added. In case the particulars of a principal deed are somewhat long it is more convenient to refer to the principal deed in the first recital and to say that this deed (the one under preparation) is supplemental to that (the former) deed; for example, "Whereas this deed is supplemental to a deed of sale made, etc. hereinafter called the 'principal

deed'.

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

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

### 17. Annexures or Schedules

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

### **ENGROSSMENT AND STAMPING OF A DEED**

The draft of document is required to be approved by the parties. In case of companies it is approved by Board of Directors in their meeting or by a duly constituted committee of the board for this purpose by passing requisite resolution approving and authorising of its execution. The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per Stamp Act. In case document is drafted on plain paper but approved without any changes, it can be lodged with Collector of Stamps for adjudication of stamp duty, who will endorse certificate recording the payment of stamp duty on the face of document and it will become ready for execution. If a document is not properly stamped, it is rendered inadmissible in evidence nor it will be registered with Registrar of Assurances.

### **LESSON ROUND-UP**

- Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability. To take for example Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed and so on.
- A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title, or interest. Many authorities have tried to define the deed. Some definitions are very restricted in meaning while some are too extensive definitions.

- A deed is divided into different paragraphs. Under each part relevant and related information is put in paragraph in simple and intelligible language.
- The usual parts or components or clauses of deeds in general are:  
Description of the Deed Title; Place and Date of execution of a Deed;  
Description of Parties to the Deed; Recitals; Testatum; Consideration; Receipt Clause; Operative Clause; Description of property; Parcels Clause; Exceptions and Reservations; Premises and Habendum; Covenants and Undertakings; Testimonium Clause; Signature and Attestation; Endorsements and Supplemental Deeds; Annexure or Schedules.
- The draft of document is required to be approved by the parties. The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per Stamp Act. In case document is drafted on plain paper but approved without any changes, it can be lodged with Collector of Stamps for adjudication of stamp duty, who will endorse certificate recording the payment of stamp duty on the face of document and it will become ready for execution.

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## **DRAFTING, APPEARANCES AND PLEADINGS STUDY III - DRAFTING OF AGREEMENTS LEARNING OBJECTIVES**

The objective of this study lesson is to provide an exposure to the students about the:

- Important points regarding drafting of contracts
- Ingredients of a dealership contract
- Drafting of dealership contracts
- Drafting of building contracts
- Drafting of commercial agency contracts
- Collaboration agreements
- Drafting of collaboration agreements
- Drafting of arbitration agreements
- Drafting of guarantees etc.
- Drafting of hypothecation agreements
- Drafting of service agreements
- Drafting of outsourcing agreements
- Drafting of leave and licence agreements

### **INTRODUCTION**

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.

### **FORM OF CONTRACT**

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

However, it is extremely desirable and essential that precise and comprehensive terms and conditions relating to the subject matter and performance of the contract should be incorporated by companies in both domestic and international contracts. In sale-purchase contracts well defined provisions relating to the quality and

quantity of the goods, the shipment period, price (C.I.F./C&F/F.O.B., etc.), delivery, port of shipment and of destination packing and marketing, mode of payment, insurance, brokerage/commission etc. should also be stipulated. In international contracts additional provisions relating to the applicable law, licences and permits, taxes, duties and charges, exchange rate, etc. also become relevant and important. Some of the important matters 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 on 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 Comp. Cas. 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.

#### **ADDITIONAL GUIDELINES REGARDING AGREEMENT TO SELL/PURCHASE**

In an agreement to sell/purchase, the following details must be incorporated:

- names and descriptions of the contracting parties;
- consideration and earnest money if paid;
- subject-matter of the agreement;
- time within which the agreement is to be performed; and
- special terms agreed upon between the parties.

#### *Contracting Parties*

The vendor and the purchaser must be sufficiently described, irrespective of the fact that the parties know each other. There must be reciprocity of interest between the person who wants to enforce the agreement and the person against whom it is sought to be enforced. A stranger to the agreement has no enforceable claim and as such no court shall entertain his claim for specific performance. However, specific performance may be enforced not only against a party to the

contract but also against a person claiming title under it. If one of the parties to the agreement is acting in his representative capacity, such capacity must be clearly and precisely disclosed and his authority to act in that capacity must form part of the agreement.

Legal representatives of parties have a right to require specific performance of a contract or are bound by the promise to perform the contract in the absence of a contrary intention. This rule does not apply where the obligation is personal in nature. As a rule, obligation under a contract cannot be assigned except with the consent of the promisee. On the other hand, rights under a contract are assignable unless the contract is personal in nature or the rights are incapable of assignment either under the law or under the agreement between the parties. If one of the parties to the agreement is acting in his representative capacity, such capacity must be clearly and precisely disclosed and his authority to act in that capacity must form part of the agreement. It is, however, usual to have a clause in a deed specifically stating that the parties shall include their executors, administrators, heirs, legal representatives and assigns.

### *Consideration*

Price is the essence of an agreement of sale/purchase and unless the price is clearly and precisely disclosed in the agreement, there is no enforceable contract between the parties because if no price is named in the agreement, the law does not imply, as in the case of sale of goods, a contract to buy/sell at a reasonable price is implied. Therefore, in all sales, the price is an essential ingredient and where it is neither ascertained nor rendered ascertainable, the contract is void for incompleteness and is incapable of enforcement. Price may not necessarily be in the form of money, it may be any other consideration. The word "price" is comprehensive enough to include any other lawful consideration. If any earnest money is paid, the same should be stated and the consequences arising in breach of the agreement may be stipulated for, namely, by forfeiture of the deposit, payment of a fixed sum by the vendor, if the breach is committed by the purchaser or the vendor, respectively.

### *Subject Matter*

Property of any kind subject to the provisions of the Transfer of Property Act, 1882, and those of any other applicable law or custom may be sold/purchased.

Transferability is the general rule and the right to property includes the right to transfer the property to another person. The property, subject-matter of the agreement, must be described in detail giving its precise situation and the extent of interest agreed to be conveyed therein should be clearly stated. If the property is subject to certain charges, easements, encumbrances, restrictions, covenants etc., the same should be clearly stated so that the purchaser knows the real nature of the property he is purchasing. The vendor should not conceal any material particular with regard to the property he is selling, which the purchaser has a right to know.

### *Time for Performance*

If the time for performance is the essence of the agreement, the same should be clearly stipulated and the consequences of non-performance within the stipulated time should also be clearly and precisely declared.

### *Drafting of an Agreement*

An agreement between the parties is an instrument whereby the parties freely agree to perform certain acts or refrain from doing sometimes unilaterally or bilaterally. The purpose of the instrument is to bind the parties to the terms and conditions agreed upon. The agreement should, therefore, be drafted as deeds between the parties thereto. The old practice of drafting them as Deeds Poll should be discouraged.

While preparing agreements it is necessary and important that the intention of the parties should be set forth explicitly so as to leave no room for doubt or future controversy. The language should be simple and the words used should be definite and precise; the use of loose expression such as "proper", "reasonable", should, as far as possible, be avoided.

The provisions of the Indian Contract Act, 1872 about the essential incident and legality of agreements (Sections 2 to 30) should be studied and nothing should be introduced or left out which would make the agreement void. But, if the material terms of an agreement are clear and specific, omission of certain details which can be worked out by consent of the parties or in its absence be settled by court will not invalidate the agreement (*Ramchandra v. Chinnubhai*, AIR 1945 Mad. 10).

An agreement can be split into same parts as any other document viz. Title, Date, Parties, *Recitals*, *Testatum*, Operating Clause, Schedule (if necessary), Exceptions and Reservations (if any), *Habendum*, Covenants (if any) and *Testimonium*. The above clauses were discussed in detail in Study No. 2 and a reference to the same may be made. However, model forms of a few general/usual clauses in agreement may assume the following forms:

- i. Operation of Agreement:  
"THIS AGREEMENT shall come into force w.e.f. (date) and shall remain in force for a period of (period) until determined earlier by notice as hereinafter provided."
- ii. Termination by Notice:  
"THIS AGREEMENT shall be liable to be terminated by either party by giving (period) notice to the other party (without assigning any reason or cause)".
- iii. Arbitration Clause:  
"Every difference or dispute which may hereafter arise between the parties hereto or their respective representatives in relation to this agreement or arising thereout whether as to the constructions or operations thereof, or the respective rights and liabilities thereunder or any thing done hereunder or otherwise shall be referred to a sole arbitrator in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996. His award shall be accepted and

binding on both the parties."

iv. Clause for Services of Communication:

"Any notice may be sent through the post to the last known place of abode or business of the party to whom it is given, and if so sent under a certificate of posting shall be taken to be sufficient service thereof."

If it is desired that each party should have a copy of the agreement, it should be executed in duplicate, either party signing one of the duplicates and such duplicates being exchanged. Thus, the duplicate signed by A is given to B and that signed by B is given to A, but it is better if both the duplicates are signed by both the parties. The duplicates must be the exact reproduction of the original and require signature and attestation in the same manner as the original.

*Attestation, Registration and Stamp Duty*

*Attestation:* It is not necessary for an agreement to be attested by any witness. But agreements are usually attested by one witness. Where registration is desired the agreement should be attested by two witnesses.

*Registration:* Agreements not relating to immovable property and agreements not creating an interest in immovable property are not compulsorily registrable. Only agreements creating an interest in immovable property worth more than Rs. 100 are required by law to be registered.

*Stamp Duty:* For the purpose of stamp duty, agreements are covered by Article 5 of Schedule I to the Indian Stamp Act, 1899. The stamp duty for different kinds of agreements varies from State to State. While drafting an agreement the draftsman should ascertain the proper stamp duty having regard to the changes made in the Stamp Act in the State where the agreement is executed.

**TERMS AND CONDITIONS IN THE AGREEMENT TO SELL/PURCHASE**

The usual conditions in an agreement to sell/purchase are:

- i. The vendor has a marketable title in the property agreed to be sold/ purchased and that the vendor has produced the title deeds relating to the property to the purchaser for his inspection or in any other manner, must be specifically stipulated between the parties to the agreement.
- ii. If the property agreed to be sold is a part of a larger property, an agreement as to retention of a particular or all the title deeds to the property by a party should be arrived at and incorporated in the agreement to sell/purchase.
- iii. If the property is subject to any prior charge or encumbrance, the parties must agree that the sale is to be subject to such encumbrance or price payable under the agreement included the sum due under the encumbrance and is required to be paid to the chargeholder at the time of registration or thereafter.
- iv. The mode of payment of the price or the balance thereof, if some earnest money or deposit has been paid, should also be stipulated in the agreement. It should also be clearly stated whether the vendor or the purchaser shall be liable to pay rates, rents, taxes or other imposts for the period commencing from the date of execution of the agreement to sell/purchase till the execution of

the conveyance deed. It should also be stated in the agreement that interest at a particular rate shall be payable by the vendor on the earnest money paid in the event of his delaying the execution of the conveyance deed or the liability of the purchaser to pay interest at a particular rate, to the vendor, if he fails to pay the balance amount of consideration at the agreed date and the execution of the conveyance deed is delayed on that account.

- v. The parties should agree as to the point of time when possession of the property should be handed over by the vendor to the purchaser, if the vendor is in possession or how the attornment by the tenant(s), if the possession is to be effected.
- vi. The parties should also agree as to who shall bear the cost and expense of execution and registration of the sale deed and if both the parties have to bear the same, in what precise proportions they shall bear.
- vii. If any broker is involved in the transaction, the agreement should clearly spell out if any brokerage is payable and by whom and at what rate, and at what point of time.

The agreement must incorporate if there are any other particular conditions attached to the transaction of sale/purchase so that the document is complete and self-contained and nothing is left to draw inferences or to presume intentions of the parties.

### **A Specimen Agreement of Sale of House Property**

THIS AGREEMENT OF SALE executed on the..... day of.....

Two Thousand Seven, between AB son

of.....,

..... residing at.....,

..... hereinafter called the vendor of the one

part

and

CD son of..... resident

at..... hereinafter called

the purchaser of the other part,

(The expressions "vendor" and "purchaser" wherever they occur in these presents, shall unless the context otherwise admits, also mean and include their respective heirs, executors, administrators, legal representatives and assigns).

WHEREAS the vendor is the sole and absolute owner of the property more fully set out in the Schedule hereunder:

AND WHEREAS it is agreed that the vendor shall sell and the purchaser shall purchase the said property for a sum of Rs.....

(Rupees.....) free of all encumbrances.

NOW THIS AGREEMENT OF SALE WITNESSETH AS UNDER:

1. The price of the property more fully set out in the Schedule hereunder is fixed at Rs..... (Rupees.....) free of all encumbrances.

2. The purchaser has paid to the vendor this day, a sum of Rs..... (Rupees.....) by way of earnest money for the due performance of the agreement, the receipt whereof the vendor doth hereby admit and acknowledge.
3. The time for performance of the agreement shall be..... months from the date hereof and it is agreed that the time fixed herein for performance shall be of the essence of this agreement.
4. The purchaser shall pay to the vendor the balance sale price of Rs..... (Rupees.....) before registration of the conveyance deed.
5. The vendor agrees that he will deliver vacant possession of the property to the purchaser before registration of the conveyance deed. Or alternatively, the vendor agrees that he will put the purchaser in constructive possession of the property by causing the tenants in occupation of the property to attorn their tenancy to the purchaser.
6. The vendor shall execute the conveyance deed in favour of the purchaser or his nominee as the purchaser may require.
7. The vendor shall hand over all the title deeds of the property to the purchaser or an advocate nominated by him within..... days from the date of this agreement for scrutiny of title and the opinion of the vendor's advocate regarding title to the property shall be final and conclusive. The purchaser shall duly intimate the vendor about the approval of title within..... days after delivering the title deeds to him or to his advocate.
8. If the vendor's title to the property is not approved by the purchaser, the vendor shall refund the purchaser the earnest money received by him under the agreement and on failure of the vendor to refund the same within..... days, he shall be liable to repay the same with interest thereon at the rate of..... per cent per annum.
9. If the purchaser commits a breach of the agreement, he shall forfeit the earnest amount of Rs..... (Rupees.....) paid by him to the vendor.
10. If the vendor commits a breach of the agreement, the vendor shall not only refund to the purchaser the sum of Rs..... (Rupees.....) received by him as earnest money, but shall also pay to the purchaser an equal sum by way of liquidated damages.
11. Nothing contained in paras 9 and 10 above shall prejudice the rights of the parties hereto specific performance of this agreement of sale/purchase.

Schedule of Property

House No..... situated  
in.....

On North  
its is.....  
.....

South  
is.....  
.....  
East  
is.....  
.....  
West  
is.....  
.....

IN WITNESS WHEREOF the vendor and the purchaser have set their respective hands to the agreement of sale/purchase on the day, month and the year above written, in the presence of the following witnesses:

*Witnesses:*

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

(2) Name :  
 Father's Name :  
 Address :  
 Signature " Purchaser

**DEALERSHIP CONTRACT**

Prior to the independence of the country, the British rulers, as a matter of policy to perpetuate their rule in India, would not allow the setting up of any industry or manufacturing activity and also discouraged Indians, by every possible means at their command, from doing anything in that direction. They used to take away from India precious raw materials, minerals and the like at throwaway prices, convert them into finished goods and dump the same back into India at fancy prices. Since India became independent, it has made tremendous progress in the fields of industry, agriculture, dairy farming and in all other fields and is now included in one of the developed countries of the world.

Manufacturers, barring a very few, do not have their own retail sale outlets. They sell their products through a network of sole selling agents, selling agents, distributors dealers, co-operative stores, super bazars, fair price shops etc. In this chain of sellers and distributors, dealer is a very important link. He is not an agent to the manufacturer as he functions in his own independent capacity and not as an agent or a representative of the manufacturer. He purchases goods either against specific orders from the prospective ultimate users or consumers or keeps stocks of goods of one or more manufacturers in anticipation of the sale orders. The manufacturer extends to him certain facilities like the supply of goods on credit for

an agreed period based on the custom in the market, capacity of the manufacturer, demand of the goods, quality image and goodwill of the goods and other relevant factors; facility of sales returns in the event of the dealer not being able to sell the goods within a specified period of time; advertisement and publicity charges; partial or whole of sale outlet and or godown rent; display expenses and the like. Both the manufacturer and the dealer enter into an agreement known as Dealership Agreement, which incorporates the important terms and conditions of their relationship so as to avoid any ambiguity and resultant dispute in order to maintain lasting cordial business relationship.

### **Ingredients of a Dealership Contract**

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

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

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

While drawing dealership contract, special care has to be taken that if the contract attracts provisions of Section 33 of the Monopolies and Restrictive Trade Practices Act, 1969\*, it must be submitted to the competent authority for registration in accordance with the provisions of Section 35 of the said Act.

While drafting a dealership contract, care should also be taken that it should not attract any of the provisions of Section 36A of the said Act, which enumerates unfair trade practices, or provisions of Section 2(o) of the Act, defining restrictive trade practices, which can be enquired into by the M.R.T.P. Commission, which may order discontinuance of such a practice or the modification of the agreement in respect of the restrictive trade practice.

### **A Specimen of a Dealership Contract**

A dealership agreement may be drawn somewhat on the following pattern:

THIS AGREEMENT is made on the..... day of..... Two Thousand Two between ABC Ltd. a company incorporated under the Companies

Act, 1956 and having its Registered Office at..... and its Manufacturing unit at..... its Company Secretary, (hereinafter called "the company", which expression shall, unless the context admits otherwise, include its representatives) of the one part and

Messrs..... a partnership firm comprising

Mr....., Mr..... and

Mr..... partners, having its main business place

at.....and

branches at.....and

..... (hereinafter called "the firm" which expression shall unless the context admits otherwise, include the partners, their heirs, executors, administrators, representatives and assigns of the other part).

WHEREAS the company is manufacturing.....;

AND WHEREAS the firm has its own marketing network and is selling goods of various branches and is desirous of selling the goods of the company at a new sales outlet recently taken on rent by it for the purpose and has communicated the same to the company;

AND WHEREAS the company, after having considered the proposal of the firm, has agreed to appoint the firm as its dealer on the terms and conditions as contained in this agreement.

NOW THIS AGREEMENT WITNESSETH as under:

1. That the company hereby appoints the firm as its dealer to sell its products, more specifically defined in the Schedule to this agreement, in the areas also clearly defined in the said Schedule.
2. The agreement shall remain in force for one year commencing from..... and shall be renewable for similar periods on the agreed terms and conditions.
3. The firm shall keep a minimum stock of..... pieces each of the company's products to meet the demand of the ultimate users/consumers, which quantity shall be reviewed every quarter in the light of the sales during the previous quarter and the market trends.
4. The company shall supply to the firm its products on fifteen days credit from the date of the invoice and if payments are not made within the credit period shall charge interest at the rate of..... per cent per annum from the sixteenth day of the invoice till payment.
5. The company shall supply to the firm sufficient quantities of publicity and advertisement material for display at the firm's sales outlet and for distribution in its area of operation.
6. The company shall bear 50% of the cost of maintaining the sales outlet of the firm including rent thereof subject to a maximum of 5% of the invoice value of the firm of all the products of the company, which amount shall be credited to the firm's running account in the books of the company at the end of each

quarter.

7. The company and the firm shall settle their accounts every six months and the balance credit/debit shall be squared by making payment by the party owing to the other.
8. The firm shall make all efforts to promote the sale of the company's products and in the event of the company forming an opinion on the basis of sale records that the firm is not properly performing its duty as dealer, the company shall be at liberty to terminate this agreement by giving the firm one month's notice in writing and at the end of the notice period, this agreement shall stand terminated and the parties shall settle their accounts within seven days of such termination.
9. The company agrees and undertake to supply to the firm its products as per the firm's orders and in the event of the company failing to supply the ordered goods within fifteen days of receipt of each purchase order, the firm shall be entitled to terminate the agreement by giving the company one month's notice in writing and at the end of the notice period, this agreement shall stand terminated and the parties shall settle their accounts within seven days of such termination.
10. The firm shall not sell any product of the company at a price higher than the one indicated by the company from time to time.
11. The firm shall be at liberty to appoint sub-dealers, salesmen, commission agents or other sales personnel on salary, commission or any other basis, so long as they function in accordance with the provisions of this agreement and do not do anything which is detrimental to the interest of the company, or the firm and the collective interest of both.

**Note:** Any additional terms and conditions of the appointment may be incorporated.

IN WITNESS THEREOF the parties aforementioned have signed this agreement in the presence of the witnesses:

**SCHEDULE OF PRODUCTS**

- |         |         |
|---------|---------|
| 1. .... | 3. .... |
| 2. .... | 4. .... |

*Witnesses:*

- |               |   |                   |
|---------------|---|-------------------|
| (1) Name      | : | for ABC Ltd.      |
| Father's Name | : |                   |
| Address       | : | (.....)           |
| Signature     | : | Company Secretary |
| (2) Name      | : | Mr.....           |
| Father's Name | : | Mr.....           |
| Address       | : | Mr.....           |

Signature :

Partners,

Messrs.....

## **BUILDING CONTRACTS**

Building contracts, being legal documents, have to be drawn in accordance with the provisions of the Indian Contract Act. Such an agreement as stated earlier under "dealership contracts" 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.....

Two Thousand Two 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 measuring.....  
 No..... 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

### **COMMERCIAL AGENCY CONTRACTS**

Sometimes business is conducted by traders not directly with their counterparts but through the agency of independent agents appointed for the purpose. Such

agents would locate customers for the principal's goods and in certain conditions would have an implied authority to deal with the goods of the principal, allow credit terms to customers and receive payment from the customers on behalf of the principal. The rights and duties of the principal and his agent abroad would be governed by the contract of agency concluded between them. Commercial agency contracts exhibit certain peculiar characteristics of their own and their terms and conditions are substantially different from those of a sale purchase or other trade contracts.

A commercial agency contract should *inter alia* include provisions regarding the date of commencement and of termination of the agency, the goods or products to be covered by the agency, the contractual territory, the nature of the agency, e.g. sole or exclusive agency, etc. The rate and basis of commission payable to the agent should also be clearly indicated. The conditions regarding the reimbursement of expenses incurred by the agent; payment of commission on orders received directly by the principal from the agent's territory and commission on repeat orders may also be defined. The commission may be calculated on the gross amount or the net amount of the invoice. If the net amount is used as the basis it may be further specified what elements of the cost, such as, freight, insurance, discount, taxes, packing and the like would be deducted from the sales amount for calculation of the commission. It may also be stipulated when the commission will accrue and be payable, e.g. when the order is transmitted or accepted or when the goods are delivered or when the payment is received by the principal. It may also be stipulated how far the amount of the commission would be affected by such subsequent events as cancellation of an order, reduction in price, failure to deliver the goods, bankruptcy or insolvency of the buyer and so on. The currency of payment of the commission and the rate of exchange applicable may also be mentioned. The permission of the Reserve Bank of India may be required for fixing the rate and remittance of the commission to foreign agents.

The agency contract should clearly indicate whether the agent may or may not make binding agreements on behalf of the principal in respect of orders obtained by him. The circumstances in which the principal may validly refuse to accept the orders transmitted by the agent may also be mentioned. It is usual to provide in the agency contracts that the agent shall guarantee certain minimum sales turnover over a given period. The duties of the agent would further include not to divulge confidential information of the principal to third-parties, not to make secret profits or accept bribes and to use all reasonable diligence, disclose all material facts and be accountable to the principal for all monies received by him on behalf of the principal.

In drawing up Commercial Agency Contracts between parties residing in different countries, it is essential to ensure that nothing contained in such a contract shall be repugnant to imperative provisions of the law of any country in which such a contract or any part thereof has to be carried into effect. It is also appropriate, as

stated earlier, to add a warning against the possible liability of the principal to tax in the contractual territory.

Experience has clearly shown, especially in the field of international trade the expediency of reducing to writing the commercial agency contract and any amendments thereto; in certain countries the law requires that this be done. Further, it is always advisable to seek legal and fiscal advice, not only in the country of the principal, but also in each of the countries (if more than one) wherein the commercial agent is to have authority to act in that capacity for the principal.

It is for the parties to the contract, carefully to decide, in the light of the facts of each case, the various points which should be covered therein. The points to be covered and the way in which they should be covered will depend largely upon the extent to which the law of the country or countries concerned covers these matters and the extent to which the law leaves them freely to be expressed in the contract. The contract should clearly define the territory or territories (including or excluding any other country which may be associated with any such territory) in which the agent is entitled to act. It is important that the parties should give serious thought to this matter, as lack of precision may give rise to disputes between the agent and other agents of the principal as regards their respective territorial rights.

If the agent is to have the sole and exclusive right to represent the principal within contractual territory, the parties should agree to what extent, if any, the principal may nevertheless reserve the right to operate in the territory, either himself or by means of his employees, with or without, as the case may be, the assistance of the agent.

In addition, it may be expedient in certain cases to append to the contract a list showing the customers of the principal in the contractual territory to whom the contractual goods or any of them had been sold before the coming into force of contract, and the quantities and value of goods so sold during that twelve months (or as the case may be) last preceding such time.

The parties should always insert a suitably worded clause at the end of their contract to the effect that there are no other agreements in existence between the parties and that the whole of the terms between the parties are set out in the contract.

### **Del Credere Agency**

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

payment from the buyer to the seller. A commission del credere is the premium or price given by the principal to the agent for guarantee, which presupposes a guarantee.

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

### **Ingredients of an Agency Contract**

The contract of agency is governed by Chapter X (Sections 182 to 238) of the Contract Act, 1872. The basic features of contract of agency are:

1. Authority should be given either expressly or impliedly to bind his principal.
2. While the principal should not be a minor, an agent could be a minor.
3. Consideration is not necessary for an agency contract.
4. For the acts of the agent, the principal is liable unless the principal has exceeded his authority.
5. The authority of an agent extends to the doing of all that is necessary and collateral to the doing of the main act.
6. The obligations under the contract of agency is not assignable unless:
  - i. the nature of the business necessitates such assignment.
  - ii. customs of usage of trade in the locality with regard to the business permit such assignment.
  - iii. such assignment is expressly permitted by the contract of agency.

### **A Specimen of an Agency Contract**

The following specimen may serve as a model for drafting agency contracts, which may be adopted according to the requirements of each case.

An agreement made this..... day of.....  
between..... (principal) (hereinafter called "the principal") of the  
one part and..... (agent) (hereinafter called "the agent") of the  
other part.

Whereby it is agreed between the parties as follows:

1. That the agent is hereby appointed the sole agent of the principal for the town..... (in the district of) (hereinafter called "the agency town") for the purpose of making sales of the principal's goods for a term of..... years commencing from the date hereof on the terms and conditions set forth hereunder.
2. That the agent shall not, while selling the principal's goods make any representation in the trade or give any warranty other than those contained in the principal's printed price list.
3. That the agent shall be allowed to deduct and retain as his agency commission with himself..... per cent of the list price of all goods sold on behalf of

the principal. The agent shall keep a record of all sales and shall regularly remit to the principal on each Saturday all sums received by the agent in respect of such sales less..... per cent his agency commission. All sales shall be made for cash against delivery of goods unless the principal's consent in writing to give credit to any particular purchaser be in any case first obtained and in the case of such credit sales the principal may direct for such increase in the price of his goods over and above the current list price of the principal.

4. That the agent shall not make purchases on behalf of nor in any manner pledge the credit of the principal without the consent in writing of the principal.
5. That the agent shall, at the expense of the principal, take on rent and occupy for the purpose of the agency, suitable premises with prior approval of the principal and shall keep insured for full value against all available risks, all the goods entrusted to his custody by the principal under this agreement and on request, shall produce to the principal, receipts, for the rent, rates and taxes of the said premises and for the premiums on insurance policies showing that the same have been paid on or about their respective due dates. That the agent shall bear all expenses relating to or incidental to the said agency.
6. That the agent, while selling to persons in the trade, shall obtain the purchaser's signature to an agreement to the following effect:
  - i. That the said principal's goods shall not directly or indirectly be re-sold outside the agency district.
  - ii. That the said principal's goods shall not be re-sold to the public below the list price for the time being.
7. That the agent shall, in all his commercial dealings and on documents and on the name-plate or letter-head indicating his place of business, describe himself as selling agent for the principal.
8. That a breach of the condition in clause 6 hereof shall entitle the principal to put an end to this agreement forthwith and also to recover from the said agent by way of liquidated damages the sum of Rs..... for each such article sold in breach of such clause. The agent undertakes that all purchasers to whom he may sell the principal's goods shall duly enter into, and carry out the aforesaid agreement referred to in clause 6 hereof for the purposes of this agreement be deemed to be a breach of clause 6 of this agreement by the agent and give the principal the rights and remedies against the agent for breach by the agent of this agreement.
9. That the principal shall keep with the agent a stock of his goods free of all expenses of delivery to the value of Rs..... according to the principal's current price list and the principal further undertakes to replenish such stock on the close of each month so as to keep it at the agreed value. Provided always that the agent shall have no right of action against the principal for delay resulting from shortage of stock, delays in transit, accidents, strikes or other unavoidable occurrences in replenishing such stock. The principal shall

always have the right, without any prior notice, to cause a stock checking of the said goods and on any shortage or deficiency found on such stock-taking the agent shall on demand pay to the principal the list price of such shortage or deficiency less the deduction by way of commission or rebate receivable by the agent. The agent shall not alter, remove, or tamper with the marks or numbers on the goods so entrusted into his custody.

10. That the agent shall not sell the goods of the principal to any purchaser except at current price list of the principal conveyed by him from time to time. The agent may, however, allow a discount or rebate of..... per cent.
11. That in the event of any dispute arising between the agent and a purchaser of the principal's goods, the agent shall immediately inform the principal of the same and shall not without the principal's approval or consent in writing take any legal proceedings in respect of or compromise such dispute or grant a release to any purchaser of the principal's goods.
12. That either party may terminate this agreement at his option at any time after the expiration of..... years by giving the other one month's notice in writing.
13. That the benefits under this agreement shall not be assignable to any other person.
14. That the agent shall always, during the existence of this agreement, devote his whole business time and energy for pushing the sale of the principal's goods and shall in all such dealings act honestly and faithfully to the principal and shall carry out orders and instructions and shall not engage or be interested either directly or indirectly as agent or servant in any other business or trade without the prior consent in writing of the principal.
15. That on the termination of his agreement for any reason whatsoever, the agent shall not for the period of one year solicit trade orders from the persons who had been purchasers of the goods of the principal any time within..... years immediately preceding the date of such termination and the agent shall not for a period of one year engage or be interested as agent or servant in any business, firm or company manufacturing, selling or dealing in goods similar to those of the principal.
16. That all goods shall be sold by the agent for delivery at agent's place or business but the agent shall, at his own expense, have the right to deliver goods to purchasers at their places of business.
17. That without prejudice to any other remedy he may have against the agent for any breach or non-performance of any part of this agreement, the principal shall have the right summarily to terminate this agreement:
  - i. on the agent being found guilty of a breach of its provisions or being guilty of misconduct or negligence of his duties; or
  - ii. on the agent absenting himself from his business duties entrusted to him under this agreement for..... days without the principal's prior permission in writing; or

- iii. on the agent committing an act of bankruptcy.
18. That in the event of any dispute arising out of or in relation to or touching upon the agreement, the same shall be decided by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996.
  19. That the principal shall be entitled to terminate this agreement by one month's notice in writing to the agent in the event of his ceasing to carry on the said business of the principal.
  20. That on the termination of this agreement for whatever reason, the agent shall forthwith deliver to the principal all the unsold stock of goods and shall pay to the principal for the shortages of deficiency of stock at list price less commission and rebate allowable to the agent. The agent shall also deliver to the charge of the principal all books of account and documents of the agency, cash, cheques, bills of exchange or other securities he may have received during the normal course as a result of sales of the principal's goods and shall transfer, assign or negotiate in favour of the principal all such securities on demand.

IN WITNESS WHEREOF the parties have signed this deed.

Witness: Principal

Witness: Agent

### **Sole Selling Agreement—Where a Company is Principal**

If in the above mentioned agreement of sole selling agency, the principal is a company, then as per provisions of Section 294(2) of the Companies Act, 1956, one more clause must be added as under:

"This agreement ceases to be valid if it is not approved by the shareholders of the principal in first general meeting held after the date of this agreement".

The provisions of Section 294(2) are mandatory and if the directors enter into sole selling agreement without the above condition, the appointment is bad ab initio.

Therefore, such an agreement cannot be ratified by the shareholders. [*Shalagram Jhajharia v. National Co. Ltd.*, (1975) 35 Comp. Cas. 706 (Cal)].

If the provisions of Section 294AA(3) are also applicable i.e. the paid-up capital of the principal (company) is rupees fifty lakhs or more, then a suitable clause in the agreement should also be added that the agreement shall be valid only if approved by the shareholders by a special resolution and also approved by the Central Government.

### **COLLABORATION AGREEMENTS**

When two parties join hands for exchange of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and/or managerial services, they are said to be collaborating in a desired venture. The word "collaboration" has, however, acquired a specific meaning, which refers to cooperation between a party within India and a party abroad. The agreements drawn and executed

between such collaborating parties are known as "foreign collaboration agreements". With sophistication and technical advance achieved in the developed countries and motivated by the desire of carrying the country into the twenty-first century, the Indian entrepreneurs are seeking all possible avenues for obtaining technical know-how in the fields of industry, agriculture, mining, oil exploration, power generation, etc. A large number of Indian industrialists have already entered into long and short-term collaboration arrangements with foreign companies, firms etc. In order to ensure quick processing of the proposed collaboration arrangements and on a uniform basis, the Central Government has issued guidelines for prospective collaborators so that they submit their proposals in accordance with those guidelines.

## **GUIDELINES FOR ENTERING INTO FOREIGN COLLABORATION AGREEMENTS**

These guidelines cover the following aspects of foreign collaboration agreements:

1. *Investment*: Where in a foreign collaboration agreement, equity participation is involved, the value of the shares to be acquired 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".

### **A Specimen Collaboration Agreement**

Agreement executed this..... day of.....  
between M/s....., a Foreign Company incorporated in the  
United Kingdom and having its registered office at.....  
hereinafter called the U.K. Company of the ONE PART.

AND

M/s..... a company incorporated in India and having its registered office at..... hereinafter called the Indian company of the OTHER PART:

WHEREAS the Indian company has been incorporated having for its object the manufacture and production of.....; WHEREAS the Indian company has already constructed factory buildings, installed plant and machinery and commenced manufacture and production of.....; WHEREAS the Indian company with a view to improve still further the quality of the commodities manufactured and to increase production are desirous of procuring the latest technique and know-how relates to the manufacture of the abovesaid commodities; WHEREAS the Indian company therefore approached the U.K. company who have considerable experience in the line of manufacture engaged in by the Indian company, and requested them to extend to them necessary technical assistance in that behalf; AND WHEREAS the U.K. company has agreed to extend technical assistance and to furnish to the Indian company for improvement of their business the requisite know-how in the form of designs, plans, engineering drawings, technical advice and also to supply technicians to advice for improvement of the existing factories, machineries and plant and also to provide to the Indian personnel necessary technical training to enable them to successfully handle and exploit the technical know-how to be imparted to the Indian company subject to the terms and conditions set out hereunder:

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

1. In consideration of the remuneration paid by the Indian company to the U.K. company as described hereinafter the U.K. company shall supply to the Indian company:
  - a. technical advice and know-how for the purpose of improving or adding to the existing factories and installing additional plant and machineries if necessary for the manufacture of.....;
  - b. further the necessary plans, factory-design and layouts, charts and drawings, documentation and other forms of technical know-how for the said purpose;
  - c. render advice in the matter of purchase of the further plant and machinery suitable and necessary for the factory;
  - d. lend the services of their technicians to assist the Indian company in carrying out the improvement to the factories and for installing additional plants and machinery;
  - e. provide technicians from their own staff to attend at the Indian company's factory in India whenever necessary;
  - f. impart technical training to selected Indian personnel at their works in England or in their associated companies, to enable them to operate the



particular shall keep all data concerned with the manufacturing processes under lock and key.

12. It is agreed that the payment made to the U.K. company shall include the compensation for use of the patent rights for the period of its duration and that the Indian company shall have the right for the period of its duration and that the Indian company shall have the right to manufacture their products even after the expiry of this Agreement.
13. The Indian company shall not during the continuance of the Agreement refer any technical or manufacturing problems or difficulties to any one other than the U.K. company but shall regard and use the U.K. company as its sole technical consultant.
14. On the expiry of the period prescribed herein or of extended period provided in clause 3 (*supra*) or upon the termination of this agreement for any reason the Indian company shall return to the U.K. company all copies of information data or material sent to it by the U.K. company under this Agreement and then in its possession and shall expressly refrain from communicating any such information, technical data or material received by it hereunder to any person, firm or company whatsoever.

IN WITNESS WHEREOF the parties hereto have signed this Agreement this..... day of..... 2007 in the presence of the following:

WITNESSES:

### **ARBITRATION AGREEMENTS**

The 'arbitration agreement' under the Arbitration and Conciliation Act, 1996 means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined relationship whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. It has to be in writing. It is in writing if it is contained in a document signed by the parties, or in an exchange of letters, telex telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of agreement is alleged by one party and not denied by the other.

The important ingredient of the arbitration agreement is the consent in writing to submit dispute to arbitration. Consent in writing implies the application of mind to the reference of dispute to arbitration in accordance with Arbitration and Conciliation law and the binding nature of the award made thereunder.

An arbitration agreement stands on the same footing as any other agreement. It is binding upon the parties unless it is tainted with fraud, undue influence etc., in which case it can be avoided like any other agreement.

An arbitration rests on mutual voluntary agreement of the parties to submit their differences to selected persons whose determination is to be accepted as a

substitute for the judgement of a court. The object of arbitration is the final determination of differences between parties in a comparatively less expensive, more expeditious and less formal manner than is available in ordinary court proceedings.

### **Pre-requisites of Arbitration**

Every arbitration must have the following three pre-requisites:

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

### **Submission of Dispute to Arbitration**

A submission is an agreement between two contracting parties to take decision from a third mutually-agreed party, to whom they refer the dispute. The arbitration presupposes that the arbitrator must accept the office of arbitrator to perfect his appointment.

### **Aim of Arbitration**

Civil litigation takes years and years to settle simple disputes. Arbitration is a means devised to quick and economical settlement of a dispute between two contracting parties, who also agree as part of the main agreement to refer dispute or difference arising out of or touching upon the terms and conditions of the agreement to a third person to give his judgement, which shall be binding on both the parties. Where the decision of a person is binding on only one of the parties and not on all the parties to the dispute, it cannot be said that the function, which the person giving the decision is exercising, is arbitral in character.

### **Methods of Arbitration**

The parties to the dispute will enter into an agreement to refer the dispute to arbitration and will agree on the terms of reference, that is, to state clearly and precisely the matter the arbitrator is required to decide. An arbitrator is not bound by the strict rules of evidence of courts of law. However, he does follow the practice of presentation and conduct of a case in a court of law. Most of the evidence is in writing. The party adducing evidence has to be present before the arbitrator so that he may be cross-examined on his written evidence. After hearing the evidence of both the parties, the arbitrator makes his award. The award must be within the terms of reference.

It is for the arbitral Tribunal to lay down its own procedure during the arbitration proceedings. The law should however, be fair and reasonable. The tribunal may decide to ask the parties to adduce evidence by way of affidavits. In that case it would be fair and just to allow cross-examination of the witness whose affidavit has been filed.

### **Requisites of an Award**

The general requisites of an award are:

- a. it must be consistent with the submission;

- b. it must be certain;
- c. it must be fair to the parties;
- d. it must be final;
- e. its implementation must be possible.

**Specimen of Arbitration Agreement to Refer the Dispute to two Arbitrators**

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

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

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

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

Signature I Signature II

## **Specimen of Arbitration Agreement to Refer the Dispute to a Common Arbitrator**

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

WHEREAS by an Agreement (Building contract) dated..... 2007 entered into between the parties hereto, the Party of the First Part entrusted the work of constructing a building on his plot of land situated at..... to the Party of the Second Part on the terms and conditions therein mentioned.

AND WHEREAS the Party of the Second Part has commenced the construction of the building according to the plans sanctioned by the..... Municipal Corporation and has completed the construction to the extent of the 1st floor level.

AND WHEREAS the Party of First Part has made certain payments to the Party of the Second Part on account but the Party of the Second Part is pressing for more payments which according to the Party of the First Part he is not bound to pay and, therefore the work has come to a standstill.

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

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

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

**NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:**

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

The points of dispute are:

- a. Whether the Party of the Second Part has carried out the work according to the sanctioned plans and specifications.
- b. Whether the Party of the Second Part has delayed the construction.
- c. Whether the Party of the Second Part is overpaid for the work done up to now.
- d. Whether Party of the First Part is bound to make any further payment over

and above the payments made up to now for the work actually done.

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

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

Signed by the within named

Mr. X..... in the presence of

Signed by the within named

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

**GUARANTEES: COUNTER GUARANTEE, FIDELITY GUARANTEE, PERFORMANCE GUARANTEE, BANK GUARANTEE**

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

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

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

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

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

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

### **Purpose of a Guarantee**

The primary idea of a guarantee or suretyship is, an undertaking to indemnify the creditors in case the principal debtor does not fulfil his promise; the contract of guarantee in that sense is a contract to indemnify. The central point in such a case is to determine what was the contingency which the parties had in their minds when the contract of guarantee was entered into.

### **Form of a Guarantee**

The law does not require a contract of guarantee to be necessarily in writing. It may be either oral or in writing. It may be express or it may even be implied. It might be even inferred from the course of conduct of the parties concerned. However, whatever may be the form of the contract, it must be satisfactorily proved. Like any other contract, a contract of guarantee must be supported by consideration. It is, however, not necessary that the consideration should flow from the creditor and be received by the surety. Consideration between the creditor and the principal debtor is a valid and good consideration for the guarantee given by the surety. A contract of guarantee as specified in Section 126 of the Indian Contract Act, 1872 presupposes the existence of a principal debtor and no such contract can be made before a sale has taken place when there is no principal debtor in existence in respect of whose default the guarantee can be given.

### **Fidelity Guarantee**

A surety's liability for the faithful discharge by another of his duties depends in each case on the exact terms of that guarantee. The surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised, because the employer of the servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work.

If the employer of a servant whose fidelity has been guaranteed continues to employ him even after a proved act of dishonesty without notice to the guarantor, the surety is discharged. That is a basic principle implicit in the very nature of a fidelity guarantee. The guarantor in such a case guarantees the fidelity and ensures the loss against the risk of infidelity and not the fact of infidelity. If the

employer wants to continue a dishonest servant after his dishonesty has been proved then he must give the guarantor notice of the fact of infidelity so that the guarantor may get an opportunity to say whether he would continue his guarantee or not for a man whose infidelity has been proved.

### **Construction of a Guarantee**

The terms of a guarantee must be strictly construed. The surety receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee.

### **Consideration for a Guarantee**

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

Consideration between the principal debtor and the creditor is good consideration for guarantee given by surety. It is not necessary that the thing done or the promise made for the benefit of the principal debtor should be at the desire of the surety. The word "done" in the above definition shows that past benefit to the principal debtor can be good consideration for a bond of guarantee.

### **Surety's Liability**

According to Section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

The surety's liability is not deferred until the creditor exhausts his remedies against the principal debtor. In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal debtor is solvent or that the creditor may have relief against the principal debtor in some other proceedings.

The liability of the surety being co-extensive with that of the principal debtor, is joint and several with the latter and, therefore, in the absence of a clear intention to the contrary it is at the option of the creditor, to decide whether he shall proceed against the surety or the principal debtor. Of course, a guarantor is prima facie entitled to have the debt proved as against him.

### **Subrogation of Surety to the Rights of Creditor on Payment**

Section 140 of the Act invests a surety with all the rights which the creditor has against the principal debtor, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety has made the payment or performed all that he is liable for.

### **Continuing Guarantee**

Section 129 of the Act lays down that a guarantee which extends to a series of transactions is called a continuing guarantee, and according to Section 130, a continuing guarantee may be revoked by the surety at any time as to future

transactions, by notice to the creditor.

**Specimen Deed of Guarantee by a Bank on behalf of a Company for the Performance of a Contract in favour of State Government**

THIS DEED OF GUARANTEE made this..... day of..... Two Thousand..... between the (Bank) ..... (hereinafter called "the Bank") of the one part and the State of..... represented by the Governor, Shri..... (hereinafter called "the State") of the other part.

WHEREAS by Acceptance of Tendor No..... dated..... made between..... Ltd., a company incorporated under the Companies Act, 1956 having its Registered Office at agreed by the Company with the State for the supply of plant, machinery and equipment in accordance with the terms, specifications and conditions therein contained which *inter alia* to.....% of the total value of the contract price, such payment to be secured by a Bank guarantee;

AND WHEREAS the bank has, at the request of the Company, agreed to stand surety for and guarantee refund of the said advance in case the plant, machinery and equipment of the value of Rs..... aforesaid is not delivered to the State in accordance with the terms and conditions of the said agreement, and the State agreed to make the said advance on such bank guarantee as aforesaid:

NOW THIS DEED WITNESSES AS FOLLOWS:

1. In consideration of the State of..... having agreed to advance a sum of Rs..... to the Company, through the Bank, for the purpose hereinafter indicated, the bank, does hereby guarantee that in case the Company shall fail and/or neglect to supply the State, the plant, machinery and equipment of the value of Rs..... in accordance with the terms, specifications and conditions contained in the Acceptance of Tendor dated the..... subject to any amendments or modifications thereof, if any, when made, the bank shall repay to the State such amount or amounts as the bank may be called upon to pay subject to the maximum limit of Rs.....
2. This guarantee of the Bank shall be effective immediately upon receipt of the sum of..... from the State for and on behalf of the Company and shall continue in force until the supply of plant, machinery and equipment of the value of Rs..... aforesaid is fully effected.
3. The guarantee hereinbefore contained shall not be affected by any change in the constitution of the bank or of the Company nor in the event of any winding up being made against the Company.

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals the day, month and year first above-written.

For and on behalf of the State of

1. ....
2. For and on behalf of the State of  
.....

**Specimen Deed of Guarantee for the Performance of a Contract**

THIS DEED OF GUARANTEE made this..... day of..... between Shri....., son of Shri..... resident of..... (hereinafter called "the Guarantor"), which expression shall, unless repugnant to the context, include his heirs, legal representatives, assigns etc. of the one part and Shri....., son of..... resident of..... (hereinafter called "the Principal), which expression shall, unless repugnant to the context, include his heirs, legal representatives, assigns etc., of the other part.

WHEREAS BY AN AGREEMENT DATED..... made between Shri..... son of Shri..... resident of..... etc., therein referred to as "the Contractor", of the one part and the said..... Shri..... herein referred to as "the Principal", of the other part, it was *inter alia* agreed by and between the parties as follows:

*(Here state the nature of the work to be done by the Contractor);*

AND WHEREAS the said work was entrusted to the Contractor upon the Guarantor having agreed with the Principal as to its guarantee of performance by the Contractor and to indemnify and keep indemnified the Principal against all losses, damages, costs, charges and expenses arising out of performance or non-performance thereof. Now it is agreed and declared by and between the parties as follows:

1. The Guarantor will see that the Contractor (unless relieved from the performance by operation of any clause of the contract or by statute or by virtue of the decision of any tribunal or court of competent jurisdiction, shall carry out, execute and perform the contract without any exception or reservation and in case he commits any breach thereof, the Guarantor will indemnify and keep indemnified the Principal and his estate against all losses, damages, costs, expenses or otherwise which he may suffer or otherwise incur by reason of any act, negligence, default or error in judgement on the part of the Contractor in performing or non-performing the contract.
2. In case of any dispute or difference as regards the quantum of such losses, damages, costs, charges or expenses, the same shall be decided by reference to arbitration of one architect or engineer if the parties so agree or otherwise to two architects or engineers, one to be appointed by each, whose decision shall be final and binding on all parties.

IN WITNESS WHEREOF, the parties hereto have hereunto set and subscribed their respective hands and seals the day, month and the year first above-written.

Signed, sealed and  
delivered in the presence of

1. Guarantor
2. Principal

### **HYPOTHECATION AGREEMENT**

Hypothecation is a form of transfer of property in goods. Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass. This form of transfer is not regulated in India by any statute. Neither the Transfer of Property Act, 1882, nor the Indian Contract Act, 1872, nor the Sale of Goods Act, 1930, recognize the non-possessory hypothecation of immovables and the rights and remedies of the parties are regulated by the courts according to the general law of contract. In hypothecation, there must be an intention of the parties to create a security on the property on which the money has been lent. If that intention can be established, equity gives effect to it.

A hypothecation not merely of moveable existing on the premises at the time but also in respect of moveable which might be subsequently acquired and brought there, is valid though it is not governed by the Transfer of Property Act or by the Indian Contract Act, 1872. An oral or written hypothecation is permitted under the law in India.

Hypothecation is an extended form of pledge. Pledge has been codified by the Indian Contract Act. Sections 172 to 176 deal with pledge of goods. Under Section 172, a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 172 entitles a pawnee to retain the goods pledged as security for payment of a debt and under Section 175 he is entitled to receive from the pawnor or the pledger any extra-ordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawnor the pawnee has the right to sue upon the debt and to retain the goods as collateral security and to sell the goods after reasonable notice of the intended sale to the pawnor. Once the pawnee, by virtue of his right under Section 176 sells the goods, the right of the pawnor to redeem them is extinguished. However, the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawnor. So long the sale does not take place the pawnor is entitled to redeem the goods on payment of the debt. Therefore, when a pawnee files a suit for recovery of debt, though he is entitled to retain the goods, he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to re-deliver the goods on payment of the debt and, therefore, if he has put himself in a position where he is not able to re-deliver the goods, he cannot obtain a decree.

As against pledge of goods, the transfer of legal title in the goods in the case of a

hypothecation, the rights of the lender and the borrower are strictly governed by the terms and conditions of the hypothecation agreement executed by the parties. No assumptions can be drawn in such a case. Hypothecation is resorted to mostly by banks and other financial institutions for securing their long-term and medium-term loans and limits of working capital, bill discounting, letters of credit and guarantees to limited companies, partnerships etc. Alongwith the hypothecation agreements, the loaning institutions including banks have a plethora of other documents executed by the borrowing companies e.g. demand promissory note, collateral personal guarantees of managing directors, directors and other persons having substantial interest in the borrowing entities, second charge on fixed assets like land and building and plant and machinery permanently attached to land by legal or equitable mortgage and so on and so forth.

Hypothecation agreements usually cover moveable machinery, equipment, stocks of finished and semi-finished goods, raw materials, consumable stores, present and future available in factories and godowns of the borrower and also enroute to the borrower's factories and book debts. While these items as moveable assets, remain in the possession of the borrower and he has absolute right to convert them, sell them and deal with them in any manner the borrower likes in the course of his business, the legal title vests in the lending institution by virtue of the hypothecation agreement. Pledge, which is regulated by the Indian Contract Act, 1872, as stated above, technically speaking, cannot exist without bailment or possession. Though not accompanied by delivery of possession, the validity of hypothecation of moveables has been recognised in India and it has sometimes been enforced even against a bona fide purchaser without notice. Since such hypothecation is not governed by the Transfer of Property Act, 1882 or the Indian Contract Act and even the Sale of Goods Act, 1930, the Court is thrown back upon principles of equity and justice.

**A Specimen Agreement to Hypothecate Goods to Secure Fixed Loan**

The Manager,

.....Bank,

.....

.....

Sir,

In consideration of your Bank advancing to me/us on loan the sum of Rs..... I/We hereby agree to hypothecate and hold under lien to the Bank as security for the repayment as per Schedule hereto of the principal amount of the loan and payment of interest on demand at.....% per annum subject to a maximum of.....% per annum above Bank Rate.

The goods so to be held by me/us under lien to the Bank I/We declare to be my/our absolute property, and to be stored in my/our godowns at..... I/We hereby agree to furnish you at the close of business on the last day of each English calendar month so long as any money remains due

in respect of the said loan with a full and correct statement of particulars of all goods so held under lien to the Bank, with the market value thereof respectively on that day.

All goods from time to time held by me/us under lien to the Bank in terms of this agreement shall be kept separate and apart from all other goods in my/our possession, and no moneys shall be borrowed by me/us from any company, firm or person on the security of such goods stored in the same godown in a way that such other goods may be mixed with the goods held under lien to the Bank nor shall I/We do any other act by means of which the Bank's lien on the goods so held shall be in any way impaired or affected.

It is understood that I/We are at liberty, from time to time in the ordinary course of business, to sell all or any of the goods from time to time held under lien to the Bank under this agreement provided that no such sale shall reduce the value of the goods held under lien below the amount of my/our said debt to the Bank plus the margin of..... per cent. In case of any goods held under lien to the Bank reducing the value of the goods held under this lien to less than the amount of my/our said debt to the Bank plus such margin, the proceeds of such sale, as soon as the same are received, shall be paid into the bank in part satisfaction of the said loan and shall in the meantime be held as specifically appropriated to payment of the amount due by me/us on the security.

I/We empower you or any one from time to time authorised by you on behalf of the Bank to enter the godowns in which the goods held under lien to the bank under this agreement shall be from time to time stored, for the purpose of inspecting and taking an account of the said goods.

I/We further empower you or anyone authorised by you as aforesaid so long as any money advanced by the bank under this agreement remains unpaid, to take possession of any goods from time to time held by me/us under lien to the Bank under this agreement and or any promissory notes or bazaar chits held by me/us in respect of any of the goods which may have been sold in such manner as you may think fit and on so taking possession to exercise on behalf of the Bank all the rights of a pawnee under the Indian Contract Act and failing payment of the amount under this loan on....., to sell and realise the said goods and promissory notes or bazaar chits. No notice to me/us of such sale shall be necessary, and I/We hereby agree to waive any such notice. I/We agree to accept the Bank account of such sale signed by the Manager, Accountant or other duly authorised officer of the Bank as sufficient proof of the correctness of the amount realised by the Bank and the charges and expenses incurred in connection with such realisation, and I/We hereby further agree to sign all documents, furnish all information and do all acts and things necessary for the purpose of enabling the Bank to sell any goods or realise any promissory notes or bazaar chits of which you shall so take possession.

I/We undertake to keep all held under lien to the Bank under this agreement,

insured against fire to their full value, and to produce and deposit the policies with the Bank any time on demand and to hold all moneys which may become payable under any such policies in trust for the Bank so long as any money shall remain due in respect of my/our said loan. It shall be optional for, but not obligatory on the Bank, to insure the said goods in the Bank's name or to appropriate floating policies for the time being effected by the Bank towards insurance of the said goods and in either case to debit the said loan with relative premiums.

It is understood that the Bank's lien on the goods, so held under this agreement shall extend to any other sum or sums of money for which I/we or any other of us either separately or jointly with any other person or persons may be or become indebted or liable to the bank on any account.

Schedule of securities referred to in the agreement.

.....  
Schedule of instalments for the repayment of the loan amount.

.....  
Yours faithfully,  
For A B C Ltd.  
(.....)  
Managing Director,  
New Delhi  
Dated.....

## **SERVICE AGREEMENTS**

### **Contents of a Service Contract**

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

As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man, Unlike other agreements and legal documents which need not contain matters presumed or implied by law, it is better in such an agreement to specify even such matters and all other matters so as to make it a complete code, embodying the rights and duties of each party.

In respect of Government service, normally no formal contract is executed and only an appointment order is issued and the terms of service are thereafter

governed by statutory rules and Government order. The same is the position of statutory corporations as employers.

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

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

*Leave:* Conditions and grounds on which, and the period for which leave may be granted as well as allowance payable during leave should be stated. In the case of Government servants engaged on contract, the leave rules applicable to permanent Government Servants in general may be applied but as there are different rules for different classes of Government Servants those applicable should be clearly referred to, or if they are not lengthy, they may be embodied in the agreement in the form of a covenant.

*Determination of Employment:* The grounds for determination of employment should be clearly expressed in the agreement. The grounds on which the employment may be determined during the term are generally misconduct, negligence, or want of medical fitness. Subject to what has been stated earlier, it may also be determined at pleasure by notice, without giving any ground. In the case of misconduct or neglect, no notice is required, but, provision may be made for framing charges and taking defence as in the case of Government Servants. Since an employee is entitled to damages for wrongful dismissal if the termination of the service is not properly made, provision in this respect should be carefully worded.

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

While drafting restrictive covenants, it is necessary to see that they are not illegal. Agreements in restraint of trade are void under Section 27 of the Indian Contract Act, and should not be inserted in an agreement.

*Effect of Labour Laws:* Many Acts have been passed by the Central or State legislatures relating to the conditions of employment of teachers and other employees of aided schools and colleges and of universities, and of workers in factories and commercial establishments, for e.g. the Factories Act, the Industrial

Employment (Standing Orders) Act, the Payment of Wages Act, the Workmen's Compensation Act etc. In drawing up a service contract for such an employee the provisions of the relevant Acts must be kept in view. Any term of contract contrary to the statutory provisions will be null and void, as it is not open to an employee to contract out of the safeguards provided by the legislature for his protection.

**Specimen Agreement of Employment of Manager of a Business Concern**

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.

**Renewal of Term of Service of an Employee (Either on old terms or new terms)**

THIS AGREEMENT is made, etc.

WHEREAS the said CD has served the said AB as..... under an agreement between the parties hereto dated the.....;

AND WAEREAS the term of the said CD's engagement under the said agreement having expired on the....., it has been agreed that the said AB shall re-engage, the said CD upon the terms and conditions hereinafter appearing (or, upon the terms and conditions contained in the said agreement dated the.....).

NOW THESE PRESENTS WITNESS and the parties hereto hereby agree as follows:

1. The said CD shall serve the said AB as..... for one year from the.....
2. etc.

(or, 2. The terms and conditions of the said agreement shall be the same as are contained in the aforesaid agreement of the parties dated..... in so far as they may be applicable to the employment under this agreement and all the terms and conditions contained in the said agree-ment shall be deemed to have been incorporated in this agreement).

IN WITNESS WHEREOF etc.

**LEAVE AND LICENSE AGREEMENT**

Leave and Licence Agreements are preferred by the parties to get out of the rigours of landlord-tenant relationship. Many types of agreements are made for the occupation of property like lease deeds, lease or tenancy agreements, rental agreements etc. Despite these agreements, most owners prefer to give their premises on leave and license basis rather than tenancy or lease basis. The process of eviction of tenants is generally difficult. The law is tilted in favour of the tenant for various purposes. Generally it is being witnessed that a person having a vacant apartment will never rent it out fearing what if the tenant decides not to vacate and makes the apartment his own. That is why tenancy has been put on the backburner and Leave and Licence is now the most popular option.

The word "leave" has many meanings. In Leave and Licence Agreements, it is used to indicate "permission". The occupancy is in essence a permission granted by the landlord or owner to use and occupy the property concerned.

Mention should be made that the practice of entering into "Leave and Licence Agreements" was adopted in Mumbai. In Mumbai, the provisions contained under the then Bombay Rents Hotel and Lodging House Rates Control Act, 1947, popularly known as the "Bombay Rent Act" were considerably in favour of the tenants. Further, Tenancy or Lease Agreement had to be stamped and registered. Even if the Agreements were duly stamped and registered, the eviction of tenants was still a very tough and time consuming procedure.

With the hope of getting over the stamp duty and registration requirements and also with the view of not creating any tenancy, that will be covered by the said Act, a practice of entering into "Leave and Licence Agreements" was adopted. However, by virtue of an amendment to the said Act in 1973, those who were in occupancy of premises under Leave and Licence Agreements as on the specified date, became statutory tenants under the provisions of the said Act. Provisions were also introduced to protect the landlords, in as much as a person was in occupation of premises under Leave and Licence Agreement, on termination of licence, such person was liable to be summarily evicted.

### **Lease, Licence and Rental Agreements**

The licence is not a lease. The lease and the license both are different. The word "licence" under Section 523 of the Indian Easement Act, 1882 is a grant by one person to another or to a definite number of persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful. If the right granted as licence does not amount to an easement or an interest in the property, then it would be a licence. A lease of immovable property as per Section 105 of the Transfer of Property Act is a transfer of a right to enjoy such property. It may be for a specified period, express or implied. The price or payment of money is usually referred to as the "rent".

In a Leave and Licence Agreement, the juridical possession of the premises is deemed to remain with the licensor and the licensee is said to be in constructive possession of the said premises. Thus a leave and licence does not create any interest in the premises in favour of the licensee but gives the licensee the mere right to use and occupy the premises for a temporary period.

A Rental Agreement between the landlord and tenant sets down the terms which will be followed while the tenant lives in the rental unit. Month-to-Month Agreement is commonly called a "Rental Agreement". This agreement is for an indefinite period of time, with rent usually payable on a monthly basis. The agreement itself can be in writing or oral, but if any type of fee or refundable deposit is being paid, the agreement must be in writing.

### **Lease and Licence: Distinction**

The cardinal distinction between a lease and a licence is that in a lease there is a transfer of interest in the premises, whereas in the case of a licence there is no transfer of interest, although the licensee acquires a right to occupy the premises. When premises are given out on lease or tenancy basis the legal possession of the premises in these cases is also deemed to be transferred to the lessee and tenant respectively.

Whether an agreement to occupy the premises between the landlord and tenant is allowed to occupy was an agreement to lease or an agreement of leave and license has been a subject of many Supreme Court & High Court rulings. In a number of judgements various High Courts as well as the Apex Court have

distinguished the lease and the license. In *Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala*, 1988 SCC 155, the Supreme Court has held:

"In order to determine whether a document created a license or a lease the real test is to ascertain the intention of the parties i.e whether they intended to create a license or a lease. If the document creates an interest in the property entitling the transferee to enjoyment, then it is a lease; but if it only permits another to make use of the property without exclusive possession, then it is a license." [See also *Rajbir Kaur & Anr. v. M/s S Chokesiri & Co*, 1988 (2) SCJ 316]

From the judgments of various Courts, it appears that the main factors to decide whether the agreement is a lease or a license are (i) the intention of the parties and (ii) whether the agreement creates an interest in the property.

A licensee is a licensee whether the license is for occupation of the premises or for casual visits or for any other purpose. The status of a licensee cannot change or vary according to the purpose of the license. The principle "once a licensee always a licensee" would apply to all kinds of licenses.

If the premises are given under the Leave and License Agreement, the same can be terminated as per the terms of the agreement or otherwise and the licensor can demand possession, back from the licensee. The termination is easy in the Leave and License Agreement and therefore Leave and License Agreements are preferred by the parties.

### **Factors to be Considered While giving out Premises on Leave & License Basis**

In deciding whether to give out premises on leave & license basis some of the factors to be considered are as follows:

- *Possession*: In a leave and license agreement, the owner is deemed to be in legal or judicial possession of the premises and the licensee is in constructive possession of the premises.
- *Income Tax*: In a leave and license agreement the owner has to pay the applicable rate of tax.
- *Municipal Tax*: In a leave and license agreement the Municipal Authorities may charge taxes as applicable in the area and if there is a security deposit amount sometimes the Municipal Authorities may calculate a notional interest on the securities deposit amount and charge tax thereon.

### **A Specimen of Leave and License Agreement**

THIS AGREEMENT is made at..... this..... day of ....., 2007, between Mr. A hereinafter referred to as 'the Licensor' of the One Part and Mr. B of ..... hereinafter referred to as the 'Licensee' of the Other Part, as follows;

WHEREAS the Licensor is the owner of a piece of land at..... bearing Survey No ... with a building consisting of ..... floor ..... having built up area of about ..... square feet.

AND WHEREAS the Licensee has approached the licensor with a request to allow

the Licensee to temporarily occupy and use a portion of the..... floor of the said building, admeasuring about ..... square feet for carrying on his ..... business, on leave and license basis until the Licensee gets other more suitable accommodation.

AND WHEREAS the Licensor has agreed to grant leave and license to the Licensee to occupy and use the said ground floor portion of the said building and which portion is shown on the plan hereto annexed by red boundary line on the following terms and conditions agreed to between the parties hereto;

NOW IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS..

1. The Licensor hereby grants leave and license to the Licensee to occupy and use the said portion of the ground floor/..... floor of the said building of the Licensor (hereinafter referred to as the Licensed Premises) for a period of eleven months from ..... The Licensee agrees to vacate the said premises even earlier if the Licensee secures any other accommodation in the locality where the said premises are situated.
2. The Licensee shall pay to the Licensor a sum of Rs..... per month (calculated at the rate of Rs..... per square foot) as License fee or compensation to be paid in advance for each month on or before the..... day of each month.
3. All the Municipal taxes and other taxes and levies in respect of the licensed premises will be paid by the Licensor alone.
4. The electric charges and water charges for electric and water consumption in the said licensed premises will be paid by the Licensee to the authorities concerned and the Licensor will not be responsible for the same. For the sake of convenience a separate electric and water meter if possible will be provided in the said premises.
5. The Licensee will be allowed to use the open space near the entrance to the Licensed premises and shown on the said plan by green wash for parking cars during working hours of the Licensee and not for any other time and no car or other vehicle will be parked on any other part of the said plot.
6. The licensed premises will be used only for carrying on business and for no other purpose.
7. The licensed premises have normal electricity fittings and fixtures. If the Licensee desires to have any additional fittings and fixtures, the Licensee may do so at his cost and in compliance with the rules. The Licensee shall remove such fittings and fixtures on the termination of the license failing which they shall be deemed to be the property of the Licensor.
8. The licensed premises are given to the Licensee on personal basis and the Licensee will not be entitled to transfer the benefit of this agreement to anybody else or will not be entitled to allow anybody else to occupy the premises or any part thereof. Nothing in this agreement shall be deemed to grant a lease and

the licensee agrees and undertakes that no such contention shall be taken up by the Licensee at any time.

9. The Licensee shall not be deemed to be in the exclusive occupation of the licensed premises and the Licensor will have the right to enter upon the premises at any time during working hours to inspect the premises.
10. The Licensee shall maintain the licensed premises in good condition and will not cause any damage thereto. If any damage is caused to the premises or any part thereof by the Licensee or his employees, servants or agents the same will be made good by the Licensee at the cost of the Licensee either by rectifying the damage or by paying cash compensation as may be determined by the Licensor's Architect.
11. The Licensee shall not carry out any work of structural repairs or additions or alterations to the said premises. Only such alterations or additions as are not of structural type or of permanent nature may be allowed to be made by the Licensee inside the premises with the previous permission of the Licensor.
12. The Licensee shall not cause any nuisance or annoyance to the people-in the neighbourhood or store any hazardous goods on the premises.
13. If the Licensee commits a breach of any term of this agreement then notwithstanding anything herein contained the Licensor will be entitled to terminate this agreement by fifteen days' prior notice to the Licensee.
14. On the expiration of the said term or period of the License or earlier termination thereof, the Licensee shall hand over vacant and peaceful possession of the Licensed premises to the Licensor in the same condition in which the premises now exist subject to normal wear and tear. The Licensee's occupation of the premises after such termination will be deemed to be that of a trespasser.

IN WITNESS WHEREOF the parties hereto have put their hands the day and year first hereinabove written.

Signed by the within named Licensor Shri .....

in the presence of .....

Signed by the within named Licensee Shri .....

in the presence of .....

## **OUTSOURCING AGREEMENTS**

Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. It differs from contracting in that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best - its core competencies.

Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing (BPO). BPO includes outsourcing related to accounting, human resources, benefits, payroll, and finance functions and activities. Knowledge Process outsourcing (KPO) includes outsourcing related to legal, paralegal, and other highly skilled activities.

A good outsourcing agreement is one which provides a comprehensive road map of the duties and obligations of both the parties - outsourcer and service provider. It minimizes complications when a dispute arises. However, many a times people neglect to pay attention while drafting an outsourcing agreement. Before finalizing an outsourcing agreement, the terms should be thoroughly discussed and negotiated to avoid any misunderstanding at a later stage. It is advisable to consult a lawyer before finalizing any outsourcing agreement.

Before signing an outsourcing agreement, the following factors must be properly addressed:

- Duties and obligations of Outsourcer
- Duties and obligations of service provider
- Security and confidentiality
- Legal compliance
- Fees and payment terms
- Proprietary rights
- Auditing rights
- Applicable law to outsourcing agreement
- Term of the Agreement
- Events of Defaults and Addressing
- Dispute Resolution Mechanism
- Time limits
- Location of Arbitration
- Number of Arbitrators
- Interim measures/Provisional Remedies
- Privacy Agreement
- Non-compete Agreement
- Confidentiality Agreement
- Rules Applicable
- Appeal & Enforcement
- Be aware of local peculiarities
- Survival terms after the termination of the outsourcing agreement.

Every outsourcing agreement should be modified as applicable under different circumstances. [Source: [www.madaan.com](http://www.madaan.com)]

### **A Specimen of Outsourcing Agreement for Converting Hard Copies of a Book in a Compact Disc (CD)**

This Agreement for the conversion of the book titled *Intellectual Property Protection in India* is executed in ..... on .....2007 by and between The Golden Law Publishing Co. Pvt. Ltd. having their Office at..... represented by Mr. .... Manager, Golden Law Publishing Co. Pvt. Ltd. (hereinafter referred to as 'the GLP Pvt. Ltd.)

AND

M/s Bluetec Web Services Pvt. Ltd, a Company registered under the Companies

Act having their office at .....and represented by Mr. ....  
Director, M/s Bluetec Web Services Pvt. Ltd, (hereinafter referred to as the M/s Bluetec Pvt. Ltd.)

WHEREAS the GLP Pvt. Ltd. has published the book *Intellectual Property Protection in India* it has decided to convert the hard copies of above mentioned book into a soft copy version by getting the book digitized and thereafter put the contents of the book in a CD (Compact Disc) along with a Search Engine. The GLP Pvt. Ltd. floated a tender for this book vide tender document with closing date .....2007 and after evaluating the bids of various parties, the GLP Pvt. Ltd. has decided to award the project to M/s Bluetec Pvt. Ltd. on the following terms and conditions:

1. M/s Bluetec Pvt. Ltd. would perform the job of digitisation (of the relevant portions marked for digitization) of the book including Data punching / Scanning, OCR Validation, Proof-reading (at an accuracy level of 99.9 %), Tagging according to search parameters, Linking, Indexing etc.
2. M/s Bluetec Pvt. Ltd. would be developing a search engine as per the GLP's requirement. The search engine would be licensed to the GLP Pvt.Ltd. for its perpetual use. The institute would further be free to use this Search Engine for any purpose and would not be liable to pay to M/s Bluetec Pvt. Ltd. any additional amount for such usage.
3. The copyright of the contents of the CD, marketing rights and all other rights pertaining to the said CD would solely vest with the GLP Pvt. Ltd.
4. M/s Bluetec Pvt. Ltd. undertakes to complete the assignment within a period of 100 days from the date of execution of this agreement.
5. After the completion of the job M/s Bluetec Pvt. Ltd. would give sufficient training including technical aspects (relating to the features of the search engine developed by the M/s Bluetec Pvt. Ltd. to the people deputed by the GLP Pvt. Ltd. to facilitate to use the search engine independently. The training must be up to the satisfaction of the GLP Pvt. Ltd. in all aspects.
6. M/s Bluetec Pvt. Ltd. would hand over the digitized contents of the magazine to the GLP Pvt. Ltd. after the completion of the job.
7. The total project cost to be paid to M/s Bluetec Pvt. Ltd. would be as follows.
  - a. Cost of developing the Search Engine – Rs. 50,000/- (Rupees fifty thousand only)
  - b. Digitization cost for each page (in hard copy) – Rs. 12/- per page
  - c. Conversion cost for each page (in soft copy) – Rs. 10/- per page
  - d. Total cost of each CD including the manual, jewel case, packing, printing and security features – Rs. 85/- per CD

It is to be noted that the original CD lot would be of 750 CDs only.

For the purpose of page count, 50% or more coverage would be treated as one full page and less than 50% would be ignored and would not be taken in counting.

8. M/s Bluetec Pvt. Ltd. would not be paid any advance money for undertaking the job. M/s Bluetec Web Services Pvt. Ltd. would however be paid 25% of the total project cost after the stage of completion of the Master CD and subject to the satisfaction of the GLP Pvt. Ltd.
9. M/s Bluetec Pvt. Ltd. agrees to keep the hard copies of the book given for digitization in good shape. M/s Bluetec Pvt. Ltd. has however been allowed to mark the relevant portions required for search taggings with special marks.
10. For updating the CD, the GLP Pvt. Ltd. reserves the right to either conduct the updation in part on its own or the GLP Pvt. Ltd. may assign this job to M/s Bluetec Pvt. Ltd. or any other agency. If the GLP Pvt. Ltd. decides to assign this job to M/s Bluetec Pvt. Ltd., the cost would be as follows:
  - a. Content assimilation, Software upgradation and Annual Maintenance charges – Rs.10, 000/- per annum
  - b. Conversion cost of each page (in soft copy ) – Rs 10/- per page
  - c. Total cost of each CD including the manual, jewel case, packing, printing and security features – Rs 85/- per CD (subject to a minimum lot of 1000 CDs)
11. Both the parties i.e. The GLP Pvt. Ltd. and M/s Bluetec Pvt. Ltd. agrees to abide by all remaining terms and conditions of the original tender document floated by the GLP Pvt. Ltd. for the said job.
12. Any notice or request or communication given or required to be given under this contract shall be given to:
  - A. In case of M/s Bluetec to:  
Mr. ...., Director, M/s Bluetec Web Services Pvt. Ltd.  
(Give Address).....
  - B. In case of GLP Pvt. Ltd. to:  
Mr....., Manager, Golden Law Publishing Co. Pvt. Ltd.  
(Give Address).....
13. M/S BLUETEC PRIVATE LIMITED HEREBY FURTHER COVENANTS AND AGREES to indemnify and keep at all times indemnified the GLP Pvt. Ltd. against any loss or damage that the GLP may sustain as a result of the failure or neglect of M/s Bluetec to faithfully carry out its obligations under this agreement and further to pay for all losses, damages, costs, charges and expenses which the GLP Pvt. Ltd. may reasonably incur or suffer and to indemnify and keep indemnified the GLP Pvt. Ltd. in all respects.
14. This Agreement can be terminated by the GLP Pvt. Ltd. by giving three month's notice in writing in the event of failure of M/s Bluetec Pvt. Ltd. for adhering to time schedules / unsatisfactory execution of the conversion of the book or quality of output or requisite training not given to the people deputed by the GLP Pvt. Ltd or for any other reasonable cause and under such notice period, the performance of the project shall continue in operation by both the parties.
15. FORCE MAJEURE : If at any time during the continuance of this contract, the

performance in whole or in part by either party or any obligation under this contract is prevented or delayed by reason of any war, hostility, acts of the public enemy, civil commotion, sabotage, fires, floods, explosions, epidemics, quarantine restrictions, strikes, lockouts, power failure or acts of God (herein after referred to as events) provided notice of the happenings of any such event is given by either party to the other within 21 days from the date of occurrence thereof, neither party shall by reason of such events, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non-performance or delay in performance, and deliveries under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, provided further that if the performance in whole or part of any obligation under this contract is prevented or delayed by reasons of any such event for a period exceeding 180 days, both parties shall consult each other regarding the termination of the contract on agreed equitable terms or otherwise devise future course of action .

16. All disputes, claims and demands arising under or pursuant to or concerning this contract shall be referred to the sole Arbitrator to be appointed by the Chief Manager, GLP Pvt. Ltd. The award of the sole Arbitrator shall be final and binding on both the parties. The arbitration proceedings shall be held under the provisions of the Arbitration and Conciliation Act, 1996 as amended till date. The place of arbitration shall be .....
17. The Courts at ..... (Mention the name of the place) alone shall have jurisdiction to adjudicate any dispute arising between the parties under this agreement.
18. Notwithstanding anything contained in this agreement, the parties agree that any terms of this agreement may be varied by way of supplementary deed/agreement. Such supplementary agreement/deed shall be effective only if it is in writing and signed by duly authorised representatives of both the parties.

IN WITNESS WHEREOF the parties hereto have set their respective hands to the agreement on the day, month and the year mentioned herein above.

Signed and Delivered By:

On behalf of M/s Bluetec Web Services Pvt. Ltd.

Name:

Designation:

Place:

On behalf of GLP Pvt. Ltd.

Name:

Designation:

Place:

In the presence of witnesses:

## LESSON ROUND-UP

- There is no particular form prescribed for the drawing up of trade contracts, except that they must fulfil all the essential requirements of a valid contract under the law applicable to the contract.
- A dealership agreement/contract must be drawn in accordance with the provisions of the Indian Contract Act, 1872. All the essential ingredients of a contract, such as, a proposal, its acceptance, its due communication to the proposer, lawful consideration, lawful purpose and competence of parties to the contract etc. must be duly satisfied and ensured while drafting such contracts.
- Building contracts, being legal documents, have to be drawn in accordance with the provisions of the Indian Contract Act. Such an agreement as stated above under "dealership contracts", must have all the essential ingredients of a contract.
- A commercial agency contract should *inter alia* include provisions regarding the date of commencement and of termination of the agency, the goods or products to be covered by the agency, the contractual territory and the nature of the agency.
- When two parties join hands for exchange of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and/or managerial services, they are said to be collaborating in a desired venture.
- In order to ensure quick processing of the proposed collaboration arrangements and on a uniform basis, the Central Government has issued guidelines for prospective collaborators so that they submit their proposals in accordance with those guidelines.
- The important ingredient of the arbitration agreement is the consent in writing to submit dispute to arbitration. Consent in writing implies the application of mind to the reference of dispute to arbitration in accordance with Arbitration and Conciliation law and the binding nature of the award made thereunder.
- The parties to the dispute will enter into an agreement to refer the dispute to arbitration and will agree on the terms of reference, that is, to state clearly and precisely the matter the arbitrator is required to decide. An arbitrator is not bound by the strict rules of evidence of courts of law. However, he does follow the practice of presentation and conduct of a case in a court of law. After hearing the evidence of both the parties, the arbitrator makes his award. The award must be within the terms of reference.
- A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The terms of a guarantee must be strictly construed. The surety receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into.

- In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee.
- Hypothecation is a form of transfer of property in goods. Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass. This form of transfer is not regulated in India by any statute.
- Service contracts are drafted in the same way as other agreements. The terms of employment should be definitely fixed and clearly expressed and nothing should be left to presumptions.
- They are required to be both affirmative (describing the acts and duties to be performed) as well as negative (putting restrictions on the acts of the employee during and/or after the term of employment).
- As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man,
- 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.
- Leave and Licence Agreements are preferred by the parties to get out of the rigours of landlord-tenant relationship.
- In a Leave and Licence Agreement, the juridical possession of the premises is deemed to remain with the licensor and the licensee is said to be in constructive possession of the said premises. Thus, a leave and licence does not create any interest in the premises in favour of the licensee but gives the licensee the mere right to use and occupy the premises for a temporary period.
- Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing (BPO).
- A good outsourcing agreement is one which provides a comprehensive road map of the duties and obligations of both the parties - outsourcer and service provider and minimizes complications when a dispute arises.

## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY IV - DRAFTING OF VARIOUS DEEDS-I**

#### **(Deeds of Sale of Land, Building, Mortgage, Licence and Lease)**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to provide an exposure to the students about the:

- Essential requirements of the sale of immovable property
- Drafting of deeds of sale of land and building
- Mortgage and its types
- Drafting of deeds of mortgages
- Release and reconveyance of mortgaged assets

#### **DEEDS OF SALE OF LAND AND BUILDING**

#### **INTRODUCTION**

Sale of immovable property is governed by the provisions of Transfer of Property Act, 1882. Chapter-III of the said Act deals with the sale of immovable property exclusively. Section 4 of the said Act defines sale.

*"Sale" defined* - "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

*Sale how made* - Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

*Contract for sale* - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on, such property. Over and above, Transfer of Property Act, legislation like Income-tax Act, FEMA, Urban Land Ceiling Act and some other laws affect the free transfer of immovable property.

#### **Essential Requirements of Sale of Immovable Property**

The following are the essential requirements of sale of an immovable property:

1. Transfer of ownership in exchange of price paid or promised or part paid or part promised.
2. Parties to transaction of sale are known as seller and buyer.
3. Subject-matter of sale is immovable property which is sold by seller and purchased by buyer.

4. Delivery of possession of property to the buyer by seller may be made as under:
  - i. Property of the value of less than Rs. 100/- may be transferred merely by delivery of physical possession;
  - ii. Property of the value exceeding Rs. 100/- may be transferred under a written instrument known as 'Sale Deed' which should be registered under the Registered Act, 1908.
5. Sale of immovable property attracts stamp duty under the Indian Stamp Act.
6. (i) Clearance certificate from the Income-tax Officer is required to be obtained under Section 230A of the Income-tax Act, 1961 by the seller in all cases where the sale consideration of immovable property exceeds Rs. 2,00,000/- as a pre-requisite for registration of the Sale Deed with the Registrar/Sub-Registrar of Assurances under the Registration Act, 1908.
  - ii. In all cases where the consideration money of the property exceeds Rs. 10 lakhs on or after 1st October, 1986, it is obligatory for the parties i.e. seller and buyer, to enter into an agreement in writing, at least three months before the intended date of transfer and submit, under Section 269UC of the Income-tax Act a statement in duplicate and in Form 37-I giving such particulars as required therein to the Appropriate Authority within 15 days of such agreement. This is required to be done to prevent under-valuation of properties situated in metropolitan towns such as Bombay, Calcutta, Madras, Delhi, Ahmedabad, Bangalore, etc. In cases of under-valuation the Government may acquire pre-empt the property under transfer.
  - iii. Permission of Income-tax Officer is required under Section 281(1) of the Act for transfer of the immovable property to evidence that no tax proceedings are pending or no arrears of Income Tax are outstanding on such property.
  - iv. Requisite permission or exemption under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 be obtained before taking up drafting of the sale deed.
  - v. Permission of RBI is required if the property acquired is owned by Non-resident as per the Provisions of FEMA.
  - vi. It may also be borne in mind by the draftsman to recite for all the above permissions, approvals, or exemptions obtained under different acts in the document.
7. The rights and obligations of the buyer and seller in the transaction of sale emerge as provided under Section 55 of the Transfer of Property Act.

### **Rights and Liabilities of Buyer and Seller**

Section 55 of the Act prescribes the rights and liabilities of buyer and seller which can be modified by the parties to a contract by mutual consent and contract to the contrary of these provisions. The seller under Sub-section (1) is bound to (a) disclose to the buyer any material defect in the property or in his title to such property, (b) to give title documents to buyer for investigation of seller's titles to the property under transaction of sale, (c) to answer the question put to him by the buyer

and provide all necessary information to him in regard to the property, (d) to execute the conveyance document on payment of consideration money in favour of the buyer, (e) pay all public dues on the property till the date of conveyance and take due care as a man of ordinary prudence to protect the title of the property till it is passed on to the genuine buyer. The buyer is also duty bound under the provisions of the Act to do the following things (a) to disclose to seller the interest of the seller in the property of which he is aware and believes that the seller is not aware and this information is likely to affect the price of the property, (b) to pay or tender the purchase money to the seller or such person as he directs, (c) where the ownership of property has passed to buyer he has to bear the full responsibility including any loss to the property etc., (d) to pay public dues from the date of transfer of ownership of the property.

Besides the above noted duties or obligations of the buyer and seller as covered under the provisions of the Act, there are certain rights and entitlements also. For example, the seller is entitled to following benefits:

- a. to the rents and profits of the property till the ownership thereof passes to the buyer;
- b. where the property has passed to the buyer before payment of the whole of the purchase moneys the seller is entitled to a charge upon the property in the hands of the buyer. He is also entitled for the interest on the amount of unpaid consideration money for the property.

Similarly, the buyer is also entitled to the following benefits viz., (a) where the ownership of the property has passed to him, to the benefit of any improvement in it which may be in any shape of increase in value of the property or its rent or profit; (b) he is entitled to charge upon the property to the extent of entitlement etc.

### **Documentation**

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

### **Drafting of Deed of Sale of Immovable Property**

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

The Study Lesson II contains description of various parts of a Deed of Transfer of Property. Before attempting a draft for Sale Deed, it is advisable to have reading of the same. Though all the components are important, one has to be very much conscious of recital, parcels, consideration, receipt and witness, as they in variably receive a close scrutiny of the reader.

A company can validly acquire or dispose of an immovable property if its

Memorandum and Articles of Association so provide and its Board of Directors pass the requisite resolution in conformity with the provisions of the Companies Act, 1956. A company may acquire any immovable property by having it sold out by any other person in its favour under a document known as 'Sale Deed' executed by the vendor in its favour. A Sale Deed must be properly drafted adhering to all the principal conditions prescribed under the Transfer of Property Act to acquire a perfect title to the property being purchased by the company.

Some of the important conditions as contained in the said Act which a draftsman should bear in mind while drafting a Sale Deed are very precisely noted below:

*a. Lawful Consideration and Object*

The property must be purchased as a part of legal transaction having paid the consideration as required under the provisions of the Indian Contract Act, 1872 for a valid contract. Besides, the objectives for which the property is being purchased by the company should be lawful i.e., not forbidden by law, not to defeat the provisions of any law, not to be fraudulent, not to involve or impart injury to the person or property of another and should not be regarded by the court of law as immoral or opposed to public policy.

*b. Competence of Person to Transfer*

For a company, the test of competence to enter into a transaction of sale or purchase is that its Board of Directors should authorise a person under the resolution passed in their meeting held in conformity with the Articles of Association and having object clause to sell or purchase immovable property under its Memorandum of Association. In case the other party is an individual who is either selling to the company or purchasing from the company any land or immovable property such individual should be considered competent to transfer if it fulfils the necessary conditions prescribed under the Indian Contract Act, 1872 viz. (i) should be of the age of majority, (ii) be of sound mind; (iii) not be disqualified from contracting by any law to which such individual is subjected. Further, the draftsman should ensure that where a transaction is being made involves a person whose competence is derived in pursuance of following or adhering a prescribed procedure under any special or general law, such procedure should be followed invariably. For example, a minor though incompetent to enter into a transaction under the Law of Contract but becomes competent if the procedure laid down under the Law of Minority and Guardianship is followed i.e. through the natural guardian or ward the minor can lawfully enter into the transaction of transfer of immovable property with the company.

*c. Transfer of All Interest - in the Property*

All interests which a transferor is capable of passing in the property as legal incident of the transfer should be explained in the document, for example, if it is transfer of land, the easements annexed thereto, the rents of profits thereof, things attached thereto etc.

*d. Absolute Transfer*

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

*e. Absolute Interest in the Property*

The interest being transferred in the property should not be conditional which may restricted full enjoyment of the property by the transferee.

*f. Justification for Transfer*

Cogent reasons for the transfer be given so as to establish bona fide base for the transaction and to avoid eventualities of fraud and multiple litigation therefrom.

*g. Protection of Creditors' Interest*

Law protects creditors' interest in the transferred property. In drafting of Sale Deed this point should be accommodated if the circumstances so warrant.

*h. Enforcement of Rights Attached to Property on Valid Transfer*

If a transferee is aware of such rights attached to the property and the transfer is gratuitous then the person can enforce such rights against transferee. But this could be avoided if the transferee has no notice about such rights attached to property and also has paid full consideration for the transaction.

*i. Property to be Free from Conditions*

The property being transferred should be free from any rights or obligations which a third person can enforce legally against transferee for enjoying any benefits.

*j. Transfer in Good Faith and with Full Authority*

Where the property is transferred by a person not to be the real owner, it is necessary to make such transfer valid for the transferor should have the authority to transfer and he must exercise this authority in good faith.

*k. Protection for Defective Title*

Law protects the transferee who acquires the immovable property under good faith and for bona fide consideration but by any circumstance unknown to him is rendered to have defective title, Section 51 of the Transfer of Property Act, provides such protection to bona fide transferees acquiring properties in good faith.

*l. Precautions*

The draftsman should know beforehand that the property under transfer is free from encumbrances and no litigation questioning such property or rights or interest connected therewith is pending in any court. To avoid fraudulent transfers, the draftsman should ensure that the title to such property has been investigated by competent advocate and he has certified the title free from any encumbrance whatsoever.

In the case of a company, it must be ensured that the Board of Directors have requisite powers under Section 293(1)(a) of Companies Act, 1956 to sell, lease or otherwise dispose of the property of company.

### **Specimen Forms for Deeds of Sale of Immovable Property**

Some specimen forms for sale deeds of immovable properties are given below representing different situations. These forms can be adopted in different situations

by making suitable modifications.

### 1. Simple Deed of Sale of a House, without Recitals

THIS DEED OF SALE made on the..... day of.....200....

BETWEEN AB, etc., {hereinafter called "the vendor"} of the one part AND CD, etc, (hereinafter called "the purchaser") of the other part.

THIS DEED OF SALE WITNESSES as follows:

1. In consideration of the sum of Rs..... paid by the purchaser to the vendor on the..... day of..... (the receipt of which the vendor hereby acknowledges) the vendor as owner hereby transfers to the purchaser by way of sale ALL that pucca house standing on the land measuring 27 metres by 10 metres fully described in the schedule hereto annexed and thereon shown with its boundaries coloured red TO HOLD the same to the purchaser as absolute owner.
2. The vendor hereby covenants with the purchaser as follows:
  1. The said premises shall be quietly entered into and upon and held and enjoyed and the rents and profits received therefrom by the purchaser without any interruption or disturbance by the vendor or any person claiming through or under him and without any lawful disturbance or interruption by any other person whomsoever;
  2. The vendor will at the cost of the person requiring the same, execute and do every such assurance or thing necessary for further more perfectly assuring the said premises to the purchaser, his heirs or assigns as may reasonably be required;
  3. The interest hereby transferred subsists and the vendor has power to sell the same;
  4. The property hereby sold is free from encumbrances.]\*
3. PROVIDED ALWAYS and it is hereby agreed that wherever such an interpretation would be requisite to give the fullest possible scope and effect to any con-tract or covenant herein contained the expressions "the vendor" and "the purchaser" hereinbefore used include their respective heirs, legal representatives, successors and assigns.

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

Witness Vendor

Witness Purchaser

*The schedule herein referred to*  
(Description of the property)

### 2. An Agreement of Sale of Immovable Property

THIS AGREEMENT OF SALE executed on the..... day

of..... 2007 between S son of SF, resident of.....,

hereinafter called vendor of the one part and P son of PF resident

of..... hereinafter called the purchaser of the other part. (The

expression "Vendor" and "Purchaser" wherever they occur in these presents, shall also mean and include their respective heirs, executors, administrator, legal representatives and assigns).

WHEREAS the vendor is the sole and absolute owner of the property more fully set out in the Schedule hereunder:

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

NOW THIS AGREEMENT OF SALE WITNESSES AS FOLLOWS:

1. The price of the property more fully set out in the Schedule is fixed at Rs..... (Rupees.....) free of all encumbrances.
2. The purchaser has paid to the vendor this day the sum of Rs..... (Rupees.....) by way of earnest money for the due performance of the agreement, the receipt of which the vendor doth hereby admit and acknowledge.
3. The time for performance of the agreement shall be..... months from this date, and it is agreed that time fixed herein for performance shall be the essence of this contract.
4. The purchaser shall pay to the vendor the balance sale price of Rs..... (Rupees.....) before registration of the sale deed.
5. The vendor agrees that he will deliver vacant possession of the property to the purchaser before registration of the sale deed.

*Alternatively*

The vendor agrees that he will put the purchaser in constructive possession (if vacant possession is not possible) of the property by causing the tenant in occupation of it to attorn their tenancy to the purchaser.

6. The vendor shall execute the sale deed in favour of the purchaser or his nominee or nominees as purchaser may require.
7. The vendor shall hand over all the title deeds of the property to the purchaser or his advocate nominated by him within..... days from the date of this Agreement for scrutiny of title and the opinion of the vendor's Advocate regarding title of the property shall be final and conclusive. The purchaser shall duly intimate the vendor about the approval of the title within..... days after delivering the title deeds to him or his Advocate.
8. If the vendor's title to the property is not approved by the purchaser, the vendor shall refund to the purchaser the earnest money received by him under this Agreement and on failure of the vendor to refund the earnest money within..... days he shall be liable to repay the same with interest thereon at..... per cent per annum.
9. If the purchaser commits a breach of the Agreement, he shall forfeit the earnest amount of Rs..... (Rupees.....) paid by him

to the vendor.

10. If the vendor commits a breach of the Agreement, the vendor shall not only refund to the purchaser the sum of Rs..... (Rupees.....) received by him as earnest money, but shall also pay to the purchaser an equal sum by way of liquidated damages.
11. Nothing contained in paras 9 and 10 *supra* shall prejudice the rights of the parties hereto, to specific performance of this Agreement of sale.

**(Schedule of Property)**

IN WITNESS WHEREOF the vendor and the purchaser have set their hands to the Agreement of sale the..... of..... 2007 in the presence of the witnesses:

Witness Vendor

Witness Purchaser

**(2A) Specimen Schedule of the Property**

1. Municipal No./Ward No./Plot No./Khasra No.:

2. Location:

Street No.:

Street Name:

3. Place/Area

North:

South:

East:

West:

4. Sub-District Hqrs./Tehsil/Taluka:

5. Police Station:

6. District/State:

7. Exact Measurement:

Total Area:

Measurement of all sides:

Plinth area/floor area:

Sketch/plan:

Carpet area:

8. Fixtures & Fittings:

9. Any other items to be covered in sale deed.

10. Permitted use of the land/building:

In case of agricultural land, the schedule may be modified to include the Khasra Nos./Plot Nos. with area and location as per the revenue records supplied by the

Patwari or revenue office of the Sub-District/Tehsil/Taluka. It is also a requirement that a survey is done as to ascertain

It is also a requirement that a survey is done as to ascertain the exact measurement of area and compare it with what is mentioned in the title deed. Buyer can make sure that he is buying a property of a particular measurement.

### 3. Deed of Sale by a Certificated Guardian of a Hindu Minor

THE DEED OF SALE made the..... day of..... BETWEEN AB of, etc. (vendor) of one part and CD of, etc. (purchaser) of the other part.

WHEREAS by an order made by the District Judge of..... in Case No..... of under Act VIII of 1890 (cause title) the said AB was appointed certificated guardian of XY who was then and is still now a minor under the age of 21 years.

AND WHEREAS by an order dated..... the..... day of..... made by the District Judge of..... in Misc. Judicial Case No. ... of..... the said AB was authorised to sell the lands, hereditament and tenement belonging solely and exclusively to the said minor on terms thereunder contained which property is fully mentioned and described in the Schedule hereto.

AND WHEREAS the said order is still in full force and virtue.

AND WHEREAS in pursuance of the said order the said AB as such certificated guardian has contracted with the said CD for absolute sale of the said property at and for the sum of Rs.....

NOW THE INDENTURE WITNESSETH that for the consideration as aforesaid and in exercise of the powers, authorities and liberties conferred upon and vested under and by virtue of the hereinbefore recited order dated..... and all other powers and authorities enabling him in that behalf the said AB do hereby grant, convey, sell, transfer, assign and assure as certificated guardian of the said minor the said property and every part whereof unto and to the use of the said CD, To Have and To Hold the same absolutely and for ever.

AND THIS INDENTURE FURTHER WITNESSETH that the said AB do hereby covenant with the said CD that the said AB has not heretobefore done, executed, performed or knowingly suffered to the contrary any act, deed or thing whereby or by reason or means whereof the said property or any part thereof may in any way be encumbered or prejudiced in title or estate or the said AB may be hindered or prevented from granting, transferring, conveying, selling, assigning or assuring the same in the manner hereinbefore indicated.

*The Schedule above referred to*

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered AB*

CD

### 4. Sale Deed of Agricultural Land

THIS DEED OF SALE made this..... day of.....  
Two Thousand..... BETWEEN..... hereinafter called the  
vendor of the one part AND..... hereinafter called the vendee of the  
OTHER PART.

AND WHEREAS the vendor is lawfully seized and possessed of or otherwise  
sufficiently entitled to the property described fully in the Schedule below.

AND WHEREAS the vendor (or vendor's) predecessor-in-interest exercised his  
option to retain the said property by submission of B form under the W.B. Estates  
Acquisition Act, 1953 or whereas the property described in the schedule below  
stands retained by reason of the then raiyat not having agricultural lands beyond  
the ceiling of the predecessor-in-interest as the case may be.

AND WHEREAS the land described in the Schedule below has been recorded in  
the finally published Khanda-Khatian of the vendor or vendor's predecessor-in-  
interest as the case may be.

AND WHEREAS the land fully described in the Schedule below stands retained  
by the vendor through operation of family ceiling as envisaged in Chapter II-B,  
W.B., Land Reforms Act.

AND WHEREAS the vendor has obtained previous permission in writing under  
Section 14C, W.B. Land Reforms Act by Revenue Office for transfer (this is  
necessary when the vendor is a member of Schedule Tribe) but vendee is not - it  
is appropriate to quote the number of the case through which the permission was  
obtained.

NOW THIS DEED WITNESSES THAT in consideration of a sum of Rs.....  
paid by the vendee or promised to be paid by the vendee or a sum of  
Rs..... paid by the vendee out of the total agreed sum of Rs.....  
being agreed as the price of the property, and the receipt whereof being  
acknowledged by the vendor do hereby and hereunder grant, convey, sell,  
transfer, assign and assure all his estate and interest in the schedule property  
with all appurtenances, together with all homestead, trees, tanks, hedges,  
ditches, ways, waters, watercourse, lights, liberties, privileges easements  
whatever to the land described in the Schedule.

AND ALL the estates, right, title, interest, claim and demand whatsoever of the  
vendor into or upon the same and every part thereof: TO HAVE AND TO HOLD  
the same unto and to the use of the purchaser, his heirs, executors,  
administrators, assigns absolutely and forever together with title deeds, writings,  
muniment and other evidences of title AND THE VENDOR do hereby covenant  
with the purchaser, his heirs, executors, administrators representatives and  
assigns that notwithstanding any acts, deed or things hereto before done,  
executed or knowingly suffered to the contrary the vendor is now lawfully seized  
and possessed of the said property free from any encumbrances, attachments or  
defect-in title whatsoever and that the vendor has full power and absolute  
authority to sell the said property in the manner aforesaid AND the purchaser

shall hereafter peaceably and quietly hold, possess and enjoy the said property in khas without any claim or demand whatsoever from the vendor or any person claiming through or under him. AND FURTHER THAT the vendor, his heirs, executors, administrators or assigns, covenant with the purchasers, his heirs, executors, administrators and assigns to save harmless indemnify and keep indemnified the purchaser, his heirs, administrators or assigns from or against all encumbrances, charges and equities whatsoever. AND the vendor, his heirs, administrators or assigns further covenant that he or they shall at the request and cost of the purchaser, his heirs, executors, administrators or assigns do or execute or cause to be done or executed all such lawful acts, deeds and things whatsoever for further and more perfectly conveying and assuring the said property and every part thereof in manner aforesaid according to the true intent and meaning of this deed.

*Schedule of Property*

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered*

by the vendor in the presence of:

**5. Deed of Sale of Property, Mortgagee - Joining**

THIS INDENTURE IS MADE this..... day of..... BETWEEN AB of etc. (vendor and mortgagor), of the first part, CD of..... etc. (mortgagees), of the second part, and MN of, etc., etc., (purchaser) of the third part.

WHEREAS by Deed of Mortgage dated..... day of..... made between the said AB described therein as mortgagor of the one part and the said CD described therein as mortgagee of the other part and registered in Book I, Vol..... Pages..... to..... in the office of..... it was witnessed that the said AB did for the consideration mentioned therein grant, convey, sell, transfer, assign and assure unto and to the use of the said CD the property fully mentioned and described in the Schedule thereto and also particularly written in the Schedule below subject to the proviso for redemption as therein contained. AND WHEREAS there is now due and payable to the said CD by the said AB a sum of Rs..... as principal and a further sum of Rs..... as interest making thus an aggregate of Rs..... which sum the said AB has no resources to repay except by sale of the said property as hereunder mentioned.

AND WHEREAS in the circumstances aforesaid the said AB has agreed with the said MN for sale of the said property at and for the sum of Rs.....

AND WHEREAS the said CD has agreed to join with the said AB in effecting such sale and assuring the same so as to pass an absolute title in the said property unto the said MN free from encumbrances.

NOW THIS INDENTURE WITNESSETH that in consideration of the said sum of Rs..... out of which a sum of Rs..... has been paid to the said

CD in satisfaction and discharge of the mortgage debt and the balance retained by the said AB the receipts whereof they, viz., the said AB and CD do hereby and hereunder respectively admit, acknowledge and confirm he, the said AB, doth hereby and hereunder grant, convey, sell, transfer, assign and assure and the said CD join with the said AB and convey, sell, transfer and release unto and to the use of the said MN the said property and every part thereof TO HAVE HOLD AND POSSESS the same absolutely and forever freed and released from the said mortgage and all moneys due and payable thereunder together with buildings etc. (as usual in the conveyance) (usual covenants on the part of the vendor e.g., covenant as to good title, peaceful possession, non-encumbrances except the mortgage, further assurance and indemnity).

AND that the said CD do hereby covenant with the said MN that he has not done any act, deed or thing, nor suffered anything to the contrary whereof or by reason or means whereof the said property or any part thereof may be in any way affected or prejudiced in title or estate. And that he has full power and absolute authority to grant, convey, sell, transfer, assign and release the same in the manner hereinbefore indicated.

*Schedule above referred to*

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered AB*

CD

MN

## **6. Deed of Sale by Co-owners of Undivided Property**

THIS DEED OF SALE is made the..... day of..... BETWEEN AB of, etc. and CD of, etc. (vendors), of the one part, and EF of, etc. (purchaser), of the other part.

WHEREAS one PQ late of, etc. who was a Hindu governed by the Dayabhaga or Bengal School of Hindu Law died on the..... day of..... intestate, leaving his surviving only two sons viz., the said AB and CD as his heirs and legal representatives under the said school.

AND WHEREAS the said PQ left *inter alia* the following property as part of his estate.

AND WHEREAS the estate of the said PQ has been fully administered.

AND WHEREAS the said AB and CD are in joint possession and enjoyment of the property hereinafter described as co-owners in equal shares without effecting any partition or division thereof.

AND WHEREAS the said AB and CD have agreed to sell the said properties free from encumbrances, to the said EF for the sum of Rs.....

NOW THIS DEED WITNESSES that in pursuance of the said agreement and in consideration of the sum of Rupees....., paid to the said AB and CD by the said EF at or immediately before execution of these presents the receipts

whereof the said AB and CD hereby admit, acknowledge and confirm, they, the said AB and CD and each as beneficial owner of one equal undivided moiety thereof, do hereby and hereunder grant, convey, sell, transfer, assign and assure unto and to the use the said EF ALL THAT, etc. (parcel, etc., as in a conveyance); TO HAVE and TO HOLD the same unto and to the use of the said EF, his heirs, executors, administrators, representatives and assigns absolutely and for ever.

(Vendor's usual covenants as in a conveyance)

*Schedule of the Property*

IN WITNESS WHEREOF, etc.

*Signed, sealed and delivered* AB

CD

EF

## **7. Deed of Sale of Joint Family Property for Legal Necessity**

THIS DEED OF SALE made this..... day of .....

BETWEEN AB for self and as Karta of and representing all other coparceners, viz., his sons named..... all constituting a Hindu Mitkshara undivided family of, etc., (hereinafter called "the vendor") which expression shall, where the subject or context allows, be deemed to include at all times hereafter all persons being from time to time the coparceners of the said family of the one part and CD of etc. (hereinafter called "the purchaser") of the other part.

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

AND WHEREAS the said joint family also carried on and still carries on business as dealers and suppliers of..... at No..... under the name and style of..... which suffered a heavy loss of its capital and reserves estimated at Rs..... in the year..... owing to out-break of fire..... at its godown at No..... on the day of.....

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

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

AND WHEREAS in the circumstances aforesaid the said AB for self and as Karta of the said joint family has by an agreement in writing dated..... agreed with the said CD for sale of the property fully mentioned and described in

the Schedule hereto at and for the sum of Rs.....

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

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

NOW THIS, INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Rs..... paid by the said CD to the said AB simultaneously with the execution of these presents he, the said AB doth hereby and hereunder for self and as Karta for and representing all other coparceners of the said joint family do hereby grant, sell, convey, transfer, assign and assure the said property together with all houses, buildings, fixtures etc. (as usual in a conveyance) unto and to the use of the said CD absolutely and for ever.

Usual covenants on the part of a vendor as in a conveyance.

*Schedule above referred to*

IN WITNESS ETC.

*Signed, sealed and delivered AB*

CD

### **Sale by Liquidator of a Company in Voluntary Liquidation**

Liquidation means winding of the company and Liquidator is the officer appointed to conduct the winding up of a company. Winding up is a proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realised and applied in payment of its debts and when these are satisfied, returning to its members the sums which they have contributed to the company or paying them other moneys due to them in their character of members.

Voluntary winding up is one of the three modes of winding up recognised under Section 425 of the Companies Act, 1956 which includes liquidation by Court, voluntary and subject to the supervision of the Court.

Sale Deed to be drafted for being executed by the Liquidator of a company in voluntary liquidation assumes the following form:

### **A Specimen of Deed of Sale by Liquidator of a Company in Voluntary Liquidation**

THIS SALE DEED is made on the..... day of..... by voluntary liquidator of..... Co. Ltd., (in voluntary liquidation) (hereinafter called "the vendor") of the one part, in favour of Shri....., son of Shri....., Occupation....., resident of..... (hereinafter called "the purchaser") of the other part, under the terms and conditions mentioned below:

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

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

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

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

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

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

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

Witness: Vendor

Witness: Purchaser

Schedule

Item Nos. 1. 2.  
3. 4.

### **A Specimen of Deed of Sale by an Administrator under Orders of the Court**

Administrator is appointed by the Court for the administration of the properties of a deceased person who has made a will and probate is granted by the Court in favour of a person who claims the right to succession to the properties of the deceased.

Form of the Sale Deed to be executed by Administrator is given below:

THIS DEED OF SALE is made on the..... day of..... by the Administrator/appointed Administrator in Administration Suit No. .... of..... in the Court of..... (hereinafter called "the vendor") of the first part in favour of Shri....., son of..... Occupation....., resident of..... (hereinafter called "the purchaser") of the second part.

WHEREAS D, son of Shri....., of..... died on..... having an estate comprising movable and immovable properties but without appointing a successor under his will dated.....

AND WHEREAS in Administration Suit No..... of..... decided by the Court of....., the vendor was appointed as Administrator to administer the estate of the said D in accordance with the terms of the will aforementioned; AND WHEREAS the said vendor as such Administrator obtained sanction for the sale of the properties more particularly described in the Schedule I annexed hereto, in an Order dated....., a copy whereof is also attached as Schedule II hereto;

AND WHEREAS the vendor advertised for receipt of tenders for the purchase of the said properties;

AND WHEREAS the said vendor has, pursuant to such tenders agreed to sell and purchaser as one of the tenders to the property mentioned in the Schedule I, agreed to purchase the Items Nos..... of the properties mentioned in Schedule I on the terms and conditions mentioned in the advertisement for sale agreed to be embodied in this Deed.

NOW THIS DEED OF SALE WITNESSES AND IT IS HEREBY AGREED BETWEEN THE PARTIES AFOREMENTIONED AND DECLARED AS UNDER:

That in consideration of the receipt of Rs..... (Rupees.....) paid by the purchaser to the vendor along with the tender dated..... (the receipt whereof the vendor hereby acknowledges) and on payment by the purchaser to the vendor of the sum of Rs..... (Rupees.....) before the Sub-Registrar, .....at the time of presentation of this Deed of Sale for registration (the receipt whereof the vendor hereby acknowledges), the vendor hereby transfers by way of sale and conveys unto the said purchaser, all that property originally belonging to the said..... mentioned in the item No..... in the Schedule I attached hereto unto the purchaser, his heirs and assigns to have and to hold the same as an absolute owner thereof for ever.

The possession of the said property conveyed under this Deed has been delivered to the purchaser on the date of the presentation of this Deed for registration before the Sub-Registrar, .....together with title-deed relating to the said item No..... with a stipulation that the vendor shall at all reasonable times allow inspection of the other documents of title, viz., partition deed

between....., father of D, and..... dated..... along with the deed of reconveyance by the mortgage dated..... relating to the item No..... mentioned in the Schedule I attached hereto as well as item Nos. 2, 4 and 7 mentioned in the Schedule and to produce the said documents of title so retained by the vendor when required by the purchaser at his expense before any Court or arbitrator or authorities.

*(Any other agreed terms may be added here)*

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

Witness: Vendor

Witness: Purchaser

Schedule

Item Nos. 1. 2.  
3. 4.

### **Sale of Business and Assignment of Goodwill**

*Wharton's* Law lexicon defines goodwill as the advantage or benefit which is required by a business, beyond mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers.

Supreme Court of India in *Khushall Khengar Shah v. Khorshedbanu*, AIR 1970 SC 1147, had opined goodwill of a business as an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make the connections durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features.

Specimen Form of the Sale Deed for sale of a business and assignment of goodwill is given below\*:

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

THIS INDENTURE made the..... day of..... BETWEEN AB of, etc. (vendor), of the one part, and CD of, etc. (purchaser) of the other part.

WHEREAS the said AB has been carrying on the trade and business of, etc. etc., at premises No..... under the name and style of.....

AND WHEREAS the said AB has contracted with the said CD for the sale to him of all his stock-in-trade and other assets and goodwill of the said trade of and the business in entirety as a going concern together with all book debts and other debts and all rights and benefits of all pending contracts, orders, securities, etc., full particulars whereof are contained in the books of the said business and all money due and payable to the said AB on account therefor whether adjusted or unadjusted subject however to all contracts, orders and engagements which are still to be executed or for which the said AB is otherwise liable; at and for the sum of

Rs..... upon the terms hereinafter mentioned;  
AND WHEREAS the said AB has delivered to the said CD the books of account and other books relating to the said business containing full particulars of the debts, respectively due and owing to and from the said AB and also the particulars of the contracts and engagements to which he is liable in respect of the said business. NOW THIS DEED OF SALE WITNESSES that in pursuance of the said agreement and in consideration of the sum of Rupees..... paid by the said CD to the said AB (the receipt whereof the said AB hereby admits and acknowledges), and also in consideration of the covenants and conditions thereunder contained to be observed and performed on the part of the said CD the said AB do hereby and hereunder grant, convey, sell, transfer, assign and assure unto and to the use of the said CD all that the trade or business carried under the name and style of..... at premises No..... with ALL beneficial interest and goodwill of the said AB, in the said trade and business of, etc., so carried on by him as aforesaid, and also all the books and other debts now due and owing to him on account of the said trade and the business and all securities for the same, and also all contracts and engagements and benefits and advantages thereof which have been entered into with the said AB and also all the stock-in-trade goods, fixtures, articles and things which, at the date of this deed, belong to the said AB on account of the said trade and business, and all the rights, title and interest of the said AB to and in the said premises; TO HAVE AND TO HOLD the same to the said CD absolutely.

AND THAT THE SAID AB does hereby covenant with the said CD that he, the said AB, will not at any time hereafter, either by himself or in collaboration with any other person or persons, or as a partner or as a director of any limited company carry on the said trade and business of, etc., within a radius of..... miles of, etc.

AND that the amount and particulars of the debts respectively due and owing to and from the said AB on account of the said trade and business and the particulars of the contracts and engagements to which he is liable with respect to the said trade and business, are correctly stated in the books of account and other books delivered by the said AB to the said CD.

AND further that the said AB will pay or cause to be paid all and every sum to the said trade and business in excess of the amount or amounts which by the said books appear to be so due and owing.

AND furthermore that the said AB has good right, full power, absolute authority and title to grant, convey, sell, transfer, assign and assure the trade or business of "....." unto and to the use of the said CD in the manner hereunder indicated together with the benefit of the tenancy according to the nature and tenure of the contract.

AND THIS INDENTURE ALSO WITNESSES that in pursuance of the said agreement in this behalf and in consideration of the premises, the said CD do hereby agree with the said AB that he, the said CD, shall and will from time to time and at all times hereafter execute and perform all outstanding contracts and orders

and engagements and/or otherwise save harmless, indemnify and keep indemnified the said AB and his estate and effects against all losses, claims, demands, costs, charges and expenses as against the several sums of money which by the said books appear to be due and owing from the said AB in respect or the said trade and business, and also from and against the contracts and engagements to which by the said books the said AB appears to be now liable and or performance or non-performance thereof.

AND THIS INDENTURE ALSO WITNESSES that the said AB do hereby irrevocably nominate, appoint and constitute the said CD as his attorney for him and in his name to do, execute and perform all acts, deeds, and things as shall be necessary or requisite to carry on the said business as his successor and for that purpose to represent him before all appropriate authorities and in all courts of law and to sue for, recover, realise and to give good valid discharges for all moneys due and payable to him on account of or in connection with the said trade or business hereby assigned and appropriate the same for his use and purposes.

IT IS FURTHER AGREED that the names of the parties hereto shall, unless inconsistent with the context, include as well the heirs, administrators or assigns of the respective parties as the parties themselves.

IN WITNESS, etc.

*Signed, sealed and delivered AB*

CD

## **DEEDS OF MORTGAGES, LICENCE AND LEASE MORTGAGE**

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

The Transfer of Property Act, 1882 deals with the mortgage of immovable property alone. It does not deal with movable at all. Therefore, it cannot be regarded as forbidding the mortgage of movable property. A mortgage of movables, such as plant and machinery, stock in trade, policy is perfectly a valid transaction even though the possession is not delivered and the mortgage is only a hypothecation.

The hypothecation of movables is increasingly resorted to in the case of borrowings by companies for financing and implementation of its various investment proposals. The transferor in the case of a mortgage is called a 'mortgagor' and the transferee as 'mortgagee', the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument, if any, by which a transfer is effected is called a "mortgage deed".

### **Types of the Mortgages**

The following are different kinds of mortgages in effect in India:

a. *Simple Mortgage*

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

*b. Mortgage by Conditional Sale*

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

*c. Usufructuary Mortgage*

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

*d. English Mortgage*

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

*e. Mortgage by Deposit of Title Deeds*

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

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

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

3. This deposit can be made by the company through its nominee or agent duly authorised.

4. Intent to create security by deposit of title deeds should be present at the time of such deposit in the mortgagor.
5. Neither ownership nor possession of the property passes to the mortgagee under the equitable mortgage.

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

*f. Anomalous Mortgage*

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

**Who can be Mortgagor and Mortgagee?**

Any living person, company, or association or body of individuals, who has an interest on immovable property can mortgage that interest. In the case of a company mortgage of the property should be duly authorised by 'Object Clause' of the Memorandum of Association and approved by a resolution of the Board of directors. Further, for creation of a mortgage, the Financial Institutions usually insist on a resolution of the shareholders under Section 293(1)(a) of the Companies Act, 1956. Any person capable of holding property may take a mortgage unless he is disqualified by any special law from doing so. A minor may be a mortgagee but as he cannot enter into a contract, the mortgage should not involve any covenants by him. Thus, as we have seen above, any interest in any property which is capable of being transferred may be a subject of mortgage.

Generally the mortgage is associated with immovable property; immovable property includes lands, benefits arising out of the land and things attached to it and does not include standing timber, growing crops or grass. When the principal money secured is 100/- or more a mortgage other than a mortgage by deposit of title deeds, can be effected only by a Registered instrument signed by the mortgagor and attested by at least two witnesses.

**Drafting of Deed of Mortgage**

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, as we have seen earlier, it is prudent to execute a memorandum referred to the deposit of title deeds to secure a specific mortgage money.

The following points should be borne in mind while drafting a Deed of Mortgage:

- 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 through 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 outgoing*: The borrower undertakes to pay and discharge and indemnify the mortgagee against all rates, taxes, duties, charges, assessments, outgoing, whatever.
- f. *Period fixed for the mortgage*: Under this clause, the parties enter into a covenant by which mortgagor is debarred from redeeming the security before lapse of a certain period. This should not be unnecessarily a long period, as otherwise the Court might hold it as clogging equity of redemption and unenforceable. The mortgagee may also enter into a covenant not to call in his money before the

lapse of certain period provided that:

- i. If the mortgagor is declared insolvent;
- ii. If he alienates the mortgage property or creates a subsequent mortgage in favour of a third person without consent of mortgagee,

the mortgagee may call in his dues even before the expiry of the term agreed upon.

- g. *Power of sale:* Under this clause, the mortgagee is entitled to recover his dues by sale of the mortgaged property, and if the sale proceeds are insufficient, to recover the balance from the person and other property of the mortgagor.
- h. *Power to appoint Receiver:* Under this clause, the mortgagee is given power to appoint a Receiver of the mortgaged property in case the payment of interest for two or more instalments is in arrear under Section 69A of Transfer of Property Act.
- i. *Power to sell given to mortgagor with the consent of the mortgagee:* The mortgagor is authorised to sell the whole or part of the mortgaged property with the consent of the mortgagee provided the sale proceeds are paid to the credit of the mortgage account.
- j. *Proviso for redemption:* Under this clause, the mortgagee covenants and declares that on payment of his dues, he shall re-transfer the mortgaged property to the mortgagor or his nominee at his expense. (See Section 60A of the Transfer of Property Act)
- k. *Possession:* In English mortgage, the mortgagee has a right to take possession of the property. In usufructuary mortgage, the possession of the property is given to the mortgagee.
- l. *Attestation & Execution:* Attestation is compulsory in every mortgage. In case where the mortgagor does not know the language, deed must be explained to him by some competent person.
- m. Registration & Stamp duty is compulsory in case of mortgage value of Rs.100/- and above.
- n. Mortgagee is entitled to all the title deeds of the mortgaged property. If for any reason they are left with the mortgagor through inadvertance or negligence he can manipulate a prior equitable mortgage by depositing the same elsewhere.
- o. The application of any other law either to the mortgage or to the property under mortgage has to be ascertained. For example: Urban Land Ceiling Regulation Act.

In Drafting of Memorandum of Mortgage by deposit of title deeds, the following information is invariably included:

*1. Preliminary information:*

1. Caption
2. Name and address of the borrower/mortgagor Company
3. Name and address of Mortgagee
4. Amount of loans made available/sanctioned

5. Date of creation of mortgage by deposit of title deeds.
- II. Memorandum record note to contain brief information covering creation of deposit, date of deposit, name and authorisation of person who created deposit, name of the lender in whose favour deposit was made, description of title deeds is to be given in the Schedule to be appended thereto, and reference of property with situation and location briefly described thereto.
- III. Consideration for creation of equitable mortgage i.e. the description of the property offered with title deeds with full description in a different schedule, the amount of loans against and for which the security is created, this..... by coverage of other cash charges, expenses, interests, liquidated damages, etc.
- IV. Description of Board Resolution to create equitable mortgage by the person authorised therein.
- V. Declaration of clear and marketable title to the property.
- VI. Witnessing clause - Mention of the name of the person in whose presence the deposit of title was made.
- VII. (Schedule I - List of document of title and evidence)  
(Schedule II - Details of property).
- VIII. Date and Signature.

### **Further Charge**

Sometimes the mortgagee advances further sums of money to the mortgagor on the same security and on the same condition. The deed executed to secure the advance of further sums of money is called "Deed of Further Charge". The deed so executed would make a reference to the first mortgage and would also set out the new loan/s, terms of its/their repayment and would make the principal and interest further charged on the same security to be endorsed in the same manner as per the original mortgage.

### **Appointment of Receiver under Mortgage**

Under Section 69A of the Transfer of Property Act, a mortgagee having the right to exercise the power to sell is entitled to appoint by writing signed by him or on his behalf a Receiver of the income of the mortgaged property or any part thereof. Any person who has been named in the mortgage deed and is willing and able to act as a Receiver may be appointed by a mortgagee. If any person has been so named or if the person or persons are not capable and unwilling to act or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees. Failing such an agreement the mortgagee shall be entitled to apply to the Court for appointment of a Receiver and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

The powers and functions of the Receiver have been set out in the Section and the Receiver is required to apply all money received by him as follows:

- i. in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
- ii. in keeping down all annual sums or other payments, and the interest on all

- principals sums, having priority to the mortgage in right whereof he is Receiver;
- iii. in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
  - iv. in payment of the interest falling due under the mortgage;
  - v. in or towards discharge of the principal money, if so directed in writing by the mortgagee.

### **Release and Reconveyance of Mortgaged Assets**

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

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

Forms of various Deeds hereinbefore discussed are as follows:

### **Deed of Simple Mortgage**

THIS DEED of Mortgage made the..... day of..... 2007, BETWEEN 'AB' of..... etc. (hereinafter called "the Mortgagor"), of the One Part and 'CD' of, etc. (hereinafter called the "Mortgagee"), of the Other Part.

WHEREAS the Mortgagor is absolutely seized and possessed of or otherwise is well and sufficiently entitled the property intended to be hereby mortgaged which is free from all encumbrances and attachments.

AND WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs..... to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed.

NOW THIS DEED WITNESSES, that in pursuance of the said agreement and in consideration of the sum of Rs. .... paid to the Mortgagor by the Mortgagee simultaneously with the execution of these presents the receipt whereof the Mortgagor do hereby admit, acknowledge and confirm, the Mortgagor do hereby agree with the Mortgagee that the Mortgagor will on or before the..... day of..... 2007, pay or cause to be paid to the Mortgagee the sum of Rs..... with interest for the same in the meantime at the rate of Rs..... per cent, per annum, such interest to be paid monthly and every month on the 7th of each following month without any delay or default.

AND THIS DEED FURTHER WITNESSETH that as a security for the repayment of

the said loan with interest, the said 'AB' do hereby charge, assure and mortgage, by way of simple mortgage, upto and in favour of the said 'CD' all property specifically described in the Schedule hereto annexed, and charge and assure the same by way of security for the repayment of the said sum of Rs. .... together with interest thereon at the rate of..... per cent, per annum;

AND THE Mortgagor does hereby agree and covenant with the Mortgagee that he will pay or cause to be paid to the Mortgagee the principal sum aforesaid, together with the interest then due, on or before the..... day of..... 2007, without delay or default;

AND THE INDENTURE FURTHER WITNESSETH and it is hereby agreed and declared by and between the parties that in case the said sum of Rs..... with interest thereon at the stipulated rate is not paid within the time and in the manner as aforesaid, it shall be lawful for the Mortgagee to enforce this mortgage and to cause the property or any portion sold and appropriate the proceeds towards satisfaction of the mortgage debt provided, however, that in the event of any short-fall or deficiency, i.e. should the claim be not then satisfied, the Mortgagee shall be entitled to recover the balance personally as against the Mortgagor who shall be entitled to redeem the said mortgage at his option by payment of the amount of mortgage debt inclusive of interest at any time before the..... day of..... 2007.

AND THIS INDENTURE FURTHER WITNESSETH that the Mortgagor do hereby covenant with the Mortgagee that notwithstanding any act, deed or thing herebefore done, executed, performed or suffered to the contrary, the Mortgagor has good title, full power and absolute authority to charge, assure and mortgage the said property in the manner hereunder effected and that the same is free from all encumbrances and attachments.

*The Schedule above referred to*

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

*Witnesses:*

1. MORTGAGOR
2. MORTGAGEE

### **Deed of Mortgage by Conditional Sale**

THIS DEED of Mortgage made the..... day of..... 2007, BETWEEN 'AB' of..... etc. (hereinafter called "the Mortgagor"), of the One Part and 'CD' of..... etc. (hereinafter called "the Mortgagee"), of the Other part WITNESSES that in consideration of the sum of Rs..... paid to the Mortgagor by the Mortgagee (the receipt whereof the Mortgagor hereby acknowledges) the Mortgagor do hereby grant, transfer, convey, assign and assure to the Mortgagee ALL that etc. To Have and To Hold the same absolutely and for ever subject to the condition hereby expressly declared, namely, that if and when the Mortgagor shall repay or cause to be repaid the said sum of Rs..... with interest thereon at the rate

of..... per cent per annum on or before..... day of..... 2007, time for which purpose shall be deemed as essence of contract then and in such an event the sale hereby effected shall stand void and shall be of no effect to all intents and purposes and the Mortgagee shall at the costs of the Mortgagor reconvey and retransfer the said property and every part thereof as then existing to the Mortgagor provided, however, that if the Mortgagor shall fail and/or neglect to repay the said sum with interest at the said rate on or before the said date, or any portion thereof the sale hereby effected shall become absolute and the Mortgagee shall be entitled to foreclose the mortgage when and in such an event the Mortgagee shall be the absolute owner of the property freed and discharged from all the right of equity of redemption of the Mortgagor.

AND IT IS HEREBY FURTHER AGREED AND DECLARED that notwithstanding anything hereinbefore contained the Mortgagor shall remain in possession of the said property and pay all rents, cess, taxes, rates and other impositions which are now or may hereafter be imposed on the said property and in case the Mortgagor fails and/or neglects to make such payments on or before the due date of payments therefor, the Mortgagee shall be at liberty to pay the same and add such sum or sums to the principal money hereby secured which shall carry interest at the aforesaid rate. And that the Mortgagor do hereby covenant with the Mortgagee that he has good title to the property and absolute authority and power to transfer the same in the manner hereinbefore indicated and that the property is free from all encumbrances and attachments whatsoever.

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

*Witnesses:* Signed, sealed and delivered

1. MORTGAGOR 'AB'
2. MORTGAGEE 'CD'

*The Schedule above referred to*

### **Deed of Usufructuary Mortgage**

THIS MORTGAGE, made..... day of..... 2007, BETWEEN 'AB' of etc. (hereinafter called "the Mortgagor") of the One Part, and 'CD' of etc. (hereinafter called "the Mortgagee") of the Other Part, WITNESSES that on consideration of the sum of Rs..... now paid to the Mortgagor by the Mortgagee (the receipt whereof the Mortgagor does hereby acknowledge), the said 'AB' hereby conveys to the said 'CD'. All that etc. (describe the property): from this day AND THAT the Mortgagee shall be in possession of the mortgaged property under the terms of the deed for securing payment on the..... day of..... 2007, of the principal sum secured, with the interest thereon at Rs..... per cent per annum, which mortgage money will be set off against the usufruct of the mortgaged property, and the Mortgagee does hereby promise to keep clear accounts thereof.

THE MORTGAGOR hereby agrees that the Mortgagee shall retain possession of the

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

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

AND LASTLY, the Mortgagor also agrees that if he, the Mortgagor, does not pay the principal sum with the interest then due on the stipulated date, this conveyance will become absolute and the Mortgagee will be entitled to foreclose the mortgaged property, and thereafter the Mortgagor, his heirs, executors, administrators or assigns shall be absolutely debarred of all the rights to redeem the same.

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

*Witnesses:* Signed, sealed and delivered

1. MORTGAGOR 'AB'
2. MORTGAGEE 'CD'

*The Schedule above referred to*

**Deed of English Mortgage**

THIS MORTGAGE made the..... day of....., 2007 BETWEEN 'AB' of, etc. (hereinafter called the "Mortgagor") of the One Part, and 'CD' of, etc. (hereinafter called the "Mortgagee") of the Other Part. WITNESSES WHEREAS the Mortgagor is absolutely seized and possessed or is otherwise well and sufficiently entitled to an absolute estate of inheritance or an estate equivalent thereto free from encumbrances to the lands, hereditaments..... fully mentioned and described in the Schedule hereto AND whereas the Mortgagor having occasion to borrow a sum of Rs..... approached the Mortgagee which the Mortgagee has agreed to lend and advance on having repayment thereof with interest at..... per cent per annum and secured by a conveyance by way of mortgage of the said property.

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of Rs..... this day paid to the said 'AB' by the said 'CD' (the receipt whereof the said 'AB' hereby acknowledges), the Mortgagor hereby agrees with the covenant to pay to the Mortgagee on the..... day of..... the sum of Rs..... with interest thereon in the

meantime at the rate of Rs..... per cent per annum computed from the date of this deed such interest to be paid monthly and every month on the 15th of every current month.

NOW THIS INDENTURE also witnesses that for the consideration aforesaid the said 'AB' as the beneficial owner, do hereby grant, transfer convey unto and to the use of the said 'CD' all that etc. (describe the property): TO HAVE AND TO HOLD the same absolutely and for ever PROVIDED ALWAYS that if the Mortgagor shall pay or cause to be paid the sum of Rs..... with interest thereon, on the..... day of....., according to the foregoing agreement in that behalf, the Mortgagee, his heirs, representatives or assigns shall, at the request and costs of the Mortgagor, his heirs, representatives or assigns, reconvey to him or them as he or they shall direct, the said property. AND THAT the Mortgagor do hereby covenant unto the Mortgagee that the Mortgagor has absolute title to the land, hereditaments, messuages and premises hereby granted and conveyed and that the Mortgagor has good right, full power, absolute authority and indefeasible title to grant, convey, transfer, assign and assure the same unto and to the use of the Mortgagee in the manner hereinbefore indicated and further the Mortgagor and all persons having lawfully or equitably any estate or interest in the same shall at all time hereafter during the continuance of the security do execute or perform or cause to be done, executed and performed all such further or other acts, deeds and things as may be reasonably required for further and more perfectly assuring the same unto and in favour of the Mortgagee.

Provided, however, and it is further agreed by and between the parties that if the Mortgagor commits any default in payment of the principal amount on the due date or any three instalments of interest, whether they have been demanded or not it shall be lawful for the Mortgagee to institute a suit for sale and to have a Receiver appointed over the mortgaged property.

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

*Witnesses:*

1. 'AB'
2. 'CD'

*The Schedule above referred to*

Signed, sealed and delivered

Memo of consideration.

### **Deed of Further Charge**

This Further Charge made the..... day of..... 2007, Between 'A' of..... etc. (hereinafter called "the borrower" which expression shall also, where the context so admits, include persons entitled to redeem the security) of the One Part and 'B' of..... etc. (hereinafter called "the mortgagee") of the Other Part. WHEREAS by a mortgage deed dated..... the property mentioned therein and

described in the Schedule attached hereto was mortgaged by the borrower with the mortgagee and the sum of Rs..... remains to the mortgagee on the security of the said mortgage but all interest for the same has been paid upto the date of this Deed.

AND WHEREAS the mortgagee has agreed to advance to the borrower the further sum of Rs..... upon terms and conditions and secured in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Rs..... now paid by the mortgagee to the borrower the receipt whereof the borrower hereby acknowledges:

1. The borrower hereby covenants with the mortgagee to pay to the mortgagee on the..... day of..... 2007 next the sum of..... principal amount with interest at the rate of..... per cent per annum, and if the said moneys are not paid on the aforesaid date, to pay interest at the said rate until payment.
2. The borrower as beneficial owner hereby declares that all and singular the property mortgaged under the aforesaid deed dated..... and more particularly described in the schedule attached hereto shall be security, and stand charged with the payment to the mortgagee of the sum of Rs..... the present advance with interest at the rate of..... per cent per annum, from the date of execution of these presents as well as the sum of Rs..... due on the recited mortgage together with interest thereon and shall not be redeemable until on payment to the mortgagee deed dated..... and the present deed.
3. It is further agreed and declared that the provisions contained in the mortgage deed dated..... shall operate and take effect in like manner for securing payment or the money hereby secured as if the same had formed part of the money secured by the said recited mortgage.

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

*Witnesses:*

1. MORTGAGOR
2. MORTGAGEE

*Schedule* referred to containing description of the mortgaged property.

**Note:** *Stamp duty chargeable on a deed of further charge is provided for by Article 31 of the Indian Stamp Act.*

### **Memorandum of Mortgage by Deposit of Title Deeds**

Memorandum that this..... day of..... 2007, '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..... 2007.

*The Schedule A above referred to*

Description of the Title Deeds deposited.

*The Schedule B above referred to*

Description of the Property.

Signature of the Mortgagor.

**MORTGAGE by a Limited Company in favour of a Bank for Securing the Amount due on Cash Credit Account**

THIS MORTGAGE made the..... day of..... 2007, Between 'AB' a Limited Company, having its Head Office at..... (hereinafter called "the borrower") of the One Part and the..... Bank Limited, having its Head Office at..... (hereinafter called "the Mortgagees") of the Other Part.

WHEREAS the borrowers are a Limited Company having their Head Office at..... and are carrying on the business of Sugar Manufacturers at their factory known as..... and situate at..... in the State of.....

AND WHEREAS the borrowers are absolute owners of the said factory free from encumbrances.

AND WHEREAS the borrowers have a cash credit account with the mortgagees for the purposes of their business.

AND WHEREAS the mortgagees have already granted and may hereinafter grant accommodation to the borrowers, and it has been agreed that all moneys now owing and which shall hereafter become owing on the said cash credit account or otherwise from the borrowers to the mortgagees should be secured in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the mortgagees granting the aforesaid accommodation to the borrowers.

1. The borrowers hereby covenant with the mortgagees that the borrowers will on demand pay to the mortgagees the balance which shall be owing on the said cash credit account or any other account or for bills or drafts accepted, paid or discounted or advances made for the accommodation of the borrowers upto the limit of Rs..... together with interest at the rate of..... per cent per annum from the date of the said loan or advance until payment.
2. The borrowers as beneficial owners hereby mortgage their property known as..... Sugar Mill, situate at..... together with all the machinery, engine, boiler etc., and buildings, land attached and appurtenant thereto, and more particularly described in the schedule attached hereto as security for

payment of the mortgagees of all principal moneys and interest at the aforesaid rate and other moneys hereby secured.

3. The borrowers further covenant with the mortgagees that all accessories to the mortgaged property shall be liable for the amount due under this Deed from the borrowers to the mortgagees.
4. The borrowers hereby further covenant with the mortgagees that the borrowers will during the continuance of this security keep the mortgaged property in good and substantial repairs and insured against loss or damage by fire for Rs..... in General Insurance Corporation of India in the name of the mortgagees, and will duly and punctually pay all premiums and other moneys necessary for effecting and keeping up such insurance. And if default shall be made by the borrowers in keeping the mortgaged property in good and substantial repairs or in effecting or keeping up such insurance, the mortgagees may repair (with power to enter upon the mortgaged premises for that purpose and without becoming liable as mortgage in possession) or may insure and keep the same insured in any sum not exceeding Rs..... and that all moneys expended by the mortgagees under this provision shall be deemed to be properly paid by them.
5. The borrowers further covenant with the mortgagees that the borrowers shall not lease the mortgaged property for any term exceeding one year or accept, surrender of any existing lease without the previous consent in writing of the mortgagees.
6. And it is hereby further agreed and declared that if the borrowers fail to pay the mortgage money with interest as agreed upon, the mortgagees shall be entitled to realise their dues by sale of the mortgaged property and, if the sale proceeds thereof are insufficient to satisfy the mortgagees' dues, to recover the balance from the person and other property of the mortgagors.
7. It is hereby further agreed and declared that if interest for any two instalments remains in arrears, the mortgagees shall be entitled to have a Receiver appointed of the mortgaged property.
8. Provided always that if the borrowers shall pay to the mortgagees the sum of Rs..... or the amount due on said account with interest thereon from the date hereof at the stipulate rate, the mortgagees will at any time thereafter at the request and cost of the borrowers execute a receipt of the mortgage amount or a deed of redemption and surrender the premises before mortgaged to the borrowers.
9. By a Resolution of the Board of Directors of the 'AB' Company Limited dated..... Mr..... one of the Directors has been authorised to execute this Deed on behalf of the Company.

IN WITNESS WHEREOF the parties hereunder have set their hands on the date and year hereinabove mentioned.

The Schedule above referred to containing description of the machinery and plant,

and all buildings and land appertaining thereto.

For and on Behalf of 'AB Co. Ltd.',  
Director

For and on Behalf of the..... Bank Ltd.,  
Secretary

### **Deed of Redemption or Reconveyance of Mortgaged Property by the Mortgagee in favour of the Mortgagor**

THIS DEED is made the..... day of..... 2007 between 'A' of etc. (hereinafter called "the mortgagee") of the One Part and 'B' of etc. (hereinafter called "the mortgagor") of the Other Part.

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

NOW THIS DEED OF RECONVEYANCE WITNESSETH:

That in consideration of all principal moneys and interest secured by the said mortgage deed dated..... having been paid, the receipt whereof the said 'A' hereby acknowledges. The said 'A' as mortgagee hereby redeems or reconveys unto the said 'B' all the property comprised in the said mortgage deed to hold the same upto and to the use of the said 'B' as absolute owner discharged from all principal money and interest secured by and from all claims and demands under the aforesaid mortgage deed.

#### **LICENCE**

Chapter VI of the Indian Easements Act, 1882 (hereinafter referred to as 'The Act') contains the statutory provisions governing licences. This chapter comprises of Sections 52 to 64. The students are advised to be thorough with the provisions contained in these Sections. In States where the aforesaid Act does not apply, Courts rely upon English Law and the principles of the Act also (*Sohan Lal Naraindas v. Laxmidas Reghunath*, 1971 (1) SCC 276).

Licence has been defined in Section 52 of the Indian Easements Act, 1882 as under: "*Licence*" defined – where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a licence".

A licence may be granted by any one in the circumstances and to the extend in and to which he may transfer his interest in the property affected by the licence (Section 54). The grant of licence may be expressed or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a licence. (Section 54)

#### **Licence when Transferable**

A licence ordinarily carries with it the incident of non-transferability. A licence cannot be transferred by the licensee or exercised by his servants or agents. The only

exception to this rule is that, unless a different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by the licensee. (Section 56 of the Act)

### **Revocation of Licence**

The revocation of licence may be expressed or implied.

The general rule is that subject to the agreement between the parties, all licences are revocable at the will of the licensor. However, following are two exceptions to this rule:

- a. a licence which is coupled with a transfer of property and such transfer is in force, and
- b. a licence acting upon which the licensee has executed a work of permanent character and incurred expenses in the execution cannot be revoked.

Section 62 of the Act provides that a licence is deemed to be revoked:

- a. when, for a cause proceeding the grant of it, the grantor ceases to have an interest in the property affected by the licence;
- b. the licensee releases it, expressly or impliedly, to the grantor or his representative;
- c. where it has been granted for a limited period or acquired on condition that it shall become void on performance or non-performance of a specified act, and the period expires, or the condition is fulfilled;
- d. where the property affected by the licence is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;
- e. where the licensee becomes entitled to the absolute ownership of the property affected by the licence;
- f. where the licence is granted for a specified purpose and the purpose is attained or abandoned, or becomes impracticable;
- g. where the licence is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;
- h. where the licence totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between grantor and the licensee;
- i. in the case of an accessory licence, when the interest or right to which it is accessory ceases to exist (Section 62).

### **Form of Deed of Licence**

No special form of grant is prescribed. It may be granted orally or by an agreement in writing or by a covenant contained in any other deed, e.g. lease, sale, etc. If it is granted in writing, the writing should be in the form of a deed or agreement or in the simple form of a deed poll. If no fee is to be paid and the licensee has not to enter into any covenants, the form of deed poll would be suitable, but if the licensee is to pay any fee and the license is for a fixed term or revocable only by notice, a deed or agreement is preferable. The deed may be described as "THIS LICENCE" or "THIS

DEED OF LICENCE” or simply as “THIS DEED” and the parties as “Licensor” and “Licensee” or “Owner” and “Licensee” or “Grantor” and “Grantee”.

The operative words may be “Licence and authorizes to do” or “grants liberty and licence to do etc.”, or “grants leave and licence to do etc.” The exact liberty given, the property on which it is to be exercised, and the conditions imposed on the exercise should be clearly expressed in the deed. If there is a long list of the powers and authority given by the licence the same may be incorporated in a schedule to be referred to in the deed. The deed should make it clear that it is a licence and not a lease or a grant.

In a simple deed recitals will be rarely necessary. A licence may be for consideration though this is not necessary. If so, it should be mentioned.

If the licence is granted by an instrument it need not be bilateral unless mutual covenants for observance and breach thereof have to be incorporated.

### **Registration and Stamp Duty**

A mere deed of licence need not be registered unless any right, title or interest in immovable property of the value of Rs. 100 or more is created, declared, assigned, limited or extinguished. (Section 17, Registration Act, 1908)

If a licence is contained in any deed such as in a deed of sale or lease, no separate stamp duty is required in respect of the covenants relating to the licence, but if a separate deed is executed it will be chargeable with the same duty as an agreement under Article 5, Schedule I of the Indian Stamp Act, 1899.

### **Specimen Forms of Licences**

The specimen forms of some of licence documents are given hereinbelow which can be adopted in different situations by making suitable modifications as per the needs of an organisation:

1. Deed of Licence for use of wall of a Building for Publicity and Advertisement for Goods, etc.
2. Agreement of Licence for use of a House Property to a Company for Office Accommodation.

#### **1. Deed of Licence for use of wall of a Building for publicity and advertisement for goods, etc.**

THIS DEED OF LICENCE is made on the..... day of .....2007  
BETWEEN AB of, etc. (the Licensor) of the one part and CD of, etc. (the Licensee) of the other part.

WHEREAS the said CD has applied to AB for the use of the eastern outside wall of his building being premises No..... for the purposes of utilising the same for publicity and advertisement of his goods, a specimen copy whereof with type and design shall be delivered to the licensor, for a period of two years.

AND WHEREAS the said AB has agreed to grant the licence on the following terms and conditions:

1. That the said CD shall be entitled to use the said outer wall of premises No..... for the purpose of advertisement of his goods by coloured



otherwise creating any other right or interest in the property in favour of the occupiers which is not at all the intention of the parties but on the contrary merely a temporary agreement or arrangement simply to allow the occupiers to use and occupy portion of the premises for their office accommodation under the control and supervision of the owner for which purpose the owner shall retain ..... rooms, viz., one in the ground floor and another in the first floor. The owner shall have his own staff in the said rooms for the care and supervision and maintenance of and services to the property.

2. The occupiers shall, in consideration of such accommodation as hereunder provided, pay to the owner a fixed sum of Rs. .... as charges for such temporary occupation for the period of ..... months which sum will be paid at the rate of ..... per month on the ..... of every current month without delay or default and a further sum of Rs. .... for service charges and also use of fittings and fixtures making thus a sum total of Rs..... per month. The two last mentioned amounts shall also be paid on the..... of every current month.
3. The occupiers shall also pay to the owner on account of Corporation of Calcutta all existing and future occupiers' share of rate and taxes of the property and also the enhancement in the owner's share, if any, during the period of their occupation and shall otherwise keep the owner and his estate indemnified as against any loss, if any, arising out of such non-payment or non-observance of any of the covenants herein contained.
4. The occupiers have as security deposit for such payments and observance of the covenants hereunder contained, kept with the owner a sum of Rs..... to be repaid without interest on revocation of licence and surrender and deliver the possession of the said portion of the property subject to such deductions as the owner shall be entitled as against the occupiers. e.g., arrears of charges provided in Clause 2, unpaid taxes, electric bills, etc., as hereunder provided or otherwise permitted in law.
5. The occupiers shall on expiry of the period of..... and licence hereunder granted or earlier revocation thereof, surrender the property and deliver the same to the owner when and in such an event he will be entitled to the refund of Rs..... subject to deductions provided in Clause 4 hereof.
6. Provided, however, and notwithstanding anything hereinbefore contained, it is hereby expressly agreed by and between the parties hereto that in default of any payment on the dates hereinbefore referred to above to the owner or the Corporation of Calcutta or other appropriate authorities the owner shall be entitled to and shall have always the power to revoke the licence hereunder granted at his absolute discretion and reoccupy the said portion of the property without subjecting himself to any liability on that account and notwithstanding any intermediate negotiations or waiver of breach thereof

when and in such an event the occupiers shall surrender the occupied portion of the property as hereunder contemplated.

7. The occupiers shall have no right to make any addition or alteration to the property except temporary removable walls by way of adjustments but shall be entitled to make interior decorations only by temporary wooden partitions which they shall remove at their own costs at the time of surrender of the said portion of the property on expiry of the term of the licence hereby granted or earlier revocation thereof and repairs all the damages, if any caused to the property.

IN WITNESS WHEREOF the parties have executed this Agreement  
this..... day of ..... 2007

Signed, sealed and delivered at Calcutta

In the presence of

(1)

(2)

(3)

## **LEASE**

According to Section 105 of the Transfer of Property Act, 1882, a lease of immovable property is a transfer of a right to enjoy property. It is the method of acquiring the right to use equipment or real property for consideration.

Lease is a contract between lessor and lessee for the fixed term for the use on hire of a specific asset selected by lessee. Lessor retains ownership of the assets and lessee has possession and use of the asset on payment of specified rental over a period. It is a sort of contractual arrangement between the two parties whereby one acquires the right to use the property called "lessee" and the other who allows the former the right to use his owned property, called the "lessor". Thus, lease is a contractual arrangement, it originates from a contract between the lessor and lessee and is regulated by the terms, conditions and covenants of such contract. In other words, leasing arrangement provides an enterprise with the use and control over assets without receiving title to them. This arrangement could be oral or written allowing the use of assets for a specified period of time. The written lease agreement is signed by both the owner of the assets i.e. the lessor and the user of the assets i.e. 'the lessee'. The lessee does not get the final ownership. In other words, leasing involves the use of an asset without assuming, or intending to assume, ownership.

### **Essential Points to be Observed for Drafting of Lease Documents**

Before taking up drafting of the lease documents one is expected to be thorough with all the essential legal aspects involved in a lease transaction. Students are, therefore, advised to recapitulate what they have already learnt about "Leases" in the Study VII on "Transfer of Property" of the paper "*General and Commercial Laws*" of the Intermediate Course under New Syllabus.

The essential legal elements of lease are (i) the parties i.e. lessor or lessee; (ii) the subject matter of lease i.e. the property to be leased; (iii) demise or partial transfer of such property; (iv) the term and period of lease; and (v) the consideration or rent. Law requires that the lease of real estate should be expressed and duration of the lease should be pre-settled under the written contract. The circumstances in which the lease shall be determined be also specifically reduced to writing to avoid complications of mis-conceptions. It should also state the mode of service of notice and the period within which the notice could be served for determining the lease both by the lessor and the lessee. However, in the absence of the contract or special law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purpose shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six months notice expiring with the end of a year of the tenancy and the lease of immovable property for any other purpose shall be deemed to be lease from month to month, terminable on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. The main document to complete the leasing transaction between the lessor and the lessee is the lease agreement or lease deed which contains all the conditions and covenants binding the parties to the lease transaction. In the case of equipment lease, some leasing companies in the text of lease agreement provide for the guarantee provisions by the guarantors to indemnify the lessor of the involved risk of non-payment of lease rents and non-compliance of terms and conditions of the lease agreement by lessee. Thus, the lease agreement is entered into between lessor, lessee and guarantors covering suitable covenants for each of the parties. Such guarantee can be obtained separately from the guarantors even if guarantors are made party in the lease agreement.

The lessor or leasing company, in addition to the lease agreement and the guarantee or in substitution of guarantee, may also accept pledge of the shares or assignment of insurance policies of the promoters of the business.

Before taking up drafting of the lease documents both the leasing company and the lessee should have the information to have a birds-eye view of the existing charges, mortgages, encumbrances or lien on the property proposed to be leased by lessor or where the leased assets are proposed to be kept by the lessee. Generally in cases of plant and machinery etc. which are affixed in the land or kept in factory premises become part of immovable assets which are mortgaged to the banks and or financial institutions for availing of financial facilities from them. In such cases, the leasing company should have full details of these existing charges so as to take other precautionary measures by providing suitable clauses in lease documents to safeguard its own interest, i.e. where the leasing company has charged the leased property to bank as security for the due discharge by the leasing company of its obligations in the form of payment of interest instalments and the repayment of the principal sum borrowed. The mortgagee bank requires all these details from the leasing company about the lessee despite the fact that there is no privity of contract

between the lessee and the bank. Such information provides full exposure to risk, if any, involved in the transaction for which bank finance is being utilized. With a view to avoid ambiguity and uncertainty with regard to the nature of the lease, due care should be taken to create distinction in the lease agreement i.e. whether the lease is a finance lease or operating lease. In case of "finance lease", provision of non-cancellability should invariably be set forth in the lease agreement. In "operating lease" the provision of cancellability is provided with responsibility of the lessor for repairs and maintenance, technology transfer and change of know-how and providing knowledge of running the equipment leased out to lessee. All these aspects, *inter alia* should be well provided in the document. In "operating lease" it is the responsibility of the lessor to provide the lessee the benefits of innovations, change in technology of the equipment and the related know-how required for. Notwithstanding the remedies available to the parties in case of breach of the agreement and defaults in payments of lease rentals, other dues should be clearly expressed in terms of money, time and space. Both the contractual as well as legal remedies be properly spaced in the lease agreement. Arbitration clause provides a better way for settlement of mutual misunderstandings and disputes and suggests a rapid course to seek remedy, the contractual remedy. Both lessor and the lessee have, therefore, to take all due precautions in the drafting of the lease agreement and other auxiliary documents. The legal remedy available in the lease document is by way of specific relief by applying to the Court of law for the same under the Specific Relief Act. But an aggrieved party can choose only one course of action for seeking redressal to its grievances i.e. either by way of arbitration or specific performance at a time. Seeking one course of action stand a bar for the other course of action.

In every State there is a legislation providing for the rights of lessors and lessees of residential and commercial buildings. They override the provisions of the Transfer of Property Act. Legislation in one State differs from that in another, but all such legislations control and restrict the rent payable and the grounds on which a tenant may be evicted. Some enactments regulate the duration of a lease, some forbid the payment of premium and some even control the letting out to the extent that this function is exercised by the authorities. It is, therefore, desirable to study the local rent control and eviction legislations before entering into a transaction of lease and before taking any action on the basis of a lease.

### **Drafting of a Lease**

A deed of lease should be drafted as a deed between the landlord and the tenant. They should be called "the lessor" and "the lessee" as these are the terms used in the Transfer of Property Act, 1882. While drafting a lease, following points may be noted:

1. *Generally recitals* are not necessary and material facts are mentioned in the operative part.
2. *Consideration Reserved* rent is mentioned in the beginning of the *Testatum*. The

entire consideration, including premium, etc., should be mentioned.

3. *Operative Part* – It shows clearly the lessor divesting himself of possession and the lessee coming into possession, e.g. by the use of such words as “The lessor hereby lets, or demises or grants a lease of, etc., etc. with effect from the ..... day of .....”
4. *Habendum* – The nature of the lease, commencement and duration of the term are specified here.
5. *Reddendum* – This is peculiar to a deed of lease. Here is mentioned the mode and time fixed for payment. It begins with the word rendering or paying with reference to the reserved rent. Rent is payable during the term of the lease. Place where payable and instalments are mentioned. If there is apportionment of rent that is also mentioned.
6. *Covenants* – Terms and conditions are mentioned in several paragraphs. The usual covenants are to be found in Section 108 of the Transfer of Property Act; other important covenants generally refer to payment of taxes, repairs, insurance, subletting purpose of the lease, e.g. residential purpose, renewal, forfeiture.

### **Sub-Lease**

A sub-lease is a demise by a lessee for lessor term than he himself has. Every lessee, however short his term may be, make a sub-lease unless he is refrained by the contract of the tenancy from subletting. If the demise is for the whole term or for a period beyond the term, it amounts to assignment. If the lessee divests himself he becomes a stranger to the demised property and he has no right to have possession delivered up to him. It is true that a covenant against subletting will restrain the assignment, but a mere covenant against subletting does not prohibit underletting a part of the premises. As long as the lessee remains in possession he may permit another person to use the demised premises without committing a breach of covenant, namely not to assign, underlet or part with the possession of the demised premises.

The Privy Council pointed out in *Hunsrai v. Bejoylal Seal*, (1930) 57 Cal 1176, that in India a sub-lease is not an absolute assignment and it was further held in *Akshoy Kumar v. Akman Molla*, (1915) 19 CWN 1197, that there is no privity of estate as between the lessor and the sub-lessee, who does not step into the shoes of the lessee. A sub-lease is not prejudiced by the surrender of the head lease (Section 115 of Transfer of Property Act) but the position is different in the case of forfeiture which annuls all sub-leases except in case of fraud as between the lessor and lessee. A sub-lessee is entitled to relief against forfeiture under Section 114 of the Transfer of Property Act, 1882, which is applicable only in the case of non-payment of rent. No relief is open to the sub-lease in case of transfer of breach of covenant in restraint of transfer.

### **Surrender of Leases**

Surrender of lease is not a transfer but mere yielding up by the lessee of his interest under the lease to the lessor by mutual agreement. It is in effect merger of the estate

of the lessee into the reversion. It is not a transfer or an assignment of any right or estate within the meaning of Section 5 of the Transfer of Property Act (*Makhanlal v. Nagendranath*, (1933) 60 Cal 379). The person who surrenders is called the surrenderer and the person to whom surrender is made is called the surrenderee. A surrender must be made with clear intention to yield up as mere non-payment of rent for years together or abandonment of the site does not amount to surrender (*Misri Lal v. Durga Narain*, AIR 1940 All. 317). A Requisition Order by the Government does not amount to any surrender (*Torabai v. Padan Chand*, 62 CWN 176). It may be expressed or implied. Except in a case of some special kinds of lease as required by special Act, no writing or registration is necessary. A surrender may be oral, if accompanied by delivery of possession.

### Registration and Stamp Duty

Section 107 of the Transfer of Property Act, 1882 and Section 17(1)(d) of the Registration Act, 1908 require that all leases from year to year, or for a term exceeding a year, or reserving a yearly rent must be registered. Other leases, if governed by the Transfer of Property Act, must be registered except that Local Government may direct them to be made by unregistered instruments. (Proviso to Section 107)

For the stamp duty of a lease, including an under-lease or sub-lease and agreement to let or sub-let, Article 35 of the Indian Stamp Act, 1899 is to be followed.

### Distinction between Licence and Lease

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

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

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

A lease of immovable property is a transfer of a right to enjoy the property for a certain time in consideration for a price paid or promised. The price paid is called "rent". In the case of a 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.

### **Specimen Forms of Leases**

The specimen forms of some of lease documents are given hereinbelow which can be adopted in different situations by making suitable modifications as per the needs of an organisation:

1. Deed of sub-lease.
2. Deed of lease of land with forfeiture clause and covenants for renewal.
3. Surrender of lease.
4. Deed altering conditions/covenants in a lease.
5. Deed modifying terms of lease.
6. Lease agreement with lessor, lessee and Bank as financing party.
7. Lease Agreement for a house (Premises).
8. Lease Agreement for Plant and Machinery.

#### **1. Deed of Sub-Lease**

THIS LEASE made this ..... day of ..... 2007 between AB of, etc. (hereinafter called "the sub-lessor"), of the one part, and CD of, etc. (hereinafter called "the sub-lessee"), of the other part.

WHEREAS By a lease (hereinafter referred to as "the original lease") dated..... the day of ..... and made between XY as owner and AB as lessee and registered in Book I, Vol. .... pages ..... to being No ..... for the year ..... in the Office of Sub-Registrar of ..... etc., the premises (or, etc.) described in the original lease were demised to the said original lessee for a period of ..... years with effect from the ..... day of..... on a yearly rent and subject to the covenants and conditions to be performed and observed as therein contained. AND WHEREAS the original lessee has agreed to grant and the sub-lessee has agreed to accept a sub-lease of the premises (or, etc.) hereinafter described upon the conditions hereinafter contained:

NOW THIS DEED WITNESSES that in consideration of the rent hereinafter reserved and the covenants by the sub-lessee hereinafter contained, the original

lessee do hereby grant to the sub-lessee a lease of ALL THAT premises (or, etc.) known by the name of, etc., and situate at, etc., together with the appurtenances; TO HOLD the same unto and to use of the sub-lessee for the period of ..... years, commencing with effect from the ..... day of ..... at the monthly rent of Rupees ..... SUBJECT to the following conditions:

1. The sub-lessee hereby agrees with and covenants with its lessor, viz., the lessee as follows:
  - a. To pay the said rent, clear of all deductions, on the..... day of..... every current month in advance during the term of the lease.
  - b. To pay all taxes and outgoings now payable or hereafter to become payable in respect of the leased premises (or, etc.).
  - c. To keep the said premises (or, etc.) in good and tenantable repair, and not to make any alteration therein without the written consent of the landlord.
  - d. To perform all the covenants, conditions and stipulations contained in the original lease affecting the property hereby leased and to be observed and performed by the original lessee except payment of rent and not to do, execute or perform any act, deed or thing or suffer anything to the contrary whereby or by reason or means whereof the original lease may be avoided or forfeited and to allow the original lessee to enter upon the leased premises (or, etc.) for the purpose of inspection of the premises and performing any of such terms of agreement contained in the original lease, which may be necessary to prevent its forfeiture.
  - e. To keep the original lessee indemnified against all actions, claims, demands and expenses on account of performance or non-performance by the sub-lessee (of any of the terms, conditions and stipulations of this agreements).
2. The original lessee does agree and covenant with the sub-lessee as follows:
  - a. That upon the sub-lessee paying the rent hereby reserved and observing and performing the conditions and covenants herein contained, shall quietly and peacefully possess and enjoy the property, hereby leased during the said term without any interruption and disturbance by the original lessee or any person claiming under or in trust for him, provided that in case of any breach of any of the conditions and covenants to be observed and performed by the sub-lessee, the lease shall, at the option of the original lessee, stand determined who shall be entitled to repossess the property as his former estate without prejudice to his right to recover all arrears of rent and/or any damages for breach of such conditions or covenants.
  - b. The original lessee shall duly and punctually pay the rent reserved, observe and perform all the covenants and conditions contained in the original lease, and keep the same alive and in full force and virtue and will further, ..... times, keep the sub-lessee and his estate indemnified against all actions, claims, proceedings and demands on account of any

breach of any of the conditions and covenants contained in the original lease.

c. The original lessee acknowledges the right of the sub-lessee as to production of the original lease and to delivery of copies thereof and undertakes for the safe custody thereof.

3. It is further agreed that the terms "the original lessee" and "sub-lessee" used herein shall, unless inconsistent with the context, include as well their respective successors and assigns.

IN WITNESS, etc.,

*Signed, sealed and delivered*

AB  
CD

## **2. Deed of Lease of Land with Forfeiture Clause and Covenant for Renewal**

THE LEASE is made the..... day of..... 2007 BETWEEN AB of, etc.: (hereinafter called "the lessor") of the one part and CD of, etc., (hereinafter called "the lessee") of the other part, WITNESSES as follows:

1. In consideration of the rent hereinafter reserved and the covenants and conditions hereinafter contained to be observed and performed on the part of the lessee, the lessor does hereby grant, transfer, demise by way of lease to the lessee ALL THAT piece or parcel or parcels of land described in the schedule below TO HAVE AND TO HOLD the same unto and to the use of lessee for the term of..... years commencing from the..... day of..... 2007 at the annual rent of Rupees.....
2. The lessor hereby covenants with the lessee as follows:
  - a. The lessor shall put the lessee in possession of the said land on the said..... day of..... 2007.
  - b. Upon the lessee paying the rent hereby and hereunder reserved and observing and performing the covenants and conditions herein contained the lessee shall quietly and peacefully hold, possess and enjoy the said land during the said term without any claim, interruption or disturbance by the lessor or any person claiming under or in trust for him.
  - c. The lessor has good right, full power and absolute authority to grant a lease of the demised premises in the manner hereunder effected.
3. The lessee hereby covenants with the lessor as follows:
  - a. The lessee shall pay the said rent without abatement or deductions on or before the..... day of..... every year and the first of such payments shall be made on the..... day of..... 2007.
  - b. The lessee shall bear and pay all rents, taxes and other assessments and outgoings which are now or may hereafter be imposed or assessed on the said land except those which are payable in law by the lessor.
  - c. The lessee shall not use and occupy the said land for any purpose other than private residence for himself and the member of his family by

construction of temporary structures according to the plan approved by the Municipal Authority.

- d. The lessee shall not, except with the consent in writing of the lessor first had and obtained, assign, underlet or part with the possession of the said land or any portion thereof or of the structures to be constructed thereon or any portion thereof which consent the lessor may at his absolute discretion withhold.
- e. That if the lessee shall pay the rent punctually and regularly and duly observe and perform the conditions and covenants herein contained and apply in writing to the landlord not less than..... months prior to the expiration of the term herein reserved for renewal of the lease, the lessor shall then and in such an event grant to the lessee a new lease of the said land for a further period of..... years on the same terms and conditions as are herein contained except the covenant for renewal and subject to such variations as may be mutually agreed.
- f. On the determination of the lease, the lessee shall deliver peaceful vacant possession of the land hereby demised as also the structures to be erected by the lessee without claiming any compensation or value thereof.

IN WITNESS, etc.,

*Signed, sealed and delivered*

AB  
CD

*The Schedule above referred to*

**3. Deed of Surrender of Lease**

THIS DEED OF SURRENDER OF LEASE made the..... day of..... BETWEEN AB of, etc. (the lessee), of the one part and CD of, etc. (the lessor) of the other part.

WHEREAS by an Indenture dated..... made between the parties hereto and registered in..... it was witnessed that the said CD, did in consideration of the rent thereby and thereunder reserved and of the covenants and conditions to be observed and performed on the part of the said AB as therein contained granted and demised by way of lease the property fully mentioned and described in the schedule hereto for a term of..... years. AND WHEREAS such lease is in full force and virtue and all rents and conditions reserved by and contained thereunder on the part of the lessee to be paid, observed and performed by the said AB upto the date of these presents. AND WHEREAS the lessee was at all material times and is presently in possession of the property since the execution of the lease.

AND WHEREAS for personal reasons and consideration, the said AB having desired to be relieved from any further payment of such rent and performance of the covenants and conditions approached the said CD for a surrender of the said lease and delivery of the possession of the property.

AND WHEREAS the said CD has agreed to accept from the said AB a surrender of the aforesaid lease of the said premises.

NOW THE DEED WITNESSES that in pursuance of the said agreement and in consideration of a sum of Rs..... being the token consideration paid by the said CD to AB, the said AB as beneficial user of the said property do hereby give up and relinquish all his leasehold estate and interest in and surrender and deliver possession to the said CD of the premises (or, etc.) comprised in and by the said deed of lease TO HOLD the same as before execution of the lease by the said CD TO HOLD THE INTENT and object that the same shall stand determined to all intents and purposes and that the residue of the said term of..... years created by the said deed of lease, and all other rights and interests of the said AB in the said premises (or, etc.) under or by virtue of the said deed shall stand extinguished and merged in the reversion freehold and inheritance of the premises with immediate effect as if the said lease was never granted nor intended.

AND THIS INDENTURE further witnesses that in consideration of the surrender of the lease which is accepted by the lessor he the said CD do hereby release and discharge the lessee AB, his successor and estate from all claims, demands and liabilities on account of future rent and or arising out of performance or non-performance or hereinbefore recited Indenture of lease.

IN WITNESS WHEREOF the parties above named have put their signatures the day and year above.

*Signed, sealed and delivered*

AB  
CD

*The Schedule above referred to*

#### **4. Deed Altering Conditions in a Lease**

THIS DEED made the..... day of..... BETWEEN AB of, etc. (hereafter called "the landlord") of the one part and CD of, etc. (hereinafter called "the tenant"), of the other part.

WHEREAS by a lease (hereinafter called "the principal deed"), dated the..... day of..... and made between the parties hereto and registered at..... Registration office in Book No..... Volume No..... pages..... to..... Being No..... for the year....., the said AB granted and demised to CD the house (or, etc.) situate at, etc.

AND WHEREAS the parties hereto have agreed to alter and modify the terms and conditions of the principal deed in the following manner.

NOW THIS DEED WITNESSES as follows:

1. Sub-clause (e) of clause 2 (or, etc.) of the principal deed, the following sub-clause shall be omitted and shall cease to have any effect.
2. For sub-clause (b) of clause 2 (or, etc.) of the principal deed, the following

sub-clause shall be substituted, namely:

(Set out the new sub-clause)

3. That as altered and modified as aforesaid the principal deed shall remain in full force and effect.

IN WITNESS WHEREOF etc.,

Witnesses: AB

CD

## 5. Deed Modifying Terms of Lease

THIS DEED made the..... day of..... BETWEEN AB of, etc. (hereinafter called "the lessor"), of the one part and CD of, etc. (hereinafter called "the lessee") other part being supplemental to the deed of lease (hereinafter called "the Principal Deed"), dated the..... day of..... and made between the same parties being a lease of a house (or, etc.) situate at etc.

NOW THIS DEED WITNESSES as follows:

1. The lessor shall forthwith erect and construct and will complete on or before the..... day of..... to the reasonable satisfaction of the lessee, a room (or, etc.) and other additions to the premises leased under the Principal Deed, in accordance with the plans and specifications, copies whereof have for the purpose of identification been signed by the lessor and the lessee.
2. In consideration of the premises, the lessee hereby agrees with the lessor that as from the..... day of..... he, the lessee will pay to the lessor during the residue of the term granted by the lease under the Principal Deed, the additional yearly rent of Rs....., such additional rent to be paid by equal quarterly (or monthly) payments on the same days and in the same manner as are provided by the Principal Deed for the payment of rent thereby reserved, the first of such payment to be made on the rights and remedies of the lessor shall be applicable to the said additional rent.
3. From and after the completion of the said additions and works to be erected and constructed by the lessor as aforesaid, the agreements and conditions contained in the Principal Deed shall apply thereto in the same manner as if the said additions and works had been completed prior to the grant of the lease by the Principal Deed.

IN WITNESS WHEREOF etc.,

*Signed, sealed and delivered*

CD  
AB

*The Plans, etc. above referred to*

## 6. Lease Agreement with Lessor, Lessee and Bank as Financing Party

THIS TRIPARTITE AGREEMENT this..... day of..... (month) ..... (year in words) ..... BETWEEN..... an existing Company within the meaning of the Companies Act, 1956 and having its registered office at..... (hereinafter called "the Lessor Company" which

expression shall unless excluded by or repugnant to the context be deemed to include its successors and assigns) of the first part, .....a Company incorporated under the Companies Act, 1956 and having its registered office at..... (hereinafter called "the Lessee Company" which expression shall unless excluded by or repugnant to the context be deemed to include its successors and assigns) of the second Part AND..... a nationalised Bank carrying on business amongst other places in India at..... (hereinafter called "the Bank" which expression shall unless excluded by or repugnant to the context be deemed to include its successors and assigns) of the third part; WHEREAS under an Agreement for Hypothecation dated..... executed by the Lessor Company in favour of the Bank, the Bank granted to the Lessor Company a sum of Rs..... as and by way of advance in current account to enable the Borrower to purchase..... (hereinafter referred to as "the said equipment") for the purpose of leasing out the said equipment to the Lessee Company, inter alia, secured by hypothecation of the said equipment upon the terms and conditions therein contained;

AND WHEREAS the Lessor Company has entered into an Agreement for Lease with the Lessee Company on the..... day of..... for leasing out the said equipment to the Lessee Company subject to the payment of rent/hire charges thereby reserved and also subject to the other terms and conditions therein contained;

AND WHEREAS in terms of the sanction of the Bank, the Bank will allow the Lessor Company to grant lease of the said equipment to the Lessee Company, inter alia, upon the following conditions:

- a. that the lease of the said equipment is to be granted by the Lessor Company to the Lessee Company with the consent of the Bank and the Lessee Company should confirm that the said equipment is subject to the Bank's charge under the said Agreement for Hypothecation dated.....;
- b. the Lessee Company should undertake the Bank that it would not assign the leasehold interest of the said equipment for any reason whatsoever;
- c. that the Lessee Company shall undertake the Bank that the Lessee Company shall not have any claim on the moneys to be realised under the insurance policies to be taken out in respect of the said equipment;
- d. that the Lessee Company should directly pay to the Bank the rent/hire charges and interest payable by the Lessee Company to the Lessor Company in terms of the said Agreement for Lease dated.....;
- e. the Bank through its officers, agent and nominee be entitled to inspect the said equipment at such time as the Bank may think fit;
- f. that the Lessor Company shall execute a Deed of Assignment in favour of the Bank irrevocably authorising the Bank to collect rent/hire charges to be paid by the Lessee Company to the Lessor Company towards liquidation of the moneys advanced by the Bank to the Lessor Company and all interest

accrued thereon.

AND WHEREAS with a view to recording the conditions hereinbefore provided, the parties hereto have agreed to enter into an agreement being these presents in the manner hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH and it is hereby agreed and declared by and between the parties hereto as follows:

1. The lessee Company hereby confirms that the said equipment is subject to the hypothecation/charges created by the Lessor Company in favour of the Bank under the Agreement for Hypothecation dated.....
2. The Lessee Company hereby undertakes the Bank not to deal with the said equipment which will prejudice the interest of Bank and not to assign or transfer the benefit of the said Agreement of Lease dated.....
3. The Lessee Company hereby undertakes the Bank that the Lessee Company shall not have any claim on the moneys to be realised under the insurance policies to be taken out in respect of the said equipment.
4. That the Lessor Company hereby irrevocably and unconditionally authorises the Lessee Company to pay all the rent/hire charges payable by the Lessee Company to the Lessor Company in terms of which the Lessee Company hereby confirms and acknowledges.
5. The Lessee Company hereby irrevocably and unconditionally agrees, confirms and declares that irrespective of any disputes between the Lessor Company and the Lessee Company as regards terms, conditions and covenants contained in the Agreement for Lease dated....., the Lessee Company shall directly pay to the Bank rent/hire charges and interest thereon payable by the Lessee Company to the Lessor Company in terms of the Agreement for Lease dated.....
6. The Lessor Company and the Lessee Company hereby jointly declare and confirm that the Bank through its officers, agent and nominees will be entitled to inspect the said equipment which will be in the possession of the Lessee Company in terms of the Agreement of Lease dated..... and to take possession thereof if the Bank so thinks fit.
7. That the Lessor Company and the Lessee Company hereby also jointly agree and confirm that it would not amend, alter and/or modify any of the terms, conditions and covenants contained in the said Agreement for Lease dated..... without the prior permission of the Bank in writing.
8. The Lessee Company hereby also confirms and declares that if the Lessee Company fails to pay the rent/hire charge to the Bank in terms of these presents, the Bank will be at liberty to take possession of the said equipment if the bank so desires to protect the interest of the Bank.
9. The Lessee Company hereby agrees that the said equipment will bear the seal "hypothecated..... Bank".

NOW THIS AGREEMENT FURTHER WITNESSETH as follows:

- a. That in pursuance of the said agreement and in consideration of the premises aforesaid, the Lessor Company as beneficial owner hereby transfers and assigns up to the Bank all the rent/hire charges payable to the Lessor Company by the Lessee Company under the Agreement for the Lease dated..... together with power for the Bank to sue, call up or recover and give effectual discharge for the same in the name of the Lessor Company or otherwise.
  - b. That the Lessee Company hereby agrees to pay duly and punctually all rents/hire charges payable by the Lessee Company to the Bank under the said Agreement for Lease dated..... and upon such payment to the Bank the Lessee Company shall be fully discharged from its obligation for payment of the rents/hire charges to the Lessor Company under the said Agreement for Lease dated.....
  - c. That the Bank upon receipt of the rents/hire charges mentioned above shall be at liberty to adjust and appropriate the said rents/hire charges in liquidation of the amounts due and payable for principal and interests for the loan granted under the said Agreement for Hypothecation dated.....
  - d. That the Lessor Company hereby covenants with the Bank that the Lessor Company has not received any rent/hire charges in advance nor any deposit or advance or premium from the Lessee Company adjustable against the said rents/hire charges.
10. It is hereby expressly agreed and declared by and between the parties hereto that all the terms, conditions and covenants herein contained shall override the terms, conditions and covenants contained in the Agreement for Hypothecation dated..... and the Agreement of Lease dated..... to the extent the same are inconsistent.

IN WITNESS WHEREOF the parties hereto have executed these presents on the day, month and year first above written.

THE COMMON SEAL OF..... has hereunto been affixed pursuant to the resolution passed by the Board of Directors of the Company on the day of..... in the presence of Mr..... and Mr..... two of the directors of the Company who have executed these presents in token of their presence in the presence of:

SIGNED AND DELIVERED for and on behalf of..... by Mr..... Constituted Attorney under the Power of Attorney dated..... in the presence of.....

**7. Lease Agreement for a House (Premises)**

THIS LEASE made on..... day of..... between AB..... (hereinafter called "the lessor") (the expression shall include the owner for the time being of the lessors' interest in demised premises) of the One Part and CD..... (hereinafter called "the lessee") (the expression shall include his

heirs, executors, administrators and permitted assigns) of the other.

THE DEED THEREFORE WITNESSETH AS FOLLOWS:

1. The lessor hereby demises to the lessee all that dwelling house with the land fully described in the Schedule hereto together with all out houses, wells, motor garage, kitchen, pathways, passage, garden and other appurtenances thereof situate at..... to hold the same to the lessee from the..... day of..... for the term of..... years (or year to year) paying therefor during the said term the monthly rent of Rs..... (Rupees.....) payable on the first day of the month succeeding that for which the rent is due.
2. Lessee's obligation:
  - i. The lessee hereby agrees that he will, during the said term (tenancy), pay all rents, taxes and other charges excluding the house tax which now are or may hereafter become payable in respect of the demised property;
  - ii. Pay Municipal charges including water bills and electric bills, etc.
  - iii. That he will not without the previous consent in writing of the lessor transfer or sublet or otherwise part with possession of the demised premises.
  - iv. That he will, without the consent in writing of the lessor, use the demised premises for residential purposes and for no other purpose.
3. Lessor's obligations:
  - i. That he will during the said term (tenancy) maintain the demised premises in good and habitable condition and shall execute all necessary repairs including annual white-washing and colour washing, plastering, painting, etc. and shall renew all broken panes, fittings, bolts, etc. and on lessee's giving the lessor notice in writing of any decay, defects, disorders, will, within one calendar month from the receipt of such notice, repair and amend the same.
  - ii. That he will, during the said term (tenancy), maintain the electric installation in the said premises and supply at his own expense such electric fans as may be required by the lessee.
  - iii. That he will carry out all immediate necessary repairs to the said premises to the entire satisfaction of the lessee.
  - iv. That the lessor shall repair, when necessary, the well, the passages, pathways and the road connecting the public road with the bungalow hereby demised.
4. Provided always and it is hereby agreed as follows:
  - i. That whenever any part of the rent hereby reserved shall be in arrears for..... months after due date or there shall be a breach of any of the covenants by the lessee hereincontained, the lessor may re-enter on the demised premises and determine this lease.
  - ii. That the tenancy hereby created shall be determinable at the option of the lessor/lessee (or either party) by giving to the lessor/lessee (or the other

party) ..... calendar months notice in writing.

5. It is hereby agreed between the parties as follows:

That the demand for payment or notice required to be made upon or given to the lessee shall be sufficiently made or given if sent by the lessor or his agent through the post by registered letter addressed to the lessee at the demised premises (or, at.....) and, that notice requiring to be given by the lessor shall be sufficiently given if sent by the lessee through the post by registered letter addressed to the lessor at his usual or last known place of residence or business (or, at.....) and that any demand or notice sent by post in either case shall be assumed to have been delivered in the usual course of post.

IN WITNESS WHEREOF the parties hereto have hereunder signed this deed on the dates mentioned against their respective signatures.

Signed, sealed and delivered

AB  
CD

## 8. Lease Agreement for Plant and Machinery

LESSOR; (insert name and address)

LESSEE; (insert name and address)

DATE:

1. LEASE: The lessor hereby agrees to lease to Lessee and the Lessee hereby agrees to take on Lease from Lessor, subject to the terms of this Lease Agreement (hereinafter referred to as the "AGREEMENT")..... (write brief title of the asset) (hereinafter referred to as the "EQUIPMENT") described in the Schedule annexed hereto.
2. PERIOD: The Lessee shall take the equipment for its use on lease for the term to commence from the date of payment by the Lessor to the supplier and to terminate at the end of..... months from the date of such commencement. The period of lease may be extended for such period and on such terms and conditions as may be agreed upon by and between the parties hereto. (Subject to the concurrence of Lessor's Bankers).
3. RENTAL: In consideration of the above, the Lessee shall pay to the lessor, Lease rent at the rate specified in the Schedule hereunder written for the entire period of the Lease. Such rent shall be payable by the Lessee to the Lessor's [designated Bankers..... (insert the name of bankers) for and on behalf of the Lessor] within seven days of the same becoming due and payable. The lease rent shall be due and payable on the first day of each calendar month, commencing from the calendar month in which the period of lease commences, provided that the lease rent for the calendar month in which the period of lease commences shall become payable on the commencement of the lease period. Lessee will pay on demand as late charges, an amount equal to two per cent (2%) per month of

each instalment of lease rent or part thereof that remains unpaid for a period of more than seven (7) days. It is expressly understood by the parties hereto that time shall be the essence of this Agreement, in so far as it relates to the obligations or commitments of the lessee.

4. **WARRANTIES:** The Lessee has made the selection of the Equipment based upon its own judgement prior to the purchase thereof by the Lessor and expressly declares that it has not relied upon any statements or representations made by Lessor, makes no express or implied warranties including those of merchantability or fitness for particular use of the Equipment and hereby disclaims the same. The Lessor shall not be responsible for any repairs, service or defects in the Equipment or the operation thereof. However, the Lessor agrees that Lessee shall be entitled to the benefits of the manufacturer's warranties in respect of the Equipment.
5. **TITLE, IDENTIFICATION, OWNERSHIP OF EQUIPMENT:** No right, title or interest in the Equipment shall pass to Lessee by virtue of these presents. Conditioned upon Lessee's compliance with and fulfilment of the term of conditions of this Agreement, the Lessee shall have the right to have and retain possession and use of the Equipment for the full term of lease including the extended term if agreed to. Lessor may require plates or makings to be affixed to or placed on the Equipment, indicating Lessor's interests therein (and the interests of its Bankers). Lessor and Lessee hereby confirm that their intent is that the Equipment shall at all times remain the property of the Lessor. Lessee also agrees and undertakes not to sell, assign, sublet, pledge, hypothecate or otherwise encumber or suffer a lien upon or against any interest in this Agreement or the Equipment, or to remove except for the purposes of repairs with prior intimation to the Lessor the Equipment from the factory or office site where originally put to use or allow any third person to use the equipment without the prior consent of the Lessor in writing.
6. The equipment hereunder leased, will be delivered by the manufacturers/suppliers to the location specified by Lessee. Lessor shall not be responsible for any damage incurred to the Equipment during delivery. Lessor will request the manufacturers/suppliers to effect delivery on or before the date of commencement of the rentable, but if for whatever reasons, delivery is not affected by the manufacturers/suppliers by the date, lessor shall not be liable for any loss suffered by the Lessee thereby. Lease rentals shall be deemed to commence from the date of disbursement for the actual purchase made with the consent of the lessee.
7. **INDEMNITY:** Lessee agrees to comply with all laws, regulations and orders relating to the possession, operation, and use of the Equipment and assumes all risks and liabilities arising from or pertaining to the possession, operation or use of the Equipment. Lessee does hereby agree to indemnify and keep indemnified and hold safe and harmless the Lessor from and covenants and undertakes to

defend Lessor against any and all claims, costs, expenses, damages and liabilities whether civil or criminal, of any nature whatsoever, arising from or pertaining to the use, possession, operation or transportation of the Equipment. Any fees, taxes or other lawful charges paid by Lessor upon failure of Lessee to make such payments, shall become immediately due from Lessee to make such payments, shall become immediately due from Lessee to Lessor. Lessee further covenants and undertakes to indemnify and keep indemnified the Lessor against loss of Equipment by seizure by any person other than the Lessor for any reason whatsoever, or resulting from any form of legal process initiated by any person other than the Lessor, provided that such indemnity shall not cover such loss as arises out of any neglect or default on the part of the Lessor. Lessee further agrees to indemnify and keep indemnified the lessor against all risks and liabilities whether civil or criminal, arising from the possession, use, operation or storage of the Equipment and for injuries or deaths of persons or damage to property arising from the above.

8. **USE, INSPECTION:** Lessee will cause the Equipment to be operated in accordance with manufacturers' manuals or instructions, if any, and in so far as applicable by competent and duly qualified personnel only and in accordance with applicable Government regulations, if any, and for business purposes only. Lessor shall have the right from time to time during the normal business hours on any working day to enter upon Lessee's premises or elsewhere after prior notice for the purpose of confirming the existence, condition and proper maintenance of the Equipment.
9. **REPAIRS, LOSS AND DAMAGE:** During the term of the Lease and any renewal thereof, Lessee, at its own cost and expenses will keep all Equipments in good repair, condition and working order and shall furnish all parts, mechanisms, devices and servicing required thereof. All such parts, mechanisms and devices shall immediately be deemed part of the Equipment for all purposes hereof and shall become the property of the Lessor. In the event, any item of Equipment is lost, stolen or destroyed or damaged beyond repair for any reason, Lessee shall promptly pay the Lessor the instalments of lease rentals then remaining unpaid less insurance claims received by Lessor, in respect of insurance effected in pursuance of this Agreement, whereupon Lessor will transfer to Lessee, without recourse of warranty, all of Lessor's right, title and interest, if any, in such items. If, however, the insurance claim received by the Lessor exceeds the amount of unpaid rentals, the Lessor shall forthwith pay the difference to the Lessee.
10. **INSURANCE:** Lessee shall obtain and maintain for the entire term of this Agreement at its own expense, comprehensive insurance against loss or destruction or damage to the Equipment including without limitations destruction or loss by fire, theft and such other risks or loss as are customarily insured against on the type of Equipment leased hereunder and by businesses in which Lessee is engaged and in such amounts as shall be satisfactory to lessor,

provided however that the amount of insurance against loss or destruction or damage to the Equipment shall not be less than the greater of the full replacement value of the Equipment or the instalments of lease rentals then remaining unpaid hereunder plus any renewal options entered into pursuant to this Agreement. Each insurance policy will name Lessee as insured and note Lessor's (and its Bankers') interests as loss payee. Lessee shall furnish to Lessor a certificate of insurance or other satisfactory evidence that such insurance coverage is in effect.

11. FURTHER ASSURANCE:

- a. During the term of this Agreement, Lessee shall provide if so asked for by Lessor annual audited accounts of the Lessee.
- b. Lessor hereby covenants that the Equipment is the absolute property of the Lessor and undertakes not to sell or transfer the same to any party except as to hypothecate, mortgage or create a charge in favour of a Bank or Financial Institution. The Lessor shall inform the Lessee of any such mortgage or hypothecation.
- c. Lessee irrevocably agrees that the lease rentals will be increased by any incremental taxes, if any, whether Sales Tax or Excise Duties or any other related and consequential charges, if any, levied on this transaction now or hereafter as also by any increase in purchase price of the asset in the intervening period between placement of the order and its acceptance and the eventual delivery of the Equipment. The lease rentals have been stipulated in the assumption that the lessor shall be entitled to claim in his income tax assessment investment allowance @25% of the cost of Equipment and depreciation @ ..... in the first year, and .....% every year subsequently on reducing balances. The lessee agrees that the lease rentals shall be suitably increased if such investment allowance or depreciation is not allowed at all or at rates given above or due to any changes in the tax laws in respect thereof.
- d. Lessee further irrevocably stipulates that at no time during the period of this lease agreement will the Lessee attempt to capitalise the leased asset on Lessee's balance sheet and Lessee and Lessor irrevocably agree that ownership of the Equipment during the tenure of the lease as specified herein and inclusive of any renewal options that the parties hereto may concur to indisputably vests with the Lessor.
- e. The Lessor does hereby agree to indemnify and keep indemnified and hold safe and harmless the Lessee from and against any loss or damage caused to or suffered by the Lessee on account of any action taken by the Bank or Financial Institution for non-satisfaction or breach of the conditions of the loan granted by the Bankers to the Lessor. In case of Lessor's failure to make payment of principal and/or interest of the loan and on being called upon by the Bank or Financial Institution to pay to them all or any instalments of rental

and the Lessee making such payment the Lessor agrees that such payment to the Bankers or Financial Institution made by the Lessee of the sums due under this Agreement, shall be considered as having been paid to the Lessor, towards the Lessor's dues hereunder. In that event, the Bank shall have no right of recourse to possession of Equipment so long as the Lessee meets with lease rental payments falling due under this Agreement.

f. The Lessor hereby agrees to inform its Bankers about this arrangement and obtain their confirmation to the same.

12. SURRENDER: Upon expiration or earlier termination of the lease, Lessee shall deliver to the Lessor the said Equipment at such a place as Lessor may specify in good repairable condition and working order, normal wear and tear resulting from the proper use of the Equipment and damage by fire not caused by the negligence of the Lessee shall be excepted.

13. EVENTS OF DEFAULT: An event of default shall occur hereunder if Lessee:

a. fails to pay any instalment of lease rentals or part thereof or other payment required hereunder when due and such failure continues for a period of 10 days after written notice is sent from Lessor; or

b. fails to perform or observe any other covenant condition or agreement to be performed or observed by it hereunder or breaches any representation or provision contained herein or in any other document furnished to the Lessor in connection herewith and such failure or breach continues unremedied for a period of ten days (if such breach is capable of being remedied within ten days) after written notice is sent from the Lessor; or

c. without Lessor's consent, attempts to remove (except for repairs), sell, transfer, encumber, part with possession or sublet any item of Equipment; or

d. shall commit an act of bankruptcy or become insolvent or bankrupt or make an assignment for the benefit of creditors, or consent to the appointment of a Trustee or Receiver or either shall be appointed for Lessee or for substantial part of its property without its consent, or bankruptcy, reorganisation or insolvency proceedings shall be instituted by or against Lessee; or

e. shall suffer an adverse material change in the financial condition from the date hereof, and as a result thereof Lessor deems itself or any of its equipment to be insecure; or

f. shall be in default under any other agreement at any time executed with Lessor.

14. REMEDIES: Upon the occurrence of any default and at any time thereafter the Lessor would declare all future rentals due and to become due hereunder for the full term of the lease immediately due and payable and on such declaration being made by Lessor, Lessee shall forthwith provide to the Lessor the present value of the said sums due discounted at the rate of 12% per annum and upon Lessee failing to make the said payment within 30 days thereof Lessor may in its discretion do any one of the following:

- a. Take action for recovery as liquidated damages for loss of bargain and not as penalty, of any amount equal to all unpaid lease rental payment which in the absence of a default would have been payable by Lessee hereunder for the full term thereof plus interest thereon at the rate of 2% p.m. for the period until receipt of the said amount;
- b. Upon notice to Lessee terminate this Agreement and all Schedules executed pursuant hereto and forfeit the amounts paid by Lessee by way of rentals and demand the Lessee to return all equipment to Lessor at Lessor's own risk and expenses in the same condition as delivered, ordinary wear and tear and damage by fire not caused by the negligence of Lessor excepted, at such location as the Lessor may designate and upon failure of Lessee to do so within 14 days from the date of demand, enter upon premises where such Equipment is located and take immediate possession of and remove the same, all without liability to Lessor or its Agent for such entry or for damage to property or otherwise. Lessor may detach and dismantle the Equipment from any part of the freehold or process machinery to which it may be affixed without the written permission of Lessee;
- c. Sell all the Equipments at public or private sale or lease to others with 7 days' Notice on account and at the risk of Lessee and appropriate the net sale proceeds or realisation of rental towards the present value of all the future rentals declared to be immediately due and payable at the rate of 12% per annum as aforesaid and to recover from the Lessee the shortfall or deficit together with interest thereon at the rate of 2% p.m. but the Lessor shall not in any such action or for duty to account to Lessee for such action or for any surplus realised by the Lessor by sale or lease.

The remedy referred to hereinabove is intended to be in addition to any other remedy available to Lessor at law provided however that on the Lessee making payment to the Lessor at any time before action under Clauses (a) or (b) above taken by Lessor of the present value of all future lease rentals as provided herein before, the Lessee shall retain all the equipment leased hereunder for its own use and the Lessor further undertakes to transfer all its title and interest on the said Equipment to the Lessee on receipt of payment as referred to hereinabove.

15. **WAIVER:** Any expressed or implied waiver by the Lessor of any default shall not constitute a waiver of any other default by Lessee or a waiver of any of Lessor's right. All original rights and powers of the Lessor under this Agreement will remain in full force, notwithstanding any neglect, forbearance or delay in the enforcement thereof, by the Lessee of this Agreement shall not be deemed as waiver of any continuing or recurring breach by the Lessee of this Agreement.
16. **NOTICES:** Any notices or demands required to be given herein shall be given to the parties hereto in writing and by post or by hand delivery at the address herein set forth or to such other addresses as the parties hereto may hereafter substitute by written notice given in the manner prescribed herein above.

17. This Agreement and other contracts executed between the parties hereto pursuant to this Agreement cannot be cancelled or terminated except as expressly provided herein. Lessee hereby agrees that Lessee's obligations to pay all lease rentals and any other amounts owing hereunder shall be absolute and unconditional. This Agreement cannot be amended except in writing and shall be binding upon and to the benefit of the parties hereto their permitted successors and assigns.
18. The captions in this Agreement are for convenience only and shall not define or limit any of the terms hereof.
19. **ARBITRATION:** All disputes, differences, claims and questions, whatsoever, which shall arise either during the subsistence of this Agreement or afterwards between the parties and/or their respective representatives touching these presents or any clause or thing herein, contained or otherwise in any way relating to or arising from these presents shall be referred to the arbitration of two Arbitrators, one to be appointed by each party to the dispute and such arbitration shall be in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment thereof for the time being in force.
20. By execution hereof, the signor hereby certifies that he has read this Agreement, including the Schedule hereto and that he is duly authorised to execute this Agreement on behalf of the Lessee.

IN WITNESS WHEREOF each of the parties hereto has caused this agreement to be executed in duplicate on this..... (date) by its duly authorised officers.

Signed for and on behalf of:

For.....

In the presence of:

Witness No. 1

Witness No. 2

Signed for and on behalf of:

For.....

In the presence of:

Witness No. 1

Witness No. 2

*The Schedules above referred to*

**LESSON ROUND-UP**

- Sale of immovable property is governed by the provisions of Transfer of Property Act, 1882. A transaction of a sale of immovable property usually involves two documents, e.g., agreement to sell and the conveyance deed i.e. sale deed. But with only a sale deed the transaction of sale can be completed.
- Before drafting the conveyance or sale deed for the immovable property, it is

necessary that the title of the property be investigated and it should be ensured that the title to the property is proved as good and marketable.

- A sale deed must be properly drafted adhering to all the principal conditions prescribed under the Transfer of Property Act to acquire a perfect title to the property being purchased by the company.
- The Transfer of Property Act, 1882 deals with the mortgage of immovable property alone. It does not deal with movable at all. Therefore, it cannot be regarded as forbidding the mortgage of movable property.
- The transferor in the case of a mortgage is called a 'mortgagor' and the transferee as 'mortgagee', the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument, if any, by which a transfer is effected is called a "mortgage deed".
- A deed of mortgage may be drafted either as a deed poll on behalf of the mortgagor in favour of the mortgagee or as a deed between the mortgagor and mortgagee as parties
- The Indian Easements Act, 1882 contains the statutory provisions governing licences. Under the Act, a licence may be granted by any one in the circumstances and to the extent in and to which he may transfer his interest in the property affected by the licence.
- A licence ordinarily carries with it the incident of non-transferability. A licence cannot be transferred by the licensee or exercised by his servants or agents. The only exception to this rule is that, unless a different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by the licensee.
- The revocation of licence may be expressed or implied. The general rule is that subject to the agreement between the parties, all licences are revocable at the will of the licencer. However, there are certain exceptions to this rule.
- A mere deed of licence need not be registered unless any right, title or interest in immovable property of the value of Rs. 100 or more is created, declared, assigned, limited or extinguished.
- Lease is a contract between lessor and lessee for the fixed term for the use on hire of a specific asset selected by lessee. Lessor retains ownership of the assets and lessee has possession and use of the asset on payment of specified rental over a period. It is a sort of contractual arrangement between the two parties whereby one acquires the right to use the property called "lessee" and the other who allows the former the right to use his owned property, called the "lessor".
- Before taking up drafting of the lease documents one is expected to be thorough with all the essential legal aspects involved in a lease transaction. The essential legal elements of lease are (i) the parties i.e. lessor or lessee; (ii) the subject matter of lease i.e. the property to be leased; (iii) demise or partial transfer of such property; (iv) the term and period of lease; and (v) the consideration or rent.
- The main document to complete the leasing transaction between the lessor and

the lessee is the lease agreement or lease deed which contains all the conditions and covenants binding the parties to the lease transaction.

## **FOOTNOTES**

\* (3) & (4) are not strictly necessary where the Transfer of Property Act applies, vide Section 52(2) Transfer of Property Act.

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## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY V - DRAFTING OF VARIOUS DEEDS-II**

#### **(Deeds of Assignment, Partnership, Trust and Power of Attorney)**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to familiarise the students with drafting skills pertaining to the deeds of:

- Assignment
- Partnership
- Trust
- Power of attorney.

#### **DEEDS OF ASSIGNMENT**

##### **INTRODUCTION**

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

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

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

The term assignment is, however, of wider import. It is well settled that a transfer of property clearly contemplates that the transferor has an interest in the property which is sought to be conveyed. Section 130 of the Transfer of Property Act, 1882 lays down the mode of transfer of actionable claim. It prescribes:

1. The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not; Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter

provided) be valid as against such transfer.

- 2. The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto."

Every notice of transfer of an actionable claim must be in writing signed by the transferor or his agent duly authorised in this behalf, or in case the transferor refuses to sign, by the transferee or his agent, and must state the name and address of the transferee. (Transfer of Property Act, 1882, Section 131).

**ASSIGNMENT OF BUSINESS DEBT**

A sum due is the same thing as a debt due. It may be now payable or will become payable in future by reason of a present obligation. There must be an existing obligation to pay a sum of money now or in future. It includes book debts, debts due on a bond, provident fund, arrears of rent, amount due on settlement of account between principal and agent, master and servant, wages which have accrued due, money due under an insurance policy, claim to money deposited for the due performance of a duty, surplus left with the vendee of property, etc. A debt is property. It is an actionable claim and is heritable and assignable and it is treated as property under the Transfer of Property Act, 1882 and is known as "actionable claim".

**Consideration for Assignment**

A debtor cannot claim or take advantage of non-payment of consideration for assignment. Section 130 of the Transfer of Property Act, 1882 specifically lays down that an assignment of an actionable claim may be with or without consideration. Passing of the property in the assigned property does not depend on the payment of consideration. The question of payment of consideration is in fact one between the assignor and the assignee.

**Liability of Transferee of an actionable claim**

Section 132 of Transfer of Property Act provides that the transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transfer was subject in respect thereof at the date of transfer.

**Warranty of Solvency of a Debtor**

Section 133 of Transfer of Property Act provides that solvency of the debtor at the time of transfer is to be taken into account for purposes of warranty by the transferor. In case the transfer has been made for consideration, the warranty is limited to the amount or value of such consideration.

**A Specimen of Deed of Assignment of Business Debts**

THIS DEED OF ASSIGNMENT made this..... day of..... between..... son of..... resident of..... (hereinafter called "the Assignor") of the one part, and....., son of....., resident of....., (hereinafter called "the Assignee") of the other part.

WHEREAS the assignor has, for some time been carrying on the business of....., in the course whereof the several persons whose names, addresses and occupations are mentioned in the Schedule appended hereto, have become lawfully debtors to him and so for the several sums of money set opposite to their respective names;

AND WHEREAS the assignor has contracted with the assignee for the absolute sale to him of the said business debts at..... and for the sum of Rs..... (Rupees.....).

NOW THIS DEED WITNESSES that in consideration of the sum of Rs..... (Rupees.....) now paid to the assignor by the assignee (the receipt whereof the assignor hereby acknowledges), the said assignor, as beneficial owner, does hereby transfer, sell and assign unto and to the use of the said assignee, all the several said debts, and sums of money specified in the said Schedule which are now due and owing to the assignor to have and to receive them for his absolute use and benefit with absolute power, authority and liberty to enforce payment thereof by suit or otherwise and that the assignor does hereby covenant with the assignee that all the several debts are lawfully due to him and the parties by whom they are payable are alive, and further that he has not entered into any arrangement with any of them and that the assignor shall at all times hereafter do, execute and perform all such and other acts, deeds, things, or writings as may be reasonably required for realization of the said debts, and further and better and more effectively transferring and/or assuring them or any of them in favour of the assignee.

*Schedule above referred to*

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their signatures on the day, month and the year above mentioned at..... (place).

Witness: (Assignor)

Witness: (Assignee)

### **ASSIGNMENT OF SHARES IN A COMPANY**

Section 82 of the Companies Act, 1956 defines the nature of property in the shares of a company. It lays down: "The shares or other interest of any member in a company shall be moveable property, transferable in the manner provided in the articles of the company."

The definition of "goods" in the Sale of Goods Act, 1930, specifically includes stocks and shares. Hence, it is necessary to provide by the articles the manner in which transfer of shares are to be affected. Where the articles of a company do not provide for the transfer of shares, and also expressly exclude the application of the regulations in Table "A" in Schedule I to the Companies Act, 1956, the general law relating to transfer of moveable property will govern.

A "share" in a company is a right to a specified amount of the share capital of the company, carrying with it certain rights and liabilities, while the company is a going concern and in the winding up. It represents the interest of the holder measured for

purposes of liability and dividend by a sum of a money.

A company cannot refuse to transfer shares except as provided by its articles\*. It is well settled that unless the articles otherwise provide, a shareholder has a free right to transfer his shares to whom he chooses. It is not necessary to look to the articles for a power to transfer, since that power is given by the Act. It is only necessary to look to the articles of association to ascertain the mode of transfer and the restrictions upon it.

As between buyer (transferee) and seller (transferor) of shares, the buyer is entitled to all dividends declared after the contract of sale, unless otherwise agreed.

Whatever may be the agreement, a transfer of shares after declaration of dividend, does not, as against the company, carry the dividend, even though the transfer may be cum-dividend.

Section 108 of the Companies Act, 1956, however, lays down that a company shall not register a transfer of shares in the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares, or if no such certificate is in existence, along with the letter of allotment of the shares.

Sub-section (1-A) of Section 108 of the Companies Act, 1956 lays down that every instrument of transfer of shares shall be in such form as may be prescribed. The Companies (Central Government's) General Rules and Forms, 1956 have prescribed Form No. 7-B as the Share Transfer Form to be presented to the company duly filled in and executed for registration of transfer of shares.

### **A Specimen of Deed of Assignment of Shares in a Company**

THIS ASSIGNMENT is made this..... day of.....  
between AB, son of ....., resident of.....  
(hereinafter called "the Assignor") of the one part, and CD, son  
of....., resident of..... (hereinafter called "the  
Assignee") of the other part.

#### **THE DEED WITNESSES:**

That in consideration of the sum of Rs..... (Rupees.....) paid  
by the assignee to the assignor, the receipt whereof the assignor hereby  
acknowledges, the said AB hereby assigns, sells and transfers to the said  
CD..... Equity Shares of Rs..... each, fully paid up, bearing  
consecutive Nos..... to..... (inclusive), which stand in the  
name of the assignor in the Register of Members of..... Co. Ltd. TO  
HOLD the same to the assignee absolutely, subject nevertheless to the conditions  
on which the assignor held the same up to date.

AND the assignee hereby agrees to take the said Equity Shares subject to such  
conditions.

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their

respective signatures on the day, month and the year stated above.

Witness: (Assignor)

Witness: (Assignee)

### **ASSIGNMENT OF POLICIES OF INSURANCE**

Policies of insurance are principally of two types (1) insuring risk to life of a person, and (2) covering various risks relating to goods. Under the former, a sum of money is secured to be paid on the death of the person whose life is insured. The latter is a contract whereby an insurer undertakes to indemnify the assured, his nominees, assigns, heirs and legal representatives against the loss of and/or damage to goods. A contract of insurance is complete when the proposal of the assured is accepted by the insurer, whether the policy of insurance is issued or not. For the purpose of showing when the proposal was accepted, a reference has to be made to the insurance cover or other customary memorandum of the contract; although it may be unstamped.

Insurable interest in the subject-matter insured is a pre-requisite of a contract of insurance and for the success of an insurance claim the assured or the claimant, as the case may be, must be interested in the subject-matter insured at the time of the loss.

An insurable interest in the subject-matter insured is a right which is capable of assignment. An insurance policy may be transferred by assignment unless it contains terms expressly prohibiting assignment. It must be assigned before death in the case of a life insurance policy and it may be assigned either before or after loss in the case of a marine or good policy. The assignee can sue on the policy of insurance in his own name and can defend an action on any ground available to the assignor. The policy may be assigned by endorsement thereon or in other customary manner. An assured who has no insurable interest in the subject-matter insured cannot assign. Where an assured who has lost interest in the subject matter by transfer and has not, before or at the time of transferring the subject matter, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative.

### **A Specimen of Deed of Assignment of Policy of Life Assurance**

THIS ASSIGNMENT made this..... day of..... between AB, son of....., resident of..... (hereinafter known as "the assignor") of the one part and CD, son of..... resident of..... (hereinafter known as "the assignee") of the other part.

WHEREAS a policy of assurance being No..... for Rs..... (Rupees.....) was issued by the Life Insurance Corporation of India on the life of the assignor on the..... day of..... to be paid to the assignor or to his executors, administrators or assigns after his death, subject to the annual premium of Rs.....;

AND WHEREAS the said AB has agreed to transfer and assign to the said CD the

said policy of assurance of a sum of Rs..... (Rupees.....); THIS DEED WITNESSES that in consideration of the sum of Rs..... (Rupees.....) the receipt whereof the said AB hereby acknowledges, the said AB as beneficial owner, hereby transfers and assigns unto and to the use and for the benefit of CD the hereinbefore recited policy of assurance, and the sum of Rs..... (Rupees.....) hereby assured and all the other moneys, benefits and advantages to be had, recovered or obtained under or by virtue of the said policy:

TO HOLD the same unto and to the use of the said CD absolutely, subject to the conditions as to payment of future premiums and otherwise to be henceforth observed in receipt of the said policy:

AND the said AB hereby covenants with the said CD that he, the said AB, shall not do, or knowingly suffer anything to be done, whereby the said policy may be rendered void or voidable or the said CD or his heirs, executors, administrators or assigns may be prevented from receiving the said sum of Rs..... (Rupees.....) or any benefit thereunder.

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their respective signatures on the day, month and the year stated above.

Witness: (Assignor)

Witness: (Assignee)

### **ASSIGNMENT OF PATENTS**

Patent is a right, granted by the Government under the Patents Act, 1970 to the grantee, of exclusive privileges of making or selling a new invention or process protected under the patent. The Act confers upon the patentee the right to safeguard his property in the patent and sue the person who infringes upon his patent right. After a complete specification in pursuance of an application for a patent has been accepted and on the request of the applicant, the Controller shall cause the patent to be sealed with the seal of the Patent Office under Section 43 of the Patents Act, 1970. Section 48 of the Act, confers upon the Patentee where the subject matter of the patent is a product, the exclusive right to prevent third parties who do not have his consent from the act of making, using, offering for sale, selling or importing for those purposes that product in India. Where the subject matter of the patent is a process, the patentee is given exclusive right to prevent third parties who do not have his consent from the act of using that process and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India provided that the product obtained is not a product in respect of which no patent shall be granted under this Act.

Section 68 of the Act makes provision with regard to the assignment of patents. The Section lays down:

"An assignment of a patent or of a share in a patent, a mortgage, licence or the creation of any other interest in a patent shall not be valid unless the same were in writing and the agreement between the parties concerned is reduced to the form of a

document embodying all the terms and conditions governing their rights and obligations and the application for registration of such document is filed in the prescribed manner with the Controller within six months from the execution of the document or within such further period not exceeding six months in the aggregate as the Controller on application made in the prescribed manner allows:

Provided the document shall, when registered, have effect from the date of its execution."

Section 69 of the Act dealing with registration of assignments prescribes: "Where any person becomes entitled by assignment, transmission or operation of law to a patent or to a share in a patent or becomes entitled as a mortgagee, licensee or otherwise to any other interest in a patent, he shall apply in writing in the prescribed manner to the Controller for the registration of his title, or, as the case may be, of notice of his interest in the register."

Section 70 of the Act empowers the person or persons registered as grantee or proprietor of a patent to assign, grant licences under, or otherwise deal with, the patent and to give effectual receipts for any consideration for any such assignment, licence or dealing. The Section further lays down that any equities in respect of the patent may be enforced in like manner as in respect of any other moveable property.

### **A Specimen of Deed of Assignment of a Patent**

THIS DEED OF ASSIGNMENT is made on this ..... day of..... between AB son....., resident of..... (hereinafter called the "assignor", which term shall include his heirs, executors and assigns) of the one part and CD, son of..... resident of..... (OR IN THE ALTERNATIVE IF THE PATENTEE ASSIGNEE IS A COMPANY).....

and..... Co. Ltd. (hereinafter called the "assignee"/"company" incorporated under the Companies Act, 1956 having its Registered Office at.....) of the other part under the terms and conditions set hereunder:

WHEREAS the assignor has invented a process for the manufacture of..... which was duly registered and entered in the Register of Patents bearing No..... dated..... and duly sealed in the Patent Office:

AND WHEREAS the company is a company limited by shares incorporated under the Companies Act, 1956 on..... with an Authorised Share Capital of Rs..... divided into..... Equity Shares of Rs..... each;

AND WHEREAS it had been agreed between the parties to this Deed that in consideration of the assignment to be made by the assignor of his rights under the said Patent to the Company in the terms mentioned hereunder, for the sum of Rs..... (Rupees.....) to be satisfied by allotment of..... Equity Shares to the assignor and/or his nominees as fully paid up:

AND WHEREAS the directors of the Company in part-performance of the said agreement resolved in a Board meeting held on the..... to allot the

requisite number of Equity Shares at the direction of the assignor as specified in the Schedule attached hereto:

NOW THIS DEED OF ASSIGNMENT WITNESSES:

That in consideration of the premises and in accordance with the agreement aforementioned and on payment of the sum of Rs.....

(Rupees.....) satisfied by the allotment of..... Equity Shares in the Company as specified in the Schedule attached hereto at the direction of the assignor by the Company, each Share being credited as fully paid up (the allotment of which shares credited as aforesaid the assignor hereby acknowledges) the assignor, as beneficial and sole owner, hereby assigns unto the Company his title to the said patent and all benefits and advantages accruing therefrom and all rights and privileges attached thereto to hold unto the Company absolutely.

The assignor covenants with the Company that he has not assigned or otherwise dealt with the said patent and that his title to the said patent subsists and that he has done nothing to prejudice the rights of the Company as transferee thereof to use the said patent exclusively.

The assignor further covenants with the Company that he shall join the Company in applying to the Central Government or other authority at the expenses of the Company, for extension of the said patent and shall do his utmost in obtaining such extension to ensure for the benefit of the Company and shall do nothing to prevent the Company from securing the extension and user of the patent in the manner prescribed by law, without the payment of any further consideration by the Company to the assignor.

The assignor further covenants with the Company that if during the currency of the said patent and the operation of the Company as a going concern, the assignor shall discover, invent or make any improvements in respect of the said invention or shall discover any other process or method for the manufacture of....., he will disclose the same to the Company and explain the new method of discovery to the Company and at the cost of the Company give such full particulars and exhibit and make such experiments as may enable the Company to make practical use of such method and discovery and join the Company in applying for patent for such new invention at the option of the Company and do all other acts and execute all such deeds as may be requisite therefor to vest in the Company all rights, title and interest in such new invention or improvement for the use and benefit of the Company.

IN WITNESS WHEREOF the parties aforesaid have set their respective hands in the presence of the witnesses hereunder.

Witness: Assignor

Witness: Assignee/Company

**Note :** *In case the assignee is not a company the word 'assignee' will be substituted for 'company' and other suitable modifications will have to be made.*

**ASSIGNMENT OF TRADE MARKS**

A trade mark is visual symbol in the form of a word, a device or a label applied to articles of commerce with a view to indicate to the purchasing public that the goods manufactured or otherwise dealt in by a particular person are distinguished from similar goods manufactured or dealt in by other persons. By virtue of such an affixture of the trade mark the person who sells his goods under the particular trade mark acquires an exclusive right subject to certain conditions, to the use of the mark in relation to those goods. Such a right acquired by use is recognised as a form of property in the trade mark, and protected under Common Law. A person can also acquire a similar right over a trade mark, not so far used but only proposed to be used, by registering it under the Trade Marks Act, 1999. It may be pointed out here that prior to Trade Marks Act, 1999, the law governing trade marks was stipulated under the Trade and Merchandise Marks Act, 1958. In view of the developments in trading and commercial practices increasing globalisation of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management and to give effect to important judicial decisions, the said Act was amended and the new Trade Marks Act 1999 was passed to provide for registration of trade marks for goods as well as services including prohibition to the registration of imitation of well known trade marks and expansion of grounds for refusal of registration.

A trade mark is property, but its precise nature differs substantially from other forms of property with which most people are familiar. It is not necessary that the trade mark chosen by a trader should be the result of inventive skill or intellectual labour. The word or device adopted for a trade mark may be some common place or thing. Subject to certain minimum conditions, the owner of the mark, whether registered or unregistered, theoretically at least, gets a perpetual right to the exclusive use of it in relation to the particular goods in respect of which it is registered or used.

The object of trade mark law is to deal with the precise nature of the right which a person can acquire in respect of trade marks; the mode of acquisition of such rights, the method of transfer of those rights to others, the precise nature of infringement of such rights, and the remedies available in respect thereof. This branch of commercial law has undergone changes from time to time, with the changing pattern of business methods and practices. Even the very concept of a trade mark and its functions have changed. One can, therefore, expect more changes to take place in course of time.

Section 37 of the Trade Marks Act, 1999 deals with the power of registered proprietor of a trade mark to assign his rights in the trade mark. The Section lays down: "The person for the time being entered in the register as proprietor of a trade mark shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power to assign the trade mark, and to give effectual receipts for any consideration for such assignment."

Section 38 of the Act further lays down:

"Notwithstanding anything in any other law to the contrary, a registered trade mark

shall, subject to the provisions of this Chapter, be assignable and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods or services in respect of which the trade mark is registered or of some only of those goods or services."

An unregistered trade mark, according to Section 39 of the Act, shall not be assignable or transmissible except along with the goodwill of the business concerned.

### **A Specimen of Deed of Assignment of a Registered Trade Mark**

THIS DEED OF ASSIGNMENT made between AB, son of....., resident of..... (hereinafter called the "assignor") of the one part and CD, son of..... resident of..... (hereinafter called the "assignee") of the other part.

WHEREAS the said AB is the owner of a Trade Mark Number..... duly registered in the Register of Trade Mark maintained by the Trade Marks Registration Office at.....;

AND WHEREAS the said AB has made actual and bona fide use of the said Trade Mark in India in relation to the toiletry goods manufactured by him at his factory in.....

NOW THIS DEED OF ASSIGNMENT WITNESSES that in pursuance of the said agreement and in consideration of the said sum of Rs.....

(Rupees.....) paid by the said CD to AB, the receipt whereof the said AB hereby admits/acknowledges and confirms, he the assignor AB do hereby grant, transfer and assign upon the terms hereinafter mentioned, the exclusive use and all benefits of the aforesaid Trade Mark in relation to the goods of toiletry manufactured by him at his factory at.....

AND the said assignor hereby covenants with the assignee that he will not infringe nor use a mark identical with the Trade Mark hereby assigned nor use another Trade Mark nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to the goods in respect of which it is registered and in a manner as to render the use of this Trade Mark likely to be taken either as being a use of the said Trade Mark or to import a reference to the assignor.

AND the assignor further covenants that he, the assignor shall, at the cost of CD or any person claiming through him, do or cause to be done any other act, deed or thing as may be required for more perfectly assuring the aforesaid assignment.

IN WITNESS WHEREOF the parties aforesaid have set their respective hands in the presence of the witnesses hereunder.

Witness: Assignor

Witness: Assignee

### **ASSIGNMENT OF COPYRIGHTS**

Section 14 of the Copyright Act, 1957 defines "copyright" as an exclusive right subject to the provisions of the Act to do or authorise the doing of any of the acts stated thereunder in respect of a work or any substantial part thereof with regard to

original literary dramatic, musical and artistic works; the cinematograph films and sound recording. The rights granted under Section 14 of the Act relate to reproduction, publication, performance, production, translation, making film or sound recording, selling or giving on hire film or sound recording, communicate film or sound recording to public and to make adaptation of the copyright work. Section 18 of the Act deals with the assignment of copyrights. The Section lays down:

"(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof;

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

2. Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

3. .... "

With regard to the mode of assignment, Sub-section (1) of Section 19 of the Act prescribes: "No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent."

### **A Specimen of Deed of Assignment of Copyright of a Book**

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

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

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

NOW THIS DEED OF ASSIGNMENT WITNESSES as follows:

1. In consideration of an subject to the covenants on the part of the publishers as hereinafter contained, the author does hereby grant, convey, transfer, sell, assign and assure unto and to the use of the publishers all that copyright as defined in Section 14 of the Copyright Act, 1957, of the book entitled..... on the subject of..... to have and hold the same as absolute owners thereof for the full term of copyright as prescribed by law.
2. The publishers shall so long as the said work or any adaptation, modification or translation thereof is published and sold, submit to the author twice every year once during the month of January and the other during the month of June, a statement of account showing details of copies printed, published, held in stock and sold or disposed of (Except otherwise by sale of damaged or destroyed

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

and published as soon as practicable within a period of twelve months from the date of this contract, and in default thereof, the author may, by a notice in writing, call upon the publishers to print and publish the work within two months of the receipt of the said notice; and if the publishers shall still fail and/or neglect to print and/or publish the work within the said period, save and except in so far as they are prevented from doing so by circumstances beyond their control, the author shall be at liberty to rescind the contract on giving a notice to that effect to the publishers when the copyright shall revert fully to the author and all the rights of publishers shall as from that date stand determined.

10. That in case of a dispute or difference arising between the parties touching the meaning, construction, interpretation, breach or fulfilment or non-fulfilment of the terms of these presents or any clause or condition thereof, the same shall be referred to the decision and arbitration of two arbitrators, one to be nominated by each party and in case of difference of opinion between the two arbitrators to an umpire to be nominated by the arbitrators before the commencement of the reference; and the award of such arbitrators, as the case may be, shall be final and binding on both the parties and this clause shall be deemed as of submission within the meaning of the Arbitration & Conciliation Act, 1996 and its statutory modification and re-enactment.
11. That the words "author" and "publishers" or "parties" used hereinabove shall unless there be something contrary to the context, include their respective heirs, survivors, successors, representatives, executors, administrators and assigns and successors in business.

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

Witness: Author

Witness: Publisher

## **ASSIGNMENT OF BUSINESS AND GOODWILL AND OTHER RIGHTS AND INTERESTS**

Goodwill is an intangible asset. It is easy to describe but difficult to define. It represents the value to a business attaching to all the factors, internal and external, which enable it to earn a differential return of profit on the capital employed; that is, a better return than that which arises in other comparable businesses, having regard to the nature, size, location and risk inherent in such a business, and which is capable of being enjoyed by a successor.

Goodwill has been variously defined by different commercial pundits. Some definitions are: "The goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on, and being entitled to represent to the outside world that he is carrying on a business, which has been carried on for some time previously."

"The attractive force which brings in custom."

"The benefit of a good name, reputation and connection of a business."

"The one thing which distinguishes an old-established business from a new business at its first start."

"The monetary measurement of the benefits attaching to the ownership of a successful business."

"The capitalized value attaching to the differential profit-capacity of a business."

"The whole advantage, whatever it may be, of the reputation and connection of the firm which may have been built up by years of honest work orgained by lavish expenditure of money."

Goodwill is an intangible, but not necessarily a fictitious asset, representing the value - however difficult its appraisement may be - to its owner, of benefits arising from the business in question, such as the sole right to enjoy the profits of the business, and, where goodwill has been acquired, the sole right of succession to the advantages of the business which have been built up in the past. Goodwill arises mainly:

- a. by personal reputation of the owners;
- b. by reputation of the goods dealt in;
- c. by site monopoly or advantage;
- d. by access to sources of supply, e.g., large quotas;
- e. for patent and trade-mark protection;
- f. effectiveness of publicity;
- g. reputation of the first's goods and methods;
- h. relationship between firm and personnel; and
- i. growth element.

The purchaser of goodwill acquires the trade marks, patents, copyrights etc. of the business as well as the benefits of contacts and all the benefits accruing from the location, reputation, connections, organisation and other exceptional features of the business. The purchaser will seek to express the sum payable in terms of the compound or capitalised value of an annuity of future differential or "super" profits that is those profits in excess of the marginal return normally arising.

No formula can be laid down for the accurate measurement of the value of goodwill, and in practice a purchaser will be prepared to pay a sum representing a number of years' purchase of recent annual average profits, e.g. three years' purchase, according to the estimated worth to the buyer of the future earning capacity of the business, the risk of the discontinuance or diminution in true profits being duly considered.

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

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

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

AND WHEREAS the said purchaser has agreed with the said vendor for purchase by him of all the interest and goodwill in the said business, and the debts, stock-in-trade, effects and the premises on which the said business is being carried on, at

the price of Rs..... and upon the terms and conditions hereinafter mentioned:

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

NOW THIS DEED WITNESSES:

1. In pursuance of the said agreement and in consideration of the sum of Rs..... (Rupees.....) paid by the said purchaser to the said vendor (the receipt whereof the said vendor hereby acknowledges), and also in consideration of the agreement hereinafter contained on the part of the said purchaser, the said vendor does hereby convey, assign and make over to the said purchaser, all the beneficial interest and goodwill of the said vendor in the said business..... so carried on by him as aforesaid, and also all the book and other debts now due and owing to him on account of the said business and all securities for the same, and also all contracts and engagements, benefits and advantages which have been entered into with the said vendor and also all the stock-in-trade, goods, fixtures, articles and things which, at the date of this Deed belong to the said vendor on account of the said business and all the rights, title and interest of the said vendor to and in the said premises, to have and to hold the premises hereby conveyed to the said purchaser absolutely;
2. The said vendor does hereby agree with the said purchaser that he, the said vendor, will not at any time hereafter either by himself or in collaboration with any other person or persons, carry on the said business of..... within..... kilometers of.....;
3. The amounts and particulars of the debts respectively due and owing to and from the said vendor on account of the said business and the particulars of the contracts and engagements to which he is liable with respect to the said business, are correctly stated and set forth in the books of account and other books delivered by the said vendor to the said purchaser;
4. The said vendor will pay all the sums (if any) which may now be due and owing from the said business in excess of the amounts which in the said books appear to be so due and owing;
5. The said vendor has full right to sell and assign the said premises hereby sold and assigned to the said purchaser and will not at any time hereafter revoke, annul and make void the aforesaid power or authority hereby given to the said purchaser, or do or execute or knowingly or willingly suffer any act, deed or thing, whereby the said purchaser may be prevented from having and receiving the said premises or any part thereof, to and for his own use and benefit, or by means whereof the said purchaser shall be injured in the said business; and
6. The said vendor will, from time to time and at all times hereafter, use his best

endeavours to promote the said business and to give to the purchaser full advantage of the connections and customs of the said vendor, in the said business.

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

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

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

Witness: Vendor

Witness: Purchaser

## **PARTNERSHIP DEEDS**

### **INTRODUCTION**

A detailed discussion of the Partnership Act, 1932 is not within the scope of this Study. Students are, therefore, advised to study the Indian Partnership Act, 1932 in detail on their own so as to acquaint themselves, *inter alia*, with the nature, formation, registration and dissolution of partnership. However, introductory observations on some of the relevant aspects of the partnership are made below.

### **Partnership - Its Nature and Meaning**

Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits. However, in any business enterprise the possibility of its incurring loss cannot be ruled out. Therefore, all partners of a firm mutually agree to share all profits and losses of the business amongst them according to their predetermined shares/proportions fixed by them in the partnership agreement.

Partnership is defined in Section 4 of the Partnership Act, 1932 as a relation between persons who have agreed to share profits of business carried on by all or any one of them acting for all. Partnership requires three elements - (a) an agreement entered into by all persons concerned; (b) distribution of the profits of business; and (c) management of the business by all or any one or more of them acting for all, i.e., mutual agency. Out of these three, the third element, i.e., the element of mutual agency, is most essential and it distinguishes partnership from other type of contractual relationship between the parties. If this element is absent

the partnership fails. One partner is not only an agent of the firm but also of the other partners and, if so, can bind another which falls within the scope of partnership subject to limitation under Section 20 of the Act.

A partnership is distinguishable from associations e.g., clubs, societies, co-operative bodies and incorporated companies.

The real intention and conduct of the parties appearing from the (a) written agreement, or (b) verbal agreement together with surrounding circumstances are the tests of partnership [*Cox v. Hickman* (1860) 8 HLC 268].

Persons who have entered into partnership with one another are called individually partners and collectively a firm, and the name under which their business is carried on is called the firm name (Section 4 of the Indian Partnership Act, 1932).

A partnership agreement usually makes provisions for the duration of the partnership or for its determination. Where no such provision is made the partnership is "partnership at will".

### **Who can be Partners**

The word "person" in Section 4 of the Indian Partnership Act, 1932 contemplated only natural and legal persons. (*Duli Chand v. C.I.T.*, AIR, 1956 SC 354).

Partnership relation is one of contractual nature. Therefore, such persons who are competent to contract can enter into partnership. A firm or a Hindu Undivided Family is not a legal person and cannot enter into partnership with any person. When the Karta of a Joint Hindu Family enters into a partnership with strangers the other members of the family do not ipso facto become partners (*Firm Bhagat Ram v. Comm. Of Excess Profits Tax*, AIR 1956 SC 374).

A minor cannot be a partner in a firm but, with the consent of all the partners, he can be admitted to the benefits of partnership (Section 30). He is entitled to share in the profits and his share is liable for the acts of the firm, but he is not personally liable. He cannot be made liable for the losses of the firm. Within six months of attaining majority or obtaining knowledge of his admission, whichever is later, the minor may elect to become or not to become a partner in the firm.

A person may be an active partner in the firm or he or she may choose to remain a dormant or a sleeping partner only. It all depends on the contract between the parties.

Two partnership firms cannot enter into partnership as such but its partners can certainly form a new partnership. However, a partnership firm may be a member of an association or company licenced under Section 25 of the Companies Act, 1956. The limited company of which a firm may be a member should be one formed for promoting Commerce, Art, Science, Religion, Charity or any other useful object without any profit making motive. On dissolution of the firm, its membership of the association or company shall cease.

While considering applications for registration of firms with bodies corporate as partners under the Indian Partnership Act, 1932, the State Government should examine the applications before them and find out whether the memorandum and

articles of association of the applicant incorporated companies contain any special article which authorise the incorporated companies to enter into partnership.

### **Maximum Number of Partners in a Firm**

As per provisions of Section 11 of the Companies Act, 1956 there cannot be more than ten partners in a firm established for carrying on banking business and not more than twenty persons in a firm formed for the purpose of carrying on any other business for profit. A partnership firm having more than the maximum prescribed limit of partners shall be illegal.

However, members of joint families carrying on business in partnership are exempted from the maximum statutory limit of partners prescribed under Section 11 of the Companies Act, 1956. If one joint family carries on business in partnership with more than twenty persons of the same family, the said partnership shall not be unlawful. But if two or more joint families carry on business with more than twenty adult persons, the association will be unlawful. Although in the beginning such an association may have less than 20 members but subsequently if the adult members exceed 20, the association will become illegal from the date when the membership exceeds the statutory limit.

### **Registration of Partnership Firm**

Registration of partnership firm has been made optional under the provisions of Section 58 of the Indian Partnership Act, 1932. Consequences of non-registration of a partnership firm are set out in Section 69 of the Partnership Act. An unregistered firm cannot enforce a right or claim arising out of a contract against any third party. However, if the firm obtains registration on the date of institution of the claim against third person, the said claim or right would be perfectly maintainable. Since the blow of the consequences of non-registration is very severe, it is advisable to get the partnership registered under the Partnership Act, 1932 immediately on its incorporation.

### **Registration of Partnership Firm under the Income-tax Law**

Registration of partnership under the Income-tax Law is distinct from registration of firm under the Partnership Act. Rule 22 of Income-tax Rules, 1962 provides that an application for registration of partnership firm should be accompanied with an instrument of partnership specifying the apportionment of shares of profit and losses of the business amongst the partners of the firm. This registration is required to be renewed every year under the orders of the concerned Income-tax Officer.

### **Partnership Deed/How Made**

The partnership is based on contract. This contract may be made either orally or in writing or even may be inferred from the course of dealing between the partners. In order to avoid all disputes relating to terms of partnership, it is suggested that a written document containing terms and conditions of partnership be executed between the partners. The deed is executed by all the partners and is drafted as an agreement to carry on certain business in partnership on certain terms and conditions. Some of the terms are indicated above.

While drafting partnership deed we should incorporate all terms and conditions that govern a particular partnership business. Partners of any partnership business are normally interested in settling certain terms amongst them before they join hands to carry on business in partnership. As a draftsman of the partnership deed one should be extra careful to understand and properly incorporate in partnership deed the terms relating to the following:

1. Name and place of business.
2. Duration of the partnership.
3. Shares of each partnership in the profits and losses of the business.
4. The management of the business.
5. Nature of principal work agreed to be carried on in partnership.
6. Number of partners and initial capital employed by each one of them.
7. Provision and the manner for raising future capital, if required.
8. Work distribution, if any, of each of the partners.
9. Obligation of partners who are members of a partnership firm.
10. Operation of Bank Accounts.
11. Withdrawal by partners.
12. Accounting system of the business.
13. Whether place of business belongs to partnership or any individual partner.
14. Division/Devolution of goodwill of the business in case of dissolution of partnership.
15. Distribution of assets and liabilities amongst partners at the time of dissolution.
16. Provisions for bringing in or admitting new partners.
17. The effect of the death of a partner, whether his heirs will take his place, or the partnership will be continued by the remaining partners or it will stand dissolved.
18. Provision for resolving disputes relating to partnership if arises amongst the partners. If all partners agree to settle their partnership disputes through the intervention of some named person who may act as an arbitrator for them or even otherwise by arbitration, it is always advisable to include an arbitration clause in the partnership stating that all disputes that may arise between the partners will be resolved by reference to arbitrator under the provisions of the Arbitration and Conciliation Act, 1996.

Besides the above conditions if there are any other particular conditions which partners want to include in the partnership deed the same may suitably be incorporated therein. Language used in the partnership deed must be such that it may avoid all possible confusion relating to terms of partnership and should be easily understandable.

A draft of model partnership deed executed between two partners is given at Annexure I. A specimen form of deed extending period of partnership is given at *Annexure II*.

### **Introduction of a New Partner**

Introduction of a new partner is a matter of agreement between the partners (vide

Section 31 of the Partnership Act, 1932. Also see Section 42 of the said Act). Introduction of a new partner in the existing partnership brings in a change in the constitution of the firm. A new partner cannot be admitted to the existing partnership except with the consent of all the existing partners of the firm but subject to any contract to the contrary between such partners. The person so admitted as a new partner in the existing partnership shall not be liable for any act of the firm done before he became a partner. Where the articles of partnership provide in express terms for the retirement and admission of partners, the right of retiring and introducing new partners under the agreement are fixed thereby except so far as they may be modified by the terms of a subsequent agreement. If a person enters an existing firm without specifying the terms upon which he becomes a partner, it is presumed that he accepts the terms of the original partnership articles, except as they are modified by the introduction of a new member.

A draft of model deed of agreement on admission into firm of a new partner is given at *Annexure III*.

### **Retirement and Expulsion of Partners**

These matters can be regulated by the terms incorporated in a deed of partnership. Sections 32 and 33 of the Partnership Act, 1932 also make provision for these matters.

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

### **Nomination of Successor**

It is not uncommon in partnership agreements to find a clause as to nomination of a successor who has the right to be declared and admitted as partner in the event of death or retirement of a partner. It was, however, held by the Supreme Court in *Commissioner of Income Tax v. Govindram Sugar Mills*, AIR 1966 SC 24, that the nomination is not effective in case of partnership firm consisting of two partners only as it stands dissolved on the death of a partner; nevertheless, in view of the rights and obligations of a person to be nominated as under Section 31 of the Act, the same principle in case of agreement between two persons is applicable in case of partnership between two partners.

### **Purchase of Business by a Partner**

When a partnership ceases to exist and partnership business is closed its assets and liabilities are valued and thereafter every partner or his representative is entitled as against all the other partners or their representatives to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.

### **Dissolution of Partnership**

When jural relation between all the partners inter se is snapped, this constitutes dissolution of the firm. Dissolution of a firm may take place:

1. Without the intervention of the Court.
2. With the intervention of the Court.

Dissolution without the intervention of the Court may take place:

- a. by agreement between the parties,
- b. by the adjudication as insolvent of all the partners or of all the partners but one.
- c. by the business of the firm becoming unlawful,
- d. subject to agreement between the partners:
  - i. by the expiry of the term fixed,
  - ii. by the death of a partner,
  - iii. by the insolvency of a partner,
- e. by notice in writing in case of partnership at will.

Dissolution with the intervention of the Court may be made on any of the grounds contained in Section 44 of the Partnership Act.

The mere incoming or outgoing of partners does not dissolve the firm.

A draft model each of deed of dissolution of partnership, and deed of dissolution of partnership by which one partner sells his share in partnership property to the other partner are given at *Annexure IV & V* respectively. Different forms of notices to dissolve partnership are given at *Annexure VI*.

### **Execution and Attestation: Registration**

A deed of partnership, or of dissolution of partnership, must be executed and attested as a bond on a non-judicial stamp paper of proper value, and its registration is not compulsory; but where a deed of dissolution of a firm involves transfer of immovable property worth Rs. 100 or upwards, the deed is compulsorily registrable. No law requires that a deed of partnership should be attested, but it is desirable that it should be attested by at least two partners. Stamp duty on an instrument of partnership and on a deed of dissolution is payable under Article 46. Schedule I to the Indian Stamp Act, 1899.

## **TRUST DEEDS**

### **INTRODUCTION**

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

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

The subject matter of the trust is called the 'trust property' or the 'trust money'. The person or persons who manages/manage the trust property or trust money is/are called the 'trustee/trustees' of the trust. The author of the trust himself or any other person can be the trustee of the trust.

The beneficial interest or interest of the beneficiaries is/are his/their right(s) against

the trustee as owner of the trust property; and the instrument by which the trust is declared is called the 'instrument of trust'.

The breach of any duties imposed on the trustee by any law for the time being in force is called 'breach of trust'.

The person creating the trust must be legally competent to contract and a trust may be created on behalf of a minor with the permission of the Civil Court of the original jurisdiction. (Section 7)

Every person capable of holding property may be a trustee. But if the trust involves exercise of discretion then he cannot execute it unless he is competent to contract. (Section 10)

A trust is, in effect, the gift by the author of property or an interest in property to a person or institution (the beneficiary) by or through the intervention of trustee. The trust property vests in the trustee and he holds it for the benefit of the beneficiary and cannot use it for his own benefit. A 'trust' is a confidence and the confidentee is the trustee.

His position is fiduciary *vis-à-vis* the *cestui que trust* (beneficiary). In a trust the author vests the property in the trustee charging him to utilise it or the income or profits arising therefrom for the benefit of the beneficiary.

A corporate body, for example, a bank or a company can both create a trust and be a trustee. In such a case it has to act through its officers/duly constituted nominees. An insolvent can also be a trustee and the trust property is not affected by his insolvency.

### **Objects of Trust**

Section 4 of the Indian Trusts Act, 1882 provides that the object of the trust must be lawful. The purpose of the trust is lawful unless it is:

- i. forbidden by law, or
- ii. is of such a nature that, if permitted, it would defeat the provisions of any law, or
- iii. is fraudulent, or
- iv. involves or implies injury to the person or property of another, or
- v. the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Any property which is transferable can be a subject of a trust whether it be immovable or movable. But more 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.

### **Trusts among the Hindus and the Muslims**

Though Hindu religious and charitable endowments sometime partake of the nature of trusts, the Indian Trusts Acts does not apply to them. Property can be dedicated to the beneficiary either by giving it to the trustee and executing a trust in the usual way or by directly dedicating it to the beneficiary.

Though *wakfs* are trusts, the Indian Trusts Act does not apply to *wakfs* under the Muslim Law. However, it is open to a Muslim to create a secular trust of a public and religious character. Such a trust would be governed by the Indian Trusts Act, 1882.

### **Creation of Trust**

A trust in respect of immovable property can be declared only by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered or by the will of the author of the trust or of the trustee. A trust in respect of movable property can be made either by a declaration as above or by the transfer of the ownership of the property to the trustee (Section 5 of the Indian Trusts Act, 1882). In places where the Indian Trusts Act, 1882 does not apply a trust of immovable property may be created orally if the author of trust is himself the trustee and consequently no transfer of the property is involved, and all that is required is only a declaration of trust (*Madanji v. Tribhuwan*, 36 B 366).

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

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

a. an intention to create a trust;

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

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

### **Instrument of Trust: How it is Drafted**

An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustee. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll. No specific words are necessary, but, whatever the words used, the deed should contain with reasonable certainty the matters mentioned under the heading 'Creation of Trust'. While drafting a trust deed, it be seen that every clause in the deed is clear in its meaning. If there is any reference to any article, documents, rules, statutory Acts etc., the same are properly applied out. In case reference to these is to be repeated in the deed it is better to first define them and use the abbreviation in the deed subsequently.

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

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

### **Acceptance of Trust**

Acceptance of trust by trustee may be either express, e.g. by executing the deed of trust or by verbal assent, or inferred from conduct, e.g., by entering into possession of the property and on the duties as trustee. But it is always safer to have the deed

of trust executed by the trustee also.

### **Registration and Stamp Duty**

A trust created by will requires neither registration nor stamp duty. But a trust in relation to movable or immovable property which is declared by a non-testamentary instrument must be registered, irrespective of the value of the property. Deeds of wakf or of religious and charitable endowments must be registered if they relate to immovable property worth Rs. 100 and upwards.

A trust declared otherwise than by a will is chargeable to stamp duty under Article 64, Schedule I of the Indian Stamp Act, 1899. The stamp duty varies from State to State.

### **Revocation and Extinction of Trusts**

A trust cannot be revoked unless (1) all the beneficiaries consent; (2) a power of revocation has been reserved in the deed; and (3) in case of a trust for payment of debts, it has not been communicated to the creditors. If the trust property is to be applied for the author's own benefit the trust can be revoked. A power of revocation may with advantage always be reserved in the deed. The declaration of trust for creating provident fund, pension fund, superannuation fund, gratuity fund etc. should be irrevocable. If they are otherwise the recognition under the Income Tax Act, 1961 will not be available to such trusts and in consequence the payment made to such funds will not be allowed as deduction in the hands of the authors of the trusts in their income tax assessments.

A trust is extinguished:

- a. when its purpose is completely fulfilled; or
- b. when its purpose becomes unlawful; or
- c. when the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise; or
- d. when the trust, being revocable, is expressly revoked.

### **A Specimen Deed of Revocation of a Trust**

THIS DEED is made on the..... day of..... by A.B. etc. (hereinafter called "the Settlor") of the one part AND C.D. etc. (hereinafter called "the Trustee") of the other part.

WHEREAS by a deed of trust dated..... the Settlor transferred him property specified therein to the Trustee upon trust to sell the same and with the proceeds of the sale to pay the debts due from the Settlor to the several creditors named in the said deed;

AND WHEREAS the trust created as aforesaid has not yet been communicated to any of the aforesaid creditors;

AND WHEREAS the Settlor now desires to revoke the said trust and to make other arrangements for the discharge of his aforesaid debts.

NOW THIS DEED WITNESSES that the Settlor hereby revokes the trust created by the aforesaid deed of trust.

IN WITNESS WHEREOF parties have signed this deed on the.....

day of.....  
Signed by.....  
In the presence of.....  
and of.....

### **Debenture Trust Deeds**

Companies in the course of their normal business borrow funds by various modes, one such mode being the issue of debentures. An issue of debentures is usually secured by a trust deed, whereunder movable and immovable properties of the company are mortgaged in favour of the trustees for the benefit of the debenture holders. The trust deed so created, as in the case of a trust, should specify all the details which have been mentioned earlier.

In addition, the usual important conditions of debenture trust deeds may be stated as follows:

1. The trust deed usually gives a legal mortgage on block capital and a floating security on the other assets of the company in favour of the trustee on behalf of the debenture holders.
2. The trust deed gives in detail the conditions under which the loan is advanced.
3. The trust deed should specify in some detail the remuneration payable to the trustee, their duties and responsibilities in relation to the trust property. Section 119 of the Companies Act, 1956 specifically provides that any provision contained in a trust deed for securing an issue of debentures, which has the effect of exempting a trustee or indemnifying him against any liability for breach of trust shall be void.
4. It also gives in detail rights of debenture holders to be exercised through the trustees in case of default by the company in payment of interest and principal as agreed upon.

For detailed reference, see precedent given in *Annexure IV*.

The duty chargeable on a debenture is provided for by Article 27, Schedule I of the Indian Stamp Act, 1899. The stamp duty varies from State to State. But when a trust-deed accompanying a series of debentures is duly stamped, no stamp is necessary to be affixed on the debentures if they are expressed to be issued in terms of the said trust deed. See exceptions to the Article referred to.

The debenture trust deed is registrable and can be registered with the Registrar of Assurances at the place where the registered office of the company is situated or at the place where a part of the immovable property proposed to be given in the mortgage is situate or at the metropolitan cities, namely, Delhi, Bombay, Calcutta and Madras.

### **Trust Deeds Constituting Provident Fund, Superannuation Fund, Pension Fund, etc.**

The companies create provident fund, superannuation fund, pension fund, gratuity fund etc. through declaration of trust for the benefit of their employees. Such funds, as we have seen earlier, will have to be irrevocable and should be drafted, keeping

in view the provisions of Schedule IV appended to the Income Tax Act, 1961 and the provisions of the Income Tax Rules, 1962 made thereunder.

It is essential that there should be a clause in the trust deed giving necessary powers to the trustees to make Rules for the smooth functioning of the trust on residuary matters not provided in the trust deed.

A company cannot create a provident fund trust to cover the employees governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees provident Fund Scheme, 1952 framed thereunder unless exemption has been obtained from the appropriate Government for establishing such a fund.

Therefore, the provident fund trust established by the company should ordinarily cover only those employees who are not governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952. Likewise the gratuity fund established by companies should ordinarily cover only those employees who are not governed by the Payment of Gratuity Act, 1972. If any company wants to have a gratuity fund covering even employees who are governed by the Payment of Gratuity Act, 1972 then they will have to obtain the approval of the appropriate Government for this purpose.

The companies so creating the trusts will have to make an application to the Commissioner of Income-tax for recognition of the respective funds. Only on receipt of the recognition from the Commissioner of Income-tax the contribution made by a company to these will be allowed as a deduction in its assessment(s).

Various forms for trust deeds constituting Provident Fund (Annexure I), Pension Fund (Annexure II), Superannuation Fund (Annexure III) and the Debenture Trust Deed (Annexure IV) are given hereafter.

These are just model forms and may be adopted for the purpose after suitably altering the clauses as the situation warrants. Clause 6 in the "Form of Debenture" given as First Schedule to the debenture trust deed be suitably amended in case where more than one class of debentures have been issued by the company. In such a case Annexure "D" of the Companies (Central Government's) General Rules & Forms, 1956 which is applicable to class meetings of debenture holders will also have to be included in the said clause 6.

Further, the 1<sup>st</sup> & 2<sup>nd</sup> Schedules of the debenture trust deed have to be got signed by the parties executing the deed, if these Schedules are to be annexed to the deed. However, these Schedules can also be made as part of the deed and reproduced below clause 22 of the deed and then it be signed by the executant at the end.

## **THE SECOND SCHEDULE**

### **DETAILS OF PROPERTIES CHARGED**

#### **PART A**

#### **PART B**

## **DEEDS OF POWER OF ATTORNEY**

### **INTRODUCTION**

Wharton in his *Law Lexicon* (1953), page 784 defines a power of attorney as "a

writing given and made by one person authorising another, who, in such case, is called the attorney of the person (or donee of the power), appointing him to do any lawful act in stead of that person, as to receive rents, debts, to make appearance and application in court, before an officer of registration and the like. It may be either general or special, i.e., to do all acts or to do some particular act".

Stroud in his *Judicial Dictionary* (1953), page 2257 defines a power of attorney as an authority whereby one is "set in turn, stead or place" of another to act for him.

A definition of power of attorney is also contained in Section 2(21) of the Indian Stamp Act, 1899 which reads as follows:

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

In terms of Section 1A of the Powers-of-Attorney Act, 1882 (7 of 1982) as amended by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982), a power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney.

A power of attorney executed for the purpose of a specific act is called a "special power of attorney". It is also called a "particular power of attorney". A specific act is meant to imply either a specific act or acts related to each other as to form one judicial transaction, such as all the acts necessary to perfect a mortgage or a sale of a particular property. A power of attorney executed for the purpose of generally representing another person, or for performing more than one act, is called a 'general power of attorney'.

A power of attorney can be executed in favour of more than one person. If a power of attorney is executed in favour of more than one person it would be desirable to provide whether such donees will act jointly or severally. In the absence of such an express provision authorising them to act severally, they will be entitled to act only jointly.

The law relating to the powers of attorney is governed by "Powers-of-Attorney Act, 1982" as amended by the Powers-of-Attorney (Amendment) Act, 1982 (55 of 1982).

A copy of the Act is reproduced at *Annexure I*.

Since the donee of a power of attorney is an agent of the donor, it is essential to know about the law of agency. Several matters concerning agency are dealt with, not in the Powers-of-Attorney Act, but in the Indian Contract Act, 1872 (sections relating to agency). Important amongst these are:

- a. who may execute a power;
- b. who may become an attorney;
- c. when is a power terminated; and
- d. whether a power coupled with interest is revocable.

The reason, obviously, is that these matters would be governed by the general principles of the law of agency. A power of attorney is an authority in writing to another person to act for and in the name of the person who executed the power.

Therefore, speaking generally, the law relating to authority, that is, agency, would be attracted when a power of attorney is executed.

**Note:** *The students are, therefore, advised to refer Chapter X of the Indian Contract Act, 1872 with a view to acquainting themselves with the rights and liabilities of an agent. For the authority of a partner in a firm, the provisions of the Indian Partnership Act, 1932, may be looked into.*

### **Who can Execute Power of Attorney**

A power of attorney can be executed by any person, who can enter into a contract i.e. a person of sound mind who has attained majority. A power of attorney can be executed only in favour of a major. While functioning as an attorney the donee is acting as an agent of the donor i.e. the executor of the power of attorney, who is the principal. Thus, in such cases there is relationship of agent and principal and such relationship can be entered into by majors and not by minors.

Section 2 of the Powers-of-Attorney Act, 1882 in its operative part provides that the donee of a power of attorney may execute or do any assurance, instrument or thing in his own name and signature, and an instrument or thing so executed or done shall be as effectual in law as if it had been executed or done "by the donee of the power in the name and with the signature and seal of the donor thereof". Simply stated, the section provides that the signature of the agent will be deemed to be the signature of the principal.

Section 5 of the Powers-of-Attorney Act, 1882, relating to married women's power to execute a power of attorney provides that a married woman of full age shall, by virtue of this Act, have power, as if she were unmarried, by a non testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers-of-attorney, shall apply thereto.

### **Form of Deed of Power of Attorney**

Powers of attorney are executed in the form of Deed Poll, usually in the first person. It is unilateral document. It begins either as - "KNOW ALL MEN BY THESE PRESENTS THAT I, ETC." or "BY THIS POWER OF ATTORNEY, I, ETC.".

Generally, the operative words making the appointment are introduced directly without any recitals. If recitals become necessary, they should be added after the words "KNOW ALL MEN BY THESE PRESENTS" thus "THAT WHEREAS etc.", and after recitals the operative part is introduced thus "Now I, the said AB, etc., hereby appoint, etc., or the deed may be drafted with the heading "THIS POWER OF ATTORNEY is made on the, etc., then adding the recitals, the operative part is introduced thus "NOW THIS DEED WITNESSES THAT I APPOINT, ETC.".

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

according to authorities such a clause does not extend or widen the authority. For specimen forms of the special powers of attorney, see *Annexure II*. Specimen forms of some of powers of attorney relevant for companies are given at *Annexure IV*.

### **Authentication of Power of Attorney**

A power of attorney need not be attested. However, it would be advisable to execute the power of attorney before and have it authenticated by a Notary Public or any Court Judge/Magistrate, Indian Consul or Vice-Consul or representatives of the Central Government. If a power of attorney is so authenticated courts shall presume the execution of the power of attorney (Section 85 of the Indian Evidence Act, 1872). Under Section 85 of the Indian Evidence Act, 1872, the Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Indian Consul or Vice-Consul or representative of the Central Government, was so executed and authenticated. Under Section 57(6) and (7) of that Act, the seals of Notary Public are taken judicial notice of.

Under Section 32(c) of the Indian Registration Act, 1908, a power of attorney can be granted to an agent to present a document for registration; but, under Section 33(1) of that Act, only certain powers of attorney are recognised. But if a power of attorney gives authority to present documents for registration under Section 32 of the Registration Act, 1908 it *must be executed before and authenticated* by the Registrar or Sub-Registrar within whose District or Sub-District the principal resides or where the Registration Act is not in force, before any Magistrate or if it is executed outside India, before a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul or representative of the Central Government (Section 33 of the Registration Act, 1908). But a power of attorney empowering an agent to execute a deed conveying the property in an immovable property and get the deed registered thereby perfecting the transaction of conveyance, need not be executed before the Officer appointed to authenticate and register documents in as much as when the agent executes the document in the name of the principal, he is the executant thereof and as such can himself present the document for registration.

### **Duration of Power of Attorney**

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

### **Revocable and Irrevocable Power of Attorney**

A power of attorney executed in favour of a person can always, at the discretion of

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

### **Power of Attorney by a Company**

A company being an artificial person can act through agents i.e. its officers. Powers are delegated by companies to the agents through Board resolutions or through powers of attorney. Delegation of powers through a power of attorney is resorted to in view of the fact that it will be very easy to prove the execution thereof. In the case of a resolution it would be necessary to produce the Minutes Books etc. to prove the passing of the resolution of delegation of the powers. Further, under Section 48 of the Companies Act, 1956, a company may, by writing under its Common Seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in India or outside India, and a deed signed by an attorney or behalf of a company and under his seal where sealing is required shall bind the company and have the same effect as if it were under its Common Seal. In any event a power of attorney, in case of a company, be executed in conformity with the articles of association. See also Regulation 84 of Table A of Schedule I to the Companies Act, 1956 in this regard.

As we have seen that companies act through agents, powers to the agents of a company i.e. officers of the company, are delegated through powers of attorney. Generally, a detailed power of attorney is executed in favour of the managing director or chief executive of the company delegating to him all the powers which under the Companies Act, 1956, directors of a company can delegate/sub-delegate. In regard to routine matters like execution of excise documents, and execution of various deeds and documents in connection therewith, the powers relating to court cases are delegated to various officers of the company. Form of such powers of attorney are given at *Annexure IV*. A specimen of a special power of attorney filed with the Registrar at the time of incorporation of a company is given at *Annexure V*. A delegate unless expressly authorised by the principal cannot sub-delegate the powers. If the intention is to empower the delegate to sub-delegate his powers then it should be specifically mentioned in the power of attorney.

## **Stamp Duty on Power of Attorney**

Power of attorney is liable to stamp duty under the provisions of the Indian Stamp Act, 1889. Duty varies from State to State. The exact amount of the duty will depend upon the State in which the power of attorney is executed. Further, if a power of attorney executed in one State has to be sent to another State where the stamp duty payable is higher, for use, then the power of attorney should be stamped with the difference in the duty before it is so used. Otherwise, the power of attorney could be impounded.

If a power of attorney is executed in a foreign country, it should be stamped within three months of its being received in India. If it is not so stamped within the period of three months of its being brought to India, then the same will be deemed to be unstamped and cannot be acted upon.

The proxy lodged with the Company under Section 176 of the Companies Act, 1956, is also a power of attorney. In that case a shareholder who is not able to attend the meeting authorises another person on his behalf to attend and vote at the meeting. It is a particular power of attorney. The stamp duty of 30 paise payable on the proxy is uniform throughout India.

In connection with the registration/subscription of shares or debentures or transfer of shares/debentures invariably companies receive powers of attorney executed by certain non-resident shareholders or resident shareholders or by companies. These powers of attorney generally provide for making of investment and varying the investments so made and empowering the attorney to sign the transfer deeds for transfer of shares from or to the name of the principal.

### **Construction of a Power of Attorney**

As a rule, a power of attorney, should be construed strictly and general words must be interpreted in the light of the special powers, although they include incidental powers necessary for carrying out the authority. The general words used in the subsequent clauses of a power of attorney must be read with the special or specific powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers mentioned in the powers of attorney.

The following two well known rules of construction should be borne in mind while interpreting a power of attorney (*Mulla: Contract Act, Page 539*):

1. That regard must be had to the recitals, if any, as showing the scope and object of the power, as such recitals will control any general terms in the operative part of the instrument. Thus, when it was recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority continued only during the principal's absence.
2. Where special powers are afforded by general words, the general words are to be construed as limited to what is necessary for the exercise of the special power and as enlarging those powers only when necessary for the carrying out the purposes for which the authority is given.

Any power which has not been expressly delegated should not be implied. For

instance, if a delegate has been authorised to invest in shares in a company, it should not be implied that the power to sell has been delegated unless the authority for varying the investment has also been delegated to the attorney.

Similarly, the power of investment in shares does not automatically confer the power of transfer the shares purchased in exercise of the power. The power delegated for investment in shares or transfer of shares should not be deemed to include the power of investment in debentures of a company. Great care has, therefore, to be taken in interpreting a power of attorney.

Precisely, some of the principles governing the construction of a power of attorney are:

1. the operative part of the deed is controlled by the recitals;
2. where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts;
3. the general words do not confer general powers, but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose;
4. a power of attorney is construed so as to include all incidental powers necessary for its effective execution [A.I.R. 1972 Gauhati 122 (125)].

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within four corners of the instrument, either in express terms or by necessary implication (*Bank of Bengal v. Ramanathan Chetty*, 43 I.A. 48, 55).

### **Registration of Power of Attorney**

Registration of a power of attorney is not compulsory. Section 4 of the Powers-of-Attorney Act, 1882 provides that it may be deposited in the High Court or District Court within the local limits of whose jurisdiction the instrument is with an affidavit verifying its execution, and a copy may be presented at the office and stamped as the certified copy and it will then be sufficient evidence of the contents of the deed. In certain cases, registration of power of attorney may become compulsory under Section 17 of the Indian Registration Act, 1908. Thus, a power which authorises the donee to recover rents of immovable property belonging to the donor for the donee's own benefit is an assignment and requires registration under clause (b) of Sub-section (1) of Section 17 of the Registration Act. Similarly, a power of attorney which creates a charge on the immovable property referred to therein in favour of the donee of the power requires registration [*Indra Bibi v. Jain Sirdar*, (1908) I.L.R. 35 Cal. 845, 848].

In other cases, a mere general power of attorney, even though it deals with immovable property, need not be registered (*Kochuvareed v. Mariappa*, A.I.R. 1954 T.C. 10, 17) since it does not come under any of the documents specified in the Indian Registration Act as requiring registration.

## Letters of Authority

Letters of authority 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.

## LESSON ROUND-UP

- An assignment is a form of transfer of property and it is commonly used to refer the transfer of an actionable claim or a debt or any beneficial interest in moveable property. A transfer of an actionable claim is usually called an assignment thereof.
- A debt is property. It is an actionable claim and is heritable and assignable and it is treated as property under the Transfer of Property Act, 1882 and is known as "actionable claim".
- A debtor cannot claim or take advantage of non-payment of consideration for assignment.
- The Companies Act, 1956 while defining the nature of property in the shares of a company provides that "the shares or other interest of any member in a company shall be moveable property, transferable in the manner provided in the articles of the company."
- Provisions have been envisaged under Patents Act, Copyright Act, and Trade Marks Act pertaining to the assignment of patents trademarks and copyrights.
- Goodwill is an intangible asset. It represents the value to a business attaching to all the factors, internal and external, which enable it to earn a differential return of profit on the capital employed.
- Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits.
- The partnership is based on contract. This contract may be made either orally or in writing or even may be inferred from the course of dealing between the partners. In order to avoid all disputes relating to terms of partnership, it is suggested that a written document containing terms and conditions of partnership be executed between the partners. The deed is executed by all the partners and is drafted as an agreement to carry on certain business in partnership on certain terms and conditions.
- While drafting partnership deed we should incorporate all terms and conditions that govern a particular partnership business.
- An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustee. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll.
- While drafting a trust deed, it should be seen that every clause in the deed is

clear in its meaning. If there is any reference to any article, documents, rules, statutory Acts etc., the same are properly applied out.

- The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty. No particular or technical words are necessary but the words used must be definite and unequivocal.
- A power of attorney includes an instrument empowering a specified person to act for and in the name of the person executing it. It is always kept by the attorney. It may be either general or special, i.e., to do all acts or to do some particular act".
- A power of attorney can be executed in favour of more than one person. A power of attorney can be executed only in favour of a major.
- A power of attorney need not be attested. However, it would be advisable to execute the power of attorney before and have it authenticated by a Notary Public or any Court Judge/Magistrate, Indian Consul or Vice-Consul or representatives of the Central Government.
- Unless expressly or impliedly limited for a particular period, a general power of attorney will continue to be in force until expressly revoked or determined by the death of either party.
- Registration of a power of attorney is not compulsory.

## FOOTNOTES

- \* In case of listed securities, Section 22A of the Securities Contracts (Regulation) Act, 1956 applies w.e.f. 17.1.1986.

## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY VI - DRAFTING OF AGREEMENTS UNDER THE COMPANIES ACT**

#### **LEARNING OBJECTIVES**

The objective of this lesson is to make the students appreciate the skills involved in the drafting of company's agreements in particular:

- Pre-incorporation contracts
- Memorandum of association
- Articles of association
- Notices
- Underwriting
- Brokerage agreements
- Agreements for the Appointment of managing director, manager & secretary
- Deeds of amalgamation of companies

#### **INTRODUCTION**

The promoter of a company is a person who does the necessary preliminary work in connection with and incidental to the formation and the establishing of the company. The term 'promoter' is not a term of 'law' but of business. The existence of a promoter or promoters conceives an idea, develop it, formulates a scheme or project and takes all the necessary steps for the formation of a company to implement the project or the scheme. In the process he puts forth his scheme or the project and discusses the same with his friends, relations and business associates, and persuades them to join him in the project. The team of such associates, called the promoters, secure name availability from the concerned Registrar of Companies, arrange for the preparation of the memorandum and the articles of association of the proposed company and file them with the Registrar of Companies and get the company incorporated.

Before the company is registered by the Registrar promoters continue to be known as promoters. They gather funds for meeting the expenses in connection with the formation of the company and spend them, which are known and designated as "*preliminary expenses*" and a provision is made in the articles of association of the company authorising the company and its directors to reimburse promoters the preliminary expenses incurred by them, and also a provision for the formalisation of the contracts which the promoters of the company had entered into with third parties prior to the company coming into existence. Promoters usually enter into contracts with the prospective directors, solicitors, bankers, brokers, underwriters, auditors, secretary, manager and with those who offer to sell land, plant, machinery equipment etc. for implementing the proposed project. Such contracts are known as

"promoters' contracts" which are not binding on the company because the company had not come into existence when they were entered into with third parties by the company's promoters. However, as a matter of practice, the company, on its incorporation enters into fresh contracts with the third parties on the lines of the promoters' contracts, which then become binding on the company.

### **PROMOTERS' CONTRACT - PRE-INCORPORATION CONTRACTS**

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

When the company comes into existence, it is not bound by the pre-incorporation contracts even when it takes the benefit of the work done on its behalf. However, specific performance of a contract between a third party and the promoters may be successfully claimed by the third party against the company, when the company enters into possession of the property on the faith of the promoters' contract.

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

A company also cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit of the contract purporting to have been made on its behalf before it came into existence, as ratification by the company when formed is legally impossible. The doctrine of ratification applies only if an agent contracts for a principal who is in existence and who is competent to contract at the time of the contract by the agent.

Where a contract is made on behalf of principal known to both parties to be non-existent, the contract is deemed to have been entered into personally by the actual maker, i.e. the agent. A company may, if it desires, enter into a new contract, after its incorporation, with the other party which is known as *novation of promoter's contracts*; and if it makes a fresh contract in terms of the preliminary contract, the liability of the promoters comes to an end and if it does not make a fresh contract within a limited, period of time, either of the parties may rescind the contract.

The essential feature of novation is that the right under the original contract is relinquished and a new right referable to a new contract is created. The substituted contract must, in order to effect a novation, be enforceable one.

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

**A Specimen of Promoters' Contract for the Purchase of an Industrial Plot for setting up Industrial Unit of the Proposed Company ABC Ltd.**

THE AGREEMENT made on..... day of..... between Mr. A, son of Mr..... resident of....., Mr. B, son of Mr..... resident of..... and Mr. C, son of Mr....., resident of.....' (hereinafter referred to as "promoters") of the one part which expression shall, unless repugnant to the context include their heirs, legal representatives and assigns and Mr. "V" son of Mr..... resident..... (hereinafter referred as "Vendor") of the other part, which expression shall, unless repugnant to the context, include his heirs, legal representatives and assigns.

WHEREAS the promoters have been engaged for quite sometime in the past in promoting and forming a company to be known as ABC Ltd., which name has been made available to the promoters by the Registrar of Companies....., consequent upon which they have filed with the Registrar memorandum of association and articles of association for registration of the company;  
AND WHEREAS the memorandum and articles of association of the proposed ABC Ltd., empower the company and its directors to enter into agreements on its incorporation on the lines of the agreement entered into by the promoters for the purchase of land, plant, machinery, equipment and for hiring the services of persons required for and in connection with the formation and incorporation of the company;  
AND WHEREAS the Vendor is the absolute owner of industrial plot of land measuring..... and situated at..... and is desirous of selling the same;  
AND WHEREAS the promoters are desirous to buy the said plot of land for the proposed company ABC Ltd. to set up an industrial unit on its incorporation.  
NOW IT IS AGREED AND DECLARED BETWEEN AND BY THE PARTIES AS FOLLOWS:

That the said vendor shall sell and the promoters shall purchase the industrial Plot No..... situated in the..... Industrial Area, .....bounded on North by....., on South by....., on East by....., and on West by..... in consideration of the payment, by the promoters on the date of this agreement, of the sum of Rs..... and the balance of Rs..... on the date of the appearance of the vendor and the promoters before the Sub-Registrar..... at the time of registration of the deed of sale to this agreement.

2. The vendor shall satisfy the promoters or ABC Ltd., if incorporated by then, about the title of the vendor to the aforesaid piece of land within one month of the execution of this agreement and the promoters or their attorney shall be entitled to ask for such information as may be necessary to ascertain the title of the vendor and the vendor shall be bound to allow inspection of the title deeds

relating to the plot of land at his place within two months of the date of this agreement. On the satisfaction of the promoters as to the title of the vendor in respect of the said plot of land, the parties shall complete the transaction of the sale within six months of the date of this agreement.

3. The parties shall bear the expenses of sale equally. The purchaser shall pay to the vendor the expenses for purchase of stamp, a fortnight before the expiry of the period fixed for this agreement for completion of the sale and the promoters shall also at the same time deliver to the vendor a draft of the deed of sale which the vendor shall, if in proper form, execute at his expense in favour of the purchasers and present the same for registration on or before the date fixed for the completion of the sale transaction.
4. The vendor shall deliver actual possession of the plot of land to the promoters or the company on the date of payment of the balance of the price aforementioned and shall do all other acts that may be necessary or requisite to effectually put the promoters or ABC Ltd., as the case may be, in such possession.
5. In case there found to be any error or misdescription in area or the boundaries or the other specifications of the plot of land agreed to be conveyed to the promoters of ABC Ltd. or ABC Ltd., as the case may be, corresponding decrease or increase in price relating to the area and rectification of misdescription of the specification relating to boundaries etc. shall be permissible, and shall not form any ground for avoiding this agreement for sale of the plot of land.

IN WITNESS WHEREOF the parties aforementioned have signed this deed of acceptance of the terms thereof.

1. Witness Vendor
2. Witness Purchasers/Promoters of the Company  
ABC Limited, under incorporation.
3. Witness A
4. Witness B  
C

*(Schedule of Land)*

**A Specimen of Agreement entered into by and between ABC Ltd. on its Incorporation and Mr. .... Vendor of Industrial Plot No..... Situated..... who had earlier entered into an Agreement dated..... for the Sale of the said Plot of land to the Promoters of the Company.**

THIS AGREEMENT made and entered into the..... day of..... between Mr. 'V' son of Mr..... resident of..... (hereinafter called "the vendor") which expression shall, unless, repugnant to the context, include his heirs, legal representatives and assigns of the one part and ABC Ltd., a company incorporated under the Companies Act, 1956 and having its Registered Office at..... (hereinafter known as "the

company") which expression shall, unless repugnant to the context, include its legal representatives, of the other part.

WHEREAS the company was incorporated on..... under the Companies Act, 1956 as a public limited company with a nominal share capital of Rs..... divided into..... equity share of Rs..... each;

AND WHEREAS Mr. A, Mr. B and Mr, C have been engaged for quite sometime in the past in promoting and forming this company;

AND WHEREAS the said promoters of the company, Mr. A, Mr. B and Mr. C had entered into agreement with the vendor on the....., for the purchase of industrial plot of land No..... situate at....., a copy of the plan whereof is annexed hereto as Annexure-I;

AND WHEREAS the memorandum and articles of association of the company empower the company and its directors to enter into agreements with third parties on the terms and conditions of the agreements entered into by and between the promoters and the third parties for the purchase of land, plant, machinery, equipment etc. for the com-pany;

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES OF ONE PART AND PARTY OF THE OTHER PART:

That the said vendor shall sell and the company shall purchase the industrial plot No..... situate in the..... Industrial Area, .....more precisely described in the Schedule hereto in consideration of payment by the company on the date of this agreement of the sum of Rs..... and the balance of Rs..... on the date of the appearance of the vendor and the company before the Sub-Register, .....at the time of registration of the deed of sale pursuant to this agreement.

2. The company has already satisfied itself with regard to absolute title of the vendor in the said plot of land and has already given to the vendor a draft of the deed of conveyance and the vendor hereby agrees and undertakes to execute the same in favour of the company within a period of a fortnight of the date of execution hereof and present the same for registration within the said period of fort-night.
  3. The vendor shall deliver actual possession of the plot of land to the company on the date of payment of price aforementioned and shall do all other acts that may be necessary or requisite to effec-tually put the company in such possession.
- Signed and delivered by within named vendor in presence of:

Witness - 1.....

Witness - 2..... Signature of Vendor

Signed, sealed and delivered by within named company (purchaser)  
(Name of the Company)

Through its Director

Shri.....

Signature.....

In presence of:

Witness - 1.....

Witness - 2.....

*(Annexure or Schedule of Land)*

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

This Agreement made at New Delhi on this..... day of..... 1987 between Shri A of the 1st part, Shri B of the Second part and AB & Co. Ltd. (hereinafter referred to as 'the company') of the third part.

Whereas after the execution of the contract on 10th July, 19B7 (hereinafter referred to as "the said contract") between Shri A, the vendor, and Shri B, on behalf of the company, the said company AB & Co. Ltd. has been incorporated under the Companies Act, 1956.

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

1. The said contract dated 10th July, 2007 is hereby adopted by the company and shall be binding on the said Shri A and on the company in the same manner and shall take effect in all respects as if the company had been in existence at the date of the agreement.
2. Shri B who actually signed on behalf of the proposed company shall be discharged from all liability under the said contract as the company had adopted and ratified the said contracts.

In witness whereof the parties hereunto have put their hands and signatures and the company has caused its common seal affixed in the presence of Shri..... and Shri..... two directors who have set their respective hands and signatures the day and year first herein above written in terms of the Resolution passed in its Board of Directors in their meeting held on.....

Common

Seal

Witnesses:

.....

(Signature)

1.....

Director

2.....

.....

(Signature)

Director

Signatures of A .....

B.....

**MEMORANDUM OF ASSOCIATION**

Memorandum of association of the company is the fundamental formation document. It is the constitution and charter of the company. It contains the basic conditions on the strength of which the company is incorporated. Thus, it defines and confines the area of operation of the company. It lays down the area, beyond which the action of the company cannot go. Sections 13, 14 and 15 of Companies Act deal with contents, form and printing and signature of memorandum of association. Students are advised to be conversant with the above sections, as they are very relevant to drafting.

### **Drafting of Memorandum**

Draftsmen should know that memorandum is the main edifice upon which the whole structure of the company is erected. It is the basic document fundamental to its existence. Further, it is also to be noted that as it is the charter of the company defining scope of its activity and extent of power it could exercise, so that its share-holders, creditors, bankers and other third parties who deal with the company could know the range of the company's enterprise. Based on the provisions of Section 13, the main drafting requirements of contents of a Memorandum are summarised:

#### *I. Name of the company*

The words 'Limited' or 'Private Limited' as the case may be added as the last words in the name made available by Registrar of Companies (ROC).

#### *II. Registered office of the company*

Name of the State where registered office would be situated, be mentioned.

#### *III. Objects for which the company is established*

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

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. The powers of the company are construed with objects which need not be expressly given (*Cotman v. Brougham*). But the practice is otherwise.

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 ob-jects;
- iv. the same objects are not repeated in other clauses of ob-jects 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.

### *Main objects*

The objects which are intended to be pursued by the company on its incorporation and in the immediate foreseeable future are its main objects. The objects clause should be widest possible coverage in precise and clear expression. This will save the company from litigation on the ground that the object pursued by the company fall outside the permitted range of its activity. No hard and fast rule could be devised for drafting main objects of the company. But a successful drafting could be done with caution and planning. Further, it may be brought to the notice that alteration of the objects clause will entail, passing of special Resolution and confirmation of Company Law Board as per Section 14, which is a time consuming, cumbersome and costly. Normally not more than four objects are permitted by ROC. Hence one has to make himself very clear about the company's main objects and not to mistake ancillary object as main one. In short, the principal objects i.e. main objects, the company has finally decided upon and for which the company plans to undertake immediately or in the near future, are included in the Main Objects.

### *Objects incidental or ancillary*

The objects under this category are not independent objects and cannot be entered upon by the company independent of its main objects. These objects are pursued only to the extent they are necessary for attainment of the main objects. Some of the clauses which are commonly included in the objects incidental and ancillary to the main objects are enumerated below (*Palmer's Co. Law 90-91 21st Edn.*):

- i. A clause authorising the company to carry on the particular business which it proposes to carry on, and also to carry on various other business which it may probably or possibly be desirable to carry on;
- ii. A clause empowering the company to acquire any other business similar to its own;
- iii. A clause empowering the company to enter into any agreement for sharing profits, joint venture or other arrangement of a like nature with other persons or companies carrying on any similar business;
- iv. A clause empowering the company to take shares in other companies having similar objects, etc. such a power is commonly wanted, and not easily implied but may be implied, e.g. from a clause allowing amalgamation;
- v. A clause empowering the company to promote other companies for any purpose calculated to benefit the company;
- vi. A power generally to acquire property and rights which the company may think necessary or convenient for the purpose of its business. In dealing with

outsiders, it is found useful to have an express power like this, and so preclude any question of capacity;

- vii. A power to lend money and guarantee the performance of contracts by customers and others;
- viii. A power to borrow or raise money by the issue of debentures, debenture stock, or otherwise;
- ix. A power to draw, make, accept, endorse, discount and issue promissory notes, bills of exchange, debentures and other negotiable or transferable instruments;
- x. A power to sell and dispose of the undertaking of the company for shares, debentures or securities of any other company having objects altogether, or in part, similar to those of this company;
- xi. A power to obtain an Act of Parliament for enabling the company to carry out any purpose which may seem expedient; or to oppose any proceedings or applications which seem to prejudice directly or indirectly the interests of the company;
- xii. A power to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with, all or any part of the property and rights of the company;
- xiii. A declaration that the objects specified in the sub-clauses of the clause shall be regarded as independent objects, and shall be construed independently of the other sub-clauses of it and that none of the objects mentioned in any sub-clauses shall be deemed to be merely subsidiary to the objects in any other sub-clause (except where otherwise expressed in such sub-clauses).

Further, it may include power to make donations to political or charitable trusts, amalgamations with other companies, extension of its operations abroad etc. No borderline could be created between the Main Objects and objects incidental and ancillary to main objects. The attainment of main objects should be facilitated by the objects incidental and ancillary. This makes it imperative that reasonable nexus or resemblance should exist or to be shown to exist in objects incidental and ancillary with main objects while drafting these clauses.

### *Other Objects*

Third part of the objects clause enumerates the objects which are covered neither by main objects nor by objects ancillary or incidental thereto, but which are nevertheless necessary to enable the company to undertake all types of business activities which the company may anticipate to pursue. The types of clauses which are commonly included in this part are mentioned below:

- i. a clause empowering the company to deal in machinery, appliances, plants, tools, transport vehicles of all kinds and descriptions, etc.;
- ii. a clause empowering the company to act as insurance agents, financiers, underwriters, commission agents and forwarding and other agents;
- iii. a clause empowering the company to acquire land, buildings, mines, forests,

- plantation etc.;
- iv. a clause empowering the company to carry on the business of manufacture, import, processing and dealing in industrial chemicals, pharmaceuticals and medical products;
- v. a power to manufacture and deal in fats, fertilisers, fungi-cides, insecticides, etc.;
- vi. a power to generate or distribute electricity or other motive power;
- vii. a power to undertake, sponsor and carry out programmes of rural development;
- viii. a power to carry on any business capable of being conveniently carried on with the other objects;
- ix. a clause empowering the company to search for, develop or produce minerals and their products and by-products;
- x. a power to undertake, purchase or otherwise acquire and hold and dispose of and to deal in shares, debentures and other securities.
- xi. to undertake, promote, sponsor or assist any activity for the promotion or growth of national economy and for dis-charging social and moral responsibility of the company towards the public or any section thereof.

Nevertheless, the other objects of the company to be included in objects clause are simple as these need not resemble to either the main objects or the objects incidental and ancilliary. But other objects should not be ambiguous and irrelevant to the main objects of the company. The use of words "and to do all such other acts, as are incidental or conducive or as the company may think conducive to the attainment of the above objects are used at the end of this clause.

It may be clearly understood that as per Section 149, a company cannot commence any business in other objects, unless a Special Resolution is passed at General Meeting and complete all the requirements as per the Act. It is, therefore, desirable that no object a company wants to undertake immediately on incorporation in near future, be included in other objects.

#### *Objects clause to mention the States of operation*

In the case of a company other than a trading company, objects clause must also mention the States to whose territories the objects of the company extend, if the objects of the company are not confined to one State.

#### *IV. The liability of members*

Limited liability of members by shares or guarantee should be mentioned. In case of a company limited by guarantee, a clause as required vide Section 13(3) of the Act be added.

#### *V. Authorised share capital*

Total amount of share capital with division into shares should be mentioned without adding details of classification of shares. A special mention is also required in drafting this clause. The authorised share capital should be sufficient

for carrying out the objects mentioned in the memorandum. It should be realistic view of the intended objects of the company. It should have a reasonable nexus with the objects; the finance required to carry out the objects, giving margin to the non-owner's contribution, possible conversion of loans future issues of shares etc. It need not be mentioned, here about the difficulties involved in alteration of this clause.

*VI. Name, address, description and occupation of each subscriber*

Seven in case of Public Ltd. companies and two in case of Private Ltd. companies and signatures with number of equity shares taken by each subscriber.

*VII. Place*

*VIII. Date*

The Memorandum shall be printed divided into paragraphs consecutively and signed by each subscriber with name, address, description and occupation if any in the presence of atleast two witnesses who shall attest the signature and shall likewise put his name, address, description and occupation, if any, as per Section 15.

Usually draft Memorandum is informally got approved with ROC before it is printed.

## **ARTICLE OF ASSOCIATION**

Articles of Association is another equally important document for incorporation of a limited company. Articles are rules and regulations for management of internal affairs of the company. It constitute a contract between the company and its members and members *inter se*. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum, Section 36 emphasises its importance as to its contractual force. Articles should be in conformity with the provisions of Memorandum and the Companies Act.

Sections 26, 28, 29, 30, 31 among other sections are very relevant in drafting of Articles. Students are advised to be conversant with these provisions.

### **Contents of Articles**

The articles of association usually contain provisions relating to the following matters:

Share capital, rights of shareholders, variation of these rights, payment of commission, share certificates:

- Lien on shares;
- Calls on shares;
- Transfer of shares;
- Transmission of shares;
- Forfeiture of shares;
- Conversion of shares into stock;
- Share warrants;

- Alteration of capital;
- General meetings and proceedings thereat;
- Voting rights of members, voting and poll, proxies;
- Directors, Managing/Whole-time directors/their appointment, remuneration, qualifications, powers and proceedings of Board of directors;
- Dividends and reserves;
- Accounts and audit;
- Borrowing powers;
- Capitalisation of profits;
- Common Seal;
- Secrecy clause; and
- Winding up.

Section 30 of the Act prescribes that articles shall be printed be divided into paragraphs, numbered consecutively and be signed by each subscriber of the memorandum of association, who shall add his address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

### **Drafting of Articles**

Utmost care is required to be taken to draft the Articles. It should contain strictly only relevant and necessary matters. In its draft, efforts must be made to incorporate comprehensive provisions so as to cover all statutory requirements and all possible contingencies. Any alteration require 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.

## **NOTICES**

A company is required to issue notices for various purposes. Some of the instances, when a notice is issued, are mentioned hereinunder:

*Instances of Notices Issued by Company as per Companies Act*

- |               |   |   |
|---------------|---|---|
| I. To Members | : | Statutory Meeting<br>Ordinary General Meeting<br>Annual General |
|---------------|---|---|

- |  |          |   |
|--|----------|---|
| <p>II. To Directors</p> <p>III. To Debenture holders<br/>(Notice of partial redemption).</p> <p>IV. To Registrar of Companies<br/>(Books of accounts - Notice of address at which they are maintained).</p> <p>V. To General Public<br/>(Notice for increasing number of Directors beyond 12).</p> <p>VI. To Shareholders Individually<br/>(Notice of liability - forfeiture of shares).</p> | <p>:</p> | <p>Meeting<br/>Class Meeting.<br/>Board Meetings<br/>Committee Meetings<br/>Individually.</p> |
|--|----------|---|

### **Essential features of notice of meetings**

The essential features of a notice are as follows:

1. The notice must fairly and intelligently convey the purpose for which the meeting is called. It should not be misleading or equivocal. A benevolent construction is not to be applied in construing the notice.
2. The notice must not be contingent or conditional, e.g., on some other resolution being passed, but the notice which is certain is valid though the business to which it refers is contingent.
3. The notice must be frank, open, clear, satisfactory and free from 'trickness'. It should fairly disclose the purpose for which the meeting is called.
4. Any resolution not covered by the terms of the notice cannot validly be passed by a meeting.
5. Except in the case of a special resolution, it is not necessary that the resolution as passed at the meeting should be in the identical terms of the resolution specified in the notice of meeting, provided the resolution is, in substance, covered by the notice.
6. If one resolution is only to be effective on the failure of other resolutions simultaneously proposed, either they must be worded accordingly or they must be set out as a single resolution and the notice must be drafted accordingly.
7. Notices are not to be construed with excessive strictness; substantial compliance with the articles is sufficient.
8. Notices are to be construed as a businessman would construe them, and to be understood in the ordinary sense, subject, however, to the rule that the shareholders, to whom they are addressed, must read them in the light of the Acts of Parliament and the terms of the memorandum and articles of the

company concerned which, in law, they are presumed to know. Accordingly, where directors are interested in any contract which is to be submitted to a meeting of the company for conformation, The notice convening the meeting should give particulars as regards such interest.

### **General Guidelines for Drafting of Notices**

1. Where the form of notice is prescribed by statutory rules or forms, it has necessarily to adhere to what is prescribed.
2. One has to study, the nature of the notice, the circumstances which warrant their issue or service. The language of the notice depends upon whether it is addressed generally or it is meant to an individual or a class or an Government official.
3. Notice shall be dated, signed by authorised person, mention date, place time and nature of meeting [Section 172(1)].
4. One of the important contents of the notice is to state the business to be transacted at the meeting. Either it be seperately enclosed or incorporated in the notice itself [Section 172(1)].
5. Another important feature of the notice is that, it should relate to the event either taken place or which is likely to take place, the time within which any particular compliance is required to be made either by person receiving the notice, or otherwise, the authority issuing the notice and the person(s) for whom it is meant.
6. Explanatory statement (Section 173) requirement shall be complied with as regards to special business to be transacted at the meeting. It should contain material facts, such as the nature of interest; extent of shareholdings etc. of directors/Manager as required as per Section 173(2).
7. If the meeting is to accord approval to a document, the explanatory statement must also state the time and place where that document can be inspected [Section 173(3)]
8. Where the resolution is to be passed 'as a special resolution', the intention to propose the resolution as such must also be stated in the notice [Section 189(2) (a)].
9. In the case of companies having share capital, the notice should also state with reasonable prominence that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of himself and the proxy need not be a member [Section 176(2)]. This must appear in the body of the notice before the signature of the authorised person.
10. If the notice is published in a newspaper mainly to satisfy the requirement of giving a deemed notice to those members who have no registered address in India and who have not supplied any address within India for the giving of notices to him, the statement of material facts need not be annexed to the notice, but it should be mentioned in the notice that the statement has been forwarded individually to the members [proviso to sub-section (2) of Section 172].
11. Notice should be clear, concise to the point which any reader can make out

quickly. Use of bold letters for key aspects is ideal.

12. One has to comply with Section 190 about special notice, proper serving of notice, duty to give notice in time, and provision of statutory length of notice etc.
13. Notice if required may warrant, the receiver to act upon, and it should mention the consequences in case of failure to act.

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

*(For specimen of some of the notices, students are advised to refer Chapter XI of the Company Secretarial Practice study material of the Professional Programme.)*

## **UNDERWRITING AND BROKERAGE AGREEMENTS**

Underwriting is an insurance against risk. When shares or debentures of a company are issued, they are, by and large, underwritten to ensure that all the shares or debentures issued are taken up and thus the required capital is raised.

Before entering into an underwriting arrangement with a member of any recognised stock exchange, it is the duty of the directors of the concerned company to ensure that the underwriter has sufficient financial resources to meet any obligation which may devolve upon him in the event of the issue not being fully subscribed by public.

### **Power of a Company to Pay Brokerage/Underwriting Commission**

Section 76 of the Companies Act, 1956 permits a company to pay certain commissions and prohibits the payment of all other commissions, discounts etc. The Section 76(1) lays down:

- "(1) A company may pay a commission to any person in consideration of —
- a. his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in, or debentures of, the company; or
  - b. his procuring or agreeing to procure subscription, whether absolute or conditional, for any shares in, or debentures of the company, if the following conditions are fulfilled—
    - i. the payment of the commission is authorised by the articles;
    - ii. the commission paid or agreed to be paid does not exceed in the case of shares, five per cent of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is less, and in the case of debentures, two and a half per cent of the price at which the debentures are issued or the amount or rate authorised by the articles, whichever is less;
    - iii. the amount or rate per cent of the commission paid or agreed to be paid is – in the case of shares or debentures offered to the public for subscription, disclosed in the prospectus, and in the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed before the payment of the commission with the Registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares or debentures, is issued, also

- disclosed in that circular or notice;
- iv. the number of shares or debentures which persons have agreed for a commission to subscribe absolutely or conditionally is disclosed in the manner aforesaid; and
  - v. a copy of the contract for the payment of the commission is delivered to the Registrar at the time of delivery of the prospectus or the statement in lieu of prospectus for registration."

**Specimen Agreement for Acting as Broker to an Issue**

Name and address of the firm of brokers who agree to act as brokers.

Ref. No..... Date.....

The Board of Directors  
 (Name and address of the company  
 for whose public issue the firm  
 agrees to act as broker)

Dear Sir(s),

Re: **Proposed public issue of..... (type of security) Shares/  
 Debentures of Rs..... each for cash at par of.....Ltd.**

We, the undersigned, hereby testify and consent to act as Brokers to the Issue of..... Shares/Debentures of Rs..... each for cash at par as captioned above by..... Ltd. and to our name being inserted as Brokers in the prospectus which the company intends to issue in respect of the proposed issue of capital and we hereby authorise the said company to deliver this consent to the Registrar of Companies..... pursuant to Section 60 of the Companies Act, 1956.

As required under Section 76(l)(v) of the Companies Act, 1956 as amended by the Companies (Amendment) Act, 1965, we are agreeable to accept one and a half per cent on the issue price as brokerage on allotment made in respect of applications bearing our rubber stamp as brokers.

Thanking you,  
 Yours faithfully,  
 For.....

**Specimen Underwriting Agreement**

Name and address of the firm of  
 brokers  
 who agree to act as underwriters.

(Letter  
 form)

Ref. No.....

Date.....

The Board of Directors

(Name and address of the  
company  
for whose public issue the firm  
agrees to act as underwriter)

Dear Sir(s),

**Re: Proposed Public Issue of Equity Shares**

We, hereby record the terms on which we (hereinafter referred as "underwriters") have agreed to underwrite..... Equity Shares of the aggregate nominal value of Rs..... out of the total issue of..... Equity Shares to be offered to the public at Rs...../- each for cash at par.

1. The prospectus as approved by the underwriters will be delivered to the Registrar of Companies..... on or before..... for registration in accordance with the provisions of Section 60 of the Companies Act, 1956. Sufficient number of copies of the prospectus and application forms shall be printed and made available to the underwriters, brokers and members of the public who intend to apply for the Equity Shares as soon as possible thereafter.
2. Underwriters shall be entitled to arrange sub-underwriting with respect to their respective commitments for their own account on terms to be arranged at their discretion with their sub-underwriters.
3. If by the closing date of the subscription list or such earlier date as may be agreed to by the underwriters, the Equity Shares offered to the public are not subscribed in full by the public and the application money payable in respect thereto is not received by you, you will within 14 days or such extended time as may be agreed to by the underwriters, notify the underwriters in writing as to the amount/number of Equity Shares which have not been so subscribed. The underwriters shall within 21 days after the receipt of such intimation apply for and subscribe such unsubscribed amount/number of Equity Shares and pay or procure to be paid the money payable on application in respect of such Equity Shares in proportion that the amount underwritten by each of them bears to the total amount of the issue.
4. In determining the amount/number of Equity Shares to be taken up by the underwriters the following factors shall be taken into consideration:
  - a. In no circumstances will the underwriters be liable to take up Equity Shares more than the amount underwritten by them.
  - b. All applications made before the closing of the subscription list by the underwriters, or on forms of application bearing the stamp of the underwriters, and not withdrawn in the meantime shall be taken into account in *pro tanto* reduction of the liability of the underwriters under this underwriting agreement.
  - c. After scrutiny of the applications received, the total shortfall shall first be allocated among all persons who have underwritten the issue and who have not fulfilled their quota, in proportion to the amount underwritten by each of

them.

- d. Credit shall be given to each underwriter who has not fulfilled his quota in relation to applications made by members of the public independently proportionately to the amount underwritten by each underwriter, any amount or such credit being in excess of the commitment of any underwriter being similarly shared proportionately by the others.
5. Subject to the terms of the prospectus, you will allot Equity Shares for which applications have been received as soon as possible and despatch Equity Share Certificates within six months of such allotment.
6. In consideration of the underwriting you will, within 14 days from the date on which we shall have fulfilled our obligation, pay the underwriters a commission at the rate of two and a half per cent on the issue of the amount/ number of Equity Shares underwritten by the underwriters.
7. Notwithstanding anything stated above the underwriters shall have the option to be exercised by them at any time prior to the date fixed finally for publication of the "Announcement" of terminating underwriting arrangement in the event of a complete breakdown or dislocation of business in the financial markets of the cities of Calcutta, Bombay, Madras and Delhi due to war, insurrection, civil commotion or any other serious or sustained or political or industrial disturbances or if the whole present basis of Stock Exchange prices in any such city should undergo substantial change through the occurrences of such catastrophe or similar event at present not foreseen. In the event of underwriters exercising such option they shall be released from all obligations arising out of the underwriting agreement.
8. Our offer is valid subject to your subscription list opening on or before.....

Please acknowledge receipt of this letter and intimate to us your acceptance of the terms and conditions mentioned above.

Thanking you,

Yours faithfully,

For.....

### **Underwriting Contract**

An agreement made the..... day of..... 20..... between.....

of..... (hereinafter called the underwriters) of the one part, and

.....Ltd. whose registered office is situate at..... (hereinafter called the 'the company') of the other part:

Whereas the company is about to offer for public subscription as issue of..... shares of..... each in accordance with the terms of the draft prospectus a copy of which is annexed hereto, or with such modifications therein as may be mutually agreed upon between the company and the underwriters:

Now it is hereby agreed as follows:

1. If the said..... shares shall on or before the..... day of..... 20..... (or such latter date as shall be mutually agreed upon by the parties hereto not after than the..... day of..... 20.....) be offered by the company for subscription by the public at par on the terms of such prospectus as aforesaid, the underwriters shall on or before the closing of the subscription list apply at par for the said..... shares.  
The said prospectus shall be issued in the form already approved by the underwriters or with such modification, if any, as shall mutually agreed between the company and the underwriters.
2. If on the closing of the lists under the said prospectus the said..... shares shall be allotted in respect of applications from the public the responsibility of the underwriters is to cease and no allotment is to be made under this agreement but if the said..... shares shall not be allotted to the public but any smaller number of such shares is so allotted, the undertaking of the underwriters is to stand for the difference between the said..... shares and the number of the shares allotted to the public.
3. The company shall pay to the underwriters in cash within..... days from the allotment of the said..... shares a commission at the rate of p.c. on the nominal value of the shares.
4. This agreement is to be irrevocable on the part of the underwriters and is to be sufficient in itself to authorise the company in the event of the underwriters not applying for the said..... shares to cause application to be made for such shares or any part thereof in the name and on behalf of the underwriters in accordance with the terms of the said prospectus and authorise the directors of the company to allot the said..... shares of the company or any part thereof to the underwriters (but subject to the provisions of this agreement) and in the event of the company causing an application to be made for such shares in the name of the underwriters, the underwriters shall hold the company and the said applicants harmless and indemnified in respect of such application.

### **Contract of Appointment with Managing Director**

According to Section 2(26) of the Companies Act, 1956, "managing director" means "a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called." While drafting a contract of appointment, the following points have to be taken care of:

The person who is being appointed as managing director must be a director of the company; and

He must be entrusted with substantial powers of management.

Usually the articles of association of companies empower the Board of directors to

appoint one or more of the directors as managing director(s) and fix their remuneration subject to the provisions of Sections 269, 309, 310, 311 and other applicable provisions of the Act. The Board of directors while appointing a director as managing director, critically examines the draft agreement prepared by the secretary for the appointment of the managing director and after having approved the same with or without any modification, authorises one of its directors to sign and execute for and on behalf of the company, the agreement for the appointment of the managing director. It should, therefore, be made sure that the person executing the agreement on behalf of the company is duly authorised by the Board of directors in this regard.

Being an agreement, such a contract must have all the other essential ingredients of a contract under the Indian Contract Act, 1872, namely,

- i. free consent of parties;
- ii. competence to contract;
- iii. for a lawful consideration;
- iv. with a lawful object; and
- v. are not expressly declared to be void in the Act (Section 10).

Section 11 of the Contract Act lays down that "every person is competent to contract who is of the age of majority, according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

Section 12 of the said Act provides that a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

According to Section 14 of the Contract Act, consent is said to be free when it is not caused by –

- coercion;
- undue influence;
- fraud;
- misrepresentation; or
- mistake.

### **Specimen Agreement of Service as a Managing Director of a Company**

THIS AGREEMENT is made on the..... day of..... 2007

between..... Ltd., a company incorporated under the Companies Act, 1956 and having its Registered Office at..... (hereinafter called "Company" of the one part and Mr..... son of Mr..... resident of..... (hereinafter called "the Managing Director" of the other part).

It is hereby agreed as follows:

1. The company hereby appoints subject to the approval of the Government of India under Section 269 of the Companies Act, 1956, Mr..... as Managing Director of the company for period of five years with effect from..... and the Managing Director hereby agrees to serve the company in such capacity for a period of five years with effect from.....
2. The Managing Director shall exercise and perform such powers and duties as the Board of directors of the company (hereinafter called "the Board") shall, from time to time, determine, and subject to any directions and restrictions, from time to time, given and imposed by the Board and subject to the restrictions contained hereinafter, he shall have the general control, management and superintendence of the business of the company with power to appoint and dismiss employees (other than officers of the company drawing a basic pay of Rs. 3000/- and above per month) and to enter into contracts on behalf of the company in the ordinary course of business and to do and perform all other acts and things, which in the ordinary course of business he may consider necessary or proper or in the interest of the company.
3. Without prejudice to the generality of the powers vested in the Managing Director under the preceding clause hereof, the Managing Director shall be entitled to exercise the following powers—
  - a. With Board's approval singly or together with other authorised officer(s) of the company, to open and operate on any banking or other account and to draw, make, accept, execute, endorse, discount, negotiate, retire, pay, satisfy and assign cheques, drafts, bills of exchange, promissory notes, hundis, interest and dividend warrants and other negotiable or transferable instruments or securities;
  - b. Together with other authorised officer(s) of the company to borrow moneys with or without security, but not exceeding Rs. five lakhs at a time from one party;
  - c. To incur capital expenditure up to a sum of Rs. five lakhs during any financial year;
  - d. Together with other authorised officer(s) of the company, to invest funds of the company in approved securities (other than in shares of other companies) and on fixed deposit with the company's bankers provided that such investments in any one financial year shall not exceed Rs. twenty lakhs;
  - e. To engage employees and other servants for the company at a basic salary not exceeding Rs. 3000/- per month within the budget sanctioned by the Board;
  - f. To increase the salary or the remuneration of any employee or servant of the company whose basic salary does not exceed Rs. 2,000/- per month. General increments must be with the Board's approval;
  - g. Together with other authorised officer(s) of the company, to enter into contracts for the purchase of goods and hiring of services for the company

which contracts do not extend over a period of one year or exceed in value the sum of Rs. ten lakhs;

- h. To institute, prosecute, defend, oppose, appear or appeal, to compromise, refer to arbitration, abandon subject to judgment, proceed to judgment and execution or become non-suited in any legal proceedings relating to customs or excise duties, tax on income, profits and capital and taxation generally or otherwise.
4. The Managing Director shall, throughout the said term, devote the whole of his time, attention and abilities to the business of the company, and shall obey the orders, from time to time, of the Board and in all respects conform to and comply with the directions and regulations made by the Board, and shall faithfully serve the company and use his utmost endeavour to promote the interest thereof.
  5. The company shall pay to the Managing Director during the continuance of this agreement in consideration of the performance of his duties –
    - a. a salary at the rate of Rs..... per month;
    - b. the actual travelling expenses incurred by the Managing Director in or about the business of the company;
    - c. the actual entertainment expenses and approved club membership fees reasonably incurred by the Managing Director in or about the business of the company;
    - d. the actual hospital and medical expenses which have been incurred by the Managing Director for himself, his wife, dependent parents and his minor children, provided that such expenses during the three consecutive financial years shall not exceed Rs.....
    - e. The Managing Director shall be entitled to use the company's car, all the expenses for maintenance and running of the same including salary of the driver to be borne by the company;
    - f. The company shall provide the Managing Director with rent free furnished accommodation and will pay electricity and water charges;
    - g. He shall also be entitled to use the company's telephone at his residence, the charges whereof shall be borne by the company;
    - h. The Managing Director shall be entitled to participate in any provident fund and gratuity fund or scheme for the employees which the company may establish;
    - i. The Managing Director shall be entitled to such increments from time to time as the Board may in the discretion determine;
    - j. The Managing Director shall be entitled to privilege annual leave on full salary for a period of one month, such leave to be taken at such time to be previously approved by the Board; Provided that the Board shall be entitled, at its sole and uncontrolled discretion, to permit the Managing Director to accumulate such leave for not more than three months; provided further that any leave not availed of by the Managing Director shall be encashable.

6. The Managing Director shall not during the period of his employment, and without the previous consent in writing of the Board, engage or interest himself either directly or indirectly in the business or affairs of any other person, firm, company, body corporate or concern or in any undertaking or business of a nature similar to or competing with the company's business and further shall not, in any manner, whether directly or indirectly, use, apply or utilise his knowledge or experience for or in the interest of any such person, firm, company, body corporate or concern as aforesaid or any such competing undertaking or business as aforesaid.
7. The Managing Director shall not, during the continuance of his employment or any time thereafter, divulge or disclose to any person, firm, company, body corporate or concern, whatsoever or make any use whatever for his own or for whatever purpose of any confidential information or knowledge obtained by him during his employment of the business or affairs of the company or of any trade secrets or secret processes of the company and the Managing Director shall, during the continuance of his employment hereunder, also use his best endeavours to prevent any other person, firm, company, body corporate or concern from doing so.
8. Any property of the company or relating to the business of the company, including memoranda, notes, records, reports, plates, sketches, plans, or other documents which may be in the possession or under the control of the Managing Director or to which the Managing Director has at any time access, shall at the time of the termination of his employment be delivered by the Managing Director to the company or as it shall direct and the Managing Director shall not be entitled to the copyright in any such document which he hereby acknowledge to be vested in the company or its. assigns and binds himself not to retain copies of any of them.

The Managing Director shall, from time to time, during his employment hereunder, fully disclose to the company the progress of his investigation and any discoveries he may make himself or in conjunction with others and if at any time hereafter he shall make himself or in conjunction with others any improvement, invention or discovery arising out of or in connection with the said employment he shall forthwith disclose to the Company or any patent agent appointed by it a full and complete description of the nature of the said improvement, invention or discovery and the mode of performing the same.
9. The whole interest of the Managing Director in the said improvement, invention or discovery and in all future improvements thereon at any time discovered or invented by the Managing Director alone or in conjunction as aforesaid, shall be the sole and absolute property of the Company and the Managing Director, if and whenever required by the Company during the period of employment or after the termination thereof shall at the expense of the Company, join with the Company in applying for letters patent, design registration or other forms of protection in India and in such other countries as the Company may direct for the said

improvement, invention or discovery or any such improvement thereon and shall, on the request by, and at the expense of the Company, execute, sign and do all applications, assignments, instruments and things necessary to vest the whole of his interest in the said improvements, invention or discovery or improvement thereon and any letters patent or other protection that may be obtained in respect thereof, in the Company or person or persons appointed by it.

10. If the Managing Director shall at any time be prevented by ill-health or accident from performing his duties hereunder, he shall inform the Company and if he shall be unable by reason of ill-health or accident for a period of sixty days in any period of twelve consecutive calendar months to perform his duties hereunder, the Company may terminate his employment.
11. The Company shall be entitled to terminate this agreement in the event of the Managing Director being guilty of misconduct or such inattention to or negligence in the discharge of his duties or in the conduct of the Company's business or of any other act of omission or commission inconsistent with his duties as the Managing Director or any breach of his agreement.
12. If before the expiration of this agreement the tenure of office of the Managing Director shall be determined by reason of a reconstruction or amalgamation whether by the winding up of the Company or otherwise, the Managing Director shall have no claim against the Company for damages.
13. The Company shall be at liberty from time to time to appoint a person or persons to be Managing Director(s) jointly with the Managing Director.  
The Managing Director hereby agrees that he will not, at any time, after the termination of this agreement, represent himself as being in any way connected with or interested in the business of the company.

IN WITNESS WHEREOF the parties hereto have set their hands the day, month and the year first above written.

Witnesses: for and on behalf of the company

1.

2. Managing Director

### **Contract of Appointment with Manager**

Section 2(24) of the Companies Act, 1956 defines "Manager" as an individual who, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of the company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not. The above definition highlights the following points, which must be borne in mind by the secretary while drafting an agreement for the appointment of a manager:

1. a manager has to be an individual only;
2. a manager has the management of the whole, or substantially the whole, of the affairs of the company;

3. a manager functions subject to the superintendence, control and direction of the Board of directors of the company;
4. a manager may be under a contract or not.

If, for the appointment of a manager, an agreement is not drawn and executed, then the secretary must draft a detailed Board resolution approving the appointment of a manager, making it very clear that the manager shall have the management of the whole or substantially the whole of the affairs of the company, and shall function under the superintendence, control and direction of the Board of directors, which means that he shall act under the directions of the Board, his actions shall be subject to the scrutiny and supervision of the Board and finally the Board shall direct the manager in his day-to-day management of the affairs of the company. As against a managing director, who is entrusted by the Board of directors with substantial powers of management, a manager by virtue of his appointment, has the power of management. A managing director after the powers of management have been entrusted to him performs his day-to-day functions independently according to the mandate of the Board, whereas a manager acts under the superintendence, control and direction of the Board. Keeping the above subtleties between the two managerial personnel in view, the secretary shall proceed to draft an agreement for the appointment of a manager.

### **Specimen Agreement for the Appointment of a Manager in a Company**

AN AGREEMENT made this..... day of..... between..... Ltd., a company incorporated under the Companies Act, 1956 and having its Registered Office at....., (hereinafter referred to as the Company, which expression shall, unless repugnant to the context or contrary to the meaning thereof include its legal representatives) of the one part and Mr....., son of Mr....., resident of..... (hereinafter called the manager) of the other part.

WHEREAS the company intends to appoint a Manager and Mr....., has been considered as a suitable and competent person for the said post;

AND WHEREAS the said Mr..... has agreed to accept his appointment as the Manager of the Company.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. The said Mr..... is hereby appointed on the terms and conditions hereinafter provided, as the Manager of the Company for a term of five years commencing..... on a monthly remuneration of Rs. ... subject to the approval of his appointment by the Central Government under Section 269 of the Companies Act, 1956 and also subject to the approval of his remuneration by the Central Government pursuant to the provisions of Sections 198, 310, 311, 312, 317 and 387 and other applicable provisions of the Act.
2. The Manager shall be entitled to other pecuniary benefits which are enjoyable by other employees of the company.
3. The Manager shall be paid travelling allowance for the tours he makes in connection with the, business of the company to perform his duties or to carry out

- the directions of the Board of Directors of the company.
4. The Manager shall be entitled to bonus in accordance with the provisions of the law.
  5. The Manager shall be entitled to annual increment of his remuneration at the rate of Rs..... per annum.
  6. The Manager shall be on probation for a period of six months. If his work is found satisfactory, his appointment shall continue for a full term of five years including the period of probation.
  7. Either the company or the Manager shall be entitled to terminate this agreement by, giving the other, notice in writing of sixty days but the company may terminate this agreement by paying two months' remuneration to the Manager in lieu of the notice.
  8. If the Manager dies during his continuance of service, his salary, remuneration, bonuses, allowances etc. for the current financial year shall be paid to his heirs, legal representatives, executors, administrators in a rateable proportion of what he would have received if he had lived and had continued in the service of the company for the whole of that year.
  9. The Manager shall not be entitled to make any claim for damages against the company other than liquidated damages, if his services are determined on account of a reconstruction or amalgamation whether by the winding up of the company or otherwise before the expiration of this agreement.
  10. The Manager shall devote the whole of his time and attention to the business of the company during the term of his service with the company and shall work with due diligence and using his abilities to his best. He shall comply with the directions issued by the Board of Directors of the company from time to time. He shall obey the orders issued by the Board of Directors. He shall do his best to promote the interest of the company and shall faithfully serve the company.
  11. The Manager shall perform the duties towards the company and exercise the powers assigned to or vested in him by the Articles of Association of the company or by the Board of Directors of the company.
  12. The Manager shall not disclose during the term of his service any information obtained by him in relation to the business of the company while attending to his duties and discharging his functions or exercising his powers as the Manager even to such employees of the company as have no concern with the information or to any person not connected with the company.
  13. The Manager shall not divulge any secret relating to any working process, improvement in the working process used by the company, invention leading to improvement in the working process or introduction of a new working process usable in the business of the company, invention relating to any of the articles connected with the business of the company, business matters, administrative affairs of the company, to any person not connected with such process, invention, matter and affairs either during the period of his employment in the company or



Essential Commodities Act and the Orders issued thereunder, drafting of various corporate documents, reports etc. and, accounts, audit, banking and finance. The appointment of a Company Secretary is done by the Board of Directors and he functions at the pleasure of the Board. He acts under the Board's instructions but at the same time he is adviser to the Board in all corporate matters. Therefore, the relationship between the Board and the Company Secretary has to be very cordial and there must be perfect understanding between the two, particularly with the Chairman/Managing director, executive director and other Chief Executive Officers. Usually the appointment of a Company Secretary is made by an appointment letter signed and issued by the Chief Executive Officer, who may be the managing director, executive director, whole-time director etc. under specific authority of the Board.

This letter is an offer by the company to the prospective Company Secretary and when he accepts the same it become a binding contract between him and the company and their relationship is governed by the terms and conditions thereof. "Secretary", according to Section 2(45) of the Companies Act, 1956 means any individual possessing . the prescribed qualifications appointed to perform the duties which may be performed by a secretary under the Act and any other ministerial or administrative duties.

The Government of India has formulated the Companies (Appointment and Qualifications of Secretary) Rules, 1988.

The Companies Act lays down various duties and functions which are to be performed by a Company Secretary. Therefore, even if the letter of appointment of a Company Secretary or an agreement between the company and the Company Secretary is silent on those statutory duties and functions, a Company Secretary is bound by law to perform them strictly according to the various provisions of the Act and the Rules framed thereunder. Therefore, the letter of appointment or the agreement need not detail all those duties. Usually it contains the fact of offer by the company, the date on or before which he is required to join the service of the company, his salary and 'perks', his answerability to the Board of Directors and/or other senior executives of the company, his relationship with other departmental heads, his leave eligibility and other benefits, commitment on his part not to divulge the secrets of the company, so on and so forth.

### **A Specimen of the Letter of Offer to the Prospective Company Secretary**

Name and Address of the company.

Ref. No.

Date:

Mr.....

.....

Dear Sir,

I have been directed to advise you that the Board of Directors of the company have decided to appoint you as Secretary of the company and the said assignment is

hereby offered to you. You are requested to join the service of the company on or before..... and contact the undersigned so that you may be introduced to the concerned persons before you start functioning.

You will be considered to have been appointed with effect from the day you actually join duty.

2. The company shall pay to you a monthly basic salary of Rs..... in the time scale of pay of Rs..... with other allowances as are applicable to other employees of the company in the same time scale of pay,
3. You will enjoy other benefits like the medical expenses reimbursement, leave travel allowance, bonus etc. as may be permissible under the company's service rules.
4. You shall be allowed casual leave/sick leave/festival holidays, weekly off days and earned leave as per rules of the company.
5. You will be on probation for a period of six months and on your services during the said probation period being found satisfactory the Board of Directors may consider you for confirmation in the said post.
6. During the period of your probation, your services may be terminated by the company without any notice and you may also leave the service of the company at twenty-four hours' notice. On confirmation, however, the contract of employment may be terminated by either party by giving the other, thirty days' written notice or paying thirty days' salary in lieu thereof.
7. The company may terminate your services even after confirmation without giving you any notice if you are found by the Board of Directors of the company not performing your assigned duties and your statutory duties properly and to the satisfaction of the Board.
8. As Company Secretary you shall be exclusively responsible: (a) for complying with all the provisions of the Companies Act and the various Rules framed thereunder; (b) maintaining all the statutory and non-statutory essential registers, books, files, records, papers etc.; (c) preparing and filing with the Registrar of Companies and other concerned authorities the required reports, returns, documents, papers etc. complete in all respects and within the prescribed periods of time; and (d) for carrying out the instructions, directions and advice of the Board of Directors of the company given to you from time to time.
9. You shall devote your whole time and attention to the work of the company during your tenure as Company Secretary and shall work with due diligence and using your abilities to your best. You shall obey the orders of the Board of Directors of the company. You shall do your best to promote the interest of the company and shall faithfully serve the company.
10. You shall not disclose to any unauthorised person during your employment as Secretary of the company an information obtained by you in relation to the business and corporate policies of the company with special reference to the company's policy regarding the issue of rights shares, bonus shares, time and

quantum of payment and/or declaration and payment of dividends from time to time.

Please convey your acceptance of the offer and the terms and conditions attached thereto by signing the carbon copy of this letter and returning the same to the company within a period of seven days from the receipt hereof.

Thanking you.

Yours truly

For.....Ltd.

(.....)

Managing Director

I accept the above offer of the post of Company Secretary with all the terms and conditions attached thereto and shall join on.....

(.....)

Company Secretary

## **DEEDS OF AMALGAMATION OF COMPANIES: TRANSFER OF UNDERTAKINGS**

An amalgamation may be defined as an arrangement whereby the assets of two companies become vested in, or under the control of one company, which may or may not be one of the original two companies. Such a company has as its shareholders all, or substantially all, the shareholders of the two companies. An amalgamation is effected by the shareholders of one or both of the amalgamation companies exchanging their shares either voluntarily or as a result of operation of law, for shares in the other or a third company. The arrangement is frequently effected by means of a take-over offer by one of the companies for the shares of the other, or of a take-over offer by a third company for the shares of both.

### **Specimen Agreement between two Companies to Amalgamate by Sale of one to the other**

AN AGREEMENT made this..... day of..... between..... Ltd., a company incorporated under the Companies Act, 1956 and having its Registered Office at..... (hereinafter referred to as the "Vendor", which expression shall, unless repugnant to the context or contrary to the meaning thereof, include its successors and assigns) to the one part and..... Ltd., a company incorporated under the Companies Act, 1956 and having its Registered Office at..... (hereinafter referred to as "the company", which term shall, unless repugnant to the context or contrary to the meaning thereof, include its successors or assigns) of the other part.

WHEREAS the vendor was incorporated in the year..... with an authorised share capital of Rs. ten lakhs divided into one lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company shall have the power to sell, transfer or otherwise dispose of the whole or any part of the

business and undertaking of the vendor company and to accept in consideration, cash or shares or debentures or debenture stock or other securities of any other company and to distribute among the members in specie or otherwise any surplus assets remain-ing in the winding-up of the vendor company.

AND WHEREAS the company was incorporated under the Companies Act, 1956 in the year..... with an authorised share capital of Rs. fifty lakhs divided into five lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company may acquire by purchase or otherwise the business and undertaking, in part or whole of any other company or companies having any of the purposes or objects same or similar to those of the company.

AND WHEREAS the Articles of Association of the company also provide that the company is empowered to increase its share capital.

IT IS HEREBY AGREED AS FOLLOWS:

1. The vendor shall sell and the company shall purchase the whole of the business undertaking, assets and property of the vendor, benefits of all securities which shall include cheques and bills given to the vendor from time to time in consideration or payment thereof, benefits of subsisting contracts, and debts due to the vendor relating to the business of the vendor as a running concern from the day of..... The said purchase shall not include the uncalled capital of the vendor. Up to the aforesaid date for the aforesaid purchase the vendor shall continue to carry on the business for the benefit of the company.
2. From the aforesaid date of the aforesaid purchase the company shall be liable for all the debts and liabilities of the vendor and shall be liable to perform all its engagements. The vendor shall be indemnified by the company against all claims and demands. The company shall defend all actions and proceedings against the vendor who shall also be indemnified in respect of such actions and proceedings.
3. The company shall pay to the vendor Rs. seven lakhs as consideration for the aforesaid purchase and out of the aforesaid consideration Rs. five lakhs shall be paid in cash and the balance of Rs. two lakhs shall be paid to the vendor by allotment of twenty thousand Equity Shares of Rs. ten each in the capital of the company credited as fully paid-up shares. For the allotment of the aforesaid shares, the vendor has conveyed its acceptance, vide its letter No..... dated.....
4. The company shall create and issue five lakh Equity Share of Rs. ten each to increase its shares capital as aforesaid and for the same purpose the company shall pass a resolution in accordance with the Articles of Association of the company and in accordance with the provisions of the Companies Act, 1956.
5. For the purpose of Stamp Duty, the value of the immoveable properties of the vendor shall be fixed for Rs..... and the goodwill benefits of contracts and securities, debts, stock, fittings and fixture and all other properties of the vendor shall be valued at Rs.....
6. The title deeds to all the immoveable and other properties of the vendor and an

abstract of all the properties of the vendor, the sale of which is hereby agreed shall be handed over to the company within thirty days from this day..... of..... The company shall accept the same titles sufficient in all respects.

7. On the..... day of....., the vendor shall be paid Rs. five lakhs in cash and shall be delivered the certificates showing that the company shall have allotted twenty thousand Equity Shares of Rs. 10 each fully paid-up of the share capital of the company.
8. Thereupon, the purchase shall be deemed to have been completed and the vendor shall execute necessary documents and do all things and give assurance as may be necessary and reasonable for the vesting of all the properties, the subject matter of the aforesaid purchase by the company.

IN WITNESS WHEREOF the parties hereto have set their hands and seals.

Signatures and seals of the parties.

### **COMPROMISE, ARRANGEMENTS AND SETTLEMENTS**

During its life time a company may find it necessary to reorganise itself. Such a re-organisation may be for many reasons. When a company is financially weak, it wishes to reach a compromise with its members and/or creditors. It may wish to take over the business of another running but endangered company. It may wish to restructure its share capital.

Sections 390 to 396 of the Companies Act, 1956 provide various methods of company re-organisation or reconstruction. The various terms used for reorganisation are arrangement, reconstruction, amalgamation, merger, take-over, etc. They are distinct terms but they have many common features and to a great extent they overlap. The expression "arrangement" is of wider import and include reconstruction and amalgamation. "Arrangement" has been defined in Section 390(b) of the Companies Act as including a reorganisation of share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both these methods.

"Arrangement" has a wider interpretation and includes reconstructions and amalgamations.

"Reconstruction" has not been defined in the Act. A reconstruction normally entails the transfer of an undertaking to another company, consisting substantially of the same shareholders with a view to its being continued by the transferee company, and usually resorted to for achieving one or more of the following objects:

- a. For the purpose of raising fresh capital by issuing partly paid shares in the new company in exchange for fully shares in the old company, and calling up the balance on new shares as and when required;
- b. For extending the company's objects otherwise than under Section 17;
- c. For reorganising or rearranging the capital structure and the rights of members as between themselves; and
- d. For effecting a compromise with creditors, or the allotment to them of shares or debentures in settlement of their claims.

A reconstruction may, however take place, without the promotion and incorporation of new company, by compromise with members involving alterations of various rights between each class, usually also involving the writing down of the amount of share capital (as in a reduction of capital, which is a special form of reconstruction) and by a compromise with creditors (including debenture holders).

Amalgamation usually covers a situation where two or more companies join forces either under the name of one of them or in a new company formed for the purpose. This is a blending of two or more existing undertakings into one, the shareholders of each company becoming substantially the shareholders in the company which is to carry on the blended undertakings.

Amalgamation will usually require the consent of the directors of both the companies and may also be described as "Merger". On the other hand, the word "take-over" is usually used to describe the acquisition by one company of sufficient number of shares in another company so as to give the purchaser company control over that company.

Amalgamations and take-overs are resorted to for any one or more of the following purposes:

- a. For saving overheads and working expenses and for improving efficiency in the management, production and marketing by reason of unified control;
- b. For reduction or elimination of competition, and some times for securing the advantages of vertical combination by an amalgamation of companies to secure a linking of different stages or processes of production back to raw materials and forward to the finished product; and
- c. For obtaining greater facilities possessed by one large company, as compared with a number of smaller companies, for raising additional capital, for buying raw materials, etc. and for securing better credit facilities on the most favourable terms, and, what is, of increasing importance now a days, for carrying out research work on a large and co-ordinated scale and basis.

The memorandum of association of almost every company permits it to amalgamate with another company. In case there is no such provision, it will be necessary to alter the memorandum before any scheme of amalgamation is drawn up.

### **"Arrangement"**

Section 391 of the Companies Act, 1956 provides that when a compromise or arrangement (the word compromise implies the existence of some dispute, but the word arrangement is of wider application) is proposed between a company and

- a. its creditors or any class of them; or
- b. its members or any class of them,

then the court may, on the application of the company, or any creditor or member, or, if the company is being wound up, the liquidator, order a meeting to be called of the creditors or class of creditors, or of the members or class, of members, as the case may be.

The compromise or scheme of arrangement will then be binding upon:

- a. all the creditors or class of creditors;
- b. the members or class of members;
- c. the company; and
- d. in the case of a company being wound up, upon the liquidator and contributories.

Provided that:

1. it is approved by a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members as the case may be, present and voting in person or by proxy; and
2. it is sanctioned by the court.

### **Procedure**

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

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

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

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

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

### **Specimen Scheme of Amalgamation**

THIS SCHEME OF AMALGAMATION is presented for the amalgamation of A Ltd., with B Ltd., pursuant to the relevant provision of the Companies Act, 1956.

2. Notice under Section 6 of the Competition Act, 2002\* will be given to the Competition Commission of India within 30 days of the approval of the proposal relating to amalgamation.\*
3. The authorised share capital of A Ltd. is one crore Rupees divided into ten lakh Equity Shares of Rs. 10/- each. The issued, subscribed and paid-up share capital of A Ltd. is eighty lakh rupees divided into eighty thousand Equity Shares of Rs. 10/- each.  
The authorised share capital of B Ltd. is ten crore rupees divided into one crore Equity Shares of Rs. 10/- each. The issued, subscribed and paid-up share capital of B Ltd. is eight crore rupees divided into eighty lakh Equity Shares of Rs. 10/- each.
4. With effect from the 1st of July, 2007 (hereinafter called "the Appointed Date"), the properties, investments, rights and assets of every kind of A Ltd. (hereinafter called "the said assets"), without further acts or deeds, be transferred to and vested in and/or deemed to be transferred to and vested in B Ltd. pursuant to Court Order under Section 394 of the Companies Act, 1956.
5. With effect from the Appointed Date, all deeds, liabilities and obligations (hereinafter referred to as "the said liabilities") of A. Ltd., shall, without further acts or deeds, also be transferred to or deemed to have been transferred to B Ltd. so as to become the debts, liabilities and obligations of B Ltd.
6. With effect from the Appointed Date, A Ltd. shall be deemed to have been holding, and shall hold the said assets for and on account of B Ltd. until the Effective Date. A Ltd., hereby undertakes to hold the said assets with utmost prudence until the Effective Date.
7. Between the Appointed Date and the Effective Date, A Ltd. shall not without the concurrence of B Ltd., alienate charge or otherwise deal with any of the said assets, except in the ordinary course of business.
8. Subject to the provisions of Clause 13 hereof as regards payment of dividend, income accruing to A Ltd. or losses or expenditure arising or incurred by it after

- the Appointment Date up to the Effective Date shall, for all purposes, be treated as income or losses or expenditure, as the case may be, of B Ltd.
9. Subject to the other provisions of this Scheme, all contracts, deeds, agreements and other instruments to which A Ltd. is a party, subsisting and operative immediately on or before the Effective Date shall be in full force and effect against or in favour of B Ltd., as the case may be, and may be enforced as fully and effectively by it instead of A Ltd. as if B Ltd. had been party thereto.
  10. All actions and proceedings by or against A Ltd. pending on the Effective Date shall be continued and enforced and be enforced by or against B Ltd.
  11. The transfer of the said assets and the said liabilities of A Ltd. under clauses 4 and 5 hereof to B Ltd. and the continuance of all contracts and proceedings by or against B Ltd. under clause 9 and 10 shall not affect any contracts or proceedings relating to the said assets already concluded by A Ltd. on or after the Appointed Date to the intent that B Ltd. accepts and adopts all acts, deeds, matters and things done and/or executed by A Ltd. in regard thereto as having been done or executed on behalf of B Ltd.
  12. Upon the scheme of amalgamation becoming effective in consideration of the transfer in favour of B Ltd. under the foregoing clauses of the said assets of A Ltd., B Ltd., shall, without further application, issue and allot to every shareholder of A Ltd., 80 fully paid Equity Shares of Rs. 10/- each of B Ltd., for 100 fully paid Equity Shares of Rs. 10/- each of A Ltd.
  13. The Equity Shares of B Ltd. to be issued and allotted to the shareholders of A Ltd. shall rank pari passu in all respects with the existing Equity Shares of B Ltd. including entitlement to dividend in respect of all dividend declared after the Effective Date. B Ltd. and A Ltd. shall be entitled to declare and pay dividends prior to the Effective Date in respect of their current earnings up to the Effective Date.
  14. Until the Effective Date, neither A Ltd. nor B. Ltd. shall issue or allot any Rights Shares or Bonus Shares out of their respective Share Capital for the time being.
  15. So much of the Share Capital of B Ltd., as may be necessary, shall be appropriated to the shareholders of A Ltd. in the proportion and in the manner provided by clause 12 above and shall, with all reasonable despatch after this scheme shall finally take effect, be issued, allotted and credited as fully paid-up to such shareholders accordingly.
  16. A Ltd. shall, with all reasonable despatch, apply to the High Court of Judicature at....., and B Ltd., shall also with reasonable despatch, apply to the High Court of Judicature at..... for orders sanctioning the scheme of amalgamation under Section 391 of the Companies Act, 1956 for carrying this scheme into effect and for dissolution without winding up of A Ltd.
  17. A Ltd. and B Ltd., by their respective Boards of directors, may consent to any modification or amendment of this scheme which may be in the best interest of the companies concerned, or to any condition that either of the High Courts may

deem fit to impose, and after dissolution of A Ltd., B Ltd. (by its Board of Directors) shall be authorised to give such directions or take such steps as may be necessary, desirable or proper to resolve any doubts, difficulties or questions, whether by reason of any order of the High Courts or of any directive or order of other authority or otherwise howsoever, arising out of or under or by virtue of this scheme and/or matter concerned or connected therewith.

18. All subsisting agreements of A Ltd. relating to use of trade marks, patents, designs of copy rights and/or technology shall accrue for the benefit of B Ltd., and proper documentation will be entered into for this purpose.
19. On this scheme finally taking effect as aforesaid—
  - all employees of A Ltd. will become employees of B Ltd. with effect from the Effective Date without any break or interruption in service, and on their existing terms and conditions of services;
  - the undertaking of A Ltd. will continue to function as a "Department A" of B Ltd. and all agreements entered into by A Ltd. with its bankers, distributors, stockists, agents shall continue to be in full force and effect and may be enforced as fully and effectively by B Ltd. instead of A Ltd. as if B Ltd. had been a party thereto. Likewise, the trusts created by A Ltd. for payment of provident fund, superannuation, gratuity etc. will continue to operate in favour of the employees of the "Department A".All business activities engaged in by A Ltd. shall be continued in the form of a "Department A" of B Ltd. to be called "Department A" and all agreements entered into by B Ltd. with its bankers, distributors, stockists, agents etc. shall continue to be in full force and effect, and may be enforced by or against such "Department A" of B Ltd. Likewise, the trusts created by A Ltd., for payment of provident fund, superannuation, gratuity etc. will continue to operate in favour of the employees of "Department A" of B Ltd.
20. This scheme is conditional on and subject to—
  - a. the requisite sanction or approval, if any, of the Controller of Capital Issues and of other appropriate authorities being obtained and granted in the matters in respect of which such sanctions or approvals are required;
  - b. the approval of any agreement with respect to the scheme by the requisite majority of the members of A Ltd. and of the members of B Ltd.;
  - c. the necessary special resolution by members of B Ltd. under Section 81 of the Companies Act, 1956;
  - d. the sanction of the High Court of Judicature at..... and of the High Court of Judicature at..... under Section 391 of the Companies Act, 1956 and to the necessary order under Section 394 of the said Act being obtained; and
  - e. its becoming fully effective and operative in accordance with Sections 391 and 394 of the Companies Act, 1956.

The scheme, although operative from the Appointed Date, shall take effect finally upon and from the date on which any of the aforesaid sanctions and approvals

shall be last obtained which shall be "the Effective Date" for the purpose of this scheme.

21. In the event of any of the approvals or sanctions enumerated in clause 20 not being obtained or complied with on or before..... or within such further period or periods as may be agreed upon by and between A Ltd. and B Ltd., through their respective Boards of Directors, the scheme shall become null and void, and in such an event, no rights and liabilities whatsoever shall accrue to or be incurred inter se between A Ltd. and B Ltd.
22. All costs, charges and expenses of A Ltd. and B Ltd. respectively in relation to or in connection with the negotiations leading to the drawing up of this scheme and to the agreement between the parties in respect thereof and of carrying out and complying with the terms and provisions of this scheme and the agreement between the parties relating thereto and of incidental nature to the completion of the amalgamation of A Ltd. in pursuance of this scheme shall be borne and paid by A Ltd. and B Ltd. in equal shares.

**Note:** *While formulating a scheme on the basis of compromise, arrangement or settlement, the secretary has to make sure that the arrangement agreed to by and between the managements of the two companies is precisely and unambiguously incorporated in the scheme leaving no room for any doubt whatsoever.*

### **LESSON ROUND-UP**

- The promoter of a company is a person who does the necessary preliminary work in connection with and incidental to the formation and the establishing of the company.
- The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre-incorporation contracts. The promoters generally enter into such contracts as agents for the company about to be formed.
- When the company comes into existence, it is not bound by the pre-incorporation contracts even when it takes the benefit of the work done on its behalf. However, specific performance of a contract between a third party and the promoters may be successfully claimed by the third party against the company, when the company enters into possession of the property on the faith of the promoters' contract.
- The pre-incorporation agreements entered into by the promoters acting on behalf of the intended company with third party cannot always be avoided for various reasons. These agreements affect the operations of the incorporated company.
- Memorandum of Association of the company is the fundamental formation document. It is the constitution and charter of the company. Draftsmen should know that Memorandum is the main edifice upon which the whole structure of the company is erected. Based on the provisions of Section 13, the main drafting requirements of contents of a Memorandum should be kept in mind.
- Articles are rules and regulations for management of internal affairs of the

company. It constitutes a contract between the company and its members and members inter se. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum. Sections 26, 28, 29, 30, 31 among other sections are very relevant in drafting of Articles.

- While drafting a contract of appointment for the appointment of a managing director of a company, certain important points have to be taken care of, i.e., the person who is being appointed as managing director must be a director of the company and must be entrusted with substantial powers of management.
- The Board of Directors while appointing a director as managing director, critically examines the draft agreement prepared by the Secretary for the appointment of the managing director and after having approved the same with or without any modification, authorises one of its directors to sign and execute for and on behalf of the company, the agreement for the appointment of the managing director.
- Being an agreement, such a contract must have all the other essential ingredients of a contract under the Indian Contract Act, 1872.
- Likewise, the Secretary has to bear in mind important points while drafting an agreement for the appointment of a manager.
- The appointment of a Company Secretary is done by the Board of Directors and he functions at the pleasure of the Board. Usually the appointment of a Company Secretary is made by an appointment letter signed and issued by the Chief Executive Officer, who may be the managing director, executive director, whole-time director etc. under specific authority of the Board.
- This letter is an offer by the company to the prospective Company Secretary and when he accepts the same it become a binding contract between him and the company and their relationship is governed by the terms and conditions thereof.
- During its life time a company may find it necessary to reorganise itself. Such a re-organisation may be for many reasons. When a company is financially weak, it wishes to reach a compromise with its members and/or creditors. It may wish to take over the business of another running but endangered company. It may wish to restructure its share capital.
- The Companies Act, 1956 provide various methods of company re-organisation or reconstruction. The various terms used for reorganization are arrangement, reconstruction, amalgamation, merger, take-over, etc.

## FOOTNOTES

\* Although Competition Act, 2002 has come into force, yet the substantial provisions of the Competition Act, 2000 are yet to be notified.

## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY VII - APPEARANCES AND PLEADINGS-I**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to acquaint the students with the legal provisions pertaining to appearance before tribunals/quasi judicial bodies. Besides, students will also become accustomed with the:

- Drafting of petitions/applications
- Drafting of written statement
- Drafting of counter affidavit
- Drafting of reply/rejoinder
- Drafting of affidavit of evidence
- Arguments on preliminary submissions
- Arguments on merits
- Legal pleadings and submissions.

#### **INTRODUCTION**

The corporate sector has recognized the role of the Company Secretaries as a compliance officer and as a nodal point of contact between the company and its shareholders, debenture holders, depositors, financial institutions and the Government. The Company Secretaries in practice are rendering value added services to corporate sector as independent professionals. That apart, a Company Secretary can appear as an authorized representative before Company Law Board\*/NCLT\*\*, Competition Commission of India (CCI), Securities Appellate Tribunal (SAT) Telecom Regulatory Authority of India (TRAI) and various other Tribunals.

#### **RIGHT TO LEGAL REPRESENTATION**

##### **Under the Companies Act**

Section 10GD of the Companies Act, 1956 dealing with right to legal representation envisages that the applicant or the appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

The expression 'authorised representative' has been defined under Regulation 2(d) as a person authorized in writing by a party under Regulation 19(2) to function before a Bench as the representative of such party.

Therefore, a person to be authorized must be one of the persons specified in Regulation 19(2) viz. Advocate or Secretary in whole-time practice or a Practising Chartered Accountant, or Practising Cost and Works Accountant. However, a company may also appoint and authorize its Director or Company Secretary to appear in its behalf, in any proceeding before the Bench. The Central Government,

the Regional Director or the Registrar may authorize an officer to appear on its behalf (Regulation 19).

Company Secretaries who are in job can appear for and on behalf of Employer Company, by virtue of powers given under a power of attorney while appearing before CLB/NCLT or Authority Letter but preferably Power of Attorney.

### **Under the TRAI Act**

Section 17 of the Telecom Regulatory Authority of India (TRAI) Act, 1997 (as amended in 2002) authorizes Company Secretaries to present his or its case before the Appellate Tribunal. As per the Explanation appended to the Section 'Company Secretary' means a Company Secretary as defined in clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act.

### **Under the SEBI Act**

Securities and Exchange Board of India (SEBI) Act, 1992 under Section 15V permits the appellant either to appear in person or authorise one or more of practising Company Secretaries, Chartered Accountants, Cost Accountants or Legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

### **Under the Competition Act**

Competition Authorities and the companies world over avail services of professionals to guide and advise them on various aspects of competition law. Professionals also assist companies in designing, implementing and maintaining effective competition compliance programmes.

Sections 35 and 53S of the Competition Act, 2002 (as amended in 2007) authorises Company Secretaries in practice to appear before Competition Commission of India and Competition Appellate Tribunal. Besides, there are a number of concepts and terms such as value of assets, turnover, determination of market, relevant market, geographic market which require active professional involvement and advice. Further, Competition Act, 2002 provides a number of factors to be considered by the Competition Commission of India in determining appreciable adverse effect on competition.

It is important to mention here that the Competition Act has not come into force fully. Most of the provisions of the said Act are yet to be enforced.

## **APPELLATE AUTHORITIES UNDER THE COMPANIES ACT, 1956**

### **Appeal against Refusal to Register Transfer of Shares**

Section 111 of the Companies Act, 1956 lays down that if a company refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the company, it shall, within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving intimation of such

transmission, as the case may be, giving reasons for such refusal.

Section 111 further lays down that the transferor or transferee, or the person who gave intimation of the transmission by operation of law, as the case may be, may appeal to the Board/Tribunal against any refusal of the company to register the transfer or transmission, or against any failure on its part within the period referred to in the preceding paragraph, either to register the transfer or transmission or to send notice of its refusal to register the same.

The appeal under above paragraph shall be made within two months of the receipt of the notice of such refusal or, where no notice has been sent by the company, within four months from the date on which the instrument of transfer, or the intimation of transmission, as the case may be, was delivered to the company.

## **APPELLATE AUTHORITIES UNDER TRAI ACT**

### **Appeal to the Supreme Court**

Section 18 of the TRAI Act (as amended in 2000) provides that notwithstanding anything contained in the Code of Civil Procedure, 1908 or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in Section 100 of that Code.

It further says that no appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against.

The proviso appended to the Section 18 says that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

## **APPELLATE AUTHORITIES UNDER SEBI ACT**

### **Appeal to the Securities Appellate Tribunal**

Section 15T of the SEBI Act lays down that any person aggrieved:

1. (a) by an order of SEBI made, under this Act, or the rules or regulations made thereunder; or  
b. by an order made by an adjudicating officer under this Act;  
may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.
2. No appeal shall lie to the Securities Appellate Tribunals from an order made
  - a. by SEBI;
  - b. by an Adjudicating Officer,  
with the consent of the parties.
3. Every appeal under sub-section (1) shall be filed within a period of 45 days from the date on which a copy of the order made by SEBI or the Adjudicating Officer, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed. This details have been prescribed in the Rules.  
Provided that the Securities Appellate Tribunal may entertain an appeal after the

expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.

4. On receipt of an appeal, the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
5. The Securities Appellate Tribunal shall send a copy of every order made by it to SEBI and the parties to the appeal and to the concerned Adjudicating Officer.
6. The appeal filed before the Securities Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

### **Appeal to Supreme Court**

Section 15Z lays down that any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of fact or law arising out of such order.

It has been provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

## **APPELLATE AUTHORITIES UNDER THE COMPETITION ACT**

### **Appeal to Appellate Tribunal**

As per Section 53B of the Act,—

1. The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of Section 53A may prefer an appeal to the Appellate Tribunal.
2. Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.
3. On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.
4. The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.
5. The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

### **Appeal to Supreme Court**

Section 53T of the Act provides that the Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them: Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

## **PETITIONS/APPLICATIONS**

### **INTRODUCTION**

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

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

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

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.

### **Drafting and Contents of Applications/Petitions**

The general rule of drafting in respect of all the applications and petitions is that they should contain all the particulars required to be alleged by law giving the material facts in support of them. They should be precise as well as concise and should not contain any irrelevant matter. They should be drafted after looking into the provisions of law so that no relevant detail is omitted. In cases where the law does not specify any particulars, the counsel should first find out from the statute what facts he is required to establish, in order to entitle his client to the relief claimed and then assert the relevant facts and circumstances. As far as possible the grounds on which the application is based should be stated in the words of statute under which the application is made. It will not be advisable to use a different language or substitute words used in any provision, though the meaning may be the same. A few applications are also required to be verified or supported by an affidavit, or both, so no mistake in this behalf should be committed.

Every application should contain the name of the court, the number and cause title of the suit or other proceeding, followed by the names of applicant and opposite party and the provision of law under which it is made.

### **Applications under C.P.C.**

Applications under the Code have to be made from stage to stage. An application is required for permission to sue or appeal as an indigent person, though the former is combined with the plaint itself while the latter is separate from the memorandum of appeal. If there is a minor defendant, an application for appointment of a guardian ad litem supported by an affidavit has to be made. If an interim relief is sought, such as the issue of an interim injunction or attachment before judgment, or the appointment of a receiver, again an application supported by an affidavit has to be made. The defendant, if he desires to contest such an application, as he generally does, has to file a reply controverting plaintiff's allegations supported by a counter affidavit. There may be other applications such as for issue of a commission, or for serving interrogatories, or discovery and inspection. Applications are also made for adjournment, for amendment of pleadings or of issues, for leave to file a document after the stage therefor has passed, and so on and so forth. If a suit, appeal or application is dismissed for default or is allowed ex parte, an application would be made for recall of such order. During the pendency of an appeal or a suit there may be an application for reference, which is rare in civil cases but more frequent in Sales Tax and Income Tax cases.

*Applications in Execution:* After a decree is put into execution, a variety of applications, depending upon the mode of execution by which satisfaction of decree is sought, have to be made by the decree-holder. The judgment debtor, too, may file objections under Section 47 or under some rule of O. 21 as may be necessary. Even a third party may do so.

### **Petitions/Applications under other Statutes**

The fundamental rule of pleadings as provided for in the Civil Procedure Code, remains the same viz-a-viz petitions/applications under other statutes. They ought to

be so framed as not only to assist the party in the statement of his case, but the court in its investigation of the truth between the litigants. While drafting a petition/application, it should be borne in mind that the pleadings therein should contain:

- i. facts only, then again material facts;
- ii. not law;
- iii. not evidence; and
- iv. immaterial facts to be discarded.

Thus, while drafting a petition/application, one should ensure that only material facts are incorporated. Material facts are the entirety of facts which would be necessary to prove to succeed in the case. These facts should be pleaded concisely. There is no scope of pleading a provision of law or conclusion of law. To find out law is the duty of the court. The facts should be presented in such a way that those would irresistibly and spontaneously draw a legal inference. In the like manner facts which are merely evidence to prove the material facts should be avoided and lastly unnecessary details which are immaterial should be discarded.

TO sum up, the rule of pleadings remains the same, in so far as petitions/ applications under other status are concerned, the only difference being the format of presentation. While drafting such petitions/applications, one should stick to the format as prescribed so as to rule out any adverse consequence later on.

### **Petitions under the Constitution**

This aspect has been discussed in the next study lesson.

### **WRITTEN STATEMENT**

It is incumbent on the defendant to file his defence in writing. If the defendant fails to file written statement, the court may pronounce judgment against him or may under O. 8, R. 10, make such order in relation to the suit as it deems fit. If the defendant has omitted to avail of his right to file a written statement at or before the first hearing, the court can extend the time for filing it, in exercise of its discretion, if the circumstances so warrant. The rule has to be worked in a manner so as to advance justice (*Mehar Chand v. Suraj Bhan*, AIR 1971 Punj 435).

### **Requirement of Written Statement**

When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleading laid down in the preceding paras. A subsequent pleading filed by the plaintiff, either in reply to a defendant's claim of set off, or with leave of the court, in answer to defendant's pleas in defence, is also called a "written statement" (also called Replication or Rejoinder). All the rules relating to defendant's written statement apply, *mutatis mutandis* to such written statement of the plaintiff also.

### **Considerations before Drafting a Written Statement**

Before proceeding to draft a written statement, it is always necessary for a pleader to examine the plaint very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the

claim and drawing up the defence is available. If any particulars are wanting, he should apply that the plaintiff be required to furnish them before the defendant files his written statement. If he cannot make a proper defence without going through such particulars and/or such documents referred to in the plaint, and that the defendant is not in possession of such copies, or the copies do not serve the required purpose, the defendant should call upon the plaintiff to grant him inspection of them and to permit him to take copies, if necessary, or, if he thinks necessary, he may apply for discovery of documents. If he thinks any allegation/allegations in the plaint is embarrassing or scandalous, he should apply to have it struck out, so that he may not be required to plead those allegations. If there are several defendants, they may file a joint defence, if they have the same defence to the claim. If their defences are different, they should file separate written statements, and if the defences are not only different but also conflicting, it is not proper for the same pleader to file the different written statements. For instance, if two defendants, executants of a bond, are sued on the bond, and their plea is one of satisfaction, they can file a joint written statement. If the plaintiff claims limitation from the date of certain acknowledgement made by one defendant and contends that the acknowledgement saves limitation against the other also, the defendants may file separate written statements. In a suit on a mortgage-deed executed by a Hindu father, to which the sons are also made parties on the ground that the mortgage was for a legal necessity, if the sons want to deny the alleged legal necessity, they should not only file a separate defence from their father's but should also preferably engage a separate pleader.

**1. Formal Portion of Written Statement:** A written statement should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants, the name of only one may be written with the addition of "and another" or "and others", as the case may be. The number of the suit should also be mentioned after the name of the court. After the name of the parties and before the actual statement, there should be added some words to indicate whose statement it is, e.g., "written statement on behalf of all the defendants" or "written statement on behalf of defendant No. 1", or "written statement on behalf of the plaintiff in reply to defendant's claim for a set off" or "written statement (or replication) on behalf of the plaintiff filed under the order of the court, dated....." or "written statement on behalf of the plaintiff, filed with the leave of the court". The words "The defendant states....." or "The defendant states as follows" may be used before the commencement of the various paragraph of the written statement but this is optional.

No relief should be claimed in the written statement, and even statements such as that the claim is liable to be dismissed should be avoided. But when a set off is pleaded or the defendant prefers a counter-claim for any excess amount due to him, a prayer for judgment for that amount in defendant's favour should be made.

**2. Body of the Written Statement:** The rest of the written statement should be

confined to the defence.

**Forms of Defence:** A defence may take the form of (i) a "traverse", as where a defendant totally and categorically denies the plaintiff allegation, or that of (ii) "a confession and avoidance" or "special defence", where he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, as where he admits the bond in suit but pleads that it has been paid up, or that the claim is barred by limitation, or that of (iii) "an objection in point of law" (which was formerly called in England "a demurrer"), e.g., that the plaintiff allegations do not disclose a cause of action, or that the special damages claimed are too remote. Another plea may sometimes be taken which merely delays the trial of a suit on merits, e.g., a plea that the hearing should be stayed under Section 10, C.P.C., or that the suit has not been properly framed, there being some defect in the joinder of parties or cause of action and the case cannot be decided until those defects are removed. These pleas are called (a) "dilatory pleas" in contradistinction to the other pleas which go to the root of the case and which are therefore known as (b) "peremptory pleas" or "pleas in bar". Some dilatory pleas are not permitted in pleadings, but must be taken by separate proceedings. Others may either be taken in the written statement under the heading "Preliminary Objections", or by a separate application filed at the earliest opportunity, as some pleas, such as that of a misjoinder and non-joinder, cannot be permitted unless taken at the earliest opportunity (O. 1, R. 7 and 13).

A defendant may adopt one or more of the above forms of defence, and in fact he can take any number of different defences to the same action. For example, in a suit on a bond he can deny its execution, he can plead that the claim is barred by limitation, he can plead that, as no consideration of the bond is mentioned in the plaintiff, the plaintiff does not disclose any cause of action, he can plead that the bond being stated to be in favour of two persons the plaintiff alone cannot maintain the suit. He can as well plead one form of defence to one part of the claim, and another defence to another part of it.

He can take such different defences either jointly or alternatively, even if such defences are inconsistent. But certain inconsistent pleas such as those which depend for their proof, on entirely contradictory facts, are generally not tenable. A ground of defence, which has arisen to the defendant even after the institution of the suit, but before the filing of his written statement, may also be raised (O.8, R.8).

All defences which are permissible should be taken in the first instance, for, if the defendant does not take any plea, he may not be allowed to advance it at a later stage, particularly when it involves a question of fact.

### **How to Draft a Written Statement**

When the defendant relies on several distinct grounds of defence or set off, founded upon separate and distinct facts, they should be stated in separate paragraphs (O.8, R.7), and when a ground is applicable, not to the whole claim but only to a part of it, its statement should be prefaced by words showing distinctly that it is pleaded only to

that part of the claim, thus: "As to the mesne profits claimed by the plaintiff, the defendant contends that, etc." or "As to the price of cloth said to have been purchased by the defendant, the defendant contends that, etc."

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas:

- i. Denials.
- ii. Dilatory pleas.
- iii. Objections in point of law.
- iv. Special defence (pleas in confession and avoidance).
- v. Set off.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admissions or denial, than to reserve them until after the admissions or denials have been recorded. If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should preferably be pleaded before the latter.

### **Drafting of Reply/Written Statement – Important Considerations**

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

- i. One has to deny the averment of the plaint/petition which are incorrect, perverse or false. In case, averment contained in any para of the plaint are not denied specifically, it is presumed to have been admitted by the other party by virtue of the provisions of Order 8, Rule 5 of the Code of Civil Procedure. It must be borne in mind that the denial has to be specific and not evasive (Order 8, Rule 3 & 4 CPC) [1986 Rajdhani Law Reporter 213; AIR 1964 Patna 348 (DB), AIR 1962 MP 348 (DB); *Dalvir Singh Dhillowal v. Kanwaljit Singh* 2002 (1) Civil LJ 245 (P&H); *Badat & Co v. East India Trading Co.* AIR 1964 SC 538]. However, general allegation in the plaint cannot be said to be admitted because of general denial in written statement. [*Union v. A. Pandurang*, AIR 1962 SC 630.]
- ii. If the plaint has raised a point/issue which is otherwise not admitted by the opposite party in the correspondence exchanged, it is generally advisable to deny such point/issue and let the onus to prove that point be upon the complainant. In reply, one has to submit the facts which are in the nature of defence and to be presented in a concise manner. [*Syed Dastagir v. T.R. Gopalakrishnan Setty*, 1999 (6) SCC 337.]
- iii. Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the plaint;

- iv. The reply to each of the paras of the plaint be drafted and given in such a manner that no para of the plaint is left unattended. The pleadings are foundations of a case. [*Vinod Kumar v. Surjit Kumar*, AIR 1987 SC 2179.]
- v. After reply, the same is to be signed by the constituted attorney of the opposite party. If the opposite party is an individual, it could be signed by him or his constituted attorney or if the opposite party is a partnership firm, the same should be signed by a partner who is duly authorised under the Partnership Deed, because no partner has an implied authority to sign pleadings on behalf of the partnership firm by virtue of Section 22 of the Indian Partnership Act, 1932. In case of a body corporate, the same could be signed by any Director, Company Secretary, Vice-President, General Manger or Manager who is duly authorised by the Board of Directors of the company because any of the aforesaid persons per se are not entitled to sign pleadings on behalf of the body corporate. [Order 29 of Code of Civil Procedure.]

It may be noted that if the plaint or reply is not filed by a duly authorised person, the petition would be liable to be dismissed [*Nibro Ltd v. National Insurance Co. Ltd.*, AIR 1991 Delhi 25; *Raghuvir Paper Mills Ltd. v. India Securities Ltd.* 2000 Corporate Law Cases 1436]. However, at the time of filing of petition, if the pleadings are signed by a person not authorised, the same could be ratified subsequently. [*United Bank of India v. Naresh Kumar*, AIR 1997 SC 2.]
- vi. The reply/written statement is to be supported by an Affidavit of the opposite party. Likewise, the Affidavit will be sworn by any of the persons aforesaid and duly notorised by an Oath Commissioner. The Affidavit has to be properly drawn and if the affidavit is not properly drawn or attested, the same cannot be read and the petition could be dismissed summarily. [Order 6, Rule 15 CPC]. The court is bound to see in every case that the pleadings are verified in the manner prescribed and that verifications are not mere formalities.
- vii. The reply alongwith all annexures should be duly page numbered and be filed alongwith authority letter if not previously filed.
- viii. At the time of filing of reply, attach all the supporting papers, documents, documentary evidence, copies of annual accounts or its relevant extracts, invoices, extracts of registers, documents and other relevant papers.
- ix. It may be noted that if any of the important points is omitted from being given in the reply, it would be suicidal as there is a limited provision for amendment of pleadings as provided in Order 6, Rule 17 CPC, and also the same cannot be raised in the Affidavit-in-Evidence at the time of leading of evidence. Because if any point has not been pleaded in the pleadings, no evidence could be led on that point. General rule is that no pleadings, no evidence. [*Mrs. Om Prabha Jain v. Abnash Chand Jain*, AIR 1968 SC 1083; 1968 (3) SCR 111.]
- x. If a party is alleging fraud, undue influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however, strong the language in which they are

couched may be, and the same applies to undue influence or coercion. [*Afsar Shaikh v. Soleman Bibi*, AIR 1976, SC 163; 1976 (2) SCC 142]. While pleading against fraud or mis-representation, party must state the requisite particulars in the pleadings. [*K Kanakarathnam v. P Perumal*, AIR 1994 Madras 247.]

- xi. It is well settled that neither party need in any pleadings allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. [Order 6, Rule 13 CPC; Sections 79 and 90 of Indian Evidence Act.]
- xii. In every pleading, one must state specifically the relief which the party is claiming from the court or tribunal or forum. While framing the prayer clause, one should claim all possible relief as would be permissible under the pleadings and the law [Order 7, Rule 7 CPC]. The general principle is that the relief if not prayed for, will not be allowed. [*R Tiwary v. B Prasad*, AIR 2002 SC 136.]

### **COUNTER AFFIDAVIT**

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

### **REPLY**

This nomenclature is used for pleadings filed by a party (plaintiff/petitioner as well as defendant/respondent) in answer to the claims raised by a party and generally confined to miscellaneous or interim applications. However, certain Tribunals/Commissions/Forums use such nomenclature to devote pleadings filed by a party in answer to the claims set out in the main petitions as well, for eg. in the case of proceedings before consumer forums. Pleadings filed by a respondent in answer to the claims set out in the complaint, are generally referred to as reply. Again, the rules of pleadings as apply to a written statement should be kept in mind while drafting reply in opposition to the claims set out in the petition.

### **REJOINDER**

A written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent, is termed as a rejoinder or replication. Such statements are subsequent pleadings as contemplated in Order of Rule 9 of the Civil Procedure Code. Under Rule 9, leave of the court is essential before any party can present a further pleading after the written statement has been filed. The only subsequent pleading that may be filed without the

leave of the court is the written statement filed by way of defense to a set-off or a counter-claim. It should be borne in mind that while filing a rejoinder/replication, a party cannot be allowed to fill up gaps or lacuna in his pleadings. Nor again can a party introduce new material facts or different cause of action except in a case where subsequent to filing of the petition/suit, the petitioner/plaintiff discovers new matters and accordingly seeks leave of the Court to submit such further particulars in his pleadings.

### **DRAFTING OF AFFIDAVIT IN EVIDENCE—IMPORTANT CONSIDERATIONS**

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

- i. The best evidence is that of a person who was personally involved in the whole transaction. In case, that person is not available for any reason, then any other person who has joined in his place to make deposition by way of his affidavit.
- ii. In case, the petitioner himself was involved in the execution of a contract, he should file affidavit-in-evidence.
- iii. The allegations or charges or grounds relating to facts should be re-produced duly supported by documentary evidence.  
It may be noted that in the affidavit in evidence, the position of law or legal provisions or principle of law are not reproduced because the position of law or settled principles of law are not required to be proved by any party and they are deemed to exist and any party can argue and take help of those settled position of law while arguing their case before the Court or Tribunal or Forum and need to be proved by filing an evidence. [Section 5, Indian Evidence Act.]
- iv. In case, the point or issue pertains to engineering, medical, technology, science or other complex or difficult issues, then the evidence of expert is to be filed in the form of his Affidavit. If necessary, the said witness has to appear before the Forum for the purpose of cross-examination by the counsel for the other party. For example, hand-writing or finger print experts etc.
- v. Besides the leading evidence on the points raised by the petitioner or by the opposite party in his written statement/reply, if possible, the party who is filing the affidavit-in-evidence should also file documents, papers or books or registers to demolish the defence or case set up by the opposite party.
- vi. It is also permissible for any party to bring any outside witness (other than the expert witness) in support of his case if the facts and circumstances of the case so warrant and permitted by the Court/Tribunal.
- vii. At the time of tendering affidavit-in-evidence, the party must bring alongwith it either the original of papers, documents, books, registers relied upon by it or bring with it the carbon copy of the same.

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

Evidence, as defined in Section 3 of the Evidence Act, 1872 means and includes—

1. all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statements are called oral evidence;
2. all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

No evidence is required of matters which are, either formally admitted for the purposes of the trial, in civil cases, by the pleadings, by answer to interrogatories, by agreement or otherwise and in criminal cases, as regards proof of those documents admitted under Section 294, Code of Criminal Procedure, 1972.

### **Rule of Adverse Inference**

It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party. The Court will be justified in drawing an adverse inference against that party. [*Ms. Shefali Bhargava v. Indraprastha Apollo Hospital & Anr.*, 2003 NCJ 787(NC)].

It is equally incumbent upon a party to produce evidence of some expert where the issue involved is a complex or difficult one as for instance, issues pertaining to engineering, medical, technology or science etc. Since the court cannot constitute itself into an expert body and contradict the claim/proposition on record unless there is something contrary on the record by way of expert opinion or there is any significantly acclaimed publication or treatise on which reliance could be based. [*Dr. Harkanwaljit Singh Saini v. Gurbax Singh & Anr.*, 2003 NCJ 800 (NC)].

### **ARGUMENTS ON PRELIMINARY SUBMISSIONS**

Preliminary submissions should primarily confine to the true and correct facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings. Additionally the provisions of law or legal objections relevant and applicable to the issues involved in the matter should also be mentioned so as to demonstrate that the relief being claimed by the opponent is not eligible to be granted and/or that the relief being claimed by the party being represented by a lawyer/authorized representative should ordinarily be allowed as per those provisions of law. Before incorporating such facts and/or provisions of law in the write-up, a lawyer/authorized representative should be thorough with the provisions of law and interpretation, thereof, based upon relevant judgments so as to ensure that the submissions being made on behalf of the client are accepted and upheld by the Presiding Officer/Court/Tribunal as the case may be. Thus, for eg., if a claim being opposed by a lawyer/authorized representative is evidently barred by limitation, such an objection should be taken in the preliminary submissions/objections. Such type of submissions/objections should be duly

supported by law on the point or by relevant case law/judgments.

### **ARGUMENTS ON MERITS**

Such arguments as relate to the facts pleaded by the parties are termed as arguments on merits. While addressing arguments on merits, a lawyer/authorized representative should carefully point out the pleadings of the parties and the relevant evidence in support thereof, lead by the parties, both oral as well as documentary. A lawyer/authorized representative should ensure that all or any contradiction in the pleadings of the opponent and the evidence in support of such pleadings are duly pointed out while submitting his/her arguments. Thus, where an agreement/contract of service is pleaded and there is no evidence either oral or documentary on record in support of such an agreement/contract, it should be specifically pointed out that the opponent has failed to prove/establish that such an agreement/contract actually exists or that the same had actually been executed at all. Similarly, where notice is alleged to have been served prior to filing of the case and there is no documentary evidence like postal receipt/courier receipt placed on record by the opponent, it should be pointed out that the opponent has failed to establish that the notice had actually been served. Furthermore, the relevant facts and/or contradictions extracted from the opponent or his/her witness during the course of cross-examination and relating to the factual issues involved in the matter, should be highlighted so as to draw attention of the Court/Tribunal towards such facts/contradictions.

### **LEGAL PLEADINGS/SUBMISSIONS**

As already pointed out above, legal pleadings/submissions should be taken under the heading "preliminary submissions/objections". While taking such plea one should ensure that the legal provisions and/or interpretation, thereof, is very clear and directly applicable to the issues involved in the matter. Thus, where an unregistered agreement/contract forms the basis of a claim set up by a party and such an agreement/contract compulsorily requires registration under Section 17 of the Registration Act, a legal plea should be taken that since the agreement/contract is not a registered document, the same could not be looked into or relied upon by the Court for the reasons that the same cannot be read in evidence. Similarly, all other legal submissions which go to the root of the controversy and which are sufficient as well as material for adjudication of the issues involved, should be taken in opposition to the claims put forth by the opponent. Some illustrations are as under:

- i. Suit is not maintainable for want of statutory notice etc.
- ii. Complaint does not disclose cause of action.
- iii. Plaintiff has no right to sue.
- iv. Suit barred by principles of *res-judicata*.
- v. Suit barred by principles of waiver, estoppel, acquiescence.
- vi. Suit is barred by special enactment.
- vii. Court has no jurisdiction.
- viii. Suit is barred by limitation.
- ix. Suit is premature, and so on.

Some of these are known technically as 'special defences'. In a suit based on contract, defendant may admit that he made the contract, but may avoid the effect of admission by pleading performance, fraud, release, limitation etc.

### **LESSON ROUND-UP**

- A Company Secretary can act as an authorized representative before Company Law Board/NCLT, Competition Commission of India (CCI), Securities Appellate Tribunal (SAT), Telecom Regulatory Authority of India (TRAI) and various other Tribunals/quasi judicial bodies.
- 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. The fundamental rule of pleadings is contained in the provisions of Order 6, Rule 2 of the Civil Procedure Code.
- The general rule of drafting in respect of all the applications and petitions is that they should contain all the particulars required to be alleged by law giving the material facts in support of them. They should be precise as well as concise and should not contain any irrelevant matter. They should be drafted after looking into the provisions of law so that no relevant detail is omitted. As far as possible, the grounds on which the application is based should be stated in the words of statute under which the application is made.
- Every application should contain the name of the court, the number and cause title of the suit or other proceeding, followed by the names of applicant and opposite party and the provision of law under which it is made.
- It is incumbent on the defendant to file his defence in writing. If the defendant fails to file written statement, the court may pronounce judgment against him or may under Order 8, Rule 10, make such order in relation to the suit as it deems fit.
- When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleadings. All the rules relating to defendant's written statement apply, *mutatis mutandis* to such written statement of the plaintiff also. One has to keep in view various points at the time of drafting the reply or written statement.
- Pleadings filed by a defendant/respondent in answer to the claims set out by the plaintiff/petitioner in the form of an affidavit and/or supported by an affidavit are referred to as a counter affidavit.
- A written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent, is termed as a rejoinder or replication.
- The provisions of Sections 101, 102, 103, 106, 109, 110 and 111 of the Indian Evidence Act must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings.

- It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party.
- Preliminary submissions should primarily confine to the true and correct facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings.
- Legal pleadings/submissions should be taken under the heading “preliminary submissions/objections”. While taking such plea one should ensure that the legal provisions and/or interpretation thereof, is very clear and directly applicable to the issues involved in the matter.

## FOOTNOTES

\* Existing.

\*\* Proposed. The amendments introduced to the Companies Act, 1956 in 2002 authorise Company Secretaries to present his or its case before the Appellate Tribunal as the case may be.

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## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY VIII - APPEARANCES AND PLEADINGS-II**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to impart knowledge to the students regarding drafting of:

- Appeals
- Writs
- Special leave petition
- Revision application
- Affidavits

#### **APPEALS**

Although "Appeal" has not been defined in the Code of Civil Procedure, 1908 yet any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an "appeal". A right of appeal is not a natural or inherent right but is a creature of a statute. It is the statute alone to which the Court must look to determine whether a right of appeal exists in a particular instance or not. Parties cannot create a right of appeal by agreement or mutual consent. The right of appeal is not a matter of procedure, but is a substantive right and can be taken away only by a subsequent enactment, if it says so expressly or by necessary intendment and not otherwise. It is for the appellant to show that the statute gives a right of appeal to him.

The Code of Civil Procedure, 1908 provides for four kinds of appeals:

1. Appeals from original decrees (Sections 96 to 99 and Order XLI);
  2. Second Appeals (Sections 100 to 103);
  3. Appeals from Orders (Sections 104 to 106, Order XLIII, Rules 1 and 2); and
  4. Appeals to the Supreme Court.
1. Appeals from original decrees may be preferred from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court on points of law as well as on facts.
  2. Second Appeals lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

Under Section 100 to the Code, an appeal may lie from an appellate decree passed *ex parte*. The memorandum of appeal shall precisely state the substantial question of law involved in the appeal. The High Court, if satisfied, that a substantial question of law is involved, shall formulate that question. The appeal shall be heard on question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. In the second appeal, the High Court may, if the evidence on the record is

- sufficient, determine any issue necessary for the disposal of the appeal:
- a. which has not been determined by the Lower Appellate Court or both by the Court of first instance and the Lower Appellate Court, or
  - b. which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred in Section 100 of the Code (Section 103).
3. Appeals from, Orders under Sections 104 to 106 would lie only from the following Orders on grounds of defect or irregularity of law:
- a. An Order under Section 35A of the Code allowing special costs;
  - b. An Order under Section 91 or Section 92 refusing leave to institute a suit;
  - c. An Order under Section 95 for compensation for obtaining arrest, attachment or injunction on insufficient ground;
  - d. An Order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree; and
  - e. Appealable Orders as set out under Order XLIII, Rule 1.
4. Appeals to the Supreme Court, the highest Court of Appeal, lie in the following cases:
1. Section 109 of the Code of Civil Procedure, 1908 provides:
 

"Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court, if the High Court certifies:

    - i. that the case involves a substantial question of law of general importance; and
    - ii. that in the opinion of the High Court the said question needs to be decided by the Supreme Court."

Order 45 of the Code of Civil Procedure, 1908 provides rules of procedure in appeals to the Supreme Court.
    2. Articles 132 to 135 of the Constitution deal with ordinary appeals to the Supreme Court:
      - i. *Appeals in Constitutional cases:*

Clause (1) of the Article 132 of the Constitution provides that an appeal shall lie to the Supreme Court from any judgement, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceedings, if the High Court certifies under Article 134A that the case involves a substantial question of law as to interpretation of the Constitution.
      - ii. *Appeals in civil cases:*

Article 133 deals with appeals to the Supreme Court from decisions of High Court in civil proceedings. For an appeal to the Supreme Court the conditions laid down in this article must be fulfilled.

These conditions are:

- a. the decision appealed against must be a "judgement, decree or final order" of a High Court in the territory of India,
- b. such judgement, decree or final order should be given in a civil proceeding, and
- c. a certificate of the High Court to the effect that (i) the case involves a substantial question of law, and (ii) in the opinion of the High Court the said question needs to be decided by the Supreme Court.

*iii. Appeals in criminal cases:*

A limited criminal appellate jurisdiction is conferred upon the Supreme Court by Article 134. It is limited in the sense that the Supreme Court has been constituted a Court of criminal appeal in exceptional cases where the demand of justice requires interference by the highest Court of the land.

There are two modes by which a criminal appeal from any "judgement, final order or sentence" in a criminal proceeding of a High Court can be brought before the Supreme Court:

1. Without a certificate of the High Court.
2. With a certificate of the High Court.
3. Appeal by Special Leave. (*Discussed in this study lesson under the heading "Special Leave Petition".*)

In appeals, as a general rule, the parties to an appeal are not entitled to produce additional evidence, whether oral or documentary, but the Appellate Court has discretion to allow additional evidence in the following circumstances:

- i. When the lower Court has refused to admit evidence which ought to have been admitted;
- ii. When the party seeking to produce additional evidence establishes that he could not produce it in its trial Court for no fault of his;
- iii. The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement; and
- iv. For any other substantial cause.

However, in all such cases the Appellate Court shall record its reasons for admission of additional evidence.

The appellate judgement must include the following essential factors:

- a. the points for determination;
- b. the decision thereon;
- c. the reasons for the decision; and
- d. where the decree appealed from is reversed or varied, the relief to which the appellant is entitled to.

### **Drafting of Appeals**

An appeal may be divided into three parts: (1) formal part, known as the memorandum of appeal, (2) material part, grounds of appeal, and (3) relief sought for.

The memorandum of appeal should begin with the name of the Court in which it is filed. After the name of the Court, number of the appeal and the year in which it is filed are given. As the number is noted by the officials of the Court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. It should be indicated against the names of the parties as to what character each party had in the lower Court, i.e. whether he was a plaintiff or a defendant, or an applicant or an opposite party, as:

A.B., son of etc. (Plaintiff) Appellant

Versus

C.D., son of etc. (Defendant) Respondent

Or

A.B., son of etc. (Decree-holder) Appellant

Versus

C.D., son of etc. (Judgement-debtor) Respondent

After the names of the parties, an introductory statement giving the particulars of the decree or order appealed from (viz., the number and date, the court which passed it, and the name of the presiding officer), should be written in some such form as:

"The above-named appellant appeals to the Court of..... from the decree of..... Civil Judge at..... in Suit No..... passed on the..... and sets forth the following grounds of objections to the decree appealed from, namely"

This may also be written in the form of a heading as:

"Appeal from the decree of ..... Civil Judge of..... at..... in Suit No..... passed on the.....".

Thereafter, the grounds of appeal be given under the heading "Grounds of Appeal". The grounds of appeal are the grounds on which the decree or the order appealed from is objected to or attacked. As a general rule, in the grounds of appeal, the following points may be raised:

- a. any mistake committed by the lower Court in weighing the evidence;
- b. any mistake in the view of law entertained by the lower Court;
- c. any misapplication of law to the facts of the case;
- d. any material irregularity committed in the trial of the case;
- e. any substantial error or defect or procedure;
- f. and the defect, error or irregularity of any inter-locutory order passed in the case, whether the same was appealable or not.

A ground taken but not pressed in the first Appellate Court cannot be revived in second appeal. A defendant can question the propriety of *ex parte* proceedings in an appeal from the decree.

The general rule, besides being subject to Section 100 of the Code, is also subject to two conditions:

1. that the mistake of the lower Court should be material i.e., it should be such as affects the decision, and
2. that the objection taken must be such as arises from the pleadings and evidence in the lower Court.

**Drafting Grounds of Appeals**

- i. Grounds of objection should be written distinctly and specifically;
- ii. They should be written concisely;
- iii. They must not be framed in a narrative or argumentative form; and
- iv. Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.

These rules are simple but are most important and must be carefully remembered and observed while drafting Grounds of Appeal.

**Relief Sought in Appeal**

It is nowhere expressly provided in the Code that the relief sought in appeal should be stated in the memorandum of appeal. The absence of prayer for relief in appeal does not appear to be fatal and the Court is bound to exercise its powers under Section 107 of the Code and to give to the appellant such relief as it thinks proper. However, it is an established practice to mention in the memorandum of appeal, the relief sought by the appellant.

**Signature**

A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his counsel but if there are several appellants and they have no counsel, it must be signed by all of them. It is not required to be verified.

**Specimen Form of Appeal to the High Court**

IN THE HIGH COURT OF..... AT.....

CIVIL APPELLATE JURISDICTION

REGULAR CIVIL APPEAL NO..... OF

*IN THE MATTER OF:*

A.B.C. Company Ltd. a company incorporated under the provisions of the Companies Act and having its registered office.....

*...Appellant*

*Versus*

M/s..... a partnership concern

(or XYZ company Ltd., a company incorporated under the Companies Act and having its registered office at.....)

*...Respondents*

May it please the Hon'ble Chief Justice of the High Court of..... and his Lordship's companion Justices,

The appellant-company

**MOST RESPECTFULLY SHOWETH:**

1. That the appellant herein is a company duly registered under the provisions of the Companies Act and the registered office of the appellant is at.....

- and the company is engaged in the business of manufacturing.....
2. That the respondents who are also doing business of selling goods manufactured by the appellants and other manufacturers approached the appellant for purchasing from the appellant-company the aforesaid manufactured goods. An agreement was reached between the parties which was reducing into writing. The appellant supplied goods worth Rs. 15 lacs over a period of..... months to the respondents. A statement of account regarding the goods so supplied is annexed hereto and marked as *ANNEXURE A-1*.
  3. That the respondents have made a total payment of Rs. 6 lacs on different dates. The statement of the said payments made by the respondents is appended and is marked as *ANNEXURE A-2*.
  4. That the remaining amount has not been paid by the respondent despite repeated demands and issuance of a legal notice by the appellant through advocate.
  5. That the appellant filed a suit for recovery of the aforesaid balance amount of Rs. 9 lacs together with interest at the rate of 12% per annum and the cost of the suit. The suit was filed on..... in the court of the learned District Judge.
  6. That upon being summoned by the said court the respondents appeared through counsel and filed their written statement to which appellant-plaintiff also filed replication (rejoinder).
  7. That the parties led evidence. After hearing the counsel for the parties the learned District Judge has by his judgement and decree passed on..... dismissed the appellant's suit on the ground that the evidence led by the parties does not establish the claim of the appellant-plaintiff. Copies of the judgement and decree of the court below are annexed hereto and are marked as *ANNEXURE A-3 AND A-4*, respectively.  
Aggrieved by the aforesaid judgement and decree of the court below dismissing the suit of the plaintiff this appeal is hereby filed on the following, amongst other,  
**GROUND**
    - A. That the judgement and decree under appeal are erroneous both on facts as well as law.
    - B. That the learned trial court has failed to properly appreciate the evidence, and has fallen into error in not finding that the preponderance of probability was in favour of the plaintiff-appellant.
    - C. That there was sufficient evidence led by the plaintiff to prove the issues raised in the suit and the defendant-respondent has failed to effectively rebut the plaintiff's evidence, more particularly the documentary evidence.
    - D. ....
    - E. ....
    - F. ....
  8. That the valuation of this appeal for the purposes of payment of court-fee is fixed at Rs..... and the requisite court fee in the form of stamps is appended to this memorandum of appeal.

9. That this appeal is being filed within the prescribed period of limitation, the judgement and decree under appeal having been passed on.....  
In the above facts and circumstances the appellant prays that this appeal be allowed, the judgement and decree under appeal be set aside and the decree prayed for by the appellant in his suit before the court below be passed together with up-to-date interest and costs of both courts.

*APPELLANT*

### VERIFICATION

Verified at..... on this, the..... day of....., 20.... That the contents of the above appeal are correct to the best of my knowledge and belief.....

*APPELLANT*

THROUGH

(.....)

### WRITS

For enforcement of Fundamental Rights as conferred on the citizens of India and others under the Constitution of India, Article 32 of the Constitution confers on the Supreme Court of India power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo 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. Dis-obedience to the writ of *habeas corpus attracts punishment for contempt of Court under the Contempt of Courts Act, 1971.*

*Mandamus:* The expression "*mandamus*" means a command. The writ of *mandamus* is, thus, a command issued to direct any person, corporation, inferior Court or Government authority requiring him to do a particular thing therein specified which pertains to his or their office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction. *Mandamus* can be issued against any public authority. The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed.

*Mandamus* is not issued if the public authority has a discretion.

*Mandamus* can be issued by the Supreme Court and all the High Courts to all authorities. However, it does not lie against the President of India or the Governor of a State for the exercise of their duties and powers (Article 360). It also does not lie against a private individual or body except where the State is in collusion with such private party in the matter of contravention of any provision of the Constitution or of a Statute. It is a discretionary remedy and the Court may refuse if alternative remedy exists except in case of infringement of Fundamental Rights.

*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.

### **Specimen Form of a Writ Petition**

In the High Court of..... at.....

Civil Original (Extra-ordinary) Jurisdiction

Civil Writ Petition No..... of 200...

*In the matter of:*

JKL S/o..... R/o..... former employee (Inspector Grade-I) in the Respondent-Company.

...*Petitioner*

1. XYZ Company Ltd., a company wholly owned by the Govt. of India and having its registered office at..... through its Chairman.
2. Managing Director of the above Company

...*Respondent*

Civil Writ Petition against the order dated..... passed by the Managing Director, respondent No. 2 herein, by which the services of the petitioner as an employee of the respondent-company have been terminated.

May it please the Hon'ble Chief Justice of the High Court of..... and His Lordship's companion Judges.

The Petitioner

**MOST RESPECTFULLY SHOWETH:**

1. That the petitioner is a citizen of India and is therefore entitled to enjoy all the rights guaranteed by the Constitution of India.
2. That respondent No. 1 is a company registered under the Companies Act, 1956 having its registered office at.....  
The respondent-company is wholly owned by the Government of India and is, thus, an instrumentality of state as given in Annexure 12 of the Constitution.
3. That the petitioner was an employee of the respondent-company, having been appointed as a Sub-Inspector Grade-I on..... 1991 and he continued to work, earning one promotion also.
4. That on..... 20..... respondent No. 2 herein abruptly issued the impugned order dated..... terminating the services of the petitioner and the petitioner came to be relieved of his duties the same day. A copy of the impugned order is annexed hereto and marked as *ANNEXURE-1*.
5. That on a bare reading of the impugned order it becomes clear that the order has been issued on the basis of some alleged misconduct on the part of petitioner, but no inquiry under the relevant rules has been held before the passing of the order.

6. That the petitioner has not committed any act that could be termed to be an act constituting misconduct.
7. The impugned order is being assailed on the following, amongst other,

**GROUNDS**

7.1 That the petitioner being a permanent employee of the respondent-company his services could not be terminating without holding an enquiry under the rules applicable to the employees of the company.

7.2 That the principles of natural justice have been contravened by the respondents in not giving to the petitioner any opportunity of being heard.

7.3 That the impugned order is otherwise also erroneous and unsustainable, as it does not contain any reason and is a non-speaking order.

7.4 That the impugned order is arbitrary and contravenes Article 14 of the Constitution.

7.5 .....

7.6 .....

8. That the petitioner has not filed any petitioner other proceedings relating to the matter at this petition in any other court.

**PRAYER**

In the facts and circumstances stated above the petitioner prays that a direction in the form of a writ of quo warranto and mandamus or any other appropriate writ be issued quashing the impugned order and reinstating the petitioner in service with all consequential benefits including back wages.

It is further prayed that the respondent be burdened with costs.

PETITIONER

THROUGH

DATED..... COUNSEL

MR.....

The Writ petition must be supported by an affidavit of the petitioner.

**SPECIAL LEAVE PETITIONS**

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

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

Where a High Court refused to issue the required certificate to enable an aggrieved party to appeal to the Supreme Court against the judgment, order or sentence awarded by the High Court the aggrieved party may petition to the Supreme Court

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

"(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.

2. Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces".

Section 112 of the Code of Civil Procedure, 1908 keeps the powers of the Supreme Court under Article 136 of the Constitution to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India, beyond the scope of the provisions of the Code.

Section 112 lays down:

1. "Nothing contained in this Code shall be deemed:

a. to affect the powers of the Supreme Court under Articles 136 or any other provision of the Constitution; or

b. to interfere with any rule, made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before that Court; ....."

### **Special Leave Petition (SLP) to the Supreme Court under Article 136**

In suitable cases, where some arguable questions, mostly on legal points, are involved the Constitution confers under Article 136 wide discretionary powers on the Supreme Court to entertain appeals even in cases where an appeal is not otherwise provided for. But so far as questions of fact, as distinct from questions of law, is concerned, it is only in rare or exceptional cases that the Supreme Court interferes and that too when finding of the High Court or the lower Court is such that it shocks the conscience of the court.

### **Specimen Form of a Petition for Special Leave in the Supreme Court of India**

CIVIL APPELLATE JURISDICTION

*IN THE MATTER OF:*

Special Leave Petition under Article 136

of the Constitution of India

AND

*IN THE MATTER OF:*

ABC Company Ltd., a company registered under the Companies Act through.....

Chairman/Managing Director, the company having its registered office at.....

...Petitioner

*Versus*

1. .... S/o..... R/o.....
2. Union of India through the Secretary, Ministry of Corporate Affairs, New Delhi.
3. The Registrar of Companies.....

...*Respondents*

May it please the Hon'ble Chief Justice of India and His Lordship's Companion  
Judges of the Supreme Court.

The petitioner-appellant-(company)

***MOST RESPECTFULLY SHOWETH:***

1. That the petitioner is a company duly incorporated under the provisions of the Companies Act, having its registered office at..... and is challenging by way of this Special Leave petition the judgment and order of the High Court of..... dated in proceeding under Section..... of the Companies Act.
2. That the questions of law involved in this matter are as follows:
  - a. Whether the High Court has fallen into error in taking the view that.....?
  - b. Whether it would be a good ground for winding up of the petitioner-company that two of its directors are not an speaking terms and there is, thus, a deadlock in the administration of the affairs of the company.

or

[Here state any other ground that has been taken by the respondents or any of the respondents seeking the relief of winding up of the company from the High Court or any other relief.....].

- c. Whether.....
3. That respondent No. 1 herein had filed a petition before the Hon'ble High Court of..... seeking the relief..... which petition was contested by the petitioner-company inter alia on the grounds that.....
4. That the High Court after hearing the parties through their respective counsel allowed the said petition, holding that sufficient grounds had been made out for winding up of the petitioner-company (or any other relief claimed in the petition before the High Court).
5. That the aforesaid findings and the final judgement/order of the High Court are assailed on the following, amongst, other.

***FOUNDATIONS:***

- 5.1 That.....
- 5.2 That.....
- 5.3 That.....
6. That the petitioner has not filed any appeal or other proceeding relating to this matter in this Hon'ble Court or any other Court.

***RELIEF***

The petitioner-company accordingly prays that this Hon'ble Court be pleased to grant Special Leave to Appeal in the matter and to allow the appeal, set aside the impugned judgement/order passed by the High Court and dismiss the petition filed by the respondent (No. ....) in the High Court.

PETITIONER

*AFFIDAVIT*

IN THE HON'BLE SUPREME COURT OF INDIA

IN THE MATTER OF:

.....

...Petitioner

*Versus*

1. ....

2. ....

3. ....

...Respondent

*AFFIDAVIT*

I, .....company through the petitioner in the Special Leave Petition titled as above do hereby solemnly affirm and state as under:

1. That I am the Chairman/Managing Director etc. of the petitioner-company and am fully aware of and conversant with the relevant facts concerning the matter in issue in this petition.
2. That the contents of the accompanying Special Leave Petition are true and correct to the best of my knowledge and belief.
3. That no relevant fact has been concealed or kept back in the S.L.P.

DEPONENT

I, further solemnly affirm at..... (place) this the..... day of..... that the above averments are true and correct. Nothing has been kept back or concealed.

DEPONENT

**REVISION AND REVIEW APPLICATIONS**

**Revision**

Section 115 of the Code of Civil Procedure, 1908 deals with revisionary jurisdiction of the High Courts. The Section lays down:

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

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

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

Provided that the High Court shall not, under the Section, vary or reverse any

order made, or any order deciding an issue, in the course of a suit or other proceeding, except where:

- a. the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or
  - b. the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.
2. The High Court shall not, under this Section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto."

**REVISION (CIVIL)**

Section 115 of the Code of Civil Procedure provides for the remedy of revision. In a case where an appeal does not lie against a final order the aggrieved party can file a revision before the High Court (an no other court). There are certain orders passed by the Civil Courts subordinate to the High Court against which the remedy of appeal is not available, even through such orders finally decide an important question involved in the suit or substantially effect the right or interest of a party to the suit. In such cases the High Court can entertain a revision and quash or modify the order of the court below.

**SPECIMEN FORM OF REVISION**

In the High Court of.....

Civil Appellate Jurisdiction

Civil Revision No..... of 20....

**IN THE MATTER OF:**

ABC S/o..... R/o.....

...Petitioner

*Versus*

XYZ S/o..... R/o.....

...Respondent

**AND**

**IN THE MATTER OF:**

**CIVIL REVISION AGAINST THE ORDER DATED..... PASSED BY THE LEARNED SUB-JUDGE, 1ST CLASS..... IN THE SUIT ENTITLED ABC -VS.- XYZ (CIVIL SUIT NO. .... OF 20....)**

May it please the Hon'ble Chief Justice, High Court of..... and his companion Justices.

The petitioner **MOST RESPECTFULLY SHOWETH:**

- A. That the petitioner named above has filed a suit against the respondents for the recovery of possession of a house situated in....., fully described in the plaint. The suit is pending in the court of Sub-Judge 1st Class..... and the next date of hearing is.....
- B. That on being summoned the respondent appeared before the court below and filed his written statement wherein he denied the petitioner's title set up in the suit

property.

- C. That the trial court framed issues on..... and directed the petitioner (plaintiff) to produce evidence, upon which the petitioner promptly furnished to the court below a list of witnesses and also deposited their diet expenses etc., making a request that the witness be summoned by that Court.
- D. That on a previous date of hearing that is....., 200..., two witness of the petitioner had appeared and their statements were recorded. However, the learned Presiding Officer of the court below passed an order that the remaining witnesses be produced by the petitioner-plaintiff on his own without seeking the assistance of the court. This order was passed despite a request by the petitioner that at least those witness named in the list who are State employees should be summoned by the court, as they are required to produce and prove some official records.
- E. That on the next date of hearing the learned trial court by the order impugned in this revision closed the evidence of the petitioner-plaintiff on the ground that the remaining witnesses were not produced by him.
- F. That the impugned order has caused great prejudice to the petitioner and if the same is allowed to stand the petitioner's suit is bound to fail.
- G. That the trial court has unjustifiably denied assistance of the court to the petitioner-plaintiff to secure the attendance of his witnesses. The interests of justice demand that he is provided with all legal assistance in this regard.

In the facts and circumstances discussed above the petitioner prays that this Hon'ble Court be pleased to quash and set aside the order under revision and direct the court below to provide assistance of the court for summoning the plaintiff-witnesses.

PETITIONER

*[Affidavit to be filed in support of the fact that the contents of the accompanying revision petition are true and correct to the best of the deponent's knowledge and that nothing has been kept back or concealed].*

### **Review**

The right of review has been conferred by Section 114 and Order XLVII(47), Rule 1 of the Code of Civil Procedure. The section provides that any person considering himself aggrieved by a decree or order, may apply for a review of judgement, to the Court which passed the decree or made the order, on any of the grounds as mentioned in Order XLVII, Rule 1, namely:

1. discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made; or
2. on account of some mistake or error apparent on the face of the record; or
3. for any other sufficient reason; and the Court may make such order thereon as it thinks fit.

### **AFFIDAVITS**

An affidavit being a statement or declaration on oath by the deponent, is an

important document and the consequences of a false affidavit are serious.

Therefore, great care is required in drafting it.

A Court may, at any time, for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any particular witness may be read at the hearing, provided that the Court may order the deponent to appear in person in Court for cross-examination.

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. The following rules should be remembered when drawing up an affidavit:

1. Not a single allegation more than is absolutely necessary should be inserted;
2. The person making the affidavit should be fully described in the affidavit;
3. An affidavit should be drawn up in the first person;
4. An affidavit should be divided into paragraphs, numbered consecutively, and as far as possible, each paragraph should be confined to a distinct portion of the subject;
5. Every person or place referred to in the affidavit should be correctly and fully described, so that he or it can be easily identified;
6. When the declarant speaks of any fact within his knowledge he must do so directly and positively using the words "I affirm" or "I make oath and say";
7. Affidavit should generally be confined to matters within the personal knowledge of the declarant, and if any fact is within the personal knowledge any other person and the petitioner can secure his affidavit about it, he should have it filed. But in interlocutory proceedings, he is also permitted to verify facts on information received, using the words "I am informed by so and so" before every allegation which is so verified. If the declarant believes the information to be true, he must add "and I believe it to be true".
8. When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents;
9. The affidavit should have the following oath or affirmation written out at the end:  
"I swear that this my declaration is true, that it conceals nothing, and that no part of it is false".

"I solemnly affirm that this my declaration is true, that it conceals nothing and that no part of it is false".

Any alterations in the affidavit must be authenticated by the officer before whom it is sworn.

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

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

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

**Specimen Affidavit of Creditor in proof of his debt in Proceeding for the Liquidation of a Company**

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

The matter of the Indian Companies Act, 1956.

And

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

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

1. That the abovenamed company was on the..... day of....., 20...., the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of Rupees..... (Rs.....) only in account of (describe briefly the nature of the debt).
2. That in proof of the aforesaid debt I attach hereto the documents marked A, B and C.
3. That I have not, nor have any person or persons by my order or to my knowledge or belief for my use, received the aforesaid sum of Rupees..... or any part thereof, or any security or satisfaction for the same or any part thereof except the sum or security (state the exact amount of security).
4. That this my affidavit is true, that it conceals nothing and no part of it is false.

Sd/- A.B.

Dated..... 20... Deponent

**Verification**

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

Sd/- A.B

Dated.....

I, ..... s/o.....

r/o.....

... declare, from a perusal of the papers produced by the deponent before me that I am satisfied that he is Shri A.B.

Sd/-.....

Solemnly affirmed before me on this..... day of.....

20..... of..... (time) by the deponent.

Sd/-.....

(Oath Commissioner)

## LESSON ROUND-UP

- Any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an "appeal". A right of appeal is not a natural or inherent right but is a creature of a statute. Parties cannot create a right of appeal by agreement or mutual consent.
- The Code of Civil Procedure, 1908 provides for four kinds of appeals—Appeals from original decrees; Second Appeals; Appeals from Orders; and Appeals to the Supreme Court.
- An appeal may be divided into three parts: (1) formal part, known as the memorandum of appeal, (2) material part, grounds of appeal, and (3) relief sought for.
- The important rules must be carefully remembered and observed while drafting grounds of appeal.
- It is nowhere expressly provided in the Code that the relief sought in appeal should be stated in the memorandum of appeal. However, it is an established practice to mention in the memorandum of appeal, the relief sought by the appellant.
- A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his counsel but if there are several appellants and they have no counsel, it must be signed by all of them. It is not required to be verified.
- 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 136 of the Constitution confers upon the Supreme Court power to grant special leave to appeal.
- In suitable cases, where some arguable questions, mostly on legal points are involved, the Constitution confers under Article 136 wide discretionary powers on the Supreme Court to entertain appeals even in cases where an appeal is not otherwise provided for.
- The Code of Civil Procedure under Section 115 deals with revisionary jurisdiction of the High Courts.
- Section 115 also provides for the remedy of revision. In a case where an appeal does not lie against a final order, the aggrieved party can file a revision before the High Court (and no other court).
- The right of review has been conferred by Section 114 and Order XLVII (47), Rule 1 of the Code of Civil Procedure.
- An affidavit being a statement or declaration on oath by the deponent, is an important document. The consequences of a false affidavit are serious.

Therefore, great care is required in drafting it.

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## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY IX - APPEARANCES AND PLEADINGS-III**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to make the students acquainted with the

- Dress code
- Etiquettes
- Court craft

#### **INTRODUCTION**

Company Secretaries are knowledge professional with a compliance bent of mind and analytical approach. They are not only conversant with the technicalities and provisions of the corporate legal areas but are highly specialized professionals in the matters of procedural and practical aspects involved in the compliances enjoined under various statutes and the rules, regulations, bye-laws and guidelines made thereunder.

Although Company Secretaries are conversant with the provisions of various corporate laws as well as other laws, rules and regulations, communication and presentation skills; nevertheless in the changing global business environment, it is equally important that they must possess manners, a professional look and demeanor to project a professional and competent image in the corporate world as well as while appearing before the tribunals and other quasi judicial bodies. So it is important for them to be familiar with dress code norms, court craft and professional etiquettes having value for their career, value for their company, value for them as an individual to achieve success in the professional career.

#### **DRESS CODE**

In professional life it is important to look presentable because personal appearance counts. How you look can be a major factor in how you are perceived by others. How you look, talk, act and work determines whether you are a professional or an amateur. The way you dress, speaks volumes about who you are as a person and as a professional. Whenever you enter a room for the first time, it takes only a few seconds for people you have never met to form perceptions about you and your abilities. Your clothes and body language always speak first. So it is important that your image gives people the right impression.

Some of the perceptions people can form solely from your appearance are: your professionalism; your level of sophistication; your intelligence and your credibility. Whether these perceptions are real or imagined, they underscore how your appearance instantly influences the opinions of strangers, peers, and superiors. Being well dressed in a corporate setting can influence not just perceptions, but also promotions.

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

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

If you are concerned about your career, you will be more concerned with looking professional than looking cute or trendy. If you look and behave like a highly-trained and well-groomed professional, you will win the respect and honour of your valued clients.

### **Guidelines for Professional Dress of Company Secretaries**

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

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

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

### **PROFESSIONAL ETIQUETTES**

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

In today's world of business, professionals need to know how to conduct

themselves within the business world. One of the best ways to do so is to practice good professional etiquette. Practicing good professional etiquette is necessary for professional success in the emerging business scenario which is constantly changing and making the market place more competitive and contestable. Corporates look for those candidates who possess manners, a professional look and demeanor, and the ability to converse appropriately with business colleagues and clients. Though your academic knowledge and skills may be spectacular, but not knowing proper etiquette required to be successful in the professional career could be a roadblock preventing you to achieve success in the professional life and business relationships. Good professional etiquette indicates to potential employers that you are a mature, responsible adult who can aptly represent their company. Dealing a client with confidence, acting appropriately at business interactions and knowing the proper table manners at a business dinner are just some of the necessary skills today's professionals must have in an increasingly competitive environment, and that will leave a lasting impression – good or bad. Some manners and behaviour remain constant. Nonetheless, other etiquette moments require you to conduct yourself differently than you do when you are with professional colleagues or clients at any business meeting/get-together. It is in these moments that you need to understand the particulars of etiquette. Being corporate professionals, you must practice some basic etiquette tips that would help you to go up the ladder of success in the workplace. These include Dressing Etiquette; Introduction and Greeting Etiquettes; Conversation Etiquette; Communication Etiquettes; Invitation Etiquette and Dining Etiquettes etc.

### *Dressing Etiquette*

With every organization program comes the inevitable question: What do I wear? Knowing what to wear, or how to wear something, is key to looking great in any event.

- Always wear neat and nicely pressed formal clothes. Choose corporate shades while you are picking up clothes for your office wear.
- Ties for men should compliment.
- Women should avoid wearing exposing dresses and opt for little but natural make-ups. Heels should be of appropriate or modest height.
- Men need to keep their hair (including facial hair) neatly trimmed and set.
- Always polish your shoes.
- Keep your nails clean.
- Wear clothes which you are comfortable in and can carry well. This is very important while you are in a business meeting or client presentation.

### *Handshake Etiquette*

Etiquette begins with meeting and greeting. A handshake is a big part of making a positive first impression. A firm shake is an indication of being confident and assertive. The following basic rules will help you get ahead in the workplace:

- Always rise when introducing or being introduced to someone.

- Shake hands with your right hand.
- Shake hands firmly (but not with a bone crushing or fish-limp grip), and with only one squeeze.
- Hold it for a few seconds (only as long as it takes to greet the person), and pump up and down only once or twice.
- Make eye contact while shaking hands.

### *Communication Etiquettes*

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

### *Invitation Etiquette*

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

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

### *Dining Etiquettes*

- Always be courteous while official dinners. Offer the seat to your guest first. If you are the guest, be punctual and thank the host for the dinner.
- Wait until you receive your host's signal.
- Initiate conversations while waiting for the food.
- Never begin eating any course until everyone has been served or the

host/hostess has encouraged you to do so.

— Chew quietly; don't speak with your mouth full.

— Avoid pointing the knife or fork towards the other person while eating and speaking.

— Allow your guest to select the menu and wine.

— If something unwanted has gone to your mouth, place the napkin in front of your mouth tactfully and bring it out instead of putting your hand inside the mouth to get rid of it.

— Learn the basic table manners before you go out to dine with a potential client or an important business meet.

That apart, you must pay special attention to the following general etiquettes: Always be punctual at your workplace; During a meeting, turn off your mobile phone or put it on silent mode. It is considered extremely impolite to allow a mobile phone to ring during a meeting and take a call while sitting in a meeting. In case it is a must to receive a phone call, it is best to discreetly excuse yourself from the meeting and take it out into the hall or private area; When in a meeting room, always stand up to greet the seniors if they arrive after you; Try to ignore and overlook funny or embarrassing sounds when in a meeting or official conversation; If you have forgotten somebody's name ask him/her politely saying that you are sorry that you cannot remember the name; Always keep a comfortable distance while conversing with others; Avoid standing or sitting too close to the other person. An arm's length would be ideal to maintain the comfort zone.

Practicing these etiquettes in your professional life, will make a great impact on everyone you are associated with. You must always be conscious that your mannerisms reflect on your professionalism and your company.

## **COURT CRAFT**

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

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

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

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

## Preparatory Points

There are certain basic preparatory points which a Company Secretary should bear in mind when contacted by a client.

- Take minute facts from the client;
- Lend your complete ears to all that client has to say;
- Put questions to the client while taking facts so that correct/relevant facts can be known;
- Convey to the client about exact legal position in context of relief sought by the client;
- Give correct picture of judicial view to the problem posed by the client.

## Drafting of Pleadings

Pleadings could be both written and oral. Mastering both the kinds of pleadings is must for effective delivery of results to the clients. Some of the important factors which may be borne in mind while making *written pleadings* are as under:

- Quote relevant provisions in the petition and excerpts of observations made by the Courts relevant to the point;
- Draft prayers for interim relief in such a manner which though appears to be innocuous but satisfy your requirements;
- Do not suppress facts;
- Highlight material facts, legal provisions and Court decisions, if any;
- State important points at the outset together with reference to relevant provisions/judgements.

*If you are opponent*

- File your reply to the petition at the earliest opportunity;
- Take all possible preliminary contentions together with reference to relevant law point and judgements;
- Submit your reply to each paragraph of the petition.

*If you are for the petitioner*

- File your rejoinder upon receiving the reply at the earliest opportunity;
- 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.

## **As Regards Advocacy**

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

They should be able to:

1. Identify the client's goals;
2. Identify and analyse factual material;
3. Identify the legal context in which the factual issue arises;
4. Relate the central legal and factual issues to each other;
5. State in summary form the strengths and weaknesses of the case from each party's perspective;
6. Develop a presentation strategy;
7. Outline the facts in simple narrative form;
8. Structure and present in simple form the legal framework of the case;
9. Structure the submission as a series of propositions based on the evidence;
10. Identify, analyse and assess the specific communication skills and techniques;
11. Demonstrate an understanding of the purpose, techniques and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify evidence;
12. Demonstrate an understanding of the ethics, etiquette and conventions of advocacy.

## **Conduct and Etiquette**

### *Duty to the Court*

- i. A Company Secretary shall, during the presentation of his case and while

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

#### *Duty to Client*

- i. A Company Secretary shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.
- ii. A Company Secretary shall not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear if he can retire without jeopardizing his client's interest.
- iii. A Company Secretary shall at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either him or continuing the engagement.
- iv. It shall be the duty of a Company Secretary to fearlessly uphold the interest of his client by all fair and honourable means without regard to any unpleasant

consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.

- v. A Company Secretary shall not at any time, be a party to fomenting of litigation. A Company Secretary shall not act on the instructions of any person other than his client or his authorized agent.
- vi. A Company Secretary shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client.

#### *Duty to Opponent*

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

#### **Important Principles**

Some of the important principles of advocacy a Company Secretary should observe include:

1. Act in the best interest of the client;
2. Act in accordance with the client's wishes and instructions;
3. Keep the client properly informed;
4. Carry out instructions with diligence and competence;
5. Act impartially and offer frank, independent advice;
6. Maintain client confidentiality.

#### **Advocacy Tips**

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

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

- vii. *Be likeable.* At least be more likeable than your opponent. If you can convert an unfamiliar Bench into a group of people who are sympathetic to you personally, you perform a wonderful service to your client.
- viii. Learn to listen.
- ix. Entertain your judge. Humour will often bail you out of a tough spot.

### **LESSON ROUND-UP**

- Though Company Secretaries are conversant with the provisions of various corporate laws and other laws and regulations, communication and presentation skills, but it is equally important that they must possess manners, a professional look and demeanor to project a professional and competent image in the corporate world as well as while appearing before the tribunals and other quasi judicial bodies.
- How you look can be a major factor in how you are perceived by others. How you look, talk, act and work determines whether you are a professional or an amateur.
- Some of the perceptions people can form solely from your appearance are: your professionalism; your level of sophistication; your intelligence and your credibility.
- Besides legal profession, professional dress code standards are established in major business organizations and these have become more relaxed in recent decades.
- To enhance the visibility and brand building of the profession and ensuring uniformity, the Council of the Institute of Company Secretaries of India has prescribed guidelines for professional dress for members while appearing before judicial/quasi-judicial bodies and tribunals.
- Practicing good professional etiquette is necessary for professional success in the emerging business scenario which is constantly changing and making the market place more competitive and contestable.
- 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.
- Being corporate professionals, you must practice some basic etiquettes 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.
- For winning a case, art of advocacy is important which in essence means to convince the judge and others that my position in the case is the proper interpretation. Art of advocacy/court craft is learned when we enter the practising side of the profession.

- 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.
- There are certain basic preparatory points which a Company Secretary should bear in mind when contacted by a client.
- Company Secretaries should be able to formulate and present a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner. They should understand the crucial importance of preparation and the best way to undertake it.

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## **DRAFTING, APPEARANCES AND PLEADINGS**

### **STUDY X - COMPOUNDING OF OFFENCES AND CONSENT ORDERS**

#### **LEARNING OBJECTIVES**

The objective of this study lesson is to acquaint the students with consent orders and also compounding of offences under the

- Companies Act
- Foreign Exchange Management Act (FEMA)
- Criminal Procedure Code
- SEBI Act

#### **INTRODUCTION**

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

Thus, in compounding, there is a compromise or agreement, while in case of imposition of fine under the provisions of an Act, there is no agreement as such. Generally, offences which are of a private nature and relatively not serious are made compoundable.

There are various advantages of compounding under any legislation, if it is done before the trial by the court, wherein either of the parties to the dispute which is at fault willingly agrees to its fault and a compromise is done between both the parties without the matter being adjudicated by the court. Compounding saves the parties from the hassle of spending a lot of money, time and energy in lengthy legal proceedings. In a country like India where there are thousands of cases pending in the courts, 'compounding' is a good way of settling disputes or matters.

#### **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. (Schedule X of the Companies Act) and additional fee payment in certain cases enable the filing of document after the expiry of the normal period of filing. The additional fee is subject to a ceiling of ten times the normal fee. However, the facility of compounding is not available to a

company or a concerned officer, if such company or the officer was allowed this facility within three years preceding the present offence.

The application for compounding is to be made to the 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.

Section 15 of the FEMA Act dealing with power to compound contravention stipulates that:

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

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 of 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.

### **COMPOUNDING OF OFFENCES UNDER CODE OF CRIMINAL PROCEDURE, 1973**

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

### **COMPOUNDING OF OFFENCES UNDER SEBI ACT, 1992<sup>\*a</sup>**

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

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

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

Settlement of proceedings through compounding can be sought by any person who is notified that a proceeding may or will be instituted against him/her, or any party to a proceeding already instituted, may, at any time, propose in writing for settlement. Following factors, which are only indicative, may be taken into consideration for the

purpose of compounding of offences under the respective statute:

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

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

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

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

### **CONSENT ORDERS<sup>\*b</sup>**

SEBI has brought the concept of Consent Order into force for resolving the disputes in more smooth manner through negotiations and discussions instead of lengthy litigation. SEBI as issued Guidelines for (i) Consent Orders and (ii) For considering requests for composition of offences, under SEBI Act, SC(R) Act and Depositories Act (*vide Circular No. EFD/ED/Cir-1/2007 dated 20th April 2007*).

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

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

The Parliament of India has recognised SEBI’s powers to pass an order with the consent of the parties. This will of the Parliament is clear from the words of Section 15T of the SEBI Act, 1992. Section 15T(2) of the SEBI Act reads as under:

“No appeal shall lie to the Securities Appellate Tribunal from an order made—

- a. by the Board on and after the commencement of the Securities Laws (Second Amendment) Act, 1999;
- b. by an adjudicating officer, with the consent of the parties.”

Thus, the Parliament in its wisdom has recognized that SEBI and its authorized delegate have power to pass Consent Orders. Similarly, courts have well recognized inherent powers to settle a case before them on an application made by the parties. Consent Orders can be passed in respect of all types of enforcement or remedial actions including administrative proceedings and civil actions e.g. proceedings under Sections 11, 11A(1)(b), 11B and 11D of SEBI Act or under Enquiry Proceedings Regulations or Adjudication Rules or equivalent proceedings under the Securities Contracts (Regulation) Act, 1956, Depositories Act, 1996 and other civil matters pending before SAT/courts.

Any person who is notified that a proceeding may or will be initiated against him/her, or any party to a proceeding already initiated may, at any time, propose in writing for settlement. The factors that may be taken into consideration for the purpose of passing consent orders are similar as stated in the compounding of offences above. Consent Order can be passed at any stage where probable cause of violation has been found. In the event of a serious and intentional violation, the process cannot be completed till the fact finding process is completed whether by way of investigation or otherwise.

When the proposal of settlement is submitted by the party, it will be examined by a high powered Committee headed by a retired High Court judge. Where the Committee finds the terms for passing a consent order inadequate, it may ask the party to revise the consent terms. Thereafter, the Committee will submit its views/recommendations to the Adjudicating Officer/Competent Authority where proceedings are pending for passing Consent Order. The above procedure and factors and waivers shall be applied for considering the proposals of composition of

offences under the SEBI Act, SCRA and the Depositories Act, 1996, wherever applicable.

Where a matter is pending before SAT/Court, the same consent process will be undertaken and the draft consent terms recommended by the Committee and approved by the Competent Authority will be filed before the SAT/Court. The SAT/Court may, if found fit, pass an order in terms of the consent terms and subject to such further terms as the SAT/Court may find appropriate in the facts and circumstances of the case. The final acceptance of any offer of settlement will come in to effect only upon the Competent Authority/SAT/Court passing the Consent Order/ Compounding order.

After passing Consent Orders, the Consent Order will be published through press release and would be put on SEBI website. In cases where a Party undertakes compliances, it has to comply with the same as per agreed schedule.

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

If SEBI rejects the offer of settlement, the person making the offer shall be notified of the same and the offer of settlement shall be deemed to be withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers. SEBI and the Party will be free to resort to legal recourse as may be available to them under law and neither SEBI nor the Party would be entitled to use any information relating to the settlement process in such proceedings. In cases where SEBI is not inclined to accept settlement, SEBI would file its objections before SAT for consideration.

### **LESSON ROUND-UP**

- Compounding means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement and the complainant agrees not to prosecute the accused.
- Compounding of offence allows the accused to avoid the lengthy process of criminal prosecution, which would save cost, time, mental agony, etc. in return for payment of compounding charges.
- Companies Act, 1956 has given power to the Central Government to compound offences that do not invite imprisonment as penalty.
- 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.
- Criminal Procedure, 1973 permits compounding of various offences under Indian Penal Code. Such compounding can be done either before or after institution of prosecution.

- SEBI Act, 1992 permits compounding of offences by the court where prosecution proceedings are pending.
- Consent order means an order settling administrative or civil proceedings between the regulator and a person (Party) who may *prima facie* be found to have violated securities laws.
- Consent order provides flexibility of wider array of enforcement and remedial actions which will achieve the twin goals of an appropriate sanction, remedy and deterrence without resorting to litigation, lengthy proceedings and consequent delays.
- The Parliament of India has recognised SEBI's powers to pass an order with consent of the parties. This will of the Parliament is clear from the words of Section 15T of the SEBI Act 1992.
- Consent orders can be passed in respect of all types of enforcement or remedial actions and other civil matters pending before SAT/courts.

## FOOTNOTES

\* This section has been substituted by the Companies (Second Amendment) Act, 2002. Date yet to be notified.

\*<sup>a</sup> Complied on the basis of SEBI Website.  
([www.sebi.gov.in/faq/consentord-faq.pdf](http://www.sebi.gov.in/faq/consentord-faq.pdf))

\*<sup>b</sup> Complied on the basis of SEBI Website.  
([www.sebi.gov.in/faq/consentord-faq.pdf](http://www.sebi.gov.in/faq/consentord-faq.pdf))

# Test-1

Saturday, October 16, 2010  
2:02 AM

## DRAFTING, APPEARANCES AND PLEADINGS

### TEST PAPER 1/2008

(OPTIONAL)

(This test paper is based on Study Lessons 1 to 5)

Time allowed: 3 hours Maximum marks: 100

1. (a) What are the preliminary requirements of drafting which a Company Secretary should consider before drafting a document? (9 marks)  
(b) Discuss in brief the law relating to dissolution of partnership. Draft a specimen deed of dissolution of partnership. Is it necessary to get such a deed registered under the Registration Act, 1908? (12 marks)
2. (a) Define 'assignment'. Draft a specimen deed of assignment of shares in a company. (9 marks)  
(b) Discuss in detail various principles employed in interpretation of deeds and documents. (8 marks)
3. (a) Explain mortgage by deposit of title deeds and how it is made? (9 marks)  
(b) Discuss briefly the components of deed of transfer of property. (9 marks)
4. Write short notes on the following:
  - i. Instrument
  - ii. Force Majeure
  - iii. Testimonium clause
  - iv. Goodwill
  - v. Parcels(20 marks)
5. (a) What are the essential points to be taken into account in drafting of an instrument of mortgage? Whether mortgage should always be in writing and does require compulsory registration? If yes, explain the consequences of non registration thereof. (12 marks)  
(b) Define a dealership contract. What are essential ingredients of such a contract and what care should be taken while drafting it? Draft a specimen dealership contract. (12 marks)

## Test-2

Saturday, October 16, 2010

2:02 AM

### **DRAFTING, APPEARANCES AND PLEADINGS**

#### **TEST PAPER 2/2008**

(OPTIONAL)

**(This test paper is based on Study Lessons 6 to 10)**

*Time allowed: 3 hours Maximum marks: 100*

1. (a) What is an arbitration agreement? What are its important ingredients? Discuss the aim and pre-requisites of arbitration. (10 marks)
- (b) How a trade mark has been defined? Draft a specimen deed of assignment of a registered trade mark. (10 marks)
2. (a) What important points you will keep in view while drafting a trust-deed? (8 marks)
- (b) What are the Appellate Authorities under the Companies Act and SEBI Act? (10 marks)
3. (a) What is meant by an 'irrevocable power of attorney'? Explain in detail authentication and registration of power of attorney. (10 marks)
- (b) What is consent order? Explain the objective of consent order? What factors are taken into consideration for the purpose of passing consent order. (10 marks)
4. (a) Define 'appeal'. Briefly outline various components of an appeal. (9 marks)
- (b) Write in brief about the underwriting and brokerage agreements. Draft a specimen underwriting agreement. (15 marks)
5. (a) Draft a specimen deed of agreement on admission into firm of a new partner. What extra care should be taken while drafting such a deed? (10 marks)
- (b) What special points are taken into account while drafting notices in case of a company? (8 marks)

# Test-3

Saturday, October 16, 2010  
2:04 AM

## DRAFTING, APPEARANCES AND PLEADINGS

### TEST PAPER 3/2008

(COMPULSORY)

(Based on All Study Lessons)

Time allowed: 3 hours Maximum marks: 100

1. (a) What is meant by 'recitals' as a component in a deed? What is its evidentiary value? (5 marks)
- (b) State the grounds on which a review of the order passed by the court can be sought. (5 marks)
- (c) Draft a specimen deed of surrender of lease. (5 marks)
- (d) Explain the difference between the 'writ of prohibition' and 'writ of certiorari.' (5 marks)
2. (a) Precious Gems Ltd. had submitted a sealed tender to Beautiful Watches Ltd. for the award of a contract to supply gems. However, its tender was not accepted. The document of tender contained an arbitration clause. Precious Gems Ltd. invoked the said arbitration clause and sought an interim relief on the ground that the floating of a tender and the response thereto constituted an arbitration agreement. Will the company be entitled to relief under the Arbitration and Conciliation Act, 1996? Refer to decided case law in support of your answer. (6 marks)
- (b) What is meant by pleadings? What is the objective behind formulating the rules of pleadings? Explain the fundamental rule of pleadings. (8 marks)
3. (a) Define building contract. Draft a specimen building contract including all the terms and conditions which are essential for such a contract. (8 marks)
- (b) How does the difference between licence and lease is reflected in drafting licence deed and lease deed? And what precaution should be kept in mind while drafting such deeds? (8 marks)
4. (a) 'The object of trust must be lawful'. Comment in the light of the provisions of Indian Trust Act, 1882. Distinguish between public trust and private trust. (8 marks)
- (b) Define Amalgamation. Draft specimen agreement between two companies to amalgamate by sale one to other. (6 marks)
5. (a) Enumerate the usual important clauses of a debenture trust deed. (8 marks)
- (b) Define partnership deed. Discuss in brief the care and precaution a draftsman should take while drafting a partnership deed. (8 marks)
6. (a) What is meant by etiquette? Why practicing good professional etiquette is necessary for professional success? (8 marks)
- (b) Differentiate between the following terms: (12 marks)
- i. Document and deed
  - ii. Affidavit and petition
  - iii. Counter guarantee and fidelity guarantee
  - iv. English mortgage and simple mortgage

# Test-4

Saturday, October 16, 2010  
2:04 AM

## DRAFTING, APPEARANCES AND PLEADINGS

### TEST PAPER 4/2008

(COMPULSORY)

(Based on All Study Lessons)

Time allowed: 3 hours Maximum marks: 100

1. a. Draft an award by an arbitral tribunal under the Arbitration and Conciliation Act, 1996. Assume facts. (5 marks each)  
b. What is deed of assignment? Draft a specimen deed of assignment of copyright of a novel.  
c. Explain Habendum. What does a Habendum clause signify in a document?  
d. Draft a deed of sale of property where mortgage is not joining.
2. (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. (8 marks)  
(b) Explain in brief as to what do you understand by "collaboration agreement". Discuss various guidelines which are required to be followed while entering into a foreign collaboration agreement. (10 marks)
3. (a) Why is art of advocacy important? What are the important factors which Company Secretaries should bear in mind while making written pleadings? (8 marks)  
(b) Explain the general rules of drafting in respect of applications and petitions. (8 marks)
4. (a) 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? (8 marks)  
(b) Draft a 'superannuation fund trust deed' including all the essential clauses. (8 marks)
5. (a) Enumerate the procedure of compounding of offences under the Companies Act and Foreign Exchange Management Act (FEMA). (8 marks)  
(b) Define 'affidavit'. What rules and guiding principles should be followed while drawing up an affidavit? (7 marks)
6. (a) Ahmed & Co., appellant, and Vijay Engineering Ltd., respondent, were party to a contract, which did not provide for escalation. However, while deciding the dispute, the arbitral tribunal allowed escalation of price to the respondent. This was challenged unsuccessfully before the High Court by the appellant, who ultimately approached the Supreme Court. Discuss in the light of a decided case whether the petition will be allowed? (8 marks)  
(b) Re-write the following sentences after filling-up the blank space with appropriate word(s) so as to convey the correct meaning :
  - i. A \_\_\_\_\_ cannot be transferred by the licensee or exercised by his servants or agents.
  - ii. Mortgage by deposit of title deeds is called in English Law as \_\_\_\_\_.
  - iii. According to Section 105 of the Transfer of Property Act, 1882, a lease of immovable property is a transfer of a right to enjoy \_\_\_\_\_.
  - iv. The terms of a guarantee must be \_\_\_\_\_ construed.
  - v. Article 136 of the Constitution of India empowers \_\_\_\_\_ with wide discretionary powers to entertain appeals even in cases where an appeal is not otherwise provided for.
  - vi. Section \_\_\_\_\_ of the Criminal Procedure, 1973 permits compounding of various offences under Indian Penal Code.
  - vii. Pleadings filed by a defendant/respondent in answer to the claims set out by the plaintiff/petitioner in the form of an affidavit and/or supported by an affidavit are referred to as \_\_\_\_\_.(1 mark each)

# Test-5

Saturday, October 16, 2010  
2:02 AM

## DRAFTING, APPEARANCES AND PLEADINGS

### TEST PAPER 5/2008

(COMPULSORY)

(Based on All Study Lessons)

Time allowed: 3 hours Maximum marks: 100

1.
  - a. "Drafting of document is a skilled man's job." Explain this statement with some important do's and don'ts in drafting.
  - b. What is compounding? How compounding of offences takes place under the SEBI Act?
  - c. What are the essential ingredients of an agency contract?
  - d. What is a dress code and what is its significance for professionals in the changing global scenario? (5 marks each)
  
2.
  - (a) Discuss in brief legal provisions governing assignment of patents. Draft a specimen deed of assignment of a patent. (8 marks)
  - (b) On behalf of Rana Ltd., draft a specimen general power of attorney authorising Vivek, Vice President to carry out day to day business of the company including legal matters. (8 marks)
  
3.
  - (a) In an arbitration award, the arbitral tribunal awarded interest pendente lite except in relation to Claim No.4. The petitioner in whose favour the award was made challenged it on the ground that interest was not awarded in Claim No.4. Decide with reference to case law. (8 marks)
  - (b) What are important matters which should be kept in view while drafting a memorandum of appeal for filing before an appellate authority/superior court etc? (7 marks)
  
4.
  - (a) What are the factors to be considered while giving our premises on leave and licence basis? Draft a specimen of leave and licence agreement. (9 marks)
  - (b) Explain briefly the various types of writs provided under the Constitution of India for the enforcement of fundamental rights. (8 marks)
  
5.
  - (a) What are the important considerations to be kept in mind while drafting a reply/ written statement? (8 marks)
  - (b) Briefly explain the contents of a service contract. Draft a specimen agreement of employment of manager of a business concern. (8 marks)
  
6.
  - (a) What is the procedure after passing consent orders? What remedies are available with SEBI, if the consent order is violated by a party? (8 marks)
  - (b) Re-write the following sentences after filling-up the blank space with appropriate word(s) so as to convey the correct meaning:
    - i. Consent order means an order settling \_\_\_\_\_ proceedings between the regulator and a person (Party) who may prima facie be found to have violated securities laws.
    - ii. A power of attorney executed for the purpose of a specific act is called a \_\_\_\_\_ power of attorney".
    - iii. When \_\_\_\_\_ relation between all the partners inter se is snapped, this constitutes dissolution of the firm. (1 mark each)
    - iv. An \_\_\_\_\_ is drafted either as a deed poll or as a regular deed between the author of trust and the trustee.
    - v. Preliminary submissions should primarily confine to the \_\_\_\_\_ facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings.
    - vi. Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to \_\_\_\_\_.
    - vii. A proper understanding of drafting cannot be realised unless the \_\_\_\_\_ between the law, the facts, and the language is fully understood and accepted.
    - viii. Delivery of tangible immovable property takes place when the seller places the buyer, or

such person as he directs\_\_\_\_\_ the property.

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