Solved

Scanner Appendix

CS Professional Programme Module - III (New Syllabus)
Solution of December - 2014

Paper - 8 : Drafting, Appearances and Pleadings

Chapter - 1: General Principles of Drafting & Relevant Substantive Rules

2014 - Dec [2] (a)

The essence of the process of drafting is synthesis of law and fact in a languages. A proper understanding of drafting cannot be realised unless the nexus between the law, the facts, and the language is fully understood and accepted. This requires serious thinking followed by prompt action to reduce the available information into writing with a legal meaning.

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 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 they 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 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.

2014 - Dec [3A] (Or) (i)

Covenants and Undertakings : The term "covenant" is defined as an agreement under seal, which 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 "undertaking" are mixed, i.e. can not be separated in that case, they are joint together, words put for this as "The Parties aforesaid hereto hereby mutually agree with each other as follows". Such covenants may be expressed or implied.

Chapter - 2: Drafting and Conveyancing Relating to Various Deeds and Agreements

2014 - Dec [1] (a)

ELECTRONIC CONTRACTS (E-CONTRACTS)

Due to the immoderate advancement of technology E-Commerce has become a part of human daily life. E-Commerce is the selling and purchasing of goods and services using technology. E-Contracts are basically the contracts analyzed with E-Commerce and other transactions taking place in the digital environment.

E-contract (contract that is not paper based but rather in electronic form)is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract. Traditional contract principles and remedies also apply to e-contracts. This is also known as electronic contract.

Electronic contracts are born out of the need for speed, convenience and efficiency. Imagine a contract that an Indian exporter and an American importer wish to enter into. One option would be that one party first draws up two copies of the contract, signs them and couriers them to the other, who in turn signs both copies and couriers one copy back. The other option is that the two parties meet somewhere and sign the contract. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a scenario.

The contracts formed through electronic media are treated as the general contracts and their formation and acceptance are governed as per the Indian Contract Act, 1872.

The Indian Contract Act, 1872 governs the manner in which contracts are made and executed in India. It governs the way in which the provisions in a contract are implemented and codifies the effect of a breach of

contractual provisions. Within the framework of the Act, parties are free to contract on any terms they choose. Indian Contract Act consists of limiting factors subject to which contract may be entered into, executed and breach enforced.

ESSENTIALS OF E-CONTRACT

As per the Indian Contract Act, the essentials of a contract are:

(i) An offer or proposal by one party and acceptance of that offer by another party resulting in an agreement consensus-ad-idem.
(ii) An intention to create legal relations or an intent to have legal consequences.
(iii) The agreement is supported by lawful consideration.
(iv) The parties to contract are legally capable of contracting.
(v) Genuine consent between the parties.
(vi) The object and consideration of the contract is legal and is not opposed to public policy.
(vii) The terms of the contract are certain.
(viii) The agreement is capable of being performed i.e., it is not impossible of being performed.

2014 - Dec [2] (b)

Del Credere Agency : Del credere agency is an arrangement where an agency is combined with guarantee. In this arrangement, the agent i.e. del credere agent undertakes to guarantee the one performance of the contract by the buyer in lien of an extra remuneration. By reason of his charging a del credere commission he assumes responsibility for the solvency and performance of the contract by the vendor 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 the seller perform the contracts which he makes with them.

Chapter - 3: Drafting and Conveyancing Relating to Various Deeds and Agreements-I

2014 - Dec [2A] (Or) (i), (ii)

(i) Probate

Probate is a certificate granted under the seal of Competent Court, certifying the Will (a copy whereof is annexure thereto) as the Will of the testator and granting the administration of the estate of the deceased in accordance with that Will to the executor named under the Will.

Letters of Administration

A letter of administration can be obtained from the Court of competent jurisdiction in cases where the testator has failed to appoint an executor under a will or where the executor appointed under a will refuses to act or where he has died before or after proving the Will but before administration of the estate. Letters of Administration are not always necessary in cases of intestacy of Hindus, Mohammedans, Buddhists, Sikhs, Jains, Indian Christians or Parsis. Letter of Administration is always necessary where a person (governed by the Indian Succession Act) dies intestate.

(ii) Privileged Will

Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a Wills made in the manner provided in Section 66. Such Wills are called Privileged Wills. Privileged Wills may be made orally and may not always be in writing. If written in handwriting of testator, it need not be signed or attested. It is governed by Sections 65 & 66 of the Indian Succession Act.

Unprivileged Will

Wills made by the persons other than stated above are Unprivileged Will. Such Wills are required to be in writing, signed by testator and attested by the two witnesses (except those made by Mohammedans). It is governed by Section 63 of the Indian Succession Act.

2014 - Dec [6] (i), (ii), (iii), (iv)

(i) 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].

(ii) 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.".

(iii) 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.

(iv) 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 tenstamentary 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.

Chapter - 4: Drafting and Conveyancing Relating to Various Deeds and Agreements - II

2014 - Dec [3] (b)

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.

Essential Points to be Observed for Drafting of Lease Documents

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.

Chapter - 5: Drafting and Conveyancing Relating to Various Deeds and Agreements - III

2014 - Dec [3] (a)

"Actionable claim" has been dealt with under sections 130 to 137 of the Act.

(i) **Definition:** "Actionable claim" is defined in Section 3 of the Transfer of Property Act as follows:

A claim to any debt, other than a debt secured by mortgage of immoveable 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 recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Actionable claims are claims, to unsecured debts. If a debt is secured by the mortgage of immoveable property it is not an actionable claim, because the Section clearly excludes such a debt. A debt is a liquidated money obligation which is usually recoverable by a suit. To create a debt, first of all, there must be a liquidated or definite sum which is actually due. For example, arrears of rent due. The term debt may also include a sum of money which is due in the sense that it exists, but is not actually payable until a later date. For example, A borrows money from B on the 1st of January and promises to repay on March 15, the amount is not payable till the 15th of March, but certainly it is a debt and it is an accruing debt. Another essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.

The Section also says that it must be a claim to any debt which the Civil Courts recognise as affording grounds for relief to the person who claims it.

Illustrations of actionable claims:

(i) Arrears of rent accrual constitute a 'debt' so it is an actionable claim (*Sheu Gobind Singh v. Gauri Prasad, AIR 1925 Pat. 310*).

(ii) Provident Fund that is standing to the credit of a member of the Provident Fund.

(iii) Money due under the Insurance Policy.

(iv) A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (*Thakardas v. Vishindas*).

Non-actionable claims:

(i) Debentures are secured debts and therefore not regarded as actionable claims.

(ii) Copy right though a beneficial interest in immoveable property is not an actionable claim since the owner has actual or constructive possession of the same (*Savitri Devi v. Dwarka Bhatya*, (1939) All 305).

2014 - Dec [4] (a)

Deed of Dissolution of Partnership

(To be executed on ₹ 10/- Non Judicial Stamp Paper)

THIS DEED OF DISSOLUTION OF PARTNERSHIP made the_____day of_____200_____BETWEEN _____.

WHEREAS the partners hereof under a deed of partnership dated_____made between them formed themselves into a business firm and carried on business under the name and style of_____in pursuant to the covenants, stipulations and provision contained in the said deed.

AND WHEREAS it has been mutually decided between the parties that the said partnership shall be dissolved, and the said trade and business should be wound up and the stock-in-trade, assets and credits realized and called in, and the net proceeds after payment and satisfaction of all debts and liabilities divided between the partners according to the covenants in this behalf appearing in the deed of partnership.

NOW THIS DEED WITNESSES that in pursuance of the said agreement it is hereby declared and agreed by and between the parties hereto as follows, that is to say:

1. The said partnership between the partners hereto under the deed, dated_____hereunto appended shall be determined and stand dissolved as from the_____day of_____200_____And the parties hereto singly or jointly shall not carry on the business of the said firm of_____under the said name and style for a period of_____years hence.
2. The parties hereto shall on the aforesaid date of_____sign notices of the dissolution and forthwith advertise in the local Official Gazette the fact of dissolution as required by Section 45 of the Indian Partnership Act AND shall also intimate the fact of dissolution to the Registrar of Firms under the provision of Section 63 of the said Act.
3. Within_____days after the dissolution of the partnership a full and general account and balance sheet shall be taken and made of

the property, assets and liabilities of the partnership; and a full and particular inventory and valuation of all the machinery, plants, tools, utensils, stock in hand. office equipment, materials and effects belonging to the firm shall be made by the parties or such other person as the partners may choose to appoint, whose decision shall be final binding upon the partners, and all debts owing to the firm shall be collected and got in by the parties or such other persons as the parties may by instrument in his behalf appoint.

4. That as soon as may be, after the property, assets and liabilities have been got in and disbursed the parties or such other person or persons whom the parties may have appointed under the foregoing clause shall divide and apportion the share of the parties, in the proportion of the contribution of the parties towards the capital. In such division any amounts paid earlier or due to the parties according to the books of the partnership shall be taken into account. That the cost of liquidation proceedings shall also be deemed to be a liability of the partnership and paid from the funds of the partnership.
5. That in case the winding up shows a loss or the assets of the partnership are insufficient to meet the liabilities and debts of the partnership then the partners shall forthwith pay such losses in the proportion of their contribution to the capital.
6. Each of the parties shall, as soon as the others or any of them, or their or his representatives, shall have executed and done all the assurances, acts things hereby agreed to be done by them respectively and at the request and cost of such other or others, or their or his representatives execute to them or him such releases, indemnifies, and assurances as may be reasonable and proper.

IN WITNESS WHEREOF the said AB, CD and EF have hereto signed and executed this agreement of dissolution and appended it to said deed of partners dated_____.

WITNESSES:

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

Chapter - 6: Drafting and Conveyancing Relating to Various Deeds and Agreements - IV

2014 - Dec [1] (b), (c)

(b) The Writing Process

Simply knowing your opinion, knowing the answer, does not mean the writing process is a mere formality. You have to know how to express yourself in an opinion, how to transfer the thinking process on the paper.

The legal opinion should be written following a structure. It should be entitled OPINION or ADVICE and contain the title of the case in the heading. The first paragraph should serve as an introduction to the legal opinion, laying out the salient facts and what you have been asked to advise about.

At this point, many legal opinions will set out the main conclusions and advice and the overall opinion. This is good practice as it will encourage focus throughout the legal opinion and the reader will be able to read the following paragraphs knowing where they are leading. A percentage chance of success can be included in this section if appropriate.

The subsequent paragraphs should set out your reasons for reaching the legal opinion which you do in the opening paragraphs. This is where the legal structure will come in. Each issue should be taken in its logical order. Each section should include your opinion on that issue and the reasons for it.

There are certain rules of structure which ought to be followed for the sake of consistency in legal opinions. One example of these is that liability should be dealt with before quantum in civil claims. If there are two or more defendants take each of the defendant's liability in turn before turning to quantum.

(c) 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.

Chapter - 7: Drafting of Agreements under Companies Act

2014 - Dec [3] (c)

Enforceability of the Shareholder's Agreement

Though the international view is split but to a large extent courts are inclined towards favouring SHA as long as they are not found to be detrimental to the minority stakeholder's rights. In the leading case of *Russell v. Northern Bank Development Corporation Ltd.* [1992] BCC 578; [1992] 1 WLR 588, the House of Lords found that though a company cannot deprive itself of its power to alter its constitution, the members of the company could agree in a shareholders' agreement as to how they will exercise their voting rights on a resolution to alter the articles/constitution. The US Courts have largely accepted shareholder agreements. [B*lount v. Taft* [246 S.E.2d 763 at 769 (1978)]

While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India courts have either refused to recognize clauses in shareholders agreements or even when consistent with company legislation, enforced such clauses only if they have been incorporated in the

articles of association of the company. There is a series of rulings where the courts have upheld that in case of any conflict between the Articles and the SHA, the former will always prevail.
Some of these are:
– *V.B. Rangaraj v. V.B. Gopalakrishnan* (AIR 1992 SC 453)
– *Shati Prasad Jain v. Kalinga Tubes Ltd*. (35 Com. Cas. 351 SC)
The Supreme Court in V.B. Rangaraj v. V.B. Gopalakrishnan, AIR 1992 SC 453 held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders. This decision was reiterated by the Bombay High Court in *IL & FS Trust Co. Ltd. v. Birla Perucchini Ltd.* [2004] 121 Comp Cas 335 (Bom).

2014 - Dec [3A] (Or) (iii)
A pre-incorporation contract means a contract entered into by the promoters on the behalf of a proposed company i.e. before incorporation of a company. These contracts are usually made by the promoters to acquire some property or right for the proposed company. Hence, a contract made by a promoter purporting to act on behalf of a company prior to its incorporation never binds the company because at the time the contract was concluded, the company was not in existence. Further, even after incorporation such a purported contract cannot be ratified by the company [*Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174]. Even if the company takes some benefit from a contract purported to have been made before its formation the contract is not binding on the company. The Promoters alone remain personally liable for any contract they purport to make on behalf of the company, unless the company enters into the contract in terms of such agreement after incorporations. A company cannot ratify a pre-incorporation contract, but it is open to it to enter into a new contract after its incorporation to give effect to a contract made before its incorporation [*Howard* v. *Patent Ivory Co.* (1888) 38 Ch D 156].

Chapter - 8: Pleadings

2014 - Dec [1] (d)

The object of a pleading which aims at ascertaining precisely the points for contention of the parties to a suit. The rules of pleading and other ancillary rules contained in the Code of Civil Procedure have one main object in view. It is to find out and narrow down the controversy between the parties. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. 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 causes of action must take (*Ganesh Trading v. Motiram*, AIR 1970 SC 480). Necessarily, a pleading is accurate only when stripped of verbosity it pinpoints succinctly the plaintiff's grievances giving him the right to sue for the desired relief, or when it briefly sets out the defendant's defence. When so done, there would be hardly any scope left to beat about the bush or to take the other party by surprise.

Pleadings should be read not by the piecemeal but as a whole and should be liberally construed. Every venial defect should not be allowed to defeat a pleading, for a plaintiffs case should not be defeated merely on the ground of some technical defect in his pleadings provided he succeeds on the real issues of the case. It has been held: "Rigid construction of the law of pleadings was inappropriate and not calculated to serve the cause of justice for which the law of procedure was largely designed (AIR 1969 Del. 120). This should, of course, not be taken as an excuse for pleadings extremely lax and irrelevant, argumentative and inaccurate".

In construing the plaint, the court has to look at the substance of the plaint rather that its mere form. If, on the whole and in substance, the suitor appears to ask for some relief as stated, the court can look at the substance of the relief. "Pleadings have to be interpreted not with formalistic rigour but with latitude of awareness of low legal literacy of poor people".

2014 - Dec [2A] (Or) (iii), (iv)

(iii) Revision: According to Section 115 of the code of civil procedure, 1908 provides that the reversionary jurisdiction of the High Court. The aggrieved party can file a revision application before the High Court and no other Court in a case where an appeal does not lie against a final order, if such subordinate court appears:

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

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 XLII, Rules 1 and 2); and
(4) Appeals to the Supreme Court.

(iv) Set-off

Order 8, Rule 6 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.

Under Order VIII Rule 6 where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary jurisdiction of the Court and where both parties fill the same character as in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Effect of Set-off

Under clause (2) the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgement in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order 8, Rule 6A)

2014 - Dec [3] (d)

Pleadings shall contain only material facts. Material facts are the entirety of facts which would be necessary to prove to succeed in the suit. Any fact which is not material should be avoided. Slackness in pleadings is unfair both to the court in which they are filed and also to the litigants. Material

facts should be pleaded concisely. There is hardly any scope for showing literary genius in a pleading.

Order 6, R. 2, C.P.C. should be read with O. 6, R. 4(c). When commencing a suit, the plaintiff is required to state only material facts, but such facts must constitute his cause of action as well. Absence of material facts will put the party to discomfiture, for no amount of evidence can be taken into consideration or regarded as sufficient in proof of any fact if specific mention of it is not made in the pleadings. Therefore, if a party omits to state a material fact, he will not be allowed to give evidence of the fact at the trial unless the pleading is amended under O. 6, R. 17, C.P.C. The rule is based mainly on principles that no party should be prejudiced by change in the case introduced by this method. No relief can be granted on facts and documents not disclosed in the plaint.

It is often noticed that during the trial of a suit, some fact is sought to be introduced in evidence which does not find mention in the plaint or in the written statement, as the case may be. Then follows a heated parley when the court intervenes and rejects any attempt of introduction of any new fact. To avoid discomfiture, the pleading should be carefully drafted not to miss any material fact which may subsequently be found to be so material as to decide the fate of the case this or that way.

2014 - Dec [4] (d)

COMPLAINT

Complaint under section 2(d) of the Criminal Procedure Code means any allegation made orally or in writing to Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown has committed an offence, but it does not include a police report.

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint and the police officer making the report as a complainant.

In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under sections 195 and 197.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

(i) an oral or a written allegation;
(ii) some person known or unknown has committed an offence;
(iii) it must be made to a Magistrate; and
(iv) it must be made with the object that he should take action.

FIRST INFORMATION REPORT (FIR)

Section 154 Cr.P.C 1973 deals with information in cognizable cases. Section 154 reads:

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

2014 - Dec [5] (a)

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.

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.

Chapter - 9: Appearances

2014 - Dec [2] (c)

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.

2014 - Dec [3A] (Or) (iv)

RIGHT TO LEGAL REPRESENTATION

Under the Companies Act

Section 432 of the Companies Act, 2013 dealing with right to legal representation envisages that the applicant or the appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

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 Practicing Chartered Accountant, or Practicing 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.

2014 - Dec [4] (b), (c)

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

(c) 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.

2014 - Dec [5] (b)

PROFESSIONAL ETIQUETTES

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.

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.

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.

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.

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.

Chapter - 10: Compounding of Offences

2014 - Dec [2] (d)

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.

2014 - Dec [3A] (Or) (ii)

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

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

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

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FOR NOTES

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