

Wakf Property

Power of mutawalli to sell or mortgage. A mutawalli has no power, without the permission of the court, to mortgage, sell or exchange wakf property or any part thereof unless he is expressly empowered by the deed of wakf to do so¹ or authorised by the court but he is to obtain the previous sanction of the Board in all such cases.² The 1995 Act makes it clear that notwithstanding anything contained in the wakf deed, any gift, sale, exchange or mortgage of any immovable property which is wakf property shall be void unless such gift, sale, exchange or mortgage is effected with the prior sanction of the Board and that no mosque, dargah or khangah shall be gifted, sold, exchanged or mortgaged except in accordance with any law for the time being in force.³

The Board may accord sanction to such transaction if it is of opinion that such transaction is necessary or beneficial to the wakf, consistent with the objects of the wakf, the consideration thereof is reasonable and adequate.³

The following enactments relating to administration of trusts apply to wakfs:⁴

- (i) Official Trustees Act II of 1913.
- (ii) Charitable Endowments Act VI of 1890, ss. 2, 3, 4, 5, 6 and 8.
- (iii) Religious Endowments Act XX of 1863, s. 14.
- (iv) The Code of Civil Procedure 1908, ss. 92 and 93.
- (v) Charitable and Religious Trusts Act XIV of 1920.
- (vi) The Bombay Public Trusts Act 1950 (Bom. Act XXIX of 1950).

1 Mulla on *Principles of Mahomedan Law*, 19th Ed., p. 179.

2 Section 36A of the Central Wakf Act 1954 and s. 53 of the Bengal Wakf Act 1934.

3 Section 51 of the Wakf Act 1995.

4 See Mulla on *Principles of Mahomedan Law*, 19th Ed., pp. 201-202.

FORMS

Deed of Wakf

TO ALL TO WHOM these presents shall come I wife of a Mahomedan by faith and religion governed by *sunni/shia* school of Mahomedan Law etc. SEND GREETING WHEREAS I am of my free will and own accord desirous of permanently dedicating my properties, movable and immovable, fully mentioned and described in the schedule hereunder written for purposes recognised by the Mahomedan Law as religious, pious and/or charitable NOW KNOW YE and I hereby declare as follows:

1. I dedicate all the properties mentioned and described in the schedule hereunder written with all appurtenances and the rents, issues and profits thereof absolutely and permanently by way of wakf for the purposes as aforesaid with intent to extinguish all my rights and claim therein and vest the same in God and complete the same by delivery of possession to the mutawalli in the manner hereinafter mentioned.

2. The ultimate benefit under this wakf is reserved for purposes and objects recognised by the Hanafi or Sunni School of Mahomedan Law as religious, pious and/or charitable and indicated in the paragraph next succeeding.

3. The purposes and objects referred to in the last preceding paragraph are *inter alia* as follows:

- (i) The payment of my just debts.
- (ii) The maintenance and support of myself and my
- (iii) The distribution of alms to poor and indigent persons on every Thursday in the week the amount or value of such weekly alms not to be less than Rupees
- (iv) The observance of the tenth day of Mohurrum by distribution of milk and other food.
- (v) The celebration of ceremonies known as Mound Shariff.
- (vi) To help poor and meritorious students professing Islam faith and reading in any recognised institution.
- (vii) The performance of the annual fateha of myself after my death and of my husband after his death and the members of
- (viii) Other religious, pious and/or charitable purposes as may be thought fit by the mutawalli from time to time or a court of law including pecuniary reliefs or assistance to indigent members of my family and the family of my

4. The moneys which may be realized by execution of the decrees in the suits mentioned in the said schedule hereto shall, after payment therefrom of my debts, be invested in landed properties and such landed properties shall form a part of the estate hereby made wakf estate.

5. Out of the income of the said wakf estate the said shall each receive a monthly sum of not more than Rs only for the benefit of themselves and their respective families and descendants. As regards the respective amounts to be spent for the other purposes aforesaid, the mutawalli or mutawallis for the time being shall have absolute discretion.

6. For the appointment of mutawalli, the following rules are laid down:

(i) I shall be the mutawalli for my life.

(ii) After my death Sri AB and CD son of MN shall be joint mutawallis and each of them shall be at liberty to appoint one of his or her lineal male descendants as his or her successor failing which each shall be succeeded by his or her eldest lineal male descendant. All the mutawallis for the time being and each of them shall have the power of appointing their, his or her successors or successor.

7. The mutawalli or mutawallis for the time being (jointly if there are more than one) shall, as and by way of remuneration, be entitled to receive jointly one-fourth part of the net income of the wakf estate and to retain all expenses of management including the costs of all necessary litigations.

8. Notwithstanding anything herein contained, no mutawalli will directly or indirectly grant or extend any benefit out of the wakf estate to my or any descendants of theirs.

9. In cases of necessity and for the benefit of the wakf estate, the mutawalli or mutawallis for the time being shall after obtaining sanction of the Wakf Board Constituted under the Wakf Act 1995 and in accordance with its directions, be at liberty, to sell, mortgage, transfer, alienate, partition and/or demise the wakf properties mentioned in the said schedule hereto or any part thereof and to invest the moneys thereby raised and in the event of such sale, mortgage, transfer, alienation, partition and/or lease the proceeds thereof as well as such investments shall form part of the wakf estate but no purchaser, mortgagee, transferee, alienee, co-sharer or lessee of the said properties shall be concerned to enquire whether the respective sales, mortgages, transfers, alienations, partition or leases are necessary for or beneficial to the wakf estate or to see to the application of the proceeds thereof.

10. The dedication hereby made will bind my heirs, executors and representatives.

11. The properties hereby dedicated are valued at Rs.

The Schedule above referred to

Part I

Part II

IN WITNESS WHEREOF the said MR has executed these presents on this day of 1999 at Calcutta.

Signed, sealed and delivered
by MR in the presence of:

NOTE: *Wakf as defined by Mahomedan jurists.* The term 'wakf' literally means detention. The term wakf has defined by Justice Kader as the property vests in God Almighty and the income is applied to the objects.⁵ The legal meaning of 'wakf', according to Abu Hanifa is the detention of a specific thing in the ownership of the wakif or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects". According to the two disciples, Abu Yusuf and Muhammad, wakf signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing is the implied ownership of God in such a manner that its profits may revert to or be applied "for the benefit of mankind". Baillie, 557-558. See Hadaya, 231, 234. A wakf extinguishes the right of the wakif or dedicator and transfers ownership to God. The mutawalli is the manager of the wakf, but the property does not vest in him, as it would in a trustee in English law.⁶ The expression "vested in trust" in s. 10 of the Limitation Act does not apply to the mutawalli. It is also for this reason that the Indian Trusts Act 1882, exempts from its scope the rules of law applicable to wakf.⁷ A wakf, however, is a trust for the purposes of s. 92 of the Code of Civil Procedure.⁸

Deed of Wakf (Mahomedan)—Movables and Immovables

WHEREAS I, AB son of, etc., of, (hereinafter called the WAKIF), am solely and absolutely seized and possessed of or otherwise well and sufficiently entitled to the property fully mentioned and described in Schedule Y hereto, and also to the shares of the joint stock companies and other securities, and also to the moneys and other movable properties set out in Schedule Z hereto: AND WHEREAS I desire to make a wakf of the properties set out in Schedules Y and Z hereto to grant aid to the poor and meritorious students (Mahomedan) prosecuting studies in the school known as and in the event of abolition of the said school to apply the income for such public charitable purposes as are hereinafter mentioned: NOW THIS DEED WITNESSES that I, the WAKIF, divest myself of all ownership, possession and enjoyment

5 Kader: *The Law of Wakfs*, Ed. 1999, p. 40.

6 *Mahomed Rustom v Mustaq Hussain* 47 IA 224.

7 *Per Amir A.J. Vaidus v Balusami* (1921)48 IA 362.

8 *Md. Kuzim v Syed Ali* 136 IC 417; *Mulla's Mahomedan Law*, 19th Ed., p. 143.

of the same and vest the same in God so as to create an endowment thereof for the religious and charitable objects hereunder mentioned and deliver possession thereof to the mutawalli hereunder appointed to effectuate my said wish and desire.

1. I appoint myself as the first mutawalli for administration of this wakf for the term of my natural life, which shall all along be known and designated as the wakf of AB.

2. After my death, CD son of, etc., and EF son of, etc., shall be the successors in my office and act as mutawalli of this wakf if qualified for the office who shall select two among their descendants as their successors and the vacancy thus created by death shall be filled up by this process for generations.

3. In the event of the death without selecting his substitute or retirement of any mutawalli holding office, the continuing mutawalli will co-opt a mutawalli in the place of one dying or retiring in the first place out of my heirs and their descendants, both male and female, PROVIDED they are found competent in that behalf, but preference shall always be given to a male eligible for the purpose.

4. Should any of the mutawallis be deemed unfit to hold the office, he shall be liable to be removed from the office of mutawalli.

5. The mutawalli or mutawallis shall realize the income of the wakf property, and shall at the first instance pay the outgoings and expenses of management of the wakf property. After such payment, the surplus shall be distributed by the mutawalli or mutawallis for the time being once in every months amongst the beneficiaries hereinafter mentioned.

6. The mutawallis shall, out of the surplus income as aforesaid of the wakf estate, set apart a sum equivalent to 75% to be applied in granting aid or financial assistance to poor and meritorious students prosecuting studies in the school subject to increase or diminution as may be permitted or justified by the income for the time being and pay the residue to me, AB the WAKIF for the time of my natural life. After my death, such surplus income shall be paid to my descendants in accordance with their respective shares according to Mahomedan law. And in the event of my descendants becoming extinct, the mutawalli or the mutawallis for the time being shall hold the property for medical reliefs to the Mussalman poor belonging to school, and shall spend the surplus income for the benefit of the poor of the said school in such manner as the mutawalli or mutawallis for the time being in their discretion shall decide.

Schedule Y above referred to

Schedule Z above referred to

IN WITNESS, etc.

WITNESSES:

AB

Appointment of Mutawalli

TO ALL TO WHOM these presents shall come I son of by faith by occupation residing at SEND GREETING WHEREAS by a deed of Declaration of Wakf made by (hereinafter referred to as the WAKIF) on and bearing date the day of and registered by the Sub-Registrar of Assurance of in Book No. 1, volume, pages being, for the year the said WAKIF dedicated the properties therein and in the schedule hereto particularly mentioned and described absolutely by way of wakf, divested himself of the ownership thereof to all intents and purposes and intended that the said properties shall be held and so treated and the rents, issues and profits thereof shall at all times thereafter be appropriated for the objects and purposes as indicated therein the ultimate benefit under the said wakf being reserved for purposes recognized by Mahomedan law as religious, pious or charitable as appearing in clauses to thereof AND WHEREAS the said Deed is in full force and virtue and the income of the properties dedicated being utilised for the purposes mentioned therein AND WHEREAS by the said deed hereinbefore recited the said WAKIF laid down the following scheme for administration of the wakf and made provisions for the appointment of mutawalli, that is to say.

- (a)
- (b)
- (c)

NOW KNOW YE ALL that in exercise of the powers, authorities and liberties given to and vested in me under by virtue of the deed hereinbefore recited and every and any other powers enabling me I the said do hereby nominate and appoint son of deceased at present residing at by faith by occupation a Mahomedan belonging the Sunni School of Mahomedan law as mutawalli to be my successor in office after my death and in the event of his death during my lifetime his sons/daughters named of the same place and caste as mutawalli or mutawallis next after me to administer the said Wakf estate.

IN WITNESS WHEREOF I the said have hereunto set and subscribed my hand and seal this day of 2000.

Signed, sealed and delivered at

Schedule of wakf properties

CHANGES IN THE LAW AS REGARDS*

Transfer of Wakf Property

In 1954 the Wakf Act was passed by the Parliament to provide for the better administration and supervision of Wakfs. The Act extended to whole of India

* See page 1292.

except the State of Jammu and Kashmir. In respect of States of Bihar, Uttar Pradesh and West Bengal the Act was enforceable only after the State Government recommended for its application and Central Government issued a notification making the provisions of the Act applicable to the State. The Wakf (Amendment) Act 1984 to a certain extent modified the Wakf Act 1954.

Wakf means the permanent dedication by a person professing Islam or any other person of any other religion of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable. It includes a wakf by user or by grant for any purpose recognised by Muslim Law as pious, religious or charitable and a Wakf-alal-auld. A Wakif means any person making such dedication. A wakf by user shall not cease to be a wakf by non-user for any length of period. In case of a dedication by a person not professing Islam the wakf or the dedication shall be void if on the death of such person any objection to such dedication is raised by any legal representative of such person.

Board of Wakfs. The State Government may by notification in the Official Gazette establish a Board of Wakfs. The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer such property subject to such conditions and restrictions as may be prescribed. The Board may sue and be sued in its name.

Wakf Commissioner. There shall be in each State a Wakf Commissioner who shall be the Chief Executive Officer of the Board. The Wakf Commissioner shall look after the administration and do all such acts as may be necessary for the due control, maintenance and administration of wakfs.

Registration. Every wakf shall be registered at the office of the Wakf Commissioner who shall maintain a register which shall be open to inspection. Any change in the wakf shall be notified to the Wakf Commissioner.

Transfer of wakf property. Section 36A of the 1954 Act provides for alienation of wakf property. The provisions contained in the Wakf Deed will be subject to the provisions of the Act. No gift, sale, exchange or hypothecation of any wakf immovable property shall be valid unless prior sanction of the Board is obtained. In granting sanction to such a transaction the Board must be of the opinion that the transaction is necessary or beneficial to the wakf, it is consistent with the objects of the wakf and the consideration is reasonable and adequate.

Sale. In case of sale of wakf immovable property prior sanction of the Board is to be obtained and thereafter the property is to be sold by public auction and again such auction sale has to be confirmed by the Board. However, the auction sale can be avoided only if the mutawalli or any other person aggrieved makes an application to the Tribunal set up by the State

Government for the State under s. 55 of the Act and after hearing the parties and for reasons to be recorded in writing the Tribunal permits such sale to be made otherwise than by public auction in the interest of the wakf.

Suits. No suit shall be instituted against the Board in respect of any act without giving two months notice in writing setting out the cause of action, the name, description and the residence of the plaintiff and the reliefs claimed. The plaint shall contain that such notice has been delivered or left at the office of the Board.

Lease. The provisions as regards gift, exchange or hypothecation applies to lease for a period of one year or more. The mutawalli can give a lease of his own without prior permission of the Board for a period of less than 12 months.

Notification bringing into force the provisions of the Act of 1954 in different States. The Act has been brought into force in Ajmer, Andaman, Andhra Pradesh, Assam, Bhopal, Bihar, Coorg, Dadra, Nagar Haveli, Delhi, Himachal Pradesh, Hyderabad, Kutch, Madhya Pradesh, Chennai, Manipur, Mysore, Nicobar Islands, Orissa, Patiala, Pondicherry, Punjab, Rajasthan, Travancore-Cochin, Tripura, Vindhya Pradesh.

Until the Wakfs Act 1954 was, by notification, brought into force the Mussulman Wakf Act 1923 would apply to Gujarat and Maharashtra, the Uttar Pradesh Muslim Wakfs Act 1960 would apply to Uttar Pradesh and the Bengal Wakfs Act 1934 would apply to West Bengal.

The Bengal Wakf Act 1934. Wakf-alal-aulad means a wakf under which not less than 75% of the net available income is for the time being payable to the wakif for himself or any member of his family or descendants. The property ultimately vests in favour of God Almighty.

Transfer of wakf property. Section 53 of the Bengal Wakfs Act 1934 provided that the mutawalli could enter into an agreement for transfer of wakf property if he is expressly empowered by the Wakf Deed but that a notice of the proposed transfer in prescribed form shall be sent to the Commissioner of Wakfs one month before the transfer was made. If there is no power to transfer in the Wakf Deed then with the previous sanction of the Board of Wakf the mutawalli may enter into agreement for transfer and may transfer any immovable property of the wakf by way of sale, gift, mortgage, exchange, lease or tenancy of any kind. The Board would give sanction if it was satisfied that the proposed transfer was for legal necessity.

In every suit or proceeding in respect of any wakf property or in respect of a mutawalli except for recovery of rent the court shall issue notice to the Commissioner of Wakf.

Agreement to transfer and conveyance. These have to be executed in accordance with the law applicable in the State where the wakf property is situated.

Wakf Act 1995 Passed by the Indian Parliament Came into Force from 1st January 1996

The Wakf Act 1995 by s. 112 has repealed the Wakf Act 1954 and the Wakf (Amendment) Act 1984. It has also repealed any corresponding law in force in any State.

The Act of 1995 extends to the whole of India except the State of Jammu & Kashmir.

It has created a Board consisting of members taken from the members of the Parliament, Legislature, Muslim religious organisations, prominent Muslim Jurists, Mutawallis, etc. The Board has been given power to control over the activity and administration of the wakfs.

Almost all the disputes are to be settled by the Tribunal set up under the Act in relation to wakf. The Board has been given power to recover any money due from any person as arrears of land revenue. In respect of matters within the jurisdiction of the Tribunal the Civil Court will have no jurisdiction. Matters which are not within the purview of the Tribunal are subject to the jurisdiction of the Civil Court. The Board and the State Government have been given wide powers over the wakf property and over the functions of the mutawallis.

The mutawallis cannot borrow any money without the previous sanction of the Board (s. 76).

Section 87 disqualifies a wakf which is not registered with the Wakf Board from filing any suit or taking any legal proceedings for determination of any right on behalf of any wakf and any pending proceedings shall not be proceeded with.

In any proceeding before the Tribunal or the court by wakf or the mutawallis or by any beneficiary, the Board shall be a necessary party or the Board shall be given notice of the proceedings. No legal proceeding or suit by or against the mutawallis shall be compromised without sanction of the Board.

Under s. 196 the State Government has been given the power to regulate the secular activities of the wakfs.

Subject to directions by the Central Government, the State Government may give general or special directions to the Board and the Board shall comply with such directions. In certain circumstances the State Government may supersede the Board.

Sections 13 and 14 envisage the setting-up of a Board of Wakfs in every State and the Union Territory of Delhi. It will function under the State Government. The members of the Board shall hold office for a term of five years.

Prior Sanction of Wakf Board is required for transfer of wakf property. Under s. 32 the general superintendence of all wakf in any State shall vest in the Board or the State. The function of the Board shall be, *inter alia*, to sanction any transfer of immovable property of a wakf by way of sale, gift, mortgage, exchange or lease in accordance with the provisions of the Act. No such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transaction. The Board may utilise wakf land or property for development for a Shopping Centre, market, housing flats and the like. The Board shall give the mutawallis the first chance to do such development work, if they fail then the Board will take up the work. The Board will return the wakf property to the mutawallis after it realises all the costs of construction or such development work.

FORMS

Agreement to Lease Wakf Property

THIS AGREEMENT TO LEASE is made on this day of 1999 BETWEEN Md. of representing (hereinafter referred to as the LESSOR) of the one part and AB & Co. of (hereinafter referred to as the LESSEE) of the other part.

WHEREAS by a Deed of Wakf dated Md. dedicated his immovable property being for pious and religious purposes mentioned in the said Deed.

AND WHEREAS the LESSOR has been appointed as the mutawalli under the said Wakf Deed and the LESSOR is managing and administering the said wakf property.

AND WHEREAS the wakf property requires urgent repairs and that the income from wakf property is inadequate to carry out the necessary repairs.

AND WHEREAS the front portion of the ground floor of the wakf property is not properly utilised and is not required for the objects and use of the beneficiaries under the said Wakf Deed and with slight renovation the front portion can be let out at reasonable rent which will be adequate for the maintenance and upkeep of the wakf property.

AND WHEREAS the LESSOR applied to the Wakf Board for the permission to enter into THESE PRESENTS for leasing out the said portion of the wakf property and a copy of these presents was furnished along with the application.

AND WHEREAS the Board has considered the matter and has recorded such leasing out is a legal necessity for maintenance and upkeep of the wakf property and has granted its consent for execution of these presents.

AND WHEREAS the LESSEE has inspected all relevant documents including the Wakf Deed, application to the Board and the Board's sanction and has

satisfied itself as to the authority and power of the LESSOR to enter into these presents and the validity of the proposed lease and thereupon has agreed to take on lease the front portion of the wakf property at for a period of 21 years.

NOW THESE PRESENTS WITNESSETH and the parties hereto agree as follows:

1. The LESSOR agrees to demise to the LESSEE and the LESSEE agrees to take on lease three rooms on the ground-floor facing the road in the premises No. for a period of 21 years commencing from the date of Deed of Lease to be executed at an yearly rent of Rs. 1,20,000 to be paid in advance from the commencement of lease.

2. The LESSEE shall pay all present and future taxes, duties, rates, levies and outgoings in respect of the said demised premises to the Government or Municipal Corporation or any other local authority or public body.

3. The Deed of Lease will contain the usual covenants to be given by the LESSOR and LESSEE and the usual terms and conditions and subject to the provisions of the Statute applicable to the wakf property.

4. The draft of the Deed of Lease will be prepared by the Lessee's Advocate and will be approved by the Lessor's Advocate and subject to the sanction by the Board.

5. The LESSEE shall make necessary repairs and renovation without in any way damaging the structures or any portion of the construction and paint the entire building at its own costs.

6. The LESSEE shall bear and pay the requisite stamp duty and registration charges and other legal expenses in respect of the present agreement as also the said Deed of Lease to be executed.

7. It is understood that these presents are subject to obtaining the requisite permission or No Objection Certificate of the authorities concerned at the costs of the LESSOR.

8. If the requisite sanction, permission or the No Objection Certificate cannot be obtained or there be undue delay in obtaining such permission sanction or No Objection Certificate the LESSEE shall have the option to terminate this Agreement to Lease on giving three months' notice.

9. In consideration of the LESSOR agreeing to enter into this Agreement to Lease and by way of security deposit the LESSEE has paid to the lessor Rs. 1,20,000 which would remain free of interest and would be adjusted against the rent.

IN WITNESS WHEREOF the parties have executed these presents on the day, month and year first above-written.

Signed and delivered
by Md.
in the presence of:

For

Signature

- 1.
- 2.

Signed, sealed and delivered by
 Mr.
 pursuant to Board Resolution
 dated of AB & Co.
 in the presence of:

For AB & Co.

Signature

- 1.
- 2.

Deed of Lease of Wakf Property

THIS DEED OF LEASE is made on this day of 2000 BETWEEN Md. AB of representing CD Wakf (hereinafter referred to as the LESSOR) of the one part and EF Limited, a company registered under the Companies Act 1956 and having its Registered Office at (hereinafter referred to as the LESSEE) of the other part.

WHEREAS by Deed of Wakf dated 1980 Md. CD dedicated his immovable property being for pious and religious purposes mentioned in the said Deed.

AND WHEREAS the LESSOR has been appointed as the mutawalli under the said Wakf Deed and the LESSOR is acting as such mutawalli and is managing and administrating the said wakf property.

AND WHEREAS the LESSOR obtained permission from the Wakf Board for leasing out three rooms on the ground floor of facing the Street to the LESSEE at a yearly rent of Rs. 1,20,000.

AND WHEREAS with the permission, sanction and approval of the Wakf Board the LESSOR entered into an Agreement to Lease dated 1999 for granting lease of the said three rooms for a period of 21 years at a yearly rent of Rs. 1,20,000 payable in advance.

AND WHEREAS the LESSEE made enquiries and taken inspection of documents and has satisfied itself about the power and authority of the LESSOR to lease out the said three rooms to the LESSEE for the said period at the said rent.

AND WHEREAS the LESSEE hereby agrees that the LESSOR has not and does not give any warranty as to his title or power or authority or the validity of these presents save and except that the Wakf Deed and the permission of the Wakf Board are valid and genuine documents.

AND WHEREAS the parties have agreed to execute the Deed of Lease as contemplated in the said Agreement to Lease dated 1999.

NOW THESE PRESENTS WITNESSETH and the parties hereby agree as follows:

1. In pursuance of the said Agreement to Lease and in consideration of the rent hereby reserved and on the terms and conditions, covenants and agreements herein contained and on the part of the lessee to be observed and performed the LESSOR doth hereby demise unto the LESSEE all that the said three rooms each measuring 140 sq. ft. situate on the ground floor of premises No. of facing West having frontage on the to hold the said premises unto the LESSEE for a term of 21 years commencing from 2000 but subject to earlier determination as mentioned hereinafter.
2. The LESSEE shall pay by way of LESSEE rent a sum of Rs. 1,20,000 per year payable in advance by 2000 and thereafter within February each year.
3. The security deposit of Rs. 1,20,000 given by the LESSEE will be adjusted towards the lease rent of the last year.
4. The LESSEE shall pay all present and future municipal rates, taxes, duties and levies and other outgoings either statutory or otherwise payable to Municipalities or other authorities in respect of the said leasehold premises.
5. The LESSEE shall keep the leasehold premises in good and tenable repairs but shall not carry out any additions or alterations to the said premises without the written permission of the LESSOR.
6. The LESSEE shall not use the said premises for any unlawful purpose or bring in the premises any inflammable or hazardous article or goods or store them.
7. The LESSEE agree to use the said premises only for the purposes of carrying on its business and in doing so undertakes not to create any nuisance or undue annoyance to the neighbours.
8. If the LESSEE makes any default in payment of any yearly lease rent and such default continues for more than three months or commits any breach of any of the terms herein then the LESSOR would have the liberty to terminate the lease and to re-enter the said premises.
9. The LESSEE shall not sub-lease or grant any leave or licence to any other person, firm or company or create any charge or mortgage over the said leasehold property without prior written consent of the LESSOR and the permission of the Wakf Board.
10. The LESSEE shall make arrangement for separate Meters for waters, electricity and gas at its own costs and any consent or permission, if required, in this respect will be given by the LESSOR.

11. The LESSEE agrees and on enquiry has satisfied itself that all necessary sanctions, permissions and No Objection Certificates have been obtained for the purpose of leasing out the said premises and execution of these presents.

12. The LESSEE agrees to bear and pay the requisite Stamp Duty and the Registration charges and other legal expenses in respect of the present Deed of Lease.

IN WITNESS WHEREOF the parties have executed these presents on the day, month and year first above-written.

Signed and delivered
by Md. AB in the
presence of:

Signature

- 1.
- 2.

Signed, sealed and delivered by
Mr.
pursuant to Board Resolution
dated of EFLimited
in the presence of:

Signature

- 1.
- 2.

Wakf-alal-Aulad

THIS DEED OF WAKF is made on this day of 1999 by Md. MAL of (hereinafter called the WAKIF).

WHEREAS the WAKIF is the owner and in possession of the immovable property mentioned in the schedule hereto.

AND WHEREAS the WAKIF has no debts and the dower debt of his wife also has been partly paid to her and partly relinquished by her by the deed dated 1998.

AND WHEREAS the WAKIF is entitled to and is desirous of making wakf of the said properties for the benefit and maintenance of himself, his own heirs and descendants and ultimately for the benefit of poor Muslims.

NOW THIS DEED OF wakf witnesseth as follows:

1. The WAKIF hereby makes a settlement by way of wakf of all his immovable properties mentioned in the schedule hereto and relinquishes all his right, title and interest in the said properties as owner thereof.

2. That the aforesaid property shall no longer be the private property of any one but shall be wakf property for the maintenance and support of the WAKIF, his family, children and descendants and in case of extinction of his line of descendants for the benefit of the poor of Park Circus area belonging to the Muslim faith.

3. That the WAKIF hereby appoints and constitutes himself the sole mutawalli of the said wakf during his lifetime with absolute power of management thereof and shall appropriate the income of the said property to his own use.

4. That after the death of WAKIF any person nominated by the WAKIF in his lifetime or failing such nomination his eldest son or failing him the eldest male descendant and failing a male descendant a female descendant of the WAKIF in the male line of descendant or failing her the eldest male descendant in the female line of the descendant and failing him the eldest female descendant shall be the mutawalli.

5. The second and subsequent mutawallis shall have power to nominate their successors and failing such nomination the descendants in the order given in cl. (4) shall be the mutawallis.

6. The mutawalli for the time being shall manage the wakf property to the best of his ability and in case he is a minor or person of unsound mind his guardian appointed by the court shall manage the property on his behalf.

7. That after the payment of revenue, cesses, rates, taxes and necessary expenses of management the surplus receipts of the said property shall be divided by the mutawalli amongst the WAKIF's descendants according to their shares under the Mohammedan Law.

8. That the mutawalli shall have no power to sell, mortgage, transfer or charge the immovable property mentioned in the First Schedule hereto or any part thereof except by lease for a period not exceeding seven years at a time but he may call in and convert into cash the property mentioned in the said schedule hereto and deposit the money in any nationalised bank or invest it in such securities as he may deem fit or may purchase immovable property and all such moneys, securities and immovable properties into which the property mentioned in the said schedule may be so converted shall be deemed to be part of the wakf property as if the same were included in the first schedule hereto.

9. That the descendants of the WAKIF will have no right to transfer or charge in any manner their share of the income or profits of the wakf property.

10. That on the extinction of the line of descendants of the WAKIF the mutawalli for the time being shall use the income, profits or surplus of the aforesaid property for the sole use and benefit of the Mussalmans of the city of Calcutta in such manner as he shall think fit.

The Schedule

IN WITNESS WHEREOF the WAKIF has signed this deed on the day, month and year first above-written.

WITNESSES:

- | | |
|----|--------------------|
| 1. | Sd/ |
| 2. | Md. MAL
(WAKIF) |

Deed of Wakf for Ultimate Religious and Charitable Purposes

THIS DEED OF WAKF is made on the day of 1999 by Md. MAL of (hereinafter called the WAKIF).

WHEREAS the WAKIF is the owner and in possession of the assets and properties, movable and immovable, described and mentioned in the schedule hereunder.

AND WHEREAS the WAKIF of his free will and own accord is desirous of permanently settling the properties described in the schedule for purposes recognised by the Mohammedan Law as pious, religious and/or charitable.

NOW THEREFORE THIS DEED witnesseth as follows:

1. I, the WAKIF, hereby dedicate and transfer all my properties mentioned in the schedule hereunder with all rents, issues, profits thereof and appurtenances thereto absolutely and permanently by way of wakf for pious, religious and/or charitable purposes and divest myself of all rights and claims therein and vest the same in Allah and complete the same by delivery of possession to the mutawalli in the manner hereinafter mentioned.

2. The ultimate benefit under this wakf is reserved for purposes and objects recognised by the Hanafi (or Sunni) School of Mohammedan Law as religious, pious and/or charitable including the following:

- (a) the payment of my just debts;
- (b) the maintenance and support of myself, my wife and descendants;
- (c) the distribution of alms to poor and indigent persons on every Friday the value of such weekly alms not being less than Rs. 100;
- (d) the observance of the tenth day of Mohurrum by distribution of milk, etc. to the poor;
- (e) the celebration of ceremonies known as Mouloud Shariff;
- (f) to help poor and meritorious students professing Islam faith and studying in any recognised institution;
- (g) to perform the annual fateha of myself and after my death, the members of my family;

- (h) other religious, pious and/or charitable purposes as may be thought fit by the mutawalli from time to time or directed by a Court of Law including pecuniary reliefs or assistance to indigent members of my family.

3. The moneys which may be realised from my debtors mentioned in the said schedule hereto shall after payment of my debts, be invested in landed properties and such landed properties shall form a part of the estate hereby made wakf properties.

4. From the income of the said estate my sons AB, DE, GH and JK shall each receive a monthly sum of not more than Rs. 1,000 for the benefit of themselves and their respective families and descendants. As regards the respective amounts to be spent for the other purposes aforesaid, the mutawalli for the time being shall have absolute discretion to decide.

5. As regards the appointment of mutawalli and succession thereof it is declared that:

(a) I shall be the first mutawalli for my life.

(b) After my death AB and DE my sons shall be joint mutawallis and each of them shall be at liberty to appoint one of his lineal male descendants. Each mutawalli for the time being shall have the power of appointing his successor.

6. The mutawalli for the time being shall, as and by way of remuneration, be entitled to receive 20% of the net income or surplus of the wakf estate and to retain all the expenses of the management including the costs of all litigations.

7. In case of legal necessity and for the benefit of the wakf estate the mutawalli for the time being shall be at liberty, at his discretion to sell, mortgage, transfer, alienate, partition, and/or demise the wakf properties mentioned in the said schedule hereto or any part thereof subject to the prior sanction of the Board of Wakfs for the State of West Bengal and to invest the moneys thereby raised shall form part of the wakf estate but no purchaser, mortgagee, transferee, alinee, co-sharer or lessee of the said properties shall be concerned to enquire whether the respective sales, mortgages, transfers, alienations, partition or leases are necessary for or beneficial to the wakf estate or to see to the application of the proceeds thereof.

8. The dedication hereby made will bind me, my heirs, executors and representatives.

9. The properties hereby dedicated are valued at Rs. 10,00,000.

The Schedule above referred to

Part I

Part II

IN WITNESS WHEREOF I have executed these presents on the day, month and year first above-written.

Signed: Md. MAL
(As WAKIF)

WITNESSES:

Accepted: Md. MAL
(As Mutawalli)

Deed of Wakf for Public Purposes

THIS DEED OF WAKF is made on the day of 1999 by Md. MAL of (hereinafter called the WAKIF).

WHEREAS the WAKIF is the owner and in possession of the properties described in the Schedule hereunder and is desirous of dedicating the said properties in the service of Allah and to be used for charitable purposes.

AND WHEREAS the WAKIF has no wife or children and the other properties belonging to him are sufficient for his maintenance during his lifetime.

NOW THIS DEED of wakf witnesses as follows:

1. That I, the WAKIF, hereby transfer, dedicate to Allah and declare as wakf all that property more particularly described in the schedule annexed hereto, the approximate value whereof is Rs. 20 lakhs.

2. That I shall be the first mutawalli of the wakf property with power to nominate the next mutawalli and/or acting mutawalli in my temporary absence from Calcutta on Haj Pilgrimage. If I die during such pilgrimage or do not return for three years, he shall continue to act as such mutawalli and shall be deemed to be the mutawalli with the like powers and subject to the like obligations and duties as myself. All acts done or deeds executed shall be valid and binding as if the same had been done, exercised, executed, taken or had by me or a duly appointed lifetime mutawalli. In case I return from the pilgrimage within three years I shall resume the office of the first mutawalli and such nominated mutawalli shall be deemed *ipso facto* to be removed.

3. Each mutawalli whether nominated by the preceding mutawalli or appointed in the manner prescribed in the succeeding clause shall exercise the similar powers and be subject to the same duties and obligations and enjoy the equivalent privileges as are applicable to me or any succeeding mutawalli.

4. In case of any vacancy arising in the office of the mutawalli which cannot be filled up by nomination as aforesaid, the principal Civil Court of original jurisdiction shall be entitled to appoint a fit person professing the Islam faith of Hanafi School, after hearing such objections as may be raised by any beneficiary or person professing the Islam faith of the said School.

5. The mutawalli shall manage the wakf property to the best of his ability and may for such purpose engage or employ managers, agents, contractors, accountants or other assistants as may be conducive to the carrying on of the objects of the wakf efficiently and economically. The mutawalli may delegate any of his functions to a committee of persons subject, however, to the retention of the supervisory control by the mutawalli whose decision in all matters affecting the wakf shall prevail.

6. The income of the wakf property after defraying the expenses of its upkeep, management, repair and renovation shall be utilised for, among others, the following objects:

- (a) payment to poor and deserving Muslims to enable them to perform Haj pilgrimage;
- (b) feeding of the poor Muslims;
- (c) supporting the blind, disabled and/or poor Muslims who are unable to earn their livelihood except by begging;
- (d) providing sanitary habitation for poor Muslim families living in bustees, shanties and footpath.

7. The mutawalli may accept donations, grants, presents, offerings and other moneys and properties for the purpose of carrying out the object of the wakf and convert any property into any other kind for more effectively carrying out the objects of the wakf, wherever necessary, with the consent of the Board of Wakf.

The Schedule

IN WITNESS WHEREOF I have declared, dedicated and transferred the property mentioned in Schedule as wakf property and I have accepted and assumed control thereof as mutawalli thereof and I have executed these presents on the day, month and year first above-written.

WITNESSES:

1.

Sd/- Md. MAL

(WAKIF)

2.

Sd/- Md. MAL

(Mutawalli)

NOTE: Directions for conduct of 'Fateha' at the graveyard and to use the house for those purposes are valid objects of a Wakf. Where the offerings of prayers are not confined to prayers at the tombs of the grantor or his family members and the grant was by the head of the order and related to prayers at a number of tombs in the graveyard it must be held that a Wakf of a public nature was created—*Wali Mohammed v Rahmat Bee* AIR 1999 SC 1136.

Some recent legislations in India. The Hindu Adoptions and Maintenance Act 1956, has for the first time codified the duty of the heirs to provide for maintenance to the dependants of the deceased out of property inherited by them. A Hindu wife is entitled to separate residence and maintenance in cases coming under s. 18 of the Act. A widowed daughter-in-law, illegitimate children, infirm parents and others all come as dependants. But s. 30 of the Hindu Succession Act gives a Hindu power to dispose of his estate by will. Under s. 27 of the former Act, a claim for maintenance is not a charge on the estate; it can therefore be defeated by a will.

Consolidating Act. The Indian Succession Act of 1925 consolidated the law relating to testamentary and intestate succession. It repealed *inter alia* the following enactments: (i) the Indian Succession Act (Act X of 1865); (ii) the Parsi Intestate Succession Act (Act XXI of 1865); (iii) the Hindu Wills Act (Act XXI of 1870); (iv) the Married Women's Property Act (Act III of 1874), s. 2; (v) the Probate and Administration Act (Act V of 1881), (Act VI of 1889), (Act II of 1890) and (Act VIII of 1903); (vi) the Succession Certificate Act (Act VII of 1889); and (vii) the Native Christian Administration of Estate Act (Act VII of 1901). The Indian Succession Act applies to whole of India but not in all cases to Hindus, Mahomedans, Buddhists, Sikhs or Jainas, e.g. Part II on Domicile, Part III of Marriage, s. 118, s. 69 and other provisions. Section 212 of the Indian Succession Act makes it obligatory on the part of Europeans, Armenians, Jews, East Indians to obtain Letters of Administration to establish title to the property of the deceased, but the section has no application to Hindus, Mahomedans, Buddhists, Sikhs, Jainas, Indian Christians and Parsis.

* Testamentary matters dealing with Probate, Letters of Administration and Succession Certificate have been dealt with in Chapter 53 also.

Muslim law. Among the Mahomedans the leading authority on the subject of will is Hedaya which was composed by Shaik Burhan-ud-Din Ali in the twelfth century who belonged to the Hanafi school of Mahomedan law. The Fatawa Alamgiri is another authority compiled in the seventeenth century during the reign of Emperor Aurangzab. So the idea of will was known to the Mahomedans from very ancient times long before the arrival of the British in India. The Indian Succession Act 1925, does not apply to the Mahomedans. So a will is valid and effective in Mahomedan law even not attested.¹ In Mahomedan law no particular writing is necessary to make a valid will not even any particular form, so long the declaration is sufficiently clear. A letter by a testator shortly before his death containing directions as to disposal of his estate after death was held by the Privy Council as to constitute a valid will.² Another special feature of the Mahomedan will is that the testamentary power is limited to one-third of the surplus estate after payment of funeral expenses and debt and no bequest to any heir is valid in the absence of the consent of the other heirs after the death of the testator. A Mahomedan will is admissible in evidence after due proof although no probate has been obtained and further no Letters of Administration are necessary to establish any right to the estate of a deceased Mahomedan except as regards debts due to the same.³ The executor of the will of a Mahomedan, if he accepts the office from the date of the testator's death, has power to alienate the estate for the purpose of administration. A child in the womb and a child, i.e. son adopted by the widow of a deceased after his death, are considered as persons in existence at the time of death in Hindu law, but in Mahomedan law a child in the womb loses the legacy unless born within six months from the date of the will.⁴ Muslim law does not recognise adoption.

Characteristics of a will. In ascertaining whether a particular document is a will or not, one of the tests is whether it is a declaration of the intention of the testator as to disposal of his property after his death and secondly whether it is revocable or not. The irrevocability of a document is inconsistent with a will.⁵

Requisites of a valid will

(a) *Capacity of the testator.* The testator must be a person in full possession of his senses and power able to make a testament and not disabled for any special cause in respect of his person, mind, condition or the property concerning which the testament is to be made. Special disability of infants,

1 In re, *Abdus Satar* 7 Bom LR 558.

2 *Mazhar Husen v Bodha Bibi* (1898)21 All 91.

3 Section 212(2) of the Indian Succession Act.

4 Mulla: *Mahomedan Law*, 19th Ed., p. 107.

*5 Section 62 of the Indian Succession Act; in re, *Marsland* (1939) WN 251; (1939)1 Ch 820.

lunatics and married women shall always be borne in mind.⁶ A man cannot by will or otherwise dispose of his dead-body or that of any other person.⁷

(b) *Intention to dispose.* As it is the free mind and not the words that give life to a testament, so a free mind and clear conscience to dispose, rather a firm determination, are essential for validity of a will, e.g. if a man rashly, unadvisably, incidentally and not seriously write down something, that is no testament and is never so regarded. Mind must be free, conscience clear and not moved by fear, fraud and flattery or undue influence, solicitation of other or other unworthy motive.

(c) The form and order of law should be observed regarding signature, attestation, etc.

(d) If the will is in a language not known to the testator, the same should be read over and explained to him by some competent person so that he may fully understand the nature, contents and implication of the document and the person so explaining shall make an endorsement on the will to that effect.

Distinction—Executor and Trustee. The words “executor” and “trustee” are mostly synonymous. A trustee is regarded as an executor and an executor is regarded as a trustee.⁸ Under s. 3 of the Indian Trusts Act II of 1882, a trustee is a person who enjoys the faith and confidence of the author of the “trust” and under s. 5 of the same Act a trust of any property may also be created even by the will of the author of the trust. So it follows that when a trust is created under the will of the testator where he appoints his executors also as the trustees of the trust or he appoints executors to administer his general estate and trustees to administer the trust estate. In cases where the residue of the estate is bequeathed on trust and separate trustees are appointed to administer the same the executors after administering the general estate hand over the residue to the trustees appointed by the will; but if however the executors are themselves appointed trustees, then and in such an event the executors become trustees when the estate is free and cleared off payment of the debts and discharge of legacies.⁹ An application for his removal under s. 30 of the Indian Succession Act 1925, is not maintainable.¹⁰ The other distinction between an executor and a trustee in this regard is that an executor after once accepting the office of an executor cannot retire by appointing someone in his place without fully administering the estate, but a trustee can retire by appointing a new trustee under s. 72

6 Section 59 of the Indian Succession Act.

7 Halsbury's *Laws of England*, 2nd Ed., vol. 15, p. 207.

8 *In re, Robinson* (1951) 1 Ch 198.

9 *In re, Smith* 43 Ch D 302.

10 *In goods of Sarnath Sanyal* AIR 1949 All 93.

of the Indian Trusts Act subject however to approval of the principal court of original jurisdiction.¹¹ An executor becomes a trustee after assenting to a legacy until delivery of possession.

Another distinction between an executor and a trustee is that an executor or an administrator may buy the property of the deceased. It is not a breach of trust provided a fair price is paid and the sale is an otherwise regular nevertheless it may be the subject to inquiry by a Court of Equity¹² which provides that the sale is voidable at the instance of a person interested in the property. Nevertheless such purchase is looked upon with suspicion.¹³ This section does not admit any exception even though the sale is made with the sanction of the court. But a trustee for sale cannot buy the property at all. It is a breach of trust irrespective of the fact as to whether a fair price is paid or not. Section 52 of the Indian Trusts Act is explicit on this point. The above rule extends to dealings between a director and his company surviving partner and the share of the deceased person and to fiduciary relations. It was held by the Privy Council in *Raja Peary Mohon Mukherjee v Manohar Mukherjee*,¹⁴ that a *shebait* also cannot purchase the property of the deity. The only protection afforded in such cases is by s. 96 of the Trust Act which is applicable to constructive trustees or resulting trustees as pointed out in *Raja of Mamnod v Arunachalam*.¹⁵ Section 96 of the Indian Trust Act 1882, is controlled by and should be read subject to s. 59A of the Transfer of Property Act. It will not protect any person in cases of evasion of any law.¹⁶ But a trustee for sale cannot buy the property at all. It is a breach of trust irrespective of the fact as to whether a fair price is paid or not. Section 52 of the Indian Trusts Act is explicit.

The property of the deceased testator vests in all the executors and if there are more than one executor, all of them together become legal representatives of the testator. The estate of the deceased cannot therefore be controlled or represented by one of the legal representatives of the deceased to the exclusion of other legal representatives.¹⁷

A further distinction is as regards accounts to be rendered by executors and trustees. In the case of an executor a suit for account of the estate is barred after three years under Art. 113 of the Limitation Act 1963. But there is no limitation against a trustee for following the trust property or proceeds

11 See also Lewin on *Trust*, 12th Ed., p. 932 and 15th Ed., p. 416.

12 Section 310 of the Indian Succession Act 1925.

13 Willams on *Executors*, 12th Ed., pp. 567 & 1207.

14 26 CWN 138.

15 38 Mad 321.

16 *Abdul Ghafoor v Md. Paharia* AIR 1957 Pat 136.

17 *K. Leelavathy v P.V. Gangadharan* AIR 1999 SC 1267.

thereof¹⁸ or for an account of the trust property. Under s. 10 of the Limitation Act there is no bar of limitation even against an executor if he is a trustee for a specific purpose.

Will void. A will or any part of a will, the making of which has been caused by fraud or coercion, or undue influence or by such importunity as takes away the free agency of the testator, is void.¹⁹

Limited power of disposition. A man can only dispose of by a will his property which could be alienated by gift *inter vivos*. The right to perform religious services or the shebaitship of any religious endowment cannot be disposed of by will.¹ A Hindu governed by the Dayabhaga or Bengal School of Hindu law can make a will both in respect of his self-acquired and also ancestral estate, whereas a Hindu governed by the Mitakshara School of Hindu law could make a will only in respect of his self-acquired or separate estate until 1956. Section 30 of the Hindu Succession Act 1956, gave the right to such a person to make a will even in respect of his coparcenary interest. Under s. 14(1) of the Hindu Succession Act (Act XXX of 1956), any property possessed by a female Hindu whether acquired before or after the commencement of the Act is her absolute property. She is therefore fully competent to make any will unless of course the will, award or other instrument by virtue whereof she acquires the same, expressly provides for a restricted estate.² The Supreme Court held that if the acquisition is by virtue of, or in recognition of, any existing right, she will have an absolute estate notwithstanding the restrictive clause.³

A Mahomedan cannot dispose of his property by a will to an heir unless the other heirs consent to the bequest after the death of the testator, and if the bequest be to a non-heir, it will be valid only to the extent of one-third of the surplus of his estate after payment of funeral expenses and debts, and the bequest in excess of the legal third cannot take effect unless the heirs' consent thereto after the death of the testator. No absolute freedom, no will can deprive wife's right of maintenance.⁴ Although a person not otherwise disqualified can dispose of his properties according to his wish and desire nevertheless he does not enjoy absolute freedom, in the matter inasmuch as certain things are prohibited in law as being against public policy though not punishable by law nor immoral, e.g. (i) he cannot convert an absolute estate into a life or limited estate as regards gifts with restraints on alienation (s. 138); (ii) gifts against bankruptcy laws;⁵ (iii) condition opposed to the

18 Sections 62 and 63 of the Indian Trust Act.

19 Section 61 of the Indian Succession Act 1925.

1 *Angurbala v Debdutta* AIR 1947 Cal 278.

2 Section 14(2) of the Indian Succession Act.

3 *Vaddeboyina v Vaddeboyina* AIR 1977 SC 1944.

4 *Pritambhai v Sundermall* (1945) 1 MLJ 58.

5 *Bilson v Crofts* LR 15 Eq 314.

policy of marriage laws—a condition restraining the marriage of the donee is void but not a partial restraint on marriage; (iv) conditions against public policy of administration.⁶ Moreover he cannot create any estate unknown in law.⁷ Furthermore he cannot create any estate in favour of an unborn person except to the extent permitted under ss. 112 and 113 of the Indian Succession Act nor any perpetuity except as provided under s. 114 of the said Act. It was held by the Supreme Court in *Bairang Bahadur Singh v Bakhtrey*,⁸ that the restraint on the power of alienation depends upon the whole tenor of the will.

Revocation of wills—power of appointment.⁹ A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by another will.

A will containing bequest in favour of charity or for religious use also stands revoked in case of death of the maker earlier than 12 months and who has a nephew or niece or other nearer relation.¹⁰ Such a will is to be deposited with the Registrar.¹¹ This section, however, does not apply to Hindus.

A will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor administrator, or to the person entitled in case of intestacy. Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint over such property.¹²

No other act, e.g. birth or adoption of a son which might influence the mind of a testator, operates as revocation of a will.¹³ Even the gift or sale of the property disposed of under any will does not so operate, though it makes the will infructuous.¹⁴

*Execution and attestation*¹⁵

Execution. Every testator not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, must execute his will according to the following rules:

6 Sengupta's *Indian Succession Act*, 3rd Ed., p. 225.

7 *Tagore v Tagore* 18 WR 359 (PC).

8 AIR 1953 SC 7.

9 Sections 69 and 70 of the Indian Succession Act 1925.

10 Section 118 of the Indian Succession Act.

11 Part IX, ss. 42-48 of the Indian Registration Act.

12 Section 69 of the Indian Succession Act.

13 *Mir Syed Hossain v Taiyabba Begum* 26 IC 457.

14 *Asanand v Rozni* 2 Lah LJ 178.

15 Section 63 of the Indian Succession Act.

(1) The testator must sign in his own handwriting affix his mark to the will or it must be signed by some other person in his presence and by his direction.

(2) The signature or mark of the testator, or the signature of the person signing for him, must be so placed that it will appear that it was intended thereby to give effect to the writing as a will. In the event the testator though literate cannot sign the will in his own handwriting the person signing the will shall also sign an endorsement to that effect.¹⁶

(3) The will must be attested by two or more independent witnesses each of whom has seen the testator to sign the will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator; but it will not be necessary that more than one witness be present at the same time, and no particular form of attestation will be necessary. It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intention of the testator can be known therefrom. Wills made by Mahomedans may be oral. Even if in writing, no particular form is necessary so long the intention is clear.¹⁷ A letter by a testator containing instructions as to disposition of his estate was held to constitute a valid will.¹⁸

A blind man is incapable of attesting a will.¹⁹ A solicitor attesting a will will lose his fees for work to be done in connection with the estate where such fees are provided for in the will as he becomes a beneficiary in such a case.²⁰ This provision does not apply to India.

Registration of the will. It is not absolutely necessary that the will shall be registered; nevertheless it is also prudent to have the same registered. In case the original will is lost, probate may easily be obtained of a certified copy of the same.

A testator may deposit his will for safe custody with the Registrar¹ of which the court may require production. Then the Registrar will open it and send the same to the court after copying the contents in Book 3.² A will requires registration if it creates a family settlement of the properties of the testator.

16 Section 3(56) of the General Clauses Act.

17 *Mahomed Ali v Ahmed Buksh* (1876)25 WR 121 (PC).

18 *Mazhar Husen v Bodha Bibi* (1898)21 All 91 (PC).

19 *Re, Limond* (1915)2 Ch 240; 84 LJ Ch 833.

20 *Re, Pooley* 40 Ch D 1.

1 Section 46 of the Indian Registration Act.

2 Section 294 of the Indian Succession Act.

Obliteration, interlineation or alteration. No obliteration, interlineation or other alteration made in a will after the execution thereof can have effect, except so far as the words or meaning of the will have been rendered illegible or indiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will; provided that the will so altered will be deemed to be duly executed if the signature of the testator and of the witness be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.³

Benefit to attesting witness. A will is not to be deemed to be insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment, to any person attesting it, or to his or her wife or husband; but the bequest or appointment will be void so far as it concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them. In England, under s. 15 of the Wills Act 1837, a beneficial gift to an attesting witness or to his wife or her husband is also void though the will is in other respect good and valid.⁴ A solicitor attesting a will, which provides for his professional charges for work to be done in respect of the estate, loses the same.⁵ Section 67 of the Indian Succession Act does not apply to Hindus, Buddhists etc. So the above law is not applicable in their cases.⁶

A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.⁷

Vesting of legacy. If a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator and, if he dies without having received it, it will pass to his legal representatives.⁸ The legacy vests in the legatee with effect from the death of the testator even though possession is postponed. In the result on the death of the legatee his legal representative gets the legacy.⁹

Residuary legatee. A residuary legatee can be constituted by words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

3 Section 71 of the Indian Succession Act 1925.

4 *Re, Craven* (1908)24 TLR 750.

5 *Re, Pooley* 40 Ch D 1.

6 *Bai Gangabai v Bhugwandas* 29 Bom 530.

7 Section 67 of the Indian Succession Act 1925.

8 Section 104 of the Indian Succession Act.

9 Section 119 of the Indian Succession Act.

Under a residuary bequest, the legatee is entitled to the property belonging to the testator at the time of his death, of which he has not made any testamentary disposition which is capable of taking effect.

When legacy lapses—when legacy does not lapse. A legacy vests in the legatee immediately upon the death of the testator no matter when it is to be paid or delivered unless the same is contingent. If the legatee is not the child of the testator or other lineal descendant¹ the legacy cannot take effect, but will lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that the same would go to his heirs or some other person.² So the representatives of the legatee are not entitled to the legacy unless he (legatee) survived the testator. If a legacy is given to legatees in words which show that the testator intended to give them distinct share of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him will fall into the residue of the testator's property. When a share which lapses is a part of general residue bequeathed by the will, that share will go as undisposed of. The doctrine of lapse applies to contingent legacy.³ It lapses on the death of the legatee before the testator whether the contingency happens or not. It also applies to conditional legacy and power of appointment exercised by will. It was held that when an annuity is payable *putra pautradi krame*, the legacy lapses on the death of the legatee unless the same is charged on any specific property.⁴

If a legacy is given to two persons jointly and one of them dies before the testator, the other legatee takes the whole. Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest will not lapse, but it will take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.⁵ This section, i.e. s. 109 of the Indian Succession Act, is based on s. 33 of the original English Wills Act 1837 (1 Vict C 26) which prolongs the life of the testator by legal fiction for the limited purpose of giving effect to the will. The expression "lineal descendant" includes all descendants, male and female.⁶ When a bequest is made to confer an absolute estate in the beneficiary any subsequent clause

1 Section 109 of the Indian Succession Act.

2 Section 105 of the Indian Succession Act—See also Williams on *Executor*, 13th Ed., p. 644.

3 Section 124 of the Indian Succession Act.

4 *Jagadish v Rai Pade* 22 Pat LT 396; AIR 1941 Pat 458.

5 Section 109 of the Indian Succession Act.

6 *Bhimnath v Tara* 33 CWN 837 (PC); AIR 1929 PC 162.

in the will as to bequest of any of the property to any other person in the event the first legatee dies without dealing with the same is inoperative.⁷

Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.⁸

Privileged will. Any soldier being in an expedition or engaged in actual warfare or an airman so employed or engaged, or any mariner at sea, if he has completed the age of 18 years, can dispose of his property by a *privileged will* made in accordance with the following rules:

(1) The will can be written wholly by the testator with his own hand. In such a case it need not be signed or attested.

(2) It can be written wholly or in part by another person and signed by the testator. In such a case it need not be attested.

(3) If the instrument purporting to be a will is written wholly or in part by another man and not signed by the testator, it will be deemed to be his will if it is shown that it was written by the testator's directions, or that he recognised it as his will.

(4) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument will not, by reason of that circumstances, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

(5) If the soldier, airman or mariner has written the instrument for the preparation of his will, but has died before it could be prepared and executed, such instructions will be considered to constitute his will.

(6) If the soldier, airman or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will and they have been reduced into writing in his lifetime, but if he has died before the instrument could be prepared and executed, such instructions will be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

(7) The soldier, airman or mariner can make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(8) A will made by word of mouth will be null and void at the expiration of one month after the testator being still alive, has ceased to be entitled to make a privileged will.

Codicils. It is a maxim that no person can die with two testaments yet any number of instruments all clearly testamentary may be admitted into

7 *Lalit Mohon Mondal v Prafullo Kumar Mondal* 86 CWN 396.

8 Section 110 of the Indian Succession Act 1925.

probate.⁹ So by a codicil a testator can appoint additional executor, replace the deceased executor, vary appointment and provide for omissions in the will. A codicil is defined in s. 2(b) of the Indian Succession Act.

A codicil means an instrument made in relation to a will and explaining altering or adding to its disposition and is deemed to form part of the will; the law applicable to wills is also applicable to codicil, except that a legatee under a will does not lose his legacy by attesting a codicil which confirms the will¹⁰ and the rules governing the execution and attestation of both are the same.¹¹

Void Bequests

Bequest to religious or charitable uses. No man having a nephew or niece or any nearer relative has power to bequeath any property to religious or charitable use except by a will executed not less than 12 months before the death and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.¹² The procedure for depositing will has been prescribed in Part X, ss. 42 to 46 of the Indian Registration Act (XVI of 1908).

This law is not applicable in the case of Hindu and Mahomedan bequests or religious or charitable uses. The court adopts a benevolent rule and allows more latitude in cases of gifts or bequest to charities, the rule being that (i) the organisation must be in existence; (ii) object definitely benevolent certain and clear.¹³ The charitable objects must not be mixed up with other objects as otherwise the bequest will fail on account of uncertainty.¹⁴ Another rule is that the court cannot make a will for the author of the trust if he has left the language vague or uncertain.¹⁵

Effect of direction for accumulation. Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of 18 years from the death of the testator, such direction will, save as hereinafter provided, be void to the extent to which the period during the accumulation is directed exceeds the aforesaid period and, at the end of such period of 18 years, the property

9 Williams on *Executors*, 11th Ed., vol. I, p. 116.

10 Section 67 of the Indian Succession Act does not apply to Hindus, Buddhists etc.

11 Prideaux's *Conveyancing*, 24th Ed., vol. 3, p. 589.

12 Section 118 of the Indian Succession Act and it is based upon the Statute of Mortmain (9 Geo 11 e 34) which has no application in India—*Mayor of Lyons v East India Co. Ltd.* 1 MIA 175.

13 Section 89 of the Indian Succession Act.

14 *Blair v Auncan* 1902 AC 37.

15 *Grimmond v Grimmond* 1905 AC 124. See also Tudor on *Charities*, 5th Ed., p. 11.

and the income thereof will be disposed of as if the period, during which the accumulation has been directed to be made, had elapsed.¹⁶

The above provision will not affect any direction for accumulation for the purposes of—

- (i) The payment of debts of the testator or any other person taking any interest under the will, or
- (ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or
- (iii) the preservation or maintenance of any property bequeathed and such direction can be made accordingly.

Rule against perpetuity. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.¹⁷

English legal policy always favoured the right of free alienation and has endeavoured to give effect to that principle in every department of law. Perpetuity means creation of an inalienable and indestructible interest, that is to say, an interest which does not vest until a remote period. It is not the same thing as a rule of possibility.¹⁸ The Rule in *Shelley's case*¹⁹ laid down that the expression "heirs in fee" or "in tail" in a conveyance or gift of a freehold estate are words of limitation to the estate of the purchaser or donee, i.e. "words which mark the estate to be given to the grantee" and not "words of gift conferring any interest upon his heirs". In India we are familiar with the expression "heirs, executors, administrators and representatives" and in Bengal *putra pautradi krame*. These do not confer any benefit upon them. The rule has been abolished by s. 131 of the Law of Property Act 1925. The English Rule was modified with effect from 1st January 1926, by s. 163 of the Law of property Act 1925. As settled now, it fixes the life or lives in existence and 21 years thereafter.¹

All charitable gifts create an inalienable and a permanent interest. So charitable trusts are not subject to rule against perpetuity if the vesting is not delayed beyond the statutory period.²

16 Section 117 of the Indian Succession Act.

17 Section 114 of the Indian Succession Act.

18 Section 114 of the Indian Succession Act.

19 *Shelley's case* 1 Rep. 94 (104); Williams on *Real Property*, 20th Ed., p. 336.

1 Grey on *Perpetuities*, 3rd Ed., p. 174.

2 *Colgan v Adm. General* 15 Mad 424.

Bequest to unborn persons. The law on this subject is that ordinarily a Hindu cannot make a bequest to a person not in existence at the time of his death. This was laid down in the *Tagore's case*.³ It is no longer good law. The doctrine was modified by the three Acts—Hindu Transfer and Bequest Act (Act I of 1914), Hindu Disposal of Property Act of 1916 and lastly by Hindu Transfer of Bequests (City of Madras Act 1921). The legal position as it stood after the amendment was that no such bequest shall be invalid by reason of the fact that the proposed legatee was not in existence on the date of death of the testator. The above rule is subject to certain exceptions: (1) A child in the womb is considered a living person.⁴ (2) Bequest to a person answering any particular description with reference to his relationship with the testator where possession is deferred until a time after the death by reason of a prior bequest provided he comes into existence meanwhile.⁵ (3) Bequest to a person though not born at the time of the testator's death which is subject to a prior bequest is valid provided the same comprises the entire remaining interest.⁶ Bequest unless hit by the rule against perpetuity.⁷ An unborn person may be the beneficiary of a charitable trust created under a will.

Bequest in favour of an idol not in existence. The Calcutta High Court held that a Hindu cannot make a gift in favour of an idol not consecrated at the time of his death.⁸ A Special Bench, however, held that a gift or devise in favour of an idol to be consecrated by the executor or other person who is in existence is not a gift or devise in favour of an unborn person and so is valid.⁹

Instructions for drawing a will. The draftsman of a will must be very cautious. He should keep and preserve the Instruction Notes made before starting with the preparation of the draft. It is always better to have the Instruction Notes signed by the party. In order to effect a valid disposition of property, which is the subject-matter of the will, it is necessary in so far as movables are concerned that it shall be in conformity with the law of the testator's domicile and, in the case of immovables, law of the country in which the property is situate.¹⁰ The other factors to be considered are *inter alia* (i) testamentary capacity of the testator; (ii) his state of mind, readiness and willingness to make the will; (iii) power of understanding the nature, contents and effect of the will; (iv) heritable character of the property—whether the

3 18 WR 359, 371 (PC).

4 *Okhoymoney v Nilmony* 15 Cal 282.

5 Section 112 of the Indian Succession Act.

6 Section 113 of the Indian Succession Act.

7 Section 114 of the Indian Succession Act.

8 *Upendra v Hem Chandra* 25 Cal 405.

9 *Bhupati Nath Smrititirtha's case* 37 Cal 128.

10 Section 5 of the Indian Succession Act.

same is legally bequeathable; (v) legality of the interest created under the will; and (vi) legal competency of the devisees to accept the devise. An unprivileged will shall always be in writing, duly signed by the testator and attested by at least two witnesses.¹¹ All erasures and alterations require the signatures of the testator and also the attesting witnesses.¹²

A will is a most solemn document. It is also a sacred one as by it a dead man entrusts to the living the carrying out of his wishes and desire.¹³ The preparation of a will is an intelligent work on the part of the draftsman. He should, therefore, study carefully laws relating to Real Properties and the provisions of Part VI, ss. 57 to 120 of the Indian Succession Act and also Hindu Succession Act, Hindu Adoptions and Maintenance Act before drafting the will.

Although under s. 85 of the Indian Succession Act, the court always tries to give a rational construction to the words of a will as far as possible and lawful nevertheless it is the duty of the draftsman to avoid ambiguity and deficiency as under the rule of construction of wills, external evidence as to intention of the testator is not admissible.¹⁴

Probate. Probate of a will can be granted only to a person not being minor or a lunatic but not to any association¹⁵ unless it satisfies the conditions prescribed by the rules made by the State Government. Probate or Letter of Administration can be granted to Banaras Hindu University.¹⁶ Probate once granted authenticates the will against the world. It is a complete answer to the challenge of the authority of the executor as regards his dealings with the estate of the deceased in due course of administration.

Bequests and Devises to the Solicitor by his Client

GENERALLY

The burden of proof that a testator was capable of making a will, and knew and approved its contents, is in all cases upon the party propounding it; and though in general a presumption of capacity arises from the fact that the will is in ordinary form and of knowledge and approval from the fact of execution yet in the case of a solicitor or other person (for there is no special rule applicable to solicitors who prepare or procure a will under which he takes some benefit the court will require affirmative proof) which is to be most satisfactorily furnished by showing that the nature, contents and effects

11 Section 63 of the Indian Succession Act.

12 Section 71 of the Indian Succession Act.

13 *Ram Gopal Lal v Aipina Kumar* 49 IA 413 (417); see also 27 CWN 485.

14 *In re, Follett Barclays Bank Ltd. v Dovell* (1954)3 All ER 478.

15 Section 235 of the Indian Succession Act.

16 *Banaras Hindu University v Gouri Dutt* 1949 ALJ 523.

of the will were read over and explained to the testator the same having been prepared in accordance with his or her instructions and also of the testator's knowledge and approval.¹⁷

Where, therefore, the client is intending to give some benefit to the solicitor, it is always prudent that the latter should insist on the will being prepared by another solicitor, and should endeavour his best to ensure the preservation of evidences that the will was read over explained to and approved by the testator and of the instructions from which the will was prepared though other evidence may, of course, suffice.¹⁸

The court refused to decree specific performance in favour of a vendor whose title depended on a will drawn by a solicitor in favour of himself, until the validity of the will had been conclusively established¹⁹ the purchaser had to bear the costs ultimately.

Certain general Rules to be followed.

(1) English rules or authorities have a persuasive value in India.

(2) No distinction in gifts, or wills, or inheritance between movable and immovable property is made in India.

In construing a will a benignant construction must be put. When there is an absolute grant of property repugnant restrictions are rejected. Where an estate of inheritance unknown to law is created it is not wholly void, it is enforceable to the extent allowed by law, namely, a life estate on the first taker can be given effect to. Life estate can be created by will.

(3) Under Dayabhaga School the extent of testamentary power extends to ancestral and acquired property movable and immovable. Even in the Mitakshara School one may alienate his undivided share for consideration or may make testamentary disposition thereof but cannot make a gift of undivided share.²⁰

(4) A child expectant is considered to be in existence.

(5) The law of perpetuities cannot be violated by the bequests contained in the will.

(6) The intention of a testator must be gathered from the words of his will. Courts are not at liberty to invent for him a new will. Least trend of an intention in the will to create an ordinary estate of inheritance will be given effect to. But, where such intention is absent an estate of inheritance cannot be conferred on even the first taker of the life estate.

17 *Wintte v Nye* (1959)1 All ER 552 (HL).

18 *In re, Estate of Austin* (1929)73 Salgo 545.

19 *Grove v Bastard* (1848)2 Ph 619.

20 Section 30 of the Hindu Succession Act.

(7) Where there were strained relations between the testator and his relatives he would be justified in making the neighbours, who looked after him in his last days, beneficiaries and cannot be condemned as suspicious circumstance. Old persons usually put thumb impression instead of signature and this also cannot be a suspicious circumstance.¹ Where a will provided that on the death of the testator and his wife the properties would be enjoyed by their daughter and on the latter's death the properties would go to her children, the daughter gets only a life-estate.²

(8) Application to revoke probate or letters of administration is to be treated as a miscellaneous application and not a suit and can be disposed of summarily or after giving an opportunity to both the parties to adduce evidence and consideration thereof. If it is treated as a suit the applicant cannot prove the will and at the same time cannot contend that the will was not validly executed.³

(9) Non-mentioning of natural heirs in the will or any reason assigned for exclusion of natural heirs are no grounds for making the will suspicious. Attestation of will cannot be doubted on the ground that no person was called for from locality to witness the will.⁴ Unrebutted testimony of attesting witness proving the will as validly executed entitled to probate.⁵

(10) Trial Court would be wrong if it directs a petition for probate to be a contested matter and to be registered as civil suit and court-fees deposited.⁶

When a man is married and still keeps company with another woman the status of the second woman, married to him or not, is that of a kept mistress and on the man's death, the first lady not having been divorced, the second woman cannot succeed to his estate and her application for Succession Certificate is not maintainable.⁷

(11) Proceeding for restoration of possession against licensee for restoration of possession under s. 41 of the Presidency Small Cause Courts Act 1882, will not abate on the death of the licensee as the cause of action is not personal and does not die with the death of the party.⁸

(12) Trusts of various kinds are recognised and acted on in India.

(13) A trust does not fail if one or more trustees decline to act.

1 *Misri Lal v Daulat Devi* AIR 1997 SC 3819.

2 *S. Rajagopal v Hamasaveni* AIR 1992 SC 704.

3 *Nalini Navin v Chandravadan* AIR 1997 SC 1055.

4 *Dhyan Chand v Savitri Devi* AIR 1998 HP 37.

5 *Surinder v State* AIR 1998 Del 140.

6 *Umesh Vashwani v Ratna* AIR 1998 Raj 84.

7 *Nimbamma v Rathamma* AIR 1999 Kant 226.

8 *Ha Malbari v Nasiruddin* AIR 1998 SC 411.

FORMS

Will Bequeathing all Properties to One Person

THIS IS THE last will and/or codicil, notwithstanding any will made by me at any time heretofore made and I declare this to be my will. It will be effective after my death. It is my wish and desire that after my death my wife (or son), CD, shall be entitled to all my estate and effects thereof absolutely and forever.

I, accordingly, declare him/her as the sole beneficiary and universal legatee of my this will.

I hereby leave, give, devise and bequeath absolutely and forever to my said wife (or son), CD, her (or his) heirs, executors or administrators, for her (or his) use and benefit, absolutely and forever, all my property, assets and credits, both movable and immovable, of whatsoever character or wheresoever situate including all reversion, expectancy and future assets, if any, acquired by me and I hereby appoint her (or him), the said CD, sole executrix (or executor) of this my will who will be entitled to obtain probate without being required to furnish any security. Dated this day of 19.....

IN WITNESS, I have hereunto set and subscribed my hand and signature this day of 19.....

Signed⁹ by the within-named testator as his last will and testament in our presence all being present at the same time. Thereafter at his request and in his presence and in the presence of one another we subscribed our respective names

Signature of witnesses

Will with Legacies, Residue to One Person

THIS IS THE LAST will and testament of me, AB, of etc., I hereby revoke all wills by me at any time heretofore made and declare this to be my last will. This will be effective after my death and carried out to its terms.

9 Section 63 of the Indian Succession Act as to execution and attestation of unprivileged wills.

(1) I appoint CD of, etc., to be sole executor of my this will and the trustee of my estate.

(2) I direct that my said executor shall so soon as convenient after obtaining probate pay for discharge and satisfy all testamentary expenses and my just debts and liabilities.

(3) I accordingly leave, bequeath and give a sum of Rupees to my grandson, EF and my gold watch and the whole of my library with its use and enjoyment to my friend, GH.

(4) Subject to the above specific legacies I give, leave and bequeath the rest and residue of my estate, movable and immovable, including future assets if any acquired by me hereafter absolutely and forever unto and to the use of my son XY, his heirs, executors, administrators or assigns.

IN WITNESS WHEREOF I have hereunto set and subscribed my hand and signature this day of 1999.

Signed by the within-named Testator as his last Will and Testament in our presence all being present at the same time. Thereafter at the request of the Testator and in his presence and in the presence of one another. We, XY and MN, subscribed our respective names

Signed, sealed and delivered by AB
the TESTATOR

Signed by XY in the presence of AB
the TESTATOR and MN

Signed by MN, in the presence of
TESTATOR and XY

Will with Legacies for Children

THIS IS THE LAST will and testament of me, AB of, etc. This will be operative with effect from my death. I hereby revoke all wills and codicils by me heretofore made.

1. I hereby appoint CD of, etc., and EF of, etc., as the executors of my this will, trustees of my estate and also the guardians of the person and property of my minor children, GH and IJ, during the respective periods of their minority. In case any one of the executors fails to obtain probate or

act as trustee and guardian, the other shall act as the sole executor, trustee and guardian.

2. I direct my said executors or executor and trustees or trustee to pay out of my estate a sum of Rs. 1 lakh to X and a further sum of Rs.1 lakh to Y for their absolute use and benefit and I hereby give, leave and bequeath the same unto and in their favour absolutely. It is my further wish and desire that a sum of Rupees 1 lakh should be paid for the expenses of the marriage of MN of, etc., should I not celebrate *his* or *her* marriage during my lifetime and I direct my said executors or executor and trustees or trustee to pay the same accordingly on the occasion of *his* or *her* marriage.

3. Subject to what are hereinbefore stated, my said executors or executor and trustees or trustee shall, after defraying the costs, charges and expenses of administration, hold and possess the entire estate, both movable and immovable, in trust for my children for their maintenance and support until the youngest of them shall attain the age of 21 years.

4. My said executors or executor and trustees or trustee shall be entitled to convert the movables only into money which should be invested in the purchase of Government securities or trustees securities or in loans against the first mortgage of houses and lands or in any other good and sound investments with power to draw interest, dividends, etc. to alter and vary the same at their discretion such investment or investments into other investment or investments of the same or like nature, to be held upon trust as aforesaid.

5. My said executors or executor and trustees or trustee shall look after, manage and keep and maintain in good repair and develop all my properties, and realise the rents, profits and other income thereof.

6. I further direct that my said executors or executor and trustees or trustee shall after paying all my just debts, testamentary and other expenses and the legacies hereinbefore recited, and, after providing for the costs, charges and expenses of the management and development of the said properties and for payment of the revenue and taxes spend the surplus of the income for all the necessary expenses for maintenance and education of my said children during their minority and on my last child attaining the age 21 years shall divide the remaining property equally among all my children, when and in such an event the trust hereunder created shall come to an end.

Provided, however, they shall keep and maintain proper account of the estate and file the same in court once in every six months and get the same audited and passed.

Provided, however, further that in the event of acquisition or compulsory purchase of any property, the said executors and trustees shall invest the

proceeds in purchase of some other suitable property or properties to be also held by them in trust as aforesaid.

IN WITNESS WHEREOF I have hereunto set and subscribed my hand and signature this day of 1999.

Signed by the within-named Testator as his last Will and Testament in our presence all being present at the same time. Thereafter at the request of the Testator and in his presence and in the presence of one another We XY and MN subscribed our respective names

Signed, sealed and delivered by AB the Testator

Signed by XY in the presence of AB the Testator and MN

Signed by MN in the presence of Testator and XY

Will with Legacies and Trust for Children and Continuation of Business

THIS IS THE last will and testament of me, AB of, etc., I hereby revoke all wills and codicil, if any heretofore made by me and declare this to be my last will. This will be operative after my death.

1. I appoint CD of, etc., and EF of, etc., (hereinafter called "my trustees"), to be the executors and trustees of this my will, and also to be the guardians of my children, GH, IJ and KL during the respective periods of their minority. In case any of them fails to act in any of the offices, the other will act solely to all intents and purposes.

2. I hereby give, leave and bequeath the following legacies to be paid out of my estate as soon as possible after my death, *viz.*,

(a) to MN Rs. 1,000 absolutely and forever,

(b) to XY my radio set and gold watch, also absolutely and forever.

3. Subject to what are hereinbefore stated, I hereby give leave and bequeath the rest and residue of my estate, movable and immovable, of whatever nature and wherever situate unto the said trustees upon trust, for the use and benefit of my children and I direct that my trustees shall

upon the youngest of my said children attaining majority divide the residue of the property among children after making several payments (as in previous precedent, cl. 6.)

4. My trustees may, in their absolute discretion, carry on and continue for such period as they shall think proper the business of, etc., at the date hereof carried on by me at, etc., either alone or in partnership with any partner or partners whom I may have admitted therein before my death, or who, in their discretion, may be admitted by them, without any detriment to the trust of my estate. And I declare that my trustees shall not be liable to my estate or any person interested therein for any loss incurred or suffered in carrying on my said business except on account of any wilful and/or *mala fide* act, default, negligence on their part or wrongful conversion or misappropriation of its funds and assets and not otherwise and that every trustee hereof shall be fully indemnified out of my estates against all liability which he may incur in connection therewith.

PROVIDED HOWEVER that they shall keep and maintain proper account of the estate and file the same in court once in every six months and get the same audited and passed.

PROVIDED HOWEVER further that in the event of acquisition or compulsory purchase of any property the said executors and trustees shall invest the proceeds in purchase of some other properties also to be held by them in trust as aforesaid.

IN WITNESS WHEREOF the said AB testator has executed these presents on the day, month and year mentioned hereinabove in the presence of OP and PQ.

Signed by testator AB

Signed and sealed by CD and EF

the trustees in token of acceptance
of the Office of Trustees

Signed by OP in the presence of AB
the testator and PQ

Signed by PQ in the presence of AB
the testator and OP

Codicil Substituting New Executor for Deceased One

THIS IS a codicil to the last will and testament made and published by me, AB of, etc., on the day of2000.

WHEREAS in my said will I had appointed CD of, etc., to be one of the executors and trustees thereof. And whereas the said CD having died, on the day or lately (if the date of death is not known), I am desirous of substituting EF of, etc., as the executor and trustee of my said will in the place and instead of the said CD. Now by this codicil I revoke the appointment of the said CD and I do appoint EF to be one of the executors and trustees of my said will in the place of the said CD deceased, and I do hereby and hereunder declare that my said will shall be read interpreted and construed and understood throughout as if the name of the said EF had been inserted in my said will instead of the name of CD save as aforesaid. I do ratify and confirm my said will in all other respects.

IN WITNESS WHEREOF I have hereto set and subscribed my hand and signature this day of 2000.

Signed by the within-named Testator as his last will and Testament in our presence all being present at the same time. Thereafter at the request of Testator and in his presence and in the presence of one another we subscribe our respective names

Signed by AB the Testator

Signed by MN in the presence of AB and PQ

Signed by PQ in the presence of AB and MN

Codicil with New Bequests on Death of a Legatee

THIS IS A CODICIL to the last will made and published by me, AB of, etc., on the day of 2000.

WHEREAS CD, one of the residuary legatees named in my said will having died since the date thereof (exact date to be given, if known), the legacy thereunder bequeathed unto and in his favour shall after my death fail and form a part of my general estate which was never intended by me. And whereas in the circumstances aforesaid it is my wish and desire that the said legacy shall go to his brother EF. Now by this codicil I do hereby give leave and bequeath the same unto and in favour of his brother, EF. Provided, however, and in case the said EF shall also predecease me, (which May God Forbid) then and in such an event the same shall pass unto and vest in GH and LJ, the two sons of the said EF, in equal shares absolutely and forever. And in all other respects I confirm my said will.

IN WITNESS WHEREOF I have hereunto set and subscribed my hand and signature this day of 2000.

Signed by the within-named Testator as his last Will and Testament at the same time. Thereafter at the request of Testator and in his presence and in the presence of one another we subscribe our respective names

Signed by AB the Testator

Signed by MN in the presence of AB and PQ

Signed by PQ in the presence of AB and MN

NOTE: Under s. 105 of the Indian Succession Act 1925, when the legatee does not survive the testator the legacy shall lapse unless otherwise provided for in the will. Section 109 also applies to Hindu which is an exception to the doctrine of lapse. It contemplates legacy in favour of any child or other lineal descendant of the testator. This section is based upon s. 33 of the English Wills Act.¹⁰

**Bequest Absolute of Land in Trust
for Religious uses with a Direction to
Found a Temple and Carry out Maintenance
of the Deity and other Expenses from the Money
Raised from Sale of Property Existing at the Testator's Death**

THIS IS THE LAST WILL and testament of AB, son of This will be effective after my death.

I hereby revoke all wills, codicils and other testamentary dispositions heretofore made by me and declare this to be my last will and testament. I appoint CD as the executor of my this will and the trustee of my estate. He will be entitled to obtain probate without being required to furnish any security. It is my wish and desire that my land situate at fully mentioned and described in the schedule below shall be given to and utilised for the service of a deity to be named as to be consecrated and established after my death by the said executor and trustee in a temple also to be constructed by him for which purpose and in order to raise capital he will

10 1 Vic C 26.

sell and convert into money all the machinery, plants, stock-in-trade and other assets of my trade or business carried under the name and style of at

Accordingly I hereby leave and I bequeath my land situate at in the city of in the district of and more particularly described in the schedule hereto and all the plants, machinery, stock-in-trade and other assets of my said trade or business at the time of my death, and also the goodwill thereof and all the book and other debts which shall then be due or owing to me on account of the said trade or business and all the moneys, securities, goods, credits and effects whether of the said trade or business or otherwise belonging to me at my death (subject to what I may otherwise dispose of during my lifetime or by any codicil hereto) unto and to the use of CD, son of etc.

TO HAVE AND TO HOLD the same upon trust with power to sell and convert into money all such parts thereof, except the said land. I direct that out of the money so realised and out of such money as I did possessed of at my death, the said CD shall at the first instance pay for discharge and satisfy all my funeral and testamentary expenses, death-bed charges and other just debts and liabilities and after payment thereof construct and build a temple on the said land and which, when completed, will be the property of the deity to be installed and named "Shree Shree Radharamanji Maharaj". I further direct that the said CD shall invest the surplus of the said moneys lying in his hands after the construction of the temple in such Government or other securities, shares and debentures all to be held by him in trust as aforesaid and shall, out of the interest or dividends etc. of such investments, carry out the worship or seva of the said "Shree Shree Radharamanji Maharaj". I appoint the said CD as also to act as *shebait* of the said deity when consecrated and established as aforesaid who shall have power to nominate and/or appoint his successor or successors in office and in the absence thereof his descendants shall act as trustees and *shebait*s. If the said CD shall die without nominating his successor and leaving no descendants or he or they refuse and/or neglect to perform the duties of the *shebait* or otherwise become unfit or personally incapable to act in the said trust, then, and in every such case, it shall be lawful for my heirs and legal representative to remove him or them from the office of the trustee and appoint another in his or their place and stead, failing which a new trustee shall be appointed by the court of competent jurisdiction.

Dated this day of 2000.

The Schedule above referred to

IN WITNESS, etc. (see first precedent)

Signed by etc. (see first precedent)

AB

Codicil with Bequest and Authority to Widow to Adopt

THIS IS CODICIL of me, AB, of etc., to my last will and testament dated the day of and which I direct to be treated as part thereof.

1. I leave, give and bequeath the sum of Rupees to each son and Rupees to each daughter of my deceased daughter, CD living at the time of my death for their absolute use and benefit and I direct that the legacy hereby given to each such son or daughter, who shall have attained the age of 21 years or married under that age, shall be paid to him or her, as the case may be, as conveniently as possible after my death, and that the legacy hereby given to each and every such son or daughter, who shall not have attained the age of 21 years or married under that age, shall be invested in Government securities in the names or name of my trustees or trustee, who shall stand possessed thereof in trust to transfer, assign and make over the same to him or her, whose legacy is represented thereby, upon his or her attaining the age of 21 years or marrying under that age, and, in the meantime and until it is transferred, assigned and made over, in trust to receive the accumulated interest of the said legacy or Government securities investing such interest, from time to time as circumstances admit, in Government securities also. I direct that each of the bequests by me hereinbefore made shall be deemed and taken to have vested in the several legatees, to whom they are by me bequeathed, immediately upon my death, and that, out of the accumulated interest on the legacies aforesaid, shall be defrayed the expenses for education of those children, and that in case of any of the said legatees dying at any time after my death, his or her legacy shall be payable to his or her executor, administrator or heir.

2. I hereby give my wife, the said EF, authority, power, and liberty to adopt a suitable boy as my son; in the event of such adopted son dying without leaving a widow or male issue, to adopt another boy, and in the same way on the death of such adopted son without leaving a widow or male issue to adopt another boy successively.

3. Subject as aforesaid I confirm my said will.

IN WITNESS WHEREOF, I have hereunto set and subscribed my hand and signature this day of 1999.

Signed by the within named Testator as his last Will and Testament in our presence all being present at the same time. Thereafter at the request of Testator and in the presence of one another we subscribe our respective names

Signed by AB the Testator

Signed by MN in the presence of
AB and PQ

Signed by PQ in the presence of AB
and MN

Codicil Revising Will and Providing for Wife and Future Children

THIS IS A CODICIL to the will of me, AB, of, etc., which bears date the
day of

WHEREAS since the date of the said will I have married CD I hereby
revise my said will.

NOW I HEREBY leave, give and bequeath to my said wife for her life the
annual sum of Rs., from the day of my death to be paid to her by
equal monthly payments. And I declare that my child or children by her
shall participate equally with my other children in my general movable and
immovable property according to the trusts of my said will. Subject as
aforesaid I confirm the said will.

IN WITNESS WHEREOF I have hereunto set and subscribed my hand and
signature this day of 2000.

Signed by the within named
Testator as his last will and
Testament in our presence all
being present at the same time.
Thereafter at the request of
Testator and in his presence and
in the presence of one another we
subscribe our respective names

Signed by AB the Testator

Signed by MN in the presence of
AB and PQ

Signed by PQ in the presence of
AB and MN

Will with Provision for Appointment of Trustee for a School

I, son of hereby declare this to be my last will thereby revoking
all or any previous wills or codicils made by me and devise and bequeath
my estate as follows:

After defraying the expenses of administration of my said estate and obtaining probate or letters of administration with the will annexed and after meeting all expenses of my funeral and construction of the *samadhi* as provided in the will and after paying off all debts or liabilities that may be owing from me to any other person or persons, I hereby bequeath and devise all my movable and immovable properties including choses-in-action and trade-mark and patent rights unto—

- (1) Shri of
- (2) Shri of
- (3) Shri of
- (4) Shri of
- (5) Shri of

Jointly as trustees of my said estate for the purpose of establishing and maintaining a school for the education of the children of poor persons specially those belonging to the scheduled castes and of beggars and unattached children.

The said trustees shall be entitled to convert all my properties and assets into any kind of Trustees' security and keep the same invested in such securities as they deem fit in order to carry out the purposes of the trust and change the same.

The school shall be named and shall consist of kindergarten, primary and secondary classes, so as to equip each child with an appropriate mode of living and becoming a good citizen of India having knowledge of arts and science suitable to the mental equipment of each such child and making him physically fit to bear the burden of life thereafter. The said school shall have attached residential boarding house where each child shall receive enough individual attention and shall be brought up in a decent and orderly way of life.

No fees shall be charged in the said school and the children shall be clothed and fed properly. For the purposes of carrying out the objects of the trust, the trustees may establish and maintain a dairy, a laundry, workshop and/or any other institution which they may consider suitable or advisable to assist them in the duties aforesaid.

In case State aid should become necessary, the trustees shall be entitled to apply for the same and observe the rules and regulations that may be imposed upon them by the State, which may override any of the instructions hereby given by me.

The trustees are directed to set apart a sum of Rs. to be utilized for the building of a *samadhi* in my name at any appropriate place, whereto should be attached small resting place for travellers which should be equipped with a well and other necessary amenities of life.

I have no wife nor any children. But in case any near relation of mine should on account of poverty be unable to maintain and educate his or her children, such children should be given preference in the admission to the aforesaid school.

IN WITNESS WHEREOF I have hereunto set and subscribed my hand and signature this day of 2000.

Signed by the within named Testator as his last Will and Testament in our presence all being present at the sametime. Thereafter at the request of Testator and in his presence and in the presence of one another we subscribe our respective names

Signed by AB the Testator

Signed by MN in the presence of AB and PQ

Signed by PQ in the presence of AB and MN

Court Proceedings. Application for Probate or Letters of Administration with the Will annexed has to be made by a petition. The petition has to be made in the court within whose jurisdiction the testator had permanent residence or within whose jurisdiction some properties covered by the Will are situated. A copy of the Will or a statement of contents of the Will is to be annexed to the petition. The petition must contain the date of the Testator's death, a statement that this was the last will and Testament, it was duly executed and attested and the amount and particulars of assets likely to come in the petitioner's hands and that the petitioner is the executor named in the Will. Particulars of value of assets lying in different places outside the jurisdiction of the court should also be stated.

If the Will has been lost or mislaid after the Testator's death or it has been accidentally destroyed then on the basis of a copy of a draft of the Will, the Probate may be granted for a limited period until the original or an authenticated copy of the Will is produced.

Revocation. The Probate or Letters of Administration may be revoked for a just cause. It will be revoked if the Probate proceeding was defective in substance or if the Probate was obtained fraudulently by making false suggestions or concealing any material fact from the court or by making untrue allegations or the grant has become useless or inoperative through circumstances or that the person obtaining the Probate exhibited incorrect inventory or accounts.

Caveat. A Caveat may be filed under s. 148A of the Code of Civil Procedure 1908 in any matter apprehended to be filed in court so that without notice to the Caveator no order would be made in such intended matter. This Caveat remains valid for 90 days but can be renewed from time to time by fresh Caveat. Caveat may be filed in case of probate proceedings before the same are started or after institution thereof. A Caveat before institution of such proceedings under s. 284 of the Indian Succession Act 1925 remains valid for an indefinite time. The question of limitation does not arise in case of it being filed in a pending proceeding. The form of Caveat in High Court is slightly different from the Form in the District Courts.

Petition for Revocation of Probate

In the Court of

Case No. 3 of 1999

AB of *Petitioner*

versus

XY of *Opposite Party*

Petition for revocation of Probate.

(Under s. 263 of the Indian Succession Act 1925)

The humble petition of the petitioner above-named

MOST RESPECTFULLY SHEWETH:

1. The opposite party XY by filing Case No. 3 of 1999 obtained a Probate/ Letters of Administration, by suppressing the material facts which if disclosed would have disintitiled him from obtaining the Probate/Letters of Administration.

2. That the material facts are as follows:

- (a) the proceedings were defective because of
- (b) false suggestions were made and material facts were suppressed such as
- (c) untrue allegations of a fact essential in point of law to justify grant was made.

3. That the applicant having practising fraud upon the Learned Court and by suppressing material facts have obtained the Probate/Letters of Administration of the Will which had been revoked. A later Will was made and has since been discovered.

The petitioner, therefore, prays that the Probate/Letters of Administration may kindly be revoked and further orders be passed as may deem fit and proper.

Signature

Verification

I, AB son of GB by occupation service do hereby solemnly affirm and say as follows:

1. I am the petitioner herein.

2. The statements in paragraphs 1, 2 and 3 of the foregoing petition are true to my knowledge as also based on information derived from records of the proceedings in this Learned Court and believed by me to be true.

3. The statements in the foregoing paragraphs are true to my knowledge.

I sign this verification on this day of October 1999 at the Court Premises at Alipore.

Before me

Identified by Clerk
of Advocate

Commissioner of Oath
or as the officer may be

Advocate for Petitioner

Application for Revocation of Succession Certificate

In the Court of

Case No. 5 of 1999

Mrs. X wife of Late Mr. Z of *Petitioner*

versus

Mr. BC of *Opposite Party*

Petition for revocation of the Succession Certificate
(under s. 383 of the Indian Succession Act 1925)

The humble petition of the petitioner
above-named

MOST RESPECTFULLY SHEWETH:

1. The opposite party filed an application for grant of Succession Certificate in Case No. 5 of 1999. The opposite party obtained a Succession Certificate in respect of the debts of the deceased Mr. Z on 5th May 2000.

2. Your petitioner is the widow of the deceased. As the nearest relation your petitioner was entitled to obtain the Succession Certificate for recovering the debts of the deceased.

3. That the opposite party is a step-son of the petitioner. He knew the petitioner being the nearest relation is entitled to be served with the notice of such application. However, the opposite party fraudulently suppressed

the name of the petitioner in the application and consequently no notice was issued to the petitioner by the Learned Court and the Succession Certificate was issued without hearing the petitioner.

By reasons of the aforesaid, it is humbly prayed that the Succession Certificate granted to the opposite party be revoked and further and consequential orders be passed as to this Learned Court may deem fit and proper.

Signature

Verification

I, Mrs. X wife of late Mr. Z residing at do hereby solemnly affirm and say as follows:

1. The statements in the paragraphs 1, 2 and 3 of the foregoing petition are true to my knowledge and also based on information derived from the records of the proceedings of this Learned Court and believed by me to be true.

2. The statements hereinabove in the verification are true to my knowledge.

I sign this verification on this day of October 1999 at the Court House at Alipore Judges' Court.

Before me
Oath Commissioner
or as the officer may be
Advocate of Petitioner

Deponent
Identified by
Clerk of Advocate

Objection to Petition for Grant of Probate
In the Court of the Civil Judge (Senior Division)

Alipore

Original Petition No. 5 of 1999

In the matter of:

The Will of S. Mohanta, the deceased

And

In the matter of:

A. Vaisnab, residing at 5 Brindaban Road,
Calcutta

Plaintiff

versus

G. Avadhoot, residing at 6 Brindaban
Road, Calcutta

Defendant

The humble petition of the defendant
above-named most respectfully

SHEWETH:

1. The plaintiff claims to be the executor of an alleged Will of the said S. Mohanta dated 5th June 1985 and claims to have the said Will established.

2. The defendant disputes the validity of the said Will.

3. The defendant states that the said Will and Codicil of the deceased were not executed in accordance with the provisions of the Indian Succession Act 1925.

4. The deceased at the time of execution of the said Will and Codicil was not of sound mind, memory and understanding.

5. The defendant states that the execution of the said Will and Codicil was procured by undue influence by the plaintiff.

6. The plaintiff fraudulently obtained the signatures of the said deceased on the Will and Codicil by fraud representing to him that the said documents were required to be executed for the purpose of inducting tenant in the said premises. The said deceased due to failing eyesight was not in a position to read the documents and did not read or understand the said documents. The deceased did not understand the nature or the contents of the said Will and Codicil.

7. Ten years prior to the said purported Will and Codicil the said deceased in sound mind, memory and understanding and with full vision and eyesight executed a Will written by his own hand and duly executed the same in presence of two respectable witnesses appointing the defendant as the Executor thereof. A copy of the said Will dated 5th June 1975 is annexed hereto marked "A".

8. The defendant states that the Will and Codicil relied on by the plaintiff be declared null and void and the Probate granted to the plaintiff be cancelled.

In the premises the defendant claims:

- (a) declaration that the said Will and Codicil of which the plaintiff obtained the Probate is null and void;
- (b) delivery of the said Will and Codicil and Probate granted and on such delivery cancellation thereof;
- (c) further and other reliefs.

Verification

I, G. Avadhoot son of late B. Avadhoot by occupation landlord residing at 6 Brindaban Road, Calcutta do hereby solemnly affirm and say as follows:

1. The statements in the paragraph Nos. 1 to 8 hereinabove are true to my knowledge derived from records maintained by me and the proceedings in this Learned Court and Mr. X and Mr. Z the witnesses to the said purported Will and Codicil on the basis of which the plaintiff obtained the Probate and believed by me to be true.

2. I sign this verification on this 5th day of January 2000 at the Court House at Alipore.

Sd/ G. Avadhoot
Identified by me

Advocate for the
Defendant

Petition of Consent to Grant of Succession Certificate

District: South 24-Parganas

In the Court of the Learned District Delegate at Alipore

Act 39 Case No. 363 of 1996

(Succession)

In the matter of:

Abdul Khalik since deceased of 2 Bagan Road, Calcutta 700 024, Police Station—Metiaburuz, District—South 24-Parganas, by faith Muslim and Nationality Citizen of India

And

In the matter of:

An application for grant of Succession Certificate in respect of Back Wages amount lying at the office "The Air Corporation of India Ltd." at 7 Roy Road, Calcutta 700 001 of Abdul Khalik since deceased under s. 372 of the Indian Succession Act 39 of 1925

And

In the matter of:

Jamina Bibi, widow of deceased Abdul Khalik residing at 2 Bagan Road, Calcutta 700 024, Police Station—Metiaburuz, District—South 24- Parganas

.....Applicant

The humble petition of:

(1) Abdul Manna

(2) Abdul Hanan

(3) Abdul Kanna

All sons of deceased Abdul Khalik residing at 2 Bagan Road, Calcutta 700 024, Police Station— Metiaburuz, District—South 24-Parganas

(4) Amina Khatoon, Married daughter of Abdul Khalik and wife of Late Md. Rahim, residing at 2 Bagan Road, Calcutta 700 024, Police Station—Metiaburuz, District—South 24- Parganas

(5) Khaira Banu, Unmarried daughter of deceased Abdul Khalik residing at 2 Bagan Road, Calcutta 700 024, Police Station—Metiaburuz, District—South 24-Parganas

MOST RESPECTFULLY SHEWETH:

1. That the deceased above-named died intestate on or about 10th day of July 1995 at about 11-30 p.m. at the Calcutta Medical College and Hospital, Calcutta, leaving behind him his widow Jamina Bibi three sons and two daughters and that the deceased left no other heirs and legal representatives.

2. That the applicant Jamina Bibi is the mother of your petitioners and she is one of the heirs and legal representatives of the deceased.

3. That your petitioner's said mother has applied for grant of the Succession Certificate in her name in respect of the goods and assets and securities and debts of our father Abdul Khalik since deceased.

4. That the petitioners above-named as the other heirs of the deceased do hereby give our consent to the grant of such Succession Certificate to the applicant Jamina Bibi and that your petitioners have no objection to the grant of the Succession Certificate to be issued in her favour by this Learned Court.

5. That this application is made *bona fide* and for the ends of justice.

Under the circumstances set forth above Your Honour would be graciously pleased to note and

record the consent and no objection of your petitioners to the issue of Succession Certificate in favour of Jamina Bibi, widow of the deceased Abdul Khalik and pass such other order or orders as to Your Honour may seem fit and proper.

And your petitioners as in duty bound shall ever pray.

Verification

We, the petitioners above-named do hereby declare that the statements made in paragraphs 1 to 4 of the foregoing petition are true to our knowledge and the rest are our humble submission before this Learned Court. We sign this verification this the..... day of 1996 at our Advocate's Chamber.

Prepared in my office	Signatures
Read over and explained in	1.
Bengali and Hindi	2.
	3.
	4.
Advocate	5.

Act 39 Case No. 363/96, granted on 18.6.97 (7th S.J.)

High Court Form No. (J) 55

Succession Certificate

Section 377 of the Indian Succession Act 1925

In the Court of the District Delegate at Alipore

Jamina Bibi, widow of Abdul Khalik residing at 2 Bagan Road, Calcutta 700 024, District-South 24-Parganas.

Whereas you applied on the 28th August 1996 for a certificate under Part X of the Indian Succession Act 1925 in the matter of the Estate of deceased, in respect of the following debts and securities, namely:

Abdul Khalik

Payment of back wages of Rs. 50,000 (Rupees fifty thousand) only with interest accrued thereon if any and lying at "The Air Corporation of India Ltd." having its office at 7 Roy Road, Calcutta 700 001 is standing to the credit in the name of deceased Abdul Khalik, in terms of its letter of 28th August 1995.

This Certificate is accordingly granted to you and empowers you to collect those debts and to receive interest or dividends on to negotiate or transfer both to receive interest or dividends on and to negotiate or transfer the same or any to them.

Succession Certificate issued on a
Stamp Duty of Rs. 1,400.

Dated this 19th day of June 1997

Sd/-

District Judge or
Delegate 7th Sub-Judge
19th June 1997

Seal

Seal of the Court of the District Delegate
South 24-Parganas, Alipore.

Registration of Documents

(The Registration Act 1908)

Compulsorily registrable. An instrument of gift of immovable property; a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish in present or in future any right, title or interest, vested or contingent, in immovable property or which acknowledges receipt or payment of any consideration in relation thereto are compulsorily registrable. Leases of immovable property from year to year or for any term exceeding one year or for receiving yearly rent are compulsorily registrable. Non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree order or award purports or operates to create, declare, assign or limit or extinguish in present or in future any right, title or interest, vested or contingent, in any immovable property are compulsorily registrable.¹ An authority to adopt a son is compulsorily registrable.² The document is to be registered with the Registrar of Assurances or Sub-registrars.

Exceptions. Any document in itself NOT creating, declaring, assigning, limiting or extinguishing any right, title or interest in immovable property but merely creating a right to obtain another document which will when executed create, declare, assign, limit or extinguish any such right, title or interest is not compulsorily registrable. Agreements to sale, lease or transfer are not compulsorily registrable.³ Any decree or order of a court even though relates to immovable property is not compulsorily registrable (unless it is a Compromise Decree and comprises immovable property which was not the subject-matter of the suit or proceeding).⁴

- 1 Section 17(1) of the Registration Act 1908.
- 2 Section 17(3) of the Registration Act 1908.
- 3 Section 17(2)(v) of the Registration Act 1908.
- 4 Section 17(2)(vi) of the Registration Act 1908.

An endorsement on a mortgage deed acknowledging payment of the whole or any part of the mortgage money and any other receipt for payment of money due under a mortgage when such receipt does not purport to extinguish the mortgage is not compulsorily registrable.⁵ A certificate of sale granted to the purchaser of any property sold by public auction or by a Civil Court or Revenue Officer is not compulsorily registrable.⁶

An agreement for sale of immovable property though containing a recital of payment of earnest money or whole or part of purchase money is not compulsorily registrable.⁷

Documents of which registration is optional. The following Instruments are valid and effective without registration. However, these documents may be registered at the option of the parties.

(a) Instruments acknowledging receipt or payment of any consideration on account of creation, declaration, assignment, limitation or extinction of any right, title or interest in immovable property or lease of immovable property for a term not exceeding one year.

(b) Instruments other than Wills which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in a *movable* property are not compulsorily registrable but may be registered at the option of the executants.

(c) Wills are not compulsorily registrable though it may cover immovable property. Such Wills which cover movable and/or immovable properties may be registered at the option of the parties.

(d) All documents which are not compulsorily registrable under s. 17 may be registered at the option of the parties.⁸

Requirements for registration by Registration Officer. If the document is in a language which the Registering Officer does not understand he may ask for a translation into a language commonly used in the district. The Registering Officer may ask for attestation of all interlineations, blanks, erasures and alterations in the document. The document to be registered should contain description of identity of the property and a Map or Plan. The houses and lands covered by the non-testamentary document should give references to the Government Maps and Surveys.⁹

Some states by amendments have provided that a document shall not be registered if the transaction is opposed to the public policy. In all land

5 Section 17(2)(xi) of the Registration Act 1908.

6 Section 17(2)(xii) of the Registration Act 1908.

7 Explanation to s. 17(2) of the Registration Act 1908.

8 Section 18 of the Registration Act 1908.

9 Sections 19-22 of the Registration Act 1908.

transactions in Salt Lake, Calcutta, the State Government must be made a party or prior permission of the Metropolitan Development Department, Government of West Bengal should be obtained.¹⁰

Time-limit for registration. A non-testamentary document shall be presented for registration to the proper officer within four months from the date of its execution. A Will can be presented for registration at any time. A copy of a Decree or an order is to be presented for registration within four months from the date when it became final.¹¹ In certain cases and in case of doubt as to the validity of registration, the document may be re-registered within four months from date when it became known that the registration is invalid or of doubtful validity.¹² Where a document is executed by several persons at different times, it should be presented for registration within four months of the first execution and within four months for re-registration of each subsequent execution.¹³ If for unavoidable reasons the document cannot be presented within four months of its execution for registration, then on payment of fine not exceeding ten times the amount of proper registration fee, the document may be registered within another four months.¹⁴ A document executed by all or any of the parties out of India may be accepted for registration if presented within four months after the date of arrival of the document in India.¹⁵ A Will may be presented for registration at any time.¹⁶

Registration Officer. Normally the documents have to be registered at the Sub-registrar's Office within whose jurisdiction the immovable property is situate.¹⁷ However, any Registrar may register any document registrable with a Sub-registrar subordinate to him. Further except in Gujarat, Orissa, Rajasthan, Uttar Pradesh and West Bengal the *Registrar of the Presidency Towns* and the *Registrar of Delhi* may register any document in respect of a property situate in any part of India.¹⁸ By a special arrangement in special circumstances, the Registering Officer may attend at the residence or office of the Executant for registration of document or to accept deposit of a Will.¹⁹

Executants or their authorised persons to present the documents for registration. Every instrument for registration is to be presented at the proper Registration Office by the person executing or claiming under the Decree or

10 Notification No. 452—Regn. R3M—25/87 dated 21st May 1988.

11 Section 23 of the Registration Act 1908.

12 Section 23A of the Registration Act 1908.

13 Section 24 of the Registration Act 1908.

14 Section 25 of the Registration Act 1908.

15 Section 26 of the Registration Act 1908.

16 Section 27 of the Registration Act 1908.

17 Section 28 of the Registration Act 1908.

18 Section 30 of the Registration Act 1908.

19 Section 31 of the Registration Act 1908.

document or by his representative or assign or duly authorised person under a Power of Attorney.²⁰

A Power of Attorney for presentation of document for registration will be accepted if the Power of Attorney was executed and authenticated by the Registering Office within whose jurisdiction the Principal resides. If the Principal does not reside in India then the Power of Attorney should be executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Indian Consul or Vice-consul or the representative of Central Government. Such execution of Power of Attorney may be proved by production of it and no further evidence is necessary.¹

An executant not appearing before the Registering Officer. Where one of the executants after execution of the document does not attend the Registering Office, the other party may compel the absenting party to attend through the process of the court and admit execution.² Wills and the authority to adopt may be presented for registration by the Testator or the Donor and after his death by executor or the Dones for registration.³ A Will may be deposited with the Registrar in a sealed cover and such deposit may be through an agent. After death of the Testator, on an application of the interested persons the sealed envelope containing the Will is opened, contents of the Will are recorded in Book No. 3 maintained by the Registrar and the original Will is thereafter kept in the custody of the Registrar.⁴

Effect of registration. A registered document shall operate from the time from which it would have commenced to operate in terms thereof and not from the date of registration.⁵ A non-testamentary document relating to movable or immovable property shall prevail over any oral agreement or declaration. However, if pursuant to any oral agreement or declaration, delivery of possession has been given and under any law it is a valid transfer, then such oral agreement will prevail over subsequent registered document. A mortgage by deposit of Title Deeds will prevail over a subsequent Registered Mortgage.⁶

Effect of non-registration. A document required to be compulsorily registered if not registered then it will not affect any immovable property comprised therein or confer any power to adopt. Such document will not

20 Section 32 of the Registration Act 1908.

1 Section 33 of the Registration Act 1908.

2 Sections 36-39 of the Registration Act 1908.

3 Sections 40-41 of the Registration Act 1908.

4 Sections 42-45 of the Registration Act 1908.

5 Section 47 of the Registration Act 1908.

6 Section 48 of the Registration Act 1908.

be received as evidence in any transaction affecting such property or conferring any power to adopt.⁷

However, the document compulsorily registrable, if not registered, may be received in evidence of a contract in a suit for specific performance or as evidence of part-performance of a contract or as evidence of any collateral transaction not required to be effected by a registered instrument.⁸

Endorsement on the document by Registering Officer. On admitting registration of a document, the Registering Officer should endorse on the document the admission of signature of the executants, the payment of money or consideration, the date and other particulars. If a person admitting the execution refused to endorsing the same, the Registering Officer shall nevertheless register it but shall endorse a note of such refusal. The Registering Officer shall endorse a Certificate on the Instrument containing the word "Registered" together with the Book No. and page No. of the Book on which the document has been copied. Such Certificate shall be signed sealed and dated by the Registering Officer. Such Certificate is thereafter admissible in evidence.⁹ The endorsements and Certificate shall be copied in the margin of the Register and the copy of Plan or Map, if any, shall be filed in Book No. 1. The document then shall be returned to the person who presented the same for registration or to his nominee.¹⁰

Fees for registration. The fee payable for registering a document or for searching of the register or for obtaining of copies are fixed by the State Government by a Notification.¹¹

Registration and Tax Clearance Certificate

(The Income-tax Act 1961)

Every transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in s. 53A of Transfer of Property Act 1882 was required to be in writing and registered with the Competent Authority (the then Deputy Commissioner of I.T. Department).

Every transaction other than sale, exchange or lease compulsorily registrable under the Registration Act whereby a person acquired any right in or with respect of any building or part of a building which had been

7 Section 49 of the Registration Act 1908.

8 Proviso to s. 49 of the Registration Act 1908.

9 Sections 58-60 of the Registration Act 1908.

10 Section 61 of the Registration Act 1908.

11 Sections 78-80 of the Registration Act 1908.

constructed or which was to be constructed was to be in writing and registered with the Competent Authority.¹²

With effect from 1.10.1986, the provisions of Chapter XXC, containing ss. 269U to 269UO, are operative. Section 269UC puts certain restrictions on transfer of immovable property and s. 269UL puts restrictions on registration, etc., of documents in respect of transfer of immovable property.

In respect of documents compulsorily registrable relating to immovable property of the value of Rs. 5 lakhs or more the Registering Officer shall not register the transaction unless a Tax Clearance Certificate under s. 230A of Income Tax Act is produced.

Notice to be given

[The Urban Land (Ceiling & Regulation) Act 1976]

(Since repealed)

No person holding vacant land within the ceiling limit shall transfer such land by way of sale, mortgage, gift, lease or otherwise except after giving notice in writing of the intended transfer to the Competent Authority.¹³

A document purporting to transfer by way of sale, mortgage, gift, lease or otherwise of any urban property shall not be registered by the Registering Officer unless evidence is produced that proper notice has been given at least 60 days before to the Competent Authority under the Act of 1976.¹⁴

Permission Required

[The West Bengal Government Land (Regulation of Transfer)
Act 1993 w.e.f. 4.3.1997]

A Registering Authority shall not register any document relating to transfer of Government land held by any Lessee on lease in favour of any person without the permission of the Competent Authority. Transfer of such leasehold land in favour of State Government or a Government undertaking does not require any permission of Competent Authority.¹⁵

12 Section 269AB of the Income-tax Act 1961. It may be noted that Chapter XXA, containing ss. 269A to 269S, was not to apply to or in relation to the transfer of any immovable property made after 30.9.1986 as mandated by s. 269RR.

13 Section 26 of the Urban Land (Ceiling and Regulation) Act 1976.

14 Section 28 of the Urban Land (Ceiling and Regulation) Act 1976.

15 Section 4 of the West Bengal Government Land (Regulation of Transfer) Act 1993.

Computer Contracts*

To be very simple a contract is an agreement enforceable by law. In the eyes of law a contract will create rights and duties. In fact the very intention of entering into a contract is to protect the rights of respective parties. Normally we witness the signing of a contract in the following circumstances *i.e.* when the subject-matter is having considerable monetary worth, when a party has to perform a particular task within a specified time, when the parties are not familiar with each other, when there is a need to clarify the rights and duties of respective parties to show clearly where the respective parties stand, when a remedy has to be provided if any party suffers any loss because the other party failed to perform his part.

Normally while structuring a contract there is no hard and fast rule to be followed, depending upon the situation, legal rules have to be taken from the Indian Contract Act 1872 and Companies Act 1956. Thus to draft a contract relating to partnership, inputs from the Indian Partnership Act 1932 are crucial. Apart from the laws enacted on the subject, attention should be given to various judgements delivered on that particular subject.

Computer contracts can be divided into 3 distinct areas.

(a) Hardware contracts. As the name implies such contracts relate to the hardware *i.e.* the issues dealing with the selling, marketing, distribution, installation, servicing/maintenance of computers. In simple words they are concerned with various activities connected with the machine. Machine and the related items of a computer are generally called hardware. Just like any tangible property hardware can be subjected to various transactions like lease, sale etc.

(b) Software contracts. Such contracts refer to the computer programs. There are various activities revolving around a computer program, for e.g.

* Contributed by V.K. Unni, Faculty, NALSAR University of Law, Hyderabad.

like developing/writing the program, marketing that particular program, issuing licenses to use such programs etc. What we call software comprises of programs, which are in simple words, directions issued to the computer (hardware) to function in a particular manner. Depending upon the functions we can broadly classify software into 2 broad heads namely applications software and operating systems.

Applications software performs all the specialised tasks that computers are used for: for e.g. video editing, animation, computer aided design, airline reservations, email, chat etc, examples Adobe Photoshop, Corel Draw etc.

An operating system termed "OS" is the program that, manages all the other programs in a computer. Right from the moment a computer is switched on, the operating system is working; to interpret and manage the entire computer's other programs and resources, until the computer is shut down. In case the Computer is running 2 programs at the same time, the OS allocates computer's resources.

An operating system program, which should be present in all computers, controls various functions of hardware and allocates various resources of the computer. The OS also controls internal components, such as memory, external devices-monitors, modems, storage devices-and the look and feel of the user interface. Examples of Operating Systems are Windows 98, Windows XP, Linux etc.

(c) Net related contracts. They are called in popular terms as Net-ware or Web-ware contracts, they relate to contracts relating to Internet like e.g. hosting of a website, registration of a particular domain name, agreements on web server co-location etc. Any activity relating to the Internet needs certain devices like fax-modem, certain programs like Windows Explorer for net browsing, certain services like net connectivity, provided by Internet Service Providers like Sify, BSNL etc.

Issues involved in a hardware contract

Sale and installation. More often than not a hardware contract is for the delivery of machines (computers), these machines can be easily ascertained by referring to a distinctive code no. which is normally printed in the machine along with a model name or number. Such contracts may be for a complete computer system, or parts of such systems. Such contracts can envisage various payment options like outright sale, rental, lease etc. In such contracts, the manufacturer can enter into an agreement with the end user, or he can enter into a contract with another who can act as a supplier to end users.

The place of installation of the machine is very important in such contracts because the place of installation can influence the delivery, freight charges etc. Normally in outright sales delivery is made immediately on signing the contract. The duty of the manufacturer/supplier of the machines/hardware is to assemble the components, thoroughly test it, and safely transport and

deliver the machines to the premises of the buyer. Normally a buyer may also require the supplier to test the machines/hardware after the machines are installed at the buyer's site before accepting the machines and making the payment.

Initially when the machine is ready the manufacturer/supplier will invite the customer to visit the manufacturer's office to see the tests, which are carried out on the machine. After such tests are carried out the machines are shipped to the premises of the customer and installed at the places earmarked for keeping the machine/computer. Thereafter the manufacturer/supplier's engineers perform some standard tests in the presence of the customer's technical team. Once such a test is performed satisfactorily at the installation site the customer shall accept the machine and the purchase price shall be paid immediately. Just like any other equipment, the defects/damages of a machine /computer will become noticeable only after a period of long usage; so the manufacturer/supplier shall guarantee such machine, for a limited period against faulty workmanship, materials etc. This period can range from 6 to 24 months.

Generally customer/buyer has the following duties:

- To pay the price stipulated in the contract;
- To prepare the installation site;
- To take care and maintain the machine.

Generally manufacturer/supplier has the following duties:

- To deliver the computer specified in the contract in working condition;
- To ensure confidentiality with respect to the information supplied by the client.

Just as in any other sale the title to the machine pass to the customer/buyer after the final payment. It is a common practice for the manufacturer/supplier to provide the customer an indemnity with respect to third party Intellectual property right violations.

In some cases the computers may be taken on rent and in such cases the contract commence from the date of delivery of the computer. In such contracts the title rests with the supplier of the computers

Marketing agreements. For the success of any product a well-oiled supply chain is a must and obviously the computer industry is no exception to this general rule. Some computer manufacturers appoint distributors while some appoint agents to market their products. The position of the distributor is that of an independent contractor and the distributor buys from the manufacturer and sells at a profit of the customers. This shows that the distributor is faced with some risks especially pertaining to bad loans.

The case of an agent is different because the agent acts as middleman between the manufacturer and customer. There is no personal liability on agent's part and the manufacturer shall indemnify the agent for any loss, which may arise in the ordinary course of business. Agents commonly are paid a commission, which can be a percentage of the net selling price of the computer.

Whatever be the type of the agreement, apart from creating a contractual relationship between parties, it also stipulates various roles assigned to both the parties with regard to manufacturing and packaging, licensing, publicity, maintenance/ customer support of the computer.

In contracts relating to distribution, price of the machine and the conditions of payment are very important. In some contracts the manufacturer may undertake to supply the computer to the distributor at a special price, which is less than the price charged from other distributors. Such agreements also may contain clauses that protect distributor from sudden price hikes by stipulating a notice period of at least 2 months before increasing the price. It is common for the distribution agreement to clearly mention the geographical area where the distributor can operate.

Maintenance agreements. Maintenance can be of 2 types, preventive maintenance, which involves regular testing and adjusting various features relating to the computer to prevent any defect to the computer, and curative maintenance to cure or rectify any defect to the computer, which has arisen.

Thus the latter agreements shall include the proper definition of the circumstances, which require maintenance along with, configuration of the computer. It shall also specify the people who are competent to carryout maintenance. Another factor to be considered is the clause which shall guarantee quick response on the part of the service provider, so such agreements shall include a clause specifying the timeframe within which engineers of the service provider shall reach the place where computer is installed. The price for maintaining computers shall be charged annually, which may be paid in 2 or 3 instalments.

In ordinary circumstances a maintenance agreement is for a specific period wherein any party can terminate the agreement by giving a notice to the other party. Again there cannot be any change in equipment as mentioned in the agreement. Maintenance services have to be carried out in accordance with the time schedule provided in the agreement.

Customer has the following duties:

- To pay the maintenance price as fixed in the agreement;
- To take proper care of the equipment;
- To provide the service provider access to the place of computer installation.

The service provider has the following duties:

- To carryout maintenance of the computer specified in the contract with proper care;
- To ensure confidentiality with respect to the information supplied by the customer.

Contracts relating to employment Here one has to appreciate the fact that IT industry essentially depends upon the strength of its human resources. More often than not the main ingredient of this industry is intellectual capabilities of its employees; this is very true in the case of software where the final output is the collective commodification of intellect. Thus the agreements, which the companies enter with their employees should be drafted in a very professional manner because any addition or omission can have serious implications in case differences arise with them on a future date. Such a contract should be frame taking into account the interests of the employer and the legislations pertaining to the subject-matter.

As a matter of general principle, such contracts must contain crystal clear provisions regarding the ownership of inventions, which arise in the course of employment. A company or the firm engaged in software development should contain a specific clause that the copyright of the software produced during the course of employment will belong to the company. In many cases the employees will be having access to confidential information/ know-how and sufficient care should be taken to ensure that the said employee would be able to misappropriate or pass on that to a competitor.

IT industry is the one with very high attrition rates and retaining the best employees is a very difficult task for any employer. Thus it is not uncommon for the employer to include some provisions, which prohibit the employee from starting a competitive business. Such employments always stipulate clause, which preclude employees from starting competitive businesses for a specified period. But here care should be taken to make sure that the employer is not crossing the limits because if the clauses are very harsh the courts may view them as affecting the constitutional right of the employee to carry on any trade or profession. Thus care should be taken not to include unreasonable clauses that affect any constitutional right or provisions, which may in effect restrain business or trade.

Non-disclosure agreements. In many cases software companies work in a specific project for their client, which may be of much importance to the client. In such cases the clients may insist that the employees of the companies who work in that specific project execute a non-disclosure agreement regarding the project, which they are working upon. This would be in addition to the employment contracts, which the employees had signed

at the time of their appointment. For example if Infosys is doing a special project for the Reserve Bank of India, (RBI), RBI can ask the employees of Infosys who work in that special project to sign a Non Disclosure Agreement.

Agreement with contractors. The concept of outsourcing has steadily gained ground in the software industry. Several large software companies in order to keep their overhead accounts low have started the practice of entrusting a portion of their work to some small or medium sized companies. This will alleviate their burden of keeping a large workforce, but here ample care should be taken to ensure that all the confidential information pertaining to the project is preserved to the maximum. Such contracts should contain specific provisions regarding the liability of the company to which the work is being outsourced. In case of any misappropriation of valuable information the company, which entrusts the work to the other company, should have adequate legal remedy and so specific clauses should be inserted in the agreement to protect the interests of the outsourcer.

Agreements with consultants. This is the era of consultants. Mostly companies engaged in developing software take the services of consultants because of their expertise in providing solutions tailor-made for a particular sector. But they are not the employees of the company and for that matter he may be eligible for some benefits like provident fund, gratuity etc. The company should draft the agreement, which specifies the ownership regarding all intellectual property developed by the consultants while the company engages their services. The consultant shall never be an agent of the company; he is dealing with the company on a principal-to-principal basis. All the products or know-how developed by the consultant when the company engages him should belong to the company. Agreements made by the company with the consultant should really take care of this issue and must contain specific clauses clarifying the right of the company.

Software contracts. Earlier the distinction between software and hardware was not that prevalent. People were buying a computer that included the price of hardware, i.e the processor, motherboard, hard disc, monitor etc. along with the built-in software. Thus in the earlier days software was considered as a thing which is given free with the hardware. Most of the major computer manufacturers were bundling the software along with the hardware. Finally by around 1970 some of the leading companies decided to charge their software separately as they were facing an anti trust litigation initiated by the Dept. of Justice, USA.

In the case of sale of software there is a very important distinction. Software is never sold as any other product; it is always viewed as an intangible property. It is only licensed and this is the most popular form of agreement being made in relation to software. Under this agreement the person who develops the software licenses certain rights in relation to the

software. Thus the developer becomes the Licensor and the customer becomes the Licensee. The Licensor still remains the owner of the software and the Licensee is granted certain limited rights under the agreement and thus a lot will depend upon the terms and conditions of the agreement.

What these contracts normally grant is a non-exclusive and non-transferrable licence to run the software on a single computer at a time. The Licensee is not in any way empowered to transfer this right to any third party. Since the licence is non-exclusive in nature the Licensor can grant these rights to other parties, or in another words the Licensor can sell the software to other people. The Licensee has the limited right to use the software only on one computer at a given time and in case anybody loads the same software into his computer by making a copy from the Licensee then the Licensee is deemed to have violated the licence agreement.

Having stated the above these licences may permit the users to use the software on more than one computers located in a particular place, of course the licence fee would be calculated on the basis of the number of systems that use a particular software. In some cases a company or a firm may negotiate with a software company to grant a license to use particular software for the entire company or a particular division of the company. Most often the licences are granted forever but in some cases there may be tie period fixed in the terms of the licence agreement after which both the parties on the payment of an additional fee might renew it.

Shrink-wrap licences. These types of licence agreement intend to establish a binding legal agreement between the software vendor and the user. The agreement can be generally seen inside the box containing the software, printed on the envelope containing the CD-ROM or disks, or may be printed in the user manual. It always begins with a warning to the user not to open the software envelope or use the software unless and until he or she fully agrees with the terms and conditions of the agreement. Shrink-wrap licences have traditionally been widely used in the computer software industry in mass market transactions. When you purchase a copy of MS-Word, for example, you will notice that the packaging of the software, or the envelope inside the box containing the computer disks, have licence agreements printed on them, along with a provision stating that opening the envelope or box (or using the software) constitutes acceptance of the terms and conditions of the licence.

Making use of this type of agreement has become the legal licensing paradigm of the software industry, which caters to the consumer mass-market software. Infact the word "shrink-wrap" developed from the fact that such agreements used to be included on the outside of the software packaging, which was visible through the clear plastic shrink-wrap with which the package was sealed.

But whether such "shrink-wrap" agreements are enforceable against the user who breaches their terms is worth taking a look.

In *Step-Saver Data Systems v Wyse Technology*,¹ Step-Saver, creator of a multi-user IBM package integrating hardware and software, had an on going long standing relationship with Wyse, creator of an operating system that Step-Saver incorporated into its multi- user package. Based on the course of the parties' dealings and in reliance on Wyse's representations, Step-Saver acquired copies of Wyse's software. Printed on each package of the software was a shrink-wrap licence which, *inter alia*, disclaimed all express and implied warranties - which disclaimers were inconsistent with Wyse's prior representations and express warranties to Step-Saver. The court ruled that the shrink-wrap licence on Wyse's software, which substantially altered the allocation of risks between the parties and conflicted with Wyse's earlier representations — and which was not expressly accepted by Step-Saver — did not become part of the parties' agreement.

In *ProCD, Inc. v Zeidenberg*,² involved the CD-ROM product sold under the trade mark "Select Phone." It has a listing of over 95 million telephone numbers, bundled with the software that enables a user to access those numbers on his or her computer, and cost ProCD millions of dollars to develop. The defendant, a student living in Madison, Wisconsin, purchased copies of Select Phone. He then copied the telephone listings from the CD-ROM onto his computer, created a software search engine, and uploaded the whole thing onto a World Wide Website that soon generated over 20,000 hits a day. Naturally, ProCD sued, alleging copyright infringement, breach of the express terms of the shrink-wrap license agreement.

Whether Zeidenberg violate the terms of the shrink-wrap licence agreement, which expressly stated that copying of the software and the data (the telephone listings) may be done only for individual or personal use and that distribution, sub-licence or lease of the software or the data was prohibited? The court again said no. Copying of the data was clearly prohibited by the license agreement. But the court refused to enforce the agreement. The court stated that the terms of the Select Phone licence agreement were not presented to Zeidenberg or any other purchaser at the time of sale. The only reference to the agreement was a statement in small print at the bottom of the package that said users were subject to the terms and conditions of the enclosed licence agreement. Zeidenberg did not have the opportunity to inspect or consider the terms of the licence. The court did not think that mere reference to the terms at the time of the initial contract formation — forking over payment at the check-out counter —

1 939 F 2d 91 (3d Cir 1991).

2 908 F Supp 640 (WD Wis 1996).

presented Zeidenberg with an adequate opportunity to decide whether the licence terms were acceptable or not. Zeidenberg had to have been given the opportunity to read and consider the terms in their entirety at the time of initial contract formation, which the court said was the time the retail transaction was consummated. Under section 2-209 of the Uniform Commercial Code, the court held that the licence agreement terms contained inside the Select Phone package constituted additional terms to which Zeidenberg did not agree, nor have the opportunity to agree to, upon the initial agreement — payment at the check-out counter in exchange for the copy of the software. Further, the court held, even if the agreement were enforceable, copyright law would pre-empt the provision of the agreement prohibiting copying of the uncopyrightable telephone listings.

This case was then appealed before the U.S. Court of Appeals for the Seventh Circuit. The said court reversed the ruling and held in favour of ProCD emphasising the fact that the information provided on the box and under the shrink-wrapping gave ample notice to Ziedenberg about the existence of an agreement and had the agreement been unacceptable to him he could have prevented the formation of the contract by merely returning the CD to ProCD.

Click-wrap and browse-wrap licences. Most of us might have surfed the World Wide Web and to visit a web-site, purchase a product or service, or download a computer program/ "software". On such occasions it is very much possible that we are greeted by a reference to numerous lines of legal terms and provisions and a request or requirement for our consent to those terms. Here we are all experiencing a new form of contract presentation on the Internet that is commonly known as "click-wrap" or "browse-wrap." There are some differences between click-wrap and browse-wrap, but their purposes are usually the same. The distinctions, details and prime legal issues regarding these new forms of contracts, are [worth discussing here](#).

What are click-wrap and browse-wrap? The advent of the Internet and the World Wide Web has given a new, electronic medium that facilitates the distribution of information, products, services, etc. that were previously distributed through physical mediums, such as personal meetings, hard-copies, and store-shelf packaging. With the arrival of this electronic medium, new means for providers to form contracts with consumers (or users), which shall govern the distribution of their offerings, has become imperative. Click-wrap and browse-wrap, as they are usually referred to, have emerged to provide this new means to form contracts over the Internet, particularly over the World Wide Web. Thus, the main purpose of click-wrap and browse-wrap is to enter into a contract (or agreement) between two or more parties where the terms and provisions of the agreement, and the consent to them, are communicated over the Internet. Infact the concept of click-wrap and

browse-wrap evolved, to some extent, from the concept of "shrink-wrap," which is a continuing practice. As noted above these licences are primarily used for computer games and software providers, to present the terms and provisions associated with the use of a product within a sealed packaging (e.g., in a written or electronic format) that typically can only be accessed after the product has been purchased and unwrapped.

Click-wrap agreements normally consists of a presentation within a web-page of the terms and provisions of an agreement or contract along with a button, link, or other means that requires the reader, such as a user or consumer, to indicate the acceptance of the terms and provisions before proceeding with any further transactions. They are presented in a scrolling window (or scroll box) or a frame of a web-page, and a popular means to obtain consent from the reader is a button or link (i.e., hyper-link) located near the agreement that is labelled "I Agree". These agreements are also called as "click-through" or "click" agreements.

Browse-wrap agreement when compared with click-wrap, contains a link, button, or other means within a web-page to direct a reader to a presentation of the terms and provisions of an agreement or contract. The presentation of the terms and provisions of a browse-wrap agreement is presented on another web-page or mostly in a remote location on the initial web-page, normally at the bottom of a long web-page. In most cases, the location of the presentation typically does not make it necessary for the terms and provisions to be read and agreed to prior to the user conducting further transactions. Furthermore, a user is typically presumed by implication to consent on the terms and conditions of a browse-wrap agreement by the mere act of browsing the associated web-site, regardless of whether those terms and conditions are actually reviewed by the user. Browse-wrap agreements are interchangeably called as "web-wrap" agreements.

What are the main differences between click-wrap and browse-wrap?

Based on the previous explanations of click-wrap and browse-wrap, some main differences can be recognized. One main difference is that a click-wrap agreement typically requires a reader to actively indicate his/her consent to the terms and provisions of the agreement before proceeding with further transactions, whereas a browse-wrap agreement does not have such a requirement. Another main distinguishing feature is that a click-wrap agreement typically presents the terms and provisions of the agreement forthright and in the same location or vicinity as the means for consent. In most of the click-wrap agreements, the terms and conditions are given above the buttons that can be clicked to accept or reject the agreement. Whereas, in contrast, a browse-wrap agreement typically presents the terms and provisions of the agreement in a location that is far from relevant initial references to the agreement and the means for acknowledgement of the

reader's consent. In such agreements, terms and provisions are displayed on a separate web-page.

Depending upon the previous differences, as well as other considerations, such as legalities and web-page aesthetics, there are many distinctions in the application of click-wrap and browse-wrap agreements, although some of these applications will likely change as laws and legal interpretations evolve. For example, click-wrap agreements are normally used to present and obtain consent to end user licence agreements for computer software and games that are purchased and or downloaded from the Internet. Whereas browse-wrap agreements are typically used to present terms of service contracts, for example, that applies to a service provided from an Internet web-site.

Legal issues regarding click-wrap and browse-wrap. There are many important legal issues regarding click-wrap and browse-wrap, which can really affect the enforceability of such agreements. These pertain to notice, consent, and fairness. These legal issues, and other related issues, will be discussed with respect to click-wrap and browse-wrap in the discussion below.

(a) Notice of click-wrap and browse-wrap. Notice is a very important legal issue with respect to the enforceability of click-wrap and browse-wrap agreements. This is because the enforceability of all agreements requires all parties who shall be bound by such agreements to knowingly agree to the terms and conditions of the agreements. Thus it is logical to assume that, the parties have notice of the existence of a click-wrap or browse-wrap agreement in order to agree to its terms and conditions.

Usually the notice of the existence of a click-wrap agreement is not a problem. If a user tries to get the service or product over the Internet that involves a click-wrap agreement, the click-wrap agreement is made available upfront to the user on an initial web-page before the user can proceed with the transaction. But notice of the existence of a browse-wrap agreement can be an issue atleast in some cases. This happens because, browse-wrap agreements are not presented to a user up-front on an initial web-page before the user can proceed with a transaction, but instead are presented on a separate web-page that can be reached by a link or other means of direction from the initial web-page. Apart from this, the link or other means of directing a user to the browse-wrap agreement is placed in a located in a manner which is not that easily noticeable on the initial web-page, normally at the bottom of the web-page. In most cases it is not visible on a screen unless the user scrolls down the page. Thus it is very much possible for a user not to receive any notice of the existence of a browse-wrap agreement.

Court decisions regarding notice and click-wrap. *Forrest v Verizon Communications, Inc.*,³ deals with a dispute over notice of the forum selection clause of a click-wrap agreement between plaintiff *Forrest* and defendant *Verizon*. The argument of the plaintiff was that the forum selection clause was unenforceable because the click-wrap agreement did not provide adequate notice of the forum selection clause. The click-wrap text was placed in a scroll box (i.e., a scrolling window), which included the statement "PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY" at the top of the text.

Furthermore, the click-wrap agreement required a button labelled "I Accept," which was located below the scroll box, to be selected to complete the transaction with the defendant. Interestingly only a small portion of the click-wrap text was seen in the scroll box at one time, and the entire text of the agreement was very lengthy. The forum provision clause of the agreement was given at the end of the text and could only be seen after scrolling through most of the agreement. The court rejected the plaintiff's assertion of inadequate notice, relying on the traditional notion of contract law that "one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not." The court here compared the scroll box to the series of pages in a traditional contract and determined, therefore, that adequate notice of the forum selection clause was provided by the click-wrap agreement.

In *DeJohn v The TV Corporation International, et al*,⁴ the plaintiff *DeJohn* tried to buy Internet domain names from defendant *TV Corp.* through the website of defendant *Register.com*. For this transaction, the plaintiff entered into a click-wrap service agreement with defendant *Register.com*. A hyper-link on *Register.com*'s web-page connected the plaintiff to a web-page containing the service agreement. To complete the purchase, *DeJohn* had to click a box, located just below the hyper-link, to indicate that he had read, understood, and agreed to the terms of the service agreement. While the dispute arose, *DeJohn* asserted that the click-wrap service agreement did not provide adequate notice of its terms, since the terms were only visible after following a link to a separate web-page. The court rejected this argument, finding that *DeJohn* was able to review the terms of the agreement by selecting the link.

Court decisions regarding notice and browse-wrap. *Pollstar v Gigmania Ltd.*,⁵ involves a browse-wrap case, where the user was alerted to a license agreement by small grey print on a grey background. Furthermore clicking on the text did not take the user to the text of the agreement. Nevertheless,

3 805 A 2d 1007 (DC 2002).

4 245 F Supp 2d 913 (CD Ill 2003).

5 170 F Supp 2d 974, (ED Cal 2000).

the court decided that people sometimes enter into a contract by using a service without seeing the terms first. Using the analogy of a person purchasing an airline ticket stamped with terms and conditions, the court decided that even without obvious notice of the contract terms, a contract was formed. The enforceability of browse-wrap with respect to notice was one of first impression for the court in this case.

In *Register.com, Inc. v Verio, Inc.*⁶ plaintiff Register.com, a registrar of Internet domain names, went to the court seeking an injunction against defendant Verio, a competitor and Internet service provider, for using automated software to access information on its web-site about its customers and compiling the information for mass-marketing purposes, such as sending "spam". Register.com contended that this involved breach of contract because its web-site contained a browse-wrap agreement that prohibited commercial use of any information obtained from its site. The browse-wrap agreement stated that using Register.com's web-site demonstrated assent to be bound by the terms and conditions of the agreement. However, Verio contended that there was no notice of such agreement provided to a user before the user became subject to the terms by using the web-site. The court, however, found that the "terms of use are clearly posted on Register's website.

(b) Consent to click-wrap and browse-wrap. Consent is a very important legal issue concerning the enforceability of click-wrap and browse-wrap agreements. As per the fundamentals of contract law, the parties to an agreement or contract must consent to the terms and conditions in order for the agreement to be binding upon them. Or in other words there should be mutual assent, or a "meeting of the minds." While it is always safe and advisable to have an explicit consent to an agreement, which of course is relied by courts in determining contract disputes, there can be circumstances in which consent can also be implied. For example, if a party knows the terms and conditions of an agreement and that party takes action that indicates the acceptance of them, a court may bind the party by its implied consent to the agreement, even though the party never explicitly submitted consent. Having stated the above, a court may not hold a party bound to an agreement by implied consent, if the actions relied on for implied consent are unintentional or if the party had no notice of the agreement and, therefore, could not consent.

Click-wrap, as discussed above, always provides a means to indicate consent and requires the user to select the means before proceeding with a transaction. The presentation of a click-wrap agreement in a web-page may include a button or link that is labelled "I agree" or "I accept". Thus, click-wrap agreements usually provide a sufficient means for a user to indicate

6 126 F Supp 2d 238, (SDNY 2000).

consent to an agreement, although there is some legal dissension over the appropriate particulars for this means. Eventhough a click-wrap agreement provides a button or other means for a user to select to indicate consent, the legal validity of this consent may be questioned if there is no explicit acknowledgement in the click-wrap that selecting the button will indicate consent to the agreement. Thus, if the button or other means is located in a position such that the user can select it without seeing some, or may be even all, of the terms and conditions of the agreement, the legal validity of the consent may come into question.

While comparing with click-wrap, browse-wrap does not provide a means for a user to actively consent to an agreement. As discussed previously, browse-wrap does not even present the existence of the agreement to a user in an up-front and perceptible manner. On the other hand, browse-wrap agreements are typically framed in a manner to indicate that a user's consent is submitted by the act of the user browsing a web-site or conducting transactions within the web-site. Thus, browse-wrap agreements are typically based on the implied consent of a user, since the user's actions are used to indicate consent. As discussed above, this manner of obtaining implied consent may not be upheld in a legal dispute, particularly if a user was not provided with sufficient notice of the browse-wrap agreement.

Court decisions regarding consent and click-wrap. The case of *I. Lan Systems, Inc. v Netscout Service Level Corp.*,⁷ was regarding the issue of whether the buyer of software was subject to the terms of a click wrap licence agreement which did not appear on the seller's web-site until after the purchase of the software was completed. I. Lan Systems made the payment for the software and was required either to accept or reject a license agreement within the software before proceeding further; I. Lan Systems selected the "I Agree" box. When the issue came before court, I. Lan Systems argued that it did not consent to the terms of the licence agreement, as they were not known to it at the time of the purchase and consequently the terms were not binding on him. The court rejected this argument and held that I. Lan Systems explicitly consented to the click wrap license agreement when it clicked on the box labelled "I Agree."

In *Moore v Microsoft Corp.*⁸ the court held that the end-user licence agreement ("EULA") contained in defendant Microsoft's software program made it a validly binding contract between the parties which barred plaintiff Moore's claims. The court reasoned that the terms and conditions of the EULA were displayed prominently on the program user's computer screen before the installation of the software. Furthermore, the program's user

7 183 F Supp 2d 328 (D Mass 2002).

8 293 AD 2d 587; 741 NYS 2d 91 (NYAD 2 Dept 2002).

was required to express his consent to the EULA by clicking on the "I agree" icon before proceeding with the download of the software. Thus, the defendant offered a contract that the plaintiff agreed by using the software after having a chance to read the license. As a result, the court concluded, the plaintiff's claims were barred by the clear disclaimers, waivers of liability, and limitations of remedies contained in the EULA.

Court decisions regarding consent and browse-wrap. In the case of *Specht v Netscape Communications*,⁹ visitors to a website who intended to download software were required to press a button to download the software. The issue was whether pressing the button, which was labelled "Download", amounted to consent to the licence agreement that included arbitration of disputes between plaintiff Specht and defendant Netscape Communications. The licence agreement terms were not visible when a web-site visitor, such as Specht, selected the "Download" button. But there was an invitation to read the terms of the licence agreement located at the bottom of the download web-page along with a link to the agreement on a separate web-page. A visitor was not asked to affirmatively indicate consent to this browse-wrap agreement before downloading the software. Therefore, the court held that the agreement, including the arbitration provision, was unenforceable, since there was nothing to show that the plaintiff had consented to it.

In *Ticketmaster Corp. v Tickets.com, Inc.*¹⁰ a federal district court in the Central District of California turned down the plea of the plaintiff to enforce its browse-wrap agreement because the defendant had not agreed to be bound by its terms and conditions. The plaintiff, Ticketmaster Corp., operated a web-site where users could get details about upcoming events and purchase tickets online. Defendant Tickets.com using automated software obtained those details from the plaintiff's web-site on upcoming concerts and ticket vendor locations and posted the data on its own web-site. Plaintiff alleged that the defendant's actions were a breach of contract because Ticketmaster's browse-wrap agreement prohibited using any of the information obtained from its site for commercial use. Ticketmaster's browse-wrap agreement had a general statement that use of the site bound users to its terms and conditions. Next to this statement was a link to the full text of the Website's terms and conditions. The court held that Ticketmaster's browse-wrap agreement was unenforceable because it did not provide for sufficient proof of Tickets.com's consent to the agreement.

(c) Fairness of click-wrap and browse-wrap. Fairness is also a vital legal issue that may affect the enforceability of click-wrap and browse-wrap

9 306 F 3d 17 (2d Cir 2002).

10 2000 US Dist LEXIS 4553 (CD Cal 2000).

agreements. Fairness is a very broad term and this may include considerations of the conscionability of the terms and condition of the agreement as well as the amount of bargaining power that is shared by the parties in making the agreement. Just as the case with most forms of contracts, a court may find a click-wrap or browse-wrap agreement unenforceable to some extent if it contains terms or conditions that go against public policy or otherwise affect the conscience of the court. Again a court may limit the enforceability of a click-wrap or browse-wrap agreement if it finds that one or more of the parties was placed in the position of having an insufficient amount of bargaining power to affect the formation of a binding agreement or contract.

Fairness can be an issue with respect to both click-wrap and browse-wrap contracts. Court may feel that, the accepting party of a click-wrap or browse-wrap agreement, for e.g. a user, does not have the chance to negotiate the terms and conditions with the offering party of the agreement, such as the provider, because the click-wrap and browse-wrap agreements are presented over the Internet, instead of person to person. Thus more often than not, click-wrap and browse-wrap agreements contain terms and conditions that may be deemed unconscionable in view of the public policy of various jurisdictions. For e.g. some click-wrap and browse-wrap agreements may contain terms and conditions that confer the offering party the authority to freely invade the privacy of the accepting party, some click-wrap and browse-wrap agreements may include terms and conditions that completely shield the offering party from liability for knowingly providing a defective product or service but hold the user liable to the fullest extent for misuse of the product or service. In all such issues there is no parity of status between the parties and the agreement is always one-sided. If such is the case then the court will be forced to limit the enforceability of click-wrap or browse-wrap because of fairness issues.

Court decisions regarding fairness and click-wrap. In *Caspi v Microsoft Network, L.L.C.*¹¹ Caspi entered into a click-wrap agreement with Microsoft as an online subscriber to Microsoft's MSN network. The terms of Microsoft's MSN click-wrap membership agreement were displayed in a scrollable window. The subscriber had to click "I agree," to continue the registration process, or "I Don't Agree," which would discontinue the registration process. Caspi contended that Microsoft engaged in "unilateral negative option billing" by rolling subscribers into more expensive plans without their consent. Microsoft's click-wrap agreement had a forum selection clause requiring jurisdiction and venue in Microsoft's backyard, King County, Washington. Caspi also argued, that the forum selection clause of the click-

wrap agreement was unenforceable because it lacked fairness. However, the court enforced the forum selection clause, finding that (1) there was no fraud or unfair bargaining power, (2) the clause did not violate public policy, and (3) it did not seriously inconvenience trial.

Court decisions regarding fairness and browse-wrap. In the case of *Comb v PayPal, Inc.*¹² the court rejected the validity of the terms in a browse-wrap agreement. PayPal was an on-line payment service provider. When some issues arose regarding its business, it tried to rely on the terms of its browse-wrap user agreement, which had a clause that provided for arbitration in case of any dispute. A link to the text of the browse-wrap user agreement was provided but the link need not be opened for the application to be processed. The agreement filled approximately 25 printed pages, and allegedly contained several overreaching and onerous provisions. The court noted that although the amount of the average transaction handled by PayPal was \$55 the arbitration clause of the browse-wrap agreement required use of the more expensive commercial arbitration rules of the American Arbitration Association. Based on California law, the court found that the browse-wrap agreement was unconscionable and unfair in light of the cost of meeting the forum selection clause in comparison to the limited value of the average claim.

Developments and strategies regarding click-wrap and browse-wrap.

The applications of click-wrap and browse-wrap are relatively new and may evolve considerably based on judicial, legislative, industry, and public opinions, among other influences. In that regard, some relevant developments and strategies concerning click-wrap and browse-wrap are discussed in the following sections. In India this concept is still in its infancy and there has been no judicial pronouncements regarding the enforceability of such contracts.

Emerging judicial opinions on enforceability of click-wrap and browse-wrap. Since click-wrap and browse-wrap are relatively new concepts, obviously there are very few published court decisions regarding such agreements. But over a period of time, as more and more cases are decided by the courts, the judicial opinions on the enforceability of click-wrap and browse-wrap will definitely take shape. If we analyse a recent court decision, it certainly indicates a change from the strict disapproval of browse-wrap indicated in the earlier case of *Comb v PayPal*.¹³ In this more recent case of *Ticketmaster, Corp. v Tickets.com, Inc.*¹⁴ the court expressed its liking for a rule that required “unmistakable assent,” such as by way of a

12 218 F Supp 2d 1165 (ND Cal 2002).

13 Ibid.

14 2003 US Dist. LEXIS 6484.

click-through agreement, before a contract could be formed. However, the court recognised that case law involving agreements for cruise tickets and parking tickets has established that unmistakable assent is not always necessary for contract formation. In that regard, the court accepted that knowledge or presumptive knowledge of the existence of browse-wrap terms may be a sufficient basis for contract formation where assent is defined as further use of a website. As a result, the court decided that with respect to browse-wrap, "a contract can be formed by proceeding into the interior web pages after knowledge or, in some cases, presumptive knowledge of the conditions accepted when doing so".¹⁵

Strategies for ensuring the enforceability of click-wrap and browse-wrap. Based on some of the unfavourable court decisions to product or service providers attempting to enforce click-wrap or browse-wrap agreements, several strategies can be suggested to ensure the enforceability of click-wrap and browse-wrap. Several steps have been recommended for ensuring the enforceability of click-wrap, which include: (1) displaying the terms and conditions of a click-wrap agreement in a highly noticeable location prior to the provision of any goods and services; (2) providing a highly visible and easily understood means to consent or decline the terms of a click-wrap agreement, preferably located at the bottom of the agreement; and (3) providing an eye-catching notice that an indication of acceptance of the click-wrap forms a legal contract binding both parties.

Thus steps can be suggested for ensuring the enforceability of browse-wrap, including: (1) making the link to the browse-wrap terms and conditions very noticeable and clearly indicative of its purpose (e.g., in some sites they use the words "THESE TERMS AND CONDITIONS GOVERN YOUR USE OF THIS SITE. YOU MUST CLICK HERE BEFORE PROCEEDING"); (2) providing a noticeable browse-wrap link consistently on each web-page and/or employing a persistent window that does not disappear as the web-site is navigated (e.g., on a web-site with multiple frames); and (3) clearly stating in the browse-wrap terms that the user agrees to be bound to the agreement by merely navigating the web-site.

With the rising use of click wrap and browse-wrap agreements over the Internet, issues pertaining to notice, consent, and fairness are likely to arise in legal disputes over these emerging forms of contracts. There are only a few published court decisions. Interestingly we can see that courts have typically upheld click-wrap agreements more consistently than browse-wrap agreements in such decisions. However, as more enterprises make use of the Internet as a medium for contract formation, it may become more

15 *Ibid.*

complex and challenging for users to dispute issues such as notice, consent, or fairness of browse-wrap, as well as of click-wrap. Further more the attitude of the courts may become more rigid in applying standards that are established for such issues of click-wrap and browse-wrap as the court decisions become more consistent. Thus it is in the interests of both providers and users to take adequate precautions to avoid disputes over the enforceability of click-wrap and browse-wrap agreements.

Issues in customised software agreements. While software licensing via the “shrink wrap” contracts contained on store-bought programs is applicable in the case of general software like MS-Office, licensing of customized software involves a lot of flexibility regarding negotiation. But of course there are some issues which needs to be negotiated very carefully.

Ownership issues. Clarity regarding ownership is a very important issue which one needs to focus. This should include terms regarding the owner of the customized software product and precisely what kind of a license the owner is getting. Unlike, other software, customized software is usually a joint project between, a programmer/developer, and a client with specific needs.

Thus the agreement will contain clauses on who will own the software when it's completed and who will own its copyright. It may be the licensor (company creating the customized software), who will license the product to the user. It could be the user if the programmer is merely paid for his programming services. In some cases it could be jointly owned. Obviously, this has many implications and the best is to include a clause, which should contain one of the last two choices — that is, ownership by the user or joint ownership.

Duration of the licence. The second concern is regarding the duration of the licence. Here a number of factors are to be taken into account, like how long is the licence? Whether it is for a definite term or is it is, forever? Whether you are the only one who will have the right to use this software, or can variations or duplicates of it be licensed to other companies, like your competitors? How many licences one should have enable all those people who need to work with the software to do so. Whether there are any other limitations being placed on your use of the software.

The importance of source code. Another important aspect is the provision pertaining to source code. Source code and object code are the most frequently used terms in connection with a computer program. Thus it would be helpful to have a brief understanding of these terms.

Source code and object code denote the “before” and “after” versions of a computer program that is compiled before it is fit to be run in a computer. The source code contains the programming statements that are written by a

programmer before being saved in a file. For example, a programmer using the C++ language types in a desired sequence of C++ language statements and thereafter saves them as a file. This file contains the source code. Thus "Source code" is a human-readable text version of the program, which programmers can read and understand. But the computer cannot understand the source code and hence this source code should be converted into a format, which it can understand.

Thus after the source code is written it is compiled (or converted) with a C++ compiler so that the computer can understand the instructions. The resulting output, i.e. the compiled file, is referred to as object code. The object code consists of a sequence of instructions that the processor can understand and it is extremely difficult for a human to read or modify the object code. Thus when anybody buys an operating system or application software, it is mostly in the form of compiled object code and the source code is not included. Proprietary software companies like Microsoft and Adobe usually do not entertain any third party to access their source code although of late, there is a movement to develop software for e.g. Linux that is open to further improvement by anyone who wants to improve it, and here the source code is provided.

Having seen the importance of source code in a computer program, it is very much essential to include terms regarding access to the software's "source code". Without the source code, the user will land in trouble if the licensor fails or refuses to maintain the program or shuts shop because of some other reasons. Thus it is vital to negotiate either a complete license to the source code or access to it under certain agreed-upon conditions.

The best option would always be to get a license to the source code, but in case this is not possible then the user should make sure that the source code is available in cases of emergency by virtue of a concept termed "source code escrow." A "source code escrow" is a separate agreement entered into among the licensor, the licensee (user) and an independent, third party escrow agent. Under a standard source code escrow contract, the licensor deposits true copies of the software, including its object and source code and pertinent documentation, with the escrow agent, who will confirm its receipt in good order and release it to the beneficiary or its agents under certain designated circumstances. Usually this happens when there is a failure to maintain the software or the bankruptcy or other dissolution of the licensor's company.

Basically the escrow agreement is a trust agreement, where the source code is placed in trust with the third party, the licensor in these agreements is the party who settles or deposits the source code in trust and is often called the "Settler". The escrow agent is mostly referred to as the "Escrowee," "Escrow Agent," "Trust Agent" or some variation of these, to reinforce the

notion that it is acting as a neutral in the transaction, holding the source code and supporting materials, which, themselves, are often referred to as the "Deposit." Finally the licensee (user) is termed as the "beneficiary" of the agreement, since it is the party that shall be given the access to the source code under certain defined conditions.

Although the precise terms of source code escrow agreements vary, there are certain aspects of these agreements that both licensors and licensees shall need to evaluate carefully before entering into such an agreement. The main issues always pertain to the duration and frequency of the deposit put in escrow along with degree of validation applied to it; clauses which specify the person who will be paying the cost of the escrow agent's services and of any administrative or litigation costs; the conditions under which the deposit may be released; and, lastly terms relating to title, confidentiality and warranty considerations. The features of a source code escrow agreement are discussed separately.

Payment, acceptance and maintenance. All customized software takes time to develop and usually consists of several modules or functional areas to it, it is always better to insist on progress payments in exchange for specific milestones. Furthermore clauses should be there to make sure that any modules developed in progress actually work, both independently and with the rest of the system.

Then there shall be provisions which relate to final acceptance of conditions, under which the licensor will be entitled to its full payment. Final acceptance criteria must be careful to clearly and comprehensively lay out performance standards as well as a certain test period for bug fixes before the software will be considered accepted. Another important clause is the one which pertains to maintenance and upgradation over time, here care should be taken to provide an affordable guaranteed maintenance contract, along with access to any upgrades that either the licensor or licensee may wish to incorporate into the software.

Warranties. Another important issue is regarding warranties. Warranties are the declarations that licensors make about how the software will perform and what will be done if it doesn't live up to those promises. The main issues here are the availability of refunds for software that doesn't perform as promised and the promptness on the part of the Licensor to repair or enhance the software in a timely manner. Other issues pertain to the licensor's responsibility for business damages sustained by the licensee because of non-functional software.

Confidentiality and trade secrets. Provisions relating to confidentiality and trade secrets are very important and should be properly addressed in the agreement. This is because in all customized software the user or his company is in a sense a co-creator of the software with the licensor. The

software may reflect the user's proprietary methods, terminology, concepts, etc. along with the proprietary algorithms, techniques and expressions of ideas developed by the licensor. Both the parties should declare that they will not reveal the trade secrets and confidential information of the other party and this must be an important part of any software license.

The main features of a source code escrow agreement. To be simple the "deposit" clauses of a source code escrow agreement will specify the details to be given to the escrow agent, how it will be validated, and how frequently it will be updated. The escrowed materials will be released to the beneficiary only when the original programmer is no longer around to help. This would naturally involve new programmers, who are often unfamiliar with the program or its history.

For this reason, the agreement contains clauses that require the licensor or "Settlor" to deposit not only the source code, but also all materials sufficient for a trained computer programmer of general proficiency to maintain and support the software without further assistance from the Settlor. This normally consists of design notes, documentation, flow charts and instructions, etc. Furthermore there are clauses, which require the source code component of the deposit be accompanied by a running object code version submitted on virus-free magnetic media, compiled and ready to be read by a computer. This will really be helpful to the escrow agent so that he can verify that the contents of the deposit are in good working condition and certify the condition to the beneficiary.

Moreover, such agreements usually shall demand the settlor to deposit any maintenance modifications; updates, new releases or documentation related to the deposit materials that the licensee/beneficiary is entitled to receive under the licence agreement within a reasonable time of its delivery to the licensee. In order to facilitate the verification process the escrow agent has to make copies of the software, and for this the Settlor shall give the escrow agent a limited license to make such copies for the purposes set forth in the agreement. But the agreement should contain the clause that title to the deposit and all associated intellectual property rights remains with the Settlor.

Another clause deals with the level of verification the Escrow Agent will be called upon to apply to the deposit to certify it. The range here is significant; it can be from the most liberal one to the most stringent procedures, which allow validation of the integrity and completeness of the deposit, compared to the version of the software and documentation given to the licensee.

Of course from a licensee's viewpoint, the more stringent the procedures used, the safer it will feel, but this is usually balanced with the cost of performing such tests, since the cost is most often borne by the licensee.

Since the licensee is aptly considered the beneficiary of the trust, most of source code escrow agreements impose the overall cost of the storage and maintenance of the deposit, on the licensee/beneficiary.

If the deposit is made, verified and updated in good order, the most important issue pertains to the conditions under which the escrow agent is required to release it to the licensee/beneficiary or give it back to the Settlor. While some sample escrow agreements have certain conditions like bankruptcy or insolvency of the programmer, most common conditions that warrant the release of the source code pertains to certain major default provisions in the underlying software license agreement, which place the licensee at risk of irreparable injury. The most common illustrations, other than the programmer shutting shop, are failures to rectify or make the suitable modifications to the software within a certain period of time after notice; the programmer ceasing to further develop or support the software in general; failing to sign a maintenance agreement concerning the software, and similar contingencies.

Here, licensors insist on certain protections — and rightly so. First and foremost, licensors normally stipulate the licensee to make written demand to the escrow agent for release of the deposit, citing the “release event” contained in the escrow agreement. In turn, the escrow agent shall give notice of the demand to the licensor, who will typically have a certain amount of time in which to either agree to the release or dispute it. Failure on the part of the licensor to respond within a fixed period of time shall result in the release of the deposit. In case the licensor disputes the demand for the release, then there arises a serious issue. This is an area of contention since the conditions upon which the demand is made are often time-sensitive. In any case most licensees don’t want to get into time consuming and expensive litigation to find out whether they had a right to get the code released.

Precisely because of this source code escrow agreements have provisions dealing with expedited arbitration and, sometimes, injunctive relief. In such cases a related provision must cover whether the licensor or licensee will cover the litigation or arbitration costs and expenses of the escrow agent, with the common compromise being either a 50-50 split between the licensor and licensee. In some other cases there may be provisions, which fix responsibility on the losing party to reimburse the costs completely. Another contentious issue is that of title and confidentiality. Although the Settlor gives a limited license to the escrow agent, title remains in the Settlor. Thus even in a scenario where the beneficiary is given access to the code and materials, still the title shall remain with the Settlor. Here the beneficiary is only granted the right of use, subject to strict limitations.

Of course there are some limitations being imposed upon the beneficiary getting access to the source code. The main limitation deals with the

independent contractors, which the beneficiary may use in the event it gains access to the source code. Customized software is a highly competitive field, and it is highly probable that particular software contains some or most of the settlor's trade secret material. Here Licensors shall always include a list of competitors with whom the beneficiary is precluded from using as a replacement for the programming vendor. Generally, a prudent Licensor will stipulate that the beneficiary shall acknowledge the continuing trade-secret nature of the software. Furthermore there are clauses which require the beneficiary to obtain confidentiality agreements from all those who handle the code, and to assign back to the Licensor all intellectual property rights to any derivative works that may be created in the process of repairs or modifications.

Many source-code escrow agreements provide that, upon release of the source code, any warranties that originally applied to the software were void, upon the premise that the settlor should not be responsible for software once it's been tampered with by the beneficiary or its agents. It seems that this provision is a bit harsh on the licensee who is forced to obtain the source code due to inaction by the original licensor.

Website development agreements. Before concluding this chapter on computer contracts the main provisions of a website development agreement shall be discussed. As in any agreement here also the subject matter of the agreement must be described. Such an agreement should specify exactly what is to be developed and how it will be developed. That is, would the website development contain only writing the computer code for the website, or should it include the design and appearance of the site as well?

Whether it is only computer programming or more, the website developer normally retains title to the "work product." Thus in order for the client to rightfully utilize the product as its own, it must be licensed; much the same way as any other intellectual property is licensed. There can be licences which are quite restrictive; limiting the use of the product by the developer's client to the Internet and to the website created. This may not be in the interest of the organization for which the website is developed and it is always better to obtain title to the website software used to develop the site.

Again it is quite usual for the website developer to claim title to all materials created by him or her eventhough the costs of the development are borne by the client. This shall include all copyrights and other intellectual property rights. These, in turn, are licensed to the client as mentioned in the preceding paragraph. This is a norm in the technology industry where the development of a software program is often paid for by a single customer, while the website developer retains title to the program and licences the software to the customer/client. Usually the customer/client provides all the subject-matter to the website developer for use on the website. This

subject-matter can range from product trademarks, product logos, literary information, or practically anything under the sun, owned by the client. Therefore, a clause is included to reaffirm the rights of the client in its own materials.

A website is truly a collection of components owned by multiple parties. Thus websites may include audio, as well video components; it is very much likely that the website includes the intellectual property of many parties. Thus there would be a clause which makes it clear that there is no transfer of third party rights or any of the components of the website.

It must be borne in mind that in a website development agreement which eventually leads to the publication of material, there is a mutuality of submissions by both the website developer and the client. The website developer will be contributing computer software that he/she develops whereas the client will be providing the content for the web page. Neither the client nor the developer, before entering into a website development agreement, will conduct any due diligence necessary to confirm that respective parties are the true owners of the materials they are providing so as to ensure there is no infringement of some third party's intellectual property rights. Thus the agreement should contain clauses which provide for mutual cross-indemnifications.

It is normal in software and website development contracts for the developer to include as a minimum a warranty that the work product will function in accordance with certain applicable specifications agreed to by the parties. Thus contracts will include a clause wherein the developer warrants the substantial conformance with acceptance criteria that have been approved, prior to contracting, between the parties.

Another important aspect to be remembered is that the World Wide Web is an international technology which rarely respects any frontiers. Thus the developer has to warrant that the use of his or her product will not violate any laws on the subject on a global basis. It is also common for developers to warrant that the contents supplied by them will in no way be scandalous, libelous or pornographic.

The website developer expects a similar warranty from the client. Thus the agreements contain clauses wherein the client warrants that it shall not violate any law or regulation nor post any defamatory or trade libellous; pornographic or obscene; content. Furthermore the client has to warrant that it has all the rights needed for the production, distribution, exhibition and exploitation of the Client Properties as part of the Work Product consistent with the license granted in this Agreement; and there is no outstanding contract, agreement to which Client is a party which conflicts with this Agreement or might limit restrict or impair the rights granted hereunder.

As is the case with all software development contracts and software licensing agreements, there shall be a clause normally at the end, which limits the liability of parties. Such a clause shall specify that neither party shall have any liability whatsoever for any cover or setoff nor for any indirect, consequential, exemplary, incidental or punitive damages, including lost profits, even if such party has been advised of the possibility of such damages. Normally such a clause is given in bold letters so that it become more noticeable.

Conclusion. This chapter has tried to shed some light on most of the agreements being used in the I.T. industry. Thus it is imperative for a user or a lawyer to understand, the concept of licensing which is prevalent in the software industry and how these licences are different from the general ones. The terms like shrink wrap, click wrap, browse wrap, object code, source code etc. might sound a bit strange to a conventional lawyer, but they are the standard terms which the I.T. industry is using. Thus an understanding of the basic concepts will help a long way in developing awareness and interest in this fast evolving field where developments are taking place at very rapid pace.

FORMS

Hardware Sale and Installation Agreement

THIS AGREEMENT is made the day of 2004 by and BETWEEN (1) Eastern Computers Limited, a Company incorporated under the Companies Act 1956 (India) and having its administrative office at 54, Shakespeare Sarani, Kolkata 700 064 (herein after called "the SELLER", the expression unless repugnant to the context or specifically exempted shall include its successors and permitted assigns) of the first part AND (2) National Silk Foundation, a Society registered under the Societies Registration Act (XXI of 1860) having its administrative office at Bungalow No.1, Satellite Complex, Ashram Road, Ahmedabad 380015 (herein after called "the CUSTOMER", the expression unless repugnant to the context or specifically exempted shall include its successors and permitted assigns) of the second part.

The SELLER and the CUSTOMER are together called PARTIES.

WHEREAS the SELLER has agreed to sell and install certain computer equipment for the CUSTOMER upon the terms and conditions hereinafter contained.

THEREFORE IT IS HEREBY AGREED as follows:

1. Definitions

In this Agreement, unless the context otherwise requires, the following words shall have the following meanings:

- (1) 'The Equipment' shall mean the computer equipment mentioned in the Schedule and any replacement equipment and /or parts provided as per clause 18 as the situation demands or the case may require;
- (2) 'Essential Software' means the computer software embedded in or forming an essential part of the Equipment as specified in the Schedule;
- (3) 'The Price' shall mean the price for the Equipment and the services to be provided hereunder as specified in the Schedule;
- (4) 'The Off-Loading Point' shall mean the customer's off-loading point mentioned in the Schedule;
- (5) 'The Location' shall mean the customer's room in which the Equipment shall be installed as mentioned in the Schedule;
- (6) 'The Delivery Date' shall mean the delivery date specified in the Schedule, including any extended date applicable under Clause 12;
- (7) 'The Commissioning Date' shall mean the date on which the Equipment is accepted by the customer pursuant to clause 11;
- (8) 'Business day' means a day other than a Sunday or a public holiday.

2. Products and services to be provided

(1) The SELLER hereby agrees to:

- (a) sell the Equipment to the CUSTOMER free from any encumbrances;
- (b) deliver the Equipment to and install it at the Location on the Delivery Date;
- (c) provide the other services hereinafter described upon the terms and conditions hereinafter contained.

(2) Floppy discs, CD-ROMs, stationery, printing cartridges and similar accessories shall not be supplied free as part of the Equipment.

3. Price and payment

(1) The Price shall be paid by the CUSTOMER as to 25 per cent upon the signing of this Agreement (by way of a deposit) whereas the balance shall be paid within 3 days from the Commissioning Date.

(2) The Price and any extra charges payable under this Agreement are in conformity with the seller's standard price list in force on the date of this Agreement.

(3) The Price and any extra charges payable under this Agreement are exclusive of Taxes which shall be paid by the CUSTOMER at the rate and

in the manner for the time being prescribed by laws of the Republic of India.

(4) Any charges payable by the CUSTOMER under this Agreement in addition to the Price shall be paid within 3 days from the Commissioning Date.

(5) If the CUSTOMER defaults in making any payment under this Agreement, upon the expiry of 7 days from the date on which payment becomes due, the SELLER may charge interest on such sum on a day to day basis from the date or last date for payment thereof to the date of actual payment (both dates inclusive) at the rate of per cent from time to time in force compounded half yearly. The CUSTOMER shall pay such interest on demand from the SELLER. This is without prejudice to the SELLER's other rights and remedies.

4. Title and risk

(1) The ownership of the Equipment shall pass to the CUSTOMER upon payment in full of the price mentioned in this Agreement and any other sums that may then be due under this Agreement.

(2) Once the Equipment is installed at the location of the CUSTOMER the risk in the Equipment shall pass to the CUSTOMER and accordingly the CUSTOMER shall be liable for insuring the Equipment against all normal risks with effect from the time risk passes.

(3) The Copyright, Patent, Trade Mark or other intellectual property rights in the Essential software are owned the Software Owner and have been licensed to the SELLER.

(4) The SELLER shall discharge its obligations under this Agreement on the following terms and conditions:

- (a) The CUSTOMER is purchasing the media on which such Essential Software is recorded or embedded only.
- (b) Nothing contained in clause 4(4) shall be construed as an assignment or transfer of any copyright, design right or other intellectual property rights in such Essential Software, all of which rights are owned by the Software Owner duly licensed to the SELLER.
- (c) Except as provided by Clause 4(4)(e), the SELLER hereby grants to the CUSTOMER a non-exclusive and non-transferable licence, to use such Essential Software in the form in which it is embedded in the Equipment on the delivery date for use in conjunction with other parts of the Equipment on the condition that the Equipment shall be used for its intended purpose only.

- (d) The CUSTOMER shall not rent, lease, sub-licence, copy, modify, adapt, merge, translate, reverse engineer, decompile, disassemble or create derivative works based on the whole or any part of such Essential Software or any part thereof in any manner.
- (e) The CUSTOMER shall be entitled to transfer the benefit of the licence granted pursuant to clause 4(4)(c) to any purchaser of the Equipment on the condition that the purchaser gives in writing before making such purchase to be bound by the terms of clause 4(4) including the provisions of this paragraph (e). The Licence shall automatically terminate forthwith in case the purchaser does not accept such terms.
- (f) The Licence shall remain effective without any limitation in time unless it is terminated in accordance with paragraph (e) or until the CUSTOMER shall terminate it by erasing or deleting such Essential Software. The Licence shall also terminate forthwith automatically if the CUSTOMER fails to abide by the terms of clause 4(4) of this Agreement. In case of such termination of the Licence, the CUSTOMER shall delete or otherwise destroy such Essential software and issue the SELLER, a written statement certifying that the Essential software has been destroyed.

(5) The price includes the right for the CUSTOMER to use the Essential software in terms of sub-clauses (3) and (4).

5. Location preparation

The SELLER shall in advance inform the CUSTOMER of the date of delivery of the Equipment and provide all assistance to enable the CUSTOMER to prepare the most suitable Location for the installation of the Equipment and for this purpose the SELLER shall depute a qualified technical person, free of charge, to advise the CUSTOMER. The CUSTOMER shall get the location ready, at its own expense and provide the required environmental and operational conditions prior to delivery

6. Information and access

(1) The CUSTOMER shall provide the SELLER promptly with any information, which the SELLER may reasonably require to carryout the performance of this Agreement without any delay.

(2) The CUSTOMER shall, for the purposes of this Agreement, provide to the authorized personnel of the SELLER during normal working hours

full and safe access to the Location along with sufficient working space and such other facilities as any be needed for the installation of the Equipment.

7. Pre-delivery tests

(1) The SELLER shall carry out standard works tests (hereinafter called TESTS) on the Equipment before delivery to the CUSTOMER, the results of which shall be given to the CUSTOMER on request, along with a certificate that the Equipment has passed the same.

(2) The CUSTOMER or its authorized representative may witness the TESTS. The SELLER shall give the CUSTOMER at least 10 days' written notice of the date and time at which the SELLER intends to carry out the TESTS. The SELLER reserves the right to proceed with the TESTS without the CUSTOMER in case the CUSTOMER fails to attend the TESTS at the time and place specified in the notice.

8. Delivery

- (a) When the Delivery Date is due the SELLER shall deliver the Equipment to the Off-Loading Point and then move the equipment to the Location.
- (b) If the Equipment requires any removal of doors, widening of entrances or any other structural work of any description for the purpose of moving the Equipment from the Off-Loading Point to the Location, such work shall be undertaken by the CUSTOMER at its own expense prior to delivery.
- (c) In the event of SELLER providing any special equipment, manpower or works necessary to move the equipment from the off-Loading point to the Location, the CUSTOMER shall reimburse the SELLER the reasonable costs incurred for doing so.

9. Installation

(1) The SELLER shall install the Equipment at the Location when the Delivery Date becomes due.

(2) In case it becomes necessary to remove, adjust, change or otherwise disconnect any of the customer's existing equipment at the Location in order to carry out the installation of the Equipment, then the CUSTOMER shall permit, and obtain all the required permission from the concerned authorities as may be required for such removal, adjustment, change or disconnection and shall give the SELLER all necessary help to carry out such work.

10. Post-delivery tests

(1) Not more than 10 days from the date of installation of the Equipment the SELLER shall, subject the Equipment to the seller's common installation tests (hereinafter called 'INSTALLATION TESTS') to make sure that the Equipment and every part thereof is in full working condition. Upon customer's request, the SELLER shall supply the CUSTOMER copies of the specification and results of the INSTALLATION TESTS.

(2) If any part of the Equipment fails to pass the INSTALLATION TESTS then, the INSTALLATION TESTS shall be repeated on such part of the Equipment within a reasonable period of time and if any part of the equipment fails to pass the second INSTALLATION TESTS, the SELLER shall, upon request made by the CUSTOMER, replace such part of the Equipment.

(3) The CUSTOMER or its Authorized representative reserves the right to witness the INSTALLATION TESTS. The SELLER shall give the CUSTOMER at least 48 hours written notice of the date and time at which the SELLER intends to carry out the INSTALLATION TESTS. The SELLER reserves the right to proceed with the INSTALLATION TESTS without the CUSTOMER in case the CUSTOMER fails to attend the TESTS at the time and date specified in the notice.

11. Acceptance

The CUSTOMER shall accept the Equipment after the Equipment and every part thereof has passed the INSTALLATION TESTS and the CUSTOMER shall, sign an Acceptance Certificate as given in the Annexure.

12. Force Majeure

Notwithstanding anything contained in this Agreement, neither party shall be responsible for any delay in performing its part hereunder in case such delay is caused by circumstances beyond its reasonable control provided the party so delaying promptly notifies the other party in writing of the reasons for the delay. Such party's obligations shall be suspended during the term that the said circumstances continue and such party shall be given a reasonable extension of time for performance taking into account the period of delay. Except where such delay is a result of an act or omission of the other party:

- (1) any costs arising from such delay shall be borne by the party incurring the same;
- (2) in case such delay persists for more than 45 days, either party reserves the right to terminate this Agreement forthwith to the other in which event neither party shall be liable to the other reason of such termination except that the CUSTOMER shall pay the SELLER a reasonable amount with respect to any work done before such termination and for that purpose the SELLER

reserves the right to deduct such sum from any amounts previously paid by the CUSTOMER under this Agreement.

13. Customer's default

In case the SELLER is prevented from performing its duties under this Agreement by reason of any act or omission of the CUSTOMER which is not covered by clause 13, then the SELLER reserves the right to charge from the CUSTOMER all reasonable costs, expenses and losses sustained or incurred by the SELLER as a result which may include, without limitation, the cost of storage and insurance of the Equipment. The SELLER shall promptly give in writing a notice to the CUSTOMER of any claim, which may arise under this Clause, by giving the necessary details of such act or omission.

14. Cancellation

The CUSTOMER may cancel this Agreement, for any reason not falling under Clause 15, in respect of all or any part of the Equipment, by giving a 20 days written notice prior to the Delivery Date and paying the SELLER cancellation charges: of a sum equal to 7.5 per cent of the price of the equipment cancelled.

15. Termination

(1) This Agreement may be terminated forthwith by either party by giving notice in writing to the other if the other party shall have a receiver or administrative receiver appointed or shall pass a resolution for winding-up, or a court of competent jurisdiction issuing an order to that effect, or shall enter into any voluntary arrangement with its creditors or shall cease or threaten to cease to carry on business.

(2) Any termination under sub-clause (1) shall discharge the parties' from further obligations under this Agreement and in the case of a termination by the SELLER shall entitle the SELLER to enter any of the customer's premises and take back any of the SELLER'S equipment and materials and also to be paid a reasonable amount for any work carried out by it prior to such termination and in the case of a termination by the CUSTOMER shall entitle the CUSTOMER to be repaid forthwith any amount previously paid under this Agreement, whether paid by way of a deposit or otherwise, and to recover from the SELLER the amount of any loss or damage sustained or incurred by the CUSTOMER as a consequence of such termination.

(3) Notwithstanding the termination of this Agreement, accrued rights or duties of either party shall remain unaffected. The termination shall have no effect on the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.

16. Seller's warranties

(1) (a) The SELLER warrants that the Equipment shall be free from defects in materials, workmanship and installation for a period of 18 months after the Commissioning Date ('the Warranty Period').

(b) In the event of a breach of the said warranty the CUSTOMER shall issue a written notice regarding the such breach to the SELLER who upon receiving such notice shall at its own expense and within 5 days after receiving such notice, repair or, at its option, replace the Equipment or such parts of it as are defective or otherwise rectify such defect provided that the SELLER shall have no liability or duty under the said warranty unless it shall have received written notice of the defect in question during the Warranty period. The legal and beneficial ownership of the Equipment or any defective parts shall revert to the SELLER upon the replacement of the Equipment or such defective parts whereupon the legal and beneficial ownership of the replacement equipment or parts shall vest in the CUSTOMER.

(c) The SELLER shall have no liability or duty as per the said warranty other than to rectify breaches thereof by the provision of materials and services within 5 days and without charges to the CUSTOMER. If the SELLER fails to discharge the said obligations the SELLER's shall be liable only to pay a sum equivalent to the price of the equipment or such parts as the case may be. The SELLER shall not be liable, whether in contract or tort, with respect to defects in the Equipment notified to it, without prejudice to liability under Clause.

(d) The said warranty shall not apply in case the CUSTOMER does not use the Equipment in a proper manner and if any part of the equipment has been modified, altered or repaired by any person other than the representative of the SELLER. Said warranty shall not apply if repairing is needed because of reasons other than ordinary use including without limitation accident, hazard, misuse or failure or fluctuation of electric power.

(2) The SELLER does not warrant that the Equipment is suitable for any particular function unless the CUSTOMER conveys that function to the SELLER in writing and the SELLER confirms in writing that the Equipment shall be suitable for that particular function.

(3) The SELLER does not give any warranty that the Equipment shall achieve any specific performance standard unless:

(a) the SELLER has specifically guaranteed such standard in writing subject to specified tolerances in an agreed sum as liquidated damages; and

(b) the environmental conditions stipulated by the SELLER are provided.

(4) With the exception of conditions and warranties specified by The Sale of Goods Act 1930, the express terms of this Agreement are in lieu of all warranties, obligations, conditions, terms, duties, and undertakings implied by statutory law, common law, trade usage, custom, course of dealing or otherwise, all of which are hereby excluded to the maximum extent permitted by law.

17. Confidentiality

Each party shall treat as confidential all facts/data/information obtained from the other as a result of this Agreement and shall not disclose such facts/data/information to any person without the other party's prior written consent. This Clause shall not apply to any facts/information/data, which was legitimately possessed by such party prior to the signing of this Agreement or which forms part of public domain or shall become so at a future date, otherwise than as a result of a breach of this Clause, or which is trivial or obvious. Each party shall ensure that its employees, including sub-contractors, comply with the provisions of this Clause. The foregoing obligations as to confidentiality shall survive any termination of this Agreement.

18. Operating manuals and training

(1) The SELLER shall provide the CUSTOMER with 3 copies of operating manuals containing adequate information, which shall enable the CUSTOMER to operate the Equipment in a proper manner. Additional copies of operating manuals shall be provided to the CUSTOMER, on request, for which the SELLER may charge a reasonable fee.

(2) The SELLER shall train the customer's staff to use the Equipment as set out in the schedule. If the customer's staffs require any additional training the SELLER shall provide such training in conformity with its standard scale of charges applicable.

19. Removal of labels

The CUSTOMER shall not change, take off, alter or remove any labels, name plates, insignia, lettering or other markings which are on the Equipment at the time of installation thereof.

20. Maintenance

The parties shall enter into a maintenance agreement on the Commissioning Date in respect of the Equipment in the form of the draft annexed hereto.

21. Intellectual property rights indemnity

(1) The SELLER shall indemnify the CUSTOMER on demand, against all claims, costs, demands, allegations, charges, expenses and liabilities of whatsoever nature arising out of or in connection with any claim that the normal use or possession of the Equipment infringes the intellectual

property right, including without limitation any patent, copyright, registered design, design right or trademark of any third party, subject to the following condition:

(a) the CUSTOMER shall forthwith intimate the SELLER in writing of any allegations of infringement of which it has notice and shall not make any admissions without the seller's prior written consent.

(2) The indemnity under sub-clause (1) above shall not be applicable in case the infringement is a result of the use of the Equipment or any part thereof in conjunction with any equipment and /or computer programs not sold, supplied or authorized by the SELLER for use with the Equipment.

(3) If a Court of competent jurisdiction delivers any judgment to the effect that customer's normal use or possession of the Equipment constitutes an infringement of a third party's intellectual property rights then the SELLER shall promptly and at its own expense:

(a) obtain on behalf of the CUSTOMER the right to continue using and possessing the Equipment; or

(b) without deviating from its overall performance, replace the Equipment so as to avoid the infringement and also reimburse the CUSTOMER for the amount of any direct loss incurred by the CUSTOMER during such replacement or remove the Equipment from the Location and refund the price to the CUSTOMER.

22. Liability

(1) The SELLER shall indemnify the CUSTOMER on demand, against any loss, destruction or damage to any property or injury to or death of any person caused by any negligent act or omission or willful misconduct of the SELLER, its employees, agents or sub-contractors or by any defect in the design or workmanship of the Equipment.

(2) The CUSTOMER shall indemnify the SELLER on demand against, any loss destruction or damage of or damage to any property or injury to or death of any person caused by any negligent act or omission or willful misconduct of the CUSTOMER, its employees, agents or sub-contractors.

(3) Notwithstanding anything contained in this Agreement the SELLER shall not be liable to indemnify the CUSTOMER for loss or profits or contracts to other indirect or consequential loss whether arising from negligence, or breach of contract.

(4) The SELLER shall not be liable to the CUSTOMER for any damage/ destruction/loss of computer programs and/or data, arising out of any failure or lapse on the part of the CUSTOMER to follow the best computing practices.

23. Entire agreement

This Agreement supersedes all prior arrangements, agreements, and understandings entered between the parties relating to the subject-matter hereof. Any addition to or modification of any provision of this Agreement shall be binding only if the said addition or modification be made by a written instrument signed by a duly authorized representative of each of the parties.

24. Assignment

Except as specifically provided in this Agreement, neither party shall assign or otherwise transfer this Agreement or any of its rights and obligations hereunder whether in whole or in part without the prior written consent of the other.

25. Sub-contracts

The SELLER shall not, without the prior written consent of the CUSTOMER, enter into any sub-contract with any person for the performance of any part of this Agreement provided that his provision shall not apply to:

- (a) the purchase by the SELLER of equipment and materials; and
- (b) the sub-contracts (if any) specified in the schedule.

The SELLER shall be liable for all of its obligations under this Agreement notwithstanding any sub-contract by the SELLER for the performance of any part of this Agreement.

26. Notice

All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in this Agreement or such other address in India as the recipient may designate by notice may be delivered personally or by express courier or facsimile transmission and shall be deemed to have been served if by hand when delivered, if by express courier 48 hours after posting and if by facsimile transmission when dispatched.

27. Interpretation

In this Agreement :

(1) reference to any statute or statutory provision shall include a reference to the statute or statutory provision as from time to time amended, extended or re-enacted;

(2) Words importing the singular include the plural, words importing any gender include every corporate and unincorporated; and (in each case) *vice versa*;

- (a) Any reference to a party to this Agreement includes a reference its successors in title and permitted assigns;

- (b) The headings to the Clauses are for ease of reference only and shall not affect the interpretation or construction of this Agreement.
- (c) Nothing in this Agreement shall be construed to constitute a partnership, joint-venture or agency relationship between parties.

28. Governing Law

The Agreement shall be governed by and construed in accordance with the Laws of the Republic of India.

29. Disputes settlement

Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination hereof, shall be finally settled by binding arbitration conducted in Kolkata (India) by a Panel consisting of three arbitrators, wherein one arbitrator shall be appointed by the SELLER, the other arbitrator shall be appointed by the CUSTOMER and the third arbitrator shall be appointed jointly by the PARTIES. The provisions of the Arbitration and Conciliation Act 1996 shall govern arbitration. The award of arbitration shall be binding and final.

30. Severability

In case the whole or any part of any provision term of this agreement is deemed to be illegal or unenforceable the other provisions of this Agreement and the remaining part of the provision in question shall remain in full force and effect.

31. Survival

The clauses of this Agreement, intended to survive the termination of this Agreement shall continue to remain in full force and effect after such termination.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be duly executed and delivered as of the day and year first above written.

Signed for and on behalf of:

By

Signature

Title

Witness

Signed for and on behalf of

By

Signature

Title

Witness

THE SCHEDULE

A. The equipment

The schedules must provide full description of each item, the number of such items and the price per item. The description shall also contain the manufacturer's reference number and also define the equipment to distinguish it from similar equipments from competitors.

B. Essential Software

Owned by third parties.

C. Price

The equipment price.

D. The off-loading point.

E. The location.

F. The delivery date.

G. Training.

H. Sub-contracts.

Hardware maintenance agreement

THIS AGREEMENT is made the day of 2003 by and BETWEEN Eastern Computers Services Limited, a Company incorporated under Companies Act 1956 (India) and having its administrative office at 54, Shakespeare Sarani, Kolkata 700 064 (herein after called "the SERVICE PROVIDER", the expression unless repugnant to the context or specifically exempted shall include its successors and permitted assigns of the first part) AND National Silk Foundation, a Society registered under the Societies Registration Act (Act XXI of 1860) having its administrative office at Bungalow No.1, Satellite Complex, Ashram Road, Ahmedabad 380015 (herein after called "the CUSTOMER", the expression unless repugnant to the

context or specifically exempted shall include its successors and permitted assigns) of the second part.

The SERVICE PROVIDER and CUSTOMER are together called PARTIES.

Recital:

The SERVICE PROVIDER has agreed to maintain the CUSTOMER's computer equipment hereinafter described upon the terms and conditions hereinafter contained.

NOW IT IS HEREBY AGREED as follows:

1. Definitions

In this agreement, unless the context otherwise demands, the following expressions shall have the following meanings:

- (i) 'The Equipment' shall mean the computer equipment mentioned in the Schedule and the Supplementary Equipment and such additions and changes thereto as shall from time to time be agreed in writing between the PARTIES.
- (ii) 'The Supplementary Equipment' shall have the meaning attributed thereto in Clause 3(iii).
- (iii) 'The Location' shall mean the CUSTOMER's computer room in which the Equipment has been installed as specified in the Schedule.
- (iv) 'The Commencement Date' shall mean the date on which this agreement becomes operational as specified in the Schedule.
- (v) 'The Initial Period' shall mean the initial period of this agreement as specified in the Schedule.
- (vi) 'The Scheduled Maintenance' shall mean the maintenance services to be provided by the SERVICE PROVIDER in accordance with Clause 2.
- (vii) 'The Emergency Maintenance Services' shall mean the emergency maintenance services to be provided by the SERVICE PROVIDER in accordance with Clause 4.
- (viii) 'The Maintenance Services' shall mean the Scheduled Maintenance Services and the Emergency Maintenance Services.
- (ix) 'The Maintenance Charge' shall mean the periodic charge for the Scheduled Maintenance Services mentioned in the Schedule as varied from time to time be agreed in writing between the PARTIES.
- (x) 'Maintenance Hours' shall mean the hours between 9.00 am and 6.00 pm each day excluding Sundays and public holidays.

2. Scheduled maintenance Services

As long as this agreement remains valid the SERVICE PROVIDER hereby agrees to provide the following maintenance services with respect to the Equipment:

- (i) *Preventive maintenance.* The SERVICE PROVIDER shall visit the Location every 3 months to check the functions of the Equipment and make such adjustments as shall be necessary to keep the Equipment in good working condition. SERVICE PROVIDER shall make such visits only during Maintenance Hours by prior appointment with the CUSTOMER. If it is convenient in the opinion of the SERVICE PROVIDER to do so, such maintenance may be carried out at the same time as corrective maintenance.
- (ii) *Corrective maintenance.* Upon receiving information from the CUSTOMER that the Equipment has failed or is not functioning properly the SERVICE PROVIDER shall during Maintenance Hours carry out such repairs and/or change the defective parts of the Equipment, as may be necessary, to restore the Equipment to its proper working condition.
- (iii) *Response time.* Upon receiving a request for corrective maintenance the SERVICE PROVIDER shall endeavour its best to send a qualified service engineer to the Location within 6 hours.

3. Charges

- (i) In consideration of the Scheduled Maintenance Services the CUSTOMER shall make payment of the Maintenance Charge periodically in advance as specified in the Schedule. The Maintenance Charge shall be paid with out prior demand. All payments shall be made in the manner specified in the Schedule.
- (ii) Any charges payable by the CUSTOMER here under in addition to the Maintenance Charge shall be paid within 30 days from receiving the SERVICE PROVIDER's invoice.
- (iii) When it becomes known to the SERVICE PROVIDER that any equipment at the Location which is not included in the Equipment and in respect of which the CUSTOMER requests any maintenance Services ('Supplementary Equipment') the SERVICE PROVIDER shall provide the Maintenance Services in respect of the supplementary Equipment in the same way as in respect of the Equipment and charge for it in accordance with the rate set out in the schedule.
- (iv) The SERVICE PROVIDER shall at any time after the expiry of the Initial Period increase the Maintenance Charges by giving to the CUSTOMER not less than 60 day's prior written notice. Where such notice is given, the CUSTOMER shall have the right to terminate this Agreement as from the date on which such notice expires by giving to the SERVICE PROVIDER written notice of termination not less than 30 days' before such date.
- (v) The Price and any extra charges payable under this agreement are exclusive of taxes which shall be paid by the CUSTOMER at the

rate and in the manner for the time being prescribed by laws of the Republic of India.

- (vi) If the CUSTOMER defaults in making any payment under this agreement, upon the expiry of 7 days from the date on which payment becomes due, the SERVICE PROVIDER may charge interest on such sum on a day to day basis from the last date for payment thereof to the date of actual payment, both dates inclusive, at the rate of per cent from time to time in force compounded half yearly. The CUSTOMER shall pay such interest on demand from the SERVICE PROVIDER. This is without prejudice to the SERVICE PROVIDER's other rights and remedies.

4. Emergency Maintenance Services

Apart from the Scheduled Maintenance Services the SERVICE PROVIDER shall provide during the subsistence of this agreement emergency corrective maintenance service outside Maintenance Hours as far as practicable after the receiving a request made by the CUSTOMER during at the SERVICE PROVIDER's standard scale of charges for such service from time to time in force. Such charges shall operate from the first arrival of the SERVICE PROVIDER's engineer at the Location to his final departure there from.

5. Exceptions

- (i) The Maintenance Services do not include any maintenance of the Equipment, which is necessitated as a result of any cause other than fair wear and tear or the SERVICE PROVIDER's negligence or default including without limitation:
- (a) Failure or fluctuation of electric power, air conditioning, humidity control or other environmental conditions; or
 - (b) Accident, transportation, neglect, misuse, or default of the CUSTOMER, its employees or agents or any third party; or
 - (c) Any defect in any attachments or associated equipment which do not form part of the Equipment; or
 - (d) Act of God, fire, flood, war, act, of violence, or any other similar occurrence; or
 - (e) Any attempt by any person other than the SERVICE PROVIDER's personnel to repair or maintain the Equipment.
- (ii) The SERVICE PROVIDER shall at the request and expense of the CUSTOMER rectify or replace any part of the Equipment which has failed due to a cause other than fair wear and tear or the SERVICE PROVIDER's negligence or default. In such cases the work shall commence only after the CUSTOMER accepts the written quotation of the SERVICE PROVIDER.

- (iii) The Maintenance Services shall not include the following:
 - (a) service at any site other than at the Location specified in the schedule;
 - (b) repair of tapes, disk, printing cartridges or other consumable supplies;
 - (c) repair or support of the operating system of any computer;
 - (d) repair or support of any electrical work external to the Equipment;
 - (e) maintenance of any attachments or associated equipment which do not form part of the Equipment; or
 - (f) retrieval of any data or programs lost or destroyed as a result of any computer virus attack, breakdown of or fault in the Equipment.

6. Replacement

- (i) The SERVICE PROVIDER shall reserve the right to replace the whole of the Equipment or any part or parts thereof which may be defective.
- (ii) The SERVICE PROVIDER while making any such replacement shall not remove the Equipment or any part or parts thereof until the Replacement Equipment has been made ready for installation.
- (iii) The SERVICE PROVIDER shall at the time of any such replacement intimate the CUSTOMER in writing of the serial numbers of the Replacement Equipment.
- (iv) If the Replacement Equipment is not identical in all respects to the replaced equipment then this fact shall be communicated by the SERVICE PROVIDER to the CUSTOMER in writing at the time of replacement.
- (v) Within 10 days of being communicated of replacement of non-identical equipment the CUSTOMER shall have the right to direct that the Replacement Equipment or any part thereof be removed and either the Equipment be put back or other equipment identical to the Equipment be installed and the SERVICE PROVIDER shall comply with such direction immediately.
- (vi) The Replacement Equipment shall become the property of the owner of the Equipment. The Equipment or any part or parts thereof removed shall become the property of the SERVICE PROVIDER subject to the condition that the owner of the Equipment shall be the owner of equipment identical in value and performance to the Equipment.
- (vii) The provisions of this agreement shall apply to all replacements and renewals of any part or parts of the Equipment made by the SERVICE PROVIDER during the subsistence of this agreement.

7. Service visits outside the Maintenance Services

The SERVICE PROVIDER shall make an additional charge, in accordance with its standard scale of charges from time in force, for service visits made at the request of the CUSTOMER by reason of any defect in the Equipment due to causes not covered by the Maintenance Services.

8. Duration

This agreement shall commence on the Commencement Date, shall continue for the Initial Period and shall remain in force thereafter until terminated by either party giving to the other not less than 6 months' written notice of termination issued on the last day of the Initial period or at any time thereafter but shall be subject to earlier termination as provided elsewhere in this agreement.

9. Customer's obligations

During the subsistence of this agreement the CUSTOMER shall:

- (i) Make sure that appropriate environmental conditions are maintained for the Equipment and shall maintain in good condition the accommodation of the Equipment, the cables, wirings and fittings associated therewith and the electricity supply thereto.
- (ii) Not make any modification to the Equipment without the SERVICE PROVIDER's prior written consent.
- (iii) Operate the Equipment in a proper and prudent manner according to the manufacturer's operating instructions and ensure that only competent trained employees are permitted to operate the Equipment.
- (iv) Not make any attempt to adjust, repair or maintain the Equipment and shall not direct, permit or authorize anyone other than the SERVICE PROVIDER to carry out any adjustments, repairs or maintenance of the Equipment.
- (v) Use on the Equipment only such spare parts as the SERVICE PROVIDER shall recommend in writing.
- (vi) Not remove the Equipment from the Location without the SERVICE PROVIDER's prior written consent.
- (vii) Not use in conjunction with the Equipment any accessory, attachment or additional equipment other than that which has been supplied by or approved in writing by the SERVICE PROVIDER.
- (viii) Provide the SERVICE PROVIDER with complete and safe access to the Equipment for the purposes of this agreement.
- (ix) Provide sufficient working space around the Equipment for the use of the SERVICE PROVIDER's personnel and shall make available

such reasonable facilities as may be requested from time to time by the SERVICE PROVIDER for storing safely the test equipment and spare parts.

- (x) Promptly inform the SERVICE PROVIDER when the Equipment needs maintenance or is not working satisfactorily. CUSTOMER failure to intimate the SERVICE PROVIDER any failure or malfunctioning within 2 months of its occurrence shall free the SERVICE PROVIDER from all obligations to investigate or correct such failure or malfunctioning.
- (xi) Subject to Clause 12(ii), provide the SERVICE PROVIDER such programs, operating manuals and information as may be necessary to enable the SERVICE PROVIDER to perform its obligation hereunder.
- (xii) Make available to the SERVICE PROVIDER free of cost all facilities and services reasonably required by the SERVICE PROVIDER to perform the Maintenance Services including without limitation computer runs, print-outs, typing and photocopying.

10. Spare parts

- (i) The CUSTOMER shall purchase from the SERVICE PROVIDER such spare parts as the SERVICE PROVIDER shall specify which shall be supplied at the SERVICE PROVIDER'S list prices from time to time in force.
- (ii) The SERVICE PROVIDER shall not be liable for any delay in performing its obligations hereunder if any of the specified spare parts are not available otherwise than due to the default of the SERVICE PROVIDER.

11. Termination

- (i) Not with standing anything else contained herein, this agreement may be terminated:
 - (a) by the SERVICE PROVIDER forthwith on giving notice in writing to the CUSTOMER incase the CUSTOMER makes any default to pay any sum due under the terms of this Agreement otherwise than as a consequence of any default on the part of the SERVICE PROVIDER and such sum remains unpaid for 30 days after written notice from the SERVICE PROVIDER that such sum has not been paid; or
 - (b) by the CUSTOMER forthwith on giving notice in writing to the SERVICE PROVIDER if the Equipment is lost, stolen or destroyed or damaged beyond economic repair; or
 - (c) by either party forthwith on giving notice in writing to the other if the other commits any material breach of any term

of this agreement other than any failure by the CUSTOMER to make any payment hereunder in which event the provisions of paragraph (a) above shall apply and in the case of a breach capable of being rectified shall have failed, within 30 days after the receipt of a request in writing from the other party so, to do, to rectify the breach; or

- (d) by either party forthwith on giving notice in writing to the other if the other party becomes insolvent or an official liquidator appointed of it or over any part of its undertaking or assets or shall cease to carry on business.
- (ii) Any termination of this agreement howsoever happened shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance intended to come into or continue in force on or after such termination.
- (iii) On the termination of this agreement the CUSTOMER shall be entitled to reimbursement of a pro-rata part of the Maintenance Charge paid in advance.

12. Confidentiality

- (i) Each party shall treat as confidential all facts/data/information obtained from the other as a result of this agreement and shall not disclose such facts/data/information to any person without the other party's prior written consent. This clause shall not apply to any facts/information/data, which was legitimately possessed by such party prior to the signing of this agreement or which forms part of public domain or shall become so at a future date, otherwise than as a result of a breach of this clause, or which is trivial or obvious. Each party shall ensure that its employees, including sub contractors, comply with the provisions of this clause. The foregoing obligations as to confidentiality shall survive any termination of this agreement.
- (ii) The CUSTOMER's obligations under clause 9(xi) to make available the information therein mentioned shall be subject to the SERVICE PROVIDER signing such confidentiality undertaking as may be required by or to protect any third party having in such information prior to the same being made available.

13. Force majeure

Neither party shall be liable for any delay in performing any of its obligations hereunder if such delay is caused by factors and/or circumstances beyond the reasonable control of the party so delaying and such party shall be entitled to a reasonable extension of time for the performance of such obligations.

14. Liability

- (i) The SERVICE PROVIDER shall not be liable for any loss or damage sustained or incurred by the CUSTOMER or any third party including, without limitation, any loss of use of the Equipment or loss of or spoiling of the CUSTOMER's programs or data resulting from any breakdown of or fault in the Equipment unless such breakdown or fault is caused by the negligence or misconduct of the SERVICE PROVIDER, its employees, agents or sub-contractors or except to the extent that such loss or damage arises from any unreasonable delay by the SERVICE PROVIDER in providing the Maintenance Services.
- (ii) The CUSTOMER shall indemnify the SERVICE PROVIDER on demand against, any loss destruction or damage of or damage to any property or injury to or death of any person caused by any negligent act or omission or willful misconduct of the CUSTOMER, its employees, agents or sub-contractors.
- (iii) The SERVICE PROVIDER shall indemnify the CUSTOMER on demand against, any loss destruction or damage of or damage to any property or injury to or death of any person caused by any negligent act or omission or willful misconduct of the SERVICE PROVIDER, its employees, agents or sub-contractors.
- (iv) Notwithstanding anything contained in this agreement the SERVICE PROVIDER shall not be liable to indemnify the CUSTOMER for any indirect or consequential loss whether arising from negligence, or breach of contract.

15. Entire agreement

This agreement supersedes all prior arrangements, agreements, and understandings entered between the parties relating to the subject-matter hereof. Any addition to or modification of any provision of this agreement shall be binding only if the said addition or modification be made by a written instrument signed by a duly authorized representative of each of the parties.

16. Assignment

Except as specifically provided in this agreement, neither party shall assign or otherwise transfer this agreement or any of its rights and obligations hereunder whether in whole or in part without the prior written consent of the other.

17. Sub-contracts

- (i) The SERVICE PROVIDER shall not, without the prior written consent of the CUSTOMER, enter into any sub-contract with any person for the performance of any part of this agreement.

- (ii) The SERVICE PROVIDER shall be liable for all of its obligations under this agreement notwithstanding any sub-contract by the SERVICE PROVIDER for the performance of any part of this agreement.

18. Notices

All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in this agreement or such other address in India as the recipient may designate by notice may be delivered personally or by express courier or facsimile transmission and shall be deemed to have been served if by hand when delivered, if by express courier 48 hours after posting and if by facsimile transmission when dispatched.

19. Interpretation

In this agreement:

- (i) reference to any statute or statutory provision shall include a reference to the statute or statutory provision as from time to time amended, extended or re-enacted;
- (ii) Words importing the singular include the plural, words importing any gender include every corporate and unincorporated; and (in each case) *vice versa*;
- (a) any reference to a party to this agreement includes a reference its successors in title and permitted assigns;
- (b) the headings to the clauses are for ease of reference only and shall not affect the interpretation or construction of this agreement;
- (c) nothing in this agreement shall be construed to constitute a partnership, joint-venture or agency relationship between PARTIES.

20. Governing Law

The agreement shall be governed by and construed in accordance with the Laws of the Republic of India.

21. Dispute Settlement

Any dispute or claim arising out of or in connection with this agreement or the performance, breach or termination hereof, shall be finally settled by binding arbitration conducted in Kolkata (India) by a Panel consisting of three arbitrators, wherein one arbitrator shall be appointed by the SERVICE PROVIDER, other arbitrator shall be appointed by the CUSTOMER and the third arbitrator shall be appointed jointly by the PARTIES. The provisions of the Arbitration and Conciliation Act 1996 shall govern arbitration. The award of arbitration shall be binding and final.

22. Severability

If any provision of this agreement is held to be invalid, illegal or unenforceable under present or future laws, such provision shall be struck from the agreement; however such invalidity or enforceability shall not affect the remaining provisions or conditions of this agreement. The parties shall remain legally bound by the remaining terms of this agreement and shall strive to reform the agreement in a manner consistent with the original intent of the parties.

IN WITNESS WHEREOF, each of the parties has caused this agreement to be duly executed and delivered as of the day and year first above written.

Signed for and on behalf of:

By

Signature

Title

Witness

Signed for and on behalf of:

By

Signature

Title

Witness

THE SCHEDULE

A. The Equipment

B. The Location

C. Commencement Date

Date of the Agreement

D. The Initial Period

E. The Maintenance Charge

Total Charges:

Advance:

Balance payable:

F. Method of Payment.

Software Licence Agreement

THIS AGREEMENT is made the 28th day of May 2004 by and BETWEEN Eastern Computers Limited (A Company incorporated under Companies Act 1956 (India) and having its administrative office at 54 Park Street, Kolkata 700 017 (herein after called "the LICENSOR", the expression unless repugnant to the context or specifically exempted shall include its successors and permitted assigns) of the first part AND National Silk Foundation, a Society registered under the Societies Registration Act (Act XXI of 1860) having its administrative office at Bungalow No. 1, Satellite Complex, Ashram Road, Ahmedabad 380 009 (herein after called "the LICENSEE", the expression unless repugnant to the context or specifically exempted shall include its successors and permitted assigns) of the second part.

The LICENSOR and the LICENSEE are together called the PARTIES.

WHEREAS the LICENSOR has agreed to deliver to the LICENSEE and install on the LICENSEE's computer certain computer programs and to grant the LICENSEE a non-exclusive to use such programs and their associated documentation upon the terms and conditions hereinafter contained.

THEREFORE IT IS HEREBY AGREED as follows:

1. Definitions

In this Agreement, unless the context otherwise requires, the following words shall have the following meanings:

1. 'The Licence' shall mean the licence granted by the LICENSOR in accordance with provisions of Clause 7.

2. 'The Equipment' shall mean the LICENSEE's computer for which the Licence is granted, specified by type and serial number in the Schedule and using the "XXXX" operating system.

3. 'The Licensed Programs' shall mean the computer programs of the LICENSOR specified in the Schedule.

4. 'The Program Documentations' shall mean the operating manuals, user instructions, technical literature and all other related materials which is readable by the human eye supplied to the for helping the use of the Licensed Programs.

5. 'The Media' shall mean the media on which the Licensed Programs and the Program Documentation are printed or recorded as supplied to the LICENSEE by the LICENSOR.

6. 'Use the Licensed Programs' shall mean to install the Licensed Programs into and store and run them on the Equipment in accordance with the terms of this Agreement.

7. 'The Licence Fee' shall mean the fee for the licence and the services to be provided under this Agreement as specified in the Schedule.

8. 'The Delivery Date' shall mean the delivery date mentioned as per the Schedule or such extended date as may be granted in accordance with provisions of Clause 21.

9. 'The Location' shall mean the LICENSEE's computer room where the Equipment is kept as specified in the Schedule.

10. 'The Acceptance Date' shall mean the date on which the Licensed Programs are accepted or deemed to be accepted by the LICENSEE in accordance with the provisions of Clause 5.

2. Products and services to be provided

THE LICENSOR hereby agrees to:

- (i) grant to the LICENSEE a non-exclusive licence to use the licensed program materials;
- (ii) provide the licensed programs to the LICENSEE and load them on the Equipment;
- (iii) hand over training and operating manuals to the LICENSEE;
- (iv) provide the other services herein after described; as per the terms and conditions hereinafter contained.

3. Payment

(i) The Licence Fee shall be paid by the LICENSEE on the Acceptance Date.

(ii) Licence Fee and other charges payable under this Agreement are exclusive of taxes which shall be paid by the LICENSEE at the rate and in the manner for the time being prescribed by laws of the Republic of India.

(iii) Any amount payable by the LICENSEE hereunder in addition to the Licence Fee shall be paid within 45 days after the receipt by the LICENSEE of the LICENSOR's invoice regarding that amount.

(iv) If the LICENSEE defaults in making any payment under this Agreement, upon the expiry of 7 days from the date on which payment becomes due, the LICENSOR may charge interest on such sum on a day to day basis from the date or last date for payment thereof to the date of actual payment (both dates inclusive) at the rate of per cent from time to time in force compounded half yearly. The LICENSEE shall pay such interest on demand from the LICENSOR. This is without prejudice to the LICENSOR's other rights and remedies.

4. Delivery and installation

Once the delivery date is due the LICENSOR shall deliver the Licensed Programs to the LICENSEE and load the same on the Equipment at the Location. The Licensed Programs shall contain one copy of the object code of the Licensed Programs in machine-readable form only, on the storage media mentioned in the Schedule.

5. Testing and acceptance

(i) After the Licensed Programs are loaded, the LICENSEE shall provide the LICENSOR the requisite test data which is appropriate to test the efficiency of the Licensed Programs along with the results expected to be attained by processing such test data using Licensed Programs. Upon receiving such data along with the expected results the LICENSOR shall process such data, in the presence of the LICENSEE or its authorised agent, on the Equipment using the Licensed Programs by way of acceptance test within 10 days after such receipt at a time mutually convenient to the PARTIES.

(ii) The LICENSEE shall accept the Licensed Programs forthwith after the LICENSOR has proved that the Licensed Programs have correctly processed the test data by attaining the expected results. The LICENSEE shall if required by the LICENSOR, sign an acceptance certificate in the form annexed hereto acknowledging such acceptance.

(iii) In case the LICENSEE fails to provide any test data as aforesaid or fails to attend the acceptance tests within the said period of 10 days then the LICENSEE shall be deemed to have accepted the Licensed Programs.

6. Warranty

I. (a) The LICENSOR warrants that the Licensed Programs shall after acceptance by the LICENSEE provide the facilities and functions set out in the Specification when properly used on the Equipment. The Program Documentation shall provide adequate information and instruction to enable the LICENSEE make appropriate use of such facilities and functions.

(b) Upon the LICENSOR receiving any written notice from the LICENSEE after the Acceptance Date of any breach of the said warranty then the LICENSOR shall at its own expense and within a reasonable time after receiving such notice remedy the defect or error in question. However the

LICENSOR shall have no liability or obligations under the said warranty unless the LICENSOR receives a written notice of the defect or error in question within 12 months from the Acceptance Date.

(c) The said warranty shall be applicable only if the LICENSEE complies with its obligations hereunder and to there having been made no alterations to the Licensed Programs by any person other than the LICENSOR. As far as possible the LICENSEE shall furnish the LICENSOR with a documented example of the defect or error.

II. The LICENSOR shall have no liability or obligations under the said warranty other than to rectify the breaches thereof by the provisions of materials and services within a reasonable time and without charge to the LICENSEE. If the LICENSOR shall fail to comply with such obligations its liability for such failure shall be limited to a sum equal to the Licence Fee. The foregoing states the entire liability of the LICENSOR, whether in contract or tort, for defects and errors in the Licensed Program Materials which are notified to the LICENSOR after Acceptance Date.

III. The LICENSEE acknowledges that the Licensed Programs have not been developed to suit the requirements of the LICENSEE and that it is therefore the responsibility of the LICENSEE to make sure that the facilities and functions described in the specification meet its requirements. THE LICENSOR shall have no liability for any failure of the Licensed Programs to provide any facility or function not specified in the specification.

IV. The express terms of this Agreement are in lieu of all warranties, obligations, conditions, terms, duties, and undertakings implied by statutory law, common law, trade usage, custom, course of dealing or otherwise, all of which are hereby excluded to the maximum extent permitted by law.

7. Licence

I. The LICENSOR hereby grants to the LICENSEE a non-exclusive licence to use the Licensed Program Materials subject to the terms and conditions hereinafter contained

II. The LICENSEE shall utilise the Licensed Program Materials for processing its own data for its own internal business only. The LICENSEE shall not allow any third party to use the Licensed Program Materials nor use the Licensed Program Materials for and on behalf of any third party in any manner possible.

III. The use of the Licensed Program Materials shall be limited to use on and in conjunction with the Equipment save that:

- (a) In the case of any inability to use the Licensed Program Materials in conjunction with the Equipment because of it being inoperable for any reason then the Licence shall be temporarily extended without additional charge to use with any other

equipment until such inability has been rectified provided that such equipment is under the direct control of the LICENSEE. It shall be the duty of the LICENSEE to immediately inform the LICENSOR such temporary use and of the commencement and cessation thereof;

- (b) The Licence may with the prior written permission of the LICENSOR use the Licensed Program Materials on and in conjunction with any suitable replacement equipment, which shall be specified by type and serial number, if the use of the Licensed Program Materials on and in conjunction with the Equipment is permanently discontinued. Once such permission being granted the replacement equipment shall become the Equipment for the purposes of the Licence.

IV. The Licence shall not be deemed to extend to any programs or materials of the LICENSOR other than the Licensed Program Materials unless specifically agreed to in writing by the LICENSOR.

V. The LICENSEE hereby acknowledges that it is licensed to use the Licensed Program Materials strictly in accordance with the express terms of this Agreement and not further or otherwise.

8. Duration of Licence

The Licence shall have its force from the Acceptance Date and shall continue until terminated in accordance with clause or as otherwise provided in this Agreement.

9. Proprietary Rights

(i) The Licensed Program and the copyright and other intellectual property rights of nature in the Licensed Program Materials are and shall remain the property of the LICENSOR and the LICENSOR shall have the right to grant licence to use Licensed Program Materials to third parties.

(ii) In case the LICENSEE becomes aware of any unauthorized use of the whole or any part of the Licensed Program Materials by any person the LICENSEE shall notify the LICENSOR forthwith.

(iii) The LICENSEE shall allow the LICENSOR to check the use of the Licensed Program Materials at all reasonable occasions and for doing so the LICENSOR and/or its authorised agent shall have the right to enter any of the LICENSEE's premises.

10. Intellectual Property Rights Indemnity

The LICENSOR shall indemnify the LICENSEE against any claim that the normal use or possession of the Licensed Program Materials infringes the intellectual property rights of any third party provided that the LICENSOR is given immediate notice of such claim, that the LICENSEE does not prejudice the LICENSOR's defence of such claim and that the claim does not arise as a result of the use of the Licensed Program Materials in conjunction with any equipment not approved by the LICENSOR. The LICENSOR shall have the right to replace, modify, change or alter all or any part of the Licensed Program Materials so as to avoid any infringement. The foregoing declares the entire liability of the LICENSOR to the LICENSEE in respect of the infringement of the intellectual property rights of any third party.

11. Confidentiality of Licensed Program Materials

(i) The LICENSEE hereby undertakes to treat as confidential all information contained or expressed in the Licensed Program Materials and the specification and all information, know-how conveyed to the LICENSEE by training (hereinafter called 'the INFORMATION').

(ii) The LICENSEE shall not without the prior written permission of the LICENSOR divulge any part of the INFORMATION to any person except:

- (a) the LICENSEE's own employees who need to know the same;
- (b) the LICENSEE's auditors and any other persons or bodies having a right, duty or obligation to know the business of the LICENSOR only in pursuance of such right, duty or obligation;
- (c) any person who is from time to time appointed by the LICENSOR to maintain any equipment on which the Licensed Program Materials are being installed only to the extent necessary to enable such person properly to maintain such equipment.

(iii) The LICENSEE hereby undertakes to make sure that the persons and bodies mentioned in paragraphs (a), (b) and (c) of sub-clause (ii) have sufficient knowledge that the INFORMATION is confidential prior to the disclosure of any part of the INFORMATION and that they owe a duty of confidence to the LICENSOR, the LICENSEE hereby undertakes to indemnify the LICENSOR against any loss, destruction or damage which the LICENSOR may sustain as a result of any failure on the part of the LICENSEE to comply with such an undertaking.

(iv) Upon knowledge of any breach of confidence by any person to whom the LICENSEE divulges all or any part of the INFORMATION, the LICENSEE shall immediately notify the LICENSOR and shall provide the LICENSOR all reasonable assistance in connection with any proceedings, which the LICENSOR may institute against such person for breach of confidence.

(v) The foregoing obligations pertaining to confidentiality shall remain in full force and effect notwithstanding any termination of the Licence or this Agreement.

12. Copying

(i) The LICENSEE may make only so many copies of the Licensed Programs as are reasonably needed for operational security and use. All such copies and the media on which they are recorded shall belong to the LICENSOR and the LICENSEE shall have the obligation to make sure that all such copies bear the LICENSOR's proprietary notices. The Licence shall apply to all such copies as it applies to the Licensed Programs.

(ii) Only after obtaining the prior written consent of the LICENSOR, the LICENSEE shall make any copy of the Program Documentation.

13. Security

The LICENSEE shall during the continuation of the Licence:

- (i) effect and maintain adequate security measures so that no unauthorized person can access or use the Licensed Program Materials;
- (ii) have effective control over Licensed Program Materials and all copies thereof;
- (iii) keep a full and accurate record of the LICENSEE's copying and disclosure of the Licensed Program Materials and shall produce such record to the LICENSOR whenever such a request is made.

14. Alterations

(i) The LICENSEE shall not modify, alter, change, adapt or translate the whole or any part of the Licensed Program Materials in any manner possible nor allow the whole or any part of the Licensed Program to be combined with or become included in any other computer programs nor decompile, disassemble or reverse engineer the same nor attempt to do any of such things, except to the extent and in the circumstances expressly required to be permitted by the LICENSOR by law.

(ii) To the extent that the Copyright Act, 1957 (India), grants the LICENSEE the right to decompile the Licensed Programs so as to obtain the details needed to make the Licensed Programs interoperable with other computer

programs used by the LICENSEE, the LICENSOR hereby undertakes to provide such information readily available to the LICENSEE. The LICENSOR hereby reserves the right to impose reasonable conditions that may include a fee for doing so. The LICENSEE shall first give the LICENSOR sufficient details of the LICENSEE's objectives and the other software concerned. Requests for the sufficient information should be given by notice to the LICENSOR as per the terms and conditions of this Agreement.

15. Software Maintenance

Unless the LICENSEE enters into a software maintenance agreement with the LICENSOR on or before the Acceptance Date the LICENSOR shall not provide any maintenance in respect of the Licensed Program Materials. If on a subsequent date the LICENSEE desires to receive the then current release of the Licensed Program Materials or maintenance, then the LICENSOR may at its discretion provide the same if the LICENSEE enters into a new licence agreement in respect of such release and also enters into the LICENSOR's standard software maintenance agreement then in force.

16. Operating Manuals

The LICENSOR shall supply the LICENSEE with 3 copies of operating manuals for the Licensed Programs containing sufficient information so that all the facilities and functions set out in the specification can be properly utilised. If the LICENSEE needs further copies of such operating manuals then these may be obtained under licence from the LICENSOR after paying the standard scale of charges from time to time in force.

17. Training

(i) The LICENSOR shall impart training for the staff of the LICENSEE to use the Licensed Programs as set out in the Schedule.

(ii) Any additional training needed by the LICENSEE shall be provided by the LICENSOR as per the LICENSOR's standard scale of charges from time to time in force.

18. Licensee's Confidential Information

The LICENSOR shall consider as confidential all information provided by the LICENSEE under this Agreement which is designated as confidential by the LICENSEE or which is by its implication clearly confidential provided that this clause shall not extend to any information which was rightfully known to the LICENSOR prior to the commencement of the negotiations leading to this Agreement or which is already in public domain or becomes so at a future date, otherwise than as a result of a breach of this clause. The LICENSOR hereby undertakes not to divulge any confidential information to any person except to its own employees who need to know the same. The LICENSOR shall ensure that its employees are fully aware of and comply

with the provisions of this Clause. The foregoing obligations shall survive any terminations of the Licence or this Agreement.

19. Termination

(i) The LICENSEE may terminate the Licence at any time by giving at least 45 day's prior written notice to the LICENSOR.

(ii) The LICENSOR may terminate the Licence forthwith by issuing notice in writing to the LICENSEE if:

- (a) the LICENSEE commits any material breach of any term of this Agreement and in the case of a breach capable of being remedied, the LICENSEE has failed to remedy the breach and 30 days have expired after the receipt of a request in writing from the LICENSOR to that effect;
- (b) the LICENSEE permanently discontinues the use of the Licensed Program Materials; or
- (c) the LICENSEE becoming insolvent or an official liquidator appointed of it or over any part of its undertaking or assets or shall cease to carry on business.

(iii) Except as expressly provided in sub-clause (2) or elsewhere in this Agreement the Licence may not be terminated.

(iv) Immediately upon the termination of the Licence the LICENSEE shall return to the LICENSOR the Licensed Program Materials and all copies of the whole or any part thereof, in the alternative upon a request being made by the LICENSOR the LICENSEE shall destroy the same by deleting the Licensed Programs from the media on which they are stored and certify in writing to the LICENSOR that they have been destroyed. The LICENSEE shall also delete the Licensed Programs from the Equipment and shall certify to the LICENSOR that the same has been done.

(v) Any termination of the Licence or this Agreement shall have no effect on any of the accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provisions hereof which is expressly or by implication intended to come into or continue in force on or after such terminations.

20. Assignment

The LICENSEE shall not be entitled to assign, sub-license or otherwise transfer the Licence whether in whole or in part except that the LICENSEE shall be entitled to assign the entire benefit of the Licence to any company which is from time to time a holding company or a subsidiary of the LICENSEE, as defined under the relevant provisions of the Companies Act 1956 (India), subject to such company first entering into a legally binding covenant with the LICENSOR undertaking to comply with the terms and conditions hereof

and provided that at the time of such assignment such company holds the exclusive possession of the Equipment for its own use and benefit.

21. Force Majeure

Notwithstanding anything contained in this Agreement, neither party shall be responsible for any delay in performing its part hereunder in case such delay is caused by circumstances beyond its reasonable control provided the party so delaying promptly notifies the other party in writing of the reasons for the delay. Such party's obligations shall be suspended during the term that the said circumstances continue and such party shall be given a reasonable extension of time for performance taking into account the period of delay. Except where such delay is a result of an act or omission of the other party:

- (a) any costs arising from such delay shall be borne by the party incurring the same;
- (b) in case such delay persists for more than 45 days, either party reserves the right to terminate this Agreement forthwith to the other in which event neither party shall be liable to the other reason of such termination except that the LICENSEE shall pay the LICENSOR a reasonable amount with respect to any work done before such termination and for that purpose the LICENSOR reserves the right to deduct such sum from any amounts previously paid by the LICENSEE under this Agreement.

22. Liability

(i) The LICENSOR shall indemnify the LICENSEE on demand, against any loss, destruction or damage to any property or injury to or death of any person caused by any negligent act or omission or willful misconduct of the LICENSOR, its employees, agents or sub-contractors or by any defect in the design or workmanship of the Licensed Program Material.

(ii) The LICENSEE shall indemnify the LICENSOR on demand against, any loss destruction or damage of or damage to any property or injury to or death of any person caused by any negligent act or omission or willful misconduct of the LICENSEE, its employees, agents or sub-contractors.

(iii) Notwithstanding anything contained in this Agreement the LICENSOR shall not be liable to indemnify the LICENSEE for loss or profits or contracts to other indirect or consequential loss whether arising from negligence, or breach of contract.

(iv) The LICENSOR shall not be liable to the LICENSEE for any damage/destruction/loss of computer programs and/or data, arising out of any failure or lapse on the part of the LICENSEE to follow the best computing practices.

23. Entire Agreement

This Agreement along with the schedules and exhibits, if any, comprises the whole and complete agreement and it shall supersede all prior arrangements, agreements, and understandings entered between the PARTIES relating to the subject-matter hereof. Any addition to or modification of any provision of this Agreement shall be binding only if the said addition or modification be made by a written instrument signed by a duly authorized representative of each of the parties.

24. Notice

All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in this Agreement or such other address in India as the recipient may designate by notice may be delivered personally or by express courier or facsimile transmission and shall be deemed to have been served if by hand when delivered, if by express courier 48 hours after posting and if by facsimile transmission when dispatched.

25. Interpretation

In this Agreement:

- (a) reference to any statute or statutory provision shall include a reference to the statute or statutory provision as from time to time amended, extended or re-enacted;
- (b) words importing the singular include the plural, words importing any gender include every corporate and unincorporated; and (in each case) *vice versa*;
- (c) any reference to a party to this Agreement includes a reference its successors in title and permitted assigns;
- (d) the headings to the clauses are for ease of reference only and shall not affect the interpretation or construction of this Agreement;
- (e) nothing in this Agreement shall be construed to constitute a partnership, joint-venture or agency relationship between PARTIES.

26. Governing Law

The Agreement shall be governed by and construed in accordance with the Laws of the Republic of India.

27. Dispute Settlement

Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination hereof, shall be finally settled by binding arbitration conducted in Kolkata (India) by a Panel consisting of

Three arbitrators, wherein one arbitrator shall be appointed by the LICENSOR, other arbitrator shall be appointed by the LICENSEE and the third arbitrator shall be appointed jointly by the PARTIES. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act 1996. The award of arbitration shall be binding and final.

28. Severability

If any provision of this Agreement is held to be invalid, illegal or unenforceable under present or future laws, such provision shall be struck from the Agreement; however such invalidity or enforceability shall not affect the remaining provisions or conditions of this Agreement. The PARTIES shall remain legally bound by the remaining terms of this Agreement and shall strive to reform the Agreement in a manner consistent with the original intent of the PARTIES.

IN WITNESS WHEREOF, each of the PARTIES has caused this Agreement to be duly executed and delivered as of the day and year first above written.

Signed for and on behalf of:

By

Signature

Title

Witness

Signed for and on behalf of:

By

Signature

Title

Witness

The Schedule

- A. Details of the Equipment.
- B. Details of the Licensed Programs.
- C. Licence Fees.
- D. Delivery Date.
- E. Location.
- F. Storage.
- G. Training:

(i) Total number of staff to be trained in total;

- (ii) Duration of training needed;
- (iii) Place of training;
- (iv) Amount to be paid as T.A. / D.A.

ACCEPTANCE CERTIFICATE

To: Eastern Computers Limited

From: National Silk Foundation

Date: 1.7.2004

Dear Sirs,

This has reference to the agreement between our organisations dated 30th May 2004 ('the Agreement') pertaining to the installation and licensing of computer programs ('the Licensed Programs'). We wish to inform the following:

1. We have today accepted the Licensed Programs.
2. We have verified the Licensed Programs and found them to be conforming to the description contained in the Agreement and that the same have been installed on the Equipment (as defined in the Agreement) to our utmost satisfaction.
3. The Licensed Programs have successfully processed the test data referred to in clause 5 of the Agreement. We hereby attach a copy of such data and the results of such tests for your perusal.

Signed for and on behalf of:

National Silk Foundation

By

Signature

Title

Witness

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(Chapterwise Index is in pages 1419-1448)

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