

A Study on Drafting, Conveyancing, Stamping and Registration of Commercial and Other Documents



The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

Drafting is an art, the success of which depends on the masterly skills of a draftsman. Drafting of commercial documents presupposes knowledge of the commercial and legal background of the underlying transactions, besides linguistic skills.

In spite of the fact that standard transactions may necessitate uniform or standard documentation and the fact that in this electronic age when documents can be reproduced/edited with ease at the click of a mouse, drafting still remains a specialized skill which involves application of a fair degree of common sense, legal knowledge and linguistic skills, which one acquires over a period of time, with continuous application of the fundamental principles of drafting tempered with the experience of how they are interpreted at a later date in courts of law when the rights/ obligations emanating from them are fought out. Even the best of transactions/deals can come to naught if the documentation of the same does not stand the scrutiny of law. Poor drafting can make or mar a transaction with multiple interpretations of a clause which can render the whole document totally ineffective, in spite of all the best of intentions.

Chartered Accountants being advisors to business entities are quite close to various commercial transactions; how they are structured and how they are put through; documentation thereon; financial implications, taxation etc and are an integral part of it. Invariably either they are a party to the drafting exercise or are called upon to give their advice on the nature of the underlying transactions to other drafting professionals.

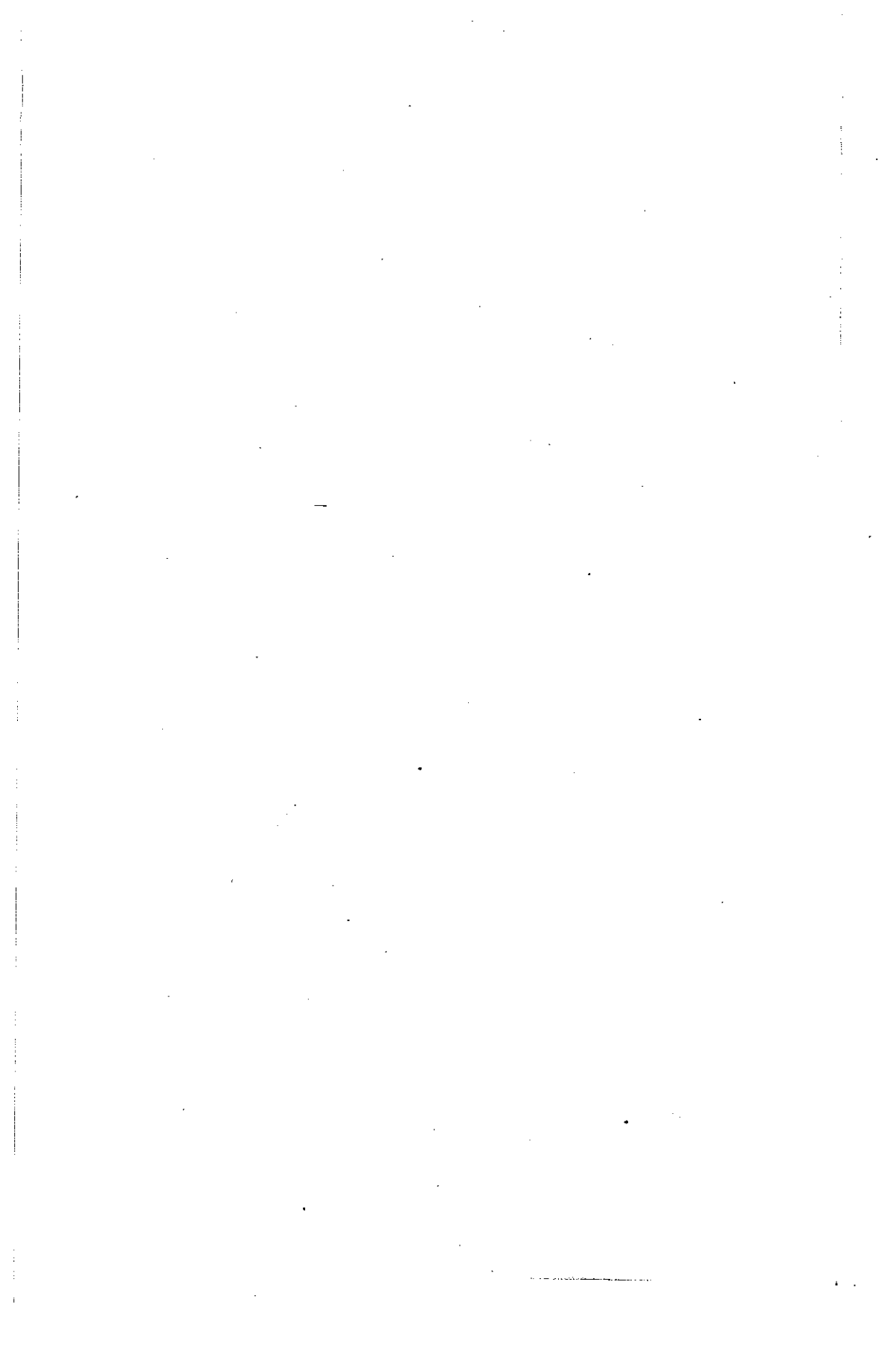
It is in this context that the Committee on Economic, Commercial laws & WTO under the Chairmanship of CA Rajkumar S. Adukia has come out with this Publication on **"A Study on Drafting, Conveyancing, Stamping and Registration of Commercial and Other Documents"** which would be quite useful to members and other readers in sharpening their skills in the area.

I am confident that the book will be quite interesting and useful to all the users.

New Delhi

Date : 4th January, 2011

CA. Amarjit Chopra
President, ICAI



Preface

A typical product of drafting is a document embodying an agreement or accord between parties, often separately advised and represented, and intended to regulate the legal relationship between those parties.

A well-drafted document should marry together the relevant facts and law in a clear and concise manner and encapsulate the final agreed instructions or negotiations.

Drafting of documents is a highly complex job. Unless one has a comprehensive knowledge of the various legislations and their application, it is extremely difficult to draft a document. Each situation requires a unique sense of handling, recital and approach to the problem. The document may be moulded to be in conformity with the laws of the country, whilst satisfying the main intention of the parties to the document. The degree of success in any dispute before a court of law largely depends on the drafting skills of an advocate.

Conveyancing is the drafting of the documents necessary for the transfer of real property, such as deeds and mortgages. Drafting a set of regulations begin with an outline to organize the subject matter of the regulations. The amount of effort put in the beginning phase of a drafting project will have a great impact on the usefulness of the final product. Without proper organization and arrangement, and the clarity that results from the use of good drafting principles, major topics of a document can easily be lost.

The art of drafting requires a thorough understanding of rules and principles. Legal drafting is an applied art which needs intelligence and knowledge in its preparation. The subject of legal drafting is of extreme importance for the legal process as a whole.

I am thankful to CA. Amarjit Chopra, President, ICAI and CA. G. Ramaswamy, Vice-President for the support and guidance given to the Committee.

I also thank the Vice Chairman of the Committee CA. P. Rajendra Kumar and other colleagues of the Committee CA. Pankaj I. Jain, CA. Mahesh P. Sarda, CA. Shiwaji B. Zaware, CA. Devaraja Reddy M., CA. Manoj Fadnis, CA. Anuj Goyal, CA. Naveen N.D. Gupta, CA. Charanjot Singh Nanda, Dr. T. V. Somanathan, Shri Deepak Narain, Shri Sidharth Birla, CA. Vikrant K. Gugrani,, CA. Anoop Dhanda, CA. Vijay Kumar Choudhary, CA. Asheesh Sharma and CA. Sudhir Malik for their valuable involvement in bringing out this publication.

I owe a word of gratitude to CA. Aseem Chawla for his contribution towards the Book.

I hope that the readers would find the study interesting and useful and relevant for their professional work.

New Delhi

Date : 4th January, 2011

CA. Rajkumar S. Adukia

Chairman

Committee on Economic, Commercial Laws & WTO

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Documents

Ordinarily the word "*document*" denotes a textual record. The dictionary meaning of the term 'document' is "*something that serves as evidence or proof; an original or official paper relied on as the basis, proof, or support of something; a writing conveying information*"¹.

However, given the rapidly growing quantity of texts being referred to as "documents", issues concerning the import of the term '*Documents*', arise in the legal arena. In this regard, Black's Law Dictionary, defines the term 'document' as "*deeds, agreements, title papers, letters, receipts, and other written instruments used to prove a fact*", whereas an 'instrument' is defined as a "*written legal document that defines rights, duties, entitlements or liabilities, such as a contract, will, promissory note or share certificate.*"²

Statutory Definition

Indian enactments refer to the term "*Documents*" in the following manner –

1. General Clauses Act, 1897 –

"Document" shall include any matter written, expressed or described upon any substance by means of letters, figures, or marks or by more than one of those means, which is intended to be used or which may be used for the purpose of recording that matter³.

Further, the Act states that expressions referring to "writing" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form⁴.

¹ Merriam-Webster Collegiate Dictionary 11th Ed.

² Black's Law Dictionary, 8th Ed. Thompson West, p.519.

³ General Clauses Act, 1897 Section 3 (18).

⁴ General Clauses Act, 1897, Section 3(65).

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2. Indian Evidence Act, 1872 –

“Document” means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter⁵.

Accordingly, the Act considers the following as documents⁶ –

- A writing;
- Words printed, lithographed or photographed;
- A map or plan;
- An inscription on a metal plate or stone;
- A caricature.

3. Indian Penal Code, 1860 –

The word ‘Document’ denotes any matter expressed or described upon any substance by means of letters, figures, or marks or by more than one of those means, intended to be used or which may be used as evidence of that matter⁷.

Thus the word “Document” has been used in a wide sense, and includes instruments, deeds, agreements, etc.

Drafting

‘Drafting’ is the practice, technique, or skill involved in preparing legal documents such as statutes, rules regulations, contracts, and wills that set forth the rights, duties, liabilities and entitlements of persons and legal entities⁸. Drafting may broadly be done with reference to the following branches:

1. Statutory Drafting

The documents that are required to be composed in accordance with the principles of legal composition may be generally described as “All

⁵ Indian Evidence Act, 1872, Section 3.

⁶ Illustrations under Section 3 of Indian Evidence Act, 1872.

⁷ Indian Penal Code, 1860, Section 29.

⁸ Ibid at 2, p 531.

writings expressly intended to be, or which frequently become, the subject of legal interpretation".

Statutory drafting cover:

a) Statutes and Enactments :

The composition and drafting of laws, enactments or statutes of the legislative body or Parliament.

b) Quasi-Legislative Documents :

The term quasi-judicial means "of or relating to, or involving an executive or administrative official's adjudicative acts"⁹, i.e. having a partly legislative character by possession of the right to make rules and regulations having the force of law'. Therefore, these documents would include the Memorandum or Articles of Association of a Company, or by-laws of a society.

2. Conveyancing

The term Conveyance in legal parlance means the voluntary transfer of a right or of property. It is transfer of an interest in real property from one living person to another, by means of an instrument such as a deed. Accordingly, conveyancing is the act or business of drafting and preparing legal instruments, especially those that transfer an interest in real property¹⁰.

Conveyancing is the art or science of preparing documents and investigating title in connection with the creation and assurance of interests in land¹¹. Conveyancing is guided by social practices, customs and usage, prudence and precedents. The most common type of document illustrating a conveyance is a deed of sale, mortgage, lease etc.

However, 'Conveyancing', in relation to drafting of deeds has a wider use when it is referred in relation to drafting of various other documents like a marriage contract, a will, etc. in which no transfer may be involved.

⁹ Ibid, p. 1278.

¹⁰ Ibid, pp. 357-358.

¹¹ Peter Butt, Land Law 7 (2d ed. 1988).

3. Pleadings

Pleadings are "formal documents in which a party to a legal proceeding sets forth or responds to allegations, claims, denials or defenses."¹²

As per the Code of Civil Procedure, 1908 the term "Pleading" means a plaint or a written statement¹³. Thus, pleadings are statements in writing, submitted in a court by the parties to a case, concisely stating the facts of the case any evidence relied upon, and the relief claimed. It also includes all such documents submitted to a court during the pendency of a suit and all minor and/or incidental documents and/or writings prepared and submitted in the course of a suit.

Pleadings provide such details as are requisite for the opposing parties to prepare their case and are governed, inter alia, by Orders VII and VIII of the Code.

No Documents for Certain Transactions

The transfer of immovable properties in India is governed by the provisions of Transfer of Property Act, 1882. As per the Act, the requirement of written documents/deeds can be dispensed with in all cases of transfer of immovable property, where writing is not expressly required by law¹⁴.

For determining whether a transaction can be made without writing, one has to see if it is expressly required by law to be in writing. Accordingly, if the transaction is a transfer of property and there is no express provision of law requiring it to be made without writing, the Act would enable it to be made without writing¹⁵.

There exist innumerable instances where courts have recognized oral transfers such as release, relinquishment, surrender, compromise, partition, transfer of easementary rights, settling maintenance, claims, creating charge, dedication to an idol, family settlements etc.

¹² Ibid, p 1191.

¹³ Order VI, R1.

¹⁴ Transfer of Property Act, 1882, Section 9.

¹⁵ *Weaver Mills v. Bulkies Ammal*, AIR 1969 Mad. 462, *Sarandaya Pillai v. Shankaralinga Pillai*, 1959, (2) MLJ 502

Case laws –

- Partition of joint family properties: *Satya Kumar v Satya Kripal*¹⁶; *Peddu Reddiar v Kothanda Reddi*¹⁷
- Compromise of Claim: *Thiruvengada Chariar v Ranganatha*¹⁸
- Transfer by Husband to wife for future maintenance: *Madam Pillai v Badrakalli*¹⁹
- Transfer in consideration of marriage: *Serandaya Pillai v Sankaralingam Pillai*²⁰
- Mortgage by deposit of Title Deed: A mortgage by deposit of title deed or an equitable mortgage does not need to be in writing.
- A transfer of immovable property of value less than Rs.100/- can be effected orally.
- A lease for less than one year: *Gulab Khan v Lal Muhammad*²¹ –A lease of immovable Property for a period less than one year made by an oral agreement accompanied by delivery of possession does not need to be in writing.
- A Hindu Religious Endowment: *Gangi Reddi v Tammi Reddy*²² – A dedication by a Hindu of property for the purpose of a religious charity according to the Hindu Law can be made without any instrument in writing. But the appropriation or alienation must be made by an act *inter vivos* and not in future by a will.

¹⁶ (1909) 10 CLJ 503.

¹⁷ AIR 1966 Mad 419.

¹⁸ 13 MLJ 500.

¹⁹ 45 Mad 612 (FB).

²⁰ (1959) 2 MLJ 502.

²¹ AIR 1926 Oudh 609.

²² ILR 50 Mad 421(PC); 54 IA 136; 1927 PC 80; 50 MLJ 524..

Registration

Registration means recording of the contents of a document. The registration of documents is subject to the provisions of the Registration Act, 1908. The Act was promulgated to consolidate the enactments relating to the registration of documents and with the objective of conservation of evidence and title.

The main purpose of the Act, is to provide a method of public registration of documents, to give information to people regarding legal rights and obligations arising or affecting a particular property and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud.

Therefore the objectives can be listed as follows:

1. The conservation of evidence,
2. Assurance of title, publicity of documents and prevention of fraud.

Registration ensures and safeguards the interest of an intending purchaser.

Brief History of the Registration Act 1908

The Act was originally titled as the Indian Registration Act, 1908²³. The first complete law for the registration of documents was Act XVI of 1864, which consolidated and amended all previous laws relating to the registration of assurances. It introduced a system of compulsory registration for certain categories of documents and abolished the provisions limiting the rights of priority to registered deeds as against unregistered document of the same nature. However, the right of priority was given to a document optionally registerable and not to documents compulsorily registerable. Thus, if two documents A and B were both optionally registerable, and only A was registered, then A would have priority over B. But if A was compulsorily registerable and B was optionally registerable, the fact that A was registered did not entitle it to priority over B.

²³ Vide the Indian Registration (Amendment) Act 1969, the word "Indian" was omitted.

The law relating to registration of assurances was amended from time to time and vide Act III of 1877 provisions according priority to registered documents irrespective of whether they were optionally or compulsorily registerable were introduced.

Basics

Under the Act, the contents of a document are recorded with a Registering Officer appointed by a State Government. The State may exclude any district or tracts of country from its operation. The Registering Officer performs the function of preserving copies of the original document.

The Act deals with cases where transactions between individuals are put in writing and provide for compulsory or optional registration, as the case may be, of such written instruments. It does not deal with transactions that are not in writing.

Registration Establishment

Under the Act, the following authorities deal with registration of documents:

- Inspector General of Registration (as appointed by a State Government under Section 3)
- Inspectors of Registration Offices (as appointed by a State Government and is subordinate to the Inspector General under Section 8)

The State government is further empowered to form districts and sub-districts, while prescribing and/or altering its limits under Section 5, while appointing Registrars for several districts and sub-registrars for several sub-districts under Section 6.

Documents: where registered?

Document are to be presented for registration at the office of Registrar/Sub-Registrar in whose jurisdiction the property is located.

Documents relating to immovable property are to be registered in the office of the Sub-Registrar of sub-district within which whole property or some

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portion thereof, is situated. Other documents can be registered in the office of the Sub-Registrar where all persons executing the document desire it to be registered.

A Registrar can accept a document which is registerable with the sub-registrar who is subordinate to him. Documents should be presented for registration in the office of the Registrar/Sub-Registrar. However, in special cases, the officer may attend the residence of any person to accept a document or will.

Registerable Documents:

Distinction on the basis of "*Compulsory*" and "*Optional*" registration of documents has been made under the Act vide sections 17 and 18 respectively. Registration of documents pertaining to immovable property of value INR 100/- or more falls under the Compulsory head under the Act, whereas the documents of immovable property of value less than INR 100/- falls under the Optional head.

Optional registration of documents also includes lease of immovable property for a term lesser than one year and instruments of wills and movable property. Further, documents provided under Section 17(2) of the Act, are not required to be registered even though they related to immovable property.

Registration is not essential to the admissibility of documents executed prior to 1st January, 1865, though they may be of the nature of documents which under later enactments are compulsorily registerable²⁴. Similarly unregistered documents executed at a time when the law did not require them to be registered would be admissible in evidence despite their non-registration²⁵. Accordingly, the question whether registration of a document in a suit is governed by the law as it exists when the suit is brought²⁶.

Section 17 of the Registration Act provides the necessity for registration of certain classes of documents as defined in clauses (a) to (e) of that section. Section 49 of the Act, provides that any document so required to be registered, shall not affect any immovable property comprised therein or to

²⁴ *Tiru Mala v. Lakshmi* I.L.R 2 Mad. 147.

²⁵ *Desaid Motilal Mangalji v. Desai Parshotam Nand Lal*, I.L.E 1 Agra 283.

²⁶ *Gandamal v. Uttamachand*, A.I.R 1933 Lah. 1038 at p. 1039.

be received in evidence affecting such transaction unless it has been duly registered.

Compulsorily Registerable Documents:

As per section 17 of the Registration Act, 1908, the registration of the following documents is compulsory:

1. The following documents shall be registered, if the property to which they relate is situated in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877 or this Act came or comes into force, namely:
 - a) instruments of gift of immovable property;
 - b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;
 - c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
 - d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
 - e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

PROVIDED that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms

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granted [by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees.

2. Nothing in clauses (b) and (c) of sub-section (1) applies to-
- i. any composition-deed; or
 - ii. any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property; or
 - iii. any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except insofar as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or
 - iv. any endorsement upon or transfer of any debenture issued by any such company; or
 - v. any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or 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; or
 - vi. any decree or order of a court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or
 - vii. any grant of immovable property by government; or
 - viii. any instrument of partition made by a revenue officer; or
 - ix. any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

- x. any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or
 - x-a. any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such treasurer of any property; or
- xi. any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
- xii. any certificate of sale granted to the purchaser of any property sold by public auction by a civil or revenue officer.

Explanation: A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

- 3. Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.

Optionally Registerable Documents:

Under section 18 of the Registration Act, any of the following documents may be registered, i.e. at the option of the executants, namely –

- a) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;
- b) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

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- c) Leases of immovable property for any term not exceeding one year, and leases exempted under Section 17;
- cc) Instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;
- d) Instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property;
- e) Wills; and
- f) All other documents not required by section 17 to be registered.

Documents Exempted from Registration

Certain documents executed by or in favour of the Government are exempted from registration by virtue of section 90 of the Registration Act 1908.

Exemption of certain documents executed by or in favour of government

- 1) Nothing contained in this Act or in the Indian Registration Act, 1877, or in the Indian Registration Act, 1871, or in any Act thereby repealed, shall be deemed to require, or to have any time required, the registration of any of the following documents or maps, namely:
 - a) documents issued, received or attested by any officer engaged in making a settlement or revision or settlement of land revenue, and which form part of the records of such settlement; or
 - b) documents and maps issued, received or authenticated by any officer engaged on behalf of the government in making or revising the survey of any land, and which form part of the record of such survey; or

- c) documents which, under any law for the time being in force, are filed periodically in any revenue office by *patwaris* or other officers charged with the preparation of village records; or
 - d) *sanads, inams*, title-deeds and other documents purporting to be or to evidence grants or assignments by government of land or of any interest in land; or
 - e) notice given under section 74 or section 76 of the Bombay Land-Revenue Code, 1879, or relinquishment of occupancy by occupants, or of alienated land by holders of such land
- 2) All such documents and maps shall, for the purposes of sections 48 and 49, be deemed to have been and to be registered in accordance with the provisions of this Act.

Filing Requirements:

If a property is located in Delhi, the following documents are to be submitted:

1. Document to be registered (in duplicate);
2. Two passport size photographs of both parties. (Also fingerprints of the buyer and seller to be affixed to the document – in case of transfer of ownership of immovable property);
3. Two witnesses;
4. Proof of identification of each party and witnesses: an election Identity Card, passport, identity Card issued by the Govt. of India, Semi govt. and autonomous bodies or identification by a Gazetted officer;
5. In case the property is/was under a lease from D.D.A., L&DO, M.C.D., Industries Department, Labour Department of Delhi Govt. etc., permission of lessor for the registration of the document;
6. No objection Certificate under section 8 of Delhi Land (Restriction and Transfer) Act, 1972 from *tehsildar* of the sub- division of the district to the effect that the property is not under acquisition.

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The documents that are presented for registration should be accompanied by their true copies. Any blanks, erasure or alteration in the document should be attested by the person executing the document with their signatures.

Procedure

1. Requisite documents are submitted to the Reader for scrutiny. After scrutiny, the Reader indicates the Registration fee required, on the document itself;
2. The registration fee is to be deposited with the cashier against a receipt;
3. After depositing the fees, the documents are required to be presented before the sub-Registrar by the parties in accordance with Section 32 of the Registration Act, 1908;
4. Endorsements made on the document after completion of formalities before the sub-registrar:
 - Day, hour and place of presentation the photographs and fingerprints affixed under section 32-A, and the signature of the person presenting the document are to be endorsed on every document
 - Receipt for such document, which is given to the person presenting the document.

On every document submitted for registration, the following particulars are to be endorsed:

- Signature and addition of every person admitting the execution of the document;
- Signature and addition of every person examined in reference to such document;
- Any payment of money or delivery of goods and any admission of receipt of consideration made in the presence of the registering officer in reference to the execution of the document.

5. The delivery of document is made on the production of the receipt issued by the cashier in respect of the document at the time of presentation.

Time of Presentation for Registration:

As per section 23 of the Act, documents should be submitted for registration within 4 months from the date of execution and a decree or order of a court can be submitted within four months from the day it becomes final. Further, section 24 states that if a document is executed by several persons at different times, it may be presented for registration within 4 months from the date of each execution.

Section 25 mandates that in cases where delay in the presentation of a document is unavoidable, the Registrar may accept the document for registration on payment of fine not exceeding ten times the amount of registration fee. In case documents are executed outside of India, provisions of section 26 would apply, which states that such a document can be presented for registration within four months after its arrival in India.

However, optionally registerable instruments like wills may be presented for registration at any time and deposited in any manner.

Re-registration

Where any document requiring registration has been accepted for registration by a Registrar or Sub-Registrar from a person not duly empowered to present the same, and has been registered, any person claiming under such document may, within four months from his first becoming aware that the registration of such document is invalid, present such document or cause the same to be presented, in accordance with the provisions of Part VI for re-registration in the office of the Registrar of the district in which the document was originally registered; and upon the Registrar being satisfied that the document was so accepted for registration from a person not duly empowered to present the same, he shall proceed to the re-registration of the document as if it has not been previously registered, and as if such presentation for re-registration was a presentation for registration made within the time allowed therefor under Part IV, and all the provisions of this Act, as to registration of documents, shall apply to such re-registration; and such document, if duly re-registered in accordance with the

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provisions of this section, shall be deemed to have been duly registered for all purposes from the date of its original registration:

Provided that, within three months from the twelfth day of September, 1917, any person claiming under a document to which this section applies may present the same or cause the same to be presented for re-registration in accordance with this section, whatever may have been the time when he first became aware that the registration of the document was invalid.²⁷

Presentation of Documents

As per section 32 of the Registration Act, 1908, every document to be registered shall be presented at the registration office:

- By some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or
- By the representative or assign or such a person, or
- By the agent of such a person, representative or assign, duly authorized by power-of-attorney and authenticated in the manner hereinafter mentioned.

As per section 33 of the Act, for the purpose of section 32, only the following powers-of-attorney shall be recognized:

- a) If the principal at the time of executing the power-of-attorney resides in any part of India in which the Act is in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;
- b) If the principal at the time aforesaid (resides in any part of India in which this Act is not in force), a power -of-attorney executed, before and authenticated by any magistrate;
- c) If the principal at the time aforesaid does not reside in India, a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, (Indian) consul or Vice-Consul, or representative of the Central government.

²⁷ Registration Act, 1908, Section 23A.

Provided that the following persons shall not be required to attend at any registration-office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely

- i. Persons who by reason of bodily infirmity are unable without risk or serious inconvenience to attend;
- ii. Persons who are in jail, under civil or criminal process; and
- iii. Persons exempted by law from personal appearance in court.

Registration by Registering Officer

If the Registering Officer is satisfied about the identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document. He will make necessary entries in the register maintained by him.

Certification of registration

After all formalities are completed, the Registering Officer will endorse the document with the word 'Registered', and put his signature on it. The endorsement will be copied in the Register maintained by the Registering Officer. After registration, the document will be returned to the person who presented the document.

After all the provisions that apply to the document presented for registration have been complied with:

- The Registering Officer shall endorse on the document, a certificate containing the word "registered" and number and page of the book in which the document has been copied.
- Such certificate will be Signed, Sealed and Dated by the registering officer.
- The Certificate shall be admissible for proving that the document has been duly registered and the facts mentioned on the document as endorsements have occurred as therein mentioned.

Effective Date of Document

Under section 47 of the Act, a registered document operates from the time it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. In this regard, section 49 provides that no document required by section 17 to be registered shall (a) affect any immoveable property comprised therein or (b) confer any power, property or conferring such powers unless it has been registered. The effect of these provisions is that a document, which is compulsorily registerable, does not effect any immovable property comprised therein till it has been registered, but soon as it has been registered, it takes effect not from the date of registration but retrospectively, from the date of the execution²⁸.

Thus, a document takes effect from its date of execution and not from the date of registration. However, if the document states that it will be effective from a particular date, it will be effective only from that date.

Ordinarily, priority of rights created by different transfers is governed by the principle embodied in the maxim *qui prior tempore potior est jure*, i.e. "he who is first in time is better in law". Where successive transfers of the same property by way of mortgage or sale are made, the latter must give way to the former. This general rule is subject to the exceptions enacted under sections 48 and 50 of the Registration Act.

Section 48 refers to the priority of registered agreements over non-registered written agreements. Under this section a registered instrument is to have priority over an oral agreement unless, the agreement or declaration has been accompanied or followed by delivery of possession. Thus, oral charges prior in point of time established by evidence of possession are recognized²⁹. The object of this section is to limit the operation of oral alienations.

Accordingly, under Section 48, all non-testamentary documents duly registered under this Act, and relating to any property whether moveable or immoveable shall take effect against any oral agreement or declaration relating to such property. However, it is subject to the following exceptions:

²⁸ *Sarjoo v. Jagatpal Singh* AIR 1942 Oudh 201.

²⁹ *Nema Charan Dhabal v. Kokil Bag*, I.L.R 5 Cal, 336.

- a. If possession of property (movable or immovable) is delivered on the basis of such oral agreement and such delivery of possession is valid transfer under any law;
- b. Mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered, which relates to the same property.

Effect of Non-Registration:

Section 49 of the Act directs that no document, which requires compulsory registration either under section 17 or under any provisions of the Transfer of Property Act, 1882 pertaining to any immovable property comprised therein or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

However, the proviso to the section states that an unregistered document may be received in evidence to prove any collateral transaction not required to be effected by a registered instrument or as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882.

Thus, if a document that is required to be registered under section 17 or under provisions of Transfer of Property Act, 1882 is not registered, the effect is that such un-registered document:

- Does not affect any immovable property comprised therein
- Cannot be received as evidence of any transaction affecting such property.

Thus, the document becomes redundant and useless for all practical purposes. But it can still be accepted as evidence in criminal proceedings.

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TABULAR REPRESENTATION OF SITUATIONS / DOCUMENTS WHEREIN REGISTRATION IS COMPULSORY / OPTIONAL UNDER SEC.17 AND SEC.18 OF THE REGISTRATION ACT, 1908:

Sr. No	Situation / documents	Registration requirement
1.	Gift of immovable property	Compulsory
2.	Transfer of right, title or interest, whether vested or contingent, of an immovable property, wherein the value exceeds Rs.100/-.	Compulsory
3.	Receipt or payment of any consideration on account of creation, declaration assignments, limitation or extinction of any such right, title or interest.	Compulsory
4.	Lease of immovable property for any term exceeding one year or reserving a yearly rent.	Compulsory
5.	Transfer or assignment of decree / order of a Court or any award if it creates, assigns, limits or extinguishes in present or future, any right, title or interest in an immovable property, wherein the value exceeds Rs.100/-.	compulsory
6.	Composition Deed	Not applicable
7.	Any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such company consist in whole or in part of immovable property.	Not applicable
8.	Any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the company	Not applicable

	has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders or such debentures.	
9.	Any endorsement upon or transfer of any debenture issued by any such company.	Not applicable
10.	Any document that does not create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, to or in immovable property, but merely creates right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest.	Not applicable
11.	Any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceeding.	Not applicable
12.	Any grant of immovable property by the Government	Not applicable
13.	Any Instrument of partition made by a revenue office	Not applicable
14.	Any order made under the Charitable Endowments Act 1890 vesting any property in the treasurer of Charitable Endowments or divesting any such treasurer of any property.	Not applicable
15.	Any endowment on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage.	Not applicable

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16.	Any certificate of sale granted to the purchaser of any property sold by public auction by a civil or revenue officer.	Not applicable
17.	Authority to adopt a son and not conferred by a Will.	Compulsory
18.	Instruments which create, assign, declare or limit any title or interest, wherein the value of the immovable property is less than Rs.100/-.	Optional
19.	Lease of immovable property not exceeding one year.	Optional
20.	Transfer or assignment of decree / order of a Court or any award if it creates, assigns, limits or extinguishes in present or future, any right, title or interest in an immovable property, wherein the value does not exceed Rs.100/-.	Optional
21.	Wills	Optional

Stamping

Stamp duty is a general tax imposed upon certain documents and some undocumented acquisitions. These include title transfers as a result of selling real estate, vehicles, business assets and other property; gifts; insurance policies and home loans, and are paid by the purchaser or borrower. The revenue so raised is used for different governmental functions. The idea of raising revenue to a State from the transactions of its citizens originated in Holland. The first law was passed in Holland in 1624. That system was subsequently adopted in England during the reign of Charles II. However it gained definite shape subsequently under the reign of William and Mary as: 'Several duties on Vellum, Parchment and Paper for four years, towards carrying on the war against France'.

Stamp duties have proven to be a revenue earner for governments and thus were continued to be levied even when its imposition led to riots in the American colonies in 1765.

Stamping duty provisions: international scenario

Australia

The federal government of Australia does not levy stamp duty. However, stamp duties (also known as transactional duties) are levied by its states on various instruments and transactions; the rates of which, vary from state to state, along with the nature of instruments and transactions. Further, certain jurisdictions no longer require a physical document for the applicability of these duties.

In Australia, stamp duty rates on instruments are either very low or have been exempted.

Major forms of duty include the transfer duty on the sale of land, businesses, shares and other forms of dutiable property: such as mortgage duty; lease duty and duty on the hiring of goods. Rebates and exemptions are available from transfer and mortgage duty for people purchasing their first home.

Hong Kong

As per to Schedule 1 of the Hong Kong Stamp Duty Ordinance Cap.117 ("SDO"), stamp duty is charged on legal documents that are classified into following 4 heads:

- All transactions of sale or lease of interests in Hong Kong immovable property;
- The transfer of Hong Kong Stock (defined as shares and marketable securities, units in unit trusts, and rights to subscribe for or to be allotted stock);
- All Hong Kong bearer instruments;
- Any duplicates and counterparts of the above documents.

One example is of shares of companies that are either incorporated in Hong Kong or listed on the Hong Kong Stock Exchange.

Singapore

Singapore views stamp duty as a tax on commercial and legal documents. The purpose of stamping of documents along with payment of taxes is that transactions are recorded and "recognized". The duty is only payable on documents relating to immovable property, stocks and shares.

In Singapore, documents can be stamped before or after their execution. However, the documents which are executed in Singapore are required to be stamped within 14 days of execution; whereas for documents executed abroad, the same are required to be stamped within 30 days of their receipt in Singapore.

Failure to comply with the stamping provisions would attract penal liability amounting to a fine of upto S\$10,000 or imprisonment up to 3 years or both³⁰.

Applicable rates and other relevant details are available from the Inland Revenue Authority of Singapore.

³⁰ As available on Singapore Business Community website, last accessed on July 12, 2010. Link: http://www.business.gov.sg/EN/Government/TaxesNGST/TypesofTaxes/taxes_stamp.htm

United Kingdom

An important feature of the British Stamp Law is that it has changed frequently in its structure of duties in response to public demand and market forces.

The scope of the United Kingdom's stamp duty has been reduced dramatically in recent years. Apart from transfers of shares and securities, the issue of bearer instruments and transactions involving partnerships, stamp duty was largely abolished in the UK from 1 December 2003. "Stamp duty land tax" (SDLT), a new transfer tax derived from stamp duty, was introduced for land and property transactions from the same date and year. SDLT is not exactly a stamp duty, but a form of self-assessed transfer tax charged on "land transactions". "Stamp duty reserve tax" (SDRT) was introduced on agreements to transfer certain shares and other securities in 1986.

Stamp Duty is payable where the contract for the purchase of property was drawn up before 10 July 2003 and the transfer documents haven't yet been 'stamped'. Further, stamp duty is payable on the purchase of shares in case of a paper-based transaction whereas in case of electronic i.e., paperless transaction SRDT is payable. However, majority of share transfers are made through a stockbroker using the electronic method and the tax is automatically deducted at the time the transaction goes through³¹.

United States of America

Although in the past the federal government imposed various documentary stamp taxes on deeds, notes and other transactional documents, but now such taxes are imposed only by states. Typically, when real estate is transferred or sold, a real estate transfer tax is collected at the time of registration of the deed in the public records. In addition, many states impose a tax on mortgages or other instruments securing loans against real property. This tax, known variously as a mortgage tax, intangibles tax, or documentary stamp tax, is also usually collected at the time of registration of the mortgage or deed of trust with the recording authority.

³¹ As available on UK Government Public Services website, Last accessed: Friday, July 9, 2010, link:http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/BeginnersGuideToTax/DG_10010529.

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Stamp duty can be said to be a tax which is a charge made when a mortgage has been obtained for the purchase of the property and consists of documentary stamps calculated on the total of the loan.

In states such as Florida, stamp duty is charged at a rate of 35 cents per \$100 of mortgage. In addition to stamp duty, investors must pay an Intangible Tax at 0.002% on the mortgage amount. Therefore, if you obtain a \$100,000 mortgage, \$350 in Documentary Stamps and \$200 in Intangible Tax will need to be paid. It is important to note that neither of these taxes will be charged if you cash is used to finance the property purchase³².

Evolution of Stamp Duty in India

The first stamp law in India was Regulation VI of 1797, which was limited to extent of Bengal, Bihar, Orissa and Benars. This was followed by Regulation VII of 1800, Regulation XIII of 1806, Regulation VIII of 1807 and the like. The Stamp Act is a fiscal enactment, on the basis of which stamp duties are levied on transactions in the shape of stamp on instruments, leviable with stamp duties on them. The schedule to the Act is deemed to be exhaustive and is to be strictly construed. Instruments not mentioned in the Schedule are deemed to be excluded from the operation of the Act. The duty payable is to be determined with reference to the Act in force at the time of execution of the document, but the penalty leviable is to be determined with reference to the Act in force at the time of admission of the instrument in evidence.

The First Stamp Act applicable to whole of India was Act XXXV of 1860 which came into force from the first day of October, 1860. After a few amendments, the Act was repealed by Act X of 1862. Subsequently, the Act was finally repealed by Act II of 1899, which came into force from 1st July 1899.

Since its inception in 1899 in India, stamp duty has been a significant source of revenue for most State governments. With the expansion of business transactions and fast growing technology, new kinds of instruments have been introduced. As the present system is not fully equipped to tackle such instruments, efforts are being made to reform and restructure the stamp law.

In India, some States levy very high rates of stamp duty. Under the JNNURM (Jawaharlal Nehru National Urban Renewal Mission) scheme, one of the

³² As available on <http://www.propertyshowrooms.com/usa/property/investment/usa-property-investment-tax-planning.asp>, last accessed: Monday, July 12, 2010.

mandatory reforms is to gradually reduce the stamp duty to 5 per cent. It is a positive effort to ensure an increased flow of property transactions in the market.

The NIPFP (National Institute of Public Finance and Policy) is working on the aforementioned issues. A Standing Committee of State Secretaries of Stamp and Registration was set up in 1999 to look into stamp law reform. The Standing Committee meets twice every year to discuss the problems under the stamp regime.

Constitutional Provisions Relating to Stamp Duty

The Constitution of India contains several provisions pertaining to stamp duty. Of these, Article 246 and the Seventh Schedule are relevant in regard to the legislative power to levy Stamp duty. Articles 265, 268 and 269(e) are relevant mainly as regards the distribution of the revenues. The former is important for the purposes of a consideration of the Stamp Act.

Part XI of the Constitution pertains to the Relations between the Union and the States, under which, Article 246 states:

246. Subject-matter of laws made by Parliament and by the Legislatures of States.—

1. Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
2. Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in the Constitution referred to as the "Concurrent List").
3. Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
4. The Parliament has the power to make laws with respect to any matter and for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

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Thus the article deals with the distribution of legislative powers as between the Union and the State Legislatures, with reference to the different Lists in the VIIth Schedule. As per the Article, the Union Parliament has full and exclusive powers to legislate with respect to matters in List I and has also power legislate with respect to matters in List III. The State Legislature, on the other hand, has exclusive power to legislate with respect to matters in List II minus falling in List I and II and has concurrent power with respect to matters in List III³³.

The mutual exclusivity of taxes which has been reflected in Article 246(1) of the Constitution means that taxing entries must be construed so as to maintain exclusivity³⁴.

Part XII of the Constitution, pertains to Finance, Property, Contracts and Suits under which Article 268 states:

1. Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union list shall be levied by the Government of India but shall be collected –
 - a. In the case where such duties are leviable within any Union Territory, by the Government of India, and
 - b. In other cases, by the States within which such duties are respectively leviable.

...

Stamp-duties are enumerated under entries 91, 63 and 44 of Union, State and Concurrent Lists, respectively of the VIIth Schedule, under Article 246. The entries are summarized as follows –

Union List ("List I") Entry 91	State List ("List II") Entry 63	Concurrent List ("List III") Entry 44
Rates of Stamp duty in respect of bills of exchange, cheques,	Rates of Stamp duty in respect of documents other than those	Stamp duties other than duties or fees collected by means of judicial

³³ *Subramaniyan Chettiar, A.L.S.P.P.L v. Muttuswami Goundan*, AIR 1941 F.C. 47

³⁴ *Gujarat Anbuja Cemets Ltd. Union of India*, (2005) 4 SCC 214.

promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.	specified in the provisions of List-I with regard to rates of Stamp Duty	stamps but not including rates of Stamp duty.
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The provisions under the constitution can be stated as³⁵:

- Under Entry 44 of List III, the power to levy stamp duty on all documents is concurrent;
- But the power to prescribe the *rate* of such levy is excluded from Entry 44 of List III and is divided between the Parliament and the State Legislature as – if the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate will belong to the Parliament; for all other instruments or documents, the power to prescribe the rates belongs to the State Legislature, under Entry 63 of List II;
- The meaning of Entry 44 of List II, therefore is that excluding the power to prescribe the rate, the charging provisions of a law relating to stamp duty can be made both by the Union and the State Legislature, in the concurrent sphere, subject to Article 254, in case of repugnancy.

Thus, the power of the Union extends to the whole field of Stamp duties, except that as regards rates of Stamp duty in the States, it is confined to the specified documents. It is plenary as regards machinery provisions.

Stamp Duty under the Act

As already stated, the basic purpose of the Indian Stamp Act 1899 is to raise revenues for the Government, thus stamp duty is a type of tax collected by a State Government, and varies from instrument to instrument. The provisions regarding levying, collection and payment of stamp duty are contained in the Indian Stamp Act 1899. Under the Stamp Act, certain documents need to be legitimized by paying applicable stamp duty on them. The proceeds of stamp duty in any financial year are assigned to the State.

³⁵ *Bar Council of U.P. v. State of U.P.*, AIR 1973 SC 231.

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Stamp Duty is paid for the transaction performed by a document or instrument under the provisions of the Indian Stamp Act, 1899 to the Collector of Stamps. The proceeds of the Duty go to the State in which they are levied. As the revenues from stamp duty are assigned to the states in which they are collected, each State Government has prescribed by rules that, the stamps purchased in a particular state should alone be used for instruments executed in it. States such as Maharashtra, Karnataka and Kerala have their State Stamp Act, while many States follow the 1899 legislation.

Subject Matter of the Act

Under the Act, a stamp duty is payable on any instrument falling within the definition of clause (14) of section 2. Accordingly, it is levied on every instrument, i.e. every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. However, the subject matter of the transaction must be situated in India.

Stamp Duty is not payable on the following:

- Documents, executed on behalf of the Government;
- Testamentary documents;
- Documents, required to be made for judicial or non-judicial proceedings;
- Documents, filed in judicial or non-judicial proceedings.

Thus, all documents chargeable with duty and executed in India are required to be stamped.

Instruments chargeable with duty and computation thereof:

Section 3 of the Indian Stamp Act, 1899 specifies the instruments which are chargeable to duty. It states:

Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the

amount indicated in that Schedule as the proper duty therefore, respectively, that is to say—

- a. Every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;
- b. Every bill of exchange payable otherwise than on demand, or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and
- c. Every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in India and is received in India:

Provided that no duty shall be chargeable in respect of

- 1) Any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;
- 2) Any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act 19 of 1838, or the Indian Registration of Ships Act, 1841 (10 of 1841), as amended by subsequent Acts;
- 3) Any instrument executed, by, or, on behalf of, or, in favour of, the Developer, or Unit or in connection with the carrying out of purposes of the Special Economic Zone:

Explanation.—For the purposes of this clause, the expressions “Developer”, “Special Economic Zone” and “Unit” shall have meanings respectively assigned to them in clauses (g), (za) and (zc) of section 2 of the Special Economic Zones Act, 2005.

INDIAN STAMP ACT 1899

SCHEDULE I

STAMPDUTY ON INSTRUMENTS

[See section 3

Description of Instrument	Proper Stamp duty
(1)	(2)
1. ACKNOWLEDGEMENT of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's passbook) or on a separate piece of paper when such book or paper is left in the creditors' possession: provided that such acknowledgement does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.	One anna.
2. ADMINISTRATION BOND , including a bond given under section 256 of the Indian Succession Act, 1865(10 of 1865), section 6 of the Government Savings Banks Act, 1873 (5 of 1873), section 78 of the Probate and Administration Act 1881 (5 of 1881), or section 9 or section 10 of the Succession Certificate Act, 1889 (7 of 1889)—	
(a) where the amount does not exceed Rs. 1,000,	The same duty as Bond No. 15 for such amount.
(b) in any other case.	Five rupees.
3. ADOPTION DEED , that is to say, any instrument (other than a Will) recording an adoption or conferring or purporting to confer an authority to adopt.	Ten rupees.
ADVOCATE , See ENTRY AS AN ADVOCATE (No. 30)	
4. AFFIDAVIT , including an affirmation or declaration in the case of persons by law allowed to affirm or declare, instead of swearing.	One rupee.
<u>Exemptions</u>	
Affidavit or declaration in writing when made	
(a) as a condition of enrolment under the Indian Army Act, 1911 (8 of 1911), or the Indian Air Force Act, 1932 (14 of 1932).	

(b) for the immediate purpose of being filed or used in any Court or before the officer of any Court; or,

(c) for the sole purpose of enabling any persons to receive any pension or charitable allowance.

5. **AGREEMENT OR MEMORANDUM OF AN AGREEMENT,**

(a) if relating to the sale of a bill of exchange;

(b) if relating to the sale of a Government security or share in an incorporated company or other body corporate;

Two annas.

Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share.

(c) if not otherwise provided for.

Eight annas.

Exemptions

Agreement or memorandum of agreement

(a) for or relating to the sale of goods or merchandise exclusively, not being a NOTE or MEMORANDUM chargeable under No. 43 ;

(b) made in the form of tenders to the Central Government for or relating to any loan;

**

**

AGREEMENT TO LEASE: See LEASE (No. 35).

6. **AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE,** that is to say, any instrument evidencing an agreement relating to

(1) the deposit of title-deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security); or,

(2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt

(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement;

The same duty as a Bill of Exchange [No. 13(b)] for the amount secured.

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(b) if such loan or debt is repayable not more than three months from the date of such instrument.

Half the duty payable on a Bill of Exchange [No. 13(b)] for the amount secured.

Exemption

Instrument of pawn or pledge of goods if unattested.

7. **APPOINTMENT IN EXECUTION OF A POWER**, whether of trustees or of property, movable or immovable, where made by any writing not being a will. Fifteen rupees.

8. **APPRAISEMENT OR VALUATION** made otherwise than under an order of the Court in the course of a suit

(a) where the amount does not exceed Rs.1,000. The same duty as a bond (No. 15) for such amount.

(b) in any other case. Five rupees.

Exemptions

(a) Appraisement or valuation made for the information of one party only, and not being in any manner obligatory between parties either by agreement or operation of law.

(b) Appraisement of crops for the purpose of ascertaining the amount to be given to a landlord as rent.

9. **APPRENTICESHIP DEED**, including every writing relating to the service or tuition of any apprentice, clerk or servant, placed with any master to learn any profession, trade or employment, not being **ARTICLES OF CLERKSHIP** (No. 11) Five rupees.

Exemption

Instruments of apprenticeship executed by a magistrate under the Apprentices Act, 1850 (19 of 1850) or by which a person is apprenticed by or at the charge of any public charity.

10. **ARTICLES OF ASSOCIATION OF A COMPANY** Twenty-five rupees.

Exemption

Articles of any Association not formed for profit

and registered under section,26 of the Indian Companies Act, 1882 (6 of 1882).

See also MEMORANDUM OF ASSOCIATION OF A COMPANY (No. 39).

11. **ARTICLES OF CLERKSHIP** or contract whereby any person first becomes bound to serve as a clerk in order to his admission as an attorney in any High Court. Two hundred and fifty rupees.

ASSIGNMENT See CONVEYANCE (No. 23), TRANSFER (No. 62), and TRANSFER OF LEASE (No. 63), as the case may be.

ATTORNEY See ENTRY AS AN ATTORNEY (No. 30), and POWER-OF-ATTORNEY (No. 48).

AUTHORITY TO ADOPT See ADOPTION-DEED (No. 3),

12. **AWARD**, that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit

(a) where the amount or value of the property to which the award relates as set forth in such award does not exceed Rs. 1,000;

The same duty as a bond (No. 15) for such amount.

(b) in any other case.

Five rupees.

Exemption

Award under the Bombay District Municipal Act, 1873 (Bombay Act 6 of 1873), section 81 or the Bombay Hereditary Offices, Act, 1874 (Bombay Act 3 of 1874), section 18.

13. **BILL OF EXCHANGE** [as defined by section 2(2)], not being a BOND, bank note or currency note—

**

**

(b) where payable otherwise than on demand

(i) where payable not more than three months after date or sight—

if the amount of the bill or note does not exceed Rs. 500;

Thirty paisa³⁶.

if it exceeds Rs. 500 but does not exceed Rs.

Sixty paisa³⁷.

³⁶ Substituted by S.O. 130(E), dated 28th January, 2004, (w.e.f. 1-3-2004)

³⁷ Ibid.

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1,000;	
and for every additional Rs. 1,000 or part thereof in excess of Rs. 1,000;	Sixty paisa ³⁸ .
(ii) where payable more than three months but not more than six months after date or sight	
if the amount of the bill or note does not exceed Rs. 500;	Sixty paisa ³⁹ .
if it exceeds Rs. 500 but does not exceed Rs. 1,000;	One rupee twenty-five paisa ⁴⁰ .
and for every additional Rs. 1,000 or part thereof in excess of Rs. 1,000;	One rupee twenty-five paisa ⁴¹ .
(iii) where payable more than six months but not more than nine months after date or sight—	
if the amount of the bill or note does not exceed Rs. 500;	Ninety paisa ⁴² .
if it exceeds Rs. 500 but does not exceed Rs. 1,000;	One rupee eighty ⁴³ paisa.
and for every additional Rs. 1,000 or part thereof in excess of Rs. 1,000;	One Rupee eighty paisa ⁴⁴ .
(iv) where payable more than nine months but not more than one year after date or sight	
if the amount of the bill or note does not exceed Rs. 500;	One rupee twenty five paisa ⁴⁵ .
if it exceeds Rs. 500 but does not exceed Rs. 1,000	Two rupees fifty paisa.
and for every additional Rs. 1,000 or part thereof in excess of Rs. 1,000;	Two rupees fifty paisa ⁴⁶ .
(c) where payable at more than one year after date or sight	
if the amount of the bill or note does not exceed Rs. 500;	Two rupees fifty paisa ⁴⁷ .
if it exceeds Rs. 500 but does not exceed Rs.	Five rupees ⁴⁸ .

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

1,000;

and for every additional Rs. 1,000 or part thereof in excess of Rs. 1,000; Five rupees⁴⁹.

14. **BILL OF (LADING** (including a through bill of lading) One rupee.

N.B.—If a bill of lading is drawn in parts, the proper stamp therefore must be borne by each one of the set.

Exemptions

(a) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1889 (10 of 1889), and are to be delivered at another place within the limits of the same port.

(b) Bill of lading when executed out of India and relating to property to be delivered in India.

Any instrument mentioned in Schedule I to the Indian Stamp Act is chargeable to duty as prescribed in the schedule.

These include affidavit, lease, memorandum and articles of company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy, partnership deed, proxy, share etc.

⁴⁹ Ibid.

Duty Payable on Several Instruments

As per Section 4, in case of a sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Re. 1 is payable.

Duty payable When Instrument Relate to Several Distinct Matters or When Instruments Come Within Several Descriptions of Schedule I

Under section 5, if one instrument relates to several distinct matters, the stamp duty payable is the aggregate amount of stamp duties payable on separate instruments. This section applies only when the instrument comprises of more than one transaction, and it is immaterial whether those transactions are of the same category or not.

When a person acts both in his personal capacity and in a representative capacity, such as a trustee, and there is a delegation of power by him in both those capacities, the position in law is exactly the same as if different persons have joined in executing a power in respect of matters, which are unrelated. There being no community of interests between the personal estate belonging to the executant and the trust estate vested in him, they must be held to be distinct matters⁵⁰.

However, as per section 6, if an instrument covering only one matter comes under more than one description given in Schedule then, the highest rate specified among the different heads will prevail.

Thus, if an instrument is so framed as to come within two or more descriptions in Schedule I and if the duties chargeable thereunder are different, the instrument will be chargeable only with the highest of such duties⁵¹.

Power to Reduce Stamp Duties

Under section 9 of the Act, the Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of the whole

⁵⁰ *Member, Board of Revenue v. Arthur Paul Benthall*, AIR 1956 SC 35.

⁵¹ *Saiyed Shaban Ali v. Sheikh Mohd. Ishaq*, AIR 1939 All 724.

or part of territories and also for a particular class of persons. Government can also compound or consolidate duties in case of an incorporated company or other body corporate in the case of issue or transfer (where there is a single transferee, whether incorporated or not) of shares or debentures, bonds or other marketable securities. Under this section the term 'Government' means the Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and 'State Government' in case of stamp duties on other documents.

Time of Stamping Instruments

Sections 17-19 prescribe the time for stamping of instruments. Section 17 lays down the time for stamping an instrument executed within India, while sections 18 and 19 prescribe the time for stamping instruments executed out of India but received in India.

Generally, the stamp duty is to be paid either before execution of the document or on the day of execution of the document. It is either paid by a purchaser or transferee or as mutually agreed in the agreement between the parties.

Under section 17, an instrument executed in India is required to be stamped either before or at the time of its execution. The word 'execution' means signature, and an instrument liable to stamp duty becomes chargeable as soon as it is signed by the executants⁵².

If an instrument is not stamped before or at the time of execution, it will be deemed to be an instrument not duly stamped in accordance with the requirements of law and all the consequences of non-stamping would follow.

If the executants of a document has already finished the execution of the document and in the eye of law, the document could be said to have been executed, any subsequent stamping, however, close in time, could not render the document as stamped at the time of execution.

However, if a court orders rectification of an instrument, the rectification has a retrospective effect and it goes back to the date of execution of the instrument. In fact, in the eye of law, the document ceases to exist and only the document which has existence is the document which is rectified in accordance with the decree of the court.

⁵² *Shams Din v. Dollector, Amritsar*, (1936) 17 Lah 223.

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Section 18 provides that instruments, not being bills of exchange or promissory notes executed out of India can be stamped within three months after these are first received in India. This section only applies to those documents executed out of India which attracts duty according to the law in India, that is, are chargeable under section 3(c). An instrument executed out of India, if it does not relate to any property in India, or any matter or thing done or to be done in India and as such is admissible in evidence without being stamped in India does not attract the provisions of this section⁵³. The section allows an instrument executed out of India to be stamped within three months after it has been received in India. Such a document, if stamped outside three months is not admissible in evidence⁵⁴.

Further, where a document is executed out of India but is intended to operate in India, the Courts in India need not see whether it complies with the stamp law of the country in which it was executed; it is sufficient if it complies with the stamp laws of India.

Section 19 states that – in the case of a bill of exchange or a promissory note made out of India, it should be stamped first by the holder in India before he presents it for payment or endorses or negotiates it in India. Thus, it lays down that bills of exchange payable otherwise than on demand and notes made or drawn out of India must be stamped and the stamp cancelled before the first holder in India deals with the instrument, i.e., presents it for acceptance or payment, or endorses, transfers or otherwise negotiates the same in India⁵⁵.

It is pertinent to note that a promissory note executed outside India is not compulsorily stamp-able in India under the Stamp Act. Thus, when a suit is filed on a promissory note executed as well as endorsed outside India, it need not be stamped, as required under section 19⁵⁶.

Types of Stamps and Modes of Using them

Payment of Stamp Duty –

As per section 10 of the Indian Stamp Act, 1899

⁵³ *Narayan v. Bapuji*, 7 Bom HCR (AC) 140.

⁵⁴ *Ali Mohammad v. Jagannath Prosad*, 26 All LJ 823.

⁵⁵ *Mahomed Rowthan v. Mohamed Hussain Rowthan*, 22 Mad 337.

⁵⁶ *V.R.Sonai v. Chinniah Konar*, (1969) 1 MLJ 590

- a. Except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments by means of stamps, -
 - a) according to the provisions herein contained; or
 - b) when no such provision is applicable thereto,
as the State Government may by rule direct.
- b. The rules made under sub-section (1) may, among other matters, regulate, in the case of each kind of instrument, the description of stamps which may be used; in the case of instruments with impressed stamps, the number of stamps which may be used;
- c. In the case of bills of exchange or promissory notes the size of the paper on which they are written.

This section enacts that the duties imposed by this Act are to be paid in stamps, and the kind of stamp to be used must be as specified in this Act, or the Rules framed under this section.

The general rule is that an instrument should be written on stamp paper with the stamp of the requisite amount embossed or engraved on it, subject to the exceptions prescribed.

Payment system for Stamp Duty –

Stamp Duty amount can be paid either by Cash/ Bank Draft/ Pay Order/ Cheque/ Electronic Fund Transfer.

Categories and Types of Stamp Duties Payable

Stamp Duty paid under the Indian Stamp Act, 1899 and Stamps used in payment of fees under the Court-fees Act 1870. The stamps used under the Indian Stamp Act, 1899 and The Bombay Stamp Supply and Sale Rules, 1934, can broadly be divided into:

1. Impressed stamps, including
 - a) Labels affixed and impressed by the proper officer;

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- b) Stamps embossed or engraved on stamped paper;
- c) Impression by franking machine;
- d) Impression by any such machine as the State Government may, by notification in the Official Gazette, specify

2. Adhesive stamps

Adhesive Stamps and use thereof

Adhesive stamp usually refers to a stamp with gum on the back which has to be moistened for pasting it on a document. As per section 11 of the Indian Stamp Act 1899. The following instrument may be stamped with adhesive stamps:

- a. Instruments chargeable with a duty not exceeding ten naye paise, except parts of bills of exchange payable otherwise than on demand and drawn in sets;
- b. Bills of exchange and promissory notes drawn or made out of India;
- c. Entry as an advocate, vakil or attorney on the roll of a High Court ;
- d. Notarial acts ; and
- e. Transfers by endorsement of shares in any incorporated company or other body corporate.

Cancellation of adhesive stamps

- 1) As per section 12 of the Indian Stamp Act, 1899:
 - a) Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again; and
 - b) Whoever executes any instrument on any paper bearing an adhesive stamp shall at the time of execution, unless such stamp

has been already cancelled in the manner aforesaid, cancel the same so that it cannot be used again.

- 2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.
- 3) The person required by sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner.

This section imposes an obligation on the person who affixes an adhesive stamp or executes an instrument which is stamped with an adhesive stamp to cancel the same. The object of cancellation, as has been made clear in sub-section (1), is to prevent the same stamp from being used more than once⁵⁷.

Impresses Stamps and writing thereof:

Impress means to make a mark or design on (an object) using a stamp or seal. It means to apply a mark to something with pressure. The phrase 'impressed stamp' includes labels affixed and impressed by a proper officer, and stamps embossed or engraved on stamped paper. Maharashtra, Karnataka and Kerala have their own State Stamp Act, but many States follow the 1899 legislation.

As per section 13, every instrument written upon paper stamped with an impressed stamp shall be written in such a manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument.

The provisions of this section are applicable to instruments written on paper bearing impressed stamps. The section requires that such an instrument must be so written that the stamp appears on the face of the instrument, and that the stamp cannot be used for any other purpose. The object of the section is to prevent the stamp paper from being used for a second time for another instrument⁵⁸.

⁵⁷ *Sohanlal v. Raghunath*, 37 PLR 494.

⁵⁸ *Orient Spinning Mills Ltd. v. Amitebh Textile Mills Ltd.*, 1972 (1) CWR 41.

Stamp Papers

There are two categories of stamps papers: Judicial and Non-Judicial. Both are issued by courts with a certain validity period and purpose mentioned at the back of the stamp paper. The document which is chargeable with Stamp Duty should be prepared on the Non-Judicial Stamp Paper of appropriate value.

From 01/05/1994, stamp paper have to be purchased in the name of one of the parties to the instrument/ document, otherwise it will be as if no stamp paper was used. Also, stamp paper is valid for a period of six months from the date of purchase exceeding which it will be treated as ordinary paper.

Duly Stamped: Meaning

According to section 2(11), the term 'Duly stamped' means that the instrument bears an adhesive or impressed stamp of not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India.

As per the definition of the expression "duly stamped" it is necessary that an instrument to be duly stamped should be stamped within a stamp not only of the amount required by law but also in the manner so required⁵⁹. A deed in order to be duly stamped must not only bear the required stamp but such stamp must have been cancelled at the time of affixation, or if it had been affixed at a previous time, at the time of execution.

In case of adhesive stamps, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way that they cannot be used for other instruments and that the stamp appears on the face of the instrument. If a stamp is not so used, the instrument is treated 'un-stamped'. Similarly, when stamp duty paid is not adequate, the document is considered 'not duly stamped'.

Instruments not Duly Stamped:

Section 35 of the Stamp Act mandates that no instrument, chargeable with duty shall be –

⁵⁹ Reference under Stamp Act, Section 46, 7 Mad 178.

- Admitted in evidence for any purpose whatsoever by any person authorized by law (by Courts) or by consent of parties to record evidence (by Arbitrators); or
- Shall be acted upon; or
- Registered; or
- Authenticated by any such person as aforesaid, or by any public officer.

However, an insufficiently stamped instrument is not an *invalid* document, and it can be admitted in evidence on payment of penalty. The penalty can be levied on all instruments, except a promissory note or a bill of exchange or an instrument chargeable with a duty to ten paise.

Thus, the section prohibits the admission in evidence of any unstamped document but the provisos set forth the conditions on which a defective document may be admitted, and further enjoins that no document can be admitted till after the payment of the duty and penalty⁶⁰.

The words "duly stamped" in section 35 refer to the time when the document is tendered in evidence. When a document is tendered in evidence, the only question for the Court is whether it bore a proper stamp when it was tendered⁶¹. However, it is pertinent to note that such chargeable instruments can be accepted as evidence in a criminal court.

Further, un-duly stamped instruments are liable to be seized by any Public Officer or Court before whom they are produced or whenever said documents are tendered before them, in course of their duties, as provided under section 33.

Validity of a Stamp Paper:

The Stamp Act does not prescribe any expiry date for the use of a stamp paper. Section 54 of the Act, merely provides for refund of unused stamp papers, which are not soiled or rendered unfit or useless. The refund can be claimed by surrendering such stamp papers to the Collector, provided that

⁶⁰ *Rahim Baksh v. Mohammad Ayub*, 3 Lah 282.

⁶¹ *Motilal v. Jagmohan Das*, 67 Bom LR 699

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they were purchased within six months, next preceding the date on which they were surrendered.

Thus, the section is only for the purpose of seeking refund of the value of the unused stamp paper, and not for the use of the stamp paper. Accordingly, the section does not require a person who has purchased a stamp paper, to use it within six months of purchase.

Thus there is no impediment for a stamp paper purchased more than six months prior to the proposed date of execution, being used as a document⁶².

E-Stamping

E-stamping is a computer-based application and a secured electronic way of stamping instruments. The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. It is a web-based electronic way of paying stamp duty to the Government.

Government of India, Ministry of Finance, Department of Economic Affairs has appointed Stock Holding Corporation of India Limited ("SHCIL") to act as Central Record Keeping Agency ("CRA"). The CRA is responsible for User Registration, Imprest Balance Administration and overall E-Stamping Application Operations and Maintenance.

SHCIL has already launched e-stamping in the states of Gujarat, Karnataka, NCT of Delhi and Maharashtra. The state of NCT of Delhi government has made e-Stamping compulsory.

Features of e-Stamping

- On-line Stamp Duty Certificate can be generated within minutes
- Stamp Certificate generated is tamper proof
- It is a secured electronic payment gateway to the Government
- Authenticity of the Certificate can be checked through its inquiry module

⁶² *Thiruvengada Pillai v.. Navaneethamal & Anr.*, AIR 2008, SC 1541.

- Stamp Certificate generated has a Unique Identification Number ("UIN")
- Specific denomination is not required.

Benefits of e-Stamping

- 1 Easy accessibility and fast processing
- 2 Security
- 3 Cost savings
- 4 User friendly
- 5 Trouble free maintenance

Some Important Terms

- UIN

Unique Identification Number (UIN) is a Stamp Certificate number mentioned on the Stamp Certificate. Anybody having the Unique Identification Number can check the authenticity of the Certificate at www.shcilestamp.com.

- CRA

Central Record Keeping Agency is responsible for User Registration, Imprest Balance Administration and overall E-Stamping Application Operations and Maintenance. CRA appoints ACC's and Travelling Vendors who issue Certificates to the clients at their counters. Stock Holding Corporation Of India Limited (SHCIL) is the only CRA appointed by the Government of India.

- ACC

ACC means Authorised Collection Centre (ACC). It is an agent appointed by SHCIL. ACC is the intermediary between the CRA and Stamp Duty payer. The following can be appointed as ACCs:

1. Bank & Financial Institutions

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2. Law firms
3. Chartered Accountant firms
4. Professionals

To register as an ACC, the above eligible applicants should submit the application form along with the required documents mentioned in the application form to the SHCIL. ACCs need to pay a nominal registration fee and interest free security deposit. ACCs need to maintain a running imprest balance.

The application form can be downloaded from the link:
<http://shcilestamp.com/E-Download.html>

- **Stamp Certificate**

The client has to approach an ACC appointed by SHCIL and fill up the application form prescribed in the e-Stamping system. Stamp Certificate is generated after the realization of funds.

After submitting a duly filled application form, the ACC will enter the details into the system and a Stamp Certificate would be generated immediately in case of cash and after realization of funds in case of Cheque/ Demand Draft/ Pay order. For cancellation of stamp certificates the Competent Authority at the Stamp Office appointed by the State Government has to be approached.

Deeds

A deed is an instrument which is written on a paper or even a parchment or vellum executed by a party under seal and delivered as his act, or deed expressing that the person so named makes, confirms, concurs in, or consents to some assurance, other than by way of testamentary disposition, of some interest in the property or some legal or equitable right, title or claim or undertakes or enters into some obligation, duty, or agreement enforceable at law or in equity or does or concurs in some other act affecting the legal relation or position of a party to the instrument or some other persons or corporation⁶³.

A 'document' has a wider import than a deed. Generally, anything written is document, however, in legal parlance; a document is a writing which creates rights, duties or obligations between parties. A deed though a document, is however, restricted to a writing relating to or recording any transfer of a property or any dealing or transaction between parties relating to property. Thus, a deed is a document evidenced in writing to record transactions between two or more persons.

In the Middle Ages, deeds were precious pieces of parchment, expertly styled and often bearing unique seals as a proof of their authenticity. Some deeds were single sheets of parchment that recorded the title information twice, after which the parchment was torn in half, deliberately, so that two complete copies of the deed were created. To test their authenticity, the two halves were brought together to see if they matched.

A deed is a legal instrument used to grant a right, and part of the broader category of documents under seal. Deeds are like contracts, as they require the mutual agreement of more than one person. Deeds can therefore be distinguished from covenants, which being also under seal, are unilateral promises.

"Any instrument under seal is a deed if made between private persons. It must be signed, sealed and delivered. A deed must either (a) effect the transference of an interest, right of property, or (b) create an obligation binding on some person or persons, or (c) confirm some act whereby an

⁶³ Halsbury's Laws of England. 4th Ed., Vol. 12, Para 1305.

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interest, right of property has already passed" (Odger's *Construction of Deeds and Statutes*, , p.1. Please use your formatting procedures for including this reference)

Under the Common Law, in England, it was not essential to sign a deed, as long as it was sealed and delivered. But under the Law of Property Act, 1925 the executants were required to sign or affix a mark on the deed.

Historically, under Common Law, an instrument could be a valid deed, if it conformed to the following:

- It must indicate that the instrument itself conveys some privilege or thing to someone. This is indicated by using the word "hereby" or the phrase "by these presents" in the sentence indicating the gift.
- The grantor must have the legal ability to grant the thing or privilege.
- The person receiving the privilege or thing must have the legal capacity to receive it.
- A seal must be affixed to it. Most jurisdictions have eliminated this requirement and replaced it with the signature of the grantor with some number of signing witnesses. Most jurisdictions also require that the deed be acknowledged before a public notary or a civil law notary.
- It must be delivered to and accepted by the recipient.

Conditions attached to the acceptance of a deed are known as covenants.

Deeds: India

The term "deed" has not been defined in India. However, the terms "instrument" and "document" have been defined.

In India, no distinction is made between instruments and deeds. The words "deed", "document" and "instrument" are used interchangeably in section 17 of the Registration Act, 1908⁶⁴.

As discussed earlier, the word "document" is defined in very similar terms in various Acts in India: such as the Indian Evidence Act, 1872, the General

⁶⁴ *Joharmal v Tejaram Jajrup* ILR 17 Bom 235.

Clauses Act, 1897 and the Indian Penal Code 1860. As per these definitions, "document" has been used in a wide sense, and it includes instruments, deeds, agreements, and the like.

The term "Instrument" is defined in the Transfer of Property Act, 1882 and the Indian Stamp Act, 1899. Under the Transfer of Property Act, 1882 "Instrument" means a "*non-testamentary instrument*". Under the Indian Stamp Act 1899, "Instrument" "*includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded*".

Naming a Deed

The nature of a deed, that is whether, for example, it is a conveyance or a mortgage is at times indicated by naming the same in the beginning of the deed itself by words. Whatever may be the name given to a document by the parties, the document will have to be examined in the light of the language employed in it and the object sought to be achieved by it before any decision in regard to its effect can be arrived at.

In England, the practice of according a nomenclature to deeds has been statutorily recognized under section 57 of the Law of Property Act, 1925, which states –

"Any deed whether or not being an indenture may be described (at the commencement thereof or otherwise) as a deed simply or as a deed of conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected."

India does not have any such law. However, in order to determine the nature of the instrument, neither the nomenclature nor the language which parties may choose to employ in framing the document is decisive. What is decisive is the actual nature and character of the transaction intended by the executants. Thus, the nomenclature of a document is hardly conclusive. Much importance cannot be attached only to nomenclature, since it is the real intention which is the guiding factor⁶⁵. –

⁶⁵ *Tamboli Ramanilal v Ghanchi Chimantlal* AIR 1992 SC 1236; *N.B Subrahmanyam v Alapati Hymavati* (1996) 9 SCC 388.

Requirements of a Deed

The basic requirements of a valid deed are:

1. All parties must be legally competent, i.e., of legal age and of sound mind;
2. There must be a statement of consideration;
3. There must be a detailed description of the subject matter of the deed;
4. It must be signed by the seller(s)/executants(s);
5. There must be delivery and acceptance of the deed.

Anatomy of a Deed

1. Title and name of the Document
2. Place
3. Date
4. Parties
5. Recitals
6. Testatum
7. Consideration
8. Receipt
9. Operative Portion
10. Description of Property
11. Map or Plan
12. All Estate Clause

13. Reservations and Exceptions

14. Covenants

15. Delivery of Title Deeds

16. Schedule of the Property

17. Execution of Signatures

18. Attestation

19. Registration

Construction and Interpretation of Deeds and Documents

A draftsman is not only required to draft a document but may also be required to interpret documents drafted by others. Therefore, knowledge of the basic rules of construction and interpretation of documents is important. These are detailed below:

- The Universal Rule of Construction is that when an instrument is susceptible to two meanings, one that is reasonable and probable and the other that leads to absurdity and frustration, then the latter must be avoided;
- The cardinal rule of interpretation is that one has to gather the 'intention' from the words of the document. For that purpose the language of the entire document has to be taken into consideration;
- The surest way of construing an instrument is to construe the instrument in the sense, which would have been applied when it was drawn up, i.e. if an instrument is contemporaneous in point of time with other documents and if those two sets of documents have been understood and acted upon by parties in a particular manner, then even though the writing of such a document may prima facie give a particular meaning to it, yet the same has to be read in conjunction with such other documents

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and interpreted in the light of subsequent conduct of the authors of the former instrument;

- In construing documents, one must have regard not to the presumed intention of parties, but to the meaning of the words used;
- The real nature of a document and transactions thereunder have to be determined with reference to all the terms and clauses of that document and all the rights and results flowing therefrom;
- The legal effect of a transaction embodied in a document depends mainly upon the intention of the parties;
- If the Recitals in the document bring out the facts and circumstances clearly and the operative portion of the document is in harmony with the recitals, then the document is easy to interpret in terms of its scope, effect, and intention of the parties;

A Recital is that portion of the deed which gives the surrounding circumstances in which the transaction has taken place. The operative portion of a deed in say, , a sale deed of a property, is the actual putting of the property in the possession of the buyer. The operative words signify the completion of a transaction. In the case of sale and mortgage the words used are Grant, Convey, etc. and in the case of lease the words used are demise or grant by way of lease. The operative part shall consist of the expression depending upon the nature of the transfer intended to be made;

- If there is inconsistency within the parts of a document or ambiguity in its wording, the courts are called upon to interpret the documents.

The rules of interpretation of a Deed can be summarized as follows⁶⁶:

- a. Words capable of more than one construction are to be construed so as to calling into effect the expressed general intention of the parties;
- b. If owing to some rule down, a deed fails to take effect in the manner expressed, it will, if possible be construed so as to carry into effect the expressed general intention of the parties;

⁶⁶ Norton on Deeds, 2nd Ed. Ch III.

- c. When words used in a deed are in their literal meaning unambiguous and when such meaning is not excluded by the context and is sensible with respect to the circumstances of the parties or the terms of executing the deed such a literal meaning must be taken to be that in which the parties used the words;
- d. If there is ambiguity in the language employed, then surrounding circumstances have to be considered to determine the intention of the parties;
- e. If technical legal terms are used, the technical meanings must be given to them unless excluded by the context;
- f. Where a document has to be construed, its intention must be gathered in the first instance from the document itself;
- g. When a transaction is represented by more than one deed, all the deeds must be construed together and one may be read to explain the other;
- h. If two clauses or provisions in a deed are repugnant to one another, the first shall be received and the latter will be rejected, unless there is any special reason to the contrary, i.e. when there is a conflict between two clauses in a deed, and they are irreconcilable, the earlier clause overrides the latter. If it is possible to reconcile the clauses, effect has to be given to both of them;

If an earlier clause is followed by a latter clause, which destroys altogether the obligation created by the earlier clause, it is rejected and the earlier clause prevails. However, if the latter clause does not destroy, but only qualifies the earlier clause, then the two have to be read together and effect is to be given to intention of parties as disclosed by the deed as a whole;

- i. Repugnant words should be rejected; if any relevant words are omitted, they should be supplied; words may be transferred, parenthesis may be inserted and false or incorrect grammar may be discarded, if the intention of the parties appears, otherwise, to be very clear;
- j. If however, despite best endeavours and application of extensive evidence, the language of a deed is ambiguous as to the person or thing

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intended and as to what is to be done, the deed as a whole or any clause suffering from such defect may be declared as void for uncertainty;

- k. Mere false description of subject matter does not vitiate a deed, if there is sufficient certainty as to the object and intention of the parties.

Brief History of Document Drafting

It is almost certain that documents of the same nature, issued from the same office, or even from distinct offices, will bear a close resemblance to one another.

Those charged with the execution and expedition of such documents come naturally to employ the same formula in similar cases; moreover, the use of such formula permits the drafting of important documents to be entrusted to minor officials, since all they have to do is to insert in the allotted space the particular information previously supplied to them. Finally, in this way every document is clothed with all possible efficiency, since each of its clauses, and almost every word, has a meaning clearly and definitely intended. Uncertainties and difficulties of interpretation are thus avoided, and possibilities of lawsuits, too.

This legal formalism is usually known as the "style" or habitual diction of chanceries and the documents that issue therefrom. It represents long efforts to bring into the document all the necessary and useful elements in their most appropriate order, and to use technical expressions suited to the case, some of them more or less essential, others merely as a matter of tradition.

In this way grew the true art of drafting public documents or private acts, which became the monopoly of chanceries and notaries, which the layman could only imperfectly imitate, and which in time developed to such a point that the mere "style" of a supposititious deed has often been sufficient to enable a skilful critic to detect any kind of forgery.

Early History

Formularies are medieval collections of models for the execution of documents (acts), public or private; a space being left for the insertion of names, dates, and circumstances peculiar to each case. Their modern equivalent is a form.

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The Roman notaries had their own traditional formula, and the drafting of their acta was subject to strictest of details. Nevertheless the formularies drawn up in the Middle Ages have not come to us directly from the Romans, but from the monastic and ecclesiastical schools. They taught law and the art of drafting public and private documents. It was called "*dictare*", as opposed to "*scriber*", i.e., the mere material execution of such documents.

To train the "*dictators*", as they were known, specimens of public and private acta were placed before them, and they had to listen to commentaries on them. Thus arose the yet extant formularies, between the fifth and the ninth centuries. These models were sometimes of a purely academic nature, but their number is small; in almost every case they are taken from real documents, in the transcription of which the individualizing references were suppressed, to make them take on the appearance of general formula; in many instances, nothing was suppressed.

The formula deal with public documents: royal decrees on civil matters, ordinances, etc.; with documents relative to legal processes and the administration of justice; or with private deeds drawn up by a notary: sales, exchanges, gifts to churches and monasteries, transference of ecclesiastical property, the manumission of slaves, the settlement of matrimonial dowries, the execution of wills etc. Finally, there are deeds which refer solely to ecclesiastical concerns: consecrations of churches, blessings of various kinds, excommunications, etc.

Later History

In the tenth century, these formularies ceased to be in universal use; in the eleventh, these were used rarely; other methods of training notaries were introduced. Copies of letters were no longer placed before them. In their stead, special treatises of instruction are prepared for these officials, and manuals of epistolary rhetoric appear, with examples scattered here and there throughout the text, or collected in separate books.

Drafting in Other Countries

A strong movement for the use of plain English in legal and legislative writing and drafting has been launched in the USA, UK, Canada, Australia and New Zealand. But the knowledge, study and use of these techniques is almost absent in India.

The UK Companies Act, 2006 is a landmark in drafting statutes in plain language; a masterpiece of statutory drafting in plain English, it has the following features:

- The elimination of "shall" and "shall not" except to convey the future.
- The use of "must" and "must not" instead of "shall" and "shall not" to convey obligation and prohibition respectively.
- The use of present tense.
- The use of short sentences (in the form of several sub-sections).
- The use of simple words and phrases.
- The use of active voice, as far as possible.

The most important feature of the UK Act is the near elimination of "shall" and "shall not," and elimination of outdated legalese, such as "hereby", "thereby", "whereby", "hereinafter", "herein below", "in the event of", "notwithstanding", and "the like".

Drafting

The term "drafting" is defined as the practice, technique, or skill involved in preparing legal documents – such as statutes, rules, regulations, contracts and wills, that set forth the rights, duties, liabilities and entitlements of persons and legal entities⁶⁷.

"Drafting" a document would imply making a rough copy of a document or an agreement. It is the most demanding of all professional skills as it requires knowledge of law, the ability to deal with abstract concepts, investigative instincts, an extraordinary degree of prescience, and organizational skills. A good draftsman has to be direct, simple, brief, vigorous and lucid.

It is often said that *"The particular qualities that distinguish the modern style of drafting – the use of definitions, division into numbered paragraphs and sub-paragraphs with marginal notes, the growing disuse of the form 'shall' in stating circumstances and conditions, the use of one word (as 'convey' or*

⁶⁷ Black's Law Dictionary, 8th Ed. Thompson West, p. 531.

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'assign') for the jumble (grant, bargain, sell, alienate, release, confirm and enforce or bargain, sell, assign, transfer, set-off and confirm) that had often previously been necessary or thought to be so are to be found in any current set of precedents.⁶⁸

Clarity

The golden rule of writing is that the words should convey to the reader the exact meaning of the writer. Modern drafting should aim at precision and clarity.

*Writing in Plain Language*⁶⁹ implies avoiding complex words and phrases and instead using plain, simple words and phrases; avoiding inappropriate jargon, archaic language, unnecessary verbiage; pedantic superfluities and antiquated sentence structure⁷⁰. –

The following are the essential elements of drafting:

- Consistency – complete internal consistency in thought, expression and terminology is the sine qua non of good drafting. Substantive ideas gathered from the client have to be woven into well-knit thoughts and they have to be expressed in a terminology employed consistently. The use of different words to denote the same idea must be carefully avoided because they are capable of causing confusion and misunderstanding. The same idea must be expressed in a consistent way and different ideas have to be expressed differently. This principle of consistency has to be applied to words, phrases, sentences, paragraphs, arrangement and format.
- Coherent Arrangement – it means the logical arrangement of ideas systematically. The ideas have to be expressed in a coherent and logical arrangement. This would save the document from a lot of substantive inadequacies. The arrangement of ideas, words, phrases and sentences has to be in a logical order.
- Normal Language – the language employed in drafting must be one, which is commonly used and understood language, i.e. the words and

⁶⁸ E.L. Piesse & Gilchrist Smith : The Elements of Drafting

⁶⁹ Plain Language also called plain English, is language that everyone in your audience can easily understand; The Plain Language Association International.

⁷⁰ Opinion Writing, Oxford University Press

phrases used in the draft must denote their normal senses. Words used in commercial behaviours must not be employed in a sense other than that as understood by the men of commerce and business. Legal drafting is not creation of literature, no rhetoric or symbolism is capable of carrying out the really intended meaning. All the words of doubtful meanings have to be avoided and only those words and phrases have to be employed which carry a definite and well established meaning.

- Punctuality – the slavish adoption of precedent form, even one of ancient lineage, without considering whether its language accords with modern conditions, must be deprecated. It would be a step in the right direction if a consistent attempt were made to introduce punctuation.

The following points need to be borne in mind with regard to drafting:

1. The Purpose of the Document
2. Accuracy
3. Syntax (arrangement of words in a sentence)
4. Style
5. Active / Passive Voice
6. Use of Short Words
7. Proper Punctuation
8. Layout and Order

Examples of Poor Drafting:

a. Pomposity –

The term implies pretentiousness, i.e. full of high-sounding phrases or characterized by excessive self-esteem⁷¹. Consider the following clause of an agreement:

⁷¹ Merriam-Webster Collegiate Dictionary 11th Ed.

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The borrower must give more than one and less than three days' notice to prepay interest.

This statement could simply have been written as "The borrower must give notice of two days to prepay the interest", or, if timing is critical under the contract, "In case of prepayment of interest, a prior notice between 24 and 48 hours is required to be given by the borrower".

b. Tautology –

Tautology means using different words to say the same thing twice, where the additional words fail to provide additional clarity, when repeating a meaning⁷². For example:

The client shall use the suite only for office purposes and for no other purpose.

The "and for no other purpose" in the clause, does not add clarity and is thus redundant and should be avoided.

c. Ambiguity –

Ambiguity means the quality or state of being ambiguous, i.e. doubtful or uncertain. Consider the following clause:

This agreement may be terminated by two months' notice after 31 March 2006.

This clause is capable of two distinct meanings:

- That the notice has to be given after March 31, 2006; or
- That the notice

Does it imply that notice has to be given after that date, or that it only need expire after that date

d. Mistake

... replacement carpets to be approved by the landlord which approval shall not be unreasonably withheld unless of a like quality and of a similar colour and design to those existing.

⁷² Ibid.

[Almost certainly a negotiating mistake (the clause originally omitting the words in italics)].

e. Being too specific –

In the case of *Smith v Garrard* [2004] a covenant provided⁷³:

'Not at any time to park vehicles upon or place any articles upon or in any way obstruct the free passage of any part of the Roadway over which other persons have rights of way'

However, this did not stop persons from parking cars.

'Other persons', as a matter of law, did not have right of way over the whole of the roadway, so parking a car did not obstruct that right. This is an example of trying to say too much in one sentence – and of succeeding. The following points arise:

- (1) It would have been better simply to refer to the "road" and not "the right of way".
- (2) "Any part" suggests there might be parts over which persons did not have right of way. Similarly "vehicles", "articles", "upon", "roadway" dilute the meaning of the clause.

The following would have probably sufficed:

'Not at any time to –

- (1) park a vehicle on the road; or
- (2) place any other article on the road.'

Use of Legalese In Drafting

The light hearted phrase "*Do it today. Tomorrow it may be illegal*", speaks volumes about the fast changing pace and complexity of laws and the prevailing uncertainty in the absence of clarity and precision in drafting. The

⁷³ <http://www.practicalconveyancing.co.uk/content/view/10318/1118/>

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purpose of any writing is to put across some message to be read and understood by the reader.

Legalese may be defined as that part of the language of draftsmen which is not used in ordinary writing. It may take many forms and may be the inclusion of some formal words, like "*I hereby call upon you*" instead of "*I call upon you*", or "*said*" and "*such*", as adjectives. Whatever form it may take, legalese is the long winded usage of excess words of irritating tautology.

Flaws in Legalese:

1. Complicated words
2. Long sentences
3. Outdated words
4. Tautology
5. Excessive use of passive voice
6. Jargon
7. Distance between related words
8. Roundabout speech
9. Nominalization
10. Negative language

Commonly used Legalese:

- "said" and "aforesaid" instead of "the" and "that"
- "commence" instead of "begin" or "start"
- "in the event of" instead of "if"
- "in favour of" instead of "for"

- "hereinbelow" instead of "below"
- "hereunto" instead of "to"
- "have knowledge of" instead of "know"
- "is hereby required" instead of "must"
- "situate" instead of "situated"
- "within a period of 30 days" instead of "within 30 days"
- "with effect from" instead of "from"
- Unnecessary usage of – "the same"; "hereby", "thereby"; "any"; "each"; "every"; "all"

Principles of Drafting

1. Preparing an outline of the proposed draft.
2. Establishing a single principle of division and using it to divide the subject matter into major topics.
3. Arranging the items in the text in a logical sequence.
4. Headings
5. Clear writing
6. Use of concrete words. It is pertinent to note that Government writing often concerns abstract subjects. But abstract words can be vague and open to different interpretations. Therefore, instructions have to be put in simple, concrete words.

Some common examples:

Avoid:	Use:
Vehicles	Automobiles

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Firearms	Rifles
Aircraft	Helicopters

7. Do not use gender-specific terminology. Avoid gender-specific job titles:

Avoid	Use
Crewman	Crew member
Draftsman	Drafter
Enlisted men	Enlisted personnel
Fireman	Firefighter
Foreman	Supervisor
Man hours	Hours worked
Manpower	Personnel, workforce

Avoid the gender-specific pronoun if the antecedent is male or female.

8. Write short sentences

Readable sentences are simple, active, affirmative, and declarative. The more a sentence deviates from this structure, the harder it is to understand. Long, run-on sentences are a basic weakness in legal documents.

Legal documents often contain conditions that result in complex sentences with many clauses. It is difficult to determine the intended meaning of such a sentence. Use short paragraphs, a writer may improve the clarity of a document by using short, compact paragraphs. Each paragraph should deal with a single, unified topic. Lengthy, complex, or technical discussions should be presented in a series of related paragraphs.

Guidelines To Improve Drafting Skills

1. Determine the purpose of a document and prepare an outline
2. Establish a single principle of division and use it to divide the subject matter into major topics.

3. Arrange the items within a topic in a logical sequence
4. Follow the rule: one sentence, one idea
5. Be accurate
6. Brevity is the soul of good writing
7. Avoid excessive use of adjectives and adverbs
8. Be careful with syntax (the arrangement of words in a sentence)
9. As far as possible, use active voice
10. Use more f short and concrete words
11. Use proper punctuation
12. Avoid using gender-specific terminology.
13. Use short words instead of a group of words or a phrase
14. Write short and simple sentences.
15. Avoid including unnecessary or irrelevant material
16. Avoid Tautology
17. Avoid Latinisms: that is, prefer English words and phrases to non-English ones

CONVEYANCING

The term Conveyance in legal parlance means the voluntary transfer of a right or of property. It is transfer of an interest in real property from one living person to another, by means of an instrument such as a deed. Accordingly, conveyancing is the act or business of drafting and preparing legal instruments, especially those that transfer an interest in real property⁷⁴

Conveyancing is the science of validly creating, transferring and extinguishing rights in property by written deeds of various kinds. It is based on the knowledge of what rights can exist in or over particular kinds of property, what ends can be secured within the existing rules of law, and what machinery can appropriately be employed to achieve particular ends.

According to Section 2(10) Indian Stamp Act, 1899, conveyance includes a sale and every instrument by which property, movable or immovable, is transferred.

It is a transfer within the meaning of Section 5 of the Transfer of Property Act, 1882.

Conveyance also means the transfer of the title of ownership of movable and immovable property from the original owner(s) to the ultimate purchaser(s) by executing a conveyance deed.

The method or system of drafting a deed is also known as conveyancing. For the purpose of transfer of ownership, interest, title in an immovable property or an agreement is prepared between the original owner/s and the purchaser/s evidencing the transfer of right, title and interest in the movable or immovable property in favour of the purchaser/ transferee and such an agreement is known as a conveyance deed.

This document has to be executed by affixing a proper stamp duty as per applicable Stamp Act, incorporating the legal provisions of the applicable Acts such as the Transfer of Property Act, 1882, Registration Act, 1908, Indian Contract Act, 1872, Income Tax Act, 1961, etc.

⁷⁴ Ibid at 10, pp. 357-358.

Advantages of Conveyance:

- **Proper title-** When a piece of land or a building is conveyed in the name of purchasers/Society, the purchasers/Society gets a proper title of the property, which means the property gets transferred in his/its names. All future municipal tax bills are drawn in their names;
- **Retaining additional Floor Space Index ("FSI")-** A plot of land has a development potential in terms of FSI. It denotes the square meter area that can be constructed upon that plot of land. It varies because of the location and user zone of the plot. The benefit of this FSI, can be availed by a housing society only when conveyance of land and building is completed and transferred in favour of the society;
- **Property-free and marketable-** On registration of the society the possession of land and building is vested with the society. The society starts maintaining the property as per the provision of the registered bye-laws. However, the land and building continues to be in the name of the original owner. Thus, when a particular person or society has paid full consideration and is in possession of the property but the title documents continue to be in the original owners' name, the purchaser will not have a free and marketable title on the property. It is only after proper conveyance that the purchaser will derive free and marketable title over the property;
- **Permission for reconstruction of property-** Once conveyance is completed; the society can obtain a "No Objection Certificate" ("**NOC**"), for reconstruction of the building under the respective town planning sections of municipal authorities. If conveyance is pending, the society may have to approach the original owners for their consent for reconstruction and the original owner may not agree to the proposal of the society or the owner may not be available or may ask for additional compensation, and delay the reconstruction proposal. When all the flat owners have paid full consideration to the builder, it is advisable to obtain conveyance at the earliest;

Conveyancing Vis-à-Vis Hindu Law

There are certain important general principles of Hindu Law, which a conveyancing draftsman has to bear in mind.

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The Hindu law as is commonly understood is a set of rules, contained in several Sanskrit books, which the scholars consider books of authority on the laws governing the Hindus.

- Most of the old Hindu laws were replaced by parliamentary statutes in 1955 and 1956. The Acts passed have substituted the Mitakshara and the Dayabhaga laws except with regard to succession to ancestral property, which continues to be covered by the Mitakshara vide Section 6 of the Hindu Succession Act, 1956;
- Customs have the force of law, to the extent they are not contrary to justice and not opposed to the Public Policy of India;
- Decisions of the Privy Council, the Supreme Court and the various High Courts;
- Parliamentary legislation to a large extent have codified the Hindu law;

Hindu under Law

The term "Hindu" in post-independence Hindu law governing marriage, divorce, adoption, maintenance, guardianship and succession, describes not only persons who are Hindu by religion, but also those who are Sikh, Buddhist, and Jain. Therefore, the term "Hindu" encompasses those Indians who are not Christian, Parsi, Muslim, or Jewish for the purposes of law.

Accordingly, the Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Hindu Adoptions and Maintenance Act, 1956; and The Hindu Minority and Guardianship Act, 1956 are applicable to all persons who are regarded Hindus.

The Joint Hindu Family

The institution of joint family is a unique feature among the Hindus. The essential features of the Joint Hindu Family governed by the Mitakshara are:

- a. Unity of ownership of joint property; and
- b. Unity of juristic existence in dealing with third parties

Its constitution might change by birth, adoption, marriage or death; but for third parties it is deemed to be a separate legal entity. As regards coparceners there is a complete community of ownership and unity of possession. Every individual member has an interest in the coparcenary (Joint inheritance or heirship of property) and on his death, his interest passes by survivorship to the other coparceners.

The Karta of a Hindu joint Family in the Hindu Law is the seniormost member of the family, entitled to manage family affairs; in his absence, the next eldest male member is entitled to be the Karta. A Karta is the caretaker of the whole family and looks after the welfare of its members. His relationship with other members is a relationship of trust and confidence.

Transfer of Property

All properties movable and immovable remain in a state of continuous transfer. This is true of all societies.

Entry 6 of List III (Concurrent List) of the Seventh Schedule to the Constitution reads 'Transfer of property other than agricultural land; registration of deeds and documents'. Thus, transfer of property is a 'Concurrent Subject'. Both Central and State Government can take legislative action in respect of transfer of property except that relating to agricultural land⁷⁵.

Transfer of movable property is regulated by the general principles of contract and property law, and a comprehensive statutory regime. The governing acts include Sale of Goods Act 1930 and the Indian Contract Act 1872. The application of the relevant act typically depends on a complex combination of many factors.

The transfer of immovable property in India is governed by the Transfer of Property Act, 1882 ("TPA"). The liberalization of the Indian Economy has permitted foreign investments in immovable property. Foreign exchange transactions in India are governed by the Foreign Exchange Management Act, 1999 ("FEMA"). The law relating to transfer of, or transaction in immovable property in India involving foreign exchange is governed under

⁷⁵ Transfer of agricultural land is a State subject under Entry 18 of List II of the VIIth schedule.

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the Foreign Exchange Management (Acquisition and Transfer of Immovable Property) Regulations, 2000.

The Act prescribes the following modes of transfer/transaction of immovable property:

1. Sale
2. Agreement to Sell
3. Gift
4. Lease
5. Mortgage; and
6. Exchange

Another mode of transfer of Immovable property is by '*Inheritance*', which has not been provided in the Transfer of Property Act, 1882, but is governed by the personal laws of the different religions of the country.

Provisions applicable to Transfers of Immovable Property

There are peculiarities of each mode of transfer/ transaction, and hence documents drafted for each mode of transfer of immovable property have different characteristics. However, certain provisions are applicable to all kinds of transfers of immovable property. These are discussed below:

Transfer of Property

As per section 5 of TPA "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or to himself and one or more other living persons; and "to transfer property" is to perform such act.

"Living person" under the Act include a company or an association or a body of individuals, whether incorporated or not. However, nothing under the Act

would affect any law in force relating to transfer of property to or by companies, associations or bodies of individuals.

Such transfer can be made orally, unless transfer in writing is specifically required under law⁷⁶. Transfer by an instrument in writing is the rule. Oral transfers of immovable property are limited to transactions whose value is less than Rs. 100/-⁷⁷.

Persons Competent to Transfer Immovable Property

Persons competent to transfer immovable property should be:

- Competent to contract
- The owner of the immovable property, or authorized by the owner to transfer the property

Operation of Transfer

Section 8 of TPA states –

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

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

and, where the property is machinery attached to the earth, the moveable parts thereof;

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

⁷⁶ Refer section 1, "Documents" of the paper, at page 7.

⁷⁷ Refer section 2, "Registration" of the paper, at page 13.

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

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

The object of the Section is to stabilize title and remove from the region of pure speculation what passed in the mind of the transferor or the transferee at the date of the transfer. When Section 8 speaks of transfer of property, it speaks of transfer of some property which may be tangible or intangible but not mere title. But when it speaks of interest, it includes title, large or small⁷⁸.

The operation of transfer may not however be immediate, if the parties demonstrate a different intention. The intention may be either expressed or implied.

Conditional Transfer

Under the Act, the transfer of any immovable property by the transferor to the transferee has to be absolute. It cannot be bound down by any condition or limitation.

In this regard, section 10 of the Act states –

Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of women (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

The principle underlying this section is that a right of transfer is incidental to, and inseparable from, the beneficial ownership of property. An absolute

⁷⁸ *Fazal Ahmad v. R.B.S. Hari Prasad*, AIR 1929 All. 465 (F.B).

restrain on that power is repugnant to the nature of the estate and an exception to the very essence of the grants.

Transfer where a Third Person is Entitled to Maintenance

Section 39 of the Act states –

Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

A Hindu widow's maintenance is payable, in the first instance, from the profits of her husband's immovable property and therefore, if a purchaser has notice of the existence of the widow, the burden is upon him to see that her claims are discharged before he purchases the property. The object of the legislature is to safeguard the widow in respect of her right to maintenance, and the Court ought not to adopt a construction which defeats that object⁷⁹.

Transfer by Ostensible Owner

Section 41 of the Act states –

Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

This section forms an exception to the general rule that no one can convey a better title than he himself has in the property⁸⁰. This section is another species of estoppel. Further the section mandates that not only the transferee should act in good faith, but also that the transfer should have been made by the ostensible owner with the consent, express or implied of the person

⁷⁹ I.L.R (1943) Bom. 646.

⁸⁰ *Kanthu Lal v. Pallu Sahu* 5 PLJ 521.

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interested. The payment of consideration has also to be proved under the section. In the absence of a finding that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer had acted in good faith, this section does not apply⁸¹.

Transfer by co-owner

Section 44 of the act confers on the transferee the right of joint possession or partition to the extent enjoyed by the transferor would apply to transferees of all kinds, including mortgagees and lessees⁸².

Under the section a co-sharer can not be allowed to cause prejudice to the other co-sharers by putting up a substantial construction during the pendency of a suit for partition filed by the latter, not even at his own risk on condition that he will not make any claim for compensation in the future in the event of the plaintiff's succeeding⁸³.

The section states –

Where an immovable property has more than one owner, each co-owner has a right to transfer his respective share in the property or interest therein. A co-owner is not required to wait for or seek permission of the other co-owners to transfer it. The undivided interest of the co-owner upon transfer shall vest with the transferee. The acquired right of the transferee would include joint possession or other common or part enjoyment of the transferred property. This right is however not applicable to a dwelling-house belonging to an undivided family, unless the transferee is also a member of the undivided family.

Doctrine of Lis Pendens

Doctrine of 'Lis Pendens' is an important part of the litigation governing immovable property. According to Section 52 of the Transfer of Property Act 1882, it is an expression of the principle that 'pending litigation nothing new should be introduced'.

The section states –

⁸¹ *Nainsukhdas v. Govardhandas*, AIR 1948 Nag 110.

⁸² *Muhammad Jafar Khan v. Mazar-ul-Hasan*, 3 ALJ 474.

⁸³ *Rukmani v. H.N.T. Chettiar*, AIR 1985 283.

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by 4 the Central Government of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

The doctrine of *lis pendis* rests upon the foundation that no party to the litigation can alienate the disputed property so as to affect the other party, otherwise it would be impossible that any action or suit could be brought to a successful termination⁸⁴. The effect of this doctrine is not to annul all voluntary transfers effected by the parties to a suit but only to render it subservient to the rights of the parties thereto under the decree or order which may be made in that suit. Its effect is binding on the transferee if he happens to be a third person, even if he is not a party to it. The transfer will remain valid subject, however, to the results of the suit⁸⁵.

Fraudulent Transfer

1. Section 53 of the Act states – Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

⁸⁴ *Sefali Roy Chowdhury v. A.K. Dutta*, AIR 1967 SC 1810.

⁸⁵ *K.A. Khader v. Rajamma Jha*, AIR 1994 Ker 123.

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Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

2. Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

The principles embodied in this section are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the courts even when a party bases his title on a transfer by a decree of the court where the provisions of this section do not apply⁸⁶.

Doctrine of Part Performance

Section 53A of the Act 1882 provides that where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the

⁸⁶ *Akramunnissa v. Mustafunnisa* AIR 1929 All 238.

law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

The position of law as stated above is applicable to agreement to sell executed before 24 September, 2001. The position after the amendment of the Transfer of Property Act 1882 and Registration Act 1908 is that the registration of an agreement to sell is compulsory if the protection of possession provided in Section 53A has to be claimed.

Further, the section imports into India, the equitable doctrine of part performance only partially, does not give the transferee any right on which he can bring a suit as a plaintiff, but only a right which is available to him as defence in order to protect his possession. It does not confer any title on the transferee who takes possession in pursuance of a written but unregistered contract. Accordingly, he cannot maintain a suit for declaration of title or that the transferor or other person has no title to the property⁸⁷.

Sale of immovable property

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Such transfer in case of tangible immovable property of the value of Rs 100/- or more can be made only by a registered instrument. Delivery of tangible immovable property is made when the seller places the buyer or such person as he directs, in possession of property. Thus, delivery of immovable property can only be by handing over actual possession to the buyer or to a person authorised by him.

Mortgage

Section 58 of the Act states that "Mortgage" is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced, by way of loan or an existing or future debt. The

⁸⁷ *Dantmara Tea Co. v. Probodh Kumar Das* 41 CWN 54.

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transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured are called "mortgage money" and the instrument by which transfer is effected is called a mortgage-deed.

A mortgage can be of the following types:

- Simple mortgage
- Mortgage by Conditional Sale
- Usufructuary mortgage
- English Mortgage
- Mortgage by deposit of title deeds; and
- Anomalous mortgage.

Simple Mortgage

The mortgagor undertakes personal liability, but no possession of property is delivered. There can be no foreclosure in the event of non-payment and no power of sale out of court, but a decree for sale of the mortgaged property must be obtained. Further, such deed must be registered by an instrument even if consideration is below Rs. 100/-

Mortgage by Conditional Sale

The mortgagor ostensibly sells that mortgaged property with the condition that the sale shall become absolute in case of default of payment, on a particular date; or that the sale shall become void on such payment and the property re-transferred. Such mortgage must be created by one document.

The remedy of the mortgagee is by foreclosure and not by sale and it must be registered in writing if the consideration is Rs. 100/- or more. If the consideration is less than Rs. 100, it may be effected by delivery of the property or by a registered instrument.

Usufructuary Mortgage

In this type of mortgage, there is delivery of possession to the mortgagee, he is to retain possession until repayment of the money and to receive rents and profits or part thereof in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money. There is redemption when the amount due is personally paid or is discharged by rents and profits received however, there exists no remedy of sale or foreclosure. If the consideration is Rs. 100/- or more, it must be registered, but if it is below that amount, it may be effected by a registered deed or by delivery of the property.

English Mortgage

This mortgage is followed by delivery of possession and along with a personal covenant to pay the amount. It is effect by an absolute transfer of property with a provision for re-transfer in case of repayment of the amount due. The remedy is by sway of sale and not by foreclosure. The power of sale out of court is conferred on certain persons under certain circumstances.

Equitable mortgage/ Mortgage by deposit of title deeds

This type of mortgage is created in the towns of Calcutta, Madras, Bombay, etc. and is affected by deposit of material title-deeds, and no delivery of possession takes place. It is made to secure a debt or advances already made or to cover future advances. No registration is necessary under this mortgage, even if there is a writing recording the deposit. The remedies are by sale and not by foreclosure and all the provisions applicable to a simple mortgage are applicable to equitable mortgage.

Anomalous Mortgage

It includes a simple mortgage, a usufructuary mortgage and a mortgage by conditional sale. Under this type of mortgage, possession may or may not be delivered. The remedy of the mortgagee is by sale or by foreclosure, if the terms of the mortgage so permit. If the consideration of the mortgage is Rs. 100/- or more, it must be registered, if not, the mortgage can be effected by a registered document or by delivery of possession.

Charge

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Section 100 of the Act relates to Charge. A charge is nothing but a devise to create security which is enforceable in law. It may be created either by act of parties or by operation of law. An act of party is an expression of the will or intention of that party, directed to the creation, transfer or extinction of a right, an act of law, on the other hand, means the creation, transfer or extinction of a right by operation of the law itself, independent of any consent on the part of the party affected⁸⁸.

The section states that where immovable property of one person is, by act of parties or by operation of law, made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all provisions in respect of 'simple mortgage' will apply to such a charge.

It is pertinent to note that a mortgage is not a 'charge' as per section 100 of TPA, but it will be a 'charge' for purpose of registration under Section 124 of Companies Act, 1956.

The section states that if immovable property is kept as security for payment of money and if it does not amount to mortgage, then the later person is said to have a charge on property. However, a 'charge' does not create an interest in the property⁸⁹. Thus, no particular form is necessary to create a 'charge'.

Lease

A lease is the outcome of the rightful separation of ownership and possession. Before the lease the owner had the right to enjoy possession of the land by the lease, he excludes himself during its currency from that right. A lease is the transfer of a right to enjoy property. It creates an interest in the property by virtue of the contract of lease, which may be either oral or written⁹⁰.

Section 105 of the Act states that a lease of immovable property is transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity. Such transfer of right should be in consideration of a price paid or promised, or of money, or a share of crops, or service or anything of value, to be rendered periodically or on specified occasions to the transferor

⁸⁸ *Bapurao v. Narayan*, AIR 1950 Nag 117.

⁸⁹ *Dattatreya Mote v. Anand Datar*, (1994) 2 SCC 799.

⁹⁰ *Tirath Ram Gupta v. Gurubachan Singh*, (1987) 10 Reports (SC) 84.

by the transferee, who accepts the transfer on such terms. Lease of property from year to year or for any term exceeding one year can be made only by a registered instrument.

Exchange

Exchange means to part with, give or transfer for an equivalent. The term "exchange" as defined under section 118 is not limited only to immovable property. But, the ownership of one party must be exclusive of the ownership of the other. As such, partition is not an exchange. The mutual transfers must be in kind, and any transaction into which money enters, either as the consideration or as a basis of measure, is excluded; of course one of the parties may pay a sum of money, in addition to property, for bringing about an equality of exchange.

The criterion determining whether a transaction is a sale or an exchange is whether there is a determination of value of things exchanged, and if no price is set for either property, it is an "exchange". Section 118 requires that in the reciprocal transfer, neither thing shall be money only⁹¹.

Actionable Claim

An 'Actionable claim' as defined under Section 3 of the Act means, a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Thus, it comprises of two types of claims –

- a. A claim to unsecured debts, and
- b. A claim to beneficial interest in moveable property.

⁹¹ *Ram Badan v. Kunwar*, AIR 1938 All 229.

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If the beneficial interest in moveable property is not in possession of claimant, it will be an actionable claim, but if it is in his possession or enjoyment, it will not be an actionable claim, but a chose in action⁹².

Such transfer of an actionable claim shall be effected only by the execution of an instrument in writing. An example of an actionable claim is the right to recover the arrears of an annuity, though it be charged upon immovable property, is not secured by a mortgage⁹³.

⁹² *H. Anraj v. Government of T.N.* AIR 1986 SC 63.

⁹³ *Satindra v. Jatindra*, AIR 1935 PC 165.

Types of Documents and their Features

Types of Documents

1. Acknowledgements and Receipts
2. Affidavits
3. Agreements
4. Annuities
5. Assignments
6. Documents for Formation of an Entity
7. Wills
8. Intellectual Property Documents
9. Documents relating to Cyber law
10. Banking Documents
11. Property Documents
12. Powers of Attorney
13. Guarantees
14. Indemnities
15. Documents for Private Equity Funding

Features of different Types of Documents

I. Limited Liability Partnerships

A Limited Liability Partnership ("LLP") is viewed as an alternative corporate business vehicle that provides the benefits of limited liability but allows its

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members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The LLP form enables entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Owing to flexibility in its structure and operation, the LLP is also be a suitable vehicle for small enterprises and for investment by venture capital.

An LLP can be described as a hybrid between a company and a partnership that provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement.

Keeping in mind the need of the day, the Parliament enacted the Limited Liability Partnership Act, 2008 which received the assent of the President on 7th January, 2009.

The salient features of the LLP Act 2008 *inter alia* are as follows: -

1. An LLP is a body corporate and a legal entity separate from its partners. Any two or more persons, associated for carrying on a lawful business with a view to profit, may by subscribing their names to an incorporation document and filing the same with the Registrar, form an LLP, which would have perpetual succession;
2. The mutual rights and duties of partners of an LLP *inter se* and those of the LLP and its partners are governed by an agreement between partners or between the LLP and the partners subject to the provisions of the LLP Act 2008 . The act provides flexibility to devise the agreement as per their choice. In the absence of any such agreement, the mutual rights and duties shall be governed by the provisions of proposed the LLP Act;
3. As the LLP is a separate legal entity, it would be liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP, which may be of tangible or intangible nature or both tangible and intangible in nature. No partner would be liable on account of the independent or un-authorized actions of other partners or their misconduct. The liabilities of the LLP and partners who are found to have acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the LLP;

Types of Documents and their Features

4. Every LLP is required to have at least two partners along with at least two individuals as Designated Partners, of whom at least one must be resident in India. The duties and obligations of Designated Partners are as provided under the act;
5. The LLP is under an obligation to maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency are required to be filed by every LLP with the Registrar every year. The accounts of LLPs are also to be audited, subject to any class of LLPs being exempted by the Central Government;
6. If required, a competent Inspector appointed by the Central Government would investigate the affairs of an LLP;
7. The compromise or arrangement including merger and amalgamation of LLPs are required to be in accordance with the provisions of the LLP Act 2008;
8. A firm, private company or an unlisted public company is also allowed to be converted into LLP in accordance with the provisions of the Act. Upon such conversion, commencing from the date of certificate of registration issued by the Registrar in this regard, the effects of the conversion would be such as are specified under the Act;
9. The winding up of an LLP may be either voluntary or by the Tribunal to be established under the Companies Act, 1956. Till the Tribunal is established, the power in this regard has been given to the High Court;
10. The 2008 Act confers powers on the Central Government to apply provisions of the Companies Act, 1956 as appropriate, by notification with such changes or modifications as deemed necessary. However, such notifications shall be laid in draft before each House of Parliament for a total period of 30 days and shall be subject to any modification as may be approved by both Houses;
11. The Indian Partnership Act, 1932 are not applicable to LLPs.

As per the above, the two important documents that emerge in respect of the LLP form of business structure are:

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- a. Incorporation Document
- b. LLP Agreement

Contents of the Incorporation Document

The Incorporation Document is similar to the Memorandum of Association of a Limited Liability Company and includes the following:

- The name of the limited liability partnership;
- The proposed business of the limited liability partnership;
- The address of the registered office of the limited liability partnership;
- The name and address of each of the persons who are to be partners of the limited liability partnership on incorporation;
- The name and address of the persons who are to be designated partners of the limited liability partnership on incorporation;
- Such other information concerning the proposed limited liability partnership as may be prescribed.

Every limited liability partnership is required to have either the words "limited liability partnership" or the acronym LLP as the last words of its name. Further, an LLP cannot be registered with a name which, in the opinion of the Central Government, is undesirable; or is identical to or too nearly resembles that of any other partnership firm or limited liability partnership or body corporate or a registered trade mark, or a trade mark which is the subject of an application for registration, of any other person under the Trade Marks Act, 1999.

LLP Agreement

Limited Liability Partnership Agreement means any written agreement between the partners of the LLP inter-se, or between the LLP and its Partners, which determines the mutual rights and duties of the partners and their rights and duties in relation to the LLP.

Types of Documents and their Features

The LLP Agreement is an important document and any changes therein should be filed with the Registrar.

The LLP Agreement is important for the following reasons:

1. The effect of the LLP Agreement is similar to the Articles of Association of a Limited Liability Company which defines the rights, duties and liabilities of a member with the Company.
2. Among other things, the LLP Agreement defines the form of contribution and liability for contribution of the partners.
3. It defines the role of partners, designated partners, their duties and powers.

Important Points in relation to the LLP Agreement:

- On the incorporation of a limited liability partnership, the persons who subscribed their names to the incorporation document become its partners and any other person may also become a partner of the limited liability partnership in accordance with the limited liability partnership agreement.
- Any changes made to the partnership agreement are required to be filed with the Registrar in the form and manner along with such fees as may be prescribed.
- An agreement in writing made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership, provided such agreement is ratified by all the partners after the incorporation of the limited liability partnership.
- In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and the partners shall be determined by the provisions relating to that matter as are set out in the First Schedule of the LLP Act 2008, under Section 23(4).

Matters are covered under the LLP agreements include:

- Business of the partnership

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- Firm name and location
- Duration
- Partnership property
- Financial Provisions
- Capital
- Profits and losses
- Drawings
- Advances to the partnership
- Bankers
- Records and account
- Managerial Provisions
- Managing Partner
- Meetings and Voting
- Holidays
- Motor cars
- Insurance
- The Partners' Obligations and Restrictions
- Good Faith
- Restrictions on partners
- Termination Provisions
- Retirement

- Expulsion
- Outgoing partners share
- Determination of the Partnership
- Cessation provisions
- Arbitration in disputes

II. Partnership

A partnership is defined as a relation between two or more persons who have agreed to share the profits of a business carried on by all of them or any one of them acting for all. The owners of a partnership business are individually known as the "partners" and collectively as the "firm".

Partnerships are governed by the Indian Partnership Act, 1932. Apart from this, the general law of contracts, as contained in the Indian Contract Act 1872 also applies to Partnership Firms in India. According to the Constitution of India, the Union and State Legislatures have concurrent power with respect to partnership contracts; therefore, every State may have its own partnership laws as well.

The main features of partnerships are:

- Two or more persons can start a partnership.
- The maximum number of partners permissible in a firm is 20, except in the business of banking, where it is 10.
- A Partnership agreement must be entered into, and clearly specify the name of the partnership firm, the names of the partners, the capital to be contributed by each partner, the profit or loss sharing ratio between partners, the business of the partnership, the duties, rights, powers and obligations of each partner and other relevant details.
- The agreement must be signed by all partners and witnessed by independent persons.
- The partnership agreement must also specify the duties and authority of all the partners.

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- Details of salary and other payments to partners must also be specified in the partnership deed.
- Registration of partnership deeds is not compulsory; however, registration ensures legal rights to the firm and its partners.
- The advantages of this form of setup are that two or more people can come together and start a new business. The disadvantages are that the liability of the partners of the firm is unlimited and the partners' personal assets are also liable for the debts incurred by the partnership firm.
- The liability of partners in Indian partnerships is joint and several.
- There is no minimum capital to be subscribed for in a partnership.
- A partnership may be dissolved with the consent of all the partners or in accordance with the provisions in the partnership agreement.

Partnership Deed

Under the Partnership Act, a Deed of Partnership is not necessary. Even though an agreement between two or more persons is necessary to form a partnership, it is not compulsory for a partnership deed to be in writing. In other words, Partnerships can also be made orally.

However, the Income Tax Act, 1961 provides that a partnership shall be assessed as a firm only if it is duly evidenced by an instrument. Therefore, it is desirable to draft and execute a proper deed of partnership.

Under the English Law of Partnership, the registration of partnership firms is compulsory. However, Chapter VII of the Indian Partnership Act, 1932 pertaining to registration of partnership firms in India provides that registration of partnership firms is not compulsory.

Under Section 57 of the Indian Partnership Act, 1932 the concerned State Government may appoint Registrars of Firms for the purposes of registration of partnership firms for different areas.

While Drafting a Partnership Deed, the draftsman has to take care of the following points:

Types of Documents and their Features

1. The form and contents of a Partnership Deed consists of the following components:
 - i. Date
 - ii. Names of Partners
 - iii. Preamble
 - iv. Recitals
 - v. Attestation
 - vi. Custody
 - vii. Special Rules
2. The clauses in the Partnership Deed contain the intentions of the partners of the firm.
3. The "Partnership Deed", amongst other things, covers/includes the following aspects:
 - Names of the partners of the firm and their addresses
 - Names of working partners with their rights and duties
 - Nature and scope of the duties, powers and rights of each partner
 - Restrictions on the rights and powers of the partners
 - Nature of firm's business
 - Place of business
 - Commencement, Duration and Determination of Partnership Business
 - The amount of capital contributed by each partner and aspects relevant to it like the introduction of additional capital, drawings that can be made, etc.
 - Interest to be paid to partners on the capital contributed, loans advanced, or deposits made by the partners

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- Salary or commission payable to any partner, if any
- Loans given by partners to the firm
- Profit or loss sharing ratio of the partners
- Mode, manner and ratio of distribution of profits
- Consent of the Guardian if a minor is admitted to the benefits of the firm
- Keeping Accounts and the manner of maintaining the books of accounts
- Outgoings and expenses of Partnerships
- Valuation of Goodwill
- Retirement, Death, Bankruptcy, Expulsion of Partners
- Dissolution of the Partnership Firm
- Mode of settling disputes among the partners
- Any other terms and conditions to run the business
- Provision that in all other matters, not provided for by the deed, the provisions of the Indian Partnership Act, 1932 shall apply.

III. Arbitration Agreements

Arbitration is a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after hearing both parties. It is the means by which parties to a dispute get it settled through the intervention of a third person, but without having recourse to a court of law. An arbitrator is basically a private judge appointed with the consent of both the parties.

According to section 2(a) of The Arbitration and Conciliation Act, 1996, "Arbitration" means any arbitration whether or not administered by permanent arbitral institution.

The foundation of arbitration is the arbitration agreement between the parties to submit to arbitration all disputes which have arisen or which may arise between

them. Thus, the provision of arbitration can be made at the time of entering the contract itself. It is also possible to refer a dispute to arbitration after the dispute has arisen.

According to section 7(1) of the Arbitration and Conciliation Act, 1996, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Ingredients of Arbitration Agreement

- There should be an agreement in writing;
- The agreement should refer either to present or apprehended dispute to arbitration.

The following factors also need to be considered while drafting an arbitration agreement:

- Applicable law to arbitration
- Location of Arbitration
- Number of Arbitrators
- Language of Arbitration
- Reference to arbitration/ Scope of arbitration;
- Interim measures/Provisional Remedies
- Appeal & Enforcement

Form of Arbitration Clause in an Agreement

As arbitration is based on an agreement between the parties, the parties must intend to make a reference, i.e. there must be *animus arbitrandi*⁹⁴. Consider the following examples regarding reference to an arbitration –

⁹⁴ *Harmousji v. District Local Board*, AIR 1914 Sind 200.

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Every dispute, difference, or question which may at any time arise between the parties hereto or any person claiming under them, touching or arising out of or in respect of this agreement (deed) or the subject matter thereof shall be referred to the arbitration of XY, etc. or if he shall be unable or unwilling to act, to another arbitrator to be agreed upon between the parties or failing agreement to be nominated by.....or, failing agreement to two arbitrators one to be appointed by each party to the difference (whether consisting of one or more than one person) and in case of difference of opinion between them to an umpire appointed by the said two arbitrators before entering on the reference and the decision of the arbitrator (or such arbitrators, or umpire as the case may be) shall be final and binding on the parties.

Or

In the event of any dispute, difference or question arising out of or in respect of this agreement or the commission of any breach of any terms thereof or of compensation payable thereof or in any manner whatsoever in connection with it, the same shall be referred to the Association of.....for arbitration as provided in Rules framed by the said Association for the purpose. The decision or award so given shall be binding on the parties hereto.

IV. Private Equity Funding Documents

Private equity is medium to long-term finance provided in return for an equity stake in potentially high growth unquoted companies. Private equity commonly refers to any type of non-public Ownership Equity securities that are not listed on a public exchange.

The Indian venture capital/private equity industry has seen tremendous development. From funding small start up ventures with emphasis only on new age companies, the industry has now matured to cover the entire spectrum of private equity products – seed funding, expansion capital, buy out financing, financing restructuring of companies and providing mezzanine capital across a variety of sectors. Deal sizes have also reached new heights, from sub USD 5 mn in the early days to USD 50 mn and more.

Private equity investment is a medium to long-term equity form of funding a company.

Types of Documents and their Features

Private equity investing may broadly be defined as "*investing in securities through a negotiated process*". Investments typically involve a transformational, value-added, active management strategy.

Private Equity Investing is often divided into broad categories described below. Each category has its own subcategories and dynamics.

- Approaching the private equity firm
- Initial Enquiries and Negotiations
- Business Valuation
- Due Diligence
- Structuring the Deal / Final Negotiation and Deal Completion
- Monitoring and performance evaluation
- Exit Strategy

Various Documents are required at each stage of the Private Equity Investment Process, these are:

a. Business Plan

A Business Plan is a document whose main purpose when raising finance is to market the company's business proposal. It is a crucial first step for an entrepreneur when moving from a business concept to the realization, funding and development of the venture.

Preparing a business plan is the first stage of the private equity process. The Company approaches the private equity firm for investment after preparing a well thought-out, comprehensive and credible business plan.

The business plan identifies the strengths and risks of the business, provides an overview of the market, sets out financial projections, articulates long-term goals and defines key targets to be achieved.

A business plan generally covers the following areas:

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1. Executive Summary
2. Market and Competition
3. Details of the Product or Service
4. The Management Team
5. Business Operations
6. Financial Projections
7. Funding Requirements
8. Exit Opportunities for the Investor

b. Term Sheet

The private equity firm sends an *Offer Letter*, setting out general terms of the proposal, subject to the outcome of the due diligence process and initial enquiries and the conclusion of the negotiations. This is followed by preparing a *Term Sheet*, which starts the process of negotiating terms of the deal.

A Term Sheet is a preliminary document designed to facilitate and provide a framework for negotiations between investors and entrepreneurs. Provisions in the term sheet are not usually intended to be legally binding, and generally focus on a given enterprise's valuation and the conditions under which investors agree to provide financing.

The Term Sheet usually contains certain conditions to be met before the investment is completed, and these are known as *Conditions Precedent*. Condition precedent is a provision of a contract that suspends the coming into effect of a contract or a term of the contract unless or until a certain event takes place.

The usual contents of a term sheet are:

- Type of share
- Valuation and milestones
- Dividend rights

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- Liquidation preference and deemed liquidation
- Redemption
- Conversion rights and Pre-emption rights
- Voting Rights
- Representations and Warranties
- Board of Directors
- Exclusivity and Enforceability
- Exit Routes
- Conditions Precedent

c. Warranties and Indemnities

A Warranty is an undertaking given by the company receiving the investment to the private equity firm or its financiers, that certain facts in relation to the business or the company are true. If there is a breach of warranty, the private equity financier can claim compensation against the company.

In the case of an Indemnity, the private equity financier is entitled to full reimbursement from the company for any loss on the occurrence of a certain event, without the need to prove the loss. Indemnities are promises by the Company to make good the losses of the Private Equity Firm, if specific events occur.

Warranties and Indemnities usually cover the following areas:

- The authority and capacity of the company to sell shares
- Warranty as to the accuracy of the latest audited accounts, stock values and the level of provision for bad debts
- Warranty that the company is not subject to any unforeseen tax liability in the future, as a consequence of its operations upto the date of the private equity investment process

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- Warranty as to the ownership of the property and other assets used by the company
- Warranty as to the future relationship with the private equity financier

d. Disclosure Letter

In response to the warranties, the Private Equity Firm carries out a disclosure exercise, which results in the preparation of a disclosure letter.

The disclosure letter goes hand in hand with warranties. It is a letter from the company setting out aspects of non-compliance with the warranties. These are cross-referenced against, and qualify the warranties.

The disclosure letter has two purposes in a private equity process:

- a. It acts as a collection point for information disclosed to the private equity firm about the business or company being financed; and
- b. It records exceptions or qualifications to the warranties contained in the agreement.

The warranties are usually drafted in wide, general terms and disclosure is the mechanism by which exceptions or qualifications to them can be documented and agreed. The disclosures lessen the private equity firm's rights under the warranties by excluding the matter disclosed from the scope of the general warranty. Thus they should be effectively managed so as to capture the interests of the investors.

e. Shareholders'/Investors' Rights/Subsription Agreement

The Shareholder's Agreement details the terms of the investment, including continuing obligations of management required by the private equity firm, the warranties and indemnities given by the existing shareholders, penalty clauses and shareholder rights.

It is an important document as it regulates the affairs of the company and gives investors their main contractual protections. The contents of a Shareholder's Agreement include:

1. Board Appointment Rights

2. Veto Rights
3. Adoption and amendment of business plans and budgets
4. Scope of business
5. Intellectual property rights
6. Right to information
7. Warranties from the management team
8. Restrictions on transfers of shares
9. Restrictive covenants
10. Strategic investor rights
11. Exit provisions

f. Company's Memorandum and Articles of Association

The Memorandum and Articles of Association will include among other things information about the objects and capital clauses of the company, the rights attached to the various share classes, the procedures for the issue and transfer of shares and the holding of shareholder and board meetings.

V. Power of Attorney

A power of attorney ("PoA") is an instrument whereby a specified person or persons are empowered to act for and in the name of the person executing the instrument ("donor"). These instruments may be classified as –

1. General Power of Attorney; and
2. Special Power of Attorney

Where the instrument is executed generally for certain acts, it is called "general power of attorney", i.e. if the PoA authorizes the agent to act generally on in more than one transaction in the name of the principal, it is

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known as general power-of-attorney. However, the word "general" means that the power must be general in respect to the subject-matter.

Whereas, if an instrument is executed for specified act or acts, it is called a "special power of attorney". In other words, a PoA conferring on the agent the authority to act in single or specified transactions in the name of the principal is known as special power-of-attorney⁹⁵.

Governing Laws

PoA's are specifically or incidentally referred to in several statutes. It is a type of agency, and law relating to the powers of attorney forms part of the general law of agency. The law of agency in India is contained in Chapter X, sections 182 to 238 of the Indian Contract Act, 1872.

The statutory provisions concerning PoAs are found in the Powers of Attorney Act, 1882.

Competence to Execute

Any person competent to contract can execute a PoA. However, as per section 5 of the 1882 Act, married women can execute a PoA even if they are minors. Thus the following persons can execute a PoA:

- a. Individuals competent to contract, provided that married minor women can also execute a PoA;
- b. Partnership firms; and
- c. Companies.

Persons appointed

As per section 183 of the Indian Contract Act, 1872 any person can become an agent between the principal and third persons, however a person who is not competent to contract can not become an agent, so as to be responsible to his principal.

⁹⁵ *Venkataramana Iyer v. Narasingharao*, ILR 38 Mad 134.

Formalities:

1. Execution

A power of attorney need not be attested or registered. However if at the time of execution of a PoA, the principal resides in any part of India, and the PoA authorizes a person to present documents at the registration office for registration; it has to be executed and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides.

In case the principal does not reside in India, it must be executed and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice Consul, or representative of the Central Government in the country in which the donor is residing at the time of executing a power of attorney.

Further, under Section 4 of the Act, it is possible to deposit a power of attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, along with the said affidavit or declaration if any, in the High Court or the District Court within the local limits of whose jurisdiction the instrument may be. A separate file is kept of the instruments so deposited and any person is entitled to search that file and inspect every instrument so deposited. A certified copy is also delivered on request. A certified copy of such an instrument is, without further proof, sufficient evidence, of the contents of the instrument and of the deposit thereof in a High Court or District Court.

Partnership Firms

The powers and authority of a partner of a firm are regulated by the Partnership Act. In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to⁹⁶ –

- Submit a dispute relating to the business of the firm to arbitration;
- Open a banking account on behalf of the firm in his own name;
- Compromise or relinquish any claim or portion of a claim by the firm;

⁹⁶ Section 19, Indian Partnership Act, 1932.

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- Withdraw a suit or proceeding filed on behalf of the firm;
- Admit any liability in a suit or proceeding against the firm;
- Acquire immovable property on behalf of the firm; or
- Enter into partnership on behalf of the firm.

Accordingly, for the purposes mentioned in clauses (a) to (h), a partner requires a power of attorney from all the partners of the firm, i.e. a PoA in favour of any partner or outsider must be executed by all the partners. However, if one or more partners hold a general power of attorney executed by all partners with a power to delegate, then one or more partners can execute a power of attorney in favour of a third person for and on behalf of the firm or other partners. A power of attorney executed by one or more partners in favour of a third person, even in the name of and for and on behalf of the partnership would not be valid as it would not be binding on the other partners. In such a case, at least the written consent of other partners should be obtained to confirm the power of attorney executed by one or more, but not all partners of the firm.

Companies

Section 48 of the Companies Act, 1956 provides that a company may by writing and under its common seal empower any person as its attorney to execute deeds on its behalf.

Power of Attorney Executed Abroad

If a PoA is executed outside India, it should be ensured that it is authenticated by the Indian Consul, Vice-Consul or a representative of the Central Government in that country and not by any Notary Public except in the where it has been executed in the countries notified under the Notaries Act, 1952.

2. Authentication

As stated earlier, a PoA need not be attested but for identification purpose, it should be signed before the Notary Public or Judge/Magistrate and be authenticated by such Notary Public or Judge or Magistrate

PoA can be authenticated by Indian consul or vice-consul or authorized representative of the Central Government in case it is executed abroad. A PoA so authenticated is admitted by court as the execution of such PoA is presumed under Section 85 of The Indian Evidence Act, 1872⁹⁷.

3. Stamp Duty

(A) The Indian Stamp Act, 1899

A PoA is chargeable to stamp duty under Article 48 of Schedule I to the Indian Stamp Act, 1899, subject to State variations, if any.

PoA Executed Outside India, Operational In India

If a power of attorney is executed outside India but relates to, any property situated in India; or to any matter or thing to be done in India and is received in India, it must be stamped with the appropriate stamp duty within three months of its arrival in India.

Stamp Duty on Revocation

There is no Article under the Stamp Act, that levies duty on revocation of a PoA. Such an instrument is, however chargeable under Article 15 – "Cancellation", if attested and not otherwise provided for.

4. Registration

A power of attorney is not required to be registered under the Registration Act, 1908.

Clause (c) of section 32 of the Act requires that where a document is presented for registration by the agent of a person entitled to present it for registration, such agent must be "duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned"; and the manner of execution and authentication of such a power-of-attorney is prescribed in section 33 of the Act.

⁹⁷ *Yogesh Singh v. Niranjana Lal*, AIR 1981 Del 222.

Duties of the Attorney

Duties of an Attorney are the same as those of an agent as enumerated under Chapter X of the Indian Contract Act, 1872.

Remuneration of the Attorney

An attorney is entitled to be remunerated for his services if the terms of his appointment expressly or impliedly make provision for such payment. However, an attorney is entitled to be indemnified by the donor, with respect to the advances made or expenses properly incurred by him in carrying out his functions under the instrument the even if the PoA does not provide for any remuneration.

Construction of Power Of Attorney

A PoA being must be construed strictly as it is a formal instrument and confers only such authority as is given expressly or by necessary implication⁹⁸. A PoA is subjected to strict interpretation because it delegates powers which are to be interpreted in strict terms and, in such a way, as would be necessary to carry into effect the authority that is expressly given.

Rules of Construction:

Refer section "Construction and Interpretation of Deeds", on page 48.

Duration, Termination/Revocation and Cancellation of Power of Attorney

1. Duration

A general PoA unless expressly or impliedly limited for a particular period, continues in force until revoked or determined by the death of either party, whereas a Special PoA continues to remain in force till act/acts for which the instrument was executed, subsists. If it is desired that the power should continue for a particular period or until a certain event happens, an express provision to that effect should be made.

⁹⁸ *Atma Ram v. Chitra Production Co.*, AIR 1952 Punj 59.

Types of Documents and their Features

Where attorneys were appointed under a PoA, without any terms limiting the duration of their power, but contained a recital that the principal was going abroad and was desirous of appointing attorney during his absence, was held to be an appointment limited to the time during which the principal was abroad.

Where a principal executed a PoA before leaving India, authorizing the agent to act in his absence and subsequently came to India and again left without executing a new PoA, it was held that the power of the agent did not terminate and the agent had the power to act for the principal during his absence.

2. Termination / Revocation

The provisions of the Indian Contract Act, 1872 relating to termination of Agency are equally applicable to termination of power of attorney, as the law relating to power of attorney is a specie of the law of agency. Relevant provisions under the Contract Act are sections 201-210.

3. Cancellation

Section 31(1) of the Specific Relief Act, 1963 provided that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

Succession is the transmission of property belonging to a person at his death to some other person or persons. Succession and Inheritance can be of two kinds: Testamentary or testate inheritance, which means inheritance as per the Will of the deceased and Non-Testamentary or intestate succession, where the deceased dies without making a Will.

In intestate succession, the properties devolve as per the religious law of the community to which the deceased belongs.

In testamentary succession, the deceased makes a will about the manner in which his property or other matters may devolve after his death. This succession is governed by Chapter VI of the Indian Succession Act, 1925.

The Indian Succession Act, 1925 has a common set of rules for people of all religions, except the Muslims. However, the Act would be applicable to Muslims where properties are situated within the State of West Bengal and within the jurisdiction of the Madras and Bombay High Courts

Indian Succession Act, 1925

The Indian Succession Act came into operation on 30 September 1925 and it consolidated all Indian Laws relating to succession. The Act consists of 11 parts, 391 sections and 7 schedules. The Act is applicable to intestate and testamentary succession.

When the British settled down to govern India, they were faced with the task of ascertaining the nature and incidents of the laws to be administered.

Intestate Succession

Part V of the Indian Succession Act deals with Intestate succession. This part does not apply to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jain. Under the Indian Succession Act, a man's widow and children, male and female, inherit equally. However, a man may, by will bequeath his or her property to anyone, totally disinheriting his children and his widow.

Muslim Law of Succession

The Muslim law of succession is a codification of the four sources of Islamic law, which are (1) The Holy Koran, (2) The Sunna — that is, the practice of the Prophet, (3) The Ijma — that is, the consensus of the learned men of the community on what should be the decision on a particular point, and (4) The Qiya — that is, an analogical deduction of what is right and just in accordance with the good principles laid down by God.

Muslim law recognizes two types of heirs: Sharers and Residuaries. A relative who is a Sharer will take a specified portion of the deceased's estate irrespective of anything else excepting the Rule of Awl and Radd. A relative who is a Residuary will take whatever is left after the Sharers have taken their share, .

Inheritance Under The Hindu Succession Act, 1956

General Rules of Succession: Male Hindu

The property of the male Hindu dying intestate will devolve in the following manner

- Firstly upon all the heirs, being the relatives specified in Class I;
- Secondly, if there is no heir of Class I, then upon heirs being the relatives specified in Class II;
- Thirdly, if there is no heir of any of the classes, then upon the agnates of the deceased; (a person is said to be an agnate of another if the two are related by blood or adoption wholly through males) and;
- Lastly, if there is no agnate, then upon the cognates of the deceased. (A person is said to be a cognate of another if the two are related by blood or adoption but not wholly through male).

CLASS 1 HEIRS

1. Son
2. Daughter

3. Widow
4. Mother
5. Son of a predeceased son
6. Daughter of a predeceased son
7. Widow of a predeceased son
8. Son of a predeceased daughter
9. Daughter of a predeceased daughter
10. Son of a predeceased son of a predeceased son
11. Daughter of a predeceased son of a predeceased son
12. Widow of a predeceased son of a predeceased son

General Rules of Succession: Female Hindu

The property of a female Hindu dying intestate shall devolve in the following order:

- Firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
- Secondly, upon the heirs of the husband;
- Thirdly, upon the mother and father;
- Fourthly, upon the heirs of the father; and;
- Lastly, upon the heirs of the mother

However, if any property is inherited by a female Hindu from her father or mother it will devolve in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the heirs referred to above but upon the heirs of the father; and any property inherited by a female Hindu from her husband or from her father in law will devolve, in the absence of any son or daughter of the deceased (including

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the children of any predeceased son or daughter) not upon their referred to above, but upon the heirs of the husband.

Wills

"Will" means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It can be revoked or altered by the maker at any time he is competent to dispose of his property.

A will made by a Hindu, Buddhist, Sikh or Jain is governed by the provisions of the Indian Succession Act, 1925. However Muslims are not governed by the Indian Succession Act, 1925 and they can dispose of their property according to Muslim Law.

Competency to Make a Will

- Every person who is of sound mind and is not a minor can make a will.
- Any married woman can make a will of any property which she could alienate during her life time.
- Persons who are deaf or dumb or blind can make a will provided they know what they do by it.
- A person who is ordinarily insane may make a will during an interval in which he is of sound mind.
- No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause that he does not know what he is doing.

Execution of a Will

- The testator (person making the will) should sign or fix his mark to the will or it should be signed by some other person in his presence and by his direction.

- The signature or mark of the testator or the signature of the person signing should be clear and legible. It should appear in a manner that is appropriate and makes the will legal.
- The will should be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen the other person sign the will, in the presence and by the direction of the testator, or has received from the testator.
- Each of the witnesses should sign the will in the presence of the testator, but it is not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary.

Kinds of Wills

Conditional Will: This is a Will made to take effect only in a contingency. The operation of the document may be postponed till after the death of the testator's wife, for example.

Joint Will: Two or more persons may make a joint Will. It will take effect as if each has properly executed a Will as regards his own property. If a Will is joint and is intended to take effect after the death of both, it will not be admitted to probate during the lifetime of either.

Mutual Will: A Will is mutual when two testators confer on each other reciprocal benefits as by either of them constituting the other his legatee, the is to say, when the executants fill the roles of both the testator and legatee towards each other. Mutual Wills are also called Reciprocal Wills.

Holograph Will: A holograph is a Will entirely in the handwriting of the testator. Naturally there is a greater guarantee of genuineness attached to such a Will. But in order to be valid it must also satisfy all the statutory requirements.

Concurrent Wills: Normally a man leaves only one will at the time of his death. But for the sake of convenience a testator may dispose off some properties e.g., those in one country by one Will and those in another country by another Will. They may be treated as wholly independent of each other, unless there is any inter-connection between the two or the incorporation of one in the other. Such Wills are called concurrent wills.

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Duplicate Will: A testator, for the sake of safety, may make a will in duplicate, one to be kept by him and the other deposited in some safe custody with a bank, executor or trustee. Each copy must be duly signed and attested in order to be valid. A Valid revocation of the original would affect a valid revocation of the duplicate too.

Onerous Will: This Will imposes an obligation on the legatee that he gets nothing until he accepts it completely.

Registration of a Will

A will need not be registered compulsorily but it may be registered by the testator during his lifetime. It may be deposited with the registering authority under Sec.42 of the Indian Registration Act, 1908. A Will or Codicil is not required to be stamped.

Drafting a Will

Section 74 of the Indian Succession Act, 1925 lays down that the use of technical words or terms of art is not necessary in a will, but the wording should be such as to clearly indicate the intention of the testator. A will must be construed as a whole to give effect to the manifest intention of the testator⁹⁹.

Codicil

Codicil is an instrument made in relation to a Will and explaining, altering or adding to its disposition. It is deemed to form a part of a Will as per Section 2(b) of the Indian Succession Act, 1925.

If the Testator wants to change the names of Executors by adding some other names, this could be done by making a Codicil in addition to the Will.

If the Testator wants to change certain bequests by adding to the names of the legatees or subtracting some of them in case some Beneficiaries are dead and the names are required to be removed, all these can be done by making a Codicil.

⁹⁹ *Nathu v. Debi Singh*, AIR 1966 Punj 226.

The Codicil must be in writing. It must be signed by the Testator and attested by two Witnesses.

Revocation of a Will

A Will may be revoked at any time before the death of the testator but a will executed by two persons jointly cannot be revoked after the death of any one of them, if the survivor has given effect to the directions of the deceased testator. In case of two Wills, the latter one will prevail¹⁰⁰. In case of a revocation, the testator should give it in writing that he has made certain changes in the will or has revoked it. It must be signed by the testator and attested by two or more witnesses. There should be a clause stating that the present will is the last will of the testator and any will made prior to this would stand revoked. The testator cannot revoke the will by just striking it off or scratching it. He must sign it and have it attested by at least two witnesses.

Probate of a Will

On the death of the testator, an executor of the will or an heir of the deceased testator can apply for a probate. The court will ask the other heirs of the deceased if they have any objections to the will. If there are no objections, the court will grant a probate. A probate is a copy of a will, certified by the court. It is to be treated as conclusive evidence of the genuineness of a will.

In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent. This has to be displayed prominently in a court. Thereafter, if no objection is received, a probate will be granted. It is only after this that the will comes into effect.

Though executors derive their title from the Will and not the probate, the probate is still the only proper evidence of the executor's appointment. The grant of probate to the executor does not confer upon him any title to the property which the testator himself had no right to dispose off, but only perfects the representative title of the executor to the property, which did belong to the testator and over which he had a disposing power.

¹⁰⁰ *Badari Basamma v. Kandrikeri*, AIR 1984 NOC 237 (Kant).

Wills by Muslims

Oral or Written Will

Under Muslim law, a will may be made either orally or in writing and though in writing, it does not require to be signed or attested. No particular form is necessary for making a will, if the intention of the testator is sufficiently ascertained. Though oral will is possible, the burden to establish an oral will is very heavy and the will should be proved by the person who asserts it with utmost precision and with every circumstance considering time and place.

But if the marriage of a Muslim has been held under Special Marriage Act, 1954, the provisions of Indian Succession Act, 1925 will be applicable and he cannot execute a will under Muslim law.

Revocation of Will by a Muslim

The testator can revoke his will at any time either expressly or impliedly. The express revocation may be either orally or in writing. The will can be revoked impliedly by the testator by transferring or destroying, completely altering the subject matter of the will or by giving the same property to someone else by another will.