

**MY THOUGHTS ON DRAFTING, CONVEYANCING, STAMPING AND
REGISTRATION OF DOCUMENTS**

By CA. (Dr.) Adukia Rajkumar Satyanarayan

Mob: 98200 61049

Email: rajkumar@cadrrajkumaradukia.com

1. INTRODUCTION

Uncertainty about which words to use stems mainly from uncertainty about what we want to say. –Turk & Kirkman, Effective Writing: Improving Scientific, Technical, and Business Communication

Drafting may be defined as the synthesis of law and fact in a language form. Perfection cannot be achieved in drafting unless the nexus between law, facts and language is fully understood. Drafting is an art, the success of which depends on the mastery skills of a draftsman, the depth of his knowledge and experience. A good drafting style requires the 3C's – Consistency, Coherence and Clarity.

The needs of society and demands of modernization and industrialization have led to enactment of a dearth of laws. There is hardly any human activity which is not governed by one or the other law. Additionally, there are several legislative enactments, provisions whereof as contained in a single section run into several pages. Therefore, writing a document these days is a highly complex job. Unless one has a comprehensive knowledge of the codified Hindu Law, the Land Reform Laws, the laws governing real estate, the Income Tax Laws, Partnership Laws, Company Laws, the Law of Registration, Stamp Duty Provisions of various States etc. and a dearth of other laws, it is extremely difficult to draft a document.

Each situation requires a different handling, a different recital, a different approach to the problem and the document may sometimes have to be moulded to be in conformity with the laws of the country and at the same time satisfy the main intention of the parties.

After the parties enter into an agreement or any other transaction which is reduced to writing, disputes may arise between them later resulting in litigation in a Court of Law. In that litigation, the fate of the parties will be decided on the interpretation of the Document in which the rights and liabilities of the parties have been spelt out. Therefore, every draftsman should keep in mind that one day the document being drafted by him could be the subject matter of judicial scrutiny and hence he should ensure that the language employed in the document is unambiguous.

With the era of globalization, and ever increasing complexities of laws and growing trade among the countries in the world, legal drafting and document writing has assumed great significance.

2. 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

¹ Merriam-Webster Collegiate Dictionary 11th Ed.

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

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.

2. Bharatiya Sakshya Adhiniyam, 2023 –

“Document” means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records⁵.

Accordingly, the Act considers the following as documents⁶ –

- (i) A writing is a document.
- (ii) Words printed, lithographed or photographed are documents.
- (iii) A map or plan is a document.
- (iv) An inscription on a metal plate or stone is a document.

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

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

⁵ Bharatiya Sakshya Adhiniyam, 2023, Section 2(1)(d)

⁶ Illustrations under Section 2(1)(d) of Bharatiya Sakshya Adhiniyam.

(v) A caricature is a document.

(vi) An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents;

3. Bharatiya Nyaya Sanhita, 2023 –

‘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, and includes electronic and digital record, intended to be used or which may be used as evidence of that matter⁷.

Explanation to the section says:

1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in a Court or not.

(a) A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

(b) A cheque upon a banker is a document.

(c) A power-of-attorney is a document.

(d) A map or plan which is intended to be used or which may be used as evidence, is a document.

(e) A writing containing directions or instructions is a document.

2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Thus the word "Document" has been used in a wide sense, and includes instruments, deeds, agreements, electronic records etc.

⁷ Bharatiya Nyaya Sanhita, 2023, Section 2(8).

Certain Transactions for which written documents are not necessary

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 law⁸.

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 writing⁹.

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.

Case laws –

- Partition of joint family properties: *Satya Kumar v Satya Kripal*¹⁰; *Peddu Reddiar v Kothanda Reddi*¹¹
- Compromise of Claim: *Thiruvengada Chariar v Ranganatha*¹²
- Transfer by Husband to wife for future maintenance: *Madam Pillai v Badrakalli*¹³

⁸ Transfer of Property Act, 1882, Section 9.

⁹ *Weaver Mills v. Bulkies Ammal*, AIR 1969 Mad. 462, *Sarandaya Pillai v. Shankaralinga Pillai*, 1959, (2) MLJ 502

¹⁰ (1909) 10 CLJ 503.

¹¹ AIR 1966 Mad 419.

¹² 13 MLJ 500.

¹³ 45 Mad 612 (FB).

- Transfer in consideration of marriage: *Serandaya Pillai v Sankaralingam Pillai*¹⁴
- 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*¹⁵ – 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*¹⁶ – 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.

3. DEEDS

A deed is an instrument which is written on a paper or even a parchment or vellum executed by a party under sale 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 corporation¹⁷.

¹⁴ (1959) 2 MLJ 502.

¹⁵ AIR 1926 Oudh 609.

¹⁶ ILR 50 Mad 421(PC); 54 IA 136; 1927 PC 80; 50 MLJ 524..

¹⁷ Halsbury's Laws of England. 4th Ed., Vol. 12, Para 1305.

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. Conditions attached to the acceptance of a deed are known as covenants. Deeds can however be distinguished from covenants, which being also under seal, are unilateral promises.

A deed must be signed, sealed and delivered. 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.

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, 1908¹⁸.

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 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

¹⁸ *Joharmal v Tejaram Jajrup* ILR 17 Bom 235.

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 factor¹⁹. –

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/

¹⁹ *Tamboli Ramanilal v Ghanchi Chimanlal* AIR 1992 SC 1236; *N.B Subrahmanyam v Alapati Hymavati* (1996) 9 SCC 388.

Structure of a Deed

A deed consists of many parts and each part serves a particular purpose. Unless all parts are in perfect harmony with each other, the deed will not be a perfect one. A deed of conveyance generally consists of the following parts:

1. Title and name of the Document
2. Place
3. Date
4. Parties
5. Recitals
6. Witnessing part
7. Consideration
8. Receipt
9. Operative Portion
10. Description of Property
11. Map or Plan of the property to be transferred
12. Clause conveying the estate / right/ title/ claim
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 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, say for example of 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 follows²⁰:

- 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;
- 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

²⁰ Norton on Deeds, 2nd Ed. Ch III.

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 endeavors and application of extensive evidence, the language of a deed is ambiguous as to the person or thing 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.

4. 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 Registration Act 1908 is used for proper recording and registration of documents / instruments, which give them more authenticity. 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
3. Prevention of fraud.
4. Registration ensures and safeguards the interest of an intending purchaser.

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.

Brief History of Registration of Documents

The Registration Act, 1908 was originally titled as the Indian Registration Act, 1908²¹. Before the year 1864, there existed multiple enactments as to registration of documents in British India. There were regulations applicable to each of the provinces of Bengal, Bombay and Madras, providing for the registration of documents. The first complete enactment as to registration of documents was passed by Act XVI of 1864, consolidating and amending all the previous laws relating to the registration of assurances. It introduced for the first time a system of compulsory registration in British India as to certain clauses of the documents and also abolished the provisions limiting the rights of priority to registered deeds as against unregistered document of the same nature. However, even under this Act, 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.

²¹ 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.

Thereafter, in 1908, a new Act namely the Indian Registration Act, 1908 (Act No. XVI of 1908) was enacted for consolidation of enactments relating to the registration of the documents. The word 'Indian' was omitted from the name of the Act on 26th December, 1969 by the Indian Registration (Amendment) Act, 1969.

Registration Establishment

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

Place of Registration of Documents

Documents 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 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 registerable²². Similarly unregistered documents executed at a time when the law did not require them to be registered would be admissible in

²² *Tiru Mala v. Lakshmi* I.L.R 2 Mad. 147.

evidence despite their non-registration²³. Accordingly, the question of registration of a document in a suit is governed by the law as it exists when the suit is brought²⁴.

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 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

²³ *Desaid Motilal Mangalji v. Desai Parshotam Nand Lal*, I.L.E 1 Agra 283.

²⁴ *Gandamal v. Uttamachand*, A.I.R 1933 Lah. 1038 at p. 1039.

- 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 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;
- 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

All persons executing the document or their representatives, assigns or agents holding power of attorney must appear before registering officer. They have to admit execution and sign the document in presence of Registrar. Appearance may be simultaneous or at different times. If some of the persons are unable to appear within 4 months, further time upto additional 4 months can be given on payment of fine upto 10 times the proper registration fee.

If document relates to transfer of ownership of immovable property, passport size photograph and finger prints of each buyer and seller of such property shall be affixed to document. The Registrar is required to ensure that these are endorsed on the document.

Taking an example where a property is located in Delhi, the following documents will need to be submitted:

1. Document required 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.

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 there for 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 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.²⁵

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

²⁵ Registration Act, 1908, Section 23A.

- 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.

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.

Certificate of 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.

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 immovable 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 execution²⁶.

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

²⁶ *Sarjoo v. Jagatpal Singh* AIR 1942 Oudh 201.

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 recognized²⁷. 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 immovable shall take effect against any oral agreement or declaration relating to such property. However, it is subject to the following exceptions:

- 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.

²⁷ *Nema Charan Dhabal v. Kokil Bag*, I.L.R 5 Cal, 336.

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.

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	Compulsory

	such right, title or interest.	
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 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.	Not applicable
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
16.	Any certificate of sale granted to the purchaser of any property sold by public	Not applicable

	auction by a civil or revenue officer.	
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

5. STAMPING

Stamp duty is a form of tax that is levied on documents. 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.

As stamp duty proved a revenue earner for the government it was never repealed. It was so successful that it remained even when its imposition led to riots in the American colonies in 1765. Stamp law spread to other countries and many of the legislation in the developing countries are based on the English Act of 1891.

Historically, a physical stamp (a tax stamp) had to be attached to or impressed upon the document to denote that stamp duty had been paid before the document became legally effective. More modern versions of the tax no longer require a physical stamp.

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 Benares. This was followed by Regulation VII of 1800, Regulation XIII of 1806, Regulation VIII of 1807 and the like.

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. The Stamp Act, 1899 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 Indian Stamp Act, 1899 extends to the whole of India except the state of Jammu & Kashmir. The Stamp Act is a fiscal measure enacted to secure revenue for the state on certain classes of instruments. The stringent provisions of the stamp Act have been enacted with a view to see that the revenue of the State are realized to the utmost extent as provided by law. The primary object to prevent evasion of the revenue is attained by excluding the document from the evidence entirely and by not acting upon it.

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.

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 III²⁸.

²⁸ *Subramanayan Chettiar, A.L.S.P.P.L v. Muttuswami Goundan*, AIR 1941 F.C. 47

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 exclusivity²⁹.

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, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.	Rates of Stamp duty in respect of documents other than those specified in the provisions of List-I with regard to rates of Stamp Duty	Stamp duties other than duties or fees collected by means of judicial stamps but not including rates of Stamp duty.

The provisions under the constitution can be stated as³⁰:

- 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

²⁹ *Gujarat Anbuja Cemets Ltd. Union of India*, (2005) 4 SCC 214.

³⁰ *Bar Council of U.P. v. State of U.P.*, AIR 1973 SC 231.

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.

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.
- 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.
- 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.

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.

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.

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 relates 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 matters³¹.

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 duties³².

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 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 to 19 of the Act prescribe the time for stamping of instruments. Section 17 lays down the time for stamping an instrument executed within India, while sections 18

³¹ *Member, Board of Revenue v. Arthur Paul Benthall*, AIR 1956 SC 35.

³² *Saiyed Shaban Ali v. Sheikh Mohd. Ishaq*, AIR 1939 All 724.

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 executants³³.

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.

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

³³ *Shams Din v. Dollector, Amritsar*, (1936) 17 Lah 223.

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 section³⁴. 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 evidence³⁵.

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 India³⁶.

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 19³⁷.

Types of Stamps and Modes of Using them

Payment of Stamp Duty –

As per section 10 of the Indian Stamp Act, 1899

³⁴ *Narayan v. Bapuji*, 7 Bom HCR (AC) 140.

³⁵ *Ali Mohammad v. Jagannath Prosad*, 26 All LJ 823.

³⁶ *Mahomed Rowthan v. Mohamed Hussain Rowthan*, 22 Mad 337.

³⁷ *V.R.Sonai v. Chinniah Konar*, (1969) 1 MLJ 590

(1) 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.

(2) The rules made under sub-section (1) may, among other matters, regulate, -

(a) in the case of each kind of instrument, - the description of stamps which may be used;

(b) 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 collected by the States can be broadly divided into two categories, viz., 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;
 - 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 instruments 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.

As per section 12 of the Indian Stamp Act, 1899:

(1) (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 once³⁸.

Impressed 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.

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

³⁸ *Sohanlal v. Raghunath*, 37 PLR 494.

other purpose. The object of the section is to prevent the stamp paper from being used for a second time for another instrument³⁹.

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.

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 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 document⁴⁰.

³⁹ *Orient Spinning Mills Ltd. v. Amitebh Textile Mills Ltd.*, 1972 (1) CWR 41.

⁴⁰ *Thiruvengada Pillai v. Navaneethamal & Anr.*, AIR 2008, SC 1541.

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 required⁴¹. 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 –

- 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.

⁴¹ Reference under Stamp Act, Section 46, 7 Mad 178.

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 penalty⁴².

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 tendered⁴³. 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.

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. (<https://www.shcilestamp.com/>)

Government of India, Ministry of Finance, Department of Economic Affairs has appointed Stock Holding Corporation of India Limited (“**SHCIL**”) to act as Central

⁴² *Rahim Baksh v. Mohammad Ayub*, 3 Lah 282.

⁴³ *Motilal v. Jagmohan Das*, 67 Bom LR 699

Record Keeping Agency (“**CRA**”). The CRA is responsible for User Registration, Imprest Balance Administration and overall E-Stamping Application Operations and Maintenance.

e-Stamping is currently operational in the States/UTs of Gujarat, Karnataka, NCT Delhi, Assam, Tamil Nadu, Rajasthan, Himachal Pradesh, Uttarakhand, UT Administration of Dadra and Nagar Haveli and Daman and Diu, Puducherry, Uttar Pradesh, Chhattisgarh, Punjab, Chandigarh, Odisha ,Andhra Pradesh, Andaman & Nicobar, Tripura , UT of Ladakh ,Jammu & Kashmir, Meghalaya, Manipur and Arunachal Pradesh.

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
- 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.
- **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.

6. DRAFTING

Drafting is an art, the success of which depends on the mastery skills of a draftsman, the depth of his knowledge and experience of law and life. A good draftsman should be direct, simple, brief, vigorous and lucid.

Drafting may be defined as the synthesis of law and fact in a language form. Perfection cannot be achieved in drafting unless the nexus between law, facts and language is fully understood.

The old style of drafting of documents of the Eighteenth Century has given way for comprehensiveness, exactitude and clarity of expressions.

History of Document Drafting

Formularies are medieval collections of models for the execution of documents (acta), 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.

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.

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”.

Meaning of 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 entities⁴⁴.

“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.

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 ‘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.”*⁴⁵

Broad Areas of 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 entities⁴⁶. Drafting may broadly be done with reference to the following branches:

⁴⁴ Black’s Law Dictionary, 8th Ed. Thompson West, p. 531.

⁴⁵ E.L Piesse & Gilchrist Smith : The Elements of Drafting

⁴⁶ Ibid at 2, p 531.

a. Statutory Drafting

The documents that are required to be composed in accordance with the principles of legal composition may be generally described as “All 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 acts⁴⁷”, 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.

b. 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

⁴⁷ Ibid, p. 1278.

of drafting and preparing legal instruments, especially those that transfer an interest in real property⁴⁸.

Conveyancing is the art or science of preparing documents and investigating title in connection with the creation and assurance of interests in land⁴⁹. 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.

c. Pleadings

Pleadings are “formal documents in which a party to a legal proceeding sets forth or responds to allegations, claims, denials or defenses.”⁵⁰

As per the Code of Civil Procedure, 1908 the term “Pleading” means a *plaint* or a *written statement*⁵¹. 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.

⁴⁸ Ibid, pp. 357-358.

⁴⁹ Peter Butt, Land Law 7 (2d ed. 1988).

⁵⁰ Ibid, p 1191.

⁵¹ Order VI, R1.

Pleading to state only material facts and not evidence –

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

Importance of Clarity in Drafting

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

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 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-esteem⁵². Consider the following clause of an agreement:

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 meaning⁵³. 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

⁵² Merriam-Webster Collegiate Dictionary 11th Ed.

⁵³ Ibid.

... 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.

[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 provided⁵⁴:

‘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.’

⁵⁴ <http://www.practicalconveyancing.co.uk/content/view/10318/1118/>

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 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. Give 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
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.

9. 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 of 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

Knowledge of Legislations

Writing a document these days is a highly complex job. Unless one has a comprehensive knowledge of the codified Hindu Law, the Land Reform Laws, the Income Tax Laws, Partnership Laws, Company Laws, the Law of Registration, Stamp Duty Provisions of various States etc., it is extremely difficult to draft a document.

Each situation requires a different handling, a different recital, a different approach to the problem and the document may sometimes have to be moulded to be in conformity with the laws of the country and at the same time satisfy the main intention of the parties.

For the purpose of doing justification to the task of drafting, detailed understanding of many legislations is imperative, some of them being:

1. The Companies Act 1956
2. The Indian Partnership Act 1932
3. The Limited Liability Partnership Act 2008
4. The Indian Trusts Act 1882
5. The Societies Registration Act 1860
6. The Co-operative Societies Act 1912
7. The Multi State Co-operative Societies Act 2002
8. The Charitable and Religious Trusts Act 1920
9. The Arbitration and Conciliation Act 1996
10. The Foreign Exchange Management Act 1999
11. The Information Technology Act 2000
12. The Banking Regulation Act 1949
13. The Insurance Act 1938
14. Succession Laws
15. Labour Laws

7. CONVEYANCING

Conveyance means the action of conveying. It has been derived from the word 'conveyance,' which means to convey the title to a property from one person to another by an instrument. The term Conveyance in legal parlance means the voluntary transfer of a right or of property.

In law, Conveyancing is the transfer of title of property from one person to another, or the granting of an encumbrance such as a mortgage or a lien.⁵⁵

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

⁵⁵ Black's Law Dictionary (7th ed. 1999).

drafting and preparing legal instruments, especially those that transfer an interest in real property. 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.

History of Conveyancing

In ancient times in England the deed writing was optional and continued to remain optional until the time of King Charles II, particularly the cases in which the deed was required not to be under seal. Writing was required only in matters of great importance. It

was only during the reign of King Charles II that the British parliament enacted in 1677 a legislation requiring writing for creation and transfer of interest in landed property with an exception in case of lease for less than three years. The Real Property Act of 1845 required all grants of landed interest to be made by writing, which became known as 'Conveyancing'. The present form of Conveyancing is based on the Conveyance of Land Act of 1845 and the Law of Property Act, 1925.

In India the forms of Conveyancing are based on the present English forms. No legislation in India has ever been passed on the law of Conveyancing. Conveyancing in India is not unknown as the words, 'Qabuliyatnama', 'Jagirdar', 'Muafidar' and 'Charpatra' etc. are occurring from ancient days in the Indian literatures.

Conveyancing Vis-à-Vis Hindu Law

There are certain important general principles of Hindu Law, which a conveyancing draftsman has to bear in mind. What was originally understood as Hindu law was not the customary law of the country like the common law of England. Neither was it a statutory law framed by Legislature, acceptance of which was enforced on the people.

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.

Hindu law has its origin in various sources, which are:

- Vedas (also known as 'Srutis') – large body of texts originating in Ancient India
- Records of pronouncements made by various Rishis (also known as 'Smritis')
- Commentaries of various Scholars which gave rise to the Schools of Hindu Law - Among the commentaries, Vijnaneshwara's Mitakshara and Jimutavahana's Dayabhaga are of paramount importance.

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;

Thereafter, Hindu Law also derived from the following sources:

- Customs having 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 which to a large extent, codified the Hindu law;
After Independence the Parliament enacted the following laws which to a large extent codified the Hindu law viz.
 - a. The Hindu Marriage Act, 1955;
 - b. The Hindu Succession Act, 1956;
 - c. The Hindu Adoptions and Maintenance Act, 1956;
 - d. The Hindu Minority and Guardianship Act, 1956.

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

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 land⁵⁶.

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.

⁵⁶ Transfer of agricultural land is a State subject under Entry 18 of List II of the VIIth schedule.

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

The TPA 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 law⁵⁷. 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/-⁵⁸.

The property can be transferred wholly or in part. It can be transferred either absolutely or conditionally. Such transfer can be only to the extent and in manner allowed and prescribed by law.

Persons Competent to Transfer Immovable Property

Any person competent to contract and entitled to transferable property, or authorised to dispose of transferable property on his own, is competent to transfer such 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

⁵⁷ Refer section “Documents” of the paper,

⁵⁸ Refer section “Registration” of the paper

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;

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 small⁵⁹.

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

⁵⁹ *Fazal Ahmad v. R.B.S. Hari Prasad*, AIR 1929 All. 465 (F.B).

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 restraint 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 object⁶⁰.

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 property⁶¹. 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 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 apply⁶².

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 lessees⁶³.

⁶⁰ I.L.R (1943) Bom. 646.

⁶¹ *Kanthu Lal v. Pallu Sahu* 5 PLJ 521.

⁶² *Nainsukhdas v. Govardhandas*, AIR 1948 Nag 110.

⁶³ *Muhammad Jafar Khan v. Mazar- ul-Hasan*, 3 ALJ 474.

Under the section a co-sharer cannot 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 succeeding⁶⁴.

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 –

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 the Central Government of any suit or proceeding which is not collusive and in which any right to immovable 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.

⁶⁴ *Rukmani v. H.N.T. Chettiar*, AIR 1985 283.

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 termination⁶⁵. 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 suit⁶⁶.

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.

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

⁶⁵ *Sefali Roy Chowdhury v. A.K. Dutta*, AIR 1967 SC 1810.

⁶⁶ *K.A.Khader v. Rajamma Jha*, AIR 1994 Ker 123.

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 immovable 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 apply⁶⁷.

Doctrine of Part Performance

Section 53A of the Act 1882 provides that where any person contracts to transfer for consideration any immovable 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 therefor by the 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

⁶⁷ *Akramunnissa v. Mustafunnisa* AIR 1929 All 238.

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 property⁶⁸.

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 transferor is called a

⁶⁸ *Dantmara Tea Co. v. Probodh Kumar Das* 41 CWN 54.

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 effected by an absolute transfer of property with a provision for re-transfer in case of repayment of the amount due. The remedy is by way 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 effected 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

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 party of the party affected⁶⁹.

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 property⁷⁰. 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

⁶⁹ *Bapurao v. Narayan*, AIR 1950 Nag 117.

⁷⁰ *Dattatreya Mote v. Anand Datar*, (1994) 2 SCC 799.

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 written⁷¹.

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 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 only⁷².

Actionable Claim

⁷¹ *Tirath Ram Gupta v. Gurubachan Singh*, (1987)10 Reports (SC) 84.

⁷² *Ram Badan v. Kunwar*, AIR 1938 All 229.

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.

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 action⁷³.

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 mortgage⁷⁴.

8. TYPES OF DOCUMENTS FREQUENTLY DRAFTED

A Chartered Accountant is a professional with multi-disciplinary talent. He is looked upon as a complete business provider. He is the best person to draft documents because of abundance of knowledge in varied avenues like finance, economic and commercial laws, information technology etc.

⁷³ *H. Anraj v. Government of T.N.* AIR 1986 SC 63.

⁷⁴ *Satindra v. Jatindra*, AIR 1935 PC 165.

The various types of documents frequently drafted by Professionals that require adequate drafting skills are enumerated hereunder –

1. Business Agreements
 - a. Arbitration Agreement
 - b. Acquisition Agreement
 - c. Agency Agreement
 - d. Advertising Agreements
 - e. Consultancy Agreement
 - f. Construction Agreement
 - g. Franchisee Agreement
 - h. Foreign Collaboration Agreement
 - i. Hire Purchase Agreement
 - j. Investment Agreement
 - k. Joint Venture Agreement
 - l. Service Agreement
 - m. Shareholder Agreement
 - n. Stock Purchase Agreement
 - o. Sale Agreement
 - p. Technology Sharing Agreement
2. Documents for Formation of an Entity
 - a. Memorandum of Association
 - b. Articles of Association
 - c. Partnership Deed
 - d. LLP Agreement
 - e. Trust Deed
 - f. Bye laws of Societies
3. Property related documents
 - a. Purchase of Flat/house/apartment (commercial/residential)
 - b. Purchase of Land

- c. Leave and Licence Agreement
 - d. Development Agreement
 - e. Transfer Deed
 - f. Power of Attorney
 - g. Lease Agreement
 - h. Gift Deed of Property
 - i. Partition Deed
 - j. Settlement Deed
 - k. Construction Agreement
 - l. Rent Agreement
 - m. Sale/ Purchase Agreement
 - n. Agreement to Sell
 - o. Deed of Mortgage of Property
 - p. Relinquishment Deed
 - q. Surrender Deed in Cooperative Housing Society
 - r. Mortgage Deed
4. Intellectual Property Documents
- a. Patent and High Technology Agreements
 - b. Licensing Agreements
 - c. Consulting and Know-How Agreements
 - d. Joint Development Agreements
 - e. Licensing of Software and Source Code Escrow Agreements, Motion Pictures for multimedia use, photographs etc.
 - f. Software Development Agreements
 - g. Agreement for Sale of Technical Know-How
 - h. License of use of copy right
 - i. Agreements relating to protection of designs/ trademarks/ patents/ and know how
5. Documents relating to Cyber law
- a. Technology related contracts
 - b. Internet services agreements

6. Banking / Financial Documents
 - a. Loan Agreements
 - b. Bank Guarantee
 - c. Promissory Note
 - d. Letter Of Credit & Reimbursement Agreement
7. Import/Export related documents
8. Documents related to labour and employment
 - a. Employment agreements
 - b. Non-disclosure Agreement
 - c. Compensation Agreement
 - d. Collective Bargaining Agreement
 - e. Wage Agreement
9. Insurance related documents
10. Documents for Private Equity Funding
 - a. Business Plan
 - b. Term Sheet
 - c. Warranties and Indemnities
 - d. Disclosure Letter
 - e. Shareholders' / Investors' Rights/ Subscription Agreement
11. Wills
12. Other legal documents
 - a. Affidavit
 - b. Plaint
 - c. Written Statement
 - d. Notices