

PRAKASAM DISTRICT

Workshop – I
ON

DOCUMENTARY EVIDENCE
OF CIVIL CASES

Presided over by

Hon'ble Ms. Justice
B.S. BHANUMATHI
Judge, Hon'ble High Court of
Andhra Pradesh,
Hon'ble Administrative Judge,
Prakasam District at Ongole.

Dt: 16-09-2023

WORKSHOP-I

SUBJECT: DOCUMENTARY EVIDENCE OF CIVIL CASES

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DOCUMENTARY EVIDENCE IN CIVIL CASES

(a. Classification of documents basing on the transactions eg. Sale, Gift, Mortgage, Will, Pronote, Lease, Adoption, Agreements etc.)

(b. Relevant laws defining and explaining the different transactions)

(c. Method of interpretation of correct nature of documents)

Article submitted by Sri Rayasam Sivakumar, I Addl. District & Sessions Judge, Prakasam District at Ongole for the Workshop-I to be held on 16.09.2023 at Ongole

“If we both exchange one rupee, we have one rupee, but if we both exchange one good thought, we have two good thoughts.”

Great words of Sri Vivekananda Ji:

(a) & (b)

CLASSIFICATION OF DOCUMENTS BASING ON THE TRANSACTIONS AND THEIR RELEVANT LAWS DEFINING AND EXPLAINING THE DIFFERENT TRANSACTIONS.

i) **SALE DEED :**

Section 54 of Transfer of Property Act defines sale as follows,

“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

ii) **GIFT DEED:**

Section 122 of Transfer of Property Act defines gift as follows,

‘Gift’ is the transfer of certain existing moveable or immoveable property made voluntarily and without

consideration, by one person, called the “Donor”, to another, called the “Donee”, and accepted by or on behalf of the donee.

iii) **MORTGAGE DEED:**

Section 58 of Transfer of Property Act deals with six types of mortgages and also defines mortgage deed, as follows,

(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.—Where the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall

transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

(d) Usufructuary mortgage.—Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.—Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [and Bombay], and in any other town which the [State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an

usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

Order 34 Rule (1) of the Code of Civil Procedure deals with Puisne Mortgage which means a second or subsequent mortgage of unregistered land of which the title deeds are retained by a first mortgagee.

iv. **WILL:**

Section 2(h) of The Indian Succession Act defines Will, as follows,

‘will’ means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

v. **PRONOTE:**

Section 4 of Negotiable Instrument Act defines. “Promissory note” as follows,

A “Promissory note” is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument

vi. **LEASE:-**

Section 105 Chapter V of The Transfer of Property Act defines Lease, as follows,

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other

thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

vii. **ADOPTION DEED:-**

Adoption deed is a deed through which all rights and responsibilities, along with filiation, from the biological parent or parents is transferred to adopted parents.

viii. **AGREEMENT:**

Section 2 (e) of The Indian Contract Act 1872 defines Agreement, as follows,

Every promise and every set of promises, forming the consideration for each other, is an agreement;

ix. **SETTLEMENT DEED:**

Section 2 (24) of The Indian Stamp Act, 1956 defines Settlement Deed, as follows,

‘settlement’ means any non-testamentary disposition, in writing, of moveable or immovable property made—

- (a) in consideration of marriage,
- (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
- (c) for any religious or charitable purpose:

and includes an agreement in writing to make such a disposition [and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration trust or otherwise, the terms of any such disposition];

x. **BOND:**

Section 5 of The Indian Stamp Act, 1956 defines Bond, as follows,

'bond' includes—

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another:

xi. **CODICIL:**

Section 2(b) of The Indian Succession Act defines Codicil as follows

'codicil' means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will;

(c). METHOD OF INTERPRETATION OF CORRECT NATURE OF DOCUMENTS

The Courts have to keep in mind the following points with regard to method of interpretation of correct nature of documents:-

1) The intention of the parties manifested at the time when the document was executed should be ascertained.

2) To ascertain the intention of the parties, the document must be considered as a whole. It is from the whole of the document, coupled with the surrounding circumstances, that the general intention of the party or parties is to be ascertained. Attempt must be made to gather the intention of the parties from the exact words used in the deed.

3) It is the duty of Court to interpret a document of contract as was understood between the parties. The terms of the contract have to be construed strictly without attending the nature of the contract as it may affect the interest of parties adversely (2005) 123 Companies Cases 663 (SC) Polymat India Ltd. and others vs. National Insurance Co. Ltd.

4) A document has to be read as a whole and the spirit of it should be taken note of and not to be carried away by the mere letters found therein. Anyone who tries to rely on mere wordings but without keeping in mind the object and spirit of the document would be considered as a person who has thrown the baby alongwith the bath water.

5) Whenever a document is couched in a language which is clear and definite and no doubt arises in its application to the facts, there is no need to resort to the rules of interpretation. Rules of interpretation of deeds are intended to ascertain, to the extent possible, the exact meaning of a document which is not clear and definite.

6) When the words used in a deed are in their literal meaning unambiguous and when such meaning is not excluded from the context and is sensible with respect to the parties at the time of executing the deed, such literal meaning must be taken. Where, the words used in a deed, if taken in its literal sense lead to absurdity and inconsistency, then

an interpretation to avoid that absurdity and inconsistency should be made.

7) When the intention of the maker or makers of a deed cannot be given effect to in its full extent, effect is to be given to it as far as possible. Where the intentions are sufficiently clear from the deed itself, mis-recital in some part of the deed cannot vitiate it. Anything expressly mentioned in the deed excludes another view impliedly possible.

8) As far as possible, effect is to be given to all words used in a document. This is yet another important principle in the interpretation of deeds. A document should be construed in its entirety. Further, if possible, it should be construed so as to give effect to every word employed therein.

9) The court is not at liberty to discard a word, if some meaning can be ascribed to it. Normally, the words employed in a deed should be taken in its ordinary sense, unless there are indications to do otherwise. It is also an important rule that plain words should be given plain meaning.

10) In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and intended they should apply.”

11) The golden rule of construction is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary natural sense. (AIR 1969 SC page 9 at page 11 & 12). Sometimes it happens that there is a conflict between what is said in one part of the document and in another part. In such a case an attempt should always

be made to read the two parts of the document harmoniously, if possible. In such a case the second part of the document has to be held as void. (AIR 1963 SC page 890 at page 893 & 894).

12) The fundamental rule is to ascertain the intention from the words used. The surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed (AIR 1951 SC page 139). However, while considering a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the party (AIR 1969 SC page 9).

13) If there is ambiguity in the language employed, the intention may be ascertained from the content of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. The document has to be considered as a whole for interpretation of particular word or direction. (AIR 1966 SC page 902 and AIR 1979 SC page 533 at page 561).

14) It is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim *ut res magis valeat quam pereat*.

15) If it is not possible to give effect all of them, the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa (AIR 1969 SC page 22).

16) The technical rules of interpretation of provisos and exceptions, with reference to their scope and legal effect, adopted in constructing statutes should not ordinarily be imported in interpreting deeds and documents executed by laymen.

17) Nomenclature of a document or deed is not conclusive of what it seeks to achieve. The court has to consider all parts of it , and arrive at a finding in regard to its true effect.

DOCUMENTARY EVIDENCE IN CIVIL CASES
PAPER PRESENTATION ON THE DIFFERENT KINDS OF TRANSACTIONS,
RELEVANT LAWS AND METHOD OF INTERPRETATION

BY

N. VIJAYA BABU,
SR. CIVIL JUDGE,
KANDUKUR

SESSION-I

- (a) Classification of documents basing on the transactions eg. Sale, gift, mortgage, will, pronote, lease, adoptions, agreements etc.,
- (b) Relevant laws defining and explaining the different transactions.
- (c) Method of Interpretation of correct nature of document.

The classification of documents is based on the transactions for which such documents are prepared and they are defined under different statutes.

Definition of a document or instrument and transaction broadly:-

Document:- As per Section 3 of Indian Evidence Act Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used or which may be used for purpose of recording the matter.

Instrument:- As defined under Section 2(14) of Indian Stamp Act Instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

Transaction is not defined under any statute. A transaction is an event associated with dealings conducted between two or more parties that involve the formation and performance of an [obligation](#) or [contract](#). But there are different kinds of transactions basing on the needs of the parties such as adoption, agreement, bond, conveyance, exchange, gift, lease, mortgage, power of attorney, promissory note, relinquishment, sale, settlement, will etc.,

SOME OF THE IMPORTANT TRANSACTIONS BETWEEN PARTIES ARE AS FOLLOWS:-

ADOPTION:-

Adoption is not defined in any statute. However, adoption is one of the transactions which is being frequently used in India. The Hindu Adoption and Maintenance Act, Guardians and Wards Act and the Juvenile Justice (Care and Protection) Act applies for adoptions based on religion, age and community of the parties.

Under Section 7 of Hindu Adoption and Maintenance Act, following conditions are to be fulfilled so as to allow a Hindu male to adopt a child:

1. He is a major

2. He is of sound mind

3. As per the declaration of the competent court, he shall not adopt any child if he has a wife living at the time, except with her consent unless and until the wife has renounced the world or her Hindu religion or has become unsound mind.

Note:- 1. The consent is not necessary in case of divorce but such consent is mandatory in case of judicial separation.

2. Prior to the civil adoption, the consent must be obtained and not later on where the proviso is disregarded adoption is not valid.

Sec 57 of the Juvenile Justice Act lays down the eligibility of prospective adoptive parents applying for adoption under the act,

1. The adoptive parents must be mentally sane, financially sound and physically fit.

2. Where the applicant is married, the consent of both the spouses is necessary.

3. The act also provides for adoption by a bachelor or divorced person but such adoption shall be subject to guidelines and rules framed by CARA.

4. A single male is barred from adopting a female child

5. Prospective parents must also fulfill any additional criteria as laid by CARA.

Adoption can't be obtained under Guardian and Wards Act and only guardianship can be obtained and it will be effective only till the age of majority of ward.

As per Section 17 of the Registration Act, the adoption deed unless it couples with creating rights in immovable property requires compulsory registration. As per Article 3 of Schedule I-A of the Indian Stamp Act an adoption deed requires stamp duty of Rs.35/-.

The Hon'ble Supreme Court of India in **M. Vanaja Vs. M. Sarala Devi (died) reported in 2020 (5) SCC 307** held that adoption only valid if Section 7 and 11 of Hindu Adoptions and Maintenance Act is complied i.e., proof of ceremony and wife's consent.

The Hon'ble Supreme Court of India in **Shabnam Hashmi v Union of India, (2014) 4 SCC 1**, declared that the right to adopt a child by a person as per the provisions of Juvenile Justice Act would prevail over all personal laws and religious codes in the country.

Agreement of Sale:-

An agreement of sale is not defined in any statute, but, as per Section 54 of Transfer of Property Act it is defined as contract for the sale of immovable property is a contract that a sale shall of such property shall take place on terms between the parties and it doesn't of itself create any interest or charge over such property.

As per Article 6 of Schedule IA of Indian Stamp Act basing on the sale consideration the stamp duty has to be paid on agreement of sale and the highest

stamp duty is Rs.100/- if the value exceeded Rs.50,000/-. As per explanation I to Article 47-A of Schedule IA an agreement of sale coupled with delivery of possession requires stamp duty as sale. As per Section 17 (g) & (1A) of Registration Act, an agreement of sale of immovable property whose value exceeds Rs.99/- is compulsorily registrable and for the agreement of sales obtained on or after commencement of Registration and other laws (Amendment) Act, 2001 if not registered are not useful for the purpose of Section 53-A of Transfer of Property Act. But, in view of the exception provided under proviso of Section 49 of Indian Registration Act eventhough such an agreement of sale is unregistered the same is being taken into consideration evidencing collateral transaction not required to be effected by registered document.

The **Hon'ble Supreme Court of India in Sita Ram Bhamra v. Ramvatar Bhamra reported in 2018 (5) SCALE 122** held that an unregistered document can be relied upon for collateral purpose.

An Agreement of sale requires no attestation.

Bond:-

As per section 2 (5) of Indian Stamp Act defines **Bond** that "bond" includes--

- (a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another; but does not include a debenture;

As per Article 13 of Schedule IA of the Indian Stamp Act stamp duty is levied @ Rs.3/- per hundred upto Rs.1000/- and @ Rs.15/- for every Rs.500/- or part thereof in excess of Rs.1000/-. Bond is not a compulsorily registrable document.

The transaction under Bonds are mostly seen in contracts and also in employment whereunder one person gives undertaking to another to do a specific act or not to do a specific act and binds himself to pay certain or uncertain amount in violation of the such condition. Bond is compulsorily attestable document and attestation by one witness is sufficient.

The Hon'ble High Court of Andhra Pradesh in Bahadurrinisa Begum v. Vasudev Naick reported in AIR 1967 AP 123 has held that in order to bring an instrument within Clause (b) of [Section 2\(5\)](#) of the Stamp Act the instrument must have been attested by a witness, and secondly the amount must not be made payable to order or bearer. If any one of the two things is absent from an instrument, then [S. 2\(5\)](#) (b) would not be attracted.

Conveyance:-

As per Section 2(11) of Indian Stamp Act defines word conveyance includes an

instrument by which property either movable or immovable is transferred. Therefore, all kinds of documents i.e., sale deed, exchange deed, lease deed, relinquishment deed, settlement deed etc., falls under the definition conveyance.

As per Article 23 of Schedule IA of Indian Stamp Act the stamp duty is levied @ Rs.0.50 Ps if amount not exceeds Rs.50/- and increased to Rs.10/- if the amount not exceeds Rs.1000/-, that @Rs.5/- for every Rs.500/- or part thereof in excess of Rs.1000/-. Whether registration is compulsory or not depends on kind of the transaction.

Exchange:-

Section 118 of the Transfer of Property defines Exchange is the transaction when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only and it has to be completed only in manner provide for transfer of such property by sale.

Therefore, an exchange deed requires no attestation and if the value of the immovable property exceeds Rs.100/- it compulsorily requires registration. As per Article 27 of Schedule IA of Indian Stamp Act the stamp duty is to be levied as conveyance on the market value equal to the market value of the property of greater value which is the subject matter of exchange.

The Hon'ble Supreme Court of India in Shyam Narayan Prasad Vs. Krishna Prasad and others reported in AIR 2018 SC 3152 to the effect that exchange deed with regard to immovable properties is compulsorily registrable and with regard to movable properties is not compulsorily registrable.

The Hon'ble Supreme Court of India in Jattu Ram Vs. Hakama Singh reported in AIR 1994 SC 1653 held that defect in title of the land received by one party, the opposite party is liable to return the land delivered to it under the exchange deed.

Gift:-

As per Section 122 of Transfer of property Act gift means a voluntary transfer of property made without consideration, by one person (the donor) to another person (the donee), who accepts the gift.

Acceptance by the donee can be made only during the life time of donor and donor is still capable of giving the said gift.

As per Section 123 of Transfer of property Act a gift of immovable property has to be made only through registered instrument signed by or on behalf of the donor, duly attested by two witnesses. For the purpose of making gift of movable property it can be made either through registered instrument as signed above or by delivery as done in the case of goods sold.

As per Section 17 (1) (a) of Registration Act, a Gift deed is compulsorily registrable document. Stamp duty has to be paid as per Article 29 of Schedule I-A of Indian Stamp Act as in the case of conveyance.

The Hon'ble Supreme Court of India in Daulat Singh Vs. State of Rajasthan and Ors reported in 2021 (3) SCC 459 described when gift of immovable property is complete in terms of Section 123 of Transfer of Property Act.

The Hon'ble Supreme Court of India in Govindbhai Chottabhai Patel and others Vs. Patel Ramanbhai Mathurbhai reported in 2020 (16) SCC 255 that a registered gift deed unless specifically denied need be proved by examining one of the attesting witness.

The Hon'ble Supreme Court of India in S. Sarojini Amma Vs. Velayudhan Pillai Sreekumar reported in 2019 (11) SCC 391 held that the donor can cancel the gift deed before the transaction is completed.

Muslim personal law of Gift is not affected by Sections 122 to 129 of Transfer of Property Act. Oral gift is permitted in Muslim personal law. The Hon'ble Supreme Court of India in Hafeeza Bibi & Ors Vs. Shaik Farid (dead) by Lrs. And Ors. Reported in 2011 (5) SCC 654 to the effect that a written declaration of a gift among Muslims need not be registered.

Lease:-

As per Section 105 of Transfer of Property Act a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

As per Section 17 (d) of Registration Act a lease of immovable property is compulsorily registrable in andhra pradesh in view of Act.No.4 of 1999 w.e.f 01-04-1999. As per Article 31 of Schedule I-A of Indian Stamp Act the stamp duty has to be paid.

The Hon'ble Supreme Court of India Siri Chand (dead) through legal representatives Vs Surinder Singh reported in 2020 (6) SCC 288 to the effect that lease deed doesn't contain the period of tenancy other conditions of the lease deed and intention of the parties has to be gathered. With regard to non requirement of registration if period of tenancy is not mentioned in the lease agreement the same is not applicable to state of Andhra Pradesh in view of the amendment to 17(d) of Registration Act.

The Hon'ble Supreme Court of India in Triveni Bai and another Vs. Smt. Lilabai reported in 1959 SCR Supl. (2) 107 to the effect that the terms of Section 2(7) of Indian Stamp Act shall be construed while deciding whether a document is agreement of lease or not.

Mortgage:-

As per Section 58 of Transfer of Property Act Mortgage is a transfer of an

interest in specific immovable property by mortgagor in favor of mortgagee through mortgage deed for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or performance of an engagement which may give rise to a pecuniary liability.

As per Section 59 of Transfer of Property Act & Section 17 (b) of Registration Act a mortgage deed where the principal money secured is more than Rs.100/- then shall be by registered instrument signed by the mortgagor and attested atleast by two witnesses. As per Article 35 of Schedule IA of Indian Stamp Act if possession is given or agreed to given same duty as conveyance and if possession is not given or agreed to be given same duty as Bottomry bond.

The Hon'ble Supreme Court of India in Sopan Vs. Syed Nabi reported in 2019 (7) SCC 635 held that no transaction shall be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which effects or purports to effect the sale, that any recital relating to mortgage or the transaction being in the nature of a conditional sale should be an intrinsic part of the very sale deed which will be the subject-matter.

The Hon'ble Supreme Court of India in Narayan Deorao Javle (Deceased) Through Lrs. Vs. Krishna and Others reported in 2021 SCC Online SC 608 to the effect that once a mortgage is always a mortgage.

The Hon'ble Supreme Court of India in U. Nilan Vs. Kannayyan (dead) through Lrs reported in 1999 (8) SCC 511 held that "Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefor, the situation cannot be exploited by the person who had advanced the loan. The court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 CPC." The Hon'ble Supreme Court of India in Mushir Mohammad Khan (dead) by Lrs vs Sajeda Bano (Smt) and others reported in 2000 (3) SCC 536 by relying on the above principle where sale deed and reconveyance agreement were entered directed the purchaser under the sale deed to pay Rs.2,00,000/- for perfecting his title.

Power of Attorney:-

As per Section 1-A of Power of Attorney Act Power of Attorney includes any instrument empowering a specified person to act for and in the name of the person executing it. Power of Attorney is not a registrable document unless it gives interest to deal with immovable property or comes within Section 17 of Registration Act. As per Section 33 of Registration Act a power of attorney shall be authenticated by a Magistrate or Notary Public or by a Registrar or Sub-Registrar.

As per Article 42 of Schedule IA the stamp duty has to be collected on Power of

Attorney and in case of power of attorney given for consideration authorising sale of immovable property and receiving of sale consideration same as conveyance on the consideration paid.

Sections 182 to 238 of Indian Contract Act are applicable to the power of attorney holder acting under the power of attorney as an agent of the principal.

Partition:-

As per Section 2(15) of Indian Stamp Act defines Instrument of Partition means any instrument whereby co-owners of any property divide or agree to divide such property in severally, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing a partition. The partition can be oral or through registered document or by Court. In view of the amendment to Hindu Succession Act, 2005 the partition should be either through Court or by registered Instrument with regard to coparcenary property.

As per Section 17 of Registration Act, the partition deed creates a right for the first time in a property worth Rs.100/- or more it requires Registration. No where in law attestation is stipulated for partition deed. As per Article 40 of Schedule IA of the Indian Stamp Act the stamp duty has to be paid.

The Hon'ble Supreme Court of India in Vineeta Sharma Vs. Rakesh Sharma reported in 2020 (9) SCC 1 held that even oral partition is also inadmissible if supported by public documents and also held that the daughters have equal birth right like sons to inherit the coparcenary property irrespective of father is alive or not.

The Hon'ble Supreme Court of India in K. Arumuga Velaiah V. P.R. Rama Swamy reported in 2022 SCC Online SC 95 held that mere arrangement to divide the properties in future by metes and bounds as distinguished from an actual deed of partition under which there is not only a severance of status but also division of joint family properties by metes and bounds in specific properties. Hence it was exempted from registration under Section 17(2)(v) of the Act.

The Hon'ble Supreme Court of India in Korukunda Chalapathi and others Vs. Korukonda Annapurna Sampath Kumar reported in 2021 SCC Online SC 847 held that unregistered partition deed can be taken into evidence to prove collateral transaction and document evidencing part partition doesn't require stamp duty and penalty.

Promissory note:-

As per Section 4 of the Negotiable Instruments Act a Promissory note is an instrument in writing not being a bank note or currency note containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. As per Section 2(22) of Indian Stamp Act it also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen.

Promissory note is not a compulsory registrable document and requires no attestation. As per Article 49 of Schedule I of Indian Stamp Act the stamp duty payable is Rs.0.05 Ps if less than Rs.250/-, Rs.0.10 Ps., if more than Rs.250/- and less than Rs.1000/- and Rs.0.15 Ps., in any other case. As per amendment to Section 35 of Indian Stamp Act Act No.21 of 2006, dated w.e.f. 18-04-2006 an insufficiently stamped promissory note can be impounded.

The Hon'ble High Court of Andhra Pradesh in Bahadurrinisa Begum Vs. Vasudev Naick and others reported in AIR 1967 AP 123 held that **6**. It can thus be broadly stated that in order that an instrument may fall within the definition of promissory note contained in section 4 of the Act it is necessary that there should be.

- (1) unconditional undertaking to pay,
- (2) the sum should be a sum of money and it should be certain.
- (3) the payment should be to or to order of, a person, who is certain, or to the bearer of the instrument, and
- (4) the maker should sign it.

It is however, clear that apart from fulfilling the above said terms of definition of promissory note the instrument must further satisfy the following three tests:—

1. The promise to pay must be the substance of the instrument.
2. there must be nothing else inconsistent with the character of the instrument as substantially a promise to pay, and
3. the instrument must be intended by the parties to be a promissory note.

Relinquishment/Release:-

The transaction of Relinquishment/Release not defined in any statute. Dictionary meaning of Relinquishment/release is that To set free; to discharge a claim that one has against another (the settlement released him from liability).

As per Section 17 of Registration Act a relinquishment/release deed with regard to immovable property worth of Rs.100/- or more is compulsorily registrable. As per Article 46 of Schedule IA of Stamp Act the stamp duty has to be levied @ Rs.3/- per hundred if doesn't exceed Rs.1000/-, if exceeds Rs.1000/- same as previous till Rs.1000/- and @ Rs.15/- for every Rs.500/- or in part in excess of Rs.1000/-.

The Hon'ble High Court of Andhra Pradesh in Pasagadugula Narayana Rao Vs. Pasagadugula Rama Murty reported in 2016 (1) ALD 238 differentiated between family settlement deed and release/relinquishment deed.

The Hon'ble Supreme Court of India in Kuppaswami Chettiar Vs A.S.P.A. Armugam Chettiar reported in AIR 1967 SC 1395 held that relinquishment deed couldn't transfer the title of the property to someone else and the renunciation of such acts should be in favor of person who already had a legal title concerning the property.

Sale:-

As per Section 54 of Transfer of Property Act 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Sale how

made.—3Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. 1In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

As per above section and Section 17 of the Registration Act, the sale deed is compulsorily registrable document, doesn't require attestation. As per Article 47A of Stamp Act the stamp duty to be paid location of the immovable property and worth of the property.

The Hon'ble Supreme Court of India in Damodhar Narayan Sawale (D) through LRs. Vs. Shri Tejrao Bajirao Mhaske & Ors reported in 2023 SCC Online SC 566 held that a Sale Deed, when registered and executed in due compliance, shall confer a valid and legitimate title to the receiver and burden is on the defendants to establish otherwise and to prove that it did not reflect the true nature of transaction.

The Hon'ble Supreme Court of India in Vidyadar Vs. Manikrao reported in 1999 (3) SCC 573 held that once the title in the property is passed even if the balance sale consideration is not paid the sale can't be vitiated on that ground.

The Hon'ble Supreme Court of India in Smt. Hansraj Vs. Yasodanand reported in AIR 1996 SC 761 to the effect that a sale deed is not compulsorily registrable document and Section 68 of Indian Evidence Act is not applicable for proving a sale deed.

Settlement:-

As per Section 2(24) of Indian Stamp Act "Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made— (a) in consideration of marriage, (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or (c) for any religious or charitable purpose; and includes an agreement in writing to make such a disposition 15 [and, where, any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition];

As per Section 17 of Registration Act settlement deed is compulsorily registrable documentor. As per Article 49 of Indian Stamp Act stamp duty has to be paid as Bottomry bond in case deed between family members and in any other case @Rs.6/- per hundred on the value of the property of subject matter.

The Hon'ble Supreme Court of India in Subbegowda (dead) by LR Vs. Thimmegowda (dead) by Lrs. Reported in 2004 (9) SCC 734 held while dealing with settlement deed that a conditional transfer or settlement accompanied by conditions is not unknown to the law of real property and unless such conditions are invalidates or

annuls such condition it will be given effect by Court and conditional settlement deed can be revoked.

WILL:-

Section 2(h) of Indian Succession Act defines Will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.

Will is not compulsorily registrable document and doesn't require any stamp duty. As per Section 63 of Indian Evidence Act it is compulsorily attestable by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator a personal acknowledgment of his signature or mark, or the signature of such person and each of the witnesses shall sign the will in the presence of testator, but, it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

The Hon'ble Supreme Court of India in Raj Kumari and others Vs. Surinder Pal Sharma reported in 2021 (14) SCC 500 discussed the manner in which a Will has to be proved under Section 63 of Indian Succession Act, 68, 71 and 114 of Indian Evidence Act etc.,

METHOD OF INTERPRETATION OF NATURE OF DOCUMENT:-

Golden Rules of Interpretation as held by the Hon'ble Supreme Court of India in some of the decisions are as follows:-

Intention of the parties as described by the words of the instrument must govern the construction as held by the Hon'ble Supreme Court of India in Triveni Bai and another Vs. Smt. Lilabai reported in 1959 SCR Supl. (2) 107.

The title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document, that the nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties as held by the Hon'ble Supreme Court of India in Fakir Chand Gulati Vs. Uppal Agencies Pvt., Ltd., reported in 2018 ACR 895.

It is settled law that the question of construction of a **document** is to be decided by finding out the intention of the executant, firstly, from a comprehensive reading of the terms of the **document** itself, and then, by looking into--to the extent permissible--the prevailing circumstances which persuaded the author of the **document** to execute it. With a view to ascertain the **nature** of a transaction, the **document** has to be read as a whole. A sentence or term used may not be determinative of the real **nature** of transaction as held by the Hon'ble Supreme Court of India in B.K.Muniraju Vs. State of Karnataka and others reported in 2008(4) SCC 451.

If there is a conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well-established that it is the earlier clause that must override the later clauses and not vice versa as held by the Hon'ble Supreme Court of India in Radha Sundar Vs. Mohd. Jahadur Rahim reported in 1959 (1) SCR 1309/AIR 1959 SC 24

But, in case of Will when there is conflict between two clauses the later clause will prevail as held by the Hon'ble Supreme Court of India in M.S.Bhavani and another Vs. M.S.Raghu Nandan reported in 2020 (5) SCC 361.

DOCUMENTARY EVIDENCE IN CIVIL CASES – SUB-TOPIC- I

- (i) Classification of documents basing on the transactions eg.Sale, Gift, Mortgage, Will, Pronote, Lease, Adoption, Agreements etc.
- (ii) Relevant laws defining and explaining the different transactions
- (iii) Method of interpretation of correct nature of documents

INTRODUCTION

DOCUMENT - means a piece of written, printed, or electronic matter that provides information or evidence or that serves as an official record.

According to Section 3 of Indian Evidence Act, 1872 “Document” means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. Illustrations A writing⁵ is a document; Words printed, lithographed or photographed are documents; A map or plan is a document; An inscription on a metal plate or stone is a document; A caricature is a document.

EVIDENCE - is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts, which are subject to Enquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself¹.

The word “Evidence” is defined in Section 3, Evidence Act as follows:

- “Evidence” means and includes –
- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called – Oral Evidence;
 - (2) all documents including ‘Electronic Records’ produced for the inspection of the Court” [‘Electronic Record’ is introduced by Information Technology Act (Act 21 of 2000 – Central) amending the Evidence Act].

Such documents are called documentary evidence.

2. CATEGORIES OF EVIDENCE

Evidence can be classified into three categories.

- a. Oral Evidence
- b. Documentary Evidence as per the definition of document in Section 3 of Indian Evidence Act, 1872

¹Halsbury’s Laws of England, 3rd ed. Vol. 15 p.260

- c. Electronic Record (under Information Technology Act, 2000, amending the expression – ‘documentary evidence’ – as defined also in Section 3 of Evidence Act, 1872).

Evidence may consist of oral statements or documents in writing. In other words evidence may be both oral [statements made by witnesses in court under oath] and documentary [documents produced for the inspection of the Judge]. Documents include electronic records.

Documentary evidence thus is defined under the Evidence Act to mean, ‘*all documents including electronic records produced for the inspection of the Court.*’ For example, a contract produced before the Court in case of a dispute for ascertaining the terms of the clause for its specific enforcement; or presentation of a sale deed as proof for the ownership of a property in a suit involving a title dispute.

Topics (i)&(ii)

RELEVANT LEGAL PROVISIONS :-

Chapter – III from Sec.54 to 57 of The Transfer of Property Act, 1882 deals with Sales of Immovable Property. Sections 58 to 99 in Chapter – IV recognizes the Mortgages and Charges over the Immovable Property. Section 105 to 117 of The Transfer of Property Act deals with Lease Deeds and Sections 118 to 121 deals with Exchanges. The Gift Deeds are dealt from Sections 122 to 129 of the Act, 1882. Apart from those Provisions, Section 4 of Negotiable Instruments Act, 1881 defines the Promissory Note and the Specific Relief Act, 1963 provides for Specific Performance of the Contracts basing on the agreements. Section 2(h) of The Indian Succession Act defines Will. Section 2 (e) of The Indian Contract Act 1872 defines Agreement.

SALE DEED

Section 54 of Transfer of Property Act deals with how the Sale should be made. As per Section 54, the following are the essential ingredients of a complete Sale.

- (1) Parties
- (2) Subject matter
- (3) Transfer of conveyance
- (4) Price or consideration (consideration is defined in Section 2(d) of Contract Act. As per Section 4 of Transfer Property Act provisions in Transfer of Property Act, 1882 relating to contracts should be treated as part of Indian Contract Act, 1872)
- (5) Registration of the sale deed if the subject matter is tangible immovable property of the value of Rs.100/- and upwards is necessary.

Sale Deed is not a compulsorily attestable document. Therefore, to prove a Sale Deed, it is not mandatory to examine any one of the attestors².

In *Kewal Krishan – Vs – Rajesh Kumar*³, the Hon'ble Supreme Court has held that "The sale deeds will have to be held as void being executed without consideration."

In *Mrs. Umadevi Nambiar – vs – Thamarasseri Roman Catholic Diocese rep. by its Procurator Devssia's Son Rev. Father Josheph Kappil*⁴, the Hon'ble Supreme Court has held that "It is a fundamental principle of the law of transfer of property that "no one can confer a better than what he himself has" (Nemo dat quad non habet). The General Power of Attorney should expressly authorize the agent, (i) to execute a sale deed; (ii) to present it for registration; and (iii) to admit execution before the Registering Authority."

GIFT DEED

Gift is defined in Section 122 of Transfer of Property Act. Section 123 of the Act provides the mode of transfer.

ESSENTIAL ELEMENTS OF A GIFT ARE AS FOLLOWS

- (1) Absence of consideration
- (2) The donor
- (3) The donee
- (4) The subject matter
- (5) Transfer
- (6) Acceptance

GIFTS UNDER MOHAMMEDAN LAW :

Section 129 of Transfer of Property Act deals with Mohammedan Gifts. Under Mohammedan Law, writing of a Gift Deed is not essential to validate the Gift of either movable or immovable property. But, if a Gift Deed is reduced into writing, it must be registered and attested. An Oral Gift followed by delivery of possession is a valid Gift under Mohammedan Law⁵.

Essentials of a Valid Gift under Mohammedan Law

The three essentials of a valid gift under Mohammedan Law are,-

- (1) A declaration of gift by donor.

²[*Hans Raji v. Yeshdamand*, AIR 1996 SC 761].

³2021(6) ALT 184 (SC)

⁴2022(2) AmLJ 244 (SC)

⁵[*Khamarunnisa – Vs - Fazal Hussain*, 1997 (1) ALT 152].

- (2) An acceptance of gift, express or implied by or on behalf of the donee.
- (3) Delivery of possession of the subject matter of gift.

In *Inspector General of Registration and Stamps, Government of Hyderabad*⁶, the Full Bench of Hon'ble High Court of AP *has held that* "Gift followed by delivery of possession is valid. But where a regular deed is executed and the gift is made under the said deed, without being preceded by any oral gift, it is not valid when it is not registered."

MORTGAGES

Under Section 58 of Transfer of Property Act there are six categories of Mortgages.

- (1) Simple Mortgage
- (2) Mortgage by conditional sale
- (3) Usufructuary mortgage
- (4) English mortgage
- (5) Mortgage by deposit of title deeds
- (6) Anomalous mortgage

The characteristic features of Mortgages is that the right in the property created by the transfer is accessory to the right to recover the debt⁷.

DEFINITION OF MORTGAGE

A Mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(a) **Simple mortgage.**—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

⁶1962 (1) ALT 108

⁷*R.Kausaly Devi v. B.P.Singh*, AIR 1960 SC 1030]

(b) **Mortgage by conditional sale.**—Where the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

(c) **Usufructuary mortgage.**—Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(d) **English mortgage.**—Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(e) **Mortgage by deposit of title-deeds.**—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [and Bombay], and in any other town which the [State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(f) **Anomalous mortgage.**—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

Order 34 Rule (1) of the Code of Civil Procedure deals with Puisne Mortgage which means a second or subsequent mortgage of unregistered land of which the title deeds are retained by a first mortgagee.

LEASE DEED

Section 107 of Transfer of Property Act provides the mode of creating lease in respect of immovable properties. According to it, the lease can be in two ways viz., lease from year to year and the other leases i.e., from month to month or less than a year.

Whether the lease is registered or not it is only a private document. It does not require any attestation. In order to be admissible it must be properly stamped. If it is registered the certified copy will be admissible under Section 57(5) of Registration Act. Proof of the document can be tendered, as in the case of any private document under Section 67 of Evidence Act, by examining someone connected with the document, like the executant, scribe, attester if there is one (though lease is not a document requiring attestation), by the evidence of someone acquainted with the signature of executant and handwriting under Section 47, by examining a handwriting expert (under Section 45 of Evidence Act) or by comparison of signatures under Section 73.

Lease of immovable property mainly consists of agricultural land or land fit for agriculture or horticulture and buildings. Several states passed what are known as state laws, like Andhra Tenancy Act, 1956 and A.P. Building (Lease, Rent and Eviction Control) Act, 1960, which has been repealed by Andhra Pradesh Residential and Non-Residential Premises Tenancy Act, 2017. The former relates to agricultural land. The latter relates to buildings.

Documents of which registration is necessary under Transfer of Property Act, but not under Registration Act – Documents fall within scope of Section 49 of Registration Act, 1908⁸.

According to the new enactment of the year 2017 the Lease Deeds need not be registered and their notarization is sufficient.

OF WILLS

Will is defined in Section 2(h) of Indian Succession Act, 1925 as follows:

⁸*Raghunath v. Kedarnath*, AIR 1969 SC 1316

“Will” means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death”.

Privileged Wills

Privileged wills are mentioned in Section 65 and mode of making the same is dealt with in Section 66 of Indian Succession Act, 1925. Privileged Wills are those executed by soldiers and men of armed forces while engaged in warfare. They may be written, signed or unsigned and may be also oral i.e., by word of mouth. Such wills normally do not come to Court, for adjudication.

Unprivileged Wills

These are the Wills that normally come up for adjudication in a Court of law. The word ‘will’ in subsequent narration means only an unprivileged will. It is only unprivileged wills that are dealt with in the coming narration.

Essentials of a WILL

As per the definition of a WILL in Section 2(h) of Indian Succession Act the following are the essentials,-

- (1) It must be a legal declaration of the testator’s intention.
- (2) That declaration must be with respect to his property.
- (3) The desire of testator that the said declaration should be effected after his death.

The fundamental difference between a Will and other instruments is this:- A Will speaks after the death of its maker.

ADOPTION DEED:-

Adoption deed is a deed through which all rights and responsibilities, along with filiation, from the biological parent or parents is transferred to adopted parents.

AGREEMENT:

Section 2 (e) of The Indian Contract Act 1872 defines Agreement as “Every promise and every set of promises, forming the consideration for each other, is an agreement;

SETTLEMENT DEED:

Section 2 (24) of The Indian Stamp Act, 1956 defines Settlement Deed, as follows, ‘settlement’ means any non-testamentary disposition, in writing, of moveable or immovable property made—

- (a) in consideration of marriage,
- (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
- (c) for any religious or charitable purpose:

and includes an agreement in writing to make such a disposition [and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration trust or otherwise, the terms of any such disposition];

BOND:

Section 5 of The Indian Stamp Act, 1956 defines Bond, as follows, 'bond' includes—

- (a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another:

CODICIL:

Section 2(b) of The Indian Succession Act defines Codicil as follows 'codicil' means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will;

(III) METHOD OF INTERPRETATION ON CORRECT NATURE OF DOCUMENTS A BROAD PRINCIPLES ARE AS FOLLOWS

The cardinal rule is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, "intention will prevail".

The Hon'ble Supreme Court of India in the case of **Delhi Development Authority -Vs- Durga Chand Kaushish**⁹ laid down **Odgers Rules** known as golden rules of interpretation of the documents in India which are as follows:-

⁹ 1974 SCR (1) 535

1. The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.
2. The intention may prevail over the words used.
3. Words are to be taken in their literal meaning.
4. Literal meaning depends on the circumstances of the parties.
5. When is extrinsic evidence admissible to translate the language?
6. Technical legal terms will have their legal meaning.
7. Therefore the deed is to be construed as a whole. Apart from the said seven rules listed by Odger, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:
8. Same words to be given the same meaning in the same contract.
9. Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier; while in a will, earlier clause is to be preferred to the later.
10. Contra Proferendum Rule-if two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.
11. If two interpretations of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative.
12. In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written clauses are to be preferred.
13. The special will exclude the general.
14. Rule of expression unius est exclusion alterius
15. Rule of noscitur a sociis.
16. Ejusdem generic rule will apply both the contract and statute.
17. Place of Punctuation in interpretation of documents.

PARTITION TRANSACTIONS

The Hon'ble Supreme Court of India in the case of **Roshan Singh -Vs- Zile Singh**¹⁰, held that:

“While an instrument of partition, which operates or is intended to operate as a declared volition, constituting or severing ownership and causes a change of legal relations to the property divided amongst the parties to it, requires registration but a writing which merely recites that there has been in time past on partition, is not a declaration of will, but mere statement of fact and would not require registration.”

¹⁰ AIR 1988 SC 89

The Hon'ble High Court of A.P. in ***Civil Revision Petition No.4664 of 2017, dated:19.01.2018*** while deciding whether Ikrarnama and Memorandum of Partition can be marked in evidence held that:-

“The essence of the matter is whether the deed is a part of partition transaction or contains merely the incidental recital of a previously completed transaction. Mere use of the past tense would not necessarily indicate that it is a recital of past transaction. Sub-Section 1(b) of Section 17 of the Registration Act, 1908 posits that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or to declare some right in immovable property and therefore, the mere recital of what has already taken place cannot be held to declare any right and there would be no necessity to register such a document.”

ARBITRATION AGREEMENT

The Hon'ble High Court of A.P. in the case of **P.Madhusudhan Rao -Vs- Lt.Col.Ravi Manan and another**¹¹ while dealing with the interpretation of an Arbitration Clause in an Arbitration Agreement and referring the Judgment of Hon'ble Supreme Court of Indian in **Delhi Development Authority** case (stated supra) held at Para Nos.25 & 26 that:

Para No.25: The dictionary meaning of the word interpretation is expound the meaning of, bring out the meaning of. But what does the words meaning mean? Does it mean (i) the literal meaning of the words used or does it mean (ii) the meaning the writer of the words had in his mind, i.e., his intention? Whether it means (i) or (ii) , the process would be that in the case of (ii) intention has to be ascertained by reference to the words used to express it. Unexpressed intention has not to be considered, but courts can consider presumed intention while interpreting a document. Thus, the modern law can be said to be that the purpose of interpretation is two-fold: (i) to ascertain the intention as expressed in the words, i.e., to consider what has actually been said; (ii) to consider what the parties intended to have said or ought to have said but did not, either because they never visualized such a state of circumstances arising or for any other reason. The task of interpretation would be easy if it were just to discover the intention of the parties as expressed in words. But the task of the court is to ascertain what the parties would have said or what they would have intended if the point had been considered by them at that time. The task involves a guessing game, which in legal terminology is called presumed intention. Any attempt to interpret the terms of document based on presumed intention is described as Courts endeavouring to achieve what the devil failed to do as devil does not know the intention of a man.

¹¹Civil Revision Petition No.4515 of 2014 decided on 12.03.2015

Para No.26: It is clear that the Court has to ascertain the intention of the parties based on the language used in the document. Time and again, the Court have laid down certain principles to interpret any document or clauses therein. In fact there are no statutory rules to interpret any document. But based on the settled principles, the Courts are interpreting the documents and any conditions contained therein. Rules of interpretation are mere working rules or as guidelines and are not binding on the Courts of law. Yet, they have some sanctity as they have been deduced from judicial decision over the years. It is found listed in Odgers Construction of Deeds and Statutes, used the listed rules by the Courts and they have acquired respectability.

AGREEMENT OF SALE – SPECIFIC PERFORMANCE

The Hon'ble Supreme Court of India in the case of **Man Kaur (Dead) by LRs. -Vs- Hartar Singh Sangha** ¹² while deciding the interpretation of the terms of Agreement of Sale given some illustrations explaining how the recitals of an Agreement to be taken into consideration and to be understood by the Court.

Para No.18: (A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.

¹² Civil Revision Petition Nos.147-148 of 2001 decided on 05.10.2010

The Hon'ble High Court of A.P. in the case of **Pradeep Kumar -Vs- Mahaveer Pershadi**¹³ held as follows:-

(1) where the language used is on its face ambiguous or defective so as to render the meaning unintelligible or where the language though intelligible creates an obvious uncertainty of the meaning, extrinsic evidence is wholly inadmissible because it is a patent ambiguity;

(2) where the language used is quite plain and intelligible but some difficulty arises in applying them to existing facts, for example, when a description is partly correct and partly incorrect, parole evidence is admissible to identify the subject-matter;

(3) where the language used is such that part of a description applies to one subject-matter and part to another, but the whole does not apply correctly to either, parole evidence is admissible;

(4) where the language used is plain and intelligible and applies equally to two or more persons or two or more things and it is necessary to ascertain to which person or thing the words were intended to apply, parole evidence is admissible;

Categories (2), (3) and (4) pertain to latent ambiguity.

(5) in construing the document, the intention must be gathered from the document itself. However, if there is ambiguity in the language used in the document, it is permissible to look to surrounding circumstances to gather the intention, such as user or possession and enjoyment.

When there is latent ambiguity in the language of a contract, courts in India can also rely upon a subsequent interpreting statement in which both parties have concurred or upon the conduct of both parties, for the purpose of interpreting a contract.

In **Godhra Electricity Co. Ltd. v. State of Gujarat**¹⁴, the Hon'ble Supreme Court of India held that:-

".....extrinsic evidence to determine the effect of an instrument is permissible when there is a doubt as to the true meaning of a contract. In such a situation, evidence of acts done under the contract are a guide to the intention of the parties, particularly when the acts are done shortly after the date of the contract.

¹³ 2002 (6) ALT 360

¹⁴ 1975 SCR (2) 42

This principle was recently reiterated by the Hon'ble Supreme Court in *Mukul Sharma v. Orion India (P) Ltd*¹⁵."

The Hon'ble High Court of A.P. in the case of **Koyya Ganga Venkata Satya Bhaskar and Another -Vs- Koyya Ramakrishnu and Others**¹⁶, while dealing with the difference between the Partition List and Partition Deed basing on the recitals held that:-

"from the settled legal proposition of Law the nature/character and the description/nomenclature/classification and also the stamp duty payable, if any, on the document have to be determined with reference to the recitals therein and the substance of the transaction embodied in the instrument and not with reference to the title, caption or name given to the instrument. Further, for classification of instruments, that is, to determine whether an instrument comes within a particular description in an Article to the schedule to the Indian Stamp Act, the instrument should be read and construed as a whole. The name or the caption given to the document is not determinative and of the nature or character or the substance of the transaction contained in the document is only the determinative factor."

Presented By:
Smt. Nettem Radhika
Principal Junior Civil Judge,
Ongole

¹⁵ Civil Appeal No.4997 of 2016, dt.10.05.2016

¹⁶ 2019 (3) ALT 53 (AP)

DOCUMENTARY EVIDENCE IN CIVIL CASES:

**Classification of documents basing on the transactions –
Relevant Laws defining and explaining the different transactions
– Method of interpretation of current nature of documents.**

**Work Shop Presented by :-
Smt. G.V.L. Saraswathi,
Junior Civil Judge,
Darsi.**

1. INTRODUCTORY:

The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. After the dicta the Privy Council in *Shamu Pattar Vs. Abdul Qadir*, 35 Mad 607 (PC) : 39 LA. 218, the Transfer of Property (Amendment) Act 27 of 1926 inserted the definition of "attested" in Sec. 3 of the Transfer of Property Act in terms of the definition of the Indian Succession Act. In general sense, 'attestation of a document' is a common formality. In India, few documents are required by law to be attested. Wills made after 1st January 1866 by persons other than Hindus, Muslims or Buddhists, Wills made by Hindus, Buddhists, Sikhs and Jainas on or after 1st September 1870 in the territories subject to the Lieutenant Governor of Bengal or in the towns of Madras and Bombay or relating to immovable property situate within those limits and wills made by any Hindu, Buddhist, Sikh or Jaina on or alter 1st January 1927 must be attested under Sec. 63 of the Indian Succession Act 1925.

Under Sec. 59 of the Transfer of Property Act, where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Under Sec. 124 of the Transfer of Property Act, a gift of immovable property of whatever value can be made only by a registered instrument attested by at least two witnesses. This rule does not apply to gifts made by Muslims. No other deed or document requires to be attested. An instrument creating a charge does not require to be attested and proved in the same way as a mortgage., *Ramaswamy Iyengar v. Kuppuswamy Iyer*, AIR 1921 Mad 514. Under Sec. 54 of the Transfer of Property Act, a deed of sale of tangible immovable property of value of one hundred rupees and upwards or of a reversion or of other intangible thing can be made only by a registered instrument and it requires no attestation. It is curious to note that In respect of Bonds, nevertheless for the purpose of Stamp Act, it may be necessary for a bond to be attested, it is not a document required by law to be attested within the meaning of Sec. 68 of the Indian Evidence Act. An agreement for sale is a document which does not require to be attested by any law. An instrument creating a charge does not require to be

attested and proved in the same way as a mortgage. [*Ramaswamy Iyengar v. Kuppuswamy Iyer*, AIR 1921 Mad 514.

Three rules must be kept in mind while interpreting a document:

The first is the “best evidence rule”, namely that the contents of a document should be proved by production of the document, not by secondary evidence.

(a) The second rule prohibits admission of extrinsic evidence to contradict, vary, add to or subtract from the terms of a document.

(b) The third rule deals with the admission of extraneous facts in aid of the interpretation of documents.

TOPIC : 1

2. CLASSIFICATION OF DOCUMENTS BASING ON THE TRANSACTIONS: (SALE – GIFT – MORTGAGE – WILL – PRONOTE – LEASE – ADOPTIONS – AGREEMENTS ETC.)

i) Gift

According to Section 123 of the Transfer of Property Act gift-deed is required to be attested at least by two witnesses. A conjoint reading of Section 122 and 123 of the Act makes it abundantly clear that “transfer of possession” of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of Transfer of Property Act, 1882.

ii) Mortgage deed

One of the essentials of mortgage deed is that each of the attesting witnesses must have signed the document in the presence of the executant. If the provisions of Sections 58 and 59 of the Registration Act and Sections 3 and 59 of the Transfer of Property Act are read together, there was no escape from the conclusion that a mortgage deed was required to be proved by producing it least one of the attesting witnesses. (Registration of mortgage deed is compulsory except in case of mortgage by deposit of title deeds).

iii) Will

Section 68 of the Evidence Act deals with proof of the execution of documents required by law to be attested. It provides that such documents shall not be used as evidence until at least one attesting witness has been called to prove the execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since by Section 63 of the Succession Act, 1925 a will has to be attested by two or more witnesses, Section 68 of the Evidence Act would come into play and therefore it was incumbent on the prepounder of the Will to examine the attesting witness to prove due prosecution of the will.

Section 67 and 68 of Indian Evidence Act, 1872 are very importance for consideration to know the difference between proof of document not required by law to be attested and proof of document required by law to be attested. Curiously enough, as was held in *Karuppaiyan Vs. Muthukaruppan*, AIR 1975 Mad 221, an attested document which is not required by law to be attested may be proved by any of the modes indicated in Sec. 67 of the Indian Evidence Act without examining the attesting witnesses.

iv) Sale deed

A sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like unregistered sale deed, though not admissible in evidence, can be looked into for collateral purposes. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction. As per Section 54 of the Act, the title in immovable property valued at more than Rs. 100/- can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties, but does not, of itself, create any interest in or charge on such property.

v) Promissory note.

Promissory note is not compulsorily attestable document. Stamp duty on Promissory note is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument, *Section 4, Negotiable Instruments Act, 1881*.

vi) Lease deed

In *Anthony v. K.C. Ittoop and Sons*, 2001 (1) MLJ 12, the Supreme Court found that there are three interdictions to claim that an instrument can create a valid lease in law. The first inhibition is that it should be in accordance with the provisions of Section 107 of the Transfer of Property Act. The second inhibition, as pointed out by the Supreme Court, is Section 17(1)(d) of the Registration Act, which states that where a lease of immovable property from year to year or for any term exceeding one year or reserving an yearly rent, such document should be compulsorily registered. The third inhibition, as noted by the Supreme Court, is Section 49 of the Registration Act relating to the consequence of non-compliance of Section 17. Section 49(c) contemplates that no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

vii) Partition deed.

In Bapayya Vs. Ramakrishnayya, 1938-1 Mad L J 582, AIR 1938 Mad 568, it was held that where unregistered partition list were sought to be put in evidence for the purpose of providing a partition between the parties, the question to be decided was whether the documents constituted the bargain between the parties, or they were merely the record of an already completed transaction, the question being whether there was a sufficient dissociation of the transaction. See also. Roshan Singh & Ors vs Zile Singh & Ors, AIR 1988 SC 881. Ambati Durgamma And Ors. vs Pericherla Jagapathiraju, 2005 (1) ALD 607, 2005 (1) ALT 357.

Effect of unregistered partition deed:- The effect of unregistered partition deed and held that an unregistered partition deed is inadmissible in evidence and cannot be looked into for the terms of partition but can be looked into for the purpose of establishing a severance in status. See. Chinnappareddigari Pedda Muthyalareddy vs Chinnappareddigari Venkata Reddy, AIR 1969 AP 242. Latest ruling of 2017, Moghal Sardar Hussain Baig vs Syed Farveej Begum, CRP.No. 1115 of 2017,dated 1207-2017.

Unregistered partition deed:-

Non-registration of a document which is required to be registered under Sec. 17(1) (b) of the Registered Act makes the document inadmissible in evidence under Cl. (cf) of Sec. 49 of the Registration Act, even though such a document can be used for a collateral purpose and that oral evidence can be adduced to establish that there was as disruption in status of the joint family. See. Chinnappareddigari Pedda vs Chinnappareddigari, AIR 1969 AP 242. In this case, it was further observed that it has been held in a series of decisions that an unregistered partition deed can be looked into for the purpose of finding out whether there has been severance in status. It is unnecessary to refer to all of them in view of the categorical pronouncement of the Supreme Court in Naini Bai Vs. Gita Bai.

Family arrangement.

It was held that there is no provision of law requiring **FAMILY SETTLEMENTS** to be reduced to writing and registered, though when reduced to writing the question of registration may arise. Binding family arrangements dealing with immovable property worth more than rupees hundred can be made orally and when so made, no question of registration arises. If, however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it required registration and without registration it is inadmissible; but the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduct

of the parties.

As to the nature of transaction under the document, it cannot be decided by merely seeing the nomenclature. Mere usage of past tense in the document should not be taken indicative of a prior arrangement.

Subraya M.N. v/s Vittala M.N. & ors (2016) 8 Supreme Court 705.

S. 49 : Capital gains – Previous owner – Cost of acquisition – Merely mentioning in sale deed that property was free from all encumbrances was not material and thus, was not a correct interpretation of the legal position :

The husband of the assessee inherited the property from his father by virtue of a will, who later transferred the same to the assessee. One of the sisters of the assessee's husband filed a suit against the will and ended up in a compromise with a share of 30 per cent in the property. While computing capital gains tax liability on sale of property by the assessee, she considered the 'sale consideration' excluding the share of the sister-in-law. The AO and the CIT (A) observed that, the recital stated in the sale agreement stated that, the property was free from all encumbrances. Accordingly, they considered the sale consideration without excluding sister-in-law's share because when the property was inherited by assessee's husband from his father, there was no dispute and he had transferred the property free from all burden /encumbrances. On appeal, the Tribunal held that merely deciding the issue on the basis of recital in the sale deed that the property was free from all encumbrances was an incorrect legal interpretation of the legal position. Further, the assessee had stepped into the shoes of her husband for all intents and purposes. Thus, she could not have acquired a better title than her husband and the cost of acquisition of the property was required to be taken accordingly i.e 70 per cent share in the property. (AY. 2012-13) Rama Vohra (Smt.) v. ITO (2017) 57 ITR 694 (Delhi) (Trib)

TOPIC : 2

3. RELEVANT LAWS DEFINING AND EXPLAINING THE DIFFERENT TRANSACTIONS

Sale and Agreement to sell— Essential feature that distinguishes contract of sale from agreement to sell, is that in contract of sale, property in goods is transferred from seller to buyer immediately, whereas in agreement to sell, property is transferred on a future date/dates. Agreement to sell becomes sale on fulfilment of conditions provided therein or when time provided in agreement elapses, *State of Uttaranchal v. Khurana Bros.*, (2010) 14 SCC 334. 2. If transfer of property is in praesenti, it is called "sale"; but if transfer is to take place at a future time and subject to some conditions to be fulfilled subsequently, it is "agreement to sell". "Agreement to sell" becomes effective when seller agrees to transfer property in goods to buyer for a price and such contract may either be absolute or conditional. When time in the agreement to sell lapses or conditions therein subject to which

property in goods is to be transferred are fulfilled, said “agreement to sell” becomes a “sale”, *Hyderabad Engg. Industries v. State of A.P.*, (2011) 4 SCC 705.

Gift. Is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee, [Section 122, *Transfer of Property Act, 1882*. A gift, though a transfer, is a gratuity and an act of generosity and does not contain any element of consideration in any shape or form. Complete absence of monetary consideration is the main hallmark which distinguishes a gift from a grant or for that matter other transactions which may be for valuable or adequate consideration. Where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift and assumes a different colour, *Sonia Bhatia v. State of U.P.*, (1981) 2 SCC 585. The old text- writers made a *gift (donatio)* a distinct species of deed and describe it as a conveyance applicable to the creation of an estate-tail; while a feoffment they strictly confine to the creation of a fee simple estate. The operative verb in ‘give’, which no longer implies any covenant in Law (Real Property Act, 1845, 8 & 9 Vict. c. 106, Section 4) and the deed requires livery of seisin. A gift is not presumed and a Court of Equity will not assist a donee, but rather relieve a donor by setting aside the gift on the ground of undue influence (see that title) or a fiduciary relationship of the donee to the donor. *Huguenin v. Baseley*, (1807) 14 Ves 273: 33 ER 226; *Morley v. Loughan*, (1893) 1 Ch 736, 757; *Lyon v. Home*, (1868) LR 6 Eq 655. Under Mohammedan law, gift is a donation conferring right of property without exchange. The gift is in the nature of contract where there must be a tender of property, acceptance of the property by the donee and delivery of possession of the property. It is only when these three ingredients are satisfied a gift is completed, *Gulamhussain Kutubuddin Maner v. Abdulrashid Abdulrajak Maner*, (2000) 8 SCC 507, 509.

Onerous Gift — Where a gift is in the form of a single transfer to the same person of several things of which one is and the others are not burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully. Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous, [Section 127, *Transfer of Property Act, 1882*

Mortgage. It is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, Section 58(a), *Transfer of Property Act, 1882*. A dead pledge; a thing put into the hands of a creditor. A mortgage is the creation of an interest in property, defeasible (i.e., annulable) upon performing the condition of

paying a given sum of money, with interest thereon, at a certain time. This conditional assurance is resorted to when a debt has been incurred or a loan of money or credit effected, in order to secure either the repayment of the one or the liquidation of the other. The debtor or borrower, is then the mortgagor, who has charged or transferred his property in favour of or to the creditor or lender, who thus becomes the mortgagee. If the mortgagor pay the debt or loan and interest within the time mentioned in a clause technically called the proviso for redemption, he will be entitled to have his property again free from the mortgagee's claim.

Types of Mortgages

Anomalous Mortgage *Section 58(g),*

English mortgage — Section 58 (e)

Equitable mortgage — Section 58 ()

Mortgage By Conditional Sale — *Section 58(c)*

Mortgage By Deposit Of Title-Deeds — *Section 58 (f)*

Simple Mortgage — *Section 58 (b)*

Usufructuary Mortgage — *Section 58(d)*

“**Will**” shall include a codicil and every writing making a voluntary posthumous disposition of property, *Section 3(64), General Clauses Act, 1897*. A will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. A will has three essentials i.e. (i) it must be a legal declaration of the testator's intention; (ii) that declaration must be with respect to his property; and (iii) the desire of the testator that the said declaration should be effectuated after his death. The essential quality of a testamentary disposition is ambulatoriness of revocability during the executant's lifetime. The basic and fundamental difference between a will/testamentary disposition and a settlement/gift is that in the case of a will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death, whereas in the case of a gift, the provision becomes operative immediately and a transfer *in praesenti* is intended and comes into effect. A will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. Further, a gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. On the other hand, a “will” need not necessarily be registered. But the mere fact of registration of a “will” will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest *in praesenti* in favour of the settlees or it intended to transfer interest in favour of the

settles only on the death of the settlors, *Mathai Samuel v. Eapen Eapen*, (2012) 13 SCC 80. 3. It is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. He is simply exercising a power to which he is entitled to under the usage of the institution. A nomination takes effect in praesenti. It is the declaration of the intention of the head of the mutt for the time being as to who his successor would be; therefore, although it is said that the usage in the mutt is that the power of nomination is exercisable by will, it is really a misnomer, because a will in the genuine sense of the term can have no effect in presenti, *Sri Mahalinga Thambiran Swamigal v. Sri LA Sri Kasivasi Arulnandi Thambiran Swamigal*, (1974) 1 SCC 150. 4. Means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death, [Section 2(h), Succession Act, 1925.

Pronote. If there is a clear promise to repay hand loan, it must follow that the instrument falls in the definition of promissory note, *Mohanlal v. Sk. Bashir*, (2008) 2 Mah LJ 258. Pronote defined in the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, S. 83, as 'an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.' The note can require payment at a particular place (*Josolyne v. Roberts*, (1908) 2 KB 349). Pronote is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument, [Section 4, Negotiable Instruments Act, 1881. Pronote includes a treasury bill, [Section 2(h), Government Securities Act, 2006. Pronote means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited or on demand or at sight, Section 2(k), Limitation Act, 1963

Lease and Licence — A lease is a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease and it follows from it that the lessee gets that right to the exclusion of the lessor, *Associated Hotels of India Ltd. v. R.N. Kapoor*, AIR 1959 SC 1262, 1268: (1960) 1 SCR 368. A license is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the possession and control of the owner, the agreement will operate as a license, even though the agreement may employ words appropriate to a lease. (*Halsbury's*

Laws of England), *Qudrat Ullah v. Municipal Board, Bareilly*, (1974) 1 SCC 202, 208-209. The difference between a “lease” and “licence” is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful, *C.M. Beena v. P.N. Ramachandra Rao*, (2004) 3 SCC 595. A lease is the transfer of a right to enjoy the premises; whereas a licence is a privilege to do something on the premises which otherwise would be unlawful. The transaction is a lease if it grants an interest in the land; it is a licence if it gives a personal privilege with no interest in the land, *B.M. Lall v. Dunlop Rubber Co. (India) Ltd.*, AIR 1968 SC 175, 177, 178: (1968) 1 SCR 23.

Adoption. As per Mayne's Hindu Law the giving and receiving are absolutely necessary to the validity of an adoption; they are the operative part of the ceremony, being that part of it which transfers the boy from one family to another; but the Hindu Law does not require that there shall be any particular form so far as giving and acceptance are concerned; for a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption and that the boy shall be handed over and taken for this purpose, *L. Debi Prasad v. Tribeni Devi*, (1970) 1 SCC 677, 681. An act by which a person appoints as his heir the child of another. In English Law any renunciation by parents of their legal rights and liabilities in favour of an adopter is a mere empty form, however desirable an adoption may be and however solemnly consented to by the parents, may be canceled by them and the adopted children restored to the parents, unless they be legally unfit to have the custody of the children. A contract between the mother of even an illegitimate child and another person for the transfer to that person of the rights and liabilities of the mother in respect of the child was held invalid by the Court of Appeal in *Humphreys v. Polak*, (1901) 2 KB 385.

ESSENTIAL OF WILL AND HOW TO DISTINGUISHES WILL FROM GIFT :

The essential quality of testamentary disposition is ambulatoriness of revocability during the executants lifetime. Such a document is dependent upon executants' death for its vigour and effect. In the case of a Will, the crucial circumstances is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer in praesenti is intended and comes into effect. A Will is, therefore, revocable because no interest is intended to

pass during the lifetime of the owner of the property. In the case of gift, it come into operation immediately. The nomenclature given by the parties to the transaction in question is not decisive. A Will need not be necessarily registered. The mere registration of 'Will' will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors.

In a composite document, which has the characteristics of a Will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to. Therefore, it is not unusual to register a composite document which has the characteristics of a gift as well as Will. Consequently, the mere registration of document cannot have any determining effect in arriving at a conclusion that it is not a Will. A 'Will' need not necessarily be registered. But the fact of registration of a 'Will' will not render the document a settlement. ***Mathai Samuel & Ors. V. Eapen Eapen (Dead) by LRs. & Ors. AIR 2013 SUPREME COURT 532***

WHAT IS EVIDENTARY VALUE OF UNREGISTERED PARTITION DEED – NOT STAMPED?

A Unregistered partition deed which is not properly stamped is not admissible in evidence under Ss. 17 and 49 of Registration Act. Document already held as inadmissible, seeking expert opinion to prove signature of executants, not necessary. ***Amar Singh v. Bhojram Son of Hiraram adopted Son of Bhaiyalal AIR 2014 (NOC) 167 (Chh.)***

TOPIC : 3

4. METHOD OF INTERPRETATION OF CURRENT NATURE OF DOCUMENTS.

IN CASE OF CONFLICT BETWEEN EARLIER AND LATER CLAUSES OF DOCUMENT

If it is not possible to give effect all of them, the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa (*AIR 1969 SC page 22*).

PROOF OF EXECUTION OF DOCUMENT :

When document is lost and even its copy is not available, in that case also, the evidence on ex-execution of document need to be given. Defence that original document itself was forged, it become necessary of party relying on the document to prove the execution of document. It is only after proof of execution, the party making

allegation of forgery need to prove forgery. ***Kashinath Yadeo Hiwarde V/s Osman Baig Sandu Baig. [AIR 2016 (NOC) 266 (BOM)]***

THE SCOPE AND LEGAL EFFECT OF PROVISIO AND EXCEPTION IN INTERPRETING DEEDS :

The technical rules of interpretation of provisos and exceptions, with reference to their scope and legal effect, adopted in constructing statutes should not ordinarily be imported in interpreting deeds and documents executed by laymen. I

WHETHER NAME, RECITAL ETC OF DOCUMENT IS CONCLUSIVE :

Nomenclature of a document or deed is not conclusive of what it seeks to achieve ;the court has to consider all parts of it , and arrive at a finding in regard to its true effect. ***Radials International v. ACIT (2014) 367 ITR 1/103 DTR 316(Delhi)(HC)***

The Supreme Court in Delhi Development Authority vs. Durga Chand, has also noticed Odgers Rules and quoted them with approval and as the observation of the Supreme Court have the force of law of the land, it may be taken Odgers Rules (known as golden rules of interpretation) have been judicially recognized and may be adopted as Rules for interpretation of the documents in India. These Rules are listed hereunder:

1. The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.
2. The intention may prevail over the words used
3. words are to be taken in their literal meaning
4. literal meaning depends on the circumstances of the parties
5. When is extrinsic evidence admissible to translate the language?
6. Technical legal terms will have their legal meaning.
7. Therefore the deed is to be construed as a whole. Apart from the said seven rules listed by Odger, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:
8. Same words to be given the same meaning in the same contract.
9. Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier; while in a will, earlier clause is to be preferred to the later.
10. Contra Proferendum Rule-If two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.
11. If two interpretation of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative
12. In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand

written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written calluses are to be preferred

13. the special will exclude the general

14. Rule of expression unius est exclusion alterius

15. Rule of noscitur a sociis

16. Eiusdem generic rule will apply both the contract and statute

17. place of Punctuation in interpretation of documents

From the Rules stated above, when the language used in a document is unambiguous conveying clear meaning, the Court has to interpret the document or any condition therein taking into consideration of the literal meaning of the words in the document. When there is ambiguity, the intention of the parties has to be looked into. Ordinarily the parties use apt words to express their intention but often they do not. The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. The most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if, the intention is so collected will not secure with the words used. The answer is the intention prevails. Therefore, if the language used in the document is unambiguous, the words used in the document itself will prevail but not the intention. See. P.Madhusudhan Rao vs Lt.Col.Ravi Manan, And Another (2015).

Chapter VI of the Indian Evidence Act, 1872, as amended (the Evidence Act) prescribes the principles of admissibility of extrinsic evidence, which also guide the interpretation of contracts with the aid of extrinsic evidence. Under Section 91 of the Evidence Act, a written contract must be proved by producing the contract itself (or by permissible secondary evidence) to prove the terms of such contract. Further, under Section 92 of the Evidence Act, no evidence of any oral agreement or statement is admitted in evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of such written contract, subject to certain exceptions as enumerated under the section itself. Proviso (6) of Section 92 of the Evidence Act admits oral evidence in cases of latent ambiguity in the contract.

According to Section 94 of the Evidence Act, when the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence cannot be given to show what facts it was meant to apply to. Also, under Section 93 of the Evidence Act, evidence cannot be given of facts to supply the defects in the language used in a document when it is, on its face, defective or patently ambiguous.

However, under Sections 95, 96 and 97 of the Evidence Act, when the language used in a document is latently ambiguous, with reference to the existing facts or one of several persons or one of several set of facts, evidence may be given to show that it was used in a peculiar sense; or to which person or which set of facts it was meant to apply to.

Therefore, under the Evidence Act, extrinsic evidence can be given or considered only in certain cases of a latent ambiguity in a document. The legal position in India in this regard has been well summarised by the Andhra Pradesh High Court in *Pradeep Kumar v. Mahaveer Pershad*¹ as follows:

From the above discussion what emerges is that:

where the language used is on its face ambiguous or defective so as to render the meaning unintelligible or where the language though intelligible creates an obvious uncertainty of the meaning, extrinsic evidence is wholly inadmissible because it is a patent ambiguity; where the language used is quite plain and intelligible but some difficulty arises in applying them to existing facts, for example, when a description is partly correct and partly incorrect, parole evidence is admissible to identify the subject-matter;

(1) where the language used is such that part of a description applies to one subject-matter and part to another, but the whole does not apply correctly to either, parole evidence is admissible;

(2) where the language used is plain and intelligible and applies equally to two or more persons or two or more things and it is necessary to ascertain to which person or thing the words were intended to apply, parole evidence is admissible;

Categories (2), (3) and (4) pertain to latent ambiguity.

(3) in construing the document, the intention must be gathered from the document itself. However, if there is ambiguity in the language used in the document, it is permissible to look to surrounding circumstances to gather the intention, such as user or possession and enjoyment.

When there is latent ambiguity in the language of a contract, courts in India can also rely upon a subsequent interpreting statement in which both parties have concurred or upon the conduct of both parties, for the purpose of interpreting a contract. ***In Godhra Electricity Co. Ltd. v. State of Gujarat³, the Supreme Court of India (the Supreme Court)***, held that extrinsic evidence to determine the effect of an instrument is permissible when there is a doubt as to the true meaning of a contract. In such a situation, evidence of acts done under the contract are a guide to the intention of the parties, particularly when the acts are done shortly after the date of the contract. This principle was recently reiterated by the Supreme Court in ***Mukul Sharma v. Orion India (P) Ltd.***

Ambiguity – Effect on operation of documents:-

The Apex Court opines that such a flaw either invalidates a document or suspends its operation till the defect is rectified or the ambiguity clarified. The substituted agreement gave a new cause of action and obliterated the earlier ones and if there was a valid defence against the enforcement of the new contract in whole or in part, the party affected must take the consequences. In the Union Of India vs Kishorilal Gupta And Bros, AIR 1959 SC 1362, In "Russel on Arbitration ", 16th Edn., p. 63, the following test is laid down to ascertain whether an arbitration clause survives after the contract is determined:

" The test in such cases has been said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause. remains

effective and can be enforced."

INTERPRETATION OF AGREEMENTS: The principles governing interpretation of agreements under Indian law can be summarised as *infra*:

(a) Extrinsic evidence can be given or considered only in certain cases of latent ambiguity in a document.

(b) As a general rule, while interpreting a contract, courts in India primarily look at the words used in the contract itself, reading it as a whole. The intention of the parties is gathered from the language used in the contract by adopting a harmonious construction of all its provisions and relying upon the natural and ordinary meaning of the language, unless the meaning leads to absurdity.

(c) Indian courts also apply a "common sense" approach for the purpose of interpretation of commercial contracts and try to give a meaningful interpretation to the terms of such contracts, consistent with the economic and commercial reality.

(d) In case of latent ambiguity in the contract, courts in India will look at surrounding circumstances (including sometimes, antecedent and pre-contractual documents and correspondence, for the purpose of ascertaining such surrounding circumstances), subsequent interpreting statement in which both parties have concurred or conduct of both parties for the purpose of interpretation, particularly when the acts are done shortly after the formation of the contract.

(e) Principles of *contra proferentem* and formation of contracts by incorporation are recognised under Indian law.

(f) Indian courts normally read contracts according to their express terms, and would imply a term in a contract only if there is a strict necessity of doing so, based upon the "five condition test", also referred to as the "penta test" by the Supreme Court.

(g) Specifically, with respect to interpretation of commercial contracts by an Arbitral Tribunal, Indian courts do not insist on a hyper-technical approach to interpretation of contracts by the Arbitral Tribunal and are generally reluctant to interfere with the wide powers of an Arbitral Tribunal as to the admissibility, relevance, materiality and weight of any evidence produced before it.

Whether a transaction is an out and out sale or mortgage?

The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in presenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record.

"From the date on which possession has been delivered"- Interpretation.

It was on the recommendation of the Special Committee that the words "from the date on which possession has been delivered" were inserted into this clause by Section 17 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English

Doctrine of Equitable Lien as propounded by Baron Rolfe in *Goode and Anr. v. Burton* (1847) 74 RR 633 : 1 Ex. 189. This clause confers statutory recognition on the English Doctrine of Equitable Lien. As pointed out by the Privy Council in *Webb and Anr. v. Macpherson* 30 Indian Appeals 238, the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See: *Venkataperumal NAIDU V. Rathnasabhpathi Chettair*; *Shobhalal Shyamlal Kunni v. Sidhelal Halkelal Bania* AIR (1939) Nagpur 210 and *Basalingayya Revanshiddappa v. Chinnaya Karibasappa*, AIR (1932) Bombay 247).

The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage.

The Privy Council as early as in Balkishen Das and Ors. v. Legge,

27 Indian Appeals 58, had laid down that, as between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of document in the light of surrounding circumstances. ***The decision of this Court in Bhaskar Woman Joshi v. Shrinarayan Rambilas Agarwal and P.L. Bapuswami v. N. Pattay Gounder are also to the same effect. See also. Vidhyadhar vs Manikrao & Anr. , 1999 (2) SCALE 93.***

In N. Pattaya Gounder v. P.L. Bappusamy Gounder (supra) , wherein it was observed that the period fixed in the document is a condition precedent for the performance and after the expiry of the period, the right reserved itself is at an end. The period fixed for the deed is not the period of limitation prescribed to any suit.

Important points to remember:-

1. **Article 131 of Limitation Act is applicable to agreement of sale. *K. Simrathmull v. Nanjalingaiah*, AIR 1963 SC 1182.**
2. **An agreement for repurchase differs an Agreement of sale . See also. AIR-1950 FC 38.**
3. **In fact, no period of Limitation is fixed under the Limitation Act in respect of an agreement for repurchase.**
4. **Agreement for repurchase is nothing but a concession or an option to contract.**

CONCLUSION

When a document is tendered in evidence, the first point for consideration is whether it is required by law to be attested. If it turns out to be a document required by law to be attested and there is an attesting witness available, then subject to the proviso to Sec. 68. at least one attesting witness must be called to prove the document. An instrument creating a charge does not require to be attested and proved in the same way as a mortgage. Under Sec. 54 of the Transfer of Property

Act, a deed of sale of tangible immovable property of value of one hundred rupees and upwards or of a reversion or of other intangible thing can be made only by a registered instrument and it requires no attestation. An agreement for sale is a document which does not require to be attested by any law. Sec. 67 of the Indian Evidence Act deals with proof of documents which are not required by law to be attested. Sec. 68 of the Indian Evidence Act deals with proof of execution of documents required by law to be attested. There is also a category of documents which we come across which could be public or private documents but they are not documents in original. Proof of such documents poses a further complication when it comes to proving the same. To prove such documents we need to lead what we all know as secondary evidence. With the quotation I have concluded this topic.

A flaw does not either invalidates a document or suspends its operation till the defect is rectified or the ambiguity clarified.

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