

Documentary Evidence in Civil Cases

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CLASSIFICATION OF DOCUMENTS

What is a document

A document is a piece of written, printed, or electronic matter that provides information or evidence or that serves as an official record. It can be a proof of something.

Document under Indian Evidence Act, 1872

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.
(section 3 of Interpretation clause)

Document under Section 29 of Indian Penal Code, 1860

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

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

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

- I. A cheque upon a banker is a document.
- II. A power-of-attorney is a document.
- III. A map or plan which is intended to be used or which may be used as evidence, is a document.
- IV. A writing containing directions or instructions is a document.

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

Illustration: A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

Documents – Relevant Laws defining and explaining different transactions - Method of Interpretation of correct nature of the documents

I. Promissory note – Bond :

Borrowing is as old as the society itself. Even our Vedic literatures and Puranas mention of money transaction between various communities of the society. Even Kautilya in his Arthashastra mentions the existence of bankers and a system of money transfer by mere letter what we now call as "**Hundies**". Though hundies are in vogue in India from pre-historical times, promissory notes came into existence in India in 18th century prior to passing of Negotiable Instruments Act, the Law Merchant of England was applied. The provisions of Indian Contract Act did not alter the well established rules as to negotiable Instruments governed by Law of Merchant. The contract Act

is a general statute dealing with contracts. The Negotiable Instruments Act is a statute dealing with a particular form of contract and the Law lay down for special cases must always prevail over general law. However, when Negotiable Instruments Act is silent, the Contract Act applies and this was observed by Hon'ble Madras High Court in **Vishwanadhan vs. Radha Kishan Rao ILR 39 Mad. 915.**

Section 4 of Negotiable Instruments Act, 1881 defines a 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"

Section 2 (22) of Indian Stamp Act defines "Promissory note means a promissory note as defined by the Negotiable Instruments Act, 1881"

Section 4 of Negotiable Instruments Act recognizes three kinds of promissory notes -

- I. A promise to pay certain sum of money to a certain person
- II. A Promise to pay certain sum of money to the order of certain person and
- III. A promise to pay the bearer

Therefore if an instrument promises to pay a certain sum of money to a certain person unconditionally, merely because it does not contain the words "order" or "bearer" it cannot be argued that it is not a promissory note. Such an argument will be inconsistent with Sec. 4M of Negotiable Instruments Act. **Now the point for discussion is when a promissory note becomes Bond ?** The Hon'ble High Court of Andhra Pradesh enlightens this aspect in **Nyamathulla vs. Chittaranjan Reddy 2008 (3) ALT 153** by holding that "a document which is not payable to bearer or order and which is attested by a witness clearly falls within the definition of bond." The same is also the observation of Hon'ble High Court of Madyapradesh in **Bhimsat Pandey vs. Phoola.**

At this juncture if one goes through the definition of bond in Sec.2(5) of Indian Stamp Act, the Section runs 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”

Clause b of Sec.2(5) of Indian Stamp Act clearly envisages that both attestation by witnesses and not payable to order or bearer are necessary for a bond. Further **a document which is not attested by a witness would not be a bond merely because its amount is not payable to order or bearer**. This was held by Hon’ble High Court of Andhra Pradesh in **Bahudurrinisa vs. Vasudev AIR 1967 AP 123**.

Hence in the light of the supra observations of Hon’ble courts, the classification of a document whether promissory note or bond can be done in the context of need of attestation. When a document has purely fallen within the ambit of a bond, in order to prove the execution of the same, one has to satisfy the requirements under section 68 of Indian Evidence Act 1872 by examining atleast one of the attesting witness unless the same was registered. Whereas, no such attestation is necessary for a promissory note and eventhough there were attestors to a promissory note their examination is not mandatory.

II. Promissory note – Agreement :

An agreement is defined under section 2(e) of Indian Contract Act, 1872 as “every promise and every set of promises, forming the consideration of each other is an agreement”

It depends upon the circumstances and wording in each case as to whether a document is a pronote or an agreement. One of the tests to be applied to find it out is the intention of the parties. The second is whether the

document as drawn out can be said to be negotiable, that is to say, could a third party file a suit on the strength of the document. If he could not, then it is a mere agreement". But the fact that a promote recites as to how the consideration was fixed by the parties and a part of that particular document is couched in the form of an agreement does not deprive the document of its character as a promissory note if there are words which, in law, can be construed as meaning promise to pay and this was observed by Hon'ble Gujarat High Court in **Chabidas Mangaldas Vs. LK Arja AIR 1967 Guj. 7**. One of the principal tests for determining is its negotiability, and intention of the parties with references to the document along with the surrounding circumstances. When the document has been expressed in the form of a letter not intended to be negotiable, and containing no unconditional promise to pay and containing condition to pay the amount in several instalments, then it is not a promissory note but is only acknowledgment of liability with agreement to pay as held by Hon'ble Allahabad High court in Firm **Chunilan vs. Firm Mukatlal AIR 1968 All. 164**.

III. Gift – Will :

Section 122 in The Transfer of Property Act, 1882 defines Gift **as follows**

"Gift is the transfer of certain existing moveable or immovable 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."

Acceptance when to be made. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

Section 2(h) of Indian Succession Act, 1925 defines a 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."

The very meaning of "Gift" and "Will" itself speaks their two dimensions. In case of gift, after the donor gifts away his property to the

donee, the donee has opportunity to accept the Will till it was not revoked by the donor and the donor was in a position to give the property to the donee by that time. Further such acceptance should take place during the life time of the donor. Whereas, in case of Will, the document comes into effect only after the death of testator. Infact, the donee may come into knowledge of gift in his favour immediately on the date of execution of gift deed or any other day and it cannot be said that the knowledge of the donee invalidates the gift per contra, coming to the case of the Will, the testator is supposed to execute the Will in the absence of propounder and the content of Will was kept secret till the date of death of testator. As a donee, in case of a Gift, is permitted to have knowledge of the gift in his favour and more over he can be present at the time of execution of gift in his favour and can accept the same at the same time, now it has to be seen whether the existence of same circumstances in case of a Will is permissible. Hon'ble Supreme Court in **H.Venkatachalam Iyengar Vs. B.N.Thimmajamma and others, AIR, 1959 Supreme Court 443 (1) held in para No.21** that "if it is shown that the propounder has taken a prominent part in execution of Will and has received substantial benefit under it, that itself is generally treated as suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence". Hon'ble Supreme Court of India in **Kavita Kanwar V/s Mrs. Pameela Mehta Civil Appeal No.3688/2017 dated 19-05-2020** referred to observations which were mentioned in supra Venkatachala Iyengar case about propounder accompanying testator for execution of Will and consequences of suspicious circumstance unanswered by the propounder. The Hon'ble Apex Court has observed that "If propounder of the Will takes an active part in execution of Will and receives substantial benefit under it, then such a circumstance is generally treated as suspicion one."

Though both Gift and Will are compulsorily attestable documents, registration of Will is optional and **a mere registration of the Will would not wipe out the suspicious character of the Will** as held in **W.E.Sambandam vs. W.E.Satyanarayana 2007 (4) Civil. LJ 699.**

Likewise, though the provisions of **Sec. 68 of Indian Evidence Act, 1872** for proof of execution of document required by Law to be attested applies to both Gift and Will, in case of a Registered Gift, the mandation of compulsory examination of atleast one attesting witness is not necessary unless execution of Gift was specifically denied, whereas no such exception is available in case of a Registered Will.

Hence, if we see the **mode of classification of Gift from Will, there are three modes** – One is based on need of attestation and the other is based on registration and another is based on time of operation.

GIFT	WILL
1. A compulsorily attestable document as per Sec.3 of Transfer of Property Act	1. A compulsorily attestable document as per Sec.3 of Transfer of Property Act and Sec. 63 of Indian Succession Act, 1925
2. Registration of Gift is compulsory (except under Muslim Law) Mode of proof is governed by Sec. 68 of Indian Evidence Act, 1872. Subject to proviso that in case of Registered Gift examination of atleast one of the attestors is not required unless execution of Gift is denied.	2. Registration of Will is not necessary. Mode of proof is governed by Sec.68 of Indian Evidence Act, 1872. No such exception is available even though the Will is registered.
3. The donee can accept the Gift at any time during the life time of the donor before the same was revoked by the donor.	3. A Will comes into effect only after the death of testator.
4. A beneficiary can take active part in the execution of a Gift	4. Beneficiary is not supposed to take prominent part in the execution of a Will and the onus shifts to him to remove all the suspicious circumstances about genuinity of the Will.

5. Includes conferment of immediate rights. Mandakini Naik vs. G.K.Naik AIR 2004 AP 525	5. Mere declaration of an intention so long as the testator is alive. Pagadala Bharathi and anr. Vs. V.J.Radha Krishna 2013 (3) ALT 467
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IV. Partition - Settlement :

Section 2(15) of The Indian Stamp Act, 1899 defines the instrument of partition as "any instrument whereby co-owners of any property divide or agree to divide such property is severalty, 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 and a memorandum regarding past partition.

It is held in **Karrothu Appalanaidu vs K.Narayana 2002 (6) ALD 24** that a document by which the property, owned and held by co-owners, is divided among them by their own volition or if they arrive at an agreement to divide the property in severalty, is an instrument of partition.

It is held in **Poduri Satyavathi vs. District Registrar, East Godavari, 2007 (5) ALT 166** that the disposition under a deed of partition would be in accordance with the rights of the respective coparcener or co-owners in accordance with their entitlement under the law of succession. If it is made by the owner as per his wish volition and not to their entitlement as per succession, it is a settlement deed.

V. Settlement deed – Will :

In **Rajammal vs. Papayee Ammal AIR 2004 NOC 280 (Mad.)** the Hon'ble High Court has held that if the executed imposes self restriction and with reference to sale and encumbrance, though he is in possession of the property after execution of the said document, the document has to be construed only as a settlement and not as a Will.

It is held by **Hon'ble Supreme Court in Namburi Basava Subramanyam vs. Alapati Hymavathi AIR 1996 SC 2220** that when the settlor created in herself life interest in presenti and vested interest in the

reminder in favour of her second daughter, it has to be construed as Settlement Deed and not Will.

VI. Sale - Agreement of Sale :

Section 54 of Transfer of Property Act, 1882 defines sale as "Transfer of ownership in exchange for a price paid or promised or part paid or part promised"

A document which does not by itself convey property but merely gives a right to call for another document is an agreement of sale as held in **Gopalakrishna Trivedi vs. Sudama Prasad Ojha (2008) 9 SCC 401**.

Therefore though both sale and agreement of sale are not compulsorily attestable documents and though both are falling under section 17 of The Registration Act, 1908 and are compulsorily registrable, as held in **A.Ramarao Vs. Ragunathpatnayak AIR 2002 Ori. 77 (DB)** that an agreement of sale even though not registered can form basis for specific performance.

VII. Sale - Lease :

Section 105 of Transfer of Property Act, 1882 defines lease as "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.

Lease is distinguished from sale in **Santhabai vs. State of Bombay AIR 1958 SC 532** as "in a lease one enjoys the property but has no right to take it away".

In **Kanji and Moolji vs. T.Shunmugam Pillai AIR 1932 Mad. 734 (DB)** there was an agreement between the parties that on payment of compensation of Rs.500/-, the defendants are permitted to remove the sand and earth from plaintiff's plots to a depth of 5 feet to 8 feet and they have to level the plots after removal of the sand. Subsequently in a suit

for damages for breach of covenant to level plaintiff's land after removing earth and sand therefrom, it was held that though the parties were describing the document as lessor and lessee, the agreement was not one of lease and it is more than a license, it is not an agreement for sale of earth and sand as chattels but it is an agreement of sale of an interest in immovable property.

VIII. Mortgage - Lease :

The term Mortgage is defined **under Section 58 of Transfer of Property Act, 1982** as "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.

In differentiating a Mortgage from Lease the Hon'ble Supreme Court in **Furzhakkai Kuttappu vs. C.Bhargavi AIR 1977 SC 105** has observed that "Mortgages are not always simple, English, or usufructuary or such other types as defined in Transfer of Property Act. They are anomalous too and sometimes more anomalous than what is defined in the said Act. Even so, there is none more essential feature in a mortgage which is absent in a lease, that is, that the property transferred is a security for the repayment of debt in a mortgage whereas in lease it is a transfer of a right to enjoy the property.

IX. Mortgage – Sale :

A mortgage is transfer of an interest in specific immovable property as security for repayment of a debt. The debt subsists in a Mortgage whereas a transaction by which a debt is extinguished is not a Mortgage but a sale. A Mortgage therefore does not amount to transfer of property as in the case of sale and the title of the mortgaged property remains with the mortgagor.

Needless to say, unlike sale, a mortgage is a compulsory attestable document.

Principles of Mandatory Injunction

Injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun. The law relating to injunctions is contained in Specific Relief Act and Civil Procedure Code. The Civil Procedure Code deals only with temporary injunctions. Section 37 of Specific Relief Act deals both temporary and perpetual injunctions.

Mandatory Injunctions :

Mandatory injunction is defined as an order requiring defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him or otherwise in fulfillment of the legal obligations. In **M/s. Magnum films and another Vs. Golcha properties Private Limited AIR 1983 Del. 392** the Hon'ble Delhi High Court held that "a temporary mandatory injunction can be granted in case of extreme hardship and company circumstance to restore status quo existing on the date of institution of suit." The Hon'ble Division Bench of Hon'ble Calcutta High Court has held in **Vincent Vs. Aisumma 1988 (1) KLT 420** that "a mandatory injunction can be granted even at the instance of defendant."

The law on the subject of grant of injunction namely prohibitory or mandatory is quite settled. For claiming prohibitory as well as mandatory injunction the plaintiff has to establish a strong prima facie case in his or its favour. The plaintiff is also to establish that the balance of convenience in granting injunction lies in his favour and in case the injunction is refused, irreparable injury would be caused to the plaintiff or the plaintiffs. Unless these three conditions are established no injunction mandatory or prohibitory can be granted. If any of the three conditions is not fulfilled, injunction cannot be granted in favour of the plaintiffs.

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