INTRODUCTION

Part I—Preliminary

Conveyancing in India

Conveyancing has never been practised as an art in India, and, except in Presidency towns where this is done by solicitors trained in the English system of conveyancing, the work has always been in the hands of scribes (deed writers) who have had no legal education or training but are only conversant with certain set forms of various kinds of deeds in common use in the country, and acquire by experience the knack of adapting them to their requirements. The origin of these vernacular forms is not known but the forms are very old and have been handed down from generation to generation. It is rare that a lawyer is consulted in the *mofussil* about the draft of conveyances except in very complicated cases, but in large towns, with the growth of general education and complexity of transactions, such consultations are becoming more frequent and lawyers are now called upon to advise on and to draft deeds of contract, transfer, etc. These lawyers, who have ordinarily had no education in conveyancing, generally get hold of some English forms from a solicitor in Calcutta or Bombay and adapt them to their needs, or take the help of some book containing English precedents of conveyancing. As, however English forms are generally very verbose and prolix, the lawyers try to cut them down, but, owing to their ignorance of the correct import of all the English technical expressions, the adapted forms which they produce are sometimes found to be lacking in some essential ingredients. A knowledge of the meaning and importance of the expressions used in English forms and of the exact requirements of Indian law is therefore absolutely necessary for making a correct adaptation. It is unfortunate that even solicitors in the Presidency towns have made no attempt to simplify the English forms and to adapt them to the needs of this country and they slavishly copy the English forms with their prolix verbiage and unnecessary technical expressions of English law which are rarely understood in the country. It is interesting to see that while there are many matters which have, owing to change in statute law, long become unnecessary even in England, the Indian solicitor has made no change in the form and style which he has adapted from old books on conveyancing.

The prolix description of parcel, "the All Estate Clause", the use of words of limitation, etc., are examples of this.

Need of Legislation

It is also unfortunate that the legislature in this country has done nothing in this direction. An Act of legislature, on the lines of English Acts,[1] laying down what a conveyance should, and what it need not contain, and providing a set of authoritative forms, seems to be an urgent necessity in this country. Until such legislation is passed, it should be the endeavour of every lawyer who has anything to do with conveyancing to make an intelligent study of the subject and in adapting the English forms to his needs, he should try to strip them of all unnecessary verbiage and expressions which are unknown in this country and draft his conveyances with due regard to the requirement of Indian law and in language which is intelligible, not only to a lawyer, but also to a layman. Legislation for shortening the language of deeds and on their interpretation on the lines of what has been provided for statutes in the General Clauses Acts can also be considered.

Form of Conveyance

The form in which a conveyance is drafted is immaterial but as English forms have, by long usage, obtained a sort of sanctity, the same may be retained with necessary alterations. In England deeds are drafted either as deeds poll or as indentures.

Deeds poll

Deeds poll are those in which there is one party only and are so

1 Namely, the Conveyancing Act 1881 (Sec. 2, interpretation of various terms) and the Law of Property Act 1925. The latter Act contains among other things (many of which are covered by our Transfer of Property Act, Trusts Act, Contract Act, Registration Act etc.) standard forms in the same manner as our Civil Procedure Code contains standard forms of pleadings, etc. Its Sec. 46 empowers the Lord Chancellor to prescribe other forms of agreements as well. Its Secs. 61, 62 and 63 also contain rules of interpretation applicable to deeds generally, subject to special provisions to the contrary as may be specified in a deed. Some other provisions which may be usefully adapted is one in Sec. 15 ("The persons expressed to be parties to any conveyance shall, until the contrary be proved, be presumed to be of full age at the date thereof").

2 See notes to Sec. 57 Law of Property Act 1925 in Halsbury Statutes, Vol 27, p. 435.

called because they were at one time polled or cut level at the top. They are chiefly used for the purpose of granting powers of attorney and for exercising power of appointment or setting out an arbitrator's award. They are drawn in first person.

Indentures Bilateral[3]

Indentures are those deeds in which there are two or more parties. Indentures were so called as at one time they were indented or cut with an uneven edge at the top. In old times the practice was to make as many copies or parts, as they were called, of the instrument as there were parties to it, which parts taken together formed the deed, and to engross all of them on the same skin or parchment. Then a word, usually *Cyrographum*, was written between the two or more copies, and the parchment was cut in a jagged line through this word. The idea was that the difficulty of so cutting another piece of parchment that it would fit exactly into this cutting and writing constituted a safeguard against the fraudulent substitution of a different writing for one of the parts of the original. This practice of indenting deeds has ceased long ago and even in England the practice of calling them indentures has largely fallen into disuse.

Indian Usage

In India the Stamp Act, 1899 uses the word "instrument" for every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, vide Sec. 2 (14). In the Registration Act, 1908 the word "document" has been used instead. In this book, for the sake of uniformity, the word "deed" has been used generally.

Simple words

In English conveyances several words in Old English form are used, e.g. "witnesseth", "doth covenant", etc. We can however as well use their modern equivalents, e.g., "witnesses", "covenants", etc.

Paragraphs, Punctuation and Capitals

In England, deeds were formerly all written in one paragraph without punctuation, but the practice of dividing the deed into paragraphs is now

3 *Ibid.*

growing. As the division of a deed into paragraphs makes it more easily intelligible, this practice is recommended. The commencement of every important part of a deed is marked by putting the first word or phrase in capital letters and this was very necessary when the deed was not divided into paragraphs as a reader who wanted to refer only to a particular part could easily find what he wanted without having to read the whole. With the division of deed into paragraph the use of capital letters is not absolutely necessary but is continued in practice.

Although a free use of punctuation marks is not desirable, as a mistake in punctuation sometimes alters the sense, yet a full stop or semicolon, as may be proper, at the end of each paragraph would be suitable. The language of the deed should be such that the intention of the parties should be clearly understood without the aid of punctuations.

A deed poll is generally drawn in the first person and an indenture always in the third person.

Deeds poll generally commence with:

"Know all men by these presents",

If there are no recitals, then with:

"To all whom these presents shall come Greeting"

If there are recitals, the date is written at the end of the deed in the testimonium clause, thus:

"IN WITNESS WHEREOF I the said ---- have hitherto set my hand this------day of ----."

The form in which deeds poll and other deeds (hitherto known as indentures) are drafted will be given later under appropriate headings and the exact requirements of such forms will be dealt with in the preliminary notes.The most common and important transactions for which deeds are required are those of various kinds of transfer of immovable property. The general requirements of all deeds of transfer are dealt with in the next part.

Figures and Words

Date, sums and numbers should, in order to avoid mistake, be preferably stated in words or in words as well as in figures.

Part II— General Requirements of Deeds of Transfer

In this part it is proposed to deal with the general requirements of all deeds of transfer and to notice the various clauses, of which a deed of transfer is generally composed, and to show in what way each clause should be framed. The particular and special requirements of particular kinds of transfer deeds and any modifications necessary in the case of a particular kind of transfer will be noticed in the "preliminary note" to the precedents relating thereto.

Division of Deed

An ordinary deed of transfer may conveniently be divided into the following parts:

Description of the deed; Date; Parties; Recitals; Testatum; Consideration; Receipt; Operative words; Parcels; Exceptions and Reservations (if any); Habendum; Covenants (if any); Testimonium.

The part of the deed which precedes the habendum is termed "the premises"[4]. Each of these parts will now be separately considered.

a) Description of the deed

Although the necessity of indenting was abolished long ago in England by Sec. 5 of the Real Property Act, 1845, which section was later replaced by Sec. 56 of the Law of Property Act, 1925, deeds are still sometimes described as indentures, such is the conservatism of English lawyers! Sec. 57 of the Law of Property Act, 1925 provides that a deed may be described as a deed simply according to the nature of the transaction. In some of the latest books on conveyancing this has been followed and the word "indenture" has been discarded.

In India there never was any reason for calling a deed "indenture", but, as solicitors generally copied the English style of conveyancing the word has come to be adopted here also. All deeds should now be

4 Black's Law Dictionary (1992 Edn) defines "premises" (in conveyancing) as "that part of a deed which precedes the *habendum*, in which are set forth the names of the parties with their titles and additions, and in which are recited such deeds, agreements, or matters of fact as are necessary to expalin the reasons upon which the present transaction is founded; and it is here, also, the consideration on which it is made is set down and the certainty of the thing granted".

described by the name of the transaction which they evidence, such as "THIS DEED OF MORTGAGE", "THIS DEED OF SALE", "THIS LEASE", "THIS DEED OF GIFT", etc. When the deed is of a complex character and evidences different transactions known by different legal names, or the conveyancer is not sure what name should properly be given to it, it would be best to describe it simply as "THIS DEED". The description is usually written in capitals.

b) Date

After the description of the deed is stated, the date on which it is executed, thus:

"THIS LEASE made on the first day of February one thousand nine hundred and ninety nine."

The date is strictly speaking not an essential part of the deed and a deed is perfectly valid if it is undated or the date given is an impossible one, e.g. the 30th day of February, and if no date is given, oral evidence will always be admissible to prove the date of execution if it becomes necessary to determine it. It is, however, always a matter of great importance to know the date from which a particular deed operates. In India, as there is a short period of four months (*see* Sec. 23, Registration Act, 1908) from the date of execution within which a deed which requires to be registered must be presented for registration, the date of execution is always the first matter for inquiry by the registering officer. Similarly, in the case of a deed of transfer of land in respect of which mutation of names is necessary, the date of execution is ascertained for mutation purposes. The date is further important for the purposes of the application of law of limitation. In view of the extreme importance of the date of execution, and of the great risk in leaving the same to be determined by oral evidence, a deed should always be dated, and this should be regarded as an essential requirement.

The date of a deed is the date on which it is signed by the party or parties executing it. When there is only one party to a deed , as in the case of deed poll, or when all the parties sign it on one and the same date, or when, though there are several parties to a deed, all do not sign and those who sign do so on one date, there is no difficulty. But if several parties to a deed sign it on different dates, the question is which date should be

entered as the date of deed. The practice is to regard the last of such dates as the date of the deed. This does not, however, seem to be universally correct as there might be parties who execute a deed only for the sake of the formality and the deed operates even without their signature. For example, in the case of a sale deed the transfer operates on its execution by the vendor and without the purchaser's signature on the deed, or when a person is impleaded as a party to a deed simply in order to give him notice of the transaction to obtain his consent though such consent is not legally necessary to validate the transaction. In all such cases the dates on which such persons sign the deed may be discarded from consideration, because the date of deed is really the date on which the deed operates.

The date should, in order to avoid mistake and risk of forgery, be written in words and not in figures. Figures may be added within parenthesis, if desired, thus—

"The First day of March One Thousand Nine Hundred Ninety Nine (the 1st March, 1999)".

In every case in which a deed is executed by more than one person, the date on which each signs the deed must be shown in the deed, preferably against his signature.

c) Parties to the Deed

i) Transferee

After the date, the names and description of the parties to the deed are mentioned. Who are the necessary and proper parties to a deed depends on the circumstances of each case. In England, the custom is to make both the transferor and the transferee parties to all deeds of transfer. This was necessary in former times as no person could take an interest under an indenture who was not named as a party therein but since the passing of the Real Property Act, 1845 (later replaced by the Law of Property Act 1925) an estate or interest in any property and the benefit of a condition or covenant respecting the same may be taken, although the transferee is not named as a party [*see* Sec.5 of the 1845 Act, now Sec. 56 of the 1925 Act]. The practice of naming the transferee as a party, however, still continues. In India, except in the case of leases which, under section 107 of the Transfer of Property Act, 1882, require to be

executed both by the lessor and the lessee, the transferee is not a necessary party to any deed of transfer, and in the forms used in Indian languages transferees are not normally named as parties and do not execute the deeds. But in all cases where any covenant has to be made by the transferee also, he becomes a necessary party.[5]

But although a transferee is not a necessary party, and a deed will not be invalid or ineffective if he is not mentioned as such, except in the case of a lease, he is certainly a proper party. It is always advisable to make him a party.

ii) Third Person

Sometimes it is necessary or expedient, in order to validate a transfer or to give a complete title to the transferee, or to avoid possible disputes or doubts in that regard, to obtain the consent or concurrence of a third person. In such cases, such third person may also be joined as a party. For instance, prior to the enactment of the Hindu Succession Act 1956, [Sec. 14 (1)], a reversioner used to be joined in the case of a transfer by a Hindu widow of absolute title in her husband's property. Again, in the case of sale of lessee's right the lessor may be joined if the lessee has no power to transfer his rights without the lessor's permission. (Such permission is generally required under rent control laws; its absence may result in the lessee forfeiting his protection under such laws). Sometimes other persons also make some covenants in the deed and are joined for this purpose. In all such cases the transferor is placed first, any person whose concurrence is necessary or who enters into any covenant comes next, and the transferee last. If different portions of the estate transferred are owned by different persons as the mortgagor and mortgagee, lessor and lessee, reversioner and life owner and full estate is transferred by all such persons, the person who has the legal estate should be placed first, and those who have the equitable estate next.

iii) Description

Full description of the parties so as to prevent difficulty of identification should follow the name. In India, parentage, occupation and residence including municipal or survey number, street and city and in the case of

5 In this context, see "Covenants and Undertakings", *post*

resident of a rural area the village, sub-division, tehsil and/or development block are generally regarded as sufficient to identify a man, but if there is any other description which is sufficient, the same may be normally adopted. It should not be considered necessary to specify the caste or religion as it is desirable to discourage emphasis on communal or caste distinctions in our republic. But where the transferor is a member of a scheduled caste or scheduled tribe for whose protection the statute places restrictions on his right to transfer it may be necessary to mention such caste or tribe while reciting the fact of permission for the transfer having been obtained from the competent authority.

iv) Juridical Person

A party to a transfer need not be a living individual but may be a company, or association or body of individuals (Sec. 5, Transfer of Property Act, 1882), or an idol[6] or a corporation sole or aggregate[7], or in fact, any juridical person capable of holding property and entering into contracts. A court is not a juridical person capable of holding property or entering into contracts, and security bonds which are given to courts must, therefore, be made in favour of a named officer of the court and not in favour of the court.[8] Care should be taken that companies, associations and corporations are described by their correct names. It is better also to refer to the Act under which they are registered or incorporated thus:

"The Bengal Sugar Mills Limited, a company within the meaning of the Companies Act, 1956, and having its registered office at Howrah";

6 *Bhopatrao* v. *Shri Ram Chandra*, 96 IC 1004; see *Angurbala* v. *Debabrata*, A 1951 SC293 (In a Hindu religious endowment the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person, and the *shebait* or *mahant*—unlike a trustee under the English Law in whom the property vests for the benefit of *cestui que trust*—is a mere manager).

7 *Board of Trustees, Ayurvedic and Unani Tibia College* v. *State of Delhi*, A 1962 SC 458 (para 9). A company is a Corporation aggregate (Sec. 34, Companies Act, 1956); it has a legal personality distinct from its shareholders (*Charanjit Lal* v. *Union of India*, A 1951 SC 41, para 43). For illustrations of corporation sole see the Administrators—General Act 1963 (Sec. 5) and the Charitable Endowments Act 1890 (Sec. 3). Universities, State Electricity Boards, Life Insurance Corporation of India and nationalised banks are instances of corporations aggregate.

8 *Raghuber Singh* v. *Jai Indra Bopander Singh*, A 1919 PC 55; ILR 42 All 158, (See precedent No. 10 under BOND).

"The Arya Pratinidhi Sabha, a society registered under the Societies Registration Act, 1860";

"The University of Lucknow a body incorporated under the U.P. State Universities Act 1973".

v) Idol

As an *idol* has to act through some natural person,[9] the name of the latter should be disclosed, thus:

"The idol of Sri Kishori Ramanji Maharaj installed in the temple at Brindaban, district Mathura, acting through its Sarbarkar, Ram Lal, son of Shiam Lal of Brindaban".

vi) Persons under Disability

Persons under disability (namely minors, persons of unsound mind and persons disqualified from contracting by any law to which they are subject) cannot enter into a contract and cannot therefore transfer property (See Sec. 7 Transfer of Property Act read with Secs. 11 and 12 Contract Act and Sec. 3 Majority Act)[10]. They cannot by themselves even take a transfer, if the same involves entering into any covenant, as all contracts made by them are void. But if no promise is made by the person under disability as a consideration of the transfer or where there remains nothing for the minor to do there is nothing to make the contract unenforceable at his instance.[11] However some statutory obligations attach to a transferee even in the absence of a specific covenant on their part, e.g., in Transfer of Property Act, Sec. 55 (5) in a case of sale and Sec. 109 in a case of lease. Thus a lease in favour of a minor is not enforceable even at his instance if he himself and not his guardian is the executant.[12] Sec. 68,

9 *Angurbala* v. *Debabrata*, A 1951 SC 293

10 See discussion of case law in *Manik Chandra* v. *Ram Chandra*, A 1981 SC 519, (1980) 4 SCC 22

11 *Raghava Chariar* v. *Srinivasa*, (1917) 40 Mad 308 (FB) (if minor has fulfilled his part of the contract the other party cannot resist its enforcement on the ground of voidness); *Zafar Ahsan* v. *Zubaida Khatun*, (1929) 27 All LJ 1114; *Bhaggobhor Mandal* v. *Mohini Mohan*, A 1918 Cal 1027; *Daniel* v. *Mariamma*, A 1951 Mad 466; *Bholanath* v. *Balbhadra*, A 1964 All 527; *The Great American Insurance Co.* v. *Mandanlal*, (1935) 59 Bom 656 (per Beaumont C.J.)

12 *Jaykant* v. *Durgashankar*, A 1970 Guj 106

Contract Act lays down an exception to the effect that a person who supplies necessaries to a person under disability is entitled to reimbursement from the latter's property.

vii) Minors

Minors are persons — male or female — who are below the age of 18 years. A transfer of his immovable property can (except short-term lease for which no permission is required, as hereinafter stated) be made only by his natural guardian or guardian appointed by will or other instrument or appointed or declared by the court under the Guardians and Wards Act with the permission of the court. Even for transfer of movables or for lease for a short-term it is necessary that the transfer should be for the benefit of the minor or for the realisation, protection or benefit of his estate and that there should be no personal covenant binding the minor. The powers of a testamentary guardian may be further restricted by the terms of the will (Sec. 28, Guardians and Wards Act).

The usual form is .....

"AB, a minor, acting through CD his guardian."

The authority of the guardian should be *either* recited in the recital, thus :

"The Vendor is a minor and the said CD is the certificated guardian of his property appointed by order of the District Judge of Agra dated .....".

Or it may be shortly stated in the heading itself thus :

"AB, a minor, acting through CD his guardian appointed by the District Judge, Agra, by order dated .....".

Or "AB, a minor, acting through his father and natural guardian CD."

In case of transfer of a minor's property the circumstances which give the guardian or *Karta* power to make the transfer should be mentioned in the recitals, e.g. in case of natural guardian or manager of a Hindu family, the legal necessity of the transfer (except a lease for a period not exceeding five years) without the sanction of the court (Sec. 29, Guardian and Wards Act). The powers of a natural guardian of a Hindu minor are now defined in Sec. 8 of the Hindu Minority and Guardianship Act, 1956. In fact, it gives statutory recognition to certain powers enjoyed by natural

guardian under the old Hindu law. Under that provision the natural guardian shall not mortgage or charge or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor; or lease any part of such property for a term exceeding five years or for a term exceeding more than one year beyond the date on which the minor will attain majority, except with the previous permission of the court. Such permission should be referred to in the recitals thus :

"The District Judge of Agra has by order dated ..... in Miscellaneous Case No. ..... of ..... permitted the said AB to make the said sale".

If the guardian in his personal capacity also joins in making a conveyance, the two may be described thus :

"AB acting for himself and as guardian of CD, a minor", *or*

"AB, etc., and CD, etc., a minor acting by his guardian the said AB".

A transfer of immovable property by a guardian in contravention of sub-sec. (1) or sub-sec. (2) of Sec. 8 of the Hindu Minority and Guardianship Act or Sec. 28 or Sec. 29 of the Guardians and Wards Act is voidable, at the instance of the minor or any person claiming under him. The other party as well as a minor, however, can enforce a contract for sale of property entered into by a natural guardian if the contract is for the benefit of the minor.[13] The restriction imposed under Sec. 8 is against alienation of minor's property by a natural guardian but the latter can purchase any property without Court's permission if the purchase is for the minor's benefit.[14]

viii) Mentally Ill Persons

A mentally ill person means a person who is in need of treatment by reason of any mental disorder other than mental retardation. A manager appointed by the court can alone transfer such person's property with the permission of the court (Sec. 59, Mental Health Act 1987). The abovementioned directions about guardian of a minor apply to the manager of the property of a mentally ill person as well.

13 *Manik Chand* v. *Ram Chandra*, A 1981 SC 519.
14 *Than Singh* v. *Barelal*, A 1973 MP 24.

ix) Insolvent

The property of an insolvent vests in the official assignee in the Presidency towns and in the official receiver elsewhere, and the official assignee or the official receiver alone can transfer it (Sec. 68, Presidency Towns Insolvency Act,1909, and Sec. 59 of the Provincial Insolvency Act, 1920).

As the property vests in the official receiver (Sec.56) or the official assignee (Sec.51), the transfer should be made by him in his own name, and the fact of the insolvency of the owner and the vesting of the property in the transferor should be mentioned in the recitals.

x) Trustees

If a property vests in trustees, the transfer should be by the trustees themselves in their own name, as

"AB, CD and EF trustees of the estate of XY",

The facts showing how the estate came to be vested in the trustees should be mentioned in the recitals.

The powers of trustees in regard to transfer of trust property depend on the terms of the trust deed. See precedents of "Miscellaneous Clauses and Conditions of Trust" under TRUSTS, *post*.

xi) Hindu Coparcenary

The manager or *Karta* may execute the deed in his name alone or all members of the coparcenary may join it. In either case the fact of the property being joint family property should be mentioned in the recitals. See "(d) Recitals", *post*.

xii) Attorney

An attorney may be made party either in his own name (Sec. 2, Power of Attorney Act, 1882), thus:

"AB attorney of CD",

or the name of the principal may be shown as a party, thus:

"CD acting by his attorney AB."

The latter form is preferable.

xiii) Firm

Every partner has, under Sec. 19 of the Partnership Act, 1932, an implied authority to bind the firm by acts done to carry on the business of the firm in the usual way. In case of emergency a partner may do any reasonable act (Sec. 21). The acts mentioned in Sec. 19(2), including transfers of immovable property must be done by all the partners; other acts done and instruments executed by one partner must be done and executed by him *in the firm's name or in any other manner expressing or implying an intention to bind the firm (Sec. 22), thus :*

"AB, etc., a partner of and acting for and on behalf of the firm carrying on business under the name and style of—— (*firm's name*)"

"Firm——acting through AB, etc., its managing partner".

It may, however, be added that strictly speaking, a firm, unlike a corporation, is not a juridical person[15] and only its partners are juridical persons. Hence if it is desired to execute a deed of transfer in the firm name it should be ensured that the deed is signed either by all its partners or by a partner holding a power of attorney on behalf of all partners. As regards Sec. 19 it is to be noted that it does not confer an implied authority on any partner to buy or sell property for or on behalf of the firm. Commercial agreements may, however, be entered into by the managing partner in the ordinary course of business.

xiv) Government

Contracts made in exercise of the power of the Union and all assurances of property vested in the Union are to be expressed in the name of the President while those relating to a State are to be made in the name of the Governor[16] of that State, as laid down by Article 299(1) of the Constitution. Notifications under Article 299(1) authorising Secretaries

15 See *Dullichand* v. *C.I.T.*, A 1956 SC 354.

16 While the agreement or the deed of lease, sale etc. may at the outset mention the President or the Governor so that it may be expressed in his name it is customary to add within brackets the words "(hereinafter called the Government of India/ the State Government/the said Government)", as the case may be, so that the office of the President or the Governor may not have to be referred to repeatedly in subsequent clauses. It is sufficient to give it only in the beginning for fulfilling the constitutional requirement. See, e.g., the agreement quoted in *Laxmanrao* v. *Telecom Distt. Manager*, A 1998 Kant 67 (para 5).

of the various Ministries of the Government of India and the Secretaries to Government of the various departments in the States as well as some heads of department and various other officers for entering into contracts or executing assurances of property on behalf of the President or the Governor, as the case may be, have been issued from time to time.

If the contract or transfer is not made in accordance with Article 299 of the Constitution, it is void.[17] Such a contract is not capable of being ratified, nor does estoppel become applicable, nor can there be implied contract between the Government and another person.[18] A formal contract in accordance with Article 299 is, however, necessary only when Government acts in its executive capacity and not when a particular statutory authority, as distinguished from the Union or the States, enters into contract in exercise of a statutory power, such as a contract whereby a licence is granted for vend of liquor after acceptance of bid at an auction under the relevant State excise law,[19] unless the statutory provision itself contemplates or requires that a formal deed between the contractor and the Government be executed.[1] Moreover, absence of a formal contract with Government or a public corporation will not stand in the way of a citizen pleading promissory estoppel against the Government or such corporation on the basis that on the assurance or promise made by the latter he has acted to his prejudice.[2] Estoppel is however inoperative to

17 *Bihar Fishermen Society* v. *Sipahi Singh*, (1977) 4 SCC 145; *Bhikraj Jaipuria* v. *Union of India*, A 1962 SC 113, (1962) 2 SCJ 479, (1962) 2 SCR 880; *State of W. Bengal* v. *B.K. Mandal*, A 1962 SC 779 ; *State of U.P.* v. *Murari Lal & Bros.*, A 1971 SC 2210, (1971) 2 SCC 449; *Union of India* v. *N.K. Private Ltd.*, A 1972 SC 915, (1973) 1 SCJ 107; *K.P. Chowdhry* v. *State of M.P.*, A 1967 SC 203; *K.N. Vidhyadharan* v. *State of Kerala*, A 1980 Ker 212.

18 *Mulamchand* v. *State of M.P.*, (1968) 3 SCR 214, A 1968 SC 1218; *State of Haryana* v. *Lal Chand*, (1984) 3 SCC 634 (para 10).

19 *State of Haryana*, supra (para 10).

1 *K.P. Chowdhry*, supra; *Mulamchand*, supra; (distinguished on this ground in *State of Haryana*, supra, para 11).

2 *Motilal Padampat Sugar Mills* v. *State of U.P.*, A 1979 SC 621, (1979) 2SCC 409; *Gujarat S.F.C.* v. *Lotus Hotel*, A 1983 SC 848, (1983) 3 SCC 379; *Union of India* v. *Godfrey Philips*, A 1986 SC 806; *State of Bihar* v. *Usha Martin Industries Ltd.*, 1987 (Supp) SCC 710.

defeat a statutory obligation of an unconditional character. Invalidity based on public policy is a good defence to the objection of consent.[3]

It is well settled that Article 299 does not by itself prohibit a contract with Government coming into existence without a formal deed as it can, notwithstanding the use of the word "executed" in that Article, result from correspondence between an authorised officer of Government, acting expressly on behalf of Government, and a private party, e.g., when a tender for purchase of goods in pursuance of an invitation issued by or on behalf of Government is accepted in writing by the authorised officer on behalf of Government.[4]

However, as clause (1) of Article 299 adds that all such contracts and all assurances of property shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise, it is open to the Government concerned to direct that contracts of a specified class shall be made only through formal deed. Even in the absence of a valid contract, where a party has done something for or supplied something to the Government under an informal agreement and the Government has taken advantage thereof, the latter can be required to compensate the other party (the former) under section 65 and 70 Contract Act.[5]

xv) Reference Labels of Parties

In order to avoid the repetition of the full name and description at every place, the parties are generally referred to in the body of the deed by some easy and convenient names which generally have reference to the character in which they join in the deed, such as "the vendor", "the purchaser", "the lessor", "the lessee". In England, in order to avoid mistakes in writing words resembling each other for opposite parties, e.g., a combination of "mortgagor" and "mortgagee" or "vendor" and "vendee", they prefer to use a combination of "borrower" and "mortgagee", or "vendor" and "purchaser". If no such name is adopted, the parties can be referred to as "the party of the first part" (or "the first party"), "the party of the second part" (or "the second party"), "the said AB", "the said

3 *Union Carbide Corporation* v. *Union of India*, (1991) 4 SCC 584 (para 107).

4 *Union of India* v. *A.L. Rallia Ram*, A 1963 SC 1685.

5 *State of W. Bengal* v. *B.K. Mondal*, A 1962 SC 779, (1962)2 SCJ 479, (1962) 2 SCR 880; *New Marine Coal Co.* v. *Union of India*, A 1964 SC 152.

CD", but it is always preferable to give each party some short name for reference. Whatever short name is adopted the party should be referred to throughout *by the same name*.

The form, in which the parties will be described in the beginning of the deed. would thus be as follows:

"This SALE DEED is made on the ——— day of ——— BETWEEN AB, etc. (hereinafter called 'the vendor') of the one part and CD, etc., (hereinafter called 'the purchaser'), of the other part."

If the transferor alone is made a party, this clause will run as follows:

"This SALE DEED is made on the ——— day of ——— BY AB etc., (hereinafter called 'the vendor')."

If there are more than two parties, instead of the words "of the one part" and "of the other part" the words "of the first part", "of the second part", "of the third part", etc., should be used.

d) Recitals

Recitals are of two kinds : (1) *Narrative* recitals, which relate the past history of the property transferred and set out facts and instruments necessary to show the title and the relation of the parties to the subject matter of the deed; and (2) *Introductory* recitals, which explain the motive for the preparation and execution of the deed.

i) Narrative Recitals

If the transferor is an absolute owner of the property transferred, his title and the mode in which he acquired it need not generally be recited, but when he is not an absolute owner, recitals showing the extent of his interest and the title under which he holds it will be necessary. So also when the transferor transfers under some power given to him by another instrument or by any special law, such instrument or law must be recited; e.g., in the case of a transfer by a guardian of a minor the fact of his appointment as such guardian by a deed or order of court and, in the latter case, the fact of his having obtained the permission of the court to make the transfer, must be recited. Similarly, in a transfer of leasehold or mortgagee rights, the lease or mortgage under which the transferor holds should be recited. When the transferor is authorized to transfer only in

certain circumstances, it would be advisable to narrate those circumstances in the recital to avoid future disputes, although their omission in the recital cannot estop the transferee from proving them if the transfer is impugned. For instance, in case of a *Karta* of a Hindu coparcenary he should better recite the legal necessity for which the transfer is being made.

ii) Introductory Recitals

Among the introductory recitals, which come after the narrative recitals, the chief one is of the agreement which the deed is intended to give effect to. If the agreement is in writing, it is not necessary to give particulars of the date and place of such agreement but it may be expressed in brief and general terms. Any other recitals which may be necessary to connect the narrative recitals with the rest of the deed by showing why and how the state of things previously existing is about to be altered by the deed should also be entered.

Caution

Recitals should be inserted with great caution because they may control the operative part of the deed if the same is ambiguous, and may operate as estoppel by estopping the parties and their representatives from showing the existence of a different state of things from that stated in the recitals. In any case, they may be good evidence of the facts recited, either as admissions under Sec. 21 or as substantive evidence under Sec. 32 or corroborative previous statements under Sec. 157 of the Evidence Act, though as admissions they are not ordinarily admissible in evidence against persons not parties to the document.[6] If, however, the operative part of the deed is clear and unambiguous nothing contained in the recital will control it. Conveyancers should therefore take the greatest care to avoid unnecessary recitals and to ensure that all recitals are both correct and judicious. The tendency of the modern conveyancers is to do away with recitals, and in simple cases of sale, lease or gift no recitals are generally needed. But recitals are necessary whenever the deed itself does not clearly imply for what purpose any person joining in it is made a party or whenever the covenants into which he enters show that he has only a qualified interest in the property transferred. It is unnecessary to recite conclusions of law or negative events.

6 *Abdur Rahim Khan* v. *Fakir Md. Shah*, A 1946 Nag 401, ILR 1946 N 518.

Order of Recitals

If it is necessary to have numerous and lengthy recitals, they should be inserted in chronological order. In the case of narrative recitals, the different instruments and acts which ultimately result in vesting the property in the transferor should be recited in strict, chronological order. When the property comes to the transferor partly under one and partly under another title, each title should be traced separately and in chronological order.

Facts and events contained in the introductory recitals also should be inserted in the sequence in which they have happened or occurred.

Form of Recitals

Recitals generally begin with the word "Whereas", but, when there are several recitals, one can either repeat the word before every one of them, by beginning the second and subsequent ones with the words "And Whereas", or divide the recitals into numbered paragraphs with the word "Whereas" at the top thus:

"Whereas——

1.

2.

etc."

e) Testatum

The next division of a deed consists of the operative part. It commences with a witnessing clause termed the "testatum", which refers to the introductory recitals of the agreement (if any) and also states the consideration (if any) and recites acknowledgement of its receipt. The witnessing clause usually begins with the words "Now this deed witnesses". These words of testatum are of no importance as affecting the operation of the deed and their sole use is to direct attention to the object which the deed is intended to effect. If the deed is intended to serve several objects, use the words "as follows" after the testatum, thus:

"Now this deed witnesses as follows:

1.

2.

etc."

f) Consideration

As contracts are necessarily for consideration (Sec. 10 Contract Act), it is advisable to express the consideration. This is necessary in many cases of transfer for ascertaining the stamp duty payable on the deed as Sec. 27 of the Indian Stamp Act requires that the consideration should be fully and truly set forth in the deed. The penalty for omission to comply with this requirement is a fine which may extend to Rs.5,000 (*vide* Sec. 64).

g) Receipt

Acknowledgment of receipt of consideration may be embodied in the deed itself instead of passing a separate receipt. Thus:

"Now this deed witnesses that in pursuance of the aforesaid agreement and in consideration of Rs. — paid by the purchaser to the vendor before the execution hereof, the receipt of which the vendor hereby acknowledges".

h) Operative Words

Then follow the real operative words which vary according to the nature of the estate and of the transaction. What words are necessary in a particular kind of transaction will be dealt with in the preliminary note to the precedents relating to that kind of transaction.

i) Parcels

This is a technical expression meaning description of the property transferred and it follows the operative words. Care must be taken, on the one hand, to include in the particular description or in general words, all the lands, etc., which are intended to pass so that no doubt may arise as to the extent and operation of the deed; and, on the other hand not insert words which will pass more than what is intended. If the description is a short one, it may be given in the body of the deed in full but if it is a long one it is better to give it in details in a schedule at the foot of the deed, describing it shortly in the body of the deed and referring to the schedule, thus:

"The house known as Glenco and situated at Naini Tal and fully described in the Schedule hereto".

The practice of entering the full description in a schedule is a convenient one and should generally be followed as it makes the reading of the deed easier and clearer.

Map : Sometimes it is necessary to have a map or a plan of the property in order to avoid mistake about its identity and to indicate the actual property conveyed with greater definiteness and precision. In such cases such plan or map should be appended to the deed and referred to in the parcels, stating how the property transferred has been shown on it, e.g., by being coloured, or by coloured boundaries or by letters, etc., thus:

"Which land is for greater clarity (*or*, by way of further identification), delineated on the plan annexed hereto and thereon shown as coloured red (*or*, with its boundaries coloured blue) (*or*, thereon marked with letters ABCDE)".

It is always desirable to make it clear whether the description in the deed controls the plan or vice versa. The words "for greater clarity" or "by way of further identification" are added to indicate that the description controls the plan. If plan is intended to control description, we may say thus:

"All that portion of the compound of house known as No.——— Clyde Road, Lucknow, which is indicated by letters ABCD on the plan annexed hereto and which contains an area of 1500 sqm. approximately".

A map referred to in a transfer deed is treated as incorporated in the deed, and if it is drawn to scale and demarcates the boundaries clearly it is not permissible to attempt to correct them with reference to revenue records.[7]

Great care should be taken in describing the property, as a slight mistake or omission may cause immense loss to a party and if the property is described both in the body and the schedule, a conflict between the two should be carefully avoided.

In English conveyancing, different technical words are used to denote different kinds of property. For example :

i) Messuage denotes a dwelling house with outhouses and gardens.

7 *K.S. Nanji & Co. v. Jatashankar*, A 1961 SC 1474.

ii) Tenement properly means land and anything which is subject to tenure but is generally used as equivalent to a messuage.

iii) Hereditament applies to all interests in land.

iv) Land includes not only the surface of earth but everything under it or over it such as mines, woods and houses.

v) Water is used to denote only the right to water and not the land it covers, while "pool" cover both water and the land.

In India, however, there is no need to use such technical words. Instead, words of ordinary use which are commonly understood, such as, land, house, trees, etc., should be used, and so long as the description is sufficient to show with certainty what the subject-matter of a conveyance is, it is of no concern what words are employed, but care should always be taken that the whole interest conveyed is clearly and fully described.

General Words: After a specific description of the property conveyed, there formerly came what were known as the "general words" giving minute details of the easements and legal incidents intended to be conveyed, but this is unnecessary in India in view of the provision of Sec. 8 of the Transfer of Property Act.

Sec. 8 is subject to a different intention expressed or necessarily implied. Hence if it is intended to exclude any easement or legal incident it should be expressly mentioned. Likewise if it is intended to include in the transfer any right the inclusion of which is not implied by these provisions, the same should be specifically mentioned, e.g., if a garden attached to a house is transferred with the house the same should be specifically mentioned. No fixed rule can be laid down as to how a particular kind of property should be described in the parcels, but care should be taken that the description used is full, sufficient, precise, definite and unambiguous.

As laid down in Sec. 3, Transfer of Property Act, standing timber, growing crops or grass are not included in immovable property, hence if they are also to be transferred specific mention should be made in that behalf.

The following are the particulars usually necessary for the description of different kinds of property in India—

Agricultural land : The numbers and areas of the plots, and the names of the village, pargana, tahsil and district should be given. The tenure

on which the land is held, with the amount of revenue, if any, fixed on the land should be given. If the land is a part of a plot, the area transferred and its position with reference to a map (to be annexed to the deed) should be clearly stated and, if possible, boundaries may also be given.

Non-agricultural land : The exact situation, area and boundaries of the land should be given. If any number is assigned to it in municipal or village register, the same should also be given.

House: should be described by its name, if any. The number of the house, if there is one, and the name of the street in which it is situate should also be given as well as its boundaries. If there are any separate out-houses, stables, garages or gardens or open land attached to it, the same should be mentioned unless the description of the house as given in the deed is wide enough to include them. Sometimes the area of the land is also given. If house alone is transferred (and not the land covered by it, e.g., when the land belongs to another person), the fact should be made clear in the deed, by adding the words "but without the land occupied by the said house" after the description of the house. Sometimes the length and breadth of the house or of the whole compound are also entered. It is not necessary to mention specifically the fixtures and fittings of the house, e.g., doors, windows, etc., and other things provided for permanent use therewith, nor any easement annexed to it (Sec. 8 of the Transfer of Property Act), but if there are any machineries fixed in the house and they are included, they should be specifically mentioned.

Trees : pass with the land on which they stand, but if they are separately transferred, they should be described correctly by their position and their species.

Grove : The name, if any, with the correct position of the grove and the number, if any, in village or municipal registers should be given. The area and the boundaries should also be mentioned.

Area : Wherever area is given, care should be taken that it is correct. To be on the safe side, it is advisable that after the area the word "approximately" or the words "more or less" may be added so that there may not be any trouble if the area is found to be incorrect.

The normal rule is that in case of conflict, a description by fixed boundaries should be preferred to a description by area which would be rejected as *falsa demonstratio*.[8] Where, however, in a deed the

8 *Plestin K.A.B. Co-op Society* v. *Govt. of Palestine*, A 1948 PC 207.

boundaries of the land conveyed and the area marked in the plan disagreed but the parties had always treated the area marked in the plan as the true area conveyed, this conduct of the parties was held to be relevant for upholding the plan in preference to the boundaries recited.[9] The boundaries stated in the description of the property at the foot of the deed should be read along with the document as a whole including any plan annexed thereto and also, if two conveyances have been simultaneously executed in respect of adjacent properties, the terms of the other conveyance so executed simultaneously.

Description of the property to be conveyed should, as far as practicable, be the same as in former title deeds. If the description in former title deeds is found to be wrong or has been changed owing to change of circumstances, the correct present description should be given and a reference may, if necessary, be made connecting the parcels with the former description, thus:

"The house now known as Hari Bhawan situate at Naini Tal which was formerly known as Endcliffe."

For forms of parcels *see* under General Forms *post*,

j) Exceptions and Reservations

All exceptions and reservations out of the property transferred should follow the parcels.

An *exception* is something in existence at the date of transfer which, if not expressly excepted, would pass with the property as described in the parcels, such as trees.

A *reservation* is something not in existence at the date of the transfer but is newly created by the grant, e.g. when the vendor reserves a right of way over the property. But since both "excepting and reserving" are used in practice it is immaterial whether what follows is an exception or a reservation.

Strictly speaking, as a reservation operates as a new grant by the transferee to the transferor, deed should be executed by the transferee

9. *Watchman* v. *Attorney General of East Africa Protectorate*, (1919) AC 533 PC; referred to with approval in *Godhra Electricity Co.* v. *State of Gujarat*; (1975) 1 SCC 199 (para 13).

also, otherwise on reservation of an easement no legal easement is created but only an equitable right.[10]

k) Habendum

This is the familiar "to have and to hold" (in Latin, ***habendum et tenendum***) clause of the English precedents. In India such phrases as "to have and hold" or such an expression as "to the use of the purchaser" are not strictly necessary but there is no harm in continuing the established practice.

See Preliminary Notes to SALE, *post* on "Habendum, when Several Purchasers".

l) Covenants and Undertakings

If the parties to a transfer enter into covenants, such covenants should be entered after the Habendum. While drafting covenants, regard should be had to the statutorily implied covenants which operate subject to any contract to the contrary. For instance, Sec. 55 (sale), Secs. 65 and 67 (mortgage), Sec. 108 (lease) of the Transfer of Property Act should be kept in mind.

Where several covenants follow each other, they may run on as one sentence, each being introduced with the words "and also" or by the words "First", "secondly", etc. or they may be sent out in paragraph form with the heading :

"The vendor hereby covenants with the purchaser as follows—"

It is better to put in the transferor's and the transferee's covenants separately, and any covenants mutually entered into by the parties with each other may be inserted separately. If the transferor's and transferee's covenants are separately mentioned in the deed, care should be taken that no covenant which should really be the covenant of one party is entered in the covenants of the other. For example, if a lessee is given the right to cut trees of a certain kind and not to cut trees of a different kind, the latter covenant is a covenant by the lessee and the former is a covenant by the lessor and both should not be inserted in one covenant by either. When it is found inconvenient or awkward to split up, what really is one covenant

10 *May* v. *Belvoma*, (1905) 2 Ch. 605.

into two parts, it is better to insert such a covenant as a mutual covenant by the parties.

Sometimes the terms and conditions of a transfer cannot be conveniently separated into transferor's covenants and transferee's covenants. In such cases, it would be better to include all the covenants under one head as parties' covenants thus : "The parties aforesaid hereto hereby mutually agree with each other as follows:"

m) Testimonium

The last part of a deed is the testimonium which sets forth the fact of the parties having signed the deed. This is not an essential part of the deed, but as it marks the close of the deed there is no harm in continuing the established practice. The usual English form of testimonium is as follows:

"In witness whereof the parties hereto have hereunto set their respective hands and seals the day and year first above written."

The use of seals is not common in India except in cases of companies and corporations, and the proper form in simple language would be somewhat as follows:

"In witness whereof the parties hereto have signed this deed on the date first above written."

n) Signatures and Attestation

After testimonium should follow the signatures of the executants and those of attesting witnesses. If the executant is not competent to contract or is a juristic person, the deed must be signed by the person competent to contract on his or its behalf. Thus if the deed is executed :

i) on behalf of a minor or a mentally ill person it must be signed by his natural guardian or where a guardian has been appointed by a competent court, then by such guardian, as guardian of————;

ii) by a firm, then by any partner or partners of the firm, authorised (impliedly under Sec. 19 Partnership Act or expressly by power of attorney), on behalf of the firm;

iii) by a corporation such as a university or a local authority or other statutory corporation, then by a person or the persons authorized in this

behalf by or under the statute incorporating such body. Whether it is also to be sealed depends on the provisions of such statute;

iv) by a company or co-operative society or a society registered under the Societies Registration Act, 1860, then by a person authorized in this behalf by or under the articles of association or rules or regulations or bye-laws, as the case may be Sec. 48 Companies Act 1956 requires that the common seal of the company should be affixed in the case of a power of attorney. Such seal is not required for other agreements and conveyances (Sec. 54);

v) by a trustee or *mutwalli*, then by such person describing himself as such;

vi) by an attorney, then by such person describing himself as such and mentioning the date of the deed of the power of attorney;

vii) by the Government, then by the person authorized in this behalf under Article 299 of the Constitution of India, by and on behalf of the President or the Governor, as the case may be, specifying the official designation and preferably notification or government order under which the authority is conferred. (The other party may well insist on seeing such notification or authorization).

Sign

The word "sign" means "to write one's name on, as in acknowledging authorship". Sec. 3 (56), General Clauses Act, 1897, extends its meaning, with refernece to a person who is unable to write his name, to include "mark". The document must be signed by a person in such a way as to acknowledge that he is the party contracting, and it is not very material in what part of the document the signature appears.

The execution of a deed is necessary under the Transfer of Property Act in cases of mortgage, lease (except a tenancy from month to month or for a term up to one year which may be created orally, accompanied by delivery of possession, Sec. 107 Transfer of Property Act), gift[11] of immovable property and transfer of actionable claims, and the omission of the signature of the executant will therefore make the deed invalid. But in

11 The Transfer of Property Act is, however, not exhaustive, nor is it universally applicable. Muslim gifts are thus governed by Muslim law, vide Sec. 129, Transfer of Property Act. A deed is not necessary for a gift by a Muslim, but if deed is executed it requires registration.

case of sale there is no such necessity if the property is movable or if the immovable property is sold for less than one hundred rupees.

A deed of transfer need not be signed by the transferee, even though he is mentioned as a party. All conditions and covenants are binding upon him without his executing the conveyance if he consents to it by entering upon the land granted under the conveyance. But if the deed contains any special covenant by the transferee or any reservation (which legally amounts to a re-grant by the transferee), it is always proper to have it signed by the transferee also.

Attestation is necessary in case of some deeds, e.g., mortgage, gift, bond, will and revocation of will. In other cases, though it is not necessary, it is except in the case of negotiable instruments, always safe to have the signature of the executants attested. Attestation in India, whenever required by law, should be by at least two witnesses, who should have seen the executant sign the deed or should have received from the executant a personal acknowledgment of his signature but it is not necessary that both the witnesses should have been present at the same time. (*See* definition of "attested" in Sec. 3 of the Transfer of Property Act and also Sec. 63, Indian Succession Act).

A deed is normally signed at the end on the right side of its last page and the attesting witnesses may sign on the left side. If both the parties sign, transferor may sign on the right and the transferee on the the left and witnesses to each signature may sign below the signautre. However, as noted earlier, the place at which the signatures occur has no legal effect. It is also expedient to ensure that preceding pages are also initialled or signed by the parties.

Forms of Attestation

There is no particular form of attestation but it should appear clearly that a witness intended to sign as an attesting witness. The practice in Indian forms is to write the word "Witness" above the signature. In English forms between the signatures of the executants and witnesses the words "in the presence of" are added. It has been held that the signature of the scribe or of an identifying witness or of a third party approving the transaction or of the registering officer at the bottom of a deed does not by itself, amount to attestation.[12] If the scribe intends to sign as an attesting

12 *Sarkar Barnard* v. *Alak Manjary*, A 1925 PC 89, 26 BLR 737, 83 IC 170; *Girja Dutt* v. *Gangotri*, A 1955 SC 346; *M.L. Abdul Jaffar* v. *Venkatashastri*, A 1969 SC 1147.

witness, this should clearly appear from the deed by the addition of the word "Witness", or otherwise. The animus to attest is necessary for any such person to be treated as an attesting witness.[13] In the case of a will it is further noteworthy that while the testator may sign or affix his mark himself or direct some other person to sign on his behalf, the attestor is not allowed to so delegate his authority to any other person to sign or make a mark on his behalf.[14]

Illiterate Persons

Illiterate persons not able to sign may either put their pen mark or thumb mark. Only the latter is in vogue in modern deeds. As a thumb mark is more satisfactory for identification purposes, the executant or witness should put his thumb mark (as per usage, left thumb mark in the case of males and right thumb mark in the case of females, and if that hand or thumb is defective or injured then of the other thumb), and the scribe or another person should make an endorsement above or under the mark to show whose mark and of which hand's thumb it is.

Deeds by Pardanashin Ladies

Where the executant cannot himself read a deed, it should be explained to him by the scribe or any other person before his signautre or mark is obtained. This is necessary in the case of *pardanashin* ladies, as courts afford special protection to them and in all cases in which a deed executed by such a lady is used against her, insist on clear proof that it had been executed by her after fully understanding the terms and the effect thereof and that she had independent advice in the matter. The person reading and explaining the deed to the executant should certify the fact at the foot, thus:

"This deed was read over and explained by me to the executant before he/she executed it."

It appears that the Scheduled Banks, while dealing with ladies, have introduced a system by which they get an endorsement from the lady stating "she does not observe *purdah*". This might be availed as admission on her part, if an occasion arises.

13 *Badri Prasad* v. *Abdul Karim*, 11 ALJ 260 (262); *Dhyan Chand* v. *Savitri Devi*, A 1998 HP 37; *Shamu Patter* v. *Abdul Kadir*, 35 M 607.

14 *Nagulapati Lakshamma* v. *Mupparaju*, (1998) 5 SCC 285 (case law on 'sign').

These precautions apart, the terms of such deeds should also not appear to be loaded against such executants so as to give suspicion of fraud.[15] Although mere absence of an endorsement on the deed that the executant was a blind person is not fatal to the validity of the deed,[16] yet it is safer and expedient to mention any such fact.

Delivery

The last formality to validate a deed in England is "delivery",[17] but this is not necessary in this country.

Errors and Omissions

Any errors or omissions detected after engrossing a deed on stamped paper but before its completion by signature may be corrected, and the corrections initialled by the parties signing the deed. It is better and safer to have these noted in a memorandum before the testimonium.

Postscript

A new covenant may according to old English practice be added as a postscript after the testimonium and it will have the same effect as one entered before.[18] However, this has now fallen in disuse and the modern practice is either to note the errors before the testimonium or to execute a separate supplementary deed (*post*).

Endorsement and Supplemental Deeds

When a deed or agreement becomes necessary in pursuance of, or in relation to, a prior deed, this is effected either by endorsement on the prior deed when a short writing would be sufficient, or by a separate deed described as "supplemental" or "intended to be read as annexed to the prior deed" in which case, detailed recitals of the prior deed are unnecessary. For example, if a lessee transfers his rights under the lease to another person such transfer, or if it is intended to alter any covenants in the lease or to surrender the lease, such agreement, may be endorsed on the lease itself (*see* precedents under "Lease"); if a mortgage is redeemed

15 *Mahiruddin* v. *Mt. Rythun Nessa*, A 1998 Gau 22.

16 *Nooruddin* v. *Umairathu Beevi*, A 1998 Ker 171.

17 See Halsbury 4th edn. Vol. 12, para 1329.

18 *Thomson* v. *Butcher*, (1625) 3 Buls.300; *Keele* v. *Wheeler*, (1844) 7 Man. and Gr. 665.

on receipt of mortgage money, the reconveyance may be endorsed on the mortgage deed (*see* precedents under "Mortgage"); and appointment of new trustees and revocation of trusts are usually made by endorsements on the deed of trust (*see* precedents under "Trust"). The same thing can also be done by a separate deed if a short writing is not considered sufficient and the deed, either by reason of large recitals or on account of lengthy covenants, promises to be a lengthy and detailed one. The matter is purely one of convenience, but mostly in contracts with the Government, a supplemental deed becomes necessary either because a new term of agreement is sought to be added or because modification of the existing terms has been subsequently agreed upon.

Endorsements which are of general use and for which no supplemental deed is necessary relate to part payment or acknowledgment of a debt by a debtor. What is necessary for such an endorsement is that the intention should be expressed by use of specific words. Endorsements are also common for negotiating a negotiable instrument or transfer of a bill of exchange or a policy of insurance or Government securities. Again no particular form of endorsement is necessary in such cases. What is necessary is that the words should clearly show the transfer of interest in favour of a particular person.

Form of Endorsement

The endorsement may begin either by saying "This deed made on this————day of————between the within named————and the within named ," or directly thus : "The parties to the within written deed hereby agree as follows". The operative part of the deed then follows, usually without any recitals unless any recital is also absolutely necessary in order to make the deed intelligible. The original deed on which the endorsement is made is referred to in the endorsement as the "within written deed" and the parties, recital, covenant, etc., in the original deed are referred to as "within named lessor" or "within named parties" or "within mentioned covenants" or "within recited ————" or "within described house" or "the garden described in the schedule to the within written deed", etc. If after one endorsement another is made, the reference in the latter to the former endorsed deed shall be made by the use of the word "above" instead of "within". After the operative part of the endorsement, the usual

testimonium clause shall be added, ending with signatures of executants and of attesting witnesses, if necessary.

Form of Supplemental Deed

The form shall be the usual form of deed or agreement in which after the names of parties should be inserted the words "supplemental (*or*, intended to be read as annexed) to a deed of ——— dated ———and made between the parties hereto (*or*, between ———and———) hereinafter called the "Principal deed". If the particulars of the principal deed are somewhat lenghty, it is more convenient to refer to the principal deed in the first recital and to say that this deed is supplemental to that deed, thus "Whereas this deed is supplemental to a deed of sale made, etc..... hereinafter called the "Principal deed". If the supplemental deed is supplemental to several deeds each should be mentioned specifically. Then should follow such recitals as are considered absolutely necessary in order to make the deed intelligible for facts leading to the execution of the supplemental deed, but recitals about the contents of the principal deed are not necessary. After that, should follow the usual operative part and covenants, etc. When referring to matters or persons mentioned in the principal deed, we should say "——— mentioned (*or*, recited) in the principal deed".

Precedents of endorsement and supplemental deeds are given under the heads of the principal deeds, e.g. Lease, Sale, Trust, etc., and all deeds given under the head "rectification and modification" are supplemental deeds.

Stamp Duty by whom payable

Sec. 29 of the Stamp Act provides which party, in the absence of an agreement to the contrary, will bear the stamp duty payable on an instrument.

This may be kept in view while drafting a deed. Only when the party other than the one mentioned in Sec.29 is to bear the stamp duty need specific provision be made in the deed. Sec. 29 is not exhaustive of all the instruments on which the stamp duty is leviable under the Stamp Act. In cases of instruments not provided for in Sec. 29, the stamp duty will be borne by the person who has agreed to pay it.

Stamp Duty on endorsements and supplemental deeds

All endorsements or supplemental deeds should be stamped according to the nature of the transaction which they evidence, e.g., if it is for receipt of money, it should be stamped as a receipt; if it is an agreement, it should be stamped as an agreement. Some documents if endorsed on prior deeds are exempt from stamp duty, e.g., receipt of mortgage money endorsed on mortgage deed, or transfer of a bill of exchange or policy of insurance or securities of Government of India endorsed on those papers.

Registration

Whether a deed is required to be compulsorily registered (Sec. 17, Registration Act) will be shown in the Preliminary Note to each deed. Even some documents not compulsorily registerable may be voluntarily got registered (Sec. 18). Sec. 49 provides that an unregistered document of the nature requiring compulsory registration may be used in evidence for certain collateral purposes, though not as evidence of the transaction itself. Sec. 60 (2) provides that the Sub Registrar's endorsement while registering a document is admissible for proving the facts mentioned therein.[19]

Part III— Precautions

Beside knowing the general requirements of deeds of transfer and the various components which compose a deed, it is also necessary to know some other essential requirements of drafting specially in light of rules of constructions of documents. In this part it is proposed to point out the precautions which are to be taken in drafting a document and in the next part to note the various rules of interpretation of documents which may help a conveyancer to a scientific drafting of deeds.

The object of writing a deed is that the parties should remain bound to their contractual obligations. The deed has therefore to be drawn up in a manner as to give no chance to any party to the deed to resile from the rights and obligations created under the deed. In the words of Sir James Fitzjames Stephen, "in drafting it is not enough to gain a degree of precision which a person reading in good faith can understand, but it is necessary to

19 *Gopal Das* v. *Sri Thakurji*, A 1943 PC, folld. in *S. Rathnammal* v. *Mottadu*, 1998 AIHC 3094 (Mad).

attain if possible a degree of precision which a person reading in bad faith cannot misunderstand."[1] To achieve this objective the following precautions should be observed:

(1) The deed should contain all the material facts leading to the agreement along with the terms and conditions settled between the parties.

(2) The intention of the parties should be made clear by plain and simple reading of the document as a whole and there should be no ambiguity or inconsistency between paragraphs or clauses of the deed.

(3) The words and expressions should be used in their primary natural and grammatical meanings and the same words and expressions should have same meaning throughout.

(4) The recitals should be kept at the minimum and drafted in consonance with the operative part, otherwise some recital may be interpreted to control the operative part.

Part IV—Rules of Construction of Deeds

Relevancy of precedents for interpreting other documents

Unless the language of two documents is identical, an interpretation placed by courts on one document is no authority for the proposition that a document differently drafted, though using partially similar language, should be similarly interpreted.[2] Judicial interpretation of similar documents in the past can[3] and ought[4] to be relied on, but as the effect of the words used must inevitably depend on the context and would be conditioned by the tenor of each document such decisions are not very useful unless the words used are identical.[5]

Description of deed not conclusive

As will be seen under the various Preliminary Notes, such as under LICENCE and under MORTGAGE, *post*, the description given to a

1 *Sant Ram* v. *Rajinder Lal*, A 1978 SC 1601, (1979) 2 SCC 274 (para 8), (1979) 1 SCWR 175.

2 *Abdulla Ahmad* v. *Animendra K. Mitter*, A 1950 SC 15.

3 *Ram Gopal* v. *Nandlal*, A 1951 SC 139 (para 23).

4 *State of Orissa* v. *Titaghur Paper Mills*, A 1985 SC 1293, (1985) Supp. SCC 280.

5 *Shapoor F. Mazda* v. *Durga Prosad*, A 1961 SC 1236.

transaction by the parties in the deed is not conclusive. It is the substance and not the form that has to be seen. A document described as licence may be construed as a lease, a deed described as a sale with a condition of repurchase may be construed as a mortgage, a deed described as family settlement may be construed to be a partition, and so on. Numerous cases under the Stamp Act also show that sometimes parties deliberately misdescribe a deed in order to avoid the need for registration or to evade stamp duty. "The document is weighed by its content, not the title".[6]

Construction of Deed a question of law or a mixed question of law and fact

The interpretation of written document is, as stated in Halsbury,[7] "generally speaking, a matter of law". But the ascertainment of the meaning of technical or commercial terms used in a written contract, and also, in order to enable the construction of the document, the surrounding circumstances of the particular case, are questions of fact; where there is a latent ambiguity in a written instrument, the question of which meaning was intended is also a question of fact.[8] Sections 91 and 92 Evidence Act also point to the same.

Thus the construction of a document of title or of a document which is the foundation of the rights of the parties necessarily raises a question of law.[9]

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6 *Shyam Sunder* v. *Delta International Ltd.*, A 1998 Cal 233 (DB), Follg. *Inderjeet Singh* v. *Karam Chand Thapar*, (1995) 6 SCC 166 (para 13) : A 1996 SC 247.

7 4th Edn. Vol. 12, para 1461.

8 The references to judge and jury in Halsbury (*ibid*) are irrelevant in the Indian context, hence replaced here by questions of law and of fact respectively.

9 *Sir Chuni Lal Mehta* v. *Century Spinning and Manufacturing Co. Ltd.*, A 1962 SC 1314; *I.C.I. India Pvt. Ltd.* v. *C.I.T.*, A 1972 SC 1524; ("The construction of a *contractual* document is a matter of law, not a question of fact); *Kameshwaramma* v. *S. Subba Rao*, A 1963 SC 884 (Construction of documents of title is a matter of law. But revenue records are not documents of title, whatever be their evidentiary value); *J.G. Chakravarty* v. *Bhowmik*, A 1978 SC 139 (Basic documents such as deeds of trust go to the root of the matter: Their construction is a question of law); *Tenkasi Senkunda* v. *N. Kuttralinga Mudaliar*, 1998 AIHC 2226 (Mad), (following A 1963 SC 884 and A 1978 SC 139 *ibid*) (Interpretation of documents involving title is a question of law).

Sections 91, 92 Evidence Act

A deed constitutes the primary evidence of the terms of a contract, or of a grant, or of any other disposition of property (Sec. 91, Evidence Act). The law forbids any contradictions of, or any addition, subtraction or variation in a written document by any extrinsic evidence,[10] though such evidence will be admissible to explain any ambiguity, etc. (Sec. 92, Evidence Act). The document should therefore contain all the terms and conditions, preceded by a recital of all relevant and material facts.

In cases of uncertainty, the rules embodied in provisos 2 and 6 to section 92 Evidence Act can be invoked for construing a deed.[11] The sixth proviso enables the court to examine the facts and surrounding circumstances to which the language of the document may be related, while the second proviso permits evidence of any separate oral agreement on which the document is silent and which is not inconsistent with its terms.

Literal Construction

The rules laid down in respect of construction of deeds are founded in law, reason and commonsense; they shall operate according to intention of parties, if by law they may and will effectuate the intention.

But it is not always possible to be guided by the meaning of the words as found in the dictionary while construing an agreement; the intention of the parties has to be given necessary weightage and it is not possible to give a wider and liberal meaning merely because one of the parties is a public authority.[12] While interpreting the terms of an insurance policy the view favouring the policyholder is preferred.[13]

If the intention of the parties can be gathered from the words and expressions used in a deed, such an intention does not require to be determined in any other manner except giving the words their normal or

10 *T.N. Electricity Board* v. *N. Raja Reddiei*, A 1996 SC 2025, 2027 (para 7) (re: contract); *General Assurance Society Ltd.* v. *Chand Mull Jain*, A 1966 SC 1644, 1649 (re: contract of insurance); *State Bank of India* v. *Agents and Manufacturers*, A 1998 Delhi 184 (re: description of risk in contract of insurance).

11 *Timblo Irmaos Ltd.* v. *Jorge A.M. Sequeira*, A 1977 SC 794.

12 *L.I.C.* v. *Raj Kumar*, (1999) 3 SCC 465 (para 15), A 1999 SC 2346.

13 *L.I.C.* v. *Raj Kumar, ibid* (para 16) Follg. *Shashi Gupta* v. *L.I.C.*, A 1995 SC 1367, 1995 Supp (1) SCC 754.

natural and primary meaning.[14] It is the dominant intention of the document as disclosed from its whole tenor, that must guide the construction of its contents.[15]

In a case[16] relating to power of attorney, the Supreme Court enumerated the following well known rules of interpretation of deeds, some of which are of general application :

"*firstly*, that a word used in a document has to be interpreted as a part of and in the context of the whole;

secondly, that the purpose of the powers conferred by the power of attorney has to be ascertained having regard to the need which gave rise to the execution of the document, the practice of the parties, and the manner in which the parties themselves understood the purpose of the document; and

thirdly, that powers which are absolutely necessary and incidental to the execution of the ascertained objects of the general powers given must be necessarily implied."

The question of interpretation of a deed arises only when there is some sort of patent or latent ambiguity. The cardinal rule again is that clear and unambiguous words prevail over any hypothetical considerations of supposed intention.[17]

Thus where the words "*malik mustakil*" being strong, clear and unambiguous were used in a compromise deed in respect of properties given to a widow, and those words were not qualified by any other words or circumstances appearing in the document it was held that the estate given to her was an absolute one.[18] In construing documents, one must have regards, not to the presumed intention of the parties, but to the meaning

14 *Krishna Beharilal* v. *Gulabchand*, A 1971 SC 1041 (1043); *V.S. Talwar* v. *Prem Chandra Sharma*, (1984) 2 SCC 420; *D.D.A.* v. *D.C. Kaushik*, A 1973 SC 2609, (1973) 2 SCC 825;
see also *Suresh Kumar Prasad* v. *Syed Imam Ali*, A 1986 Patna 353.

15 *Nai Babu* v. *L. Ramnarayan*, A 1978 SC 22, (1978) 1 SCC 58; *Puzhakkal Kuttappu* v. *C. Bhargavi*, (1977) 1 SCC 17 (whether mortgage or lease).

16 *Timblo Irmaos Ltd.* v. *Jorge A.M. Sequeira*, A 1977 SC 734, (1977) 3 SCC 474.

17 *Union of India* v. *Kishorilal*, A 1959 SC 1362.s

18 *Krishna Beharilal* v. *Gulabchand*, A 1971 SC 1041 : (1971) 1 SCC 837 : (1971) 1 SCWR 614

of the words they have used. If two interpretations of the document are possible, the one which would give effect and meaning to all its parts should be adopted, and for the purpose, the words creating uncertainty[19] or illegality[20] in a document can be ignored.

Commercial contracts liberally construed

In respect of contracts which are commercial documents, including arbitration agreements, it has further been held that while interpreting them it would not be right to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a commonsense approach and it must not be thwarted by a narrow, pedantic and legalistic interpretation.[1]

Ambiguous or redundant words in an agreement ought to be ignored. The rule of statutory interpretation that no words used by the legislature are useless and that meaning should be spelt out from the context is not applicable to a contract.[2]

Document to be read as a whole

A document must be read as a whole for finding out its true meaning, and it is not permissible to pick clause or a sentence and to construe the document on its basis.[3] Even the description or title given to the document by the parties is not decisive if the document read as a whole leads to a different conclusion.[4] Where the words used are not clear and unambiguous the intention will have to be ascertained. The most essential thing is to collect the intention of the parties from the expressions they have used in

19 *Delhi Development Authority* v. *Durga Chand Kaushish*, A 1973 SC 2609 : (1973) 2 SCC 825 (proviso to covenant No. 9 suffered from vice of uncertainty, hence ignored, and the earlier operative part of the demise, which was clear, given effect to); *Abdul Ghaffar* v. *Raghubir Singh*, 1979 ALJ 1140.

20 *Kissenlal Verma* v. *Khaleda*, A 1977 (NOC) 159 (Cal.).

1 *Union of India* v. *D.N. Revri and Co.*, (1976) 4 SCC 147.

2 *Ghaziabad Development Authority* v. *Unique Construction*, A 1997 All 341 (DB) (para 5).

3 *State of Orissa* v. *Titaghur Paper Mills*, A 1985 SC 1293 : (1985) Supp SCC 280; *Sita Ram* v. *Board of Revenue*, A 1979 All 301; *Kaluram Jain* v. *Mahabir Prasad*, 1978 ALJ 399.

4 *Padmaraja* v. *Dhanvathi*, (1972) 2 SCC 100.

the deed itself.[5] What if the intention so collected will not square with the words used? The answer is that the intention prevails.[6]

The maxim "False grammar does not vitiate a deed" (*Grammatica falsa non vitiat chartam*) has been approved in *Whirlpool Corpn.* v. *Registrar of Trade Marks*,[7] where in it was extended even to statutory interpretation. Similarly, "*Falsa grammatica non vitiat concessionem*", *i.e.*, false or bad grammar does not vitiate a grant. Again *falsa orthographia non vitiat chartam, concessionem*, *i.e.*, false spelling does not vitiate a deed or grant.[8] In other words, mistakes of language will not make a deed void when the intent of the parties is plainly apparent. Thus in *Whirlpool*, *supra*, the Supreme Court ascertained the true meaning of the incorrect sentence from a reading of the statute as a whole (para 68 of the S.C.C. report).

Other verbal mistakes are also not necessarily fatal if the true intention can be reasonably ascertained. Thus, '*falsa demonstratione legatum non perimi*', *i.e.*, a bequest is not rendered void by an erroneous description, and '*falsa demonstratio non nocet, cum de corpore (persona) constat*', *i.e.*, false description does not injure or vitiate, provided the thing or person intended has once been sufficiently described (Mere false description does not make an instrument inoperative). These maxims should not, however, lead to complacency or want of care on the part of the draftsman.

As observed by the Privy Council[9] "the form of expression, the literal sense is not to be so much regarded as the real intention of the parties which the transaction discloses".

Surrounding Circumstances

In construing a document whether in English or in an Indian language,

5 *Ram Gopal* v. *Nand Lal*, A 1951 SC 139 (Hindu widow relinquishing all rights in certain properties and receiving under a *Tamaliknama* only two items of property as *malik*. Her full ownership could not be whittled down to life estate merely because of the circumstances that the motive was to provide for her maintenance).

6 Odger's Construction of Deeds and Statutes 5th Ed., p.31; *Goodlittle d. Edwards* v. *Balley*, (1772) 2 Cow. 597.

7 (1998) 8 SCC 1 (para 12), A 1998 SC 22.

8 Black's Law Dictionary, 6th edn., p.600.

9 *Hunooman Prasad* v. *Mst. Babooee*, (1856) 6 MIA 393 (PC).

the fundamental rule is to ascertain the intention from the words used. The surrounding circumstances are to be considered only for the purpose of finding out the intended meaning of the words which have actually been employed.[10]

In case the terms are not unambiguous it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties.[11] The social milieu, the actual life situations and the prevailing conditions of the country are also relevant circumstances.[12] How the parties or their representatives-in-interest treated the transaction may be relevant.[13] As observed by the Supreme Court,[14] "the test of the pudding is in the eating and the true scope of the instrument can readily be ascertained from what actually happened instead of merely depending upon expressions which the parties might have under some mistaken notion loosely used" and that not merely the words used but the substance has to be seen. The court is to look through or behind the documents, and to get at the reality.[15]

As observed by the Court of Appeal[16] "the first task of the Court was always to construe the particular words of the particular contract against the factual background known to the parties at or before the time when the contract was entered into". A subsequent declaration of intention by the author of an instrument is, however, inadmissible for the purpose of construing it,[17] but if both parties have subsequently agreed to a particular interpretation, it would be admissible.[18] Evidence is admissible to show

10 *M.N. Aryamurthi* v. *M.L. Subbaraya Setty*, A 1972 SC 1279 : (1972) 4 SCC 1.

11 *Syed Abdul Khader* v. *Rami Reddy*, A 1979 SC 553; *Abdulla Ahmad* v. *Animendra K. Mitter*, A 1950 SC 15; *C.N. Arunachala Mudaliar* v. *C.A. Muruganath*, 1954 SCR 243, A 1953 SC 495 (paras 16, 18); *M.P. Perla Karuppan Chettier* v. *C.I.T.*, (1975) 3 SCC 439; *C.I.T.* v. *Maharaja Bahadur Singh*, A 1987 SC 518 : (1986) 4 SCC 512 (517); *State of Orissa* v. *Orient Paper Mills*, A 1977 SC 687 : (1977) 2 SCC 77.

12 *Sant Ram* v. *Rajinder Lal*, (1979) 2 SCC 274.

13 *Puzhakkal Kuttappu* v. *C. Bhargavi*, (1977) 1 SCC 17; *Godhra Electricity Co* v. *State of Gujarat*, (1975) 1 SCC 199.

14 *Sharad Vasant Kotak* v. *Ramnik Lal*, (1998) 2 SCC 171 (para 20 at p. 187) (words "for diverse other causes and considerations" construed)

15 *Tata Engg. & Loco Co.* v. *Bharat Mining Corpn.*, A 1980 Bom 168.

16 *Charter Reinsurance Co.* v. *Fagan*, (1996) 1 All ER 406.

17 *Bati Maharani* v. *Collector*, 17 All 198.

18 *Godhra Electricity Co.* v. *State of Gujarat*, (1975) 1 SCC 199.

that the writing did not represent the real nature of the transaction but was only an illusory, fictitious and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs. For such evidence is not barred by Sec. 92 Evidence Act,[19] vide provisos to that section (See Sec. 91 to 100 of that Act on exclusion of oral by documentary evidence).

Headings and sub headings

In a case of ambiguity or doubt the heading or sub-heading may be referred to as an aid to construe the provision "but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision". They cannot be referred to for the purpose of construing the provision when the words used in the provision are clear and unabmiguous.[20]

Legal terms in legal sense

If a legal term such as "heirs" has been used in a will it must be construed in the legal sense (unless a contrary intention is clearly expressed) as including all legal heirs and cannot normally be limited to "issues" only.[1]

The Ejusdem Generis rule

General words following words conferring specifically enumerated powers cannot be construed so as to enlarge the restricted powers mentioned therein.[2]

The converse rule

Specific instances do not deregate from the width of the general power initially conferred.[3]

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19 *Krishna Bai* v. *Appasaheb*, A 1979 SC 1880, (1979) 4 SCC 60.

20 *Frick India Ltd.* v. *Union of India*, (1990) 1 SCC 400; *Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231 (para 9 at p. 240)

1 *N. Krishnammal* v. *R.E. Rambaram*, A 1979 SC 1298 (para 16) : (1979) 3 SCC 273 (para 15).

2 *Adaikappa Chettiar* v. *Thomas Cook & Sons*, A 1933 PC 78, 64 MLJ 184 (case of power of attorney).

3 *Timblo Irmaos Ltd.* v. *Jorge A.M. Sequeira*, A 1977 SC 734 (para 18) : (1977) 3 SCC 474 (case of power of attorney).

Intention to prevail

A cardinal rule of construction of documents is that the intention of the contracting parties should be determined from the document as a whole,[4] and not from any particular part or clause or clauses[5] read out of context,[6] or from the description of the document or the form in which it is dressed.[7] The court must have regard to the declared object of the document which is often contained in the preamble, (*i.e.*, the recitals, *ante*) but the title given to a document is not conclusive. The preamble may be looked into for ascertaining the object of the document in case of ambiguity, but if the operative words are clear they cannot be controlled by the recitals in the preamble.[8] As stated in Halsbury[9] the best construction of deeds is to

4 Halsbury's laws of England, 4th Edn. Vol. XII p. 606 para 1469; *Syed Abdul Khader* v. *Rami Reddy*, A 1979 SC 553 : (1979) 2 SCC 601; *C.I.T.* v. *Jagannath Jew*, A 1977 SC 1523: (1977) 2 SCC 519; *State of Orissa* v. *Titaghur Paper Mills*, A 1985 SC 1293 : (1985) supp. SCC 280 (para 117).

5 *Abdul Kader Laskar* v. *State of West Bengal*, A 1967 Cal 99; *Shambhu Prasad Singh* v. *Mst. Phool Kumari*, A 1971 SC 1337; *State of Bihar* v. *Charusila Dasi*, A 1959 SC 1002

6 *Jayadayal Poddar* v. *Bibi Hazra*, (1974) 1 SCC 3; *Ramkishan Lal* v. *Kamalnarayan*, A 1963 SC 890 (despite the words "*Kul huq haquq samet milkiyat*" it was held that the intention was not to make the co-sharer absolute owner of the benefits of the deity).

7 *Shri Tarkeshwar Sio Thakur Jiu* v. *Dar Dass Dey & Co.*, A 1979 SC 1669 : (1979) 3 SCC 106 (deed described as licence held to be lease); *Sarjug Barhi* v. *Devendra*, A 1979 SC 1967 : (1980) 1 SCC 14 (deed described as sale held to be lease); *State of Orissa* v. *Titaghur Paper Mills*, A 1985 SC 1293 (the end result of document not by itself conclusive); *Bhopal Sugar Industries Ltd.* v. *S.T.O.*, (1977) 3 SCC 147 (contract title to be one of agency, held to be one of sale); *Undayilli Nagarathnam* v. *Reddy*, (1976) 4 SCC 20 (deed titled settlement deed, held to be one of lease); *C.I.T.* v *Alagappa Textile Ltd.*, (1980) 1 SCC 214 (deed by a company purporting to appoint another company as "manager", held to be a loan agreement with conferment of superior powers of management on the creditor and not one of appointment of the other company as "manager" who would be subordinate to the board of directors of the former); *C.I.T.* v. *Panipat Woolen Mills*, (1976) 2 SCC 5 (deed titled a sole selling agency agreement, held to be a joint venture, as an agent could not be given a share in profits of the principal).

8 *Padmaraja* v. *Dhanavathi*, (1972) 2 SCC 100 (para 6); *Beli Ram* v. *Ch. Mohd. Afzal*, A 1948 PC 168.

9 *Atikulla K. Nawabjada* v. *Mohd. Mobarak Hossein*, A 1949 Cal 174, 52 CWN 304.

make one part of the deed expound the other so as to make all the parts agree. Therefore, while drafting a document, care has to be taken that the various parts of the deed bring out the same intention of the parties.

Executed and Executory Contracts

Sometimes a contract is completed in two parts. At first an executory contract is executed and later on an executed contract. In such cases too, the same language should be used, so that a different intention may not be made out by difference in language. It should be remembered that a deed is primarily construed from the words and expressions used in it and not on the basis of antecedent contract. In case of any difference between the preliminary contract and final contract the terms of the latter must prevail.[10] In some cases the ground for such a view has been stated to be merger of the earlier contract into the latter,[11] or that the first contract was merely a provisional one.[12] (See also the next sub-heading "*Reference to earlier deeds*", in this context).

Conflict between different parts

A document has to be read harmoniously as a whole with attending circumstances giving effect to all the clauses contained in it which manifest the intention of the person who executed it.[13]

Where, however, in the same document there seems to be some difference in different clauses with regard to the purport or intention, attempt should first be made to reconcile all the clauses so that none of them is rendered nugatory, meaningless or futile,[14] the principle *ut res magis valeat*

10 *Kandal Rao Naidu* v. *Dhanakoti Ammal*, A 1938 Mad 81, 1937 MWN 1027, 176 IC 173; see however, *Agarwal Engg. Co.* v. *Technoimpex*, (1977) 4 SCC 367 (para 17).

11 *The Knight Sugar Co. Ltd.* v. *The Alberata Railway & Irrigation Co.*, 173 UC 88 (PC).

12 *Laxam Waman* v. *Balmukund Jainarain*, A 1954 Nag 142; *State of Punjab* v. *Okara Grain Buyers Syndicate Ltd.*, A 1964 SC 669.

13 *Naramadaben* v. *Pranjivandas Thakker*, (1997) 2 SCC 255 : JT 1996 (9) SC 273; *Keshav Kumar* v. *Flowmote Ltd.*, (1994) 2 SCC 10; *Tamboli Ramanlal* v. *Ghanchi Chimanlal*, 1993 SCC Supp (1) 295 (See also case law under "Intention to Prevail" above)

14 *Ramanna D. Shetty* v. *International Airport Authority*, A 1979 SC 1628 : (1979) 3 SCC 489.

quam pereat being applicable. As laid down in Halsbury, "it is a rule of construction applicable to all written instruments that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument if that interpretation does no violence to the meaning of which they are naturally susceptible. The best construction of deeds is to make one part of the deed expound the other, so to make all the parts agree. Effect must, as far as possible, be given to every word and every clause". If, however, there is a clear conflict and such reconciliation is not possible then the earlier clause must override the later clause and not vice versa.[15] Lord Wrenbury stated the rule in the following terms :

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails".[16] However, if the terms of a conveyance are self-contradictory and one part must be rejected it is legitimate to lean towards the rejection of that part which is inconsistent with the contract for carrying out which the conveyance was being executed.[17]

Where in a contract of sale of goods it was expressly provided that the price was exclusive of sales tax and at another place it was mentioned that the sales tax payable should be shown as an extra item, it was held that the former was a fundamental term while the latter was merely matter of procedure. Hence an ommission in regard to the latter cannot absolve the purchaser from his liability under the former.[18]

Reference to earlier deeds

Mere reference to some earlier transaction in a document does not amount to an incorporation, in that document, of the terms and conditions

15 *Sahebzada Md. Kamgash Shah* v. *Jagdish Chandra*, A 1960 SC 953 (para 13); *Radha Sunder* v. *M.J. Rahim*, A 1959 SC 24; *Jaggavarapu Krishna Reddy* v. *Jaggavarapu Chittemma*, 1998 AIHC 3834 (AP).

16 *Forbes* v. *Git*, (1922) 1 AC 256, A 1921 PC 209, followed in *Radha Sunder, supra* and distinguished in *Central Bank of India* v. *H.F. Insurance Company*, A 1965 SC 1288.

17 *N.S. Krishnaswami Avvangar* v. *Perumal*, A 1950 PC 105.

18 *Hind Tobacco Co* v. *CCR A*, A 1972 SC 899, (1972) 1 SCC 726, (1972) 1 SC 899.

relating thereto. Before the terms and conditions of an agreement can be said to have been incorporated into another document, the same must clearly show that the parties thereto intended to incorporate them.[19]

Previous and subsequent conduct of parties

In England, just as negotiations between the parties previous to the formation of a contract are inadmissible to prove the intention of the parties,[20] likewise subsequent conduct of the parties has been held to be inadmissible to construe the contract.[1] The American and other foreign courts have, however, received subsequent actings as admissible guides to interpretation.[2] Corbin on Contracts[3] points out that it is true that one party cannot build up his case by making an interpretation in his own favour but the concurrence therein by the other party can be used by the former against the latter. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicated it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation. Such evidence has been held to be admissible.[4]

Evidence of acts done under a deed can, in case of doubt as to its true meaning, be a guide to the intention of the parties particularly when acts are done shortly after the date of the instrument.[5]

In cases, however, where Government or other public authority or corporation is a party, courts have to keep in mind the possibility of their subordinate officers colluding with the other party. In such cases the *mala fide* conduct or representations or collusive admissions of such officers should not be binding on their employer.

19 *Himalaya House Co. v. C.C.R.A.*, A 1972 SC 899 : (1972) 1 SCC 726 : (1972) 1 SC 899.

20 *Prem* v. *Simmonds*, (1971) 3 All ER 237, Hl..

1 *James Miller & Partners Ltd* v. *Whitworth Street Estate Ltd.*, (1970) 1 All ER 39 : (1973) 2 WLR 683 HC.

2 *Godhra Electricity Co.* v. *State of Gujarat*, (1975) 1 SCC 199 (para 11 and 12)

3 Cited in *Godhra Electricity Co.*Supra (para 11).

4 *Godhra Electricity Co.*, supra (para 18), relying inter alia, on *Abdulla Ahmed* v. *A.K. Mitter*, A 1950 SC 15.

5 Halsbury's Laws of England (III Edn.) para 343, p. 274 relied on by Mahajan J. In *Abdulla Ahmed*, supra.

Ancient Documents

The initial intention to be gathered from an ancient document when the provisions are reasonably clear cannot, however, be readily altered to suit changing conditions over the years. In interpreting ancient documents the Courts have to be cautious to guard against warping of the issue by reference to subsequent conduct of the parties or their representatives, which may vary for imponderable reasons, bona fide or otherwise.[6] Contemporaneous usage may legitimately be resorted to for ascertaining the meaning of an ancient document which is ambiguous,[7] but if there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it.[8]

Proviso

A proviso is normally an excepting or a qualifying clause and the effect of it is to except out of the preceding clause upon which it is engrafted something which but for the proviso would be within it.[9] If the main clause is clear and the contingency mentioned in the proviso does not arise the proviso is not attracted at all and its language should not be referred to for construing the main clause in a manner contradictory to its import.[10]

Clause modifying statutory rights and liabilities

Some statutory provisions define rights and liabilities of parties subject to the contrary. This gives the parties the option to contract themselves out of their statutory rights. Such clauses are strictly construed against the person claiming exemption from the statutory liability[11] and should therefore

6 *Saffani Md. Mohideen* v. *Sethusubramania Pillai*, (1974) 1 SCC 615.

7 *Attorney General* v. *Drummond*, (1842) 1 Dr. & War 353 (per Sugden L.C.); *Hulada Pd* v. *Kaludas*, A 1914 Cal 813 : 42 C 536.

8 *Saddler* v. *Biggs*, (1853) 4 HLC 453, 10 ER 531 (per Lord Cranworth L.C.); *N.E. Rly Co.* v. *Lord Hastings*, 1900 AC 260; *Attorney General* v. *Rochester Corporation*, (1854) 5 De, G.M. & G 797, 43 ER 1079; *Drummond* v. *Attorney General*, (1849) 2 HLC 837 : 9 ER 1312.

9 *Angurbala* v. *Debabrata*, A 1951 SC 293; *Dibyasingh Malana* v. *State of Orissa*, A 1989 SC 1737; *C.I.T.* v. *Indo Mercantile Bank Ltd.*, A 1959 SC 713.

10 *Angurbala*, supra.

11 *Karanpura Development Co.* v. *Kamakshya Narain Singh*, A 1956 SC 446.

be drafted in categorical terms so that there may be no scope for doubt about the intention of the parties.

Deed partly void

The fact that a clause in the deed is not binding on the ground that it is unauthorised cannot *ipso facto* render the whole deed void unless it forms such an integral part of the transaction as to render it impossible to sever the good from the bad.[12]

Recitals when to be looked into

As a general rule of construction of documents, the recitals are not looked into, if the terms of the deed are otherwise clear.[13] If in a deed the operative part is clear, or the intention of the parties is clearly made out, whether consistent with the recitals or not, the recitals have to be disregarded. It is only when the terms of a deed are not clear or are ambiguous or the operative part creates a doubt about the intention of the parties that the recitals may be looked into to ascertain their real intention.[14] If there are several recitals in a deed, and there is at the same time some ambiguity in the operative part of the deed, it may be resolved by giving preference to such a recital as may appear to be the most important to convey the intention of the parties. An ambiguity in the recitals, when the terms of the contract or the intention of the parties is clear from the operative part, has no importance. If the recitals refer to an earlier transaction evidenced by a deed, such reference does not amount to an incorporation of the terms and conditions of the earlier deed unless the parties so intended.[15]

Unanticipated Contingency

Sometimes the terms of the agreement provide elaborately for many things, but do not include an express provision to meet a contingency which the parties presumably never anticipated but which has since occurred. The rule of construction applicable in such case has been stated

12 *Karanpura Development Co.*, supra.

13 *Beli Ram & Bros.* v. *Ch. Mohd. Afzal*, A 1948 PC 168.

14 *Union of India* v. *Amarendra Nath Sarkar*, A 1967 Cal 119.

15 *Himalaya House Co.* v. *Chief Controlling Revenue Authority*, (1972) 1 SCC 726, A 1972 SC 899.

to be that the court is not to make a new agreement for the parties or to speculate how they would have dealt with the new contingency had they anticipated it; but that (except in cases when the intervening event produces frustration) the court should take the words of the agreement as they stand and apply them, as best as it can, to the new situation which has caused the difficulty.[16]

Contracts in Standard Form

These days it is common for big corporations to obtain contracts in standard form from the consumers of their goods and services. In such cases the consumer has hardly any option but to sign such standard agreements. These agreements are often one-sided and contain onerous terms or impose obligations on the party to whom they are handed over for signature or exclude or restrict the liability of the corporation supplying the document for signature. Hence the courts interpret them strictly against the supplier of the form and may sometimes relieve the other party from its unduly onerous obligations.[17] Where however the parties' bargaining capacity is evenly balanced there is little scope for claiming such relief.[18] The Competition Commission[19] can also grant relief against unfair terms of a contract in such cases.

In these standard printed forms, words not applicable are deleted according to the requirements of each individual transaction. A question often arises, whether reference may be made to the deleted words for interpreting the terms of the contract. The true rule is that the court must first look at the clause in its actual form without looking at the deleted words, and only if that clause is ambiguous then for solving the ambiguity assistance may be derived by looking at the deleted words.[20] But if the words of the clause in its actual form are clear a different intention cannot

16 *L.C. Ltd.* v. *G.B. Ollivant Ltd.*, 13 ITR (Supp.) 23, per Lord Simon, followed in *Shamlal Pragnaram* v. *C. I.T.*, 1955 ALJ 122 (FB).

17 *L.I.C.* v. *C.E.R. Centre*, (1995) 5 SCC 482 : A 1995 SC 1811; *Pawan Alloys* v. *U.P.S.E.B.*, (1997) 7 SCC 251 (para 45 to 49, giving extracts from text books on law of Contract such as Chitty, Cheshire, Anson).

18 *Pawan Alloys*, supra; *Bihar SEB* v. *Green Rubber Ind.*, (1990) 1 SCC 731.

19 Monopolies and Restrictive Trade Practice Act has been repealed by Competition Act.

20 *H.M. Kamaluddin Ansari & Co.* v. *Union of India*, (1983) 4 SCC 417 (substitution of certain words held significant).

be ascribed to the contracting parties by inferring it from the deletion of certain other words.[21] If something is added in handwriting or by typewriter to a printed form such addition should prevail over the language in print.[1]

Where an arbitration clause was deleted in the notice inviting tenders and the agreement entered into by parties but it was not deleted from the standard contract form which was made applicable it was held that the deletion held good.[2]

Draftsman to be careful in the choice of words and expressions

The language of a deed, in order to convey the intention of the parties, should be simple, so that no other meaning except the primary and natural meaning may be imputed. The sentences should be grammatically correct. The court while construing a document would give to the words used their natural and grammatical meanings.[3] In construing contracts, the courts cannot give the words of the contract an entirely different meaning even to avoid superfluity. The parties' intention must be found out from the language in which the parties to the agreement chose to express themselves. This can easily be achieved if in drafting a document the same words and expressions are used to convey the same meaning in different clauses of the deed. Use of different words and language or substituted words, even though the meaning may be same, should be avoided. A draftsman, unlike a literary writer or orator, cannot indulge in the luxury of 'elegant variation'.[4] As pointed out in *L.I.C.* v. *Dharam Vir*,[5] "when the same clause of a contract uses two different expressions, ordinarily those different

21 *Louis Dreyfus et Cie* v. *Parnaso Cia*, (1959) 1 All ER 502 : (1959) 2 WLR 405 (per Diplock J.)

1 *China Cotton Exporters* v. *B.R. Cotton Mills*, A 1961 SC 1295; ***Moolchand Kesarimall*** v. *Associated Agencies*, A 1942 Mad 139; ***Ganpatrai*** v. ***Modi Bros.***, 85 CLJ 136.

2 *State of Kerala* v. *N.E. Thomas*, A 1997 Ker 126 (DB), following ***State of Kerala*** v. *Abrahem*, A 1989 Ker 61 (FB); also see *M. Dayanand Reddy* v. ***A.P. Industrial Infrastructure***, A 1993 SC 2268; *K. Sasidharan Co.* v. ***K.S. Film Development Corporation***, A 1994 SC 2534.

3 *Sohanlal Pachisia & Co.* v. *Bilasrav Khemani*, A 1954 Cal 179 (para 17)

4 Fowler's Modern English Usage, (Oxford) does not recommend elegant variation for users of the language. Dictionaries of synonyms such as Roget's Thesarus are available for that purpose.

5 (1998) 7 SCC 348.

expressions convey different meanings and both the expressions cannot be held to be conveying one and the same meaning". Because, if any inconsistency arises in the literal construction of the words used, the courts in their attempt to reconcile the inconsistency may interpret the clauses in a manner which may not be according to the actual intention of the contracting parties. If the inconsistency cannot be resolved by attributing natural and grammatical meanings, the courts may give the words any other reasonably possible construction that may resolve the inconsistency.[6]

Blank spaces in Deed

Care should be taken, particularly while executing a contract in standard form, not to leave any blank space unfilled. Illustration (b) of Section 93 of the Evidence Act provides that evidence cannot be given of facts which would show how the blanks were meant to be filled. A deed containing blanks thus stands the risk of being declared void on the ground of uncertainty,[7] vide Sec. 29 of the Contract Act.

Material alteration in deed after execution

A motivated interpolation in a solemn document completely vitiates the document.[8]

If an alteration is made by erasure, interlineations or otherwise in a material part of a deed after its execution by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void,[9] with effect from the date of such alteration. A material alteration is one which varies the rights, liabilities or legal position of the parties or otherwise varies the legal effect which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.[10] However an alteration which is not material *i.e.*, which does not vary the legal effect of the deed in its original state but which merely

6 *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co. Ltd.*, A 1940 PC 151 (153).

7 *I.T.C. Classis Finance Ltd.* v. *Grapco Mining and Co. Ltd.*, A 1997 Cal 397.

8 *Valiammal Rangarao Ramachar* v. *Muthukumaraswamy*, (1982) 3 SCC 508.

9 *Arumugam* v. *M.S. Narasaich*, A 1998 Mad 67 (Promissory note became void, hitby Sec. 87, Negotiable Instruments Act).

10 *Nathulal* v. *Gomti Kaur*, A 1940 PC 160 (but alterations held immaterial); *Ramlagan* v. *Akleshwar*, A 1958 Pat 211; *Seth Loonkaran* v. *Ivan John*, A 1977

expresses that which was implied by law in the deed as originally written, or which carries out the intention of the parties already apparent on the fact of the deed and does not otherwise prejudice the party liable thereunder will not make the deed void.[11] An agreement modified on a date subsequent to its signing and execution was however held to be valid if the modification was consented to by both parties.[12]

SC 336 : (1977) 1 SCC 319; *Valiammal R. Ramacharn* v. *Muthu Kumaraswamy Gounder*, (1982) 3 SCC 508.

11 *Kalianna Grounder* v. *Palani Grounder*, (1970) 1 SCC 56 : A 1970 SC 1942.

12 *State of Gujarat* v. *Inderjit Parakh*, 1987 (Supp) SCC 280.