## PART B : CONVEYANCING

**Definition of Conveyancing**

The art of 'conveyancing' is of English origin. The word 'to convey' means to transfer or to make over. The word conveyancing means an instrument or deed through which one or more living person transfer his or their interest in present or in future in or upon an inmmovable property to one or more living persons. In other words conveyance means an act by which property is conveyed or voluntarily transferred from one person to another by means of a written instrument and other formalities. Section 2(10) of the Indian Stamp Act, 1899 defines the term 'conveyance' as:

> Conveyance includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I.

**History of Conveyancing**

In ancient times, in England the deed writing was optional continued to remain optional until the time of King Charles II, particularly the case in which the deed was required not to be under seal. Writing was required only in the great matter of importance. It was only during the reign of King Charles II that the British Parliament enacted in 1677 a legislation requiring writing for creation and transfer of the interest in landed property with an exception in case of lease for less than three year. The Real Property Act of 1845 required all grants of landed interest to be made by writing which came to be known as 'conveyancing'. The present form of conveyancing is based on the Conveyance of Land Act of 1845 and the Law of Property Act of 1925.

In India the forms of conveyancing are based on the present English forms. No legislation in India has ever been passed on the law of conveyancing. Conveyancing in India is not unknown as the word, *'Qabuliyatnama', 'Jagirdar', 'Muafidar' and 'Charpatra'*, etc., are occurring from ancient days in the Indian literatures. Thus, as in England and so in India, too, there are two types of Deeds, viz., 'Deed Poll' and 'Indenture'. *Charpatra* (Redemption of rent), *Jagir* grants, *Quabuliyats*, etc, were all the seal of the grantor. The Deed Poll is a document which is executed unilaterally in the first person while an indenture is bilateral or multilateral deed. Bonds, Power of Attorney and Wills are 'Deed Polls'. Mortgages, sales and gifts can also be unilateral and so these are 'Deed Polls', while a deed of Lease is a bilateral document to be executed by the Lessor and Lessee both and so it is an 'Indenture'.

**The Position of Drafting in India**

The condition of drafting of conveyancing in mofussil India is deplorable. It is only in the then Presidency Towns (metropolitan cities) of Bombay, Calcutta and Madras the work of drafting of the conveyancing remained in the hand of solicitors and barristers well trained in

the field of drafting on the lines of English conveyancing and it still continues on the same pattern and is satisfactory. But in the Mofussil Towns the task of drafting of conveyancing remained and continues to remain in the hands of 'deed writers', 'scribes' or 'scribers' who have no legal knowledge but have adopted the profession of deed writing. So, the deeds in Mofussils generally and commonly suffer from so many defects and sometimes these defects become incurable.

**Deed**

In a broad sense the 'deed' means something done or performed which is synonymous with 'act'. In legal sense, deed means a solemn act denoting document, and it may be defined as an instrument written on parchment or on a paper executed, signed, sealed and delivered by the executant. A document or an instrument through which a present or future interest in an immovable property is transferred by one or more living persons to another living person or persons is called deed. It is called a deed because it is considered the most solemn and authentic act that a person can possibly perform in relation to his property. Statements made in deeds may amount to admission and may operate as estoppel in certain circumstances.

In Halsbury's Law of England, a deed has been defined as an instrument written on parchment or paper expressing the intention of some persons named therein who make assurance of some interest in property, or of some legal or equitable right, title or claim, or undertake or enter into some obligation, duty or agreement enforceable at law or in equity, or to do some other act affecting the legal relation or position of a party to the instrument.

Historically, in England, deeds were classidfied into (a) Deed Poll, and (b) indenture deed.

**Deed Poll**

As the old practice in England was to indent or cut a document which indicated towards executant of the deed; and when deed was polled or cut at the top or at the bottom it was known as 'Deed Poll'. It was called Deed Poll or single deed because it was executed by one party only. A bond, a power of attorney, and a will are the best examples of Deed Poll. It is an executed contract of conveyance made by the grantor alone.

**Indenture Deed**

Under the old practice of drafting of deed in England, the mark of cut or indent indicated towards the executant of the deed. A deed is technically called an 'indenture' or 'deed indented', because the old-practice in England was to cut or intend for the purpose of tally. The old practice was to write two copies of the deed upon the same piece of parchment or substance with some words or terms or letter of alphabet were so written that when one copy was separated from the other, the substance or the parchment was so cut or indented so as to leave half of the word or letter in one copy and the other half in another copy, so as to fit or aptly join its counterpart from which it was supposed to have been cut, indented or separated.

This practice of indenting of deeds is no more in England and at present indenture means a deed between two or more parties importing the meaning of executed contract of conveyance made under seal. A deed of Lease, a mortgage deed and a partnership deed were the best example of indenture deed according to old practice in England.

**Distinguish between Deed Poll and Indenture Deed**

1. Deed Poll and Indenture both are executed contract and are always in writing.

2. Both are deeds of conveyance and muniment of record of title, and used as documentary evidence if needed.

3. Deed Poll or single deed is a unilateral document executed by one party only, while Indenture deed is bilateral or multilateral document executed by two or more than two parties.

4. A Deed Poll is generally written in the first person while an Indenture deed is always written in the third person. In other words, in a Deed Poll, the grants and the covenants of the grantor are in the first person, while in an Indenture, grant and covenants are in the third person.

5. A Deed Poll may be commenced with the expression, 'Know All Men By These Presents' or 'To whomsoever it May Concern' or straightway 'I, so and so, Send These Greeting or Presents', while in an Indenture deed, the opening words are – 'This Indenture of.....' or 'This Deed of.....' or 'This Instrument of.....' etc.

6. Historically, in England, the difference between a Deed Poll and an Indenture deed was an interesting one, but at present there is no such difference and both are indiscriminately used for each other. The difference is only for phraseology but of no practical importance.

7. The old concept of difference between the Deed Poll and an Indenture as, historically, was maintained in England had never found place in India. It is because an indenture relating to real property in England was required to be made under seal which never was a requirement in India.

**Document**

Documents means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter ( sec. 3, Indian Evidence Act 1872).

Documentary evidence is an important piece of evidence of which the Court, Jury and Tribunal take judicial cognizance.

**Deed, Conveyance and Deed of Conveyance**

The term 'Deed', 'Conveyance' and 'Deed of Conveyance' or 'Conveyancing' are frequently used interchangeably to denote one and the same legal concept, and each is being commonly understood to mean an instrument in writing whereby the grantor conveys to the grantee some right, title or interest in or upon some real property . Thus, by the aforesaid expressions, we mean each of them as document, indenture or instrument in writing. So , the terms, 'conveyance', 'conveyancing', 'deed of conveyance' or 'conveyancing', 'deed', 'document', 'indenture' and 'instrument' are interchangeable for the purpose of drafting of documents.

**Object and Function of Conveyancing**

Movable property may be physically given and taken by actual delivery, while this is not possible in case of property in case of immovable properties. Thus, conveyancing is that branch of the law of transfer of property which deals with the mode and form of transfer to which both- the transferor and the transferee have agreed upon. Its main object is to enable the owners of real property to make voluntary transfers of their right, title and interest therein for some specific purpose and for a specified period. Such transfers are not otherwise possible than by conveyancing.

It incorporates the expressions of the intention of the parties to the deed of conveyance so that accordingly it shall take effect. In case of any doubt, dispute, ambiguity and susceptibility, the real intention of the parties may be discovered from the words, phrases and the expression used in the deed. A transferor may have passed the property intending to pass; but if he has not expressed himself in suitable words of the language, the deed may be defective or susceptible of two or more constructions; and so the benefits of the transfer may be lost to the transferee. Secondly, where any adverse claimant interposes before the transferee, may get actual legal possession of the transferred property, it may be quite possible that the transferor with all his willingness may not be able to help the transferee.

It helps the Court and judicial tribunals to determine any dispute if subsequently arises between the parties to the deed. It serves the purpose of both- the transferor and the transferee in protecting their interests. It protects the interests of the transferee from any precedent and /or subsequent acts or omissions of the transferor or any other person claiming through or under him against the expressed intention of the grant and the covenant of the deed; and likewise, the interest of the transferor is also protected from any subsequent acts or omissions of the transferee. It is a document of title to the property and forms the basis of a record of rights maintained by the Government. It is, also, a documentary piece of evidence.

## COMPONENTS OF DEEDS

Drafting of a deed involves the law by which parties are governed, effect of the transaction and certainty and clarity by using appropriate words and expressions. 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; Exception and Reservations (if any); Habendum; Covenants (if any); Testimonium. The part of the deed which precedes the habendum is termed "the premises". Each of these parts will now be separately considered.

### A) DESCRIPTION/NAME/TITLE OF THE DEED

All deeds should be 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 AND PLACE

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 of a deed is the date on which it is singed 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.

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.

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.

The place where the deed is executed must be specified very clearly and generally at the start of document.

### C) PARTIES TO THE DEED

1. 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. 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.

2 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 parties.

3. 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 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. Where the transferor is as 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.

4. Juridical Person

A party to a transfer need not be a living individual but may be a company, or association or body of individuals or an idol or a corporation sole or aggregate, or in fact, any juridical person capable of holding property and entering into contracts.

5. Idol

As an idol has to act through some natural person, the name of the latter should be disclosed.

6. 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 the deed, such as 'the vendor', 'the purchaser', 'the lessor', 'the lessee', 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 CD', but is 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 along is made a party, this clause will run as follows:

"The 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 works "of the one part" and "of the other part" the works " 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, relates to 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.

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.

**E) Testatum**

The next part 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 serve several objects, use the words 'as follows' after the testatum, thus:

'NOW THIS DEED WITNESSES AS FOLLOWS:'

**F) CONSIDERATION**

As contracts are necessarily for consideration (Sec. 10 of the 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 requirements 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 purchases 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.

**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.

*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. 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.

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.

**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 reservations 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.

**K) HABENDUM**

This is 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 expressions as 'to the use of the purchaser' are not strictly necessary but there is no harm in continuing the established practice.

**L) CONVENANTS 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. 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 set 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 transferer's and transferee's covenants are separately mentioned in the deed, care should be taken that no covenant which should really by 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 tree 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 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 testimonum 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 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.

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