

LEGAL DOCUMENTATION

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APRIL 2016

HOW TO DRAFT DOCUMENTS?

Drafting of documents is making a document putting facts and events with legal perspective. It can be said that it is synthesis of law and fact in a language form.

In other words, legal drafting is the crystallization and expression in definitive form of a legal right, privilege, function, duty, or status.

The process of drafting operates in two planes: the conceptual and the verbal. Besides seeking the right words, the draftsman seeks the right concepts. Drafting, therefore, is first thinking and second composing.



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SKETCH OR SCHEME OF THE DRAFT DOCUMENT

- It is always advisable to sketch or outline the contents of a document before taking up its drafting.
- The first rule on which a draftsman must act is this—that before his draft is commenced, the whole design of it should be conceived, for if he proceeds without any settled design, his draft will be confused and incoherent.
- The importance of the above rule cannot be overemphasized and it should be observed by every draftsman.



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COMPONENTS OF DEEDS

- Deed title
- Place & date of execution
- Description of parties
- Description of property
- Recitals
- Consideration
- Receipt clause
- Operative clause
- Testatum clause

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SOME DO'S

- Use single word;
- Avoid confusing words and sentences which are capable of undesirable construction;
- Do not go for unnecessary repetition;
- Use shorter sentences;
- Express the ideas in clear and fewer words;
- Always use active to the passive voice sentences;
- Choose the right word;
- The meaning of words used should be well known and understood.
- Read the whole document carefully and satisfy yourself about the content, interpretation and the sense it carries.



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SOME DON'TS

The following things should be avoided while drafting the documents:

- (a) Avoid the use of words of same sound. For example, the words "Employer" and "Employee";
- (b) When the clause in the document is numbered it is convenient to refer to any one clause by using single number for it. For example, "in clause 2 above" and so on.
- (c) Negative in successive phrases would be very carefully employed.
- (d) Avoid the use of words "less than" or "more than", instead, use "not exceeding".



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CONSEQUENCES OF AMBIGUOUS DRAFTING

- Double and doubtful meaning will defeat the objective of the document.
- Inherent ambiguity and difficulties in interpretation of the documents will mislead.
- Difficulties in implementation of the objectives desired in the documents if the document is not clear.



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- Ambiguous document will cause increased litigation and loss of time, money and human resources.
- Such document will lead to misinterpretation of facts leading to wrongful judgment.



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IMPORTANT PROPERTY DOCUMENTS

- Agreement to Sell
- Sale Deed
- Leave and License Agreement
- Lease Agreement
- Mortgage Deed
- Gift Deed
- Relinquishment
- Power of Attorney
- Other Documents



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AGREEMENT TO SELL

- An agreement to sell is banakhat.
- Agreement to sell is entered into for the purpose of completing the property transaction at a future date.
- Agreement to sell should clearly state the name and addresses of parties and other details.
- Agreement to sell clearly state the description of the property, consideration amount, schedule of payment and the duration.
- If the intention of the parties is to make time essence of the contract, the same shall be clearly stated.



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- All eventualities for recession of the agreement should be clearly stated.
- In case of dispute, the jurisdiction and dispute resolution mode must be clearly specified.
- The agreement must be in writing and registered so that the protection of section 53A of the Transfer of Property Act would be available to the buyer.
- The rights and interest in such property gets divested only on the execution of sale deed.



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CLAUSES TO BE INCLUDED IN AGREEMENT TO SELL

Some clauses which must appear in an agreement to sale are as follows:

- Full description of parties, property and consideration amount
- Clause of "free from encumbrances"
- Clause of Delivery of title deeds to the purchaser
- Clause of Marketable title free from reasonable doubt
- Clause of Tenure
- Clause of Respective rights and duties



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- Clause of Respective rights and duties
- Clause of Time being the essence of the contract
- Clause of Delivery of possession
- Clause of Risk of fire or other accidents
- Clause of Notice from the Government or Municipal Authorities
- Clause of Search in the Collector's Office
- Clause of Search in the Sub-Registrar's Office



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SOME IMPORTANT POINTS:

- Agreement to sale aimed at defeating the provisions of an enactment, can not be enforced.
- Title of an immovable property cannot pass, gives only right to enforce it specifically.
- Parties to the agreement would include their successors-in-interest.
- Vendor should have present right or interest in the property.
- Where it is established that there is breach of warranty of title, the seller must be held liable to the vendee even though the later has notice of the defective title, provided there is no contract to the contrary.



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- Agreement to sale without consideration-VOID. [Sec. 25 of the Indian Contract Act]
- Agreement to sale having object being unlawful and opposed to the public policy -VOID. [Sec. 23 of the Indian Contract Act]
- Acceptance by the seller must be absolute.
- Inadequate consideration does not invalidate the contract of immovable property.
- Agreement of sale with possession- compulsory registration and stamp duty of sale deed has to be paid.



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SALE DEED

Salient Features:

- The sale deed is the final document of sale of property from previous owner to the new owner.
- Previous owner passes his title absolutely and forever to the purchaser for the amount agreed.
- Owner cannot pass better title than the owner has himself.
- The sale deed is compulsorily registered.
- The sale deed must clearly state the name and address of the vendor and vendee along with their PAN, if any.



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- The sale deed must demise the property absolutely with all privileges attached with it.
- It should be lawful consideration.
- Vendee must be put in possession.
- The vendor must have clear title.
- No clauses to restrict the use should be put in the deed.
- No clause in violation of law should be put in the deed.
- Sale deed cannot be conditional.
- Payment of consideration is not a condition precedent for transfer of property.



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- If consideration is not paid, the same as per the terms of the deed then the vendor can initiate recovery proceedings as per law.
- Unregistered sale deed does not confer any right.
- If incorrect boundaries are shown in a sale deed then the same maybe rectified.
- Miss-description of property is rectifiable.
- A sale deed can not be cancelled after its execution. However, under the Specific Relief Act on grounds of being voidable, terminable or unlawful, it can be cancelled under the order of the Court.



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- Section 31 of The Transfer of Property Act lays down that a property may be transferred with a legally valid condition that the interest created by way of the deed shall cease to exist in case of the occurrence or non-occurrence of a particular event.
- Execution of sale deed in breach of Court order is invalid.
- Only *karta* can execute sale deed if the property belongs to HUF.



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LEASE AGREEMENT

- Section 105 of the Transfer of Property Act, 1882 defines Lease as a transfer of a right to enjoy such property, made for a certain time, or in perpetuity, in consideration of a price paid or promised.
- The Lease agreement must clearly specify all conditions of Lease such as the parties, lease rentals, duration of lease, payment mode of rentals and respective rights and duties.
- The Lease agreement must provide for defaults and eventualities of termination of the lease agreement.

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- As per Sec 107 of The TP Act a lease of immovable property can be made –
 - by a registered document
 - to be executed by both the lessor and lessee
- For the termination of monthly lease a simple notice giving 15 days time to the lessee will be sufficient.



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Rights and Liabilities of the Lessor and Lessee

- The lessor is bound to disclose to the lessee any material defect in the property.
- The lessor is bound on the lessee's request to put him in possession of the property.
- If the lessee pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.



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LEAVE & LICENSE AGREEMENT

- Section 52 of Indian Easement Act, 1882 defines License.
- A Leave and License Agreement is granting rights to the licensee to enjoy the immovable property for limited time without granting any right of any kind in the property.
- A license is a personal right granted to a person to do something upon immovable property of the grantor and does not amount to the creation of interest in the property itself.
- It is purely a permissive right and is personal to the grantee.



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- It creates no duties and obligations upon the persons making the grant and is, therefore, revocable except in certain circumstances expressly provided for in the Act itself.
- The license grants right to the licensee to do particular activity on the property.
- Lease and license grants only a right to use the property in particular way or under certain terms.
- The possession of the property remains in the control of the owner.



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- The legal possession, thereof, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose.
- Leave and License does not create in Licensee's favour any estate or interest in the property."
- A license cannot be transferred or assigned.
- License is purely permissive right arising only by permission, express or implied, and not by adverse exercise or in any other way.
- License only legalize a certain act which would otherwise be unlawful and does not confer any interest in the property itself in or upon or over which such act is allowed to be done.



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MORTGAGE DEED

- Sec 59 of TP Act deals with mortgage.
- Mortgage can be effected in three different ways (a) by registered document, (b) by delivery of possession and (c) deposit of title-deeds.
- A mortgage deed must specify the full details of the mortgager and the mortgagee.
- The deed must define respective rights and obligations of the parties.
- The deed must also specify the mode of redemption/release of the mortgage.
- The deed must also set out clearly when the mortgage can be foreclosed.
- Deed must be registered and attested by two witnesses.



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EQUITABLE MORTGAGE OF PROPERTY

- Equitable mortgage is most popular and convenient.
- Equitable mortgage is effected by deposit of title deeds with the mortgagee.
- For effecting equitable mortgage, a deed known as Memorandum of Entry is executed through which deposit of title deeds are witnessed.
- Like any other deed, the description of the parties, property, the amount must be clearly specified.
- All terms and conditions of equitable mortgage should be clearly set out.
- The deed must expressly mention the intention of creating security for debt or loan.



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POWER OF ATTORNEY

- As per sec 2(21) of The Power of Attorney Act, 1882, a POA is a formal document whereby a person authorizes another to represent him and act in his name in relation to the acts mentioned in the POA.
- The hectic schedules of the businessmen and industrialists have made the execution of power of attorney for delegating his functions.
- ‘Power Of Attorney’ can be executed by two or more persons jointly to one or more persons.
- POA should be clear and understandable without any ambiguity.



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- The POA must describe the donor and donee properly with their addresses etc.
- It must be clearly stated for what purpose the POA is being executed.
- It must be clearly mentioned whether it is revocable or irrevocable.
- If there is any specific act to be done, the same shall be defined properly.
- If the POA is for a specific duration, the same must be clearly set out.
- A POA applies during a person's lifetime and ceases to apply when he dies.



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- The Power of Attorney can be either General Power of Attorney or Special Power of Attorney
- The POA must be in clear language without any ambiguity.
- The grantor of the POA must specify that he will be bound by all acts of the grantee.
- The POA as far as possible be registered, particularly if it is for dealing with immovable property.
- To prevent any fraud, the purpose and scope of the POA must be clearly set out.



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RELINQUISHMENT DEED

- Relinquishment deed is one of the modes of transfer of property.
- Relinquishment means extinction of rights or interest in property.
- It may not amount to transfer of property if it is in favour of a person having interest in property.
- It amounts to transfer if it is in favour of a person who has no interest in the property.



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- By way of relinquishment deed, one or more joint owner can give up/relinquish/release his /their share in a immovable property to one or more joint owners.
- All the clauses of sale deed will be incorporated in the relinquishment deed with such modifications as may be necessary.
- A relinquishment or release deed can be equated with sale deed if the relinquisher relinquishes his right in favour of strangers and has to pay full stamp duty.
- Release or relinquishment in favour of brother / sister / parents / son / daughter / spouse or father and mother of the spouse etc. does not attract usual rate of stamp duty but only nominal amount.



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GIFT DEED

- Gift is defined under section 122 of the TP Act.
- Gift is made out of natural love and affection to a living person.
- An endowment is not a GIFT.
- It must be stated in gift deed that gift is made out of love and affection.
- The donee must accept the gift.
- The deed must state that it is made voluntarily, absolutely and unconditionally.



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- Though the gift is to be unconditional, except in cases where any property is to be given for a particular purpose.
- In such case, it must be stated that if the object fails, the property will revert back.
- Gift deed can be made as a settlement for the purpose of maintenance of the donor.
- All covenants of gift deed must be absolutely clear.
- It is always advisable to make the donee or acceptor a party to the gift deed.



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- If a gift is to be burdened by an obligation, it must be clearly stated in the gift deed.
- A gift deed of immovable property must be registered.
- Gift deed must be attested by two witnesses.
- Gift deed must state that it is by free will and not by coercion or undue influence.
- No condition can be made in the gift deed for its being revocable at the will of the donor.



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