



1

CONVEYANCING

ANNAMALAI UNIVERSITY

Date : 05.03.2018



PARAG SHETH

FIE, FIV, MICA, MASCE, LL.B, DPM

CHARTERED ENGINEER ▪ ARBITRATOR ▪ GOVT. REGD. VALUER
INSOLVENCY PROFESSIONAL

www.paragsheth.com

- The importance of the knowledge about drafting and conveyancing for the corporate executives has been felt particularly for the three reasons viz.,
 1. for obtaining legal consultations;
 2. for carrying out documentation departmentally;
 3. for interpretation of the documents.

Introduction

3

- With the knowledge of conveyancing, better interaction could be had by the corporate executives while seeking legal advice from the legal experts in regard to the matters to be incorporated in the documents, to decide upon the coverage and laying down rights and obligations of the parties therein. Knowledge in advance on the subject matter facilitates better communication, extraction of more information, arriving on workable solutions, and facilitates settlement of the draft documents, engrossment and execution thereof.

Introduction

- Knowledge of conveyancing for the corporate executives is also essential for doing documentation departmentally. An executive can make a better document with all facts known and judging the relevance and importance of all aspects to be covered therein.
- A number of documents are required to be studied and interpreted by the corporate executives. In India, in the absence of any legislation on conveyancing, it becomes imperative to have knowledge about the important rules of law of interpretation so as to put right language in the documents, give appropriate meaning to the words and phrases used therein, and incorporate the will and intention of the parties to the documents.

Meaning of Conveyancing

5

- Technically speaking, conveyancing is the art of drafting of deeds and documents whereby land or interest in land i.e. immovable property, is transferred by one person to another; but the drafting of commercial and other documents is also commonly understood to be included in the expression.
- Mitra's legal and commercial dictionary defines "conveyance" as the action of conveyancing, a means or way of conveyancing, an instrument by which title to property is transferred, a means of transport, vehicle. In England, the word "conveyance" has been defined differently in different statutes.

Meaning of Conveyancing (Contd...)

6

- Section 205 of the Law of Property Act, 1925 provides that the “conveyance includes mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of any interest therein by any instrument except a will”. “Conveyance”, as defined in clause 10 of Section 2 of the Indian Stamp Act, 1899, “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 by Schedule I” of the Act.” Section 5 of the Transfer of Property Act, 1882 (Indian) makes use of the word “conveyance” in the wider sense as referred to above.

Meaning of Conveyancing (Contd...)

7

- Thus, conveyance is an act of conveyancing or transferring any property whether movable or immovable from one person to another permitted by customs, conventions and law within the legal structure of the country. As such, deed of transfer is a conveyance deed which could be for movable or immovable property and according to the Transfer of Property Act, 1882, transfer may be by sale, by lease, by giving gift, by exchange, by will or bequeathment. But acquisition of property by inheritance does not amount to transfer under the strict sense of legal meaning

Immovable Property

8

Immovable property is defined in Section 2 (26) of the General Clauses Act, 1897 thus:

- “Immovable property” shall include land, benefits to arise out of the land and things attached to the earth or permanently fastened to anything to the earth. In section 3 of the Transfer of property Act it is stated that for purposes of this Act” Immovable property” does not including timber, growing crop or grass. Thus in the T.P Act “immovable property” has slightly restricted meaning.

Tangible and intangible property

9

- The tangible means something that can be touched i.e. a material object. All abstract rights are incapable of being touched are intangible. Examples for Intangible property are Good will of business, mortgage rights, lessee rights etc.

Transfer of property defined

10

- In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and "to transfer property" is to perform such act.
- In this section "living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

What may be transferred

11

Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

- (a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- (dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

What may be transferred

12

- (e) A mere right to sue cannot be transferred.
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.
- (h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee.
- (i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

Persons competent to transfer

13

- Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

AGREEMENT FOR PURCHASE

14

As the sale transactions cannot be done then and there, and since it requires some reasonable time for both the seller and purchaser, many a times, the parties enter in to agreement for sale pending registration of the actual sale deed. Before entering into agreement for purchase or sale, all the points narrated above have to be verified. The purchaser must retain the original agreement. Copies of the title deeds have to be obtained. The agreement has to be drawn and executed on stamp paper of required value. The agreement for sale must contain at least the following particulars:

- a) Full name and address of the Seller and Purchaser.
- b) A brief history of the title of the seller, with reference to his title deed.
- c) An undertaking by the seller to sell the land to the purchaser
- d) The total price of the property agreed between the parties.
- e) The amount of advance paid, mode of payment, acknowledgement of receipt of the advance by the seller, the amount of balance price to be paid, the time for payment of the balance price.

AGREEMENT FOR PURCHASE

15

- f) Time for execution and registration of the sale deed.
- g) An undertaking to deliver vacant possession of the property
- h) An undertaking to hand over all title deeds
- i) A clear description of the property
- j) Date and time of the agreement.
- k) A default clause stipulating penalty or damages for breach of agreement.

GUIDELINES FOR USE OF PARTICULAR WORDS AND PHRASES FOR DRAFTING AND CONVEYANCING

16

There cannot be any clear cut rule which can be laid down as guideline for using the particular words and phrases in the conveyancing. However, the draftsman must be cautious about the appropriate use of the words and should be clear of its meaning. The following rules may be prescribed for the guidance of the draftsman for using any particular word and phrase in the drafting of the documents:

- (1) For general words refer to ordinary dictionary for ascertaining the meaning of the words. For example, Oxford Dictionary or Webster's Dictionary or any other standard dictionary may be referred to for this purpose.
- (2) For legal terms refer to legal dictionary like Wharton's Law Lexicon or other dictionaries of English Law written by eminent English Lexicographers as Sweet Cowel, Byrne, Stroud, Jowit, Mozley and Whiteley, Osborn etc. In India, Mitra's Legal and Commercial Dictionary is quite sufficient to meet the requirements of draftsman.
- (3) As far as possible current meaning of the words should be used and if necessary, case law, where such words or phrases have been discussed, could be quoted in reference.

GUIDELINES FOR USE OF PARTICULAR WORDS AND PHRASES FOR DRAFTING AND CONVEYANCING

17

(4) Technical words may be used after ascertaining their full meaning, import of the sense and appropriate use warranted by the circumstances for deriving a technical or special meaning with reference to the context.

(5) The choice of the words and phrases should be made to convey the intention of the executor to the readers in the same sense he wishes to do.

(6) The draftsman should also use at times the recognised work of eminent legal expert on the interpretation of statutes. In Maxwell's Interpretation of Statutes use of some of the words is explained for the guidance of the readers.

The above guidelines acquaint the students of a few instances leading to the choice of appropriate word or phrase. As a matter of fact, much will depend upon the executives own skills and talents as to how they express the wishes of the company in limited words befitting to an expression of a certain event or description of facts.

Some Do's

18

- 1. Reduce the group of words to single word;
- 2. Use simple verb for a group of words;
- 3. Avoid round-about construction;
- 4. Avoid unnecessary repetition;
- 5. Write shorter sentences;
- 6. Express the ideas in fewer words;
- 7. Prefer the active to the passive voice sentences;
- 8. Choose the right word;
- 9. Know exactly the meaning of the words and sentences you are writing; and
- 10. Put yourself in the place of reader, read the document and satisfy yourself about the content, interpretation and the sense it carries.

Some Don'ts

19

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) Draftsman should avoid the use of words “less than” or “more than”, instead, he must use “not exceeding”.
- (e) If the draftsman has provided for each of the two positions to happen without each other and also happen without, “either” will not be sufficient; he should write “either or both” or express the meaning of the two in other clauses

Some Don'ts

20

In writing and typing, the following mistakes always occur which should be avoided:

- 1. “And” and “or”;
- 2. “Any” and “my”;
- 3. “Know” and “now”;
- 4. “Appointed” and “Applied”;
- 5. “Present” and “Past” tense

Components of Deed

21

- (1) Description of the Deed Title.
- (2) Place and Date of execution of a Deed.
- (3) Description of Parties to the Deed.
- (4) Recitals.
- (5) Testatum.
- (6) Consideration.
- (7) Receipt Clause.
- (8) Operative Clause.
- (9) Description of Property.
- (10) Parcels Clause.
- (11) Exceptions and Reservations.
- (12) Premises and Habendum.
- (13) Covenants and Undertakings.
- (14) Testimonial Clause.
- (15) Signature and Attestation.
- (16) Endorsements and Supplemental Deeds.
- (17) Annexures or Schedules.

Description of Components of Deed

22

1. Description of the Deed Title

- The deed should contain the correct title such as “This Deed of Sale”, “This Deed of Mortgage”, “This Deed of Lease”, “This Deed of Conveyance”, “This Deed of Exchange”, “This Deed of Gift” etc. These words should be written in capital letters in the beginning of document. Where it is difficult to locate the complete transaction out of number of transactions covered under the deed, it may not be possible to give single name to the deed like ‘Deed of Gift’ and as such it would be better to describe the deed as “This Deed” written in capital letters like “THIS DEED”.

2. Place and Date of Execution of a Deed

- We first highlight the importance of “date”. The date on which the document is executed comes immediately after the description of the deed. For example, “This Deed of Mortgage made on the first day of January, 1986”. It is the date of execution which is material in a document for the purpose of application of law of limitation, maturity of period, registration of the document and passing on the title to the property as described in the document. Thus, the “date” of the document is important

Description of Components of Deed

3. Description of Parties

The basic rule is that all the proper parties to the deed including inter-parties should be properly described in the document because inter-parties are pleaded as they take benefit under the same instrument. While describing the parties, the transferor should be mentioned first and then the transferee. Where there is a confirming party, the same may be placed next to the transferor. In the order of parties, transferee comes in the last

The form is illustrated as under:

“This lease deed at New Delhi on the day of 2013 between Shri Vinod resident of (Hereinafter called lessor) of the one part and Shri Dinov resident of (hereinafter called lessee) of the other part.

Description of Components of Deed

24

4. Recitals

Recitals contain the short story of the property up to its vesting into its transferors. Care should be taken that recitals are short and intelligible. Recitals may be of two types. One, narrative recitals which relates to the past history of the property transferred and sets out the facts and instrument necessary to show the title and relation to the party to the subject matter of the deed as to how the property was originally acquired and held and in what manner it has developed upon the grantor or transferor. The extent of interest and the title of the person should be recited. It should be written in chronological order i.e. in order of occurrence. This forms part of narrative recitals. This is followed by inductive recitals, which explain the motive or intention behind execution of deed.

Introductory recitals are placed after narrative recitals. The basic objective of doing so, is to put the events relating to change of hand in the property.

Recital generally begins with the words “Whereas” and when there are several recitals instead of repeating the words “Whereas” before each and every one of them, it is better to divide the recitals into numbered paragraphs for example, “Whereas” –

- 1.
- 2. ...etc.

Description of Components of Deed

25

5. Testatum

- This is the “witnessing” clause 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”. Where there are more than one observations to be put in the clause the words, “Now This Deed Witnesses as Follows” are put in the beginning and then paragraphs are numbered.

6. Consideration

- As stated above, consideration is very important in a document and must be expressed. Mention of consideration is necessary otherwise also, for example, for ascertaining stamp duty payable on the deed under the Indian Stamp Act, 1899. There is a stipulation of penalty for non-payment of stamps, but non-mention of consideration does not invalidate the document. In the absence of mention of consideration the evidentiary value of document is reduced that the document may not be adequately stamped and would attract penalty under the Stamp Act.

Description of Components of Deed

26

7. Receipt

- Closely connected with consideration is the acknowledgement of the consideration amount by the transferor, who is supposed to acknowledge the receipt of the amount. An illustration follows: “Now this Deed witnesses that in pursuance of the aforesaid agreement and in consideration of sum of Rs. 100,000/- (Rupees One Lakh Only) paid by the transferor to the transferee before the execution thereof (receipt of which the transferee does hereby acknowledge)”.

8. Operative Clause

- This is followed by the real operative words which vary according to the nature of the property and transaction involved therein. The words used in operative parts will differ from transaction to transaction. For example, in the case of mortgage the usual words to be used are “Transfer by way of simple mortgage” (usual mortgage) etc. The exact interest transferred is indicative after parcels by expressing the intent or by adding habendum. (The parcel is technical description of property transferred and it follows the operative words).

Description of Components of Deed

27

9. Description of Property

- Registration laws in India require that full description of the property be given in the document which is presented for registration under Registration Act. Full description of the property is advantageous to the extent that it becomes easier to locate the property in the Government records and verify if it is free from encumbrances. If the description of the property is short, it shall be included in the body of the document itself and if it is lengthy a schedule could be appended to the deed. It usually contains area, measurements of sides, location, permitted use, survey number etc. of the property

Description of Components of Deed

28

10. Parcels Clause

This is a technical expression meaning methodical description of the property. It is necessary that in case of non-testamentary document containing a map or plan of the property shall not be accepted unless it is accompanied by the True Copy. Usually the Parcel Clause starts with the words “All Those..... And further or description covers as per the type of property subjected to transfer under the deed. This clause includes words such as: Messuages, Tenements, Hereditaments, Land, Water etc. But use of these now has been rendered unnecessary in view of

Section 8 of Transfer of Property Act given herein below.

“Section 8. Operation of transfer — Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

Description of Components of Deed

29

And, where the property is machinery attached to the earth, the movable parts thereof;

And, where the property is a house, the easements annexed thereto the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

And, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

And, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.”

This Section has cut down the length of the deeds and do away with description of minute details of the incidents of the property intended to be conveyed.

Description of Components of Deed

30

11. Exceptions and Reservations Clause

It refers to admission of certain rights to be enjoyed by the transferor over the property to be agreed to by the transferee. All exceptions and reservations out of the property transferred should follow the parcels and operative words. It is the contractual right of the parties to the contract or to the document to provide exceptions and reservations which should not be uncertain, repugnant or contrary to the spirit of law applicable to a particular document or circumstances.

For example, Section 8 of the Transfer of Property Act, 1882 provides for transfer of all the interest to the transferee in the property and any condition opposing the provisions of law will be void. Further, Section 10 of the said Act provides that any condition or limitation restraining the transferee of property in disposing of his interest in the property is void. So, nothing against the spirit of law can be provided in the document.

The clause generally is signified by the use of words “subject to” in deeds, where it is mentioned, it is advisable that both the parties sign, to denote specific understanding and consenting to this aspect.

Description of Components of Deed

31

12. Premises and Habendum

Habendum is a part of deed which states the interest, the purchaser is to take in the property. Habendum clause starts with the words “THE HAVE AND TO HOLD”. Formerly in England if there was a gratuitous transfer, the transferee was not deemed to be the owner of the beneficial estate in the property, the equitable estate wherein remained with the transferor as a resulting trust for him. It was therefore, necessary to indicate in the deed that it was being transferred for the use of the transferee if it was intended to confer an equitable estate in him. It was for that reason that the habendum commenced with the words: “to have to hold to the use of.....”. Now it is not necessary to express it so. In the modern deeds, however, the expression “to have and” are omitted. The habendum limits the estate mentioned in the parcels. The transferee is mentioned again in the habendum for whose use the estate is conveyed. Whatever precedes the habendum is called the premises. The parcels or the description of the property usually again included in the premises. If the property conveyed is encumbered, reference thereto should be made in the habendum. If the parties to transfer enter into covenants, they should be entered after the habendum.

In India such phrases as “to have and to hold” or such an expression as “to the use of the purchaser” can very well be avoided as in cases except those of voluntary transfers such an expression is superfluous.

Description of Components of Deed

32

13. Covenants and Undertakings

The term “covenant” has been defined as an agreement under seal, whereby parties stipulates for the truth of certain facts. In Whasten’s Law Lexicon, a covenant has been explained as an agreement or consideration or promise by the parties, by deed in writing, signed, sealed and delivered, by which either of the parties, pledged himself to the other than something is either done or shall be done for stipulating the truth of certain facts. Covenant clause includes undertakings also. Usually, covenant is stated first. In some instances the covenants and undertakings are mixed, i.e. can not be seperated in that case, they are joint together, words put for this as “The Parties aforesaid hereto hereby mutually agree with each other as follows:” Such covenants may be expressed or implied.

14. Testimonial Clause

Testimonial is the clause in the last part of the deed. Testimonium signifies that the parties to the document have signed the deed. This clause marks the close of the deed and is an essential part of the deed. The usual form of testimonium clause is as under: “In witness whereof, parties hereto have hereunto set their respective hands and seals the date and year first above written”. This is the usual English form of testimonium clause. In India, except in the case of companies and corporations seals are not used and in those cases

testimonium clause reads as under:

- “In witness whereof the parties hereto have signed this day on the date above written”. Thus testimonium clause can be worded according to the status and delegation of executants.

Description of Components of Deed

33

15. Signature and Attestation Clause

After attestation clause, signatures of the executants of the documents and their witnesses attesting their signatures follow. If the executant is not competent enough to contract or is juristic person, deed must be signed by the person competent to contract on its behalf. For example, if the deed is executed by the company or cooperative society then the person authorised in this behalf by and under the articles of association or rules and regulations or by resolution as the case may be should sign the document and seal of the company/society should be so affixed, thereto by mentioning the same.

16. Endorsements and Supplemental Deeds

Endorsement means to write on the back or on the face of a document wherein it is necessary in relation to the contents of that document or instrument. The term “endorsement” is used with reference to negotiable documents like cheques, bill of exchange etc. For example, on the back of the cheque to sign one’s name as Payee to obtain cash is an endorsement on the cheque

Description of Components of Deed

34

17. Annexures or Schedules

A deed remains incomplete unless particulars as required under registration law about the land or property are given in the Schedule to be appended to the deed. It supplements information given in the parcels. A Site Plan or Map Plan showing exact location with revenue no. Mutation No., Munipal No., Survey No., Street No., Ward Sector/Village/Panchayat/Taluka/District etc..... Plot No., etc. so that the demised property could be traced easily

A Specimen Agreement of Sale of House Property

35

THIS AGREEMENT OF SALE executed on the..... day of..... 2018, between AB son of residing at hereinafter called the vendor of the one part and

CD son of resident at hereinafter called the purchaser of the other part,

(The expressions “vendor” and “purchaser” wherever they occur in these presents, shall unless the context otherwise admits, also mean and include their respective heirs, executors, administrators, legal representatives and assigns).

WHEREAS the vendor is the sole and absolute owner of the property more fully set out in the Schedule hereunder:

AND WHEREAS it is agreed that the vendor shall sell and the purchaser shall purchase the said property for a sum of Rs..... (Rupees) free of all encumbrances.

A Specimen Agreement of Sale of House Property

36

6. The vendor shall execute the conveyance deed in favour of the purchaser or his nominee as the purchaser may require.
7. The vendor shall hand over all the title deeds of the property to the purchaser or an advocate nominated by him within..... days from the date of this agreement for scrutiny of title and the opinion of the vendor's advocate regarding title to the property shall be final and conclusive. The purchaser shall duly intimate the vendor about the approval of title within..... days after delivering the title deeds to him or to his advocate.
8. If the vendor's title to the property is not approved by the purchaser, the vendor shall refund the purchaser the earnest money received by him under the agreement and on failure of the vendor to refund the same within..... days, he shall be liable to repay the same with interest thereon at the rate of..... per cent per annum.
9. If the purchaser commits a breach of the agreement, he shall forfeit the earnest amount of Rs..... (Rupees) paid by him to the vendor.
10. If the vendor commits a breach of the agreement, the vendor shall not only refund to the purchaser the sum of Rs..... (Rupees.....) received by him as earnest money, but shall also pay to the purchaser an equal sum by way of liquidated damages.

A Specimen Agreement of Sale of House Property

11. Nothing contained in paras 9 and 10 above shall prejudice the rights of the parties hereto specific performance of this agreement of sale/purchase.

Schedule of Property

House No..... situated in.....

On its

North is.....

South is.....

East is.....

West is.....

A Specimen Agreement of Sale of House Property

38

IN WITNESS WHEREOF the vendor and the purchaser have set their respective hands to the agreement of sale/purchase on the day, month and the year above written, in the presence of the following witnesses:

Witnesses:

(1)

Name :

Father's Name :

Address :

Signature :

Vendor

(2)

Name :

Father's Name :

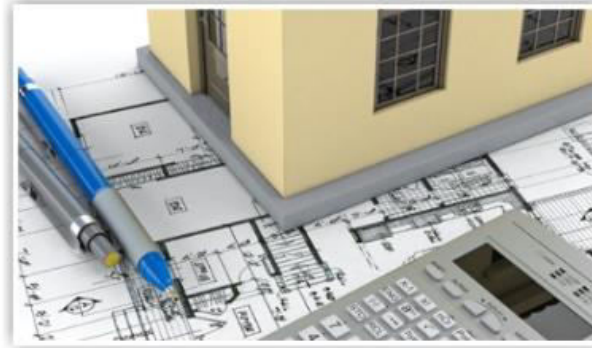
Address :

Signature

Purchaser

•

THANK YOU



PARAG SHETH

FIE, FIV, MICA, MASCE, LL.B, DPM

CHARTERED ENGINEER ▪ ARBITRATOR ▪ GOVT. REGD. VALUER
INSOLVENCY PROFESSIONAL

E : parag@paragsheth.com

M : 0-98250 25953