



DRAFTING, PLEADINGS & APPEARANCES

CS Vikas Vohra *Corporate BaBa*

HIGHLIGHTS

- Covers all the major concepts of the subject
- Coloured book for better learning
- Important concepts highlighted for quick revision



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SANDESH



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On behalf of **TEAM YES**

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CHAPTER 2 - GENERAL PRINCIPLES OF DRAFTING

DRAFTING - MEANING

Drafting may be defined as the synthesis of *law and fact* in a *language form*.

The process of drafting operates in two planes:

- *Conceptual*
- *Verbal*

Besides seeking the right words, the draftsman seeks the right concepts. Drafting, therefore, is *first thinking and second composing*.

It is the development and preparation of legal instruments such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts and leases, etc.

CONVEYANCING - ITS MEANING

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.

According to Section 2(10) of the Indian Stamp Act, 1899, 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 by Schedule I of the Act.

DISTINCTION BETWEEN DRAFTING AND CONVEYANCING

Sr. No.	Drafting	Conveyancing
1.	Drafting gives a general meaning synonymous to preparation of drafting of documents.	Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another.

DISTINCTION BETWEEN CONVEYANCING AND CONTRACT

Sr. No.	Conveyancing	Contract
1.	Conveyance does not create any right of any action but at the same time it alters the ownership of existing right.	Contract remains to be performed and its specific performance may be sought but conveyance passes on the title to property to another person.
2.	Transfer of immovable property is governed by the Transfer of Property Act, 1882.	Contracts are governed by provisions of the Indian Contract Act, 1872.
3.	The deed of mortgage or sale would operate as conveyance of such interest.	A mere contract to mortgage or sale would not amount to actual transfer of interest in the property.

GENERAL PRINCIPLES OF DRAFTING

1. **Fowlers' five rules of drafting**

According to Fowler, "anyone who wishes to become a good writer should endeavour, before he allows himself to be tempted by more showy qualities, to be direct, simple, brief, vigorous and lucid."

His rules states as follows:

- (a) Prefer the **familiar word** to the far fetched (familiar words are readily understood).
- (b) Prefer the **concrete word** to the abstract (concrete words make meaning more clear and precise).
- (c) Prefer the **single word** to the circumlocution (single word gives direct meaning avoiding adverb and adjective).
- (d) Prefer the **short word** to the long (short word is easily grasped).
- (e) Prefer the **Saxon word** to the Roman (use of Roman words may create complications to convey proper sense to an ordinary person to understand).
- (f) Always prefer **active voice** to the passive voice in the drafting of documents.



2. Sketch or scheme of the draft document

The first rule on which a draftsman must act is 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, many things will be done which ought to be done and many left undone which ought to be done.

3. Skelton draft and its self-appraisal

Once the draft of the document is ready, the draftsman should *fill it with available facts, law applicable*, logical presentation of the facts, use of simple language understandable to layman, avoidance of repetition and conceivable mis-interpretation, elimination of ambiguity of facts, and adherence to the use of Fowlers' Rules.

4. Special attention to be given to certain documents

Certain documents require extra care before taking up the drafting. For example, it must be ensured that *contractual obligations are not contrary to the law* in the document, where the facts so warrant to ensure.

5. Expert's opinion

If the draft document has been prepared for the first time to be used again and again with suitable modification depending upon the requirements of each case *it should be vetted by the experts* to ensure its suitability and legal fitness if the corporate executive feels it so necessary.

Some do's

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't's

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 should 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.

COMPONENTS / PARTS OF A DEED

Following are the components or parts of a document or an instrument or a deed :

- I) Non-operative Part.
- II) Operative Part
- III) Formal Part.

Non-Operative Part

1) Description or Name of the Deed :

It is usual, but not necessary, to begin a Deed by giving it a name. The name should be indicative of the true contents of the Deed. E.g. Sale Deed, Lease Deed, Partnership Deed.

2) Date and Place of the execution of the Deed :

It is usual to give the date and place on which and where respectively a deed is executed, either after the name of the deed or at the end before the signatures.



The date and place are state in the following manner :

This Deed of Sale made at New Delhi on the Sixteenth day of October, Two Thousand and Five (16.10.2005) between

3) Parties to the Deed :

The names and particulars of the parties to the deed shall be given and they shall be given in such detail so that parties to the deed can be easily identified. It is usual to describe parties by their name, age, parentage, occupation and residence. In the case of artificial persons, the particulars such as name of the organization, the law under which it has been formed and the address of its place of business should be provided.

In case where it is intended that the successors of the parties will also be bound by the deed, it is usual to add a clause after the description of the parties stating the following :

“The parties shall include their heirs, successors, assigns and legal representatives.”

4) Recitals :

They contain a brief history or in short form the motive for making the deed, Recitals begin with the familiar words, such as “Whereas the parties are desirous of or have agreed on some particular course of action, etc.”

Where the operative part of a deed is unambiguous, the recitals have no effect on the construction of the deed. However, if the operative part is ambiguous, the recitals govern the construction of the deed.

Recitals carry evidentiary importance in the deed. (Ram Charan V. Girija Nandini)

Operative Part:

After the recitals, the operative part of the deed generally begins with the words : “NOW THIS DEED WITNESSES THAT”



1) Testatum or Premises :

This part gives effect to the intention of the parties and sets out in detail the transaction between the parties. It sets out the capacity in which the parties are acting and the payment and receipt of the consideration.

2) Habendum :

The purpose of the Habendum is to define the interest conveyed and to set out the limitations on the property involved. It shows whether transfer is of a life interest or absolute sale. It mentions whether the property is encumbered or not.

3) Exceptions and reservations :

In this part, all the exceptions and reservations which are intended to be attached to the transfer should be clearly stated. For e.g. where in a transaction of lease of a piece of land, if the lessor desires to retain the right to extract the minerals there from, then it should be specifically provided under the Lease Deed.

4) Covenants :

Every deed must contains the terms and condition by which the parties bind themselves. However, it is not necessary to mention such covenants which are implied by law, but if any special terms and conditions are desired which are at variance with the implied covenants, then these must be clearly stated. For instance, a lease under the Transfer of Property Act implies the right to sub-let but the parties may impose conditions against sub-letting.

Formal Part :

1) Testimonium :

This clause sets forth the fact that the parties have signed the deed. It usually begins with the words : "In witness whereof, the parties aforesaid, namely, Have on the day and year just above mentioned put their signatures in the presence of the witnesses.



2) Signature and Attestation :

Immediately after the Testimonium, the parties put their signatures. Thereafter the witnesses put their signatures.

Where a deed requires attestation, then the executants must sign in the presence of the witnesses and the witnesses must sign in the presence of the executants. In such a case, after the signatures of the executants, the following words are written :

"Signed by the above named parties in our presence and we have signed in their presence."
Then follows the signatures of the witnesses.

e.g. Gift Deed pertaining to an immovable property requires mandatory attestation.

Where a document consists of more than one page, the parties and witnesses must sign on each page.

3) Parcels or Description of the Property :

The property is described in details accurately and correctly in this part either by way of a footnote or by way of a Schedule. The object of the description is to make the property easily identifiable. For e.g., in the case of documents relating to immovable property, it is mandatory that there should be a parcel or description of the property in the document.

IMPORTANT CONCEPTS RELATING TO DEEDS AND DOCUMENTS

Interpretation of Deeds and Documents :

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.



There is no law in India on the interpretation of documents also. However, some of the relevant principles of interpretation of deeds and documents are discussed below :

Informal Agreements : In interpretation of informal agreements, the rule to be applied is that of reasonable expectation; that is to say, the agreement is to be interpreted in the sense in which the party who used the words in question should reasonably have apprehended that the other party may apprehend them.

Formal Agreements : Where the agreement is formal and written, the following rules of interpretation may be applied :

1. Any form of written document carries **highest evidentiary value in law**. Hence formal agreements play a great role in the courts.
2. In case if the documented evidence is not clear, **circumstantial evidence shall be adopted** by the courts.
3. **Clear and unambiguous words prevail** over hypothetical meanings.
4. Sometimes a contract is in two parts. At first an executory contract is executed and later on an executed contract. In case of any difference between the preliminary contract and final contract, **the terms of the final must prevail**.
5. **Later clause in an agreement always prevails over an earlier clause**.
6. The court must interpret the words in their **popular, natural and ordinary sense**.
7. If certain words employed in business, or in a **particular locality**, have been used in particular sense, they must be construed in **technical sense**.
8. **The ordinary grammatical interpretation is not to be followed, if it doesn't fit with the general context**.
9. **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.
10. As a general rule of construction of documents, the **recitals are not looked into, if the terms of the deed are otherwise clear**. 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.

11. Sometimes a *standard form is used, particularly in contracts with government departments or big corporations*. In these standard printed forms, words not applicable are deleted according to the requirements of individual transactions.

ENDORSEMENT AND SUPPLEMENTAL DEED

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 document 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. Thus, to inscribe one's signature on the cheque, bill of exchange or promissory note is endorsement within the meaning of the term with reference to the Negotiable Instruments Act, 1881.

Supplemental Deed is a document which is entered into between the parties on the same subject on which there is a prior document, existing and operative, *for adding new facts to the document on which the parties to the document have agreed*, which otherwise cannot be done by way of endorsement. Thus, supplemental deed is executed to give effect to the new facts in the deed.

BASIC COMPONENTS OF DEEDS

Deed

A deed is a writing -

- (a) on *paper, vellum or parchment*
- (b) *sealed, and*
- (c) *delivered, whereby an interest, right or property passes, or an obligation binding on some persons is created or which is in affirmance of some act whereby an interest, right or property has been passed.*



Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability.

Example: Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Deed of Family Settlement, Lease Deed, Mortgage Deed etc.

Document

As per section 3(18) of the General Clauses Act, 1897, document means and include any **matter written, expressed or described upon any substance by means of letters, figures or mark**, which is intended to be used for the purpose of recording that matter.

For example, for a banker the document would mean loan agreement, deed of mortgage, charge, pledge, guarantee, etc.

Kinds of deeds

A **good deed** is one which conveys a **good title**, not one which is good merely in form.

A **good and sufficient deed** is **marketable deed**; one that will pass a good title to the land it purports to convey.

An **inclusive deed** is one which contains within the **designated boundaries** lands which are expected from the operation of the deed.

A **latent deed** is a deed **kept for twenty years** or more in man's escritoire or strong box. A **lawful deed** is a deed conveying a good or lawful title.

A **pretended deed** is a deed apparently or **prima facie valid**.

Deed Pool is a deed between two or more parties where **as many copies are made as there are parties**, so that each may be in a possession of a copy.



Deed Poll is a deed made and **executed by a single party** e.g. power of attorney, is called a deed poll, because in olden times, it was polled or cut level at the top. It had a polled or clean cut edge.

Indenture are those deeds in which there are two or more parties. It was **written in duplicate** upon one piece of parchment and **two parts were severed** so as to leave an indented or vary edge, forging being then, rendered very difficult.

Cyrographum was another type of indenture in olden times. The word "**Cyrographum**" was **written between two or more copies of the document and the parchment was cut in a jugged 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.

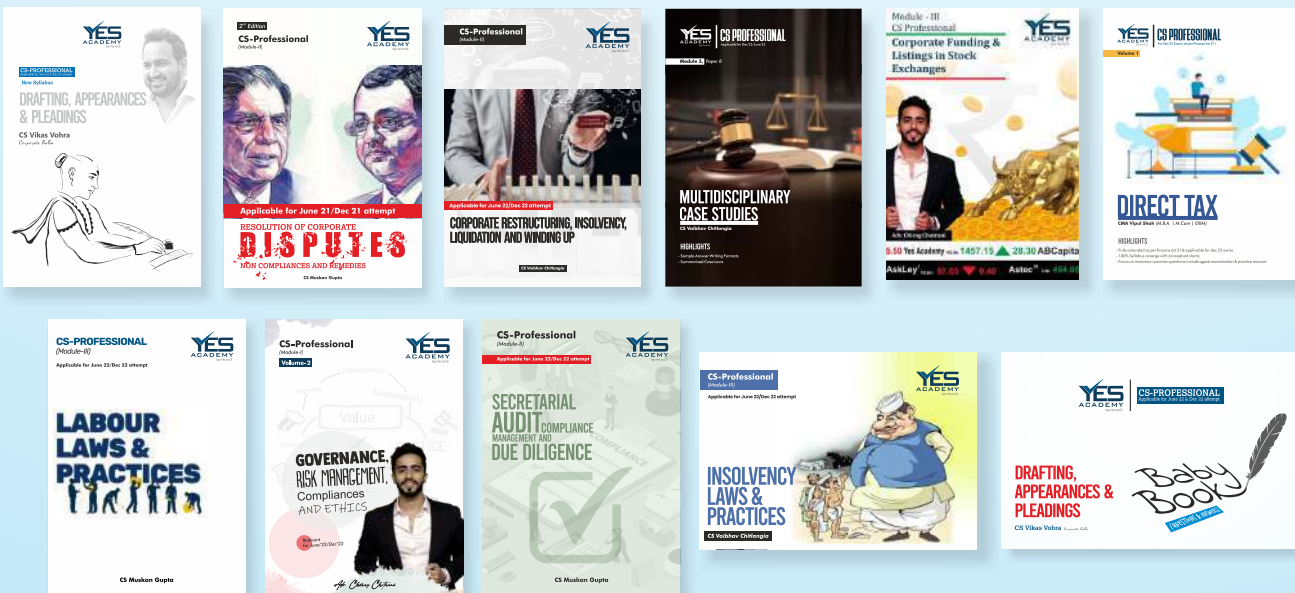
Deed Escrow is a deed **signed by one party will be delivered to another** as an "escrow" for it is not a perfect deed. It is only a mere writing (Scriptum) unless signed by all the parties and dated when the last party signs it.

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CS Vikas Vohra
(Corporate BABA)

CS Vikas Vohra, Founder - YES Academy

Vikas is a Commerce and Law Graduate and a Company Secretary by profession. He has to his credit, few other Certifications and specialisations in Corporate and Securities Laws. On the teaching side, he has taught more than 10,000 students.

He is also a speaker at various Management Institutes and ICSI on various Corporate matters and Entrepreneurship. In his previous assignments, he worked as an Associate Vice President with LexValueAdd Consulting Private Limited, an Investment Banking firm based out of Mumbai.

He has significant hands on experience in Mergers and Acquisitions, Public Offerings and consequent listing of the Shares and GDR's on the Bourses, fund raising and Deal Structuring. Before that he also worked with Kirloskar Brothers Investments Limited & Bajaj Auto Limited wherein, he was deeply involved in various M&A activities.

Vikas is presently the Founder of YES Academy for CS, Pune He is also a Co-Founder of PapaZapata (Mexican food chain) & GujjuKhakhra (Indian Breads). He enjoys writing poetry and doing meditation in his free time.



📍 Office 30A, 1st Floor, Gate No. 1, Kumar Prestige Point,
Behind BSNL Office, Bajirao Road, Shukrawar Peth, Pune - 411 002
📞 8888 235 235, 8888 545 545, 8888 569 569, 8888 280 280
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