CONSTRUCTION OF BUSINESS INSTRUMENTS

An instrument containing the legal relation of an enforceable obligation between parties is called a written agreement. It expresses rights, duties, privilege and power of parties under consideration.

As per sec. 2 (14) of the Indian Stamp Act, 1899, "instrument" includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. An instrument is a writing and generally means a writing of a formal nature- UMAJI KESHAO MESHRAM Vs. RADHIKA BAI, AIR 1986 SC 1272. it cover any written document under which any liability or right, whether legal or equitable, exists- R. Vs. REGISTRAR OF COMPANIES, (1986) 1 ALL ER- 105 (CA). It includes a trust deed-SOM PRAKASH REKHI Vs. UOI AIR 1981 SC 212, an affidavit also- SAMBASIVARAJU Vs. CHADRAYYA AIR 1967 AP. 87.

In business agreement, right means proprietary rights and benefits in property. An agreement may be a transaction if it is a business deal or negotiation. In other words, any thing reduced to writing, a document of a formal or solemn character to give formal expression to a legal act or agreement for the purpose of creating, securing, modifying or terminating right, and accordingly, the same may be used as a means of affording evidence. It means a writing executed and delivered as the evidence of an act or agreement – MOORE VS. DIAMOND DRY GOODS CO. 47 ARIZ 128. It gives a formal colour to an agreement or act for creating, securing, modifying or terminating a right.

The Supreme Court in VISHNU PRATAP SUGAR WORKS LTD Vs CHIEF INSPECTOR OF STAMP AIR 1968 SC 102. expressed that an "instrument means a writing usually importing a document of a formal legal kind, but it does not include Acts of Parliament unless there is statutory definition to that effect in any Act". It is a document which creates or affects rights and liabilities – RE. ROLLS ROYCE LTD (1974) 3 ALL ER 646 (Ch,D.).

The term "document" is a recorded instrument by way of letters, figures, marks in legal forms or otherwise and includes deeds, agreements, title papers or any other written instrument.

The term "document" as expressed in sec. 3 (18) of the General Clauses Act, 1897 shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means which is used, for the purpose of recording that matter.

The meaning of the "document" or of a particular part of it is to be sought for in the document itself. That is, undoubtedly the primary rule of construction to which Section

90 to 94 of the Indian Evidence Act give statutory recognition and effect, with certain exceptions contained in Sections 95 to 98 of the Act. Of course, "the document" means "the document" read as whole and not piecemeal. *DELHI DEVELOPMENT AUTHORITY V. DURGA CHAND KAUSHISH*, AIR 1973 SC 2603.

A "document" is something that furnishes evidence, Especially legal deed or other piece of writing. "Document" shall also include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more then one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter. "Document" will also include summons, notice, requisition, order, other legal process and registers. Any decipherable information, which is set down in a lasting from would be a document; "Document" is a written paper or something similar, which may be put forward in evidence. The term "document" means a document legally enforceable. The expression "document" would also mean something on which things are written, printed or inscribed, and which gives information and would also included any written thing capable of being evidence, a paper or other material thing affording information, proof or evidence of anything- "Document" would also mean and include something to provide with factual or substantial support for statements, made on a hypothesis proposed and also to equip with exact references to authoritative supporting information. APARNA TRADING Co. (INDIA) PVT. LTD. Vs. CCT, (1982) 51 STC 199, 216 (Cal).

Under the law, the term "agreement" in writing means an instrument for co-existence of understanding and intention between two or more persons with respect to the effect upon their relative rights and duties (i.e. considerations for performance of an obligation) of certain past or future facts or performances.

The expression "agreement" as employed under the Indian Contract Act, 1872 refers to both "promise" and "promisee" and a "set of promises , forming consideration for each other" while an agreement enforceable by law is a contract. The word "agreement" means a commercial contract and not an agreement to refer or an arbitral clause –V/O TRACTORD EXPORT, MOSCOW Vs TARAPORE & Co. AIR 1971 SC 1.

Sec-2 (b) of the Competition Act, 2002 lays down that "agreement" includes any arrangement or understanding or action in concert,-

(i) Whether or not, such arrangement, understanding or action in formal or in writing; or
(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

The term "deed" is a conveyance in writing, signed and delivered by one or more persons about disposal of a right or property. However, it is not required that every type of deed must be sealed. The examples are partnership deed, gift deed, will,

separation/partition deed, etc. There is also a deed by estoppel which precludes a party from denying a certain fact recited in deed executed or accepted by him in an action brought on such deed executed or accepted by party who would be detrimentally affected by such denial – *CLEVELAND BOAT SERVICE Vs (CITY OF CLEVELAND 102 OHIO APP. 255; DENNY Vs WILSON COUNTY 198 TENN. 677.*

[A Document, described as a "deed" and stating at its conclusion that it was "signed sealed and delivered" had a printed circle as the place for the seal. The person executing the document signed across the circle and the signature was witnessed. The document was held to be properly executed as a "deed" even though no seal had been affixed. (FIRST NATIONAL SECURITIES Vs. JONES (1978) CH. (109) "a document purporting to be a deed is capable in law of being such although it has no more than an indication of where the seal should be." (IBID. per GOFF L.J)]. (Stround, 6th Edn. 2000)

Interpretation of an instrument means process of ascertaining the ideas of a given text to avoid any inconvenient and absurd construction. *It is a heat so that the thing may rather stand then fall.* It is a method by which the meaning of an expression is ascertained.

An interpretation is "authentic" when it is expressly provided in the instrument itself, but once it is derived from unwritten practice, it is called as usual. The process to find out the meaning of words or sentences is called as "grammatical" interpretation while "logical" interpretation is a source of finding out the intentions which may be "extensive" or "restrictive". Restrictive interpretation means discovery of the meaning of a word only to the extent of intentions, while the process to discover its obvious meaning is called as "extensive". In strict sense, the expression "construction" refers a wider scope than "interpretation" because it explains the legal effects and consequences of the instrument in question rather than to ascertain the sense and meaning.

The question of construction of business agreements could arise only where such contracts or agreements are in writing. An employment of the term "construction" in comparison to the expression "interpretation" is too much relevant, because the term " construction" includes not only to ascertain the sense and meaning (i.e. ideas) of the subject, but also the legal effects and consequences of such instrument in question. A rule of construction is one which either governs the effect of the ascertained intentions, or points out what the court should do in the absence of express or implied intention, while a rule of interpretation is one which directs to ascertain the ideas of the maker of the instrument. In other words, a rule of interpretation is one which governs the ascertainment of the meaning of the maker

of an instrument while the rule of construction indicates the effects and consequences of such ascertained intentions.

It is well settled fact that any evidence in writing is having more authority than an oral evidence except in extreme extraordinary situations – *SYED ABDUL KHADER Vs RAMI REDDY AIR 1977 SC 553*. Evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances. Such evidence as is furnished by written instruments, inscriptions, documents of all kinds and also any inanimate objects admissible for the purpose, is distinguished from "oral" evidence, or that delivered by human beings via voice – *PEOPLE Vs PURCELL 22 CAL APP 2d 126.*

It is well settled law that to find out a proper conclusion about creation of right under an instrument, it is not enough to attain a degree of precision in good faith, but a possible degree of misconstruction in bad faith must always be required - *SANT RAM Vs RAJINDER LAL AIR 1978 SC 1601.*

It is well settled law that in case where there is a specific provision in an instrument, the same becomes enforceable by ignoring customs unless there is no fraud or illegality. Each and every word employed may have its own relevance, so, any word [in normal circumstances] should not be assumed as superfluous.

Now first point is to interpret an instrument or agreement to search the ideas behind the same. To construct a document, the determination of dominant intention is a required condition [see *SMT. NAI BAHU Vs LALA RAMNARAYAN AIR 1978 SC 22*]. The true nature of an instrument could not be disguised by labelling it something else – *SMT SHANTA BAI Vs STATE OF BOMBAY AIR 1958 SC 532*. To find out the ideas or, intentions, the document must be perused as a whole by taking entire terms employed along with surrounding circumstances. When the instrument is a composite one, for the essential aspect of reality of the transaction, to find out the predominant intention of the parties executing it, the same shall be perused as a whole which must be a required condition – *FUZHAKKAL KUTTAPPU Vs C. BHARGARI AIR 1977 SC 105*. And to find out the intentions, surrounding circumstances must also be considered – *CIT Vs DURGA PRASAD MORE (1971) 82 ITR 540 (SC*) and the recitals made in the form of document i.e. substance over form must prevail – *M C DOWELL & CO. LTD. Vs CIO (1985) 5 ECC 259 (SC*). Though the nomenclature and descriptions given in an instrument is not determinative to find out the real character of the transaction involved but for that, the entire instrument must be perused. It is well established maxim that instrument must be perused as a whole and the intention shall be ascertained by the terms there-of and not by extraneous circumstances or evidences. However, in case of ambiguity (which could not be resolved by the terms of the documents), surrounding circumstances would be a deciding factor – *CHUNCHUN JHA Vs EBADAT ALI AIR 1954 SC 345.*

It is well settled principle that a rectification or modification of the phraseology employed in an instrument could not be permitted where there is no dispute or controversy between the parties in respect of implementation, but the object is more to obtain some tax benefits or to avoid tax liabilities – WHITE SIDE Vs. WHITE SIDE (1949) 1 ALL ER 755 (Ch.D.)

In other words, intentions behind reformation of an instrument are a relevant factor which would be able to anticipate subsequent developments.

Every instrument is having its boundary while determining the legal effect. It is quite relevant while permitting a modification or a supplementary instrument. The situation to find out the same could be categorized as follows:-

- # Whether the written agreement is what it purports to be;
- # Whether the writing properly complies with the formalities of law;
- # The interpretation of the expression employed in the instrument;
- # Because of a combination of all the previous oral and written agreements,

whether all the situations or entire effects have been memorialized .

It is reiterated that any document must be constructed with their limits without considering extrinsic evidence. In other words, an obligation of a written agreement cannot be abridged or modified or reconstituted by another preceding or

contemporaneous parole agreement, not referred to in the writing itself. It means limit of an instrument must be determined. However, there are some exceptions:

- **Where the terms employed are ambiguous and the surrounding circumstances are also not resolving such ambiguity, subsequent conducts or deeds could be a deciding factor.**

- Where an instrument is a combination of several contracts or considerations, it could not be difficult to put any one of them in the form of a collateral document. To that extent, the document could be modified because not form but substance prevails.

- Where as per the customs, everything must not be required in writing. Oral agreements made subsequently or supplement deeds connected with the principal instrument are concord as a part and parcel of the same;

- Where the document is incomplete or there is a specific provision for supplementary deed also. For example, where a contract does not state the time of performance, the parties decide orally a particular point of time – *ALBERT COHN TRUSTEE Vs JHON T. DUNN (1930) 70 ALR 740.*

- Where a part of the contract is left to implication in terms of such contract. Where such implication is not external, the same is to be gathered from it as set forth therein in express terms – *RIOUX Vs RYEGATE BRICK CO 70 VT 148.*

Wherever time is an essence of a contract, either expressly or by implication, and where there is an omission, the law does not declare the contract as void but, the event mentioned shall take place within a reasonable time. What is reasonable time in a given case depends upon the circumstances and as such, it is usually a question of fact – *FARMERS FEED & GRAIN CO Vs LONGWAY & CROSS (1930) 103 VT. 327.*

It is well settled law that judicial authorities should be very cautious while admitting any evidence to supply or explain an instrument. A written contract could not be modified by an oral agreement which is never referred in such instrument. However, to resolve out any uncertainty because of an ambiguous language, an oral evidence could be admitted after considering all the facts and circumstances including relation and situation at the time of negotiation. And the same must be found out from the expressions employed in such instrument as far as possible because the language indicates the force of an obligation which is to be carried out.

Subject to the intention, where an instrument is a combination of several promises, there is no restriction for any subsequent modification because substance is the sole criterion. However, an oral agreement can be admitted to reform an instrument, if –

- The agreement must be collateral one;
- It shall not overrule an express or implied provision in such instrument ; and

- In such surrounding circumstances, such oral agreement is a part and parcel of such instrument.

Where all previous agreements have been merged in an instrument, intentions should be gathered from the expressions employed in such instrument instead of referring all the previous negotiations. However, where there is a scope of a collateral agreement, upto that extent, the intentions could be gathered otherwise. For example, where an instrument does not stipulate the time of performance, there could be an oral agreement about such point of time – *ALBERT COHN TRUSTEE Vs JOHN.T. DUNN (1930) 70 ALR 740.*

A contract may be so drawn that one or more of its terms are left to implication. And when such implication is not external to the contract, but is gathered from it, it is as much part of the contract as if it was set forth therein in express terms – *RIOUX Vs RYEGATE BRICK CO. 72 VT. 148.*

A latent ambiguity in the words of a instrument may be explained by evidence; for it arose on evidence extrinsic to the instrument and it may, therefore, be removed by other similar evidence. However, a patent ambiguity in the words of a written instrument cannot be cleared up by evidence to the instrument.

It is well settled law that every instrument must not be sealed or registered. However, where the statute stipulates a condition of registration strictly, non registration of a compulsory registrable document is fatal to its admissibility as evidence – *RATAN LAL Vs PURSHOTTAM AIR 1974 SC 1066.*

It is well settled law that while construing an instrument, the surrounding circumstances to find out its true nature and the reality of the recitals made in the documents must always be considered – CIT Vs. DURGA PRASAD MORE (1971) 82 ITR 540 (SC); but it does not mean that legal relation resulting from such transaction must be ignored. However, a party can not escape the consequences of law merely by describing an agreement in a particular form though in essence and in substance, it may be a different transaction – CIT Vs. PANIPAT WODLEN GENERAL MILLS CO.LTD (1976) 103 ITR 66 (SC).

It is well settled that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance – INLAND REVENUE COMMISSIONERS Vs. DUKE OF WESTMINSTER (1936) AC 1, but it must not be overstated or overextended – W.T. RAMSAY Vs. INLAND REVENUE COMMISSIONERS (1982) AC 300. While obliging the court to accept documents or transactions, found to be genuine, as such, ***it does compel the court to look at a document or a transaction in blinkers isolated from any context to which it properly belongs.*** Where a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. ***It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence*** and if that emerges from a series or combination of

transactions intended to operate as such, it is that series or combination which may be regarded – CHINN Vs. HOCHSTRASSER (1981) AC 533.

It is well settled that an employment of the maxim – "NON EST FACTUM" is a plea whereby a defendant states that the instrument has not been executed by him or there was a mistake as to its nature where the same was executed. It is a defence about the transfer of a right under a transaction. It is a denial. It is an expression to say that the document was never executed in point of fact but he could not deny its validity in point of law.

The application of the plea creates an absurd situation because the proposition [that whoever raises a plea that he did not understand the contents of the document should be believed] could obviously unsettle the sanctity attached to an instrument. The effect is that the instrument is void because of not being executed by the defendant. The principle may prevail only in extreme situation. There are still illiterate or sensible persons who cannot peruse an instrument or don't know the importance of making a statement on verification. Several times and very often, persons put their signature on a piece of paper, blank form or return because of an excessive faith in other person or their attorneys to execute document or to complete such form or return, and in such a situation, the plea is admissible specifically when the contents in such document are essentially different in substance or in kind which the person has intended. It means the document shall be held as void. Similarly, when it has been proved that the signature was obtained by fraud, undue influence or under mistake, he may be able to avoid it upto a point only but not when where some one else has relied on it being his document in good faith – *GALIE Vs LEE (1969) 1 ALL ER 1062*. So being an exception, a protection, its application is strict and restricted and subject to situational factor also, but having a great relevance and implication even in taxing statutes also.

And at last, in case, where there is a conflict between one part of the document and the other with respect to the same right, to ascertain the intentions, the relevant portion of such instrument must be considered as a whole with taking into circumstances of employing particular words in it and even after the same, there is a controversy, the earlier disposition of absolute title would prevail over later direction of disposition. And for the same, an extrinsic evidence is also permissible – ABDULLA AHMED Vs. ANIMENDRA KISSEN MITTER AIR 1950 SC 15; RAM KISHORE LAL Vs. KAMAL NARAYAN AIR 1963 SC 890; but it is not a rigid formula. It depends upon the nature of the instrument and surrounding circumstances besides reading all parts as a whole there is no rigidity as regards to an application of any maxim because of fast movement of ideologies, values and systems. What is relevant is that the maxim must be suited to the needs in the given circumstances. It is the essence.***