

PROPERTY TRANSACTIONS AND DOCUMENTATION

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Legal Document

A document determines contractual relationship between the parties and defines their respective rights and privileges on one hand and their respective obligations and duties on the other hand and it can be used to furnish decisive evidence or information.

In short a legal document is any written instrument that defines, declares, limits, or expands the legal rights or privileges and duties or obligations of a person or entity.

Some of the obvious legal documents are like Sale Deed, Power of Attorney, Agreement to Sell, Will, Lease agreement etc. some of electronic documents are Digital Signatures, E-contracts, Faxes, E-mails etc.

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Introduction

The legal document of property transaction refers to a valid legally enforceable contract by which rights in the property are determined. One should take note of the following requirements in such documents:

- To decide and agree on terms and conditions of the transactions.
- To find out the title of the property to be free from all encumbrances and marketable.
- To find out, if there are any legal obligations.
- To find out that such transfer is not prohibited under the law.
- Contracting parties are not minor.
- None of the parties is of unsound mind.
- HUF rights in ancestral property.
- Previous rights created to be examined.
- Free consent, misrepresentation or undue influence or coercion in the transaction.
- There should be no fraud.
- The agreement is not a result of mistake.

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Property Transactions

Property transactions refers to transactions relating to property by which some rights, privileges and or encumbrances are created. Transactions relating to property ultimately translates into various rights and duties and liabilities which are documented by way of various types of documents such as:

- Agreement to Sell.
- Sale Deed.
- Lease Agreement.
- Mortgage Deed.
- Gift Deed.
- Will.
- Easement.
- Relinquishment.
- Family Settlements.
- Partition Deed.
- Power of Attorney.
- Cancellation and Rectification Deed.
- Joint Development Agreement.

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Applicable Laws

In India, basically the following laws govern property matters –

- The Transfer of Property Act, 1882
- The Special Relief Act, 1963
- The Indian Contract Act, 1872
- The Registration Act, 1908
- The Indian Stamp Act, 1899
- The Indian Succession Act, 1925
- The Indian Easements Act, 1882
- The Real Estate (Regulation and Development) Act, 2016

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- Urban Land (Ceiling And Regulation) Act (ULCRA), 1976 (Repealed w.e.f. 22nd March, 1999)
- Land Acquisition Act, 1894
- The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (w.e.f. 1st January 2014)
- State/Local Laws

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Important terminologies used in property transaction

Immovable Property:

Section 3 of Transfer of Property Act defines immovable property as “immovable property” does not include standing timber, growing crops or grass. This definition is neither comprehensive nor exhaustive and only exclude certain things.

However, section 17 of the Registration Act, 1908 defines the term immovable property as follows “immovable property shall include land, benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth”.

Section 3(25) of General Clauses Act, 1897 defines immovable property to include land, benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

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Instrument

Instrument is a legal document. Section 3 of Transfer of Property Act defines instrument as a non-testamentary instrument. This Act does not deal with testamentary transfer such as will etc. However instrument can be understood to be a legal document.

Attested

In relation to instrument means an instrument attested by two or more witnesses. No particular form of attestation is required. (Section 3 Of TP Act)

Registered

For registration of a document it is necessary to fulfill all requirements of the Registration Act, 1908.

Transfer of Property

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. Living persons include company, association, body of individuals etc.

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Property

A property is a bundle of rights which means when the property is transferred the rights therein also transferred and the term property includes the properties of all description i.e. movable, immovable, tangible and intangible properties.

Partition

Partition is not a transfer of property but it is the partition of interests of several co-owners of a joint property.

Surrender

Surrender is merging of a lesser interest in a greater interest in such a manner that the greater interest is not enlarged and it is not a transfer of a property under section 5 of Transfer of Property Act. Perfect example of Surrender is where a lease holder surrenders its right in favour of the owner.

Compromise

Compromise means an agreement for settlement of doubtful claims between the parties in respect of some property and it is also not a transfer.

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Relinquishment

A relinquishment is extinguishment of a right, therefore, it cannot amount to a transfer. A relinquishment by a reversioner of his reversionary interest does not amount to transfer. Where a person in whose favour the release is executed gets certain rights by virtue of such release and such transaction may amount to transfer.

Can future property be transferred?

If a contract to transfer future property is made, it will not be enforced before the property comes into existence. The contract to transfer future property will be specifically performed only on coming into existence of that property.

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Documentation

Agreement to Sell

Under a contract of sale, the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called 'an agreement to sell' [Sec. 4(3)]. It is an executory contract and refers to a conditional sale.

All agreement to sell are bilateral contracts which come into existence when the seller agrees to sell his property to the purchaser for a lawful consideration subject to the terms of the agreement. Agreement to sell in itself does not create any interest in or charge on such property except by the execution of a sale deed.

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Legal Owner

Unlike English law, Indian law does not draw any distinction between legal and equitable property and owner. It recognizes only one ownership in respect of immovable property i.e. legal ownership.

Essential ingredients

Amount and terms of consideration, dates of payment, break up of payments etc.

Particulars of the parties and the property.

Time of transfer and possession of the property.

Other terms relating to the transfer.

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Sale Deed

‘SALE DEED’ is a legal written document executed by the vendor and the purchaser which evidences the sale and transfer of ownership of the tangible immovable property. Sale deed is governed by ‘The Registration Act, 1908’. Sale deed is the main document which gives details of how the seller got the property, at what consideration the seller is selling the property and assurance to the purchaser that the property is free from encumbrances and liabilities.

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- The sale deed must explicitly convey that the title of the property has been transferred absolutely for lawful consideration and that the vendee is put in the possession of the property.
- Registration of Sale Deed is compulsory .
- Sale deed is admissible as evidence.
- Registration helps in avoidance of creation of any new title other than that possessed by the vendor.
- During the time period between the date of execution of the sale deed and completion of its registration the vendee cannot act as the owner of the property and the vendor is morally liable to protect the title and possession of the property.

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- Once a sale deed is executed the vendor/vendee cannot deny the facts or admissions contained therein. Unless same is made due to (a) misconception of law (b) mistake of facts (c) fraud (d) duress (e) coercion (f) pressure.
- On execution of a registered sale deed, the vendor cannot on his own cancel the same and execute another sale deed in favour of any third party with respect to the same property.
- Payment for consideration is not a condition precedent for transfer of property. however if the same is not made as per the terms of the deed then the vendor can initiate recovery proceedings as per law.

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- Unregistered sale deeds shall not affect the property and neither shall confer any powers nor shall be admissible as evidence. Unless received for collateral purposes.
- Misdescription of the property is rectifiable.
- A sale deed is a contract and can be cancelled under the Specific Relief Act on grounds of being voidable, terminable or unlawful or by decree of competent court.
- A registered sale deed can be cancelled by a court of competent jurisdiction.

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Lease Agreement

As per Section 105 of the TP Act a lease of immovable property involves the transfer of the right to enjoy, use and occupy the property, by the transferor to the transferee, for a certain period of time at a price. The lease rentals represent the consideration for the lease transaction. The existence of the leased asset is an essential element of a lease transaction.

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Lease how made

An agreement to lease is required to be registered with the Sub-Registrar of Assurances, constituted under the Indian Registration Act. Provisions regarding registration are contained in both Sec. 107 of the Transfer of Property Act and in Sec. 17 of the Indian Registration Act. Under both these provisions, leases of immovable property from year to year or, for any term exceeding one year or, reserving a yearly rent, have to be registered.

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Rights and Liabilities of the Lessor

1. The lessor is bound to disclose all material defects in the property to the lessee. However, he need not disclose the defects which are discoverable with ordinary care. This is based on the principle of "Caveat Emptor" (Let the buyer be aware).
2. The lessor is bound to put the lessee in possession of the leased property. The lessee however must first request the lessor to put him in possession. If the lessee does not do so and fails to take possession, then he must not pay the rent for lease.

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3. The Lessee has right to have free and quiet enjoyment of the property. The covenant for title runs with the land.

4. If the lessor transfers the leased property, then the transferee gets all the rights and liabilities of the lessor. However, for making the transferee liable, the lessee must elect to treat the transferee as the person liable to him. Further, the transferee is not entitled to any arrears of rent due before the transfer.

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Rights and Liabilities of the Lessee

- During the continuation of the lease, if any addition is made to the property, then such property must also be returned with the main property to the lessor. In other words, "Accessory follows the principle" in the accessed lands.
- If part of the property is destroyed, then the lease becomes void at the option of the lessee. However, such destruction of the property must not be due to the wrongful act of the lessee.
- If the lessor neglects to make sufficient repairs even after notice by the lessee. The lessee can make such repairs himself and can deduct the expenses of such repairs with interest from the rent.

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- If the lessor neglects to make payment of revenue, tax, etc., then the lessee can make such payment and deduct such payments from the rent with interest or recover the amount from the lessor with interest.
- After the termination of the lease, the lessee can remove all the things, which he had attached to the earth but the must leave the property in the same state as he received it.
- If the lease is terminated by some uncertain events, then the lessee or his legal representatives can remove their belongings from the property.

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Difference between Wrongful occupation and unlawful occupation of tenant

Wrongful occupation relates to the act of unfairness or injustice, contrary to law, person not entitled to possession. However unlawful means which is in violation of any law not a mere breach of the terms of the contract. Eg. Occupation of lease property even after efflux of time.

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Gift Deed (Section 122 of Transfer of Property Act, 1882)

"Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration.

Such acceptance must be made during the lifetime of the donor.

If the donee dies before acceptance, the gift is void.

Essentials elements of Gifts:

- The absence of consideration
- The donor and the donee
- The subject-matter
- The transfer and the acceptance.

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How to create Gift

Can be created by registered instrument signed by or on behalf of donor and attested by at least two witnesses and a gift deed of immovable property is required to be registered.

When acceptance to be made

The acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

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When Gift may Be Suspended or Revoked

Section 126 of the Transfer of Property provides following conditions when gift may be revoked:

That the donor and donee must have agreed that the gift shall be suspended or revoked on the happening of a specified event.

Such event must be one which does not depend upon the donor's will.

The donor and donee must have agreed to the condition at the time of accepting the gift and the condition should not be illegal, or immoral and should not be repugnant to the estate created under the gift.

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Gift by way of Will

A testamentary gift is called a will which comes into operation only after the death of the transferor. A father can gift his self acquired property to his son/family members for the benefit of the receiver.

Gift to Minor

Gifts can be made to minors through their guardians.

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Relinquishment Deed

Relinquishment deed is a legal document where a person legally gives up or releases his legal rights of the property being relinquished in the name of some other person. This is one of the modes of transferring immovable property. As a relinquishment deed is an legal document by which a person formally gives up his claim to another person, the said deed must be executed and registered as per law.

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Easement

As per section 4 of the Easement Act, 1882 which defines "Easement".

An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Succession

The rights and obligations of the deceased person get transferred to the living person under the process of succession. They pass to some person, whom the dead person or the law on his behalf, has appointed to represent him in the world of living.

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Succession depends on

- The law applicable to the deceased at the time of his/her death and further whether the succession will be;
- Testamentary under Will of the deceased, or
- Intestate in the absence of valid Will, or
- Operation of law, by nomination, transmission,
- The nature of property or rights and obligations held by the deceased at the time of death.

In 2005, after the amendment of Section 6 of the Hindu Succession Act, 1956, daughters are given equal rights with the sons including coparcenary property. Earlier daughters had no share in HUF properties.

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WILL

According to Section 2(h) of Indian Succession Act, 1925, "Will" means a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death."

According to Section 3(64) of General Clauses Act, 1987, "Will as including Codicil and every writing making a voluntary posthumous disposition of property."

According to Section 2(d) of Indian Succession Act, 1925 'Codicil' means an instrument made in relation to Will and explaining, altering or adding to its dispositions and is deemed to form part of the Will.

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WHO CAN MAKE THE WILL?

Every person of sound mind, not being minor may dispose of his property by WILL. According to Sec. 59 Indian Succession Act, a testator is presumed to be sane and to have a mental capacity to make valid WILL. However no person can make WILL while he is in a state of mind arising from intoxication or from illness or from any other cause such that he does not know what he is doing. Even persons who are deaf or dumb or blind can make WILL provided they are aware of their action. Further a person who is ordinarily insane, may make his WILL during the interval in which he is of sound mind.

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WHETHER NOMINATION IS A WILL?

Nomination does not prima facie confer any beneficial interest on the nominee nor does it give the right to ownership.

In the case of *Ram Chander Talwar and Anr. v. Devender Kumar Talwar and Ors.* “it was held by the Supreme Court that the nominee is merely placed in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. But it by no stretch of imagination makes the nominee the owner of the money lying in the account.”

PROBATE

Probate is a certificate granted under the seal of Competent Court, certifying the Will as the Will of the testator and granting the administration of the estate of the deceased in accordance with that Will to the executor named under the Will. (Section 2(f) of The Indian Succession Act, 1925.)

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How to take probate?

Under Section 264 of The Indian Succession Act, 1925:

A petition for probate must be filed in court along with the time of the testator's death that the writing annexed in his last will and testament that will in question.

It should contain the following facts:

- That it was duly executed
- The amount of assets which are likely to come to the petitioner's hands
- The petitioner is the executor named in the will
- The application for probate shall be signed and verified by the executor or beneficiary.

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The petitioner shall furnish a blank stamp paper of value equal to the requisite court fee, along with the application. The court shall grant the probate on the said stamp paper.

After receipt of the petition, the court issues notice to the next of kin of the deceased to file their objections, if any, to the grant of probate.

A general public notice is also given in a newspaper.

On satisfaction that the Will in question has been validly executed the court will grant probate to the executor named in the Will.

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Mortgage Deed

(Section 58 of The Transfer Of Property Act, 1882)

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument by which the transfer is effected is called mortgage-deed.

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Following are the Kinds of Mortgage

Simple mortgage

When the possession of the mortgaged property, is not delivered, the transaction is known as simple mortgage.

English mortgage

It is an absolute transfer of ownership in the mortgaged property. After the transfer, the mortgager remains bound to pay mortgage money.

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Equitable Mortgage

Mortgage created by deposit of title deeds by the mortgagor with the mortgagee.

Usufructuary mortgage

If the mortgagor deliver the possession of the mortgaged property and allows the mortgagee (the creditor) to receive any income there upon adjustable to the interest and or the principal amounts, it is known as usufructuary mortgage.

Sub mortgage

Where mortgagee (the creditor) transfers his interest in the mortgaged property to third party, such an act is known as Sub-mortgage.

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POWER OF ATTORNEY

As per the section 2(21) of the Power of Attorney Act, 1882, the term ‘Power Of Attorney’ is an authority given by an instrument by one person, called as the donor or principal, authorizing another person, called donee or agent to act on his behalf.

There may be possibility of giving ‘Power Of Attorney’ by two or more persons jointly to one or more persons. Here a legal authority is given to take all necessary decisions related with matters stated in the deed.

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The Power of Attorney can be classified into three categories which includes:

General Power of Attorney

A general power of attorney is one by which an instrument is executed by the principal authorizing the agent to do certain acts in general on his behalf. The word 'General' here means that the power must be general regarding the subject matter and not general with regard to powers in respect of a subject matter.

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Special Power of Attorney

A special power of attorney is one by which a person is appointed by the principal to do some specified act or acts.

Irrevocable Power of Attorney

When the Power of Attorney cannot be revoked or cancelled.

Compulsory Registration

Power of Attorney Deed authorizing sale of immovable property are required to be compulsorily registered under Section 17 of Registration Act, 1908.

Duration

If any express period is not mentioned in the Power of Attorney then the same is operative and effective till the same is not cancelled or death of the donor.

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Family Settlement

A Family Arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family, either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. The agreement may be implied from a long course of dealing. But it is more useful to embody or to effectuate the agreement in a deed to which the term family agreement is applied.”

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Partition and Family Arrangement

If a person having absolute title of a property transfers his title in some parts to the others then the formalities of transfer of property have to be complied with. However if parties having competing rights in the title resolve their differences by way of compromise then no formalities are required to be observed as no title is derived from others.

Further a mere arrangement to divide a property does not require to be registered. However if the deed itself effects division then it must be registered.

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Essentials of a Family Arrangement and Family Settlement

1. Must be a bonafide settlement to resolve conflicts for fair and equitable division
2. Must be voluntary
3. May be oral
4. Registration is necessary only in case of written arrangement
5. Members must have an interest, claim, title or possible claim
6. Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement

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REGISTRATION AND STAMPING

Stamping and registration is required on the basis of wordings contained in the document. If it is required to be stamped and registered, but is not properly stamped and registered, it cannot be looked into for any purpose. Whether a purpose is collateral or not, is a matter which has to be gathered from the facts and circumstances concerned.

JOINT DEVELOPMENT AGREEMENT

It is an arrangement between an owner of the land and a builder where the land owner contributes the land and the developer undertakes the responsibility of obtaining approvals, property development, launching and marketing the project with the help of his financial resources.

Depending upon the land price, the joint development ratio is decided among the owner and the builder.

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ESSENTIAL INGREDIENTS OF A JOINT VENTURE AGREEMENT

- Description of the parties along with the date of execution of the agreement.
- Definition clause
- Formation, Place and Principle place of business
- Purpose/objective
- Term/Duration
- Description with regards to percentage of participation
- Losses
- Liabilities
- Indemnities
- Initial Contributions
- Venture interests

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ESSENTIAL INGREDIENTS OF A JOINT VENTURE AGREEMENT

- Management of Joint Venture
- Terms & Conditions of Joint Venture
- Salaries and expenses
- Delegation of Authority – Administrator of Joint Venture
- Joint Venture Bank Accounts
- Escrow Accounts
- Insurance Coverage
- Accounting and Auditing
- Resolution of disputes
- Governing Law
- Signatures of the parties
- Full description of Witnesses

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Cancellation and rectification of documents

If for any reasons, the document executed between the parties is required to be cancelled, the same can be done so by execution of cancellation deed.

However, a sale deed cannot be cancelled. In case the party wants to revert back to the original position then cancellation will virtually be a Conveyance Deed. For the reason Sale Deed is a document which absolutely vest right in the property.

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DEED OF CONFIRMATION TO RECTIFY ERRORS

A deed of confirmation is made to rectify an error in a deed. The error may be in the spelling of a name, property description, address, or in execution. This deed is also referred to as a correction deed.

A confirmation may be made either by acquiescence by limitation or by a deed.

The Indian Registration Act recognizes a confirmation deed. According to Section 17 of the Act, any deed confirming an interest in property needs to be registered. A confirmation deed attracts stamp duty.

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In case the main document is registered or to be registered, a corresponding confirmation deed also requires registration.

It is to be noted that legal documents involving property are lengthy and voluminous. Errors may creep into the main documents of sale, mortgage, or lease. The errors are corrected through supplementary documents such as a deed of confirmation, rectification deed or cancellation deed.

Through the deed the parties give consent to a transaction already executed. Through this confirmation, the party further strengthens and gives legal validity to the estate. In case of a confirmation deed, a person may confirm and assent to the documents of conveyance executed by another person. This is required when a person is not made a party to the main document of conveyance by oversight or ignorance.

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An agreement for sale, mortgage, lease, partition, licence etc may be cancelled by the parties with the consent of all parties involved in the transaction.

In case all the parties do not consent to the cancellation, the affected party needs to seek the intervention of the court by filing a suit in accordance with the provisions of Section 13 of the Specific Relief Act. It is important to note that a duly executed and registered deed of conveyance cannot be cancelled by a deed of cancellation only. The parties need to execute a reconveyance deed and get it registered too.

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Execution of documents

To "execute a document" can mean to bring it into effect.

However, it can also mean to carry out the formalities (signature, sealing, etc) needed to bring the document into effect, and in this case it probably means to sign it as one of the principals (rather than simply as a witness).

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