Chapter 3: OVERVIEW OF STAMP DUTY ACTS

‘There are only two things worse than an empty canvas; death and taxes.’

Jarold Kings.

3.1. Indian Stamp Act

The basic purpose of Indian Stamp Act, 1899 is to raise revenue to Government. However, over a period of time, the stamped document has obtained so much value that a ‘stamped document’ is considered much more authentic and reliable than an unstamped document, this is so because the payment of proper stamp duty on instruments bestows regality on them. Such instruments get evidentiary value and are admitted as evidence in courts. Hence a stamped document is considered more authentic and realistic than an unstamped document.

3.2. Object of Stamp Duty

The Stamp Act is a purely fiscal measure enacted to secure revenue for the State on certain class of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. It is designed to secure revenue for the State on certain classes of instruments and all its provisions must be construed as having in view the protection of revenue and the prevention of evasion of the revenue that it imposes. This object is attained by excluding documents which are not stamped or insufficiently stamped, as evidence. It is not, however, the purpose of the Act to exclude evidence or to enable parties to avoid their obligations on technical grounds or to alter the terms of the bargain between the parties. The stringent provisions
of the Act are concerned solely in the interest of the revenue, and once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument.\textsuperscript{67} Object and reasons could be looked into to find out as to what mischief is sought to be remedied and how the Government proposed to get over the situation faced by it by seeking to amend the law.\textsuperscript{68}

The enactment is prohibitory. It is confined to affording a party a protection of which he may avail himself or not as he pleases. Although the protection of revenue is its primary object, it is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the penalty limited in cases for which a penalty is to be imposed.\textsuperscript{69}

Rule making power enables the state to make rules to carry out the purpose of the Act and cannot override the statute. Powers of the Registering Authority exercising quasi judicial functions cannot be curtailed by the recommendations of the District level Committee.\textsuperscript{70} The object of the Stamp Act is to secure revenue for the state.\textsuperscript{71} The object of the Act is three fold:

(a) to raise the revenue by taxing instruments;
(b) to penalise by rendering an unduly stamped instrument, to be inadmissible in evidence and
(c) also to provide for penalty against evasions of Stamp duty.
    (i) by impounding of instruments,
    (ii) imposing penalty and
    (iii) by prosecuting defaulter for evasion.\textsuperscript{72}

\textsuperscript{68} M/s. Park View Enterprises v. State of Tamil Nadu, AIR 1990 Mad 251 (DB).
\textsuperscript{72} K. Manavala Naicker v. K.R. Gopal Krishnaiah, AIR 1969 AP 417.
3.2.1. Statement of Objects and Reasons

It is well-settled that where the language of a statutory provision is clear and unambiguous, the Statement of Objects and Reasons cannot be utilized for interpreting the provisions. However, where the language of the provision, as in the present case, is not clear, the Statement of Objects and Reasons can be used for a limited purpose of understanding the background of antecedent state of affairs leading up to the legislation, the situation that existed, the evil sought to be remedied and the cure that is tried to be provided.\(^73\)

The Statement of Objects and Reasons is not otherwise admissible as an aid to the construction of a statue but the same simply assists as to the necessity of introduction of such a law and since the decision of the Apex Court in the law seems to be well settled without a contra note being sounded till now that while construing the clear terms of an Act the Court is not required to ascertain the object of the enactment.\(^74\) Though in case of an urgent need of the situation by reasons where from the intent of the Legislature is to be assessed, the Statement of Objects and Reasons can be looked into for the limited purpose of ascertaining the conditions prevailing at the time which prompted actuated the proposer of the Bill to introduce the same and the extent of remedying the existing evil of the society.\(^75\)

The Statement of Objects and Reasons when the Bill was presented to Parliament, the reports of the Committee, if any, preceded the Bill, legislative history, other statues in pari passu and legislation in other States which pertain to the same subject matter, persons, things or relations should be studied.\(^76\) Occasional excursions into the debates of Parliament are permitted.\(^77\)

\(^74\) *Aswini Kumar Ghosh v. Arabinda Bose*, (1953 SCR 1.)
\(^75\) *Subhas Ramkumar Bind v. State of Maharashtra*, AIR 2003 SC 269, 276, 277.
\(^76\) *Kehar Singh v. State of (Delhi Admn.)*, AIR 1988 SC 1883 at 1946.
3.2.2. Instruments Chargeable under Stamp Duty

Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded; section 2(17) of Indian Stamp Act. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule. The list includes all usual instruments like affidavit, lease, memorandum and articles of company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy, partnership deed, proxy, shares etc. Thus, if an instrument is not listed in the schedule, no stamp duty is payable. ‘Instrument’ does not include ordinary letters. Similarly, an unsigned draft of an agreement is not an ‘instrument’.

3.2.3. Duty Payable in Several Instruments

In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of rupee one is payable; section 4(1). If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments; section 5. However, it may happen that one instrument covering only one matter can come under more than one description given in Schedule to Stamp Act. In such case, highest rate specified among the different heads will prevail; section 6.

3.2.4. Powers to Reduce Stamp Duty

Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies; section 9(1). ‘Government’ means Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and ‘State Government’ in case of stamp duties on other documents; section 9(2).
3.2.5. Mode of Payment of Stamp Duty

- The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution; section 17.

- Instrument executed out of India can be stamped within three months after it is first received in India; section 18(1).

- However, in case of bill of exchange or promissory note made out of India, it should be stamped by first holder in India before he presents for payment or endorses or negotiates in India; section 19.

3.2.5.1. Survey: Payment of Stamp Duty

Questionnaire item no. 5 is related to procedure for payment of Stamp Duty. The detail of the questionnaire item no. 5 is as under;

**Question:** In the procedure of payment of duties under Stamp Act–

<table>
<thead>
<tr>
<th>Response</th>
</tr>
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<tbody>
<tr>
<td>(a) emphasis should be put on system of payment by stamp papers and adhesive stamps only. 80</td>
</tr>
<tr>
<td>(b) arrangement should be made to see that payment is made through government treasury only. 120</td>
</tr>
<tr>
<td>(c) arrangement should be made to see that payment in the nationalized and private banks be made by using franking machines. 108</td>
</tr>
<tr>
<td>(d) system of e-payment should be implemented. 87</td>
</tr>
</tbody>
</table>

- The questionnaires were sent to 601 persons, among those 408 have responded, 13 respondents have not answered this item.
**Figure 3.1:** Survey Response Graph for Item No. 5

![Survey Response Graph](image)

**Majority Response:**

In the procedure of payment of duties under Stamp Act – arrangement should be made to see that payment is made through government treasury only.

**Observations:**

Majority numbers of respondents have opted for payment through Government treasury only, which probably is because of Fake Stamp Scam prevailing during the period of survey. It is for this reason; the respondents have rejected the option of payment by Stamp Papers and Adhesive Stamps, even though stamp papers are meant to have psychological appreciation of satisfaction in people’s mind. However, the system of accepting the payment of stamp duty has to be improved with substantial introduction of current financial transactions of financial institutions. The system of e-payment shall therefore be adopted in all the various forms as available for similar type of financial transaction.

**3.2.6. Valuation for Stamp Duty**

In some cases, stamp duty is payable on *ad valorem* basis i.e. on basis of value of property etc. In such cases, value is decided on prescribed basis.
3.2.7. Adjudication as to Stamp Duty Payable

Adjudication means determining the duty payable. Normally, the person paying the duty himself may decide the stamp duty payable and pay accordingly. However, in cases of complex documents, the person paying the duty may not be sure of the stamp duty payable. In such case, he can apply for opinion of Collector. He has to apply with draft document and prescribed fees. Collector will determine the stamp duty payable as per his judgment; section 31(1).

3.2.8. Meaning of ‘Duly Stamped’

‘Duly Stamped’ means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India; section 2(11). In case of adhesive stamps, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way that it cannot be used for other instrument and stamp appears on face of instrument. If stamp is not so used, the instrument is treated as ‘un-stamped’. Similarly, when stamp duty paid is not adequate, the document is treated as ‘not duly stamped’.

3.2.9. Instrument Non Admissible if Not Duly Stamped

An instrument not ‘duly stamped’ cannot be accepted as evidence by civil court, an arbitrator or any other authority authorized to receive evidence. However, the document can be accepted as evidence in criminal court.

3.2.10. Case When Short Payment is by Mistake

If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid; section 41.
3.2.11. **Stamp Duty on Receipt**

Stamp Duty on receipt is rupee one for receipt above rupees five thousand. Receipt includes any note, memorandum or writing, whether signed by any person or not (a) where any money, or any bill of exchange or promissory note is acknowledged to have been received or (b) where any other movable property is acknowledged to have been received in satisfaction of a debt or (c) whereby any debt or demand is acknowledged to have been satisfied or discharged or (d) which signifies or indicates any such acknowledgment; section 2(23).

3.2.12. **Stamp Duty on Transfer of Shares in a Corporate Body**

It is fifty paise for every hundred rupees or part thereof of the value of share. It is seventy five paise as per Article 62 of Schedule I to Stamp Act, reduced to fifty paise per rupees one hundred vide notification No. Standing Order 198(E) dated 16/3/1976. As per section 21, the duty has to be calculated on the basis of market price prevalent on date of instrument and not on the face value of shares.

3.2.13. **Stamp Duty on Transfer in Depository Scheme**

If the company issues securities to one or more depositories, it will have to pay stamp duty on total amount of security issued by it and such securities need not be stamped; section 8A(a) of Stamp Act. If an investor opts out of depository scheme, the securities surrendered to Depository will be issued to him in form of a certificate. Such share certificate should be stamped as if a 'duplicate certificate' has been issued; section 8A(1)(b) of Indian Stamp Act. If securities are purchased or sold under depository scheme, no stamp duty is payable.\(^78\)

\(^78\) [www.legalpundits.com](http://www.legalpundits.com) (Visited on December 12, 2011)
3.2.14. Types of Stamp in India

There are two kinds of stamps (a) impressed stamps, and (b) adhesive stamps.

A. Impressed stamps

- Labels affixed and impressed by proper officer;
- Stamps embossed or engraved on stamped paper; and
- Impressions by franking machines generally being done by the authorised institutions e.g. banks etc. by depositing the necessary amount of stamp duty with the banks. This kind of stamping is mostly preferred on instruments (other than commercial instruments) as at times it becomes difficult to obtain stamps embossed on stamp paper of a higher value such as, Rs. 5,000 or Rs. 10,000. For example, if on an instrument, the stamp duty payable is Rs. 16,00,000 it would be very difficult to collect embossed stamp papers of say Rs. 10,000 aggregating Rs. 16,00,000. Hence, it is convenient for the person paying stamp duty to simply draw a pay order in favor of authorized institutions which shall frank the instrument for an amount of Rs. 16,00,000 as franking may be allowed up to any amount.

B. Adhesive stamps

Adhesive stamps are labels which can be conveniently stuck on the instruments. Adhesive stamps can be further categorized as postal stamps and non-postal stamps. Postal Stamps are used only for transactions with the post office and related functions.

Non-Postal adhesive stamps are:

- Court fee stamp: Court fee stamps are generally used by public and other departments as processing fees for transactions with Government departments, such as Regional Transport Officer, Police, Revenue Officers.
- Revenue Stamp: Revenue stamps are used for acknowledging the receipt of money.
• Notarial Stamp: Notarial stamps are used by a Notary Public who is a duly appointed officer whose function is to draw, attest and certify deeds, conveyances and Power of attorney usually under his official seal along with the notary stamp; Article 42 of the Indian Stamp Act, 1899;

• Special adhesive stamp: The Special adhesive stamps are non-judiciary stamps used in certain financial instruments such as bills of exchange, cheques, promissory notes, instruments of transfer of shares and transfer of debentures; Rule 17 of the Indian Stamp Rules, 1925.

• Foreign bill stamp: Foreign bill stamp is a special adhesive stamp bearing the words Foreign Bill. Such kind of stamp is generally used in case of bills of exchange and promissory note drawn out of India; Rule 17(a) of the Indian Stamp Rules, 1925.

• Broker’s note: Brokers note is a special adhesive stamp bearing the words Broker’s Note. Such kind of stamp is used in case of transactions through brokers or agent to his principal intimating the purchase or sale on account of such principal (a) if any goods exceeding rupees twenty, (b) of any stock or marketable security exceeding rupees twenty; Article 43 of the Indian Stamp Act, 1899.

• Insurance Policy stamp: This kind of stamp is used by the insurance department to authenticate the insurance policies.

• Share transfer stamp: This kind of stamp is used by financial institutions in respect of transactions pertaining to Shares; Article 62 of the Indian Stamp Act, 1899.

3.3. Important Provisions of Stamp Duty

Instruments chargeable to stamp duty: Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded. Any instrument mentioned in Schedule I to Indian Stamp Act, 1899 is chargeable to duty as prescribed in the Schedule. The list includes all usual instruments like affidavit, lease, memorandum and articles of association of a company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy,
partnership deed, proxy, shares etc. Thus, if an instrument is not listed in the Schedule, no stamp duty is payable.

Duty payable when there are several instruments: In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty is payable. If one instrument relates to several distinct matters than stamp duty of aggregate amount is payable on the principal instrument. However, it may happen that one instrument covering only one matter can come under more than one description given in Schedule to Stamp Act in such a case, the highest rate specified among the different heads will prevail.

Powers to reduce stamp duty: The Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. The Government can also compound or consolidate duties in case of issue of shares or debentures by companies. Government means “Central Government” in respect of stamp duties on bills of exchange, cheque, receipts etc. and “State Government” in case of stamp duties on other documents.

Mode of payment of stamp duty: The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution of the same. Instrument executed out of India can be stamped within three months after it is first received in India. However, in case of bill of exchange or promissory note made out of India, it must be stamped by first holder in India before he presents for payment or endorses or negotiates in India.

Valuation for stamp duty: In some cases, stamp duty is payable on ad valorem basis, i.e. on basis of value of property. In such cases, value is decided on prescribed basis by the Government.

Adjudication as to stamp duty payable: Adjudication means determining the proper duty payable on an instrument.

Normally, the person paying the duty himself may calculate the stamp duty payable as per the rates provided in the Indian Stamp Act or the State Stamp
Act, as the case may be, and pay accordingly. However, in cases of complex
documents, the person paying the duty may not be able to ascertain the
correct stamp duty payable, and in such case, he can apply for opinion of the
Collector of Stamps.

For getting the instrument adjudicated, one has to apply with draft document
and prescribed fees for adjudication to the Collector of Stamps. The Collector
of Stamps will then determine the stamp duty payable on such instrument as
per his judgment.

Instrument will not be accepted as evidence if not duly stamped: An
instrument not duly stamped will not be accepted in evidence by court of law,
an arbitrator or any other authority authorized to receive the same in
evidence.

Case when deficient payment is by mistake: If non-payment or deficient
payment of stamp duty is by accident, mistake or urgent necessity, the person
can himself produce the document to Collector of Stamps within one year for
payment of the proper stamp duty. In such a case, the Collector of Stamps
may receive the amount and endorse the document that proper duty has been
paid.

Stamp duty is levied by different States in accordance with their respective
Stamp laws enacted in line with the Indian Stamp Act, 1899. Such stamp duty
collected forms a considerable part of the revenue of the States. Revenue so
collected by the States is earmarked to the State in which they are levied
under the Constitution of India. However, the power to prescribe the rates on
the commercial instruments, as stated in the Indian Stamp Act, 1899 and
Section 74 of the Bombay Stamp Act, 1958, remains with the Parliament.

Provision of the Indian Stamp Act, 1899 and Bombay Stamp Act, 1958 are
more or less similar, so also the Schedules appended to these two Acts.
However, the stamp duties fixed under these Acts materially differ. For
example, with the introduction of the concept of “true market value” of the
immoveable property to Article 20 of the Bombay Stamp Act, 1958, the stamp
duty payable on instruments such as conveyance, exchange, gift, partition,
power of attorney to sell when given for consideration, deed of settlement, transfer of lease, is on the basis of market value of the subject matter and not on the basis of consideration mentioned in such instruments as was provided earlier.

3.4. Instruments under Gujarat Stamp Act, 1958

Schedule I of the Bombay Stamp Act, 1958 comprises of 59 instruments that are chargeable to stamp duty as provided under section 3 of the said Act along with exemptions as contained therein. The 59 instruments are indicated in the form of articles under Schedule I.

Broadly, the 59 articles of Schedule I can be grouped in three categories:

(i) Articles whose amount of Stamp duty is fixed irrespective of the value mentioned in the instrument.

(ii) Articles where depending upon the value mentioned in the document, the amount of stamp duty is varied.

(iii) Articles which attract stamp duty on the consideration mentioned in the document or True Market Value, whichever is higher.

3.4.1. Bombay Stamp Act, 1958: Pattern and Design

The Gujarat State was formed on the 1st May, 1960 as a result of bifurcation of the bigger bilingual State of Bombay into two linguist States of Gujarat and Maharashtra by the Bombay Reorganization Act, 1960. By section 87 of the said Act, the Bombay Acts came in force in the State of Bombay; where continued to be in force in the State of Gujarat or part thereof. Therefore, the Acts having short title with prefix “Bombay” continued to be in force in the State of Gujarat or part thereof. To intend to amend those short titles so as to substitute the prefix “Bombay” by the prefix “Gujarat”, The Gujarat Short Titles (Amendment) 2011, Act was passed. By the said Act short titles of 67 Acts are substituted by word “Gujarat”. Bombay Stamp Act, 1958 was one of
them. Hence the Bombay Stamp Act, 1958 may be called “The Gujarat Stamp Act, 1958”.

The Bombay Stamp Act, 1958 contains 76 sections and 2 schedules. The Act does have VIII chapters.

The preamble indicates that the Act prescribes rates of stamp duty and levies stamp duties on documents as set out in the Act. Section 74 of the Act specifically excludes the Scheme of the Act. Section 3 is a charging section and provides for charging stamp duties on instrument and to that extend in levies duties on instrument and not on the transaction. The taxing event is when the instrument is executed in the State for the first time without being previously executed. Document as defined in Evidence Act means any matter expressed or described upon substance by mean of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter. Explanations to Section 62 of the Evidence makes each counterpart of a document to be primary evidence as mentioned and where document is executed in several parts each part is primary evidence of the document. Section 4 of the Bombay Stamp Act provides for specified documents executed in several parts and the duties chargeable thereon. Here the distinction made is between principal instrument and other instruments Sub Section 4, 5, 6. Further duty is payable and has to be paid on the principal instrument and it is only when such duties are paid that other instruments can be received in the state having regard to Section 7. Section 8 provides for special rates on certain documents as mentioned.

Section 10 prescribes the mode of paying duties on instruments by user of stamps on such instruments. Sections 10 to 14 are machinery sections providing as to how the stamp duty is to be collected. Section 15 provides that when stamp duties are not paid as provided for them the instrument shall be deemed to be not duly stamped. Section 17 to 19 prescribes the time when stamp duty can be said to be duly paid. Events prescribed are two (1) When

79 This word was substituted for the word “Bombay” by Gujarat Act No. 15 of 2011 (Sr. No.. 56) dt 30-4-2011 and deemed to have substituted on 1-5-1960.
the instrument is executed in the state; (2) When the instrument though executed outside is brought into the State.

Section 20 to 29 sets out as to how the instruments have to be valued for the purpose of stamp duty. Section 21 to 23, 25 prescribes how ad valorem stamp duties have to be valued. Section 24, 26, 27 provides for the valuation is cases as mentioned therein.

Section 28 prescribes that all maters must be mentioned in the instrument affection chargeability to stamp duty.

Section 29 prescribes for apportionment of duties regarding separate parts of instrument among different persons.

Section 30 provides for persons liable to pay the stamp duties.

Chapter III Section 31 to 32 B provides for adjudication.

Chapter IV deals with consequences and effect of instrument correctly stamped and not correctly stamped. In particular it contains provisions for impounding of instruments and for inadmissibility of instrument not duly stamped in evidence. Penalty proceedings and prosecutions are provided for. Refund of penalty and excess duty are provided for in Section 44 whilst Section 46 provides for recovery of duties and penalties by distress and sale of movables or as arrears of land revenue as provided therein.

Chapter V makes provisions for allowances and the procedure for the same. Section 52C provides that stamps purchased have to be used within 6 months and if not so done, or no allowances are claimed, the same shall become invalid.

Chapter VI provides for reference, revision and appeal against orders passed under the Act. Procedures for offences and for penalties are provided in Chapter VII. Chapter VIII contains supplemental provisions and inter alia in Section 69 and 70 confers rule making power on State Government generally for purposes of the Act and for specifically provided subject.
Schedule I mentions descriptions of instruments and provide for the proper stamp duty as chargeable. Schedule II provides list of enactments repealed.

Government of Gujarat has framed following rules by experience of the powers conferred by Indian Stamp Act, 1899 and Gujarat Stamp Act, 1958;

1. Gujarat Stamp Rules, 1978,
2. Gujarat Stamp Supply and Sales Rules, 1987,
3. Bombay Stamp (Determination of Market Value of Property) Rules, 1984,

Perusing the above, it may be observed that stamp duty becomes and important source of revenue for the State, affects various transaction of individuals, though it is duty levied on instrument meaning documents which create rights or liability or transfers, limits, extends, extinguishes of records such rights or liabilities. Further generally speaking it is indirect source of revenue though duty becomes payable by the parties to the documents executed in the State.

It is in this context and system that the revenue collection through Stamp Act operates and its knowledge and understanding become significantly vital to avoid the instruments being inadmissible in evidence.

3.5. Rules of Business

As per article 77 of the Indian Constitution all executive actions of the Government of India shall the express to be taken in the name of the President. The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. Constitution under article 116 prescribes details for conduct of business of the State Governments. All executive actions of a State Government are expressed to be taken in the name of the Governor. Article 116 (3) says, ‘the Governors shall make rules for the more convenient transaction of the business of the State Government, and for the allocation among the Ministers of the said business. In so far as it is not business with respect to which the Governor is by or under this constitution

3.6. **Bombay Stamp Act and Other Acts**

Indian Stamp Act 1899 and Bombay Stamp Act 1958 are interrelated with Registration act 1908 and Transfer of Property Act, 1882. Along with these Acts it is necessary to study Indian Contract Act 1872, Power of Attorney Act and Court Fees Act etc. Here some important provisions of those acts are discussed.

3.6.1. **Registration Act, 1908**

The main purpose for which the Act was designed was to ensure information about all deals concerning land so that correct land records could be maintained. The Act is used for proper recording of transactions relating to other immovable property also. The Act provides for registration of other documents also, which can give these documents more authenticity. Registering authorities have been provided in all the districts for this purpose.

Note that this registration is entirely different from registration of charge done by Registrar of Companies under Companies Act. If the charge relates to immovable property, registration with Registrar (appointed by State Government) under Registration Act and registration under Companies Act with ROC both are required.

3.6.1.1. **Documents of which Registration is Compulsory**

Registration of documents relating to immovable property is compulsory. Registration of will is optional.
Documents not requiring registration - Some documents though related to immovable property are not required to be registered. These are given in Section 17(2) of the Act.

3.6.1.2. Time of Presentation for Registration

Document should be submitted for registration within 4 months from date of execution; section 23. Decree or order of Court can be submitted within four months from the day it becomes final. If document is executed by several persons at different times, it may be presented for registration within 4 months from date of each execution; section 24. If a document is executed abroad by some of the parties, it can be presented for registration within four months after its arrival in India; section 26. If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within four months from the date he became aware of the fact that registration of document is invalid; section 23A.

3.6.1.3. Where Document should be Registered

Document relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated; section 28. Other document can be registered in the office of Sub-Registrar where all persons executing the document desire it to be registered; section 29. A Registrar can accept a document which is registerable with sub-registrar who is subordinate to him; section 30(1). Document should be presented for registration at the office of Registrar/Sub-Registrar. However, in special case, the officer may attend residence of any person to accept a document or will; section 31.

All persons executing document must appear before Registrar - All persons executing the document or their representatives, assigns or agents holding power of attorney must appear before registering officer; section 34(1). They have to admit execution and sign the document in presence of Registrar, as required under section 58(1)(a). Appearance may be simultaneous or at different times; section 34(2). If some of the persons are unable to appear
within four months, further time up to additional four months can be given on payment of fine upto ten times the proper registration fee; proviso to section 34(1).

If document relates to transfer of ownership of immovable property, passport size photograph and finger prints of each buyer and seller of such property shall be affixed to document; proviso to section 32A. The Registrar is required to ensure that these are endorsed on the document.

3.6.1.4. Registration by Registering Officer

If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document; section 35(1). He will make necessary entries in the Register maintained by him.

Certification of registration - After all formalities are complete, the Registering Officer will endorse the document with word ‘Registered’, and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document; section 61.

3.6.1.5. Effective Date of Document

A document takes effect from its date of execution and not from date of registration. However, if the document states that it will be effective from a particular date, it will be effective from that date; section 47.

Document registered has priority over oral agreement - Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property. The only exceptions are : (a) If possession of property (movable or immovable) is delivered on basis of such oral agreement and such delivery of possession is valid transfer under any law (b) Mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered which relates to same property; section 48.
3.6.1.6. Effect of Non Registration

If a document which is required to be registered under section 17 or under provisions of Transfer of Property Act, 1882 is not registered, the effect is that such un-registered document does not affect any immovable property comprised therein, cannot be received as evidence of any transaction affecting such property. Thus, the document becomes redundant and useless for all practical purposes. It can be accepted as evidence in criminal proceedings.\(^\text{80}\)

3.6.2. The Gujarat Court Fees Act, 2004

With the establishment of Courts a system was evolved for the payment of fees for adjudication of the cases. The rates of stamp fees leviable in courts and offices established beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay and in proceedings on the appellate side of, High Courts were fixed by Act XXVI of 1867 which were, to the great extent, tentative. Within a span of about two years the experience gained of their working seemed to be conclusive as to their repressive effect on the general litigation of the country. It was thought necessary to make a general reduction in the rates on the institution of civil suits, and to revert to the principle of maximum fee which obtained under the former law. It was proposed to reduce the valuation for the computation of the fee leviable on suits relating to land under temporary settlement or land exempt from the payment of revenue to the Government. In order rectify the repressive effect and in future there may be no confusion between stamp-revenue proper and the revenue derived from what have heretofore been termed judicial stamps, a comprehensive Bill i.e., the Court fees Bill was introduced in the Legislature.\(^\text{81}\)

\(^{80}\) Sir Dinshah Fardanji Mulla, Mulla on the Indian Registration Act (Butterworths, New Delhi, 10\(^{th}\) edn, 2010)

\(^{81}\) K. L. Shethi, Bombay Court Fees Act, with Exhaustive Commentary (United Law Publishers, New Delhi, 2\(^{nd}\) edn, 1974)
At present in Gujarat, the Gujarat Court Fees Act, 2004 is in force. Under that section 2 defines various terms. Chapter II gives details of computation of fees, which includes section 3.

3.6.3. Transfer of Property Act, 1882

As said by Frederic Bastiat “Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.”

By its very existence, society mandates interaction, exchange or transfer. A property, movable or immovable, is transferred from one person to another under various different situations and circumstances and for different values. The transfer may be a gift, an inheritance or an asset acquired by paying full value.

When a movable property is transferred inter vivos (between two living persons), Sales of Goods Act, 1930 comes into play. When an immovable property is transferred from dead person to living person(s), the Transfer of Property Act, 1882 comes into play. In case, the property is transferred from a dead person to a living person(s), the law applied will be the Law of succession. Should a person die without leaving a will (intestate), the law of intestate succession is applicable and in cases where a person dies leaving a will, the law of testamentary succession is applicable.

In India, the personal laws governed the transfer of property assisted by orders of Courts under Civil Procedure Code before the Transfer of Property Act, 1882 came into existence. Transfer of movable goods was regulated to an extent by the Indian Contract Act, 1872. For transfer of immovable property, the Anglo-Indian courts often turned to principles of Justice, Equity and Good Conscience as it prevailed in England at the time. This rarely did any good due to the vast differences in customs and society of the two countries. Of course the rapidly growing commerce and infrastructure in the late nineteenth century lead to more conflicts even in business. Thus, an immediate need was felt for a clear and pragmatic law regarding property and
transfers suited to India and its peculiar problems as well as to take care of
the potential economic problems. The task of drafting such legislation fell
upon the First Law Commission and was later referred to the Second Law
Commission.

A Bill, finally presented to the Legislative Council, became a law on the 17th
of February 1882 and came into force from 1st July of the same year. The
Transfer of Property Act, 1882 mainly deals with transfer of immovable
property. It does not apply to transfers by the operation of law such as transfer
of immovable property necessitated by Order of Court for insolvency or
forfeiture among others. The 137 sections contained within have been divided
into 8 chapters.

Interestingly, nowhere does the Act define ‘What is a transfer of property’. But
it does define ‘transfer’ as a standalone in Section 5.

The Transfer of Property Act, 1882 was intended to define and amend the
existing laws and not to introduce any new principle. It applies only to
voluntary transfers. The following may be enumerated as the objectives of the
Act:

- As per the preamble of the Act, the Transfer of Property Act, 1882 is to
  amend or regulate the law relating to transfer of property by the acts of the
  parties.
- The Act provides a clear, systematic and uniform law for the transfer of
  immovable property.
- The Act completes the Code of Contract since it is an enacted law for
  transfers that take place in furtherance of a contract.
- With provision for *inter vivos* transfers, the Transfer of Property Act, 1882
  provides a law parallel to the existing laws of testamentary and intestate
  transfers.
- The Act is not exhaustive and provides scope to apply the principles of
  Justice, Equity and Good Conscience if a particular case is not governed
  by any provision of law.
Since the Transfer of Property Act, 1882 is not a complete code of transfer of property; we can say its scope is limited. The Act does not apply to all the transfers taking place in India.

Limitation on Transfer: The Act applies to transfer by the act of parties and not by application of law. Thus, its operations are limited to transfers by act of parties only except in a few cases saved by Section 2 of the Act.

Not Exhaustive: There are various kinds of property and various modes of transfer of property. The Act does not incorporate rules for all modes of transfer in existence. The Act does not even claim to be a complete code as apparent from omission of the term ‘consolidate’ from its Preamble.

Transfer of Immovable Property: The Act mainly deals with transfer of immovable properties only.

Exemption of Muslim Law: In case of a conflict between the Transfer of Property Act, 1882 and rules of Muslim Law, the latter will prevail. Section 2 of the Act does not affect inconsistent rules of Muslim Law. Thus, a settlement made in perpetuity for the benefit of descendants of the settler is a valid wakf (charitable gift) wherein there is an ultimate gift in favor of a charity.

Exemption of Rights and Incidents: Certain incidents of a contract or the essential nature of property are exemption from the operation of the Act by Section 2. The Act also saves certain property rights. For example, the right to partition of immovable property is an incident of property but this right is not affected by the provisions of the Transfer of Property Act, 1882.

Entry 6 of List III (Concurrent List) of Seventh Schedule to Constitution reads ‘Transfer of property other than agricultural land; registration of deeds and documents’. Thus, transfer of property is a ‘Concurrent Subject’. Both Central and State Government can take legislative action in respect of transfer of property except that relating to agricultural land.

The Act proposes to prescribe law relating to transfer of property by act of parties. Thus, the Act applies only to voluntary transfer or property. It does not cover transfer of property by ‘will’.
Section 4 of the Act clarifies that the part of the Act which relates to contracts shall be taken as part of Indian Contract Act and some specified sections shall be read as supplemental to Indian Registration Act. Thus, the Act is complimentary to Indian Contract Act and Registration Act. The Act applies both to movable and immovable property.

‘Transfer of Property’ means an act by which a living person conveys property, in present or future, to one or more living persons, or to himself or to himself and one or more other living persons. ‘Living person’ includes a company or association or body of individuals, whether incorporated or not; section 5. The property may be movable or immovable, present or future. Such transfer can be made orally, unless transfer in writing is specifically required under any law; section 9. Any person competent to contract and entitled to transferable property, or authorized to dispose of transferable property on his own, is competent to transfer such property. The property can be transferred wholly or in part. It can be transferred either absolutely or conditionally. Such transfer can be only to the extent and in manner allowed and prescribed by law; Section 7.

3.6.3.1. Sale of Immovable Property

‘Sale’ is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Such transfer in case of tangible immovable property of value of rupees one hundred more can be made only by a registered instrument. Delivery of tangible immovable property is made when seller places the buyer or such person as he directs, in possession of property. Thus, delivery of immovable property can be only by handing over actual possession to buyer or to a person authorized by buyer; Section 54.

3.6.3.2. Mortgage

‘Mortgage’ is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced, by way of loan or an existing or future debt. The transferor is called a mortgagor; the transferee a mortgagee, the principal money and interest of which payment is
secured are called as ‘mortgage money’ and the instrument by which transfer is effected is called a mortgage-deed; section 58(a). Mortgage can be simple mortgage, Mortgage by conditional sale, Usufructuary Mortgage, English Mortgage, Mortgage by deposit of title deeds or Anomalous Mortgage.

3.6.3.3. Possession of Mortgaged Property in Case of Default

Under provisions of section 69 of Transfer of Property Act, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only in case of English mortgage, if there is default of payment of mortgage money. In addition, mortgagee can take possession of mortgaged property where there is specific provision in mortgage deed and the mortgaged property is situated in towns of Kolkata, Chennai or Mumbai. In other cases, possession of property can be taken only with intervention of Court. English Mortgage is where mortgagor binds himself to repay the mortgaged money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer the property to the mortgagor upon payment of the mortgage-money as agreed; section 58(e) of Transfer of Property Act.

3.6.3.4. Charge

Where immovable property of one person is, by act of parties or by operation of law, made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all provisions in respect of ‘simple mortgage’ will apply to such charge; section 100. Mortgage is not a ‘charge’ as per section 100 of Transfer of Property Act, but it will be a ‘charge’ for purpose of registration under Companies Act, as per section 124 of Companies Act.

A 'charge' is not 'mortgage'. In every mortgage, there is 'charge', but every charge is not a mortgage. Section 100 of Transfer of Property Act states that if immovable property is made as security for payment of money and if it does not amount to mortgage, then the later person is said to have a charge on
property. However, a 'charge' does not create an interest in the property. Thus, no particular form is necessary to create 'charge'.

3.6.3.5. Lease of Immovable Property

A lease of immovable property is transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity. Such transfer of right should be in consideration of a price paid or promised, or of money, or a share of crops, or service or anything of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms; Section 105. Lease of property from year to year or for any term exceeding one year can be made only by registered instrument; Section 107.

3.6.3.6. Exchange

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an 'exchange'; Section 118.

3.6.3.7. Actionable Claim

‘Actionable claim’ means a claim to any debt or to any beneficial in movable property not in possession (either actual or constructive) of the claimant. The debt should be other than secured by mortgage of immovable property or pledge of movable property. The claim should be such as Civil Court would recognize as affording grounds for relief. Such debt or beneficial interest is existent, accruing, conditional or contingent; section 3(6). Such transfer of an actionable claim shall be effected only by execution of an instrument is writing; section 130. One normal example is that receivable from a person is ‘actionable claim’, which can be transferred to another.

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3.6.4. Indian Contract Act 1872

The law relating to contracts in India is contained in Indian Contract Act, 1872. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to the All the States of India except the State of Jammu & Kashmir. It determines the circumstances in which promise made by the parties to a contract shall be legally binding on them. All of us enter into a number of contracts everyday knowingly or unknowingly. Each contract creates some right and duties upon the contracting parties. Indian contract deals with the enforcement of these rights and duties upon the parties in India.

The Third Law commission of British India formed in 1861 under the stewardship of Chairman Sir John Romilly, with initial members as Sir Edward Ryan, R. Lowe, J.M. Macleod, Sir W. Erle (succeeded by Sir. W.M. James) and Justice Wills (succeeded by J. Henderson), had presented the report on contract law for India as Draft Contract Law (1866). The Draft Law was enacted as The Act 9 of 1872 on 25th April 1872 and the Indian Contract Act, 1872 came into force with effect from September 1, 1872.

Before the enactment of the Indian Contract Act, 1872, there was no codified law for contract in India. In the Presidency Towns of Madras, Bombay and Calcutta law relating to contract was dealt with the Charter granted in 1726 by King George I to the East India Company. Thereafter in 1781, in the Presidency Towns, Act of Settlement passed by the British Government came into force. Act of Settlement required the Supreme Court of India that questions of inheritance and succession and all matters of contract and dealing between party and party should be determined in case of Hindu as per Hindu law and in case of Muslim as per Muslim law and when parties to a suit belonged to different persuasions, then the law of the defendant was to apply. In outside Presidency Towns matters with regard to contract was mainly dealt with English Contract Laws; the principle of justice, equity and good conscience was followed.
3.6.4.1. **Essential Elements of a Valid Contract**

According to Section 10, "All agreements are contracts, if they are made by the free consent of the parties, competent to contract, for a lawful consideration with a lawful object, and not hereby expressly to be void."

Essential Elements of a Valid Contract are:

- **Proper offer and proper acceptance:** There must be an agreement based on a lawful offer made by person to another and lawful acceptance of that offer made by the latter. Section 3 to 9 of the Contract Act, 1872 lay down the rules for making valid acceptance.

- **Lawful consideration:** An agreement to form a valid contract should be supported by consideration. Consideration means “something in return” (quid pro quo). It can be cash, kind, an act or abstinence. It can be past, present or future. However, consideration should be real and lawful.

- **Competent to contract or capacity:** In order to make a valid contract the parties to it must be competent to be contracted. According to section 11 of the Contract Act, a person is considered to be competent to contract if he satisfies the following criterion:
  - The person has reached the age of maturity.
  - The person is of sound mind.
  - The person is not disqualified from contracting by any law.

- **Free Consent:** To constitute a valid contract there must be free and genuine consent of the parties to the contract. It should not be obtained by misrepresentation, fraud, coercion, undue influence or mistake.

- **Lawful Object and Agreement:** The object of the agreement must not be illegal or unlawful.

- **Agreement not declared void or illegal:** Agreements which have been expressly declared void or illegal by law are not enforceable at law; hence they do not constitute a valid contract.

- **Intention to Create Legal Relationships:** When the two parties enter into an agreement, there must be intention to create a legal relationship between them. If there is no such intention on the part of the parties, there
is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship; as such they are not contracts.

- Certainty, Possibility Of Performance
- Legal Formalities 10. by surety

### 3.6.4.2. Types of Contracts

On the basis of validity:

Valid contract: An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.

Void contract; Section 2(g): A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may be valid and binding on the parties. It may subsequently become void. There are many judgments which have stated that where any crime has been converted into a "Source of Profit" or if any act to be done under any contract is opposed to "Public Policy" under any contract than that contract itself cannot be enforced under the law-

Voidable contract; Section 2(i): An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract. If the essential element of free consent is missing in a contract, the law confers right on the aggrieved party either to reject the contract or to accept it. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.

Illegal contract: A contract is illegal if it is forbidden by law; or is of such nature that, if permitted, would defeat the provisions of any law or is fraudulent; or involves or implies injury to a person or property of another, or court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void ab initio.

“All illegal agreements are void agreements but all void agreements are not illegal.”
Unenforceable contract: Where a contract is good in substance but because of some technical defect cannot be enforced by law is called unenforceable contract. These contracts are neither void nor voidable.

On the basis of formation:

Express contract: Where the terms of the contract are expressly agreed upon in words, written or spoken, at the time of formation, the contract is said to be express contract.

Implied contract: An implied contract is one which is inferred from the acts or conduct of the parties or from the circumstances of the cases. Where a proposal or acceptance is made otherwise than in words, promise is said to be implied.

Quasi contract: A quasi contract is created by law. Thus, quasi contracts are strictly not contracts as there is no intention of parties to enter into a contract. It is legal obligation which is imposed on a party who is required to perform it. A quasi contract is based on the principle that a person shall not be allowed to enrich himself at the expense of another.

On the basis of performance:

Executed contract: An executed contract is one in which both the parties have performed their respective obligation.

Executory contract: An executory contract is one where one or both the parties to the contract have still to perform their obligations in future. Thus, a contract which is partially performed or wholly unperformed is termed as executory contract.

Unilateral contract: A unilateral contract is one in which only one party has to perform his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time of the contract or before the contract comes into existence.

Bilateral contract: A bilateral contract is one in which the obligation on both the parties to the contract is outstanding at the time of the formation of the
contract. Bilateral contracts are also known as contracts with executory consideration.

3.6.4.3. Agency

In law, the relationship that exists when one person or party; the principal engages another; the agent to act for him, e.g. to do his work, to sell his goods, to manage his business. The law of agency thus governs the legal relationship in which the agent deals with a third party on behalf of the principal. The competent agent is legally capable of acting for this principal vis à vis the third party. Hence, the process of concluding a contract through an agent involves a twofold relationship. On the one hand, the law of agency is concerned with the external business relations of an economic unit and with the powers of the various representatives to affect the legal position of the principal. On the other hand, it rules the internal relationship between principal and agent as well, thereby imposing certain duties on the representative (diligence, accounting, good faith, etc.).

Under section 201 to 210 an agency may come to an end in a variety of ways;

(i) By the principal revoking the agency; however, principal cannot revoke an agency coupled with interest to the prejudice of such interest. Such Agency is coupled with interest. An agency is coupled with interest when the agent himself has an interest in the subject-matter of the agency, e.g., where the goods are consigned by an upcountry constituent to a commission agent for sale, with poor to recoup himself from the sale proceeds, the advances made by him to the principal against the security of the goods; in such a case, the principal cannot revoke the agent’s authority till the goods are actually sold, nor is the agency terminated by death or insanity;

(ii) By the agent renouncing the business of agency;

(iii) By the business of agency being completed;

(iv) By the principal being adjudicated insolvent; Section 201 of The Indian Contract Act. 1872.
The principal also cannot revoke the agent’s authority after it has been partly exercised, so as to bind the principal; Section 204, though he can always do so, before such authority has been so exercised; Section 203.

Further, as per section 205, if the agency is for a fixed period, the principal cannot terminate the agency before the time expired, except for sufficient cause. If he does, he is liable to compensate the agent for the loss caused to him thereby. The same rules apply where the agent, renounces an agency for a fixed period. Notice in this connection that want of skill continuous disobedience of lawful orders, and rude or insulting behavior has been held to be sufficient cause for dismissal of an agent.

Further, reasonable notice has to be given by one party to the other; otherwise, damage resulting from want of such notice, will have to be paid; Section 206. As per section 207, the revocation or renunciation of an agency may be made expressly or impliedly by conduct. The termination does not take effect as regards the agent, till it becomes known to him and as regards third party, till the termination is known to them; Section 208.

When an agent’s authority is terminated, it operates as a termination of subagent also; Section 210.84

3.6.5. Power of Attorney Act, 1882

‘Power of Attorney’ is defined under Indian law as a legal document in which the appointer of the document authorizes someone else to act on his behalf. The rights conferred to the person depend on the specific conditions included in the format of this document, called the Power of Attorney form. Sometimes, the rights of the appointee are very limited and in some cases, the powers are very broad.

The appointee can be bestowed with several rights, such as the right to sign a contract on your behalf, the right to take your health care decisions, the right

84 Federick Pollock, Sir Dinshah Fardunji Mulla, Pollock and Mulla on Indian Contract and Specific Relief Acts, (Butterworths, New Delhi 2nd edn 1986)
to handle your monetary transactions, the right to sell your property or any other legal right.

As per Indian law, a power of attorney is a legal document that has to be properly framed; using the right legal terminology and setting out the objectives and responsibilities that you wish to authorize the appointee to carry out on your behalf.

If you want to authorize someone to act as a power of attorney on your behalf, it must be signed and notarized by a certified notary advocate, who is able to declare that you are competent at the time of signing the document to issue the said power of attorney. You will need to show your ID to the notary advocate before he/she is able to certify and issue the document.

3.6.5.1. Indian Law: Types of Power of Attorney Documents

There are different types of Power of Attorney:

Limited Power of Attorney:

A limited power of attorney gives the appointee very limited powers, to do a specific act, such as authority to sell property on the appointer’s behalf.

General Power of Attorney:

A general power of attorney authorizes the appointee with several rights and very broad powers, to execute any legal act on behalf of the appointer. This type of a Power of Attorney provides a list of activities that the appointer wants the appointee to perform on his behalf.

Durable Power of Attorney:

A general or limited power of attorney expires in case the principal or appointer becomes incapacitated. A durable power of attorney was created to overcome this limitation. A durable power of attorney does not terminate, if the appointer becomes incapacitated. It still remains effective. However, a durable power of attorney must include specific conditions, which authorize the appointee to survive the incapacity of the appointer. Such a power of attorney
comes into effect as soon as it is signed by the appointer, unless restricted by some legal condition.

3.6.5.2. Power of Attorney as an Agency

(i) A power of attorney is a delegation of authority in writing by which one person is empowered to do an act in the name of the other. The person who acts on behalf of another person (the principal) by his authority, express or implied, is called an agent and the relation between him and his principal is called agency.

(ii) A power of attorney holder is nothing but an agent as defined in Section 182 of the Indian Contract Act, 1872. The authority of an agent is his power to affect his principal’s position by doing acts on his behalf. Actual authority is the legal relationship between the principal and agent created by a consensual agreement to which they alone are parties.

(iii) A power of attorney is a document of convenience. Where circumstances require, appointing an agent formally to act for the principal in a particular transaction, or a series of transactions, or to manage the affairs of the principal generally, the necessary authority is conferred by a power of attorney.

(iv) In typical commercial transactions, a power of attorney may also purport to act as security to enable the security holder to exercise the powers conferred on him, which would be difficult for the donor to perform at a subsequent time. This subsequent nature of a power of attorney is dealt with herein.

3.6.5.3. Power of Attorney and Stamp Duty Evasion

As we know, through power of attorney delegation of authority is made. The relation of principal and agent is established. In transaction of immovable property this form of instrument is a tool of tax evasion. The response to the survey confirms this belief. The detail of the questionnaire item no. 14 is as under;
Question: Of all commoner practices of evasion or avoidance of payment of stamp duties which one of the following is more prevalent -

(a) avoid payment of stamp duty by non-execution of instruments.

(b) execute other type of instruments e.g. ‘Power of Attorney’ instead of ‘conveyance’ or ‘Agreement to sell’

(c) disclosing inadequate consideration amount in the instrument.

(d) taking undue benefit of exemption of stamp duty.

Response

- 122
- 149
- 74
- 54

The questionnaires were sent to 601 persons, among those 408 have responded, 9 respondents have not answered this item.

Figure 3.2: Survey Response Graph for Item No. 14

Majority Response:

To execute other type of instruments e.g. ‘Power of Attorney’ instead of ‘conveyance’ or ‘Agreement to sell’ is more prevalent way of all commoner practices of evasion or avoidance of payment of stamp duties.

Observations:

No doubt power of attorney was a very popular method of tax evasion in case of transfer of immovable property. But so far as Gujarat is concern, this method of tax evasion is controlled by amending Bombay Stamp Act, 1958.
In Gujarat at present power of attorney with possession is treated as conveyance. The explanation I was inserted under article 20(d) of Schedule I by Gujarat Amendment Act, 13 of 1994. The said explanation is as under;

“For the purpose of this articles, an agreement to sell an immovable property or an irrevocable power of attorney shall, in case of transfer of possession of such property before, at the time of, or after the execution of such agreement or power of attorney, be deemed to be a conveyance and the stamp duty thereon shall be chargeable accordingly: Provided that the provisions of section 32-A shall apply mutatis mutandis to such agreement or power of attorney as are applicable to a conveyance : Provided further that were subsequently a conveyance is executed in pursuance of such agreement of sale, or an irrevocable power of attorney, the stamp duty, if any, already paid and recovered on the agreement of sale or an irrevocable power of attorney which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance.”

3.6.5.4. Termination of a Power of Attorney

a) Generally speaking, a power of attorney can be terminated or cancelled by the principal by revoking his authority or by the power of attorney holder renouncing his authority.

b) According to Section 201 of the Contract Act, an agency can be terminated by the principal by revoking his authority or by the agent renouncing his authority, unless such revocation is prohibited under Section 202 of the Contract Act (quoted herein-below). Section 201 of the Contract Act also states that an agency terminates, inter alia, by death of principal or agent.

c) Now, the questions that arise are whether a power of attorney can be irrevocable in nature, and, whether an irrevocable power of attorney granted would terminate on death of a donor? In such an event, would the security holder under a power of attorney, cease to hold such security in the event the donor dies?
3.6.5.5. Other Acts: Relevant to Bombay Stamp Act, 1958

Many Acts are referred in Bombay Stamp Act 1958 for clarification of the definitions, sanctions and schedule. The list of the Acts referred and relevant is as under.

1) Bombay Coasting Vessels Act, 1838,
2) Indian Registrations of Ships Act, 1841,
3) Gujarat Panchayat Act, 1993,
4) Local Authorities Loans Act, 1914,
5) Indian Stamp Act, 1899,
6) General Clauses Act, 1897,
7) Code of Criminal Procedure, 1973,
8) Indian Coinage Act, 1906,
9) The Prevention of corruption Act, 1947,
10) Public Servants (Inquires) Act, 1850,
11) Indian Succession Act, 1925,
12) The Army Act, 1950,
13) The Air Force Act, 1950,
14) The securities contracts (Regulation) Act, 1956,
15) The Companies Act, 1956,
16) Registration Act, 1908,
17) The Gujarat Court fees act, 1870,
18) Transfer of Property Act, 2004,
19) Indian Contract Act 1872,
20) Power of Attorney Act, 1882,
21) The Administrator General Act, 1963,
22) The Indian Trust Act, 1982,
23) The Benami Transactions (Prohibition) Act, 1988,
24) The Bombay Hereditary Offices Act, 1874,
26) The Copyright Act, 1957,
27) The Gujarat Cooperative Societies act, 1961,
28) Non Trading Corporation Act, 1959,
29) The Gujarat Housing Board Act, 1961
30) The Gujarat Rural Housing Board Act, 1972,
31) The Gujarat Ownership Flats Act, 1973,
32) The Indians Customs Act, 1962
33) The Central Excise and Salt Act, 1944
34) The Gujarat Agricultural Credit (Provision of facilities) Act, 1979,
35) The Gujarat Rural Debtor’s Relief Act, 1976