

Unit I: Concept of Property and General Principles Relating to Transfer of Property

The Transfer of Property Act, 1882, regulates the transfer of property in India. It was enacted on 17th February, 1882, and came into force from 1st July, 1882.

a.) Concept of Property

‘Property’ has a wide connotation in its real sense and it refers to all kinds of property, movable or immovable, tangible or intangible, anything that is a source of wealth or income.

A person, who has the exclusive right to the things that is owned by him, i.e. the proprietor, is free to claim, use and dispose them as he pleases. He can exchange them for other things, or gift them to any other person without taking anything in return, or just let it waste. He enjoys the right to rent, sell, mortgage, transfer, exchange, consume or even destroy them; he can also exclude others from doing these actions.

There are certain things like water, air, sun, etc. over which no one can claim exclusive rights and therefore, cannot be called ‘Property’.

Thus, the principles to property rights can be summed up as-

- Exclusive right over the use of the property any which way it shall please him
- Free to derive any benefit from the property
- Right to sell or transfer the property to whomever he shall wish
- Right to exclude others from the property

Distinction between Movable and Immovable Property

Movable Property:

The General Clauses Act of Transfer of Property Act, 1882, has no distinctive definition of the term ‘movable property’. It merely has been defined as ‘property of every description except immovable property’. Thus, it is essential to examine what are the things that fall under the category of ‘immovable property’.

Immovable Property:

The Transfer of Property Act, 1882, does not provide an exhaustive definition of the term ‘immovable property’. It simply states that that standing timber, growing crops and grass shall be excluded from ‘immovable property’.

According to Section 3 (26)¹ of the Act, immovable property shall include-

- Land- in its legal term land includes following elements-
 - a) A defined portion of the earth’s surface area
 - b) Ground beneath the surface
 - c) All-natural objects that lie under the surface e.g. minerals.
- Benefits arising out of land,
- Things attached to the earth, or
- Permanently fastened to anything attached to the earth.

‘Attached to the earth’ means-

- Rooted to the earth as the trees or shrubs are;
- Imbedded in the earth as the walls or buildings; or
- Attached to what is embedded i.e. fixtures.

Movable Property	Immovable Property
Can comfortably be shifted or transferred without its quantity, shape, capacity or quality. Example- books, timber, vehicles, etc.	Cannot be shifted or transported to another place with ease, and if done it will change its shape, quantity, quality or capacity. Example- land, buildings, trees attached to the ground, etc.
Mango trees cut and sold for timber purposes.	Mango trees sold for fruits and nourishment.
No need to register under the Indian Registration Act, 1908.	Mandatory to register under the Act each time the property is transferred.
Liable to pay sales tax.	Liable to pay stamp duty and registration fee.
The transfer of property is considered complete by mere delivery with intention to transfer.	The transfer of the property mandates registry in the name of the transferee, mere delivery is not sufficient.
Does not form an accretion to an ancestral impartible estate. Case law- <i>Thakur Hari Singh v. Commissioner</i>	Forms an accretion to an ancestral impartible estate.

¹General Causes Act, 1897.

of Income-tax ²	Case law- <i>MahendraSingji v. IswarSingji</i> ³
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b.) Conditions Restricting Transfer

Sections 10-18 of Transfer of Property Act, 1882, deals with various kinds of conditions that can or cannot be imposed while transferring a property.

The right of disposition of the transferee shall be determined by the extent to which the person who transfers his interest in the property decides. ‘Condition Restraining alienation’ is said to exist where the transferee’s power to transfer or dispose of the property held by him, is restricted. Section 10 of the Act states that ‘absolute’ restriction or limitation that restrains the buyer from alienating the property is void.

Case Law

#1. Roshier v. Roshier⁴

The Case: Mr. J.B. Roshier made a will in which he gifted all his real estate to his son, with a condition that if he ever wanted to sell it, he shall offer it to Roshier’s wife at a certain amount (that was the one-fifth rate) and nobody else.

The Verdict: The Court held that by restricting the son from selling or by compelling him to sell at an undervalued price resulted to absolute restraint on alienation and therefore, void.

#2. Renand v. Tourangeaon⁵

The Case: A property was transferred with a condition that the transferee shall not sell it for 20 years.

The Verdict: The Court held that this condition amounted to absolute restriction, therefore, void. Section 10 of the Act is based on the principle that law favors alienation to accumulation, encouraging unrestrained circulation and disposal of properties.

²AIR 1968 Raj. 5

³1952 B. 243.

⁴(1884) 26 Ch. D. 801.

⁵(1867). LR 2 PC 4.

There are two exceptions to the rule-

- 1) In cases of lease agreements, as the restraint here is for the benefit of the lesser or the estate leased out.
- 2) Secondly, where the property is transferred for the benefit of a woman (who is not a Hindu, Muslim or a Buddhist), with a condition that she doesn't have the power during her marriage to transfer or create any encumbrance in the sale of property transferred to her.

Absolute and Partial Restriction

Restrictions on alienation can be absolute or partial. Absolute restrictions are void under Section 10 of the Act, but partial limitations can be permitted.

As in the case of *Renand v. Tourangeon*⁶ if the restricting condition would have been of 2-3 years instead of 20, it would have been partial restriction, thus, making it valid.

c.) Definition of Transfer of Property

Transfer of property is defined in Section 5 of the Act, and is stated to mean “an act by which a living person conveys property, in present or in future, to one or more other living persons, or, himself and one or more other living persons”.

A living person refers to an individual or a company or an association or body of individuals; imperative of the fact that its incorporated or not.

The word ‘transfer’ has a very wide range and it covers either transfer of all rights or any one or more of the subordinate rights of the property.

Salient Points of Section 5 of Transfer of Property Act

- ‘Transfer’ can happen only from living person/s to living person/s.
- It can take place in the present or future but the transferor shall be a living person.
- Living person includes company or associations, etc.
- Other laws that govern transfer are not affected by Transfer of property Act.
- The transfer of property can be implied or expressed.

Requisites of a Valid Transfer

- 1) Section 5 specifies that the transfer shall be between two or more living persons.
- 2) Section 6 states about the property shall be transferable or non-transferable.
- 3) Section 7 describes person/s who are competent to transfer.

⁶(1867). LR 2 PC 4.

4) Section 9 mentions that the transfer shall be done in the mode as prescribed by the Act.

5) The transfer consideration or object shall be lawful.

The Persons who are competent to Transfer

Every person is competent if-

- He is of age of majority. Generally, 18 years but in cases where a guardian has been appointed for a minor, it is 21 years.

In the case of *Mallikarjuna v. Mareppa*⁷ the property was bought in the name of buyer's minor son's name. After some years it was sold off while the son was still a minor. The sale was declared void as the guardian had not taken the mandatory court permission needed under Section 8 of the Hindu Minority and Guardianship Act, 1956.

Neither can a minor be a transferor, such a contract shall be void.

- a person should be of sound mind; any contract by a person of unsound mind shall be void.
- Persons can be authorized by the title holder to dispose of the property under power of attorney.

Kinds of Transfer

The Act acknowledges five kinds of transfers-

- 1) Sale- is a complete transfer of property rights for money.
- 2) Mortgage- is a limited transfer of interest in the property.
- 3) Lease- gives rights to immovable property for a limited period.
- 4) Exchange- gives complete transfer of rights like a sale but the consideration is not money but some other thing.
- 5) Gift- is given free, there is no consideration involved.

d.) Transferable and Non-transferable Property

Section 6 of Transfer of Property Act, 1882, states that property of any kind may be transferred except for those as otherwise provided by this Act or any other law that is in force at the moment.

It enumerates different kinds of property that shall not be transferred-

Clause a) Spessuccessionis

⁷ILR 2007 KAR 5357.

Spessuccessionis means chance or expectancy of succession, then all such property is not transferable.

Under this clause it means of succession i.e. when there is a possibility of getting property in future through

- a) Chance of an heir apparent succeeding an estate,
- b) Chance of a relative obtaining a legacy on the death of a kinsman, or
- c) Any other mere possibility of like nature.

Clause b.) Right to Re-entry

The second exception to the general transferability states that a mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected. Such restriction is generally inserted in a lease, empowering the lessor and helping him safeguard his property.

Clause c) Right to Easement

Easement is a right which exists for beneficial enjoyment of a land and is exercised upon the land of another person. Hence, it is a right connected to the property and has no independent existence. It cannot be transferred except for the dominant heritage.

Clause d) Restricted Interest

It says that an interest in property restricted in its enjoyment to the owner personally cannot be transferred. For example, if a house has been taken on rent for personal use by someone, he cannot transfer it to another.

R. Rajegowda v. H R Shankare Gowda⁸

It was held that as absolute right of alienation was not awarded, therefore, the person cannot pass on such property in his will.

Clause dd) Right to Future Maintenance

A right to future maintenance is granted for the personal (e.g. a Hindu widow) benefit of the person to whom it is granted, hence is not transferable. The right to maintenance cannot be transferred but the arrears arising out of it can be transferred.

⁸AIR 2006 Kant. 48.

Clause e) Right to Sue

The clause states that a mere right to sue cannot be transferred. In short, a right to sue for indefinite amount of money cannot be transferred but if it is for a definite amount, it can be transferred.

Clause f) Public Office

This clause ascertains to keep the public policy and states that a public office, or the salary of a public officer (before or after it has become payable), cannot be transferred.

Clause g) Stipends and Pensions

This clause specifically mentions that stipends granted to military, naval, air-force, and pensions given to the government officials and politicians, cannot be transferred. It cannot be bequeathed in a will as a will can be executed only in respect of an estate.

*Sundariya Bai Chaudhary v. Union of India*⁹: The Court held that because the deceased pension was not part of an estate, thus, non-transferable, cannot be passed on in a will. The Court cleared that other benefits like provident fund and gratuity, etc. fall in the category of an estate and can be transferred.

Operation of Transfer

Section 8 of the Act provides the clarification that the transfer of property passes on all the interests as well as the legal incidents to the transferee as seen in the case of *Biswanath Prasad Singh v. Rajendra Singh*¹⁰.

1) **Land:** Following are the legal incidents if a property transferred is land:

- All things attached to the earth
- Rent and profit occurring after the transfer
- Easement attached to it

In the case of *Jai Narayan Mishra v. HashmathUnnisa Begum*¹¹ the Court rejected the argument that the partnership deed was a license to use the land.

⁹AIR 2008 MP 227.

¹⁰Civil Appeal No. 1276 of 2006.

In another case, *Ram Chandra v. Kalyan Singh*¹² the court disagreed with the defense of the seller standing ground that the standing trees on the land cannot be transferred.

2) **Machinery:** In case of machinery, all its movable and immovable parts shall be transferred.

3) **Home or house:** legal incidents related to a house includes:

- Locks, keys, windows, etc. all that provide permanent use.
- Rent and profits occurring after the transfer
- An easement annexed with it

4) **Debt:** If the property transferred is a debt, then all securities with that debt shall pass on to the transferee.

5) **Money:** When the property transferred is money or yielding money, then its legal incidents shall include its income and interest occurring after the transfer.

In the case of *Nathoo Lal v. Durga Prasad*¹³ the Supreme Court reversed the order of Rajasthan HC and cleared that there was no difference between a female or a male when it came to inheriting the absolute estate.

e. Transfer to an Unborn Person and Rule against Perpetuity

Section 13 of the Act refers to 'Transfer for benefit of unborn person'. It has been imported into Indian law from England in what has been termed as 'The rule of Double Possibilities'.

As the Act specifies in the previous section that the transfer shall take place only from a living person to another living person; Sections 13-16 is an exception to the general rule. It gives the right to transfer a property from the born to the unborn emphasizing that a property can be transferred to an unborn child with certain provisions.

Transfer to an Unborn Person

No Direct Transfer-The Act does not provide a direct transfer of property to an unborn child. To be legally effective it is imperative that it shall be first transferred to a living person/s if the

¹¹2002 (3) ALT 689.

¹²AIR 2006 All 184.

¹³1954 AIR 355.

person is unborn on the date of transfer. A trust can be created or a living individual can be trusted with the transfer till the child is born.

The basic principle of Section 13, is that the person who is transferring the property shall not bind it the free disposition of the said property for more than one generation.

Prior interest- the person/s can enjoy life interest up to the time the child does not come into existence.

Should come into existence prior to the death of the last life estate holder- The unborn person must come into existence, means he should be in his mother's womb and not essentially born, before the passing away of the last estate holder.

Instant transfer of rights- the unborn child shall become absolute owner of the said property as soon as he comes into existence. All the rights regarding the property shall vest in the unborn child.

It is worth noting that transfer can be made to an unborn person but not to the next generation of an unborn person.

If the gift made in favor of the unborn grandchildren where not in respect of whole interest in the property, the gift was declared a valid document as seen in the case of *Issac Nissin v. Official Trustee*¹⁴.

Under Muslim Law- This Section does not apply to Muslims and a gift to unborn is not allowed except in the case of Wakf as was upheld in the case of *Abdul Khadur v. Turner*¹⁵.

Rule Against Perpetuity

Section 14 of the Act deals with rule against perpetuities. Perpetuity means indefinite period or time and this rule is essentially against a transfer that bestows the right of making a property inalienable for an indefinite period.

Perpetuity may arise in two ways-

- 1) By taking away the power of alienation from the transferor
- 2) By creating future remote interest

¹⁴A. LR. 1957 CAL 118 (119).

¹⁵ILR 9B 158.

Both the situations have been countered in the Act. Section 10 bars the first condition whereas Section 14 prohibits the second one.

Objective of Rule Against Perpetuity: There were people who had vested interest in keeping their property in their family, from generation to generation but this would be a great loss to the society. It would deprive the people of all the benefits arising from that property. The real motive behind this rule is to ensure free and frequent circulation of all property, so that not only people enjoy the benefits but also it will result in betterment of the property.

Following conditions must be fulfilled to attract Section 14-

- There must be a transfer of property
- The said transfer should be in favor of an unborn person as the ultimate beneficiary
- The vesting of interest in favor of the unborn must be preceded by limited interest or life of living person/s
- The unborn person must be in existence at the expiration of the interest of the living person/s

In the presence of all the above conditions the vesting of interest in favor of the ultimate beneficiary may be postponed only up to the life of living person/s plus the minority of the ultimate beneficiary but not beyond that.

Landmark Cases

#1. *Sopher v. Administrator General of Bengal*¹⁶

The Case: A testator directed to divide his property among all his children and also children of predeceased, after the death of his wife. Each child was to get income of each share for life and later to the grandchildren till the attainment of 18 years of age, after which the grandchildren were to get absolute entitlement of the property.

The Verdict: The Privy Council held the bequest to the children void as they observed that the beneficiaries under the later bequest did not receive the interest in the same unrestricted form as in which the testator held. Thus, they concluded that the condition of whole of the remaining was not fulfilled.

Exceptions to the Rule Against Perpetuity:

There are few exceptions to this rule-

- 1) Transfer for public benefit
- 2) Covenants of redemption

¹⁶(1944) 46 BOMLR 865.

- 3) Personal agreements
- 4) Pre-emption
- 5) Perpetual Lease

f.) Vested and Contingent interest

The Transfer of Property Act illustrates two types of interest-

- i. Vested interest
- ii. Contingent interest
- iii.

Difference between Vested interest and Contingent interest	
Vested interest	Contingent interest
Definition	
Defined under Section 19.	Defined under Section 21.
When on the transfer of a property in favor of a person an interest is created without specifying any time or terms then, an interest is vested, unless the terms of transfer specify otherwise.	When on transfer of a property in favor of a person an interest is created and shall take effect only on the happening of a specified uncertain event or not happening of a specified uncertain event, the said person acquires a contingent interest in the property. Such interest becomes vested, in the former case, on the happening of the event, in the later, when the happening of the event becomes impossible.
Fulfillment of Conditions	
Vested interest is not conditional and creates an immediate right though the enjoyment is postponed to a future date.	Contingent interest is completely dependent on the fulfillment of certain specified condition, if the condition is not fulfilled, then the interest fails.
Impact of transferee's death	
Vested interest is not defeated by the death of the transferee before he obtains possession.	Contingent interest is defeated by the death of the transferee before he obtains possession.

Is it transferable and heritable?	
Vested interest is both transferable and heritable and therefore, if the transferee dies before the actual possession or enjoyment, it passes to his heirs.	Contingent interest is transferable but if its heritable or not will depend on the nature of the condition. It does not pass on to the heir on the death of the transferee.
Present right of enjoyment	
There is present, immediate right even when its enjoyment is postponed.	There is no present right of enjoyment, there is mere promise of giving such a right.
Case Laws	
1. <i>Sarjit Singh Sareen v. Mrs. Ritu Menon</i> ¹⁷ 2. <i>Devlakshmi H Vahalia v. Vishwakant P. Bhatt</i> ¹⁸	1. <i>Rajesh Kanta Roy v. Shrimati Sunita Debi</i> ¹⁹ 2. <i>Sundar Bibi v. Rajendra Narayan</i> ²⁰

Rule of Election

Section 35 of Transfer of Property Act, 1882, states the doctrine of election. The doctrine of election is founded on the theory of equity that one cannot take what is advantageous to him and dismiss something that is against him. It can be very aptly described by the classic quote, which is often quoted in this context, of Maitland, “That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.”

It specifies that if a party transfers a property over which he has otherwise no right to transfer, implies advantages bestowed on the original owner of the property, then the title holder has to elect the option to accept or reject it.

If rejected, the relinquished property shall go back to the transferor or his representative, as if it had not been disposed of. However, when such benefit is reverted to the transferor, the

¹⁷166(2010) DLT242.

¹⁸AIR 1972 Bom 103.

¹⁹AIR 1957 SC 255.

²⁰AIR 1925 All 389.

disappointed transferee shall be compensated the value or the amount of the attempted to be transferred to him, under two conditions-

- i. Where the transfer is gratuitous, and the transferor has before election died or otherwise become incapable of making fresh transfer; and
- ii. Where the transfer is for consideration.

Illustration: X owns a farm worth Rs 8,00,00. Y by an instrument of gift avows to transfer it to Z and Y with the same instrument gives Rs 10,00,00 to X. X opts to retain the farm and he forgoes the amount of Rs 10,00,00.

In another scenario, if Y dies before election then his representative must give Rs 8,00,00 to Z.

Exceptions to the Rule of Election

- The owner who has the option to elect between accepting a particular benefit or retaining the property, selects the former, then he shall relinquish the particular benefit but he is not bound to return any extra benefits arising out of the transaction.
- If the original owner is aware of his responsibilities and the circumstances that may influence his election, then the acceptance of benefit shall be considered as elected by him, thus, validating the transfer.
- If the person, gaining the benefit, enjoys it for a period of more than a period of two years, then the knowledge of circumstances shall be presumed.
- If the owner of the property does not confirm or dissent the transfer, within one year of the date of transfer, then it shall be presumed that he has elected to confirm the transfer.
- In case of a minor, if he is not represented by a guardian, the period of election shall be postponed till the individual reaches the age of majority.
- Where the person who is to make election, suffers from some disability, then the election shall be postponed till the disability ceases or someone authorized makes the election on his behalf.

Application of the Doctrine of Election

As regards to Hindu Law: the said principle was always applicable on Hindus. In the case of *Rungammav. Atchamma*²¹ the Privy Council while referring to the rule reiterated that affirmation and disaffirmation both cannot be done for a particular transaction. One cannot elect to affirm the benefits and at the same time disaffirm the disadvantages.

²¹ (1858) 4 Moo Ind App 1: 7 Suth WR 57

As regards to Muslim Law: the doctrine was applied to the Muslims too by the Privy Council as was seen in the case of *Sadik Hussain v. Hashim Ali*²².

Comprehending the Doctrine

The concept that has been ingrained in the Doctrine of election incorporated in the Transfer of Property Act, 1882, is that when faced with two options, an individual shall either accept it or relinquish it. In short, if an individual accepts the benefits of an instrument, he shall have to carry the burden attached to it too.

- This doctrine is universally applicable to Hindus, Muslims as well as Christians.
- The doctrine provides the benefit of voluntary choice to the owner, with all freedom, but bound by the choice that he makes; accept it wholly or relinquish it completely.
- Thus, he cannot approbate and reprobate.
- Moreover, election is limited to the case of a will or a gift and not in case of legal remedy.

Essential conditions pertaining to the Doctrine of Election

- a) The transferor shall not be the owner of the property which he transfers.
- b) The transferor must transfer the property of the owner to a third person.
- c) By the same instrument, the transferor shall grant some property from his own, to the owner of the said property.
- d) In the same transaction the transfer of property to the transferee and the bestowing of the benefit to the owner shall be made. If two different instruments are used for the two purposes, then the doctrine of election shall not be applicable.
- e) It is mandatory for the owner to have a propriety interest in the property.
- f) If the owner does not avail the benefit directly and instead diverts it indirectly, then he need not elect.
- g) When the benefit is given to a person in a different capacity, then the question of election does not arise.

Case Law

***Muhammad Kader Ali Fakir v. Fakir Lakman Hakim*²³:**

A landmark judgement in which the Court has tried to explain all the nuances of the doctrine of election in detail. It reiterated all the essential conditions implied by electing for one of the options. Electing for one choice came as a complete package and an individual cannot choose to

²² (1968) 38 ALL 627.

²³ PLR 1956 Decca 370.

keep the benefits and shirk from accepting the burden. The terms and conditions have to be either wholly accepted or completely relinquished.

Unit II. General Principles Governing Transfer of Immovable Property

a.) Transfer by Ostensible Owner

The law of the Transfer of Property is ruled by the principle that no person can transfer to another a title or right greater than what he possesses. But, Section 41 of Transfer of Property Act, 1882, which deals with transfer of an immovable property by an ostensible owner, is an exception to the general principle.

The concept of ostensible owner was included in the Act to protect the right of the innocent third parties with regard to the property owners. This theory was for the first time witnessed in use in the much-publicized case of *RamcoomarKoondoov. John and Maria McQueen*²⁴. The Judicial Committee held that the third party shall not give the property back and declared the transfer legitimate in the eyes of law.

The contention underlying this judgement is that whenever one of the two innocent people are faced to suffer by the actions of a third person, then he who has given chance to the third person an opportunity to lead to loss, shall bear or sustain the loss.

Section 41 defines transfer by ostensible owner as:

“Where, with the consent, express or implies, of the persons interested in immovable property, a person is the ostensible owner of such property and transfer the same for consideration, the transfer shall not be voidable on the grounds that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

It lays down certain requirements in order to avail the provisions under this section:

- The most important clause is that the transferor of the property should be ostensible owner.
- There should be implied or expressed consent from the real owner.
- In return for the transfer of the property the ostensible owner should get some consideration.
- The transferee should take reasonable care regarding the authority of the transferor in order to bring about the transaction and also that the transferee has acted in good faith.

²⁴(1872) 11 Beng LR 46 p 52.

- This Section and its rules apparently are applicable only to immovable property not on the movables.

Meaning and definition of ‘Ostensible Owner’

The term ostensible owner has not been defined in the Act but the following references will help in understanding the concept of the term.

- 1) **According to Corpus Juris Secundum**- the word ‘ostensible’ refers to something as shown, professed, exhibited, avowed or declared and is generally used as opposed to ‘real’ or ‘actual’. Most of the times its use implies divergence or concealment of facts.
- 2) **According to Black’s Law Dictionary**- Ostensible ownership refers to apparent ownership derived from words or conduct.
- 3) **According to Case Law definition**- Ostensible owner is a person who has got the ‘indicia’ of ownership, for example, possession, title or entries and records, that can prove ownership. *KannashiVershi v. RatnashiNenshi*²⁵

- **What is ‘indicia’ of ownership?**

This Latin term means indications or signs. In this reference the indicia of ownership will be determined by the circumstances of each case. For example, the act of possession is an ostensible act of ownership but not all the time. A true owner may not manage his property and may hire a manager to do so, who shall perform acts as collection of rents, giving out leases, etc.

Case Laws

Fazal Imam v. Mul Raj²⁶

The Case: One Musallmandied leaving behind a son and a daughter and her son Habib remained in the physical possession of the said property for 25 years. It was gradually mortgaged by him to a person. Later, his sister filed a suit asking for her share in it.

The Verdict: The Allahabad High Court opined that under the given circumstances, Section 41 of the Transfer of Property Act applied and on the ground of ‘ostensible owner’ the suit was dismissed.

Mohammad Shakur v. Shah Jehan²⁷

²⁵[1952] A.I.R. 85 (Kutch).

²⁶(1923) ILR 45 ALL 520.

²⁷63 IC 125.

The Case: A widow was left in possession of an estate and looked after it as she willed. She sold it afterwards. The real owners, who resided in another village, filed a case when they came to know about it.

The Verdict: The Court dismissed the case on the grounds of provisions mentioned in Section 41 and the owners lost the case as the transfer was declared valid.

Following person/s shall not be considered Ostensible owner

- 1) An agent or a manager
- 2) A mortgagor, owing limited interest
- 3) A servant in occupation of the property
- 4) The trustee or manager of an idol
- 5) A co-sharer in occupation of a joint family residential property

Comprehending the principles/conditions of the Act

#1. Transferor must be the Ostensible owner

It is not essential that the transfer is made by the consent of the real owner, in fact, the only mandatory factor at the time of transfer is to prove that the transferor was the Ostensible owner with the consent of the actual owner as was held by the Supreme Court in the case of *Syed Abdul Khader v. Rami Reddy and Others*²⁸.

#2. Such ownership must be with the consent of the real owner:

The chief reason of incorporating this section in the Act is to safeguard the rights of innocent third parties, who have purchased the property, where the actual owner is to be blamed for not protesting the transfer. In the case of *Lickbarrow v. Mason*²⁹ the Court specified that when it had to pick between two innocents, it would side with the one who suffered by no fault of his. The other party, i.e. the real owner would not be protected because he could have availed the option to stop the transfer. A similar judgement was pronounced in the case of *Root v. French*³⁰.

When it comes to minors even if the Ostensible owner claims to have a consent, it will be of no value because minors cannot give required consent. This principle was applied in many cases like *Abdulla Khan v. Bundi*³¹ and *Gadigeppav. Balangauda*³².

²⁸AIR 1979 SC 553.

²⁹(1787) 5 Term Rep 683.

³⁰(1835) 13 Wendell 570.

³¹(1912) ILR 34 All 22.

³²[1931] 741 (ILR 55 Bom).

There may not be the need to secure consent of the real owner, (and in some instances, it may be that the real owner was not even aware of the transfer) as was laid down in the case of *SatyanarayanaMurthi v. Pydayya*³³.

Consents in such cases can be expressed or implied:

Implied consent shall be deduced from the conduct of the real owner and it is not mandatory that he expresses his consent or gives it in writing. If another person is dealing with the property as his own, and the real owner is aware of it then it shall be taken as implied consent by the real owner as in the case of *Sara Chunder v. Gopal Chunder*³⁴.

But if a person is unaware of his rights or silent over it then it would not be implied consent as was held in the case of *Shamsher Chand v. Bakshi Meher Chand*³⁵.

Silence on part of the real owner that gives an impression to the third party that the Ostensible owner is the real owner, then it shall be treated as consent.

#3. Transfer must be for Consideration:

The benefit of Section 41 shall be availed only if it is proven that the property has been transferred for some consideration. The Ostensible owner has no right to gift away the property.

#4. Reasonable care shall be taken by the Transferee:

The section lays down that the transferee shall take reasonable care in the transfer. It is his duty to ascertain the title of the transferor. In the case of *Nageshar Prasad v. Raja Pateshri*³⁶ third party was found to be negligent and the transfer was held void on the grounds of not taking reasonable care.

#5. Proper Inquiry shall be made:

This is a subjective factor and therefore, the courts of India have held that what amounts to reasonable inquiries will depend on the circumstances and facts of each case. The ultimate test being if he acted-

a) like a reasonable man of business, and

³³[1943] A.I.R. 459 (Mad).

³⁴(1893) ILR 20 Cal 296.

³⁵AIR 1947 Lah 147.

³⁶(1915) 265, (20 Cal WN).

b) with ordinary prudence.

As was established in the case of *Fazal Husain v. Muhammad Kazim And Ors.*³⁷ by the Court.

#6. In Good Faith:

This simply stresses on the need for the transferee to have believed the Ostensible owner to be the real owner after conducting all inquiries, as was upheld in the case of *Layak Ram v. Dharmavati*³⁸.

In case the transferee has the knowledge that the transferor is not real owner but Ostensible owner and still goes ahead with the transfer then it shall stand void, as seen in the case of *Laxman Sakharam Salvi And Others v. Balkrishna Balvant Ghatage*³⁹. Transferee cannot seek protection under this Act taking advantage of his negligence.

#7. Burden of Proof Lies on the Transferee:

To prove that the transferor is not the true owner but an Ostensible owner with the consent to transfer the property, lies on the transferee, as was ascertained in the case of *Ram v. Muktinath*⁴⁰.

The transferee has to prove that he had taken the step in good faith and was not at fault. He can also bring forth evidence to prove that the transferor suppressed the facts and hid the truth from him.

Conclusion:

Section 41 has balanced all the parties whereas transfer of immovable property is concerned. The innocent third party was duped and made a fool of most of the time, this section has taken good care of this anomaly.

b.) Rule of Feeding the Grant by Estoppel

The Doctrine of Feeding the Grant by Estoppel:

‘Estoppel’ means to being stopped from doing or not doing something.

The Doctrine of Feeding the Grant by Estoppel states that if a person is-

- not the owner of the property

³⁷[1934] AIR 193 (All).

³⁸[2010] AIR 95 (P&H).

³⁹[1955] A.I.R. 190 (Bom).

⁴⁰[1956] A.I.R. 154 (Assam).

- but he falsely or dishonestly represents himself as the owner or possesses the authority to transfer and
- makes a transfer of a property to a transferee
- and the transferee buys it in good faith and for a consideration
- then the rights of the transferee cannot diminish.
- Under such circumstances the transferee may revoke the contract or keep it alive.
- If he chooses to keep it alive and the if the transferor obtains interest in the said property (of which he was not the owner at the time of transfer) then the property shall automatically be transferred to the transferee.

Principles used to formulate this doctrine:

This doctrine is based on two principles-

- 1) Common law of doctrine of estoppel by deed
- 2) Doctrine of equity which emphasizes 'as done which ought to be done'.

The principle has been incorporated in Section 43 of the Transfer of Property Act, 1882 and uses one or a combination of both of the above-mentioned doctrines.

This Section shall be applicable if there has apparently been erroneous or fraudulent representation by a person projecting himself to be authorized to transfer immovable property and shall have confessed to have transfer said property.

The Section does not anyway requires the transferee should have been aware of the false representation made by the transferor. In fact, he might have truthfully believed in the representation of the transferor, but this shall in no way render the Section inapplicable.

Case Laws

#1. *The Jumma Masjid, Mercara v. KodimaniandraDeviah*⁴¹:

The Case: In this case, two people transferred a property claiming to be their own and later the transferors inherited the said property. Ganapathi, the transferee sued the transferors to recover the possession of the property.

The Verdict: The Supreme Court held that under the provisions of Section 43 the transferee was entitled to the property. It did not matter whether or not the transferors acted innocently or fraudulently, what matters is only fact that whether the transferee was misled. The transferee had

⁴¹AIR 1962 SC 847.

acted on the representation of the transferors, hence, based on the doctrine of feeding the grant by estoppel, the property shall automatically pass to the transferee.

#2. Parma Nand v. Champa Lal⁴² and Jumma Masjid case⁴³:

The Case: in both these cases the question that remained to be examined by law was that the transferee takes advantage of Section 43 if he was not only fraudulently misled but also was unaware of the true factual position of the property.

The Verdict: A full bench of the Supreme Court was of the opinion that in both the cases the advantage of Section 43 can be availed by the transferee. It shall not be applicable only when both the parties, the transferor as well as the transferee, were aware of the true position and colluded to transfer the property, as was rendered in the judgement of the case of *Mohori Bibi v. Dharmodas Ghosh*⁴⁴.

#3. Karthar Singh v. Harbaunj Kaur⁴⁵:

The Case: The mother had sold property to the appellant on behalf of her minor son Kulwant. Kulwant, on attaining majority, filed a case and sought it to be declared void, as being a minor, he could not have consented. The deed was declared void but Kulwant passed away before he could take position. Hence, the appellant approached the court, laying his claim based on Section 43.

The Verdict: the plea of the appellant was turned down by the Court on the grounds that due diligence was not made by the transferee and therefore, Section 43 is inapplicable.

c.) Rule of Lis pendens

The term 'lis' denotes 'suit' whereas 'pendens' implies 'pending or continuing' and has been derived from the Latin maxim "*Ut pendent nihil innovetur*" which means that during litigation nothing should change.

Section 52 of Transfer of Property Act, 1882, incorporates the doctrine of Lis Pendens and it states that during the pendency of the suit, the subject matter of a case should not be transferred. Hence, in cases relating to transfer of immovable properties, the transferee shall be bound by the verdict of the suit.

The primary aim of this doctrine is to-

- avoid endless litigation

⁴²(S) AIR 1956 All 225.

⁴³AIR 1982 SC 847.

⁴⁴(1903) 30 Cal. 539.

⁴⁵(1994) 4 SCC 730.

- protect both the parties against each other
- prevent abuse of the legal process

Thus, the Section is broadly structured to maintain the status quo not only during pending litigation but also after decision, if an appeal has been filed, then in the intermediary period too the pendency shall be applicable. It essentially prohibits alienation of any immovable property during the period of litigation until a final judgement is pronounced.

This doctrine is based on two principles- public policy and equity.

Conditions to be satisfied for application of Section 52

A three-judge Bench of the Supreme Court, in the case of Dev Raj Dogra and others v. Gyan Chand Jain and others⁴⁶, analyzed and interpreted the meaning of Section 52 and laid down certain conditions.

A suit or proceeding, which specially and particularly refers to any right of an immovable property, must be pending;

It should be pending in a Court of competent jurisdiction;

The suit or proceeding should not be a collusive one;

Any transfer is prohibited, except under the authority of Court, of all such immovable property or any dealing with such property during the pendency of the suit.

Non-applicability of Section 52

Lis pendens is not applicable in every case; there are certain instances where it shall not be applicable.

- 1) A private sale by a Mortgagee in exercise of the powers given by mortgage deed
- 2) In cases of friendly suits
- 3) In cases where the cases are collusive
- 4) In cases where only the transferor is affected
- 5) In matters of review
- 6) In cases of suits involving pending transfers
- 7) In cases where the description of the property is lacking in any way in the plaint

Case Laws

#1. Hardev Singh v. Gurmail Singh⁴⁷:

⁴⁶AIR 1981 SC 981.

In this case the Supreme Court clarified that a pendente lite transfer under Section 52 is not declared void or illegal but it will bound the pendente lite purchaser by the decision of the pending litigation. Therefore, during the pendency period such immovable property shall not be transferred by either of the parties so that the rights of the other party is not adversely affected.

#2. JayaramMudaliar v. Ayyaswami⁴⁸:

In this case the Supreme Court maintained that the aim or purpose of Section 52 is not to defeat any rightful or equitable claims but it is rather to subject them to the authority of the Court that is dealing with them. It further clarified that apart from actual transfers there might be other dealings that may affect the rights of other parties too.

#3. Rajender Singh and Ors. v. Santa Singh and Ors.⁴⁹:

In this case the observation of the Supreme Court was that the actual aim of the doctrine of lispendens was to subject parties to litigation as well as others too, who attempt to acquire rights in immovable property that is subject to litigation, thus, preventing the object of a pending action from being defeated.

#4. GouriDuttMaharaj v. Sheikh Sukur Mohammed and Ors.⁵⁰:

In this case the Court once again reiterated that the main objective of this doctrine is to maintain the status quo, irrespective of the acts of any party.

#5. Lov Raj Kumar v. Dr. Major DayaShanker and Ors.⁵¹:

In this case the Supreme Court observed that the formative principles of Section 52 are in conformity with the essence of the principle of equity, justice or conscience, as it is founded on the basis of these. It further clarified that in order to safeguard these principles, disallowing alienations during the pendency was essential, otherwise just and equitable claims shall be defeated by the cleverness of a defendant.

d). Fraudulent Transfer

Section 53 of Transfer of Property Act, 1882, enumerates fraudulent transfer:

- 1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

⁴⁷Civil Appeal No. 6222 of 2000.

⁴⁸1972 (2) SCC 200.

⁴⁹AIR 1973 SC 2537.

⁵⁰AIR 1948 PC 147.

⁵¹AIR 1986 Delhi 364.

Nothing in this subsection shall impair the rights of a transferee in good faith and for consideration.

Nothing in this subsection shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of all the creditors.

- 2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this subsection, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Section 53 (1) elucidates that a transfer of immovable property that has been done with an intention to delay or defeat the creditors of the transferors, shall be void if the delayed or defeated creditor chooses.

This provision shall not be applicable to-

- The rights of a subsequent transferee in good faith for consideration,
- Any law for the time being in force relating to insolvency.

Section 53 (2) explains about a transfer of an immovable property is done without consideration and transferred to another person again, then the subsequent transferee may avoid the first transfer. It states that any transfer without any consideration, shall be void and deemed to be done with a fraudulent intention.

Sham Transfers or Fictitious Transfers

These transfers are unreal and colorable and never intended to operate between the parties as the transferor has no intention that the property should really vest in the transferee.

Benami transaction also falls in the category of sham transfer as the real owner never intends it should belong to the ostensible owner.

In the case of *PetherpermalChetty v. MuniandiServai*⁵², a sale deed was executed in favor of the predecessor of the appellant. It was not a real transaction, it was a benami transaction. On the death of the vendor of the land, his heir sued the legal representative of the purchaser. The Court said that it will not help either of the parties in such a matter as both of them should be affected. The legal maxim that applies in such cases is to let the estate lie where it falls.

If a transfer was made to dodge the creditors, then the rights of a transferor and the benami transferee can be ignored, and the creditor can proceed against the property as if it belonged to the transferor. A benami transaction is not a transfer at all.

How Fraudulent Intentions in a Transaction can be proved

Fraudulent intentions in transfers can be proved through circumstantial or direct evidence, however, each case must be examined according to the corresponding circumstances.

There are some tell-tale signs that give a strong presumption of a transfer being fraudulent-

- If the transfer was done in undue haste and a secretive manner.
- If the transfer was made soon after the decree ordering the payment of debt was passed against the judgement-debtor.
- If the debtor does not keep anything to himself and transfer all of his property.
- If the consideration paid is very less if compared to the original or real value.
- If there is evidence to prove that no actual payment of was done in the sale deed.

There are many other ways in which it can be proved, therefore, each case will depend on its merit to be decided whether the transfer was *bonafide* or fraudulent.

If there are several creditors then the debtor has the preference of decide to whom he shall pay his debts first. His discretion of paying one of the creditors shall not amount to be a transfer made to defeat or delay the other creditors as was adjudged in the case of *Mina Kumari v. Bijoy Singh*⁵³.

In a similar case, *MusahurSahu v. Hakim Lal*⁵⁴ the said petition was dismissed on the ground that it was the debtor's discretion to decide which creditor to pay first.

⁵²AIR 1982 All 316.

⁵³AIR 1916 PC 238.

⁵⁴(1915) LR 43 IA 104.

But in the case of *Vinayak v. Kaniram*⁵⁵ the Court held that the purchaser was a party to the fraud committed as he was aware of the fraudulent intentions and the sale was voidable at the option of the creditors.

The case of *KapiniGoundan v. Sarangapani*⁵⁶ is an exception to the rule where a man had borrowed a large sum of money, transferred all his property to the children of his first wife to marry a second wife. Madras Court held that the intention of the debtor was not to defeat the creditors, and the consideration was good therefore, the transfer was valid and *bonafide*.

e.) Rule of Part Performance

The doctrine of part performance is based on the principle of equity and was developed in England and later on added to the Transfer of Property Act, 1882, in the year 1929 via amendment.

Section 53A of the Act embodies the doctrine of part performance. It lays down that if a person gets into an agreement with another and lets the other person act on behalf of the contract; then such a person creates an ownership right for himself, even though the formalities might not have completed. In short, even though the contract might not have been registered or accomplished in the prescribed manner yet, the transferor shall not go against the transferee. The only mandatory factor is that the agreement or the contract should not be unsigned or unstamped.

Nothing in this section affects the rights of a transferee for consideration even if he had no notice of contract of part performance.

The law mandates that the transfer of any immovable property should be duly registered but the practical hardships foreseen in this, brought into being the doctrine of part performance. Therefore, if one party has already performed his part with the confidence thinking the other shall also honour the agreement, then even though the formalities are incomplete, the doctrine of part performance will be applicable. If the transferee has taken possession or part possession of the property, he shall not be evicted.

This section counters to protect the rights of the transferee against any fraud or challenge, ascertain that 'Equity looks to the intent rather than to the form'.

Essentials of the Doctrine of Part Performance

⁵⁵AIR 1926 Nag. 293.

⁵⁶(1916) Mad. WN 288.

- A written contract is mandatory for transfer of an immovable property, which should be signed by or on behalf of the transferor. The doctrine cannot be applied if the agreement is void or there is no agreement.
- There must be consideration.
- The contract should give out the terms of the transfer with reasonable certainty.
- The transferee must have taken possession as a result of this contract or continued in possession, if he was already in possession of the property.
- The transferee must have done some act in furtherance of the contract. Acts done prior to the agreement or independent of it cannot be deemed to be part performance of the contract.
- The transferee should have performed his part of the deal or be willing to perform it.

Significance of the Law of Part Performance

It is a statutory right, and shall only be used to protect the rights of the transferee. It does not create a title in favor of the transferee.

Actionable Claim

Section 3 of the Transfer of Property Act, 1882, defines as to what is ‘actionable claim’-

“‘Actionable claim’ means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent”.

Based on this definition, it can be ascertained that to claim ‘actionable claim’ one can approach the court for relief. In other words, an individual can initiate recovery of movable or immovable property, in a court of law to secure his claim.

Section 130- Transfer of ‘Actionable Claim’:

The claims under this provision are associated with any beneficial interest in movable property or debts that are not in possession of the claimant or are not secured by instruments such as mortgage, hypothecation, pledge, etc. These can be inherited or transferred by means of gift,

mortgage or sale, like any other property. There is no requirement to register the transfer of such claims and can be completed by merely writing about it.

Following are some examples of what amounts to 'actionable claim' -

- Claim for arrears of rent.
- Claim for rent due to fall in future.
- An option of repurchase the sold properties.
- Dividend due on shares.
- Benefit of a contract giving option to purchase the land.

There are quite a few exceptions to it, some of them are as follows-

- Right to sue (though it is a right but cannot be an actionable claim)
- A claim that is decreed.
- A claim in main profits.

The transferee of 'actionable claim' shall have all the rights and remedies that had vested in the transferor.

The transferee can institute proceedings or sue in his own name without seeking transferor's consent or making him a party.

Exception- Nothing in this Section shall be applicable to the transfer of a marine or fire policy of an insurance; or affects the provisions of Section 38 of the Insurance Act, 1938.

Section 131- Every notice for transfer of 'actionable claim' shall be in writing, signed by the transferor or his authorized agent, and shall possess the name and address of the transferee.

Section 132- All the liabilities and equities of the transferor shall be transferred on the transferee from the date of transfer.

Unit III- Specific Transfers

a) Mortgage: Definitions and Kinds

Sections 58-104 of the of Transfer of Property Act, 1882, deals with substantial essential features of mortgage of immovable property.

Mortgage is a common term which in layman's understanding refers to an instrument that is used when we are in need of loan or money, we mortgage our property. The property thus mortgaged works as a security against the loan.

Mortgage is a French word which literally means ‘death pledge’, referring to the ‘pledge’ that shall end only when the loan is repaid and the obligation is completely fulfilled.

Section 58(a) defines mortgage and related terms as such

“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, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability”.

- The person who is the Transferor is called a Mortgagor,
- The person who is the Transferee a Mortgagee.
- The principal money and interest of which payment is secured for the time being are called the Mortgage-Money.
- The instrument (if any) by which the transfer is effected is called a Mortgage-Deed.

The Black’s Law Dictionary defines ‘mortgage’ as

“A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon performance according to the stipulated terms”.

Fundamental features of a mortgage

- a) A mortgage can take place only on an immovable property. As specified in the Act, immovable property refers to land, benefits arising out of it, and things attached to it, like trees, buildings, machinery, etc.
- b) The owner of the immovable property can transfer some of his rights to the Mortgagee, like the right to redeem the property.
- c) The aim of transfer of right in the property must be to secure a loan or a money obligation, otherwise, it will not be a mortgage. A property that is transferred to clear a debt shall not be a mortgage.
- d) The specifications of the property should be mentioned, the size, its boundaries, its location, etc.
- e) The actual possession of the mortgaged property generally lies with the mortgagor.
- f) On the repayment of the loan, the interest in the mortgaged property is re-conveyed to the mortgagor.

- g) On the failure of repayment of the loan by the mortgagor, the mortgagee has the right to sell the property and recover the debt.

Different kinds of Mortgage

Six kinds of mortgages are described under Section 58 of the Act

1. **Simple Mortgage:** In a simple mortgage, the mortgagor personally binds himself to payback the mortgage money, either impliedly or expressly, that in the case of failure of repayment, the mortgagee shall have the right to dispose the said property and recover the mortgage money.

The primary feature of simple mortgage is that the mortgagee shall not sell the property without the intervention of the court. He can-

- apply to the court seeking permission for the sale of the property, or
- file a suit for the recovery of the entire amount.

2. **Mortgage by Conditional Sale:** In this kind of mortgage, the property is ostensibly sold by the mortgagor to the mortgagee, on the following conditions-

- On the payment of the mortgage money, the sale shall become void.
- On the payment of the mortgage money, the mortgagee shall retransfer the property.
- The sale shall become absolute if the mortgagor fails to repay the amount on the specified date.
- Although, the mortgagee enjoys no right to sell the property, yet, he can sue for foreclosure.

Foreclosure signifies that the mortgagor loses the right to redeem the mortgaged property and shall be completely debarred from it.

The situation of foreclosure arises when the mortgagor fails to repay the mortgaged money within the stipulated period; with the order in place, the mortgagee shall become the owner of the property.

3. **Usufructuary Mortgage:** Under this arrangement, following things occur:

- The possession of the property is delivered to the mortgagee.
- The mortgagee shall retain the property until the debt is repaid.

- The mortgagor reserves the right to recover the property on the repayment of the mortgage money.
- The mortgagee is entitled to get rents and profits relating to the mortgaged property till the loan is repaid.
- The mortgagor is not personally liable for the repayment of the mortgage money.
- The mortgagee shall not sue the mortgager for the repayment or foreclosure or sale of property.
- The only remedy for the mortgagee is to pay himself out of the rents and profits of the mortgaged property.

4. **English Mortgage:** The salient features of English mortgage is:

- The property is absolutely transferred to the mortgagee by the mortgagor and the mortgagee can take the possession of the property immediately.
- The condition for the transfer is that the property shall be transferred on the repayment of the mortgage money.
- The mortgager also binds himself to pay the mortgage money on a certain date.
- The mortgagee enjoys the right to sell the property without any permission from the court, if the mortgagor fails to pay the mortgage money.

5. **Mortgage by Deposit of Title Deeds:** Also known as equitable mortgage, the requisite of this kind of mortgage is-

- A debt shall be there, existing or future.
- Most essentially, the deposit of the title deed shall be with the creditor.
- The intention of the said deposit is that the title deed shall be work as a security for debt.
- No registration is required for this type of mortgage. This was established by the Court in the case of *Royal Printing Works v. Oriental Bank of Commerce*⁵⁷.
- It can be effected only in specified towns as mentioned by the government, such as Kolkata, Mumbai and Chennai. But as was stated by the Court in the case of *Sulochana and Others v. The Pandyan Bank Ltd.*⁵⁸ the debtor need not do it in person, in fact, if the

⁵⁷AIR 1990 AP 120.

⁵⁸AIR 1975 Mad 70.

documents were duly forwarded, then it shall be deemed to have been deposited in the specified towns.

In another case, *Sabasiva Rao v. Bank of Baroda*⁵⁹ the Court clarified that even the certified copies of the documents of titles shall amount to equitable mortgage.

- The documents shall be returned to the mortgagee on the payment of the mortgage money.
- If the mortgagor fails to repay the loan on a specified date, then the mortgagee has the right to apply to the court to convert the equitable mortgage into legal mortgage.
- It carries a big advantage of involving minimal formalities along with keeping it confidential, safeguarding the reputation of the borrower.

6. Anomalous Mortgage: A mortgage which does not fall in the prescribed five categories, is known as anomalous mortgage. This can be effected as per the conditions set down by the mortgagor and the mortgagee, specific to their requirements. It usually is a combination of two or more of the above-mentioned mortgages. It may take various shapes depending on the contract, usage and custom.

Rights and Liabilities of Mortgagor and Mortgagee

Rights of Mortgagor

Mentioned below are the rights of the mortgagor

- 1) **Right of Redemption:** The mortgagor possesses the right to redeem the property if-
 - he repays the mortgage money on the due date at the prescribed time and place;
 - the right of redemption has not been terminated by decree of a court or by an act of the parties.

The mortgagor is entitled to the following rights if he has redeemed the mortgage-

- to get back all the relevant documents as well as the mortgage deed;
- if it is an English mortgage, then, shall obtain the possession of the mortgaged property from the mortgagee;
- to have the mortgaged property retransferred at his cost to any third party as he may desire or to himself.

⁵⁹1991 70 Comp Cas 840 AP.

- 2) **Accession to Mortgaged Property:** If the mortgagee has voluntarily made certain changes and improvements in the property, then the mortgagor is entitled to all of it at the time of redemption, unless there is a contract to the contrary.
- 3) **Right to Transfer to the Third Party:** Instead of getting the property retransferred to himself, the mortgagor may require the mortgagee to transfer the mortgaged property to a third person.
- 4) **Right to Inspection and Production of Documents:** The mortgagor has the right to inspect and make copies of all documents of title in the custody of the mortgagee.

Liabilities of Mortgagor

Here are some of the major liabilities of a mortgagor-

- 1) **Right to Mortgage:** he should possess the right to mortgage such property.
- 2) **Have Legal Title:** The mortgagor must have the legal title of the property.
- 3) **Pay Taxes:** The mortgagor shall pay all the taxes if the property is not under the possession of the mortgagee.
- 4) **Comply with the Terms and Conditions:** He must pay the lease rent and comply with all the terms and conditions of the lease agreement, if the mortgaged property is under lease deed.
- 5) **Compliance with Previous Mortgage Deed:** If there has been any previous mortgage deed of the same property, then the mortgagor shall abide by the terms and conditions of it too.

Rights of Mortgagee

Following are the rights of the mortgagee-

- 1) **Right to sue for Mortgage Money:** The mortgagee enjoys the right to file a suit in a court of law under the given circumstances-
 - In the case of Simple and English mortgage, where the mortgagor binds himself to repay the mortgage money.

- If the mortgaged property is wholly or partly destroyed and the security furnished is insufficient and the mortgagor has not provided more.
- If the mortgagor has acted wrongfully and deprived the mortgagee of the whole or part of his security.
- If the mortgagee is entitled to the transfer of the mortgaged property, yet, the mortgagor fails to deliver.

2) **Right of Sale:** In case of a Simple, English or Equitable mortgage, where the mortgagee has the right to sale the property after filing a suit and getting a decree from the court.

Section 69 of the Act states circumstances under which a mortgagee enjoys the right of sale without the intervention of the court.

3) **Right of Foreclosure:** The right of foreclosure is allowed in cases of:

- The Anomalous mortgage, and
- A mortgage by a conditional sale.

In such cases a mortgagee has the right to obtain from the court a decree for foreclosure against the mortgagor, who will be completely debarred from redeeming the mortgaged property.

4) **Right of Accession of Property:** In case any addition has been made to the mortgaged property, the mortgagee has the right to it, provided there has been no contract to the contrary.

5) **Right of Possession:** If it is an Usufructuary Mortgage, then the mortgagee is entitled to the possession of the mortgaged property conforming to the terms and conditions of the deed.

Liabilities of Mortgagee

When the mortgaged property is under the possession of the mortgagee, then following liabilities fall on him-

1) **Property shall be protected from any damage**

- 2) **It must be insured**
- 3) **No alteration should be made**
- 4) **The property must be secured**
- 5) **Rent of the property must be duly collected**
- 6) **Govt. revenue must be paid**
- 7) **It must be kept clear from all due**

b). Charge

Section 100 of the Transfer of Property Act, 1882, explains what is meant by Charge-

“Where immovable property of one person is by act of parties or operation of law made security for the 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 the provisions hereinbefore contained [which apply to a simple mortgage shall, so far as may be, apply to such charge].”

In short, it specifies that under any circumstance, if a person keeps his immovable property as a security to another, in exchange for the payment of money, latter person shall be said to have the charge of the property. In such cases of charge, all the provisions of simple mortgage shall apply, even though the transaction does not amount to mortgage.

The Act further clarifies the exceptions-

“Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

Difference between Mortgage and Charge

Basis For Comparison	Mortgage	Charge
Meaning	A mortgage is a transfer of an interest in specific immovable property.	Charge is security for obtaining the debt by way of mortgage, hypothecation or pledge.
Creation	Mortgage is created by the act of the parties.	Charge is a result of either by the act of parties or by the operation of law.

Term	Fixed.	Infinite.
Registration	Mandatory to register under the Transfer of Property Act, 1882.	Compulsory only when it is the result of the act of concerned parties, otherwise, not mandatory.
Personal Liability	Generally, it carries a personal liability.	Commonly, no personal liability is created.

Kinds of Charges

There are two kinds of Charges that have been dealt in this section.

- 1) Charges created by act of parties- An agreement in which an immovable property is presented for the satisfaction of a debt, but without transferring any interest in the property, then it constitutes a charge by act of parties. For creation of a charge it is not essential to have a particular form of words. It is enough to have all circumstances of the transaction. However, there must be a clear intent to make a property security for money in praesenti.
- 2) Charges arising out of operation of law- A charge by operation of law is one which occurs regardless of the agreement of the parties. These are known as equitable liens in English law. The inclusion of charges arising out of operation of law in the Act has been greatly criticized as being inconsistent to the Act which primarily deals with transfer by act of parties.

While giving judgement in the case of *Bapurao Jatalev. Mahadeo Mali*⁶⁰, the Nagpur HC opined that a charge created by a decree is not created by the act of parties nor is created by acts of law. But later MP High Court in the case of *Attarbaiv. Mishrilalsa*⁶¹ held that a charge created by a compromise of a money decree amounted to act of parties and hence, governed by this section.

c). Sale

Section 54 of the Transfer of Property Act, 1882, defines ‘sale’ as “a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.”

⁶⁰1988 (3) Bom CR 52.

⁶¹AIR 1966 MP 318.

Requisites of a valid sale

- 1) **Parties:** In a sale there must be a seller and a buyer. A seller should be competent to transfer the property to the seller. In addition, both of them should be competent for contract- of a sound mind, reached age of majority .
- 2) **Subject matter of sale:** The subject matter should be sale of immovable property. It may be of tangible immovable property like house, land, etc. or of intangible immovable property such as right of fisheries or ferries, etc.
- 3) **Price or consideration:** Price is a very vital factor of a sale. A sale is a transfer of ownership in exchange of money. For completion of the transfer, payment of price is not necessary but its reference is essential. At the time of execution, it can be paid or promised to pay or part payment of it can be made at the time of execution and rest may be promised to be paid in the future.
- 4) **Transfer of Ownership:**In a sale, the said property must be transferred from the seller to the buyer.

Section 54 states there must be a registered conveyance in the case of-

- Any tangible immovable property of the value of Rs. 100 and upwards; or
- a reversion of an intangible thing of any value.

In case of tangible immovable property of a value less than Rs. 100, there may either be,

- a registered conveyance, or
- delivery of property.

Sale and Contract of Sale

Section 54 defines both 'sale' and 'contract of sale'. On one hand it describes 'sale' as a transfer of ownership of a property in exchange for a price; on the other it establishes 'contract of sale' as an agreement of sale on specific terms as decided between the parties.

A 'contract of sale' precedes a sale and is merely a document based on which shall be obtained duly executed sale deed. A sale mandates that absolute interest in the property shall be passed on

to the buyer and needs to be duly registered; a contract of sale requires no registration, as it is only the means not the end.

Sale and Exchange

According to Section 54 of the Act, a sale is a transfer of ownership in a property in exchange for a price. Section 118 of the Act defines ‘exchange’ as a transfer of ownership in property in lieu of ownership of another property. “When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called exchange.”

In both there is transfer of absolute interest in the property, but the major difference is that in sale, the consideration is money, whereas in exchange, it is another property or anything of value.

Sale and Gift

In both sale and gift, transfer of ownership of an immovable property is involved. However, the biggest distinction between the two is that in sale the ownership is transferred in exchange for a price, whereas in gift, the immovable property is transferred without any consideration.

In sale, if an immovable property is valued Rs. 100 or more, then it is mandatory to be effected only by registered instrument, but in case of a gift of an immovable property, irrespective of the value of the property, it shall be made solely by registered instrument.

Rights and Duties of a Seller

A Seller’s duty before sale:

Section 55 (1)(a) specifies that if there is any material defect in the property or title of which the buyer is not aware, nor the buyer could in ordinary case discover, then the seller is bound to disclose it to the buyer.

Section 55 (1)(b) lays down that it is the duty of the seller to oblige the buyer on his request for examination of all documents of title relating to the property that are in his custody or power.

Section 55 (1)(2) points out that the seller is duty bound to reply to the best of his ability all queries put up by the buyer, in respect to the property or the title.

Section 55 (1)(d) sets out that to execute the conveyance is an important responsibility of the seller. When the buyer tenders the conveyance to him for execution at the given time and place, he is duty bound to execute it.

Section 55 (1)(c) mandates as duty of the seller to inform the buyer about any ongoing case pending in the court related to the property that may affect the transfer or sale of the property.

Section 55 (1)(g) states that it is the seller's duty that he clears all the dues, taxes, etc. that accrues before the completion of sale, as he continues to be the owner of the property.

A Seller's duty after sale:

Section 55 (1) (f1) states that once the formalities of transfer are completed, the seller shall hand over the possession of the property to the buyer or any such person to whom he directs.

Section 55 (2) lays down that it is the seller's duty to covenant for title.

Section 55 (3) mandates that when the entire of purchase-money has been paid to the seller, he is duty bound to handover all documents of title relating to the property, which is in the seller's possession or power, to the buyer.

A Seller's rights before sale:

Section 55 (4)(a) sets down that before the completion of the sale of the property, the seller is entitled to all the rents, profits or other benefits arising out of the property.

A Seller's rights after sale:

Section 55 (4)(b) says that if some price amount remains unpaid, the seller cannot refuse the delivery of possession nor can claim back the possession if already given to the buyer. Although the seller has a right to recover unpaid purchase money from and out of the property.

Rights and Duties of a Buyer

A Buyer's duty before sale:

Section 55 (5)(a) mandates that the buyer is duty bound to disclose, facts which shall materially increase the value of property, of which he is aware but the seller may not be.

Section 55 (5)(b) provides that the buyer is bound to tender or pay the purchase money to the seller.

A Buyer's duty after sale:

Section 55 (5)(c) provides that once the ownership of the property has passed to the buyer, then the buyer is bound to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller.

Section 55 (5)(d) lays down that after the completion of sale, the buyer is liable to pay the outgoings, like Government dues, revenue or taxes, rents, etc. as he becomes the owner of the property.

A Buyer's rights before sale:

Section 55 (6)(a) specifies that for the purchase money properly paid the buyer in anticipation for the delivery, he is entitled to (unless he has improperly declined to accept delivery of property), a charge on the property and also interest on such purchase money.

In case he declines to accept delivery, then the earnest money and cost shall be awarded to him.

A Buyer's rights after sale:

Section 55 (6)(a) after sale, the buyer has the right to enjoy the benefits of any improvement in, or increase in value of, the property, and also to the rents and profits.

d).Gift

Section 122 of the Transfer of Property Act, 1882, defines a Gift.

Essential requisites of a gift are-

- A transfer of ownership of a property must be there.

- It shall be an existing property.
- The transfer shall be voluntary.
- The transfer shall be without consideration.
- The donee shall accept the transfer of gift by the donor.
- The gift shall be void if the donor dies before the acceptance of the gift.

The Section makes no specific mention of delivery of possession of the property while defining gift; the acceptance shall mean that the donee has agreed and consented to the said gift.

Section 123 deals with the mode of transfer of immovable as well as movable gifts. In case of immovable gifts two essential conditions have been stated-

- A. Must be done by a registered document;
- B. Shall be attested by two witnesses.

Thus, it is clear that registration is mandatory when it comes to gift of immovable property and the property shall be gifted after the registry and not prior, a point clarified by the Court in the case of Sahadevv. Shekh Papa⁶².

The donor has no right to revoke or cancel the gift after it has been registered unless there exists a specific clause in the deed.

e). Lease

Section 105 of the Transfer of Property Act, 1882, deals with Lease.

It defines lease as-

“A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined-

- The transferor is called the **lessor**,
- the transferee is called the **lessee**,
- the price is called the **premium**, and
- the money, share, service or other thing to be so rendered is called the **rent**.”

Thus, the essential elements of lease are-

- 1) immovable property;

⁶²(1905) 29 Bom. p.119.

- 2) right to enjoy such immovable property;
- 3) a fixed duration of the lease;
- 4) the parties who are competent to make contract; and
- 5) the consideration, that is, the rent.

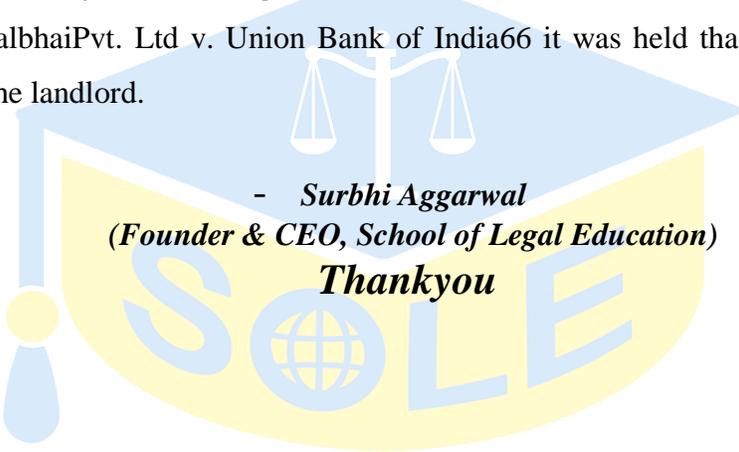
Lease cannot be created for more than one year unless it is registered.

In the case of *Anthony v. K.C. Ittoop & Sons and Others*⁶³, the Supreme Court concluded that even an unregistered lease deed shall be taken as an evidence of any collateral transaction.

In the case of *Hindustan Petroleum Corporation Ltd. v. Vummidi Kannan*⁶⁴ it was specified by the Court that if the renewal of lease mandated compulsory registration then no valid lease shall come into existence until and unless registration is done.

But in the case of *M/s MTZ Industries Ltd v. Mr. K.C. Khosla*⁶⁵, Delhi High Court ruled that no particular form is necessary to serve a legal notice under Section 106 of the Act.

In the case of *Vithalbhai Pvt. Ltd v. Union Bank of India*⁶⁶ it was held that a tenant shall not dispute the title of the landlord.



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Thankyou

⁶³(2001) 1. M.L.J, 12.

⁶⁴AIR 1992 Mad. 190.

⁶⁵RSA No.93-94/2006.

⁶⁶AIR 1992 Cal 283.