

# THE TRANSFER OF PROPERTY ACT, 1882

## Chapter 1

### Learning Objectives

After going through this chapter you should be able to understand:

- ❖ Various definition given under 'The Transfer of Property Act, 1882
- ❖ Types of property under the Act
- ❖ Distinguish between Movable and Immovable Property
- ❖ Concept of Transfer of Property
- ❖ Properties which can be transferred and which cannot be transferred
- ❖ Rules against perpetuity

### Structure

- 1.1 Introduction
- 1.2 Important Definitions
- 1.3 Types of Property
- 1.4 Transfer of Property
- 1.5 What cannot be transferred
- 1.6 Rules against perpetuities
- 1.7 Exceptions to the rule against perpetuity

## 1.1 Introduction

The act came into force on 1<sup>st</sup> July, 1882. The Act applies to the whole of India.

The Preamble to the Act lays down that it is an Act to define and amend the law relating to transfer of property by act of parties (i.e. not by operation of law)

The objectives of the Transfer of Property Act are as follows :

1. To bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the complement to the work commenced in framing the law of intestate and testamentary succession; and
2. To complete the code of contract law, so far as it relates to immovable property."

The Act is limited to the transfer of property by act of parties, as distinguished from a transfer by operation of law e.g. in case of inheritance (succession), insolvency, forfeiture, or sale in execution of a decree. It relates to transfers of property inter vivos, i.e. voluntary transfers between living persons, and has no application to the disposal of property by will. Some of the general provisions of the T.P Act may be applied even to transfer by operation of law, on principles of justice, equity and good conscience.

If the property is movable, the sale of Goods Act will apply, and if it is immovable, the Transfer of Property Act will govern the case.

## 1.2 Important Definitions

1. **Property-** Transfer of Property Act 1882 does not define the term 'property' but it has been used in its widest and most comprehensive sense. Property is a legal term to denote every kind of a interest or right which has an economic content. When a property is transferred, the rights along with the property are also transferred. Property is divided into two broad category i.e. Movable and immovable property.

2. **Immoveable property** – Transfer of property act does not defined the term immovable property but it only speaks that immovable property does not include standing timber, growing crops or grass.

As the act do not give exhaustive definition it only tells what is not included in immovable property, it become necessary to explore the other acts which defined the term immovable property.

According to section 3(25) of the General clauses Act 1897, "the Immovable property shall include land, benefit to arise out of land and things attached to earth or permanently fastened to anything attached to the earth".

Registration Act 1908 define 'immovable property' as " it shall include land, buildings, hereditary allowances, right to ways, lights, ferries, fisheries or any other benefits to arise out of land or things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops or grass".

3. **Instrument-** Section 3 of the transfer of property act defines instruments as "Instrument means a non-testamentary instrument". The transfer of property act does not deal with testamentary transfers (will etc.), that is why instrument does not cover testamentary instrument under this act.

4. **Attested-** Attested in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has

- (a) seen the executant sign or affix his mark to the instrument, or
- (b) has seen some other person sign the instrument in the presence and by the direction of the executant, or
- (c) has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and
- (d) each of whom has signed the instrument in the presence of the executant; but
- (e) it shall not be necessary that more than one of such witnesses shall have been present at the same time, and
- (f) no particular form of attestation shall be necessary.

To attest means to sign and witness any fact. In T.P. Act attesting means that a person has signed the document by way of testimony of the fact that he saw it

executed. The party who sees the document executed is, in fact, a witness to it; if he subscribes as a witness, he becomes an attesting witness. To 'execute' means to write and to put signatures on the instrument.

**5. Registered-** According to Transfer of property act "Registered" means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents.

According to Registration Act,

- (a) the description of the property must be suitably given so that it become easy to identify the property,
- (b) registration must be done in the area in which the property is situated
- (c) the registration must be by the prescribed authority and
- (d) the document for registration must be presented by the proper person.

For the purpose of registration of a document, it is mandatory to fulfill all the above provisions of Registration Act, if the provisions of registration act will not fulfilled, the document will not be considered as duly registered.

**6. Attached to the earth-** Attached to the earth means--

- (i) rooted in the earth, as in the case of trees and shrubs;
- (ii) imbedded in the earth, as in the case of walls or buildings; or
- (iii) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

**7. Actionable Claim-** Actionable claim means a claim

- (a) to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or
- (b) to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant,
- (c) which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

In brief, an actionable claim means –

- (i) a claim to an unsecured debt, or
- (ii) a claim to any beneficial interest in movable property not in possession of the claimant.

Every claim is not an actionable claim. It must be a claim either to a debt or to a beneficial interest in movable property. The beneficial interest is not the movable property in itself, and may be existing, accruing, conditional or contingent. The

movable property in which such beneficial interest is claimed, must not be in the possession of the claimant.

A debt is an obligation to pay a definite amount of sum of money, if the sum money is not certain, it is not debt. A debt may be payable in future, or it may be conditional or contingent. Debt secured by a mortgage of immovable property or by pledge of movable property is excluded from the definition of actionable claim, as they are secured.

Beneficial interest refers to a claim under a contract to movable property.

**8. Notice - A person is said to have notice"** of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

### **1.3 Types of Property**

Transfer of Property Act 1882 does not define the term 'property' but it has been used in its widest and most comprehensive sense. A property is a collection of rights. When a property is transferred, the rights along with the property are also transferred but it is not necessary to transferred all rights with the property, the arrangement can be made by which some of the rights may be transferred. For example, when gift of a house is made by the transferor to transferee, there is a transfer of absolute right but in case of a lease agreement only partial interest i.e. right of enjoyment of the house is transferred. Property is divided into two broad category i.e. Movable and immovable property.

**1. Immovable Property** – The transfer of property Act 1882 has not defined the term but Section 3 of the act merely lay down that "immoveable property" does not include standing timber, growing crops or grass.

Section 3(26) of the general clause Act 1897 defined immovable property as "it shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything to the earth."

According to Indian Registration Act, Immovable Property includes land, building, hereditary allowances, right to ways, lights, ferries, fisheries, or any other benefits to arise out of land and things attached to earth, but not standing timber, growing crops or grass.

Immovable Property means lands, benefits arising of the lands and the things attached to the earth or permanently fastened to anything attached to the earth. Other than the physical aspect, every benefit arising from and every interest in the property is also included in the definition. It excludes three things, namely, standing timber, growing crops and grass.

It may be concluded from above definitions that Immovable Property means lands, benefits arising of the lands and the things attached to the earth or permanently fastened

to anything attached to the earth. Other than the physical aspect, every benefit arising from and every interest in the property is also included in the definition. It excludes three things, namely, standing timber, growing crops and grass.

After analysis the above definitions it may be concluded that the following objects and things are included in 'Immovable property':

- (1) **Land** – Land includes earth's surface, column of space above the surface, the ground beneath the surface, all objects which are on or under the surface in its natural state e.g. minerals, land covered by water e.g. lakes, river and ponds, object placed by human agency with the intention of permanent annexation e.g. buildings, walls and fences.
- (2) **Benefits arising out of land** – The benefits arising out of land are also known as 'profit a prendre'. All benefits arising out of immovable property and every interest in such property are also regarded as immovable property as such benefits cannot be severed from the land e.g. hereditary allowances, rights of ways, right to collect fish from ponds etc. If Ram sells a forest to Shyam, the trees, rivers, minerals etc. all forming part of land or 'profit a prendre' or benefits arising out of land will go with it.

**Case Laws:** In case of **Shanta Bai v State of Bombay** (AIR 1959 SC 532) right to enter in land, cut and carry away wood over a period of 12 years was held to be immovable property.

- (3) **Things attached to earth** – Section 3 of Transfer of property Act defines the expression "attached to earth" as including –
  - (a) things rooted in the earth as in the case of trees and shrubs
  - (b) things imbedded in the earth, as in the case of wall or buildings
  - (c) things attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

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**The following have been judicially interpreted as included in immovable property:-**

- (i) A right of way
- (ii) A right of ferry
- (iii) Right to collect rent of immovable property
- (iv) A right to catch and carry away fish
- (v) Hereditary rights
- (vi) Rights of collect lac from trees etc.

**But the following are not included in immovable property:-**

- (i) A right to worship;
- (ii) A copyright;
- (iii) The interest of a partner in a partnership firm;
- (iv) A right to get maintenance;
- (v) A right to obtain the specific performance of an agreement to sell;
- (vi) Government promissory notes; and
- (vii) A machinery that is not permanently attached to the earth and can be shifted from one place to another.

The real test is whether a property is immovable or movable is the intention behind the transfer and the transferability of the property. For example, generally a mango tree will be treated as an immovable property but it will be treated as movable property if it is to be cut and used to build a house.

**2. Movable Property** – The definition of movable property is not given in transfer of property act 1882. According to general clause act, “movable property means property of every description except immovable property”.

The following are held to be not immovable property so these properties may be considered as movable property:

- (i) Right of worship
- (ii) A decree for sale of immovable property
- (iii) A decree for arrears of rent
- (iv) Royalty
- (v) A right to recover maintenance allowance
- (vi) Standing timber, growing crops and grass
- (vii) Machinery which is not permanently attached to earth etc.

**Case laws:**

**Bamdev Panigrahi v Manorama Raj** (AIR 1974 A.P. 226) – it was held in this case that Cinema equipments like projector, diesel engine etc. installed on the tenanted land temporarily and not only not attached to the earth, but also not permanently fastened to anything attached to the earth, are movable properties.

**Ducans Industries Ltd. v state of U.P.** [(2000) 1 SCC 633] – it was held whether a machinery embedded in the earth can be treated as movable or immovable property depends upon the intention of the parties which embedded the machinery and also the intention of the parties who intend alienating that machinery.

## Distinguish between Movable and Immovable Property

In a leading case Justice Holloway explained the difference between movable and immovable property: Movability may be defined a capacity in a thing of suffering alteration of the relation of place. Immovability is incapability for such alteration. If however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable.

S.No.	Immovable Property	Movable Property
1.	It includes land, benefits to arise out of land, and things attached to the earth (sec. 3 of General Clauses Act).	It includes stocks and shares, growing crops, grass, and things attached to or forming part of the land, and which are agreed to be severed before sale, or under the contract of sale (sec.2 of Sale of Good Act).
2.	If the thing is fixed to the land even slightly of it is caused to go deeper in the earth by external agency, then it is deemed to be immovable property.	If the thing is resting on the land merely on its won weight, the presumption is that it is movable property, unless contrary is proved.
3.	If the propose of annexation of a thing is to confer a permanent benefit to the land to which it is attached, then it is immovable property.	If the purpose was only to enjoy the thing itself, then it is movable property even though it is fixed in the land.
4.	Examples Benefits to arise out of land such as hereditary allowances, right of way, ferries and fisheries, right to collect rent and profits of immovable property; a mortgage-debt; right to cut grass of one year, a factory; etc.	Examples Right of worship; royalty; a decree of sale of immovable property; a decree for arrears of rent; Government promissory notes; standing timber, growing corps and grass.
5.	Transfer of immovable property requires registration of the document	No registration is required to transfer a movable property.

## 1.4 Transfer of Property

### Section 5

#### “Transfer of property” defined.—

In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act.

In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

#### Right to Property

Right to obtain shares of a company is a “property” and the donee’s right to such shares cannot be thwarted only because such shares in the name of the donee was not entered into the register of the company; Vasudev Ram Chandra Shelat v. P.J. Thakkar, (1974) 2 SCC 323.

#### Analysis of definition given u/s 5

After analyzing the language of section 5 the following point may be observed:

1. **Act of Conveyance**- Transfer of property is an act in which the property must be conveyed. It is not necessary that all rights or interest in property must be conveyed to another person. The person conveying the property is entitled to the property wanted to be conveyed and it is conveyed to that person who has no prior title in it.
2. **In present or in future** – Section 5 allows that the transferor may transfer the property either with immediate effect or to be effective from a future date. It must be remember that whether the transfer of property will take effect from present or from future but property must exist at the time of transfer. It means that at the time of transfer, the property must be in existence; hence no transfer shall take effect in case of future property.



3. **Living Persons** - The property must be conveyed by one living person to another living person, it means the transfer must be 'Inter Vivos' transfer. In this section "living person" includes a human being, a company or association or body of individuals, whether incorporated or not.
4. **To himself or himself with on or more other persons** – A living person conveys property to one or more other living persons, or to himself, or to himself and one or more other living persons. But earlier, the property cannot be conveyed to himself, it means a person cannot be able to transfer a property to himself, it become difficult for those person who want to settle their property into trust and declare themselves as the sole trustee. To overcome this difficulty, in 1929 the word 'to himself' was added.
5. **Kinds of transfer** – The act contemplates the following type of transfer- sales, mortgage, lease, exchange and gift.

### 1.5 What may be transferred (section 6)—

Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,—

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred;

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby;

- (c) An easement cannot be transferred apart from the dominant heritage;
- (d) All interest in property restricted in its enjoyment to the owner personally cannot be transferred by him;
- 1[(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred;]
- (e) A mere right to sue 2[\*\*\*] cannot be transferred;
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable;
- (g) Stipends allowed to military 3[naval], 4[air-force] and civil pensioners of the 5[Government] and political pensions cannot be transferred;
- (h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) 6[for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872)], or (3) to a person legally disqualified to be transferee;
- 7[(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.]

## COMMENTS

If guardian of a minor transfers his property without permission of Court as envisaged under section 8 of the Hindu Minority and Guardianship Act, 1956 and without legal necessity, then a purchaser of property from minor can sue to set aside such sale within 3 years after the minor attains majority; Amritham Kudumbah v. Sarnam Kudumbam, AIR 1991 SC 1256.

## Ingredients of Section 6

1. **Spes Successionis [sec 6(a)]** – ‘Spes successionis’ means expectation of succession, it is a possibility of getting in future through succession. Section 6(a) of TP Act includes the following:
  - (i) **The chance of an heir-apparent succeeding to an estate**- The term ‘heir apparent’ implies that a living person does not have any heir. An heir is a person who succeeds to the property of another on the death of the later if such person dies intestate or wills his property to him.

Intestate means if a person dies leaving behind property without a valid will. Therefore, who will be the heir can only be determined only at the time of the death of a person.

A mere chance or possibility or expectancy of an heir succeeding to an estate is not a transferable property. If a person transfers spes successionis, the transfer in law is void ab-initio. It does not convey any right in favor of the transferee, even if the transferor who transfers a chance may, in fact, become the owner of the same property in future.

- (i) **Chance of legacy** – The chance of a relation obtaining a legacy is also mere possibility and therefore cannot be transferred. This is so even if the testator has agreed with the relation that would give him a legacy. A will or legacy becomes operative only after the death of the testator. If a testator has made two or more wills, then only the last will made by him be operative. Expectancy to receive legacy is uncertain because the legatee may or may not survive the testator and the testator may have changed the name of legatee in his last will. That is why; the chance of a legacy has been made non-transferable.
- (ii) **Any other possibility of like nature**- Any other possibility is similar to spes successionis or the chance of a relation obtaining a legacy cannot be transferred. Any property which is merely a future uncertain possible interest should not be made a transferable property. For example: future wages of a servant before they are earned, possibility of winning lottery or a prize in a competition cannot be transferred.

**2. Right of Re-entry [Sec6 (b)]** – A right of re-entry for a breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby e.g. X grants a lease of a plot of land for 3 years to Y with the condition that Y shall not dig a tank on the land but Y digs the tank. X transfers the right of re-entry to Z for the breach of the condition committed by Y. The transfer is invalid.

**3. Easement [Sec6 (c)]** - An easement is a right to use, or restrict the use of land of another in some way, e.g. right of way, right of light and water etc. An easement cannot be transferred without the property which has the benefit of it. It means if anybody wants to transfer an easement, it can be transferred only with along the property. E.g. X, the owner of a house, has a right of way over an adjoining plot belonging to Y. X transfer this right to Z. The transfer is invalid because this is a transfer of an easement only. If, however, X transfers the house itself to Z, the right to way will pass on to Z without any additional act on the part of X.

4. **Restricted interest [Sec6 (d)]** - A person having right to a property can transfer the same either subject to a restriction or without restriction. Where property is transferred subject to a restriction the transferee is supposed not to act contrary to the restriction. Thus, if property is transferred to the transferee with a restriction that it is to be enjoyed him personally, he shall have no right to transfer such a property and if he transfers the property in violation of the restriction, the transfer shall be void under this clause. Under this clause, a trustee cannot alienate his office because his office is based on personal confidence.
5. **Maintenance [Sec6 (dd)]** - “A right to future maintenance, in whatsoever manner arising secured or determined, cannot be transferred”. A right to receive maintenance is a personal right, although any particular property or the income thereof may be charged with it. The right of maintenance is a personal right and it is not transferable. But this right can be transfer in case of any arrears of maintenance but as to future maintenance it is not valid.
6. **Mere right to sue [Sec6 (e)]** - A mere right to sue cannot be transferred. To sue means to make a legal claim or to take legal proceedings against any person. Claims for damages for breach of contract or for tort, for suing an agent for accounts are all mere rights to sue and cannot be transferred. But if right to sue has merged in a decree, the right can be transferable.
7. **Public Office [Sec6 (f)]** – A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable. The prohibition on transfer of public office and on transfer of the salary of a public officer is imposed on ground of public policy. A person is chosen to hold a public office for qualities personal to him and if he were allowed to transfer it, there is likelihood that the public duties may not be duly discharged and as well salary is given to him for purpose of upholding its dignity and proper performance of its duties, it cannot be transferable.
8. **Pensions [Sec6 (g)]** – Under this clause, stipend allowed to military and civil pensioners of Government and political pensions cannot be transferred. Here pension means a stipend granted not in respect of any right of office but on account of past services of particulars merit.
9. **Nature of Interest [Sec6 (h)]** – This clause deals with three classes of cases:
  - (i) **Opposed to the nature of business** – there are things which from their very nature are not transferable. It includes, res communes, i.e. things of which no one in particular is the owner or also known as res nullius i.e. thing without an owner) such as air, water of rivers etc. These things from their very nature are not transferable. Similarly, res extra commercium (i.e. things which cannot be the subject of commerce) e.g. property dedicated to a idol cannot be transferred.

- (ii) **Unlawful object or consideration** – A property otherwise transferable become non transferable when the object or the consideration of the transfer is unlawful. Thus a house given on rent for the purpose of gambling or prostitution being immoral or opposed the public policy is invalid.
- (iii) **A person legally disqualified to be a transferee** – A transfer cannot be made in favor of a person who is disqualified to be transferee. U/S 36 of Transfer of property act, a judge, a legal practitioner or an officer connected with courts of justice are disqualified fro purchasing any actionable claims.

**10. Untransferable Interest [Sec6 (i)]** – The general rule is that leasehold are transferable but this clause makes an exception to this rule and declares certain interest untransferable. A tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate cannot assign or transfer their interest in the holding.

### **1.6 Rule against perpetuity (Section 14) —**

No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

#### **Analysis of Section 14**

1. The vesting of property absolutely cannot be postponed beyond the life-time of any one or more persons living at the date of transfer, i.e. there must be no internal between the termination of the precedent interest of a living person and the vesting of the interest in the unborn person.
2. The unborn person takes a vested interest at birth, immediately on the termination of prior interest, however the vesting of interest in favor of him may be postponed until he attains full age i.e. the age of majority. Sec 14 allows the delaying of the vesting during the minority period of a person who is not born at the date of the transfer.
3. Perpetuity Period – It is maximum period during which the property may be rendered inalienable. The extent of perpetuity period is the life of any person who is alive at the movement when the deed which creates the interest begins to operate, plus period of 18 years from the time when such designated person dies.
4. While examining the transfer of property under sec 14, the court looks at the possible events according to the terms of the deed, and not the actual events on the date of transfer.

## 1.7 Exceptions to the rule against perpetuity

1. Vested interests are not affected by the rule, for when an interest has once existed, it cannot be bad for remoteness.
2. Gifts to charities do not fall within the rule, thus, in case of a transfer for the benefit of the public in advancement of religion, knowledge, health, commerce etc., the rule does not apply. Perpetuity is not repugnant in cases of religious or charitable endowments.
3. Property settled upon individuals for memorable public services may be exempted from the operation of this rule.
4. The rule against perpetuity applies when interest in property is created and has no application to personal contracts. A contract for sale of property does not of itself create any interest in such property. Thus, a contract to pay money to a person, his heirs or legal representatives upon a future contingency, which may happen beyond the period prescribed would be perfectly valid.
5. The rule also does not apply to contracts for perpetual renewal of leases.
6. The rule also does not apply where only a charge is created, which does not amount to a transfer of any interest e.g. when property is made merely security for payment of money.
7. A covenant of redemption in a mortgage does not offend the rule.

### OBJECTIVE TYPE QUESTIONS

1. Choose the most appropriate answer from the given options in respect of the following:
  - a) Immovable property includes
    - i) standing timber
    - ii) growing crops;
    - iii) hereditary offices;
    - iv) a right to way.
  - b) Transfer includes
    - i) the chance of an heir-apparent succeeding to an estate.
    - ii) an easement apart from the dominant heritage.
    - iii) a mere right to sue.
    - iv) voluntary transfer.
  - c) The transfer of Property Act, 1882 applies to-
    - i) Movable property
    - ii) Immovable property
    - iii) Both (a) and (b)
    - iv) Only to testamentary dealings

### Short Answer Type Questions

1. Explain in the 'rule against perpetuity' and point out exceptions thereto.
2. What are the exceptions to the general rule that property of any kind may be transferred? Refer to the relevant provisions of the Transfer of Property Act, 1882.

# THE TRANSFER OF PROPERTY ACT, 1882

## Chapter 2

### Learning Objectives

After going through this chapter you should be able to understand:

- ❖ Concept of Lis Pendens
- ❖ Meaning of sale and essential of a valid sale
- ❖ Rights and liabilities of buyer and seller
- ❖ Mortgage and kinds of Mortgage
- ❖ Concept of charge

### Structure

- 2.1 Lis Pendens
- 2.2 Definition and essentials of a valid sale
- 2.3 Rights and liabilities of buyer and seller
- 2.4 Definition of Mortgage
- 2.5 Kinds of Mortgage
- 2.6 Definition and Requisite of charge
- 2.7 How a charge can be created
- 2.8 Distinction between Mortgage and Charge

### 2.1 Lis Pendens (Section 52)

Transfer of property pending suit relating thereto During the pendency in any court having authority [within the limits of India excluding the State of Jammu and Kashmir] Government or established beyond such limits] by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

**Explanation :** For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

**For example**, there is a dispute between A and B with regard to ownership of property X. A files a suit against B in a court of law. A may either win or lose the suit. If he wins, he gets the property. If he loses, B gets the property. Now suppose during the pendency of the suit, A, professing to be the owner of the property, sells it to C. If the suit ends in A's favour, no difficulty arises. If it ends in B's favour, C cannot retain the property. C is bound by the decree of the Court and must return the property to B. He cannot even take plea that he had no notice of the pending litigation.

It may be noted that the doctrine of lis Pendens applies only when the property has been transferred by a party to the litigation and it does not apply when the property has been transferred by a stranger i.e., the person who is not a party to the litigation.

### **Essentials of the Doctrine**

1. There must be pendency of a suit or proceeding.
2. The suit or proceeding must be pending in a competent court.
3. The suit or proceeding must not be collusive.
4. A right to immovable property must be directly and specifically in question in the suit or proceeding.
5. The property in dispute must be transferred or otherwise dealt with by any party to the litigation.
6. The alienation must affect the rights of the other party.

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## 2.2 Sales

**"Sale" defined (Section 54)** - "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

### Essential of a valid sale

The following are the essential of a valid sale:

- (i) There must be at least two parties i.e. transferor or seller and buyer or transferee. The seller and the buyer must be a competent person. The seller must be a competent person; it means he must be major, sound mind and not declared by law as disqualified. The seller must have a legal title on property which he wants to sell if he does not have the title he cannot sell it e.g. a tenant cannot have the power to sell the tenanted property. The buyer must also be a competent person, he must not be disqualified by any law to buy a property e.g. a judge, an official of court cannot buy actionable claims.
- (ii) The subject matter of transfer of property act in case of sale must be transfer of immovable property only as movable property are dealt in sale of goods act 1930.
- (iii) The transfer must be in exchange for a price. At the time of contract of sale the price must be ascertained for which the property is going to be transferred. The price may be paid at the time of sale or it may be paid later on but must be ascertained at the time of contract of sale.
- (iv) There must be a transfer of ownership.

### Sale how made:

The conditions for the transfer of ownership in case of sales

1. In the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, the transfer can be made only by a registered instrument.
2. In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
3. Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

**Contract for sale:** Find More at [https://t.me/Law\\_Drishti](https://t.me/Law_Drishti)

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

In a contract of sale of an immovable property it the parties who decide that on what term and condition the sale will be effective. Section 54 says that a contact of sale does not of itself

create any interest in or charge on such property. Even after the contract of sale the ownership remains with the vendor. The intending buyer acquires no interest in the property; he has only the right to get conveyance in the term of the contract; the vendor's ownership over the property remain unaffected.

### **2.3 Rights and liabilities of buyer and seller (Section 55) -**

In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights as are applicable to the property sold. The section 55 will be applicable only when there is no express contract to the contrary.

#### **Seller's Liabilities/ Duties [sec-55(1)(2) & (3)]**

The liabilities/duties of seller can be divided into two categories:

##### **2.3.1. Seller's Liabilities before completion of sale [Sec 55 (1)(a)-(e)(g)]**

(a) **Sellers duty to disclose-** It is the duty to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover [sec-55 (1) (a)]

(b) **To produce Title-deeds-** The seller is bound to produce to the buyer on his request for examination all documents of title relating to the properties which are in the seller's possession or power [sec-55 (1) (b)].

(c) **To answer questions as to title-** The seller is bound to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto [sec-55 (1) (c)]

(d) **To execute a proper conveyance-** On payment or tender of the amount due in respect of the price by buyer, it is the duty of seller to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place [sec-55 (1) (d)]

(e) **To take care of property and Title deeds-** Between the date of the contract of sale and the delivery of the property, the seller is bound to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents [sec-55 (1) (e)]

(f) **To pay statutory charges due on property-** The seller is bound to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold

subject to encumbrances, to discharge all encumbrances on the property then existing [sec-55 (1) (g)]

'Public charges' mean to financial or other liabilities such as tax liabilities to the government. The obligation is absolute unless there is a contract to the contrary. These statutory charges cannot enforce against a buyer who purchases the property without notice of the same.

### **2.3.2. Seller's Liabilities after completion of sale [Sec 55 (1)(f), sec 55(2) & (3)]**

(a) **To give possession**- The seller is bound to give to the buyer or to such person as he directs, such possession of the property as its nature admits [sec-55 (1) (f)]. The seller is to give possession to the buyer or his authorized person whenever the buyer so requires.

(b) **Implied covenant for title** - The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

PROVIDED that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. [sec-55 (2)].

(c) **To Deliver Title-deeds on receipt of price** - Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

PROVIDED that,

(i) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and,

(ii) where the whole of such property is sold to different buyers, the buyers of the lot of greatest value is entitled to such documents. But in case (i) the seller, and in case (ii) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

### **2.3.3. Seller's Rights [sec-55(1)(2) & (3)]**

The Rights of seller can also be divided into two categories:

### 1. Seller's Rights before completion of sale [Sec 55 (4) (a)]

**Right to take the rents and profits of the property**-The seller is entitled to take the rents and profits of the property till the ownership thereof passes to the buyer.

### 2. Seller's Rights after completion of sale [Sec 55 (4) (b)]

**Charge upon property for unpaid price**- where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

### 2.3.4. Buyer's Liabilities/duties

The buyer liabilities can be divided into two parts:

#### Buyer's Liabilities before completion of sale [Sec 55 (5) (a)]

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: PROVIDED that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

#### Buyer's Liabilities After completion of sale

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

### 2.3.5. Buyer's Rights

The buyer liabilities can be divided into two parts:

## Buyer's Rights before completion of sale

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a) and paragraph (5), clause (a), is fraudulent.

## Buyer's Rights after completion of sale

Benefit of increment [sc 55 (6) (a)]re the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

## 2.4 Mortgage (Section 58)

Section 58 of transfer of property act defines the terms "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed as follows:

**Definition of Mortgage-** Section 58 of Transfer of property Act 1882 'A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing any of the following:

- (i) The payment of money advanced or to be advanced by way of loan,
- (ii) An existing or future debt, or
- (iii) The performance of an engagement which may give rise to a pecuniary liability.

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

In a mortgage, out of the bundle of rights which constitute ownership, some are transferred to the mortgagee and the other rights remain vested in the mortgagor.

## 2.5 Kinds of Mortgage

(a) **Simple mortgage [section 58(b)].**—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

### **Elements of Simple Mortgage**

- (i) The possession of the mortgage property is not delivered by the mortgagor to mortgagee.
- (ii) The mortgagor undertake a personal liability to pay the mortgage money and
- (iii) In the event of mortgagor's failing to pay according to term of the contract, the mortgagee shall have a right to move to the court for a decree, to sell the property and to pay off his debt out of the sales proceed of the property and balance if any to be paid back to the mortgagor.

(b) **Mortgage by conditional sale [Section 58(c)]** — Where, the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

### **Elements of Mortgage by conditional sale**

- (i) The mortgagor ostensibly (ostensible means that it has an appearance of sale but is really not a sale) sells the mortgaged property.
- (ii) The mortgagor sells the property on the condition that:
  - (a) on payment of mortgage money the sale shall become void and the buyer shall transfer the property to the seller on the date fixed
  - (b) On default of payment of the mortgage money on the date fixed, the sale shall become absolute.
- (iii) The proviso to this section envisages that the condition affecting a sale as a mortgage transaction must be incorporated in one and the same deed. Where there are separate deeds

he mortgagor will be debarred from saying that the transaction was in the nature of mortgage by conditional sale.

In this form of mortgage, there is no personal liability on the part of the mortgagor to pay the debt. The remedy of the mortgage is by foreclosure only.

(c) **Usufructuary mortgage [Section 58(d)]** —Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

### **Elements of Usufructuary Mortgage**

- (i) There is delivery of possession to the mortgagee or an express or implied undertaking of the mortgagor to deliver such possession.
- (ii) Retention of the possession by the mortgagee till the payment of the mortgage money or he has to receive rents and profits of the property either in lieu of interest on mortgage money or in payment of mortgage money or partly in payment of either interest or mortgagee money.
- (iii) There is no personal liability of the mortgagor.
- (iv) The mortgagee cannot foreclose or sue for sale of mortgage property
- (v) When the amount due is personally paid or the debt is discharged by rents and profits received by the mortgagee, the mortgagor is entitled to redeem the property.
- (vi) There is no time limit fixed for the repayment.

(d) **English mortgage[Section 58(e)]** —Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

### **Elements of English Mortgage**

- (i) The mortgagor takes a personal liability to repay the mortgage money
- (ii) He promise to pay the mortgage money on a certain date
- (iii) He transfer the mortgage property absolutely to the mortgagee and
- (iv) When the mortgagor pays back the mortgaged money to the mortgagee, the mortgagee retransfer the property to mortgagor.

(e) **Mortgage by deposit of title-deeds [Section 58(f)]** —Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

#### **Elements of Mortgage by deposit of title-deeds**

- (i) This form of mortgage is allowed only in Calcutta, Madras, and Bombay and in any other town for which the State Government concerned has notified.
- (ii) The mortgagor delivers to a creditors or his agent documents of title of a immovable property
- (iii) The documents of title are delivered with intent to secure the payment of a loan

(f) **Anomalous mortgage [Section 58(g)]** —A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

#### **Types of Anomalous Mortgage**

- (i) **Combination of simple mortgage and usufructuary** – it is a combination of a simple and a usufructuary mortgage. In such type of mortgage, the mortgagee is in possession and pays himself the debts out of the rents or profits and there is also personal undertaking as well as a right to cause the property to be sold on the expiry of the date fixed for payment.
- (ii) **Mortgage Usufructuary by conditional sale-** in such type of anomalous mortgage, the mortgagee is in possession as a usufructuary mortgagee for a fixed period and if debt is not discharged at the expiry of the period, he gets all the rights of a mortgagee by conditional sale.

**Customary Mortgage-** These are mortgage to which special incidents are attached by local usage

#### **2.6 Charges (Section 100)—**



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.

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.

### **Requisites of a Charge**

- (i) A charge does not contemplate any transfer of an interest in the immovable property.
- (ii) The property should be specified, and it should be made security for the payment of money. A clear and accurate specification of the property is mandatory for creation of a charge. Otherwise, the charge would be void for uncertainty.
- (iii) In order to constitute a charge, the form of words is immaterial; it is not necessary to use any technical terms [Nathan V Durga Das AIR 1931 All 62]
- (iv) A charge must be created in favour of a particular person specifically named.
- (v) A charge may be created orally, although if it is created by an instrument in writing, it must be registered, unless made by a will, or unless the amount secured is less than one hundred rupees.
- (vi) A charge cannot be created on a future contingency (Mohani v Purna Shashi AIR 1932 Cal. 451). Thus, a charge created by a person on the unknown and uncertain share, which one of his heirs may succeed to, is invalid as a charge (Matlub Hasan v Kalawati AIR 1933 All 934).
- (vii) A charge on future property is valid and operates on such property when it comes into existence.
- (viii) A charge could be assigned.
- (ix) A charge cannot ordinarily be split up by apportioning liability amongst various persons (Har Charan Lal v Agra Municipal Board AIR 1953 All 315).

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### **2.7 How a charge can be created**

A charge can be created by Act of parties as well as by operation of law

#### **Charge by Operation of Law**

Charges by operation of law are based upon the consideration of duty of implied intention on the part of the owner of the property to make it answerable for a specific claim. A charge created by a decree of a competent court is created by operation of law.

Instances of charges created by operation of law:

- (a) A Hindu widow's charge on the family property for her maintenance, if created by a decree (sec. 39).
- (b) A vendor's charge for unpaid purchase-money [sec. 55(4)]; or the charge of buyer for advances made by him [sec. 55(6)].
- (c) A party entitled to claim contribution under sec.82 also acquires a charge in respect thereof.
- (d) Arrears of government revenue such as municipal taxes are a paramount charge on the land.
- (e) A compromise decree creates a charge on an immovable property [Dattatraya Mote v Anand Datar (1974) 2 SCC 799].

The creation of charge by operation of a statute (Estate Duty Act) does not create an interest in the property (R.M. Arunachalam v I.T. Commr., Madras AIR 1997 SC 2905). A security bond to the court will not operate as a mortgage nor create a charge as the court is not a juridical person, but the security bond creates an encumbrance.

## **2.8 Distinction between Mortgage and Charge**

Where immovable property of one person (a) by act of parties or operation of law, (b) 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 (Sec. 100). An actual mortgage of an immovable property, in the sense that any interest in the property is transferred to the transferee, and yet a person may have a right to recover a debt from the property. Where such a right exists, it is called a 'charge', and the person who is entitled to it is called a charge-holder, and the right is exercisable by a suit for sale of the property for realizing the money charged on it.

### **The distinction between a 'Mortgage' and a 'Charge' is as follows:**

- (1) Security – A 'mortgage' is a security for the payment of a debt. A 'charge' is a security for the payment of money (and such money may or may not be a debt; it may be payment of maintenance allowance). A 'mortgage' may be a security for the performance of an engagement giving rise to a pecuniary liability. Such is not the case with a 'charge'.
- (2) Covenant to Pay – In a 'mortgage', there may be a covenant to pay. In a 'charge', there is no covenant to pay.
- (3) Transfer of interest – A 'mortgage' involves a transfer of an interest specific immovable property. A 'charge' does not operate to transfer any interest in the property in favour of the charge-holder. It merely gives the charge-holder the right to have claim satisfied out of a particular property, without transferring that property to him. It is only under a decree for sale that an interest in the property is transferred in the case of a charge.
- (4) Creation – A 'mortgage' can only be made by act of parties. A 'charge' may arise either by an act of parties or by operation of law.
- (5) Right in rem – A 'mortgage' gives rise to a right in rem. A 'charge' is a little more than a personal obligation without a right in rem. It is available only against a

- particular set of person i.e. persons, who are affected with notice of the charge. A charge becomes a right in rem only when a decree has been obtained to that effect.
- (6) Following the security – A ‘mortgagee’ can follow his security into whatsoever hands it goes (subsequent transferees). Thus, he can follow a bona fide purchaser value without notice. A ‘charge-holder’ cannot do so.
  - (7) Defence of purchaser for value without notice – Such a defence is wholly unavailing against a ‘charge.’ It is good against a subsequent transferee for value with notice, or with or without notice against a transferee without consideration.
  - (8) A mere agreement to create a mortgage is neither a mortgage nor a charge. Every mortgage is a charge but every charge is not a mortgage; it has to be determined in accordance with the intention of the parties.

### **OBJECTIVE TYPE QUESTIONS**

1. Choose the most appropriate answer from the given options in respect of the following:
  - a) Where possession of the property is to be given to the mortgagee, the mortgage is called-
    - i) Usufructuary mortgage
    - ii) Simple Mortgage
    - iii) Anomalous mortgage
    - iv) None of the Above
  - b) The right to alienate the mortgaged property without intervention of the court is available to the mortgagee in the case-
    - i) Where the mortgagee is the government
    - ii) Where there is English mortgage
    - iii) Where there is mortgage by conditional sale
    - iv) Both (i) and (ii)
  - c) A charge can be created by-
    - i) By operation of law
    - ii) By act of parties
    - iii) Both (i) and (ii)
    - iv) None of the above

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### **Short Answer Type Questions**

1. Explain the concept of ‘Lis Pendens’.
2. Distinguish between Charge and mortgage.
3. Define Sale. What are the rights and liabilities of a buyer ?

# THE TRANSFER OF PROPERTY ACT, 1882

## Chapter 3

### Learning Objectives

After going through this chapter you should be able to understand:

- ❖ Definition of Lease and various terms related to Lease
- ❖ How lease is made
- ❖ Rights and liabilities of Lessor and lessee
- ❖ Determination of lease
- ❖ Doctrine of merger
- ❖ Concept of Gift
- ❖ Rules related to actionable claim

### Structure

- 3.1 Definition of Lease, lessee and license
- 3.2 Duration of certain leases in absence of written contract or local usage
- 3.3 Leases how made
- 3.4 Rights and liabilities of lessor and lessee
- 3.5 Determination of lease
- 3.6 Doctrine of merger
- 3.7 Definition of Gift
- 3.8 Transfer of actionable claim
- 3.9 Essential of a valid Transfer of Actionable Claims

### 3.1 Lease

#### Definition of Lease (Section 105)

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.

## **Lessee**

A lessee of a property has a right to possession and enjoyment of the devise to the exclusion of the lessor whereas a licensee does not have such a right. Since the appellant had the right to exclusive possession and enjoyment of the disputed property, he was a lessee and not a licensee; *Ajab Singh v. Shital Puri*, AIR 1993 All 138.

## **Lease**

(i) If the agreement between the parties shows an intention to create an interest in the property in favour of the grantee what results is said to be a lease. A licensee on the other hand does not create an interest in property; *Mrs. Karuna Manoharlal Ohri v. Vipinbhai U. Sanghani*, AIR 1993 Bom 177.

(ii) The furniture and fittings and the tools and implements which have been given alongwith the shop were not meant for the beneficial use of the shop but were meant exclusively for running of the hair dressing saloon, thus creating a lease of the business and not a lease of the shop; *Vidya Wati v. Hansraj*, AIR 1993 Del 187.

## **Licence**

The Corporation had all the supervisory powers to regulate the running of the refreshment stall. No exclusive right was created in favour of the caterer to run the refreshment stall in the manner the caterer choose to do so. Since there is no transfer of interest in the stall and as per the terms of agreement, the document can be termed as licence only and not a lease; *Udai Pratap Singh v. Collector Varanasi*, AIR 1991 All 104.

### **3.2 Duration of certain leases in absence of written contract or local usage.—**

**Section 106.** Duration of certain leases in absence of written contract or local usage.—

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]

If any person claims to the contrary that the lease was for a fixed term or to be a yearly lease instead of a lease from month to month he has to prove by legal, valid and reliable evidence. Therefore the burden lay upon the defendant to prove his contrary claim that lease was for a fixed term of five years and the lease would be entered at the option and wish of the lessee; **Punjab National Bank v. Ganga Narain Kapur, AIR 1994 All 221.**

### **Service of notice**

Notice sent on correct address to addressee who refused to accept it. Presumption lies with regard to notice on addressee/defendant. It is addressee/defendant who has to prove that either notice was not sent on correct address or same was not served upon him; *Kali Ram v. Mirza Wakar Ali, AIR 2005 NOC 296 (UP).*

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### **3.3 Leases how made**

**Section 107** Leases how made.—A lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

2[All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

3[Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

Provided that the State Government may<sup>4</sup>[\*\*\*] from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

### **Lease of immoveable property**

The legislature intended that a lease of immoveable property for a period of more than one year should be made by a registered deed. But if a lease of immoveable property for a term of more than one year is not made by a registered deed or is made orally, then in such cases the presumption about the duration of lease under section 106 will apply; Punjab National Bank v. Ganga Narain Kapur, AIR 1994 All 221.

### **Lease not to apply agricultural lease**

Principle of section 107 which envisage mode in which lease is to be made do not apply to agricultural lease; Atar Singh v. Jiledar Singh, AIR 2005 MP 157

### **Nature of lease**

If a lease agreement is neither a registered document nor an oral agreement accompanied by delivery of possession, it cannot create lessor and lessee relationship. Such document shall not effect any immoveable property nor be received as evidence of any transaction affecting such property; Chemical Sales Agencies v. Naraini Newar, AIR 2005 Del 76.

### **3.4 Rights and liabilities of lessor and lessee (Section 107)**

In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

#### **(A) Rights and Liabilities of the Lessor**

- (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;
- (b) the lessor is bound on the lessee's request to put him in possession of the property;
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

## **(B) Rights and Liabilities of the Lessee**

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor;

(h) the lessee may 1[even after the determination of the lease] remove, at any time 2[whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth; provided he leaves the property in the state in which he received it;

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease;

Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;



(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest;

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell 3[or sell] timber, pull down or damage buildings 3[belonging to the lessor, or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

### **Section 109 Rights of lessor's transferee**

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays

rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

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### **3.5 Determination of lease (Section 111) .—**

A lease of immoveable property determines—

(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event—by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter 1[\* \* \*]; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; 2[or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event]; and in 3[any of these cases] the lessor or his transferee 4[gives notice in writing to the lessee of] his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f)

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

### **3.6 Doctrine of merger**

The doctrine of merger is attracted when a leasehold and reversion coincide. If the lessee purchases the lessor's interest, the lease is relinquished as the same person cannot at the same time be both landlord and tenant. The doctrine of merger is based on the principle of union of two conflicting interests which cannot be held by one person at the same time. Therefore, the leasehold rights in favour of the appellants stand extinguished; *Ramesh Kumar Jhambh v. Official Assignee*, High Court Bombay, AIR 1993 Bom 374.

#### Implied surrender

There can be implied surrender, if the lessor grants a new lease to a third person with the assent of the lessee under the existing lease who delivers the possession to such person or where the lessee directs his sub-tenant to pay the rent directly to the lessor. Since the respondents had by executing the agreement impliedly surrendered their leasehold rights, they were no longer lessees; *P.M.C. Kunhiraman Nair v. C.R. Nagaratha Iyer*, AIR 1993 SC 307.

Clause (1) of section 111(g) has no application as there was no covenant prohibiting sale or on its breach, of the right of re-entry. Clause (2) of section 111(g) is also of no avail to the landlord for forfeiture because there is no unequivocal and clear disclaimer of title of the landlord. Therefore neither clause (1) nor (2) of section 111(g) are of any avail for forfeiture; *Guru Amarjit Singh v. Rattan Chand*, AIR 1994 SC 227.

The statement by the tenant that he was not aware of as to who was his landlord cannot be held to be denial of title of landlord and no eviction decree by forfeiture was granted; *Munisami Naidu v. C. Ranganathan*, AIR 1991 SC 492.

It has been held that the Board was entitled to institute proceedings against the tenant as the notice period had expired; *Vasant Kumar Radhakishan Vora v. The Board of Trustees of the Port of Bombay*, AIR 1991 SC 14.

### **3.7 “Gift” (Section 122)**

“Gift” is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.— Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

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

#### **Validity of gift**

Gift deed executed by defendant in favour of plaintiff with respect of property of her deceased husband. Defendant was not legally wedded wife of deceased. She being concubine was not entitled to inherit property. Gift deed executed by her is not valid.

**Transfer how effected (Section 123)**— For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

#### **Unregistered gift of immovable property**

Under section 123 a gift of immoveable property cannot pass any title to the donee if it is not registered. Any oral gift of immoveable property cannot be made in view of the provision of section 123 of the Act, mere delivery of possession without written instrument cannot confer any title.

#### **Section 124 Gift of existing and future property.—**

A gift comprising both existing and future property is void as to the latter.

#### **Section 125 Gift to several of whom one does not accept.—**

A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

### **Section 126 When gift may be suspended or revoked.—**

The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

#### **Illustrations**

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds goods as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

### **Section 127 Onerous gifts.—**

Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.—A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

#### **Illustrations**

(a) A shares in X, prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B

all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

### **3.8 Transfer of actionable claim (Section 130)—**

(1) The transfer of an actionable claim [whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instruments, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938 (4 of 1938)].

#### **Illustrations**

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to provisions of section 132.

### Instances of Actionable Claim

- (i) Unsecured debt.
- (ii) Right to claim benefit of a contract for the purchase of goods; beneficial interest under a subsisting contract in an actionable claim (Jaffar Mehr Ali v Budge Jute Mills (1907) 34 Cal 289).
- (iii) Arrears of rent [Daya Debi v Chapala Devi (1959) 63 CWN 976].
- (iv) Maintenance allowance payable in future.
- (v) Annuities under a deed of wakf (Mt. Bibi v kAbdul Aziz AIR 1936 Pat 527).
- (vi) Amount standing to the credit of the member of a provident fund.
- (vii) A share in partnership; interest of the partner in a dissolved partnership (Mulchand v Shamdas AIR 1941 Sindh 73).
- (viii) A claim for return of earnest money.
- (ix) Right of vendor to recover money left with vendee.
- (x) Money due under an insurance policy (official Assignee v Hukum Chand AIR 1941 Mad 147).
- (xi) Fixed deposit in a bank [Anantaraman v Official Liquidator (1940) Mad. 157]
- (xii) Hire-purchase agreement [Krishnamurthi v Kamalakshi (Kant 233).

### Instances of Non-actionable Claim

- (i) A debt is an actionable claim, but a debt which has passed into a decree is not an actionable claim; as here the action has already been taken while an actionable claim means something which can be enjoyed only after taking action [Afzal v Ram Kumar Bhudra (1886) 12 Cal 610].
- (ii) The right to recover damages for breach of contract is not an actionable claim. Because after a breach of contract, nothing is left but a right to sue for damages which is not a beneficial interest in the contract (but a mere right to sue for non-performance of the contract) (Hirachandv Nemchand AIR1923 Bom 403).
- (iii) Secured debt (e.g. debt secured by a mortgage).
- (iv) A claim to mense profits (unascertained sum).
- (v) A copyright [Savitri v Dwarka (1939) ALJ 575].

### 3.9 Essential of a valid Transfer of Actionable Claims

- (i) **Mode** – Sec. 130, T.P. Act, prescribes the mode of assigning or alienation an actionable claim. The assignment may be by way of sale, mortgage, gift or exchange. The transfer must be effected by an instrument in writing signed by the transferor or his fully authorized agent. An endorsement on the back of a document comprising the actionable claim is enough.
- (ii) **Effect** – The assignment takes effect from the date of the execution of the writing and its effect is to vest all the rights and remedies of the transferor in the transferee [sec.130 (1)]. The transferee may sue for the actionable claim in his own names without obtaining transferor's consent without making him a party

to the suit (Cl. 2). After the assignment, the transferee is the only person who is entitled to recover the claim. The assignment has also the effect of subjecting the transferee to all the liabilities and equities to which the transferor was subject in thereof at the date of the transfer (Sec.132).

For instance, a debtor has a right to set off any counter claim against the transferee which he could have done against the transferor.

- (iii) Notice – Although a notice of transfer to the debtor is not necessary to perfect the title to the transferee, but until the debtor receives notice of the transfer in accordance with law, his dealings with the original creditor will be protected. The transferee, therefore, in his own interest, must give notice of the transfer to the debtor as early as possible. Once he does this the debtor becomes liable to pay the debt to him alone. However, in respect of transfer of 'arrears of rent', such notice will not be necessary.

Sec.131 lays down that every notice of transfer of an actionable claim shall be in writing signed by the transferor (or his agent) or in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

### **Case Law**

In *Doriaswami Mudaliar v D. kAijangar* (AIR 1925 Mad 753), it was held that (1) even though Sec. 130 does not prescribe any language or wording of transfer, from the language used, the intension must be clearly discernible; (2) the whole of the debt/beneficial interest must be transferred, a part cannot be transferred, as a single cause of action will be split up into a number of causes of action; and, (3) the letter of transfer must be addressed to the transferee.

1. Which of the following is an actionable claims :

- (i) Fixed deposit in a bank.
  - (ii) Share purchased form UTI but not yet issued.
  - (iii) A claim to maintenance.
- (a) (i) and (ii) above.  
(b) (ii) and (iii) above.  
(c) All of the above.  
(d) None of the above.

2. What do you mean by Onerous gift?

3. Define Lease. What are the Rights and liabilities of lessor and lessee.

4. What do you mean by actionable claim? What are the essential of a valid transfer of actionable claims?