

**LLB**  
**Subject: Property Law**

**Paper Code: 310**  
**L4 C4**

**Objective:** The Objective of this paper is to focus on concept and classification of property as well as principles governing transfer of immoveable property.

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

- a. Concept of property – distinction between movable and immovable property
- b. Transferability of property
- c. Compartment transfer
- d. Conditions restricting transfer
- e. Definition of property of transfer
- f. Transfer and non-transfer property
- g. Transfer to an unborn person and rule against perpetuity
- h. Vested and Contingent interest
- i. Rule of Election

**Unit-II: General Principles Governing Transfer of Immoveable Property**

- a. Transfer by ostensible owner
- b. Rule of feeding grant by *estoppel*
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- d. Fraudulent transfer
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**Unit – III: Specific Transfers – I**

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**Unit – IV: Specific Transfer – II**

- a. Lease and License
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## **Unit-I: Concept of Property and General Principles Relating to Transfer of Property**

### **a. Concept of property – distinction between movable and immovable property**

Under Transfer of Property Act we deeply study about moveable property and immoveble property.

Section 3. Interpretation clause

In this Act, unless there is something repugnant in the subject or context,-

" immovable property" does not include standing timber, growing crops or grass;

#### **Movable Property:**

1. The movable property can easily be transported from one place to another, without changing its shape, capacity, quantity or quality.
2. Examples: vehicles, books, utensils, timber, etc.
3. Mango trees, if cut and sold for timber purpose, are deemed as movable property.
4. Contract for cutting the bamboos and collection of beedi leaves for orve sjea comes under movable property.
5. The movable property need not be registered under the Indian Registration Act, 1908. It is purely optional.
6. The movable property is liable to sales tax, and Central sales tax, subject to certain restrictions and conditions under the Andhra Pradesh General Sales Tax Act, 1957 (or the State concerned) and the Central Sales Tax Act, 1956.
7. Mere delivery with intention to transfer the movable property completes the transfer.
8. Movable property does not form an accretion to an ancestral impartibly estate. (Case-law: Thakur Hari Singh vs. Commissioner of Income-tax (AIR 1968 Raj. 5)

**Immovable property:**

1. The immovable property cannot easily be transported from one place to another. If transported, it will lose its original shape, capacity, quantity or quality.
2. Examples: Land, houses, trees attached to the ground; so long they are so attached.
3. Mango trees, if sold for nourishment and for fruits, they are deemed as immovable property.
4. Gutting the bamboos for a number of years under a contract comes under Immovable property.
5. Whenever the immovable property is transferred, it must compulsorily be registered under the Indian Registration Act, 1908, subject to its value if exceeds Rs. 100.
6. The immovable property is not liable to sales tax. But stamp duty is to be paid under the Indian Stamp Act 1899 and registration fee is to be paid under the Indian Registration Act 1908.
7. Mere delivery does not sufficient for a valid transfer. The property must be registered in the name of the transferee,
8. Immovable property only forms and accretion ‘ to an ancestral impartible estate.  
(Case-law: Mahendra Singji vs. Iswar Singji 1952 B. 243)

**b. Transferability of property :**

The transferability of the property i.e. what property may be transferred is to be seen in the light of section 6 of the Transfer of Property Act and as per section 6 following property may be transferred

Section 6: what may be transferred

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 anyone except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A mere right to sue 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, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.

(h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) 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.

(i) Nothing in this section shall be deemed to authorize 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.

### **c. Compartment transfer**

The concept of compartment transfer deals with the situation where the owner of the property transfers a portion of his property to the other party; in such a case the transferee becomes entitled to possession on that particular portion of the property which has been transferred to him and the rest of the property would still be in the possession of the owner.

This principle is basically protecting the first owner with respect to the property which is left with him.

### **d. Conditions restricting transfer**

The Transfer of Property Act 1882 contains specific provisions regarding what constitutes transfer and the conditions attached to it. According to the Act, transfer of property means, 'an act by which a living person conveys property to one or more other living persons, or, himself and one or more other living persons'. The living person may include an individual, company or association, or body of individuals.

Section 10, Condition restraining alienation;

Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him:

PROVIDED that property may be transferred to or for the benefit of a women (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

What transfer of property means:

Every person who is competent to contract is competent to transfer property. The transfer may be in whole or in part. He should be entitled to the transferable property, or authorized to dispose off a transferable property which is not his own. The right may be either absolute or conditional. The property may be movable or immovable, present or future. Such transfer can be made orally, unless a transfer in writing is specifically required under any law. A transfer of property passes forthwith to the transferee, all the interest which the transferor is then capable of passing in the property, unless a different intention is expressed or implied.

However, in some cases there may be transfer of property by an unauthorized person who subsequently acquires interest in such property. According to the Transfer of Property Act, in case a person either fraudulently or erroneously represents that he is authorized to transfer certain immovable property and does some acts to transfer such property for a consideration, such a transfer will continue to operate in future. It will operate on any interest which the transferor may acquire in the property. This will be at the option of the transferee. This can be done during the time during which the contract of transfer exists. According to this rule, the rights of a bona fide transferee, who has no notice of the earlier transfer or of the option, are protected. This rule embodies the rule of estoppel, that is, a person who makes a representation cannot later on go against it.

The rights of a transferee will not be adversely affected, provided, he acted in good faith, the property was acquired for consideration, and the transferee had acted without notice of the defect in title of the transferor.

It should be noted that these conditions must be satisfied:

\_ there must be as representation by the transferor that he has authority to transfer the property. The representation should be either fraudulent or erroneous

\_ the transferee must act on the representation in good faith

\_ the transfer should be done for a consideration

\_ the transferor should subsequently acquire some interest in that property which he had agreed to transfer

\_ the transferee may have the option to acquire the interest which the transferor subsequently acquires. The exercise of option must be during the period of continuation of the contract and not afterwards

When all these conditions exist the transferee becomes entitled to the interest which is subsequently acquired by the transferor

#### **e. Definition of property of transfer**

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 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.

Hence transfer of property with respect to sec.6 onwards means where a living person transfers the property to some other living person or persons or to himself, such transfer may be in present or in future but not in past. It further declares that the living person includes company or association or body of individuals whether incorporated or not.

#### **f. Transfer and non-transfer property**

An act of the parties, or of the law, by which the title to property is conveyed from one person to another.

Transfer encompasses the sale and every other method, direct or indirect, of (1) disposing of property or an interest therein or possession thereof; or (2) fixing a lien (a charge against property to secure a debt) absolutely or conditionally, voluntarily or involuntarily, with or without judicial proceedings, in the form of a conveyance, sale, payment, pledge, lien, mortgage, gift, or otherwise. The term transfer has a general meaning and can include the act of giving property by will.

Transferable property as per 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 anyone except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.



- (e) A mere right to sue 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, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.
- (h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) 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.
- (i) Nothing in this section shall be deemed to authorize 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.

Section 8 deals with the method of operation of transfer, it says:

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, when the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the movable parts thereof; and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debtor other actionable claim, the securities therefore (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Note- A transfer of property may be made without writing in every case in which writing is not expressly required by law. (Sec.9 Oral transfer)

#### **g. Transfer to an unborn person and rule against perpetuity**

**Section 13 of the Act refers to ‘Transfer for benefit of unborn person’.** This Section is an attempt to import into India what used to be known in England, “The rule of Double Possibilities”. The rule is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more than one generation. As we have read earlier that both the parties to a transfer of property must be living persons (including juristic person), but Section 13 is an exception to the general rule of transfer inter vivos. S.13 is a transfer by born to the unborn. A property can be transferred to a child in the mother’s womb but not to one who’s not in the mother’s womb.

**Unborn Person:** He is one who is not in existence as of now or who will come into existence in future at any time or who is in the womb of the mother. He is basically, a person not yet born.

**Prior Interest:** Prior interest is not affected by reason of the subsequent interest being rendered void by this rule. It is neither enlarged or extinguished (MOHAMED SHAH V. OFFICIAL TRUSTEE OF BENGAL, 190936 CAL 431).

**Limited Interest:** Limited interest can-not be created for the benefit of an unborn person even though it is subject to a prior interest in favour of a living person.

**PRE-REQUISITES FOR A VALID TRANSFER OF PROPERTY TO AN UNBORN PERSON**

i) No transfer. The transfer of property can be done by way of trusts but not directly. In the absence of trust the property must be created in favors of a living person and then to the minor.

ii) Prior Interest. Life interest can be enjoyed by person(s) until the unborn comes into existence.

iii) Before the death of last life estate holder. The unborn person must come into existence before the death of the last life estate holder. It is not necessary that he should be born, even if he is in the mother's womb, its enough. A child in ventre sa mere is equal to child in essence meaning a child in the mother's womb is equal to a child in existence.

iv) Immediate transfer of rights. All the rights should vest in the unborn child as soon as he comes into existence. He will be the absolute owner of the property vested in him.

It should be noted that the transfer can be made to an unborn person but not to the issue of an unborn person. Where the gift made in favor of the unborn grand children was not in respect of the whole interest in the property, the gift was held to be a valid document

(ISSAC NISSIN V. OFFICIAL TRUSTEE, BENGAL, A.L.R. 1957 CAL 118(119)).

**Under Muslim Law:** This Section does not apply to Mohammedans. A gift to an unborn person is void except in case of Wakf (ABDUL KHADUR V. TURNER, ILR 9B 158).

**Under Hindu Law:** A gift or bequest in favor of an unborn person is void but now under T.P. Act it is valid (Section 13 of the T.P. Act).

## **RULE AGAINST PERPETUITY**

Perpetuity means an uncertain period or time or indefinite period. There are people who want to retain their property in their own families from generations to generations. This will be a loss to the society because it will be deprived of any benefit arising out of that property. Free and frequent circulation is important and the policy of the law is to prevent the creation of such perpetuity.

Origin: Perpetuity may arise in two ways- (a) By taking away the power of alienation from the transferor (b) By creating a remote interest in the future property.

A condition restraining the transferee's power of alienation is void as per S.10 of the Act. And **a disposition to create a future remote interest is prohibited under S.14 of the Act.**

Object: As discussed earlier, it is important to ensure free and active circulation of property both for trade and commerce as well as for the betterment of the property that ultimately is good for the society. Thus, the object of this section is to see that the property is not tied- up and to prevent creation of perpetuity.

**Following conditions must be satisfied to attract Section 14:**

1. There must be transfer of property.
2. The transfer should be to create an interest in favor of an unborn person.
3. Interest created must take effect after the lifetime of one or more persons living at the date of such a transfer and during the minority of the unborn person.
4. The unborn person must be in existence at the expiration of the interest of the living persons.
5. The vesting of the interest in favor of the ultimate beneficiary may be postponed only up to the life or lives of living persons plus the minority of the ultimate beneficiary but not beyond that.

**EXTENT OF PERPETUITY PERIOD**

Position in India – Life or any number of lives in being + period of gestation + minority period of the unborn beneficiary.

English Law – Life or lives in being +period of gestation +minority period.

Difference between Indian and English Law:

1. The minority period in India is 18 years whereas it is 21 years under English law.
2. The period of gestation should be an actual period under Indian Law but it is a gross period under English law.
3. Under Indian law, property should be given absolutely to the unborn person whereas in English law, need not be absolutely given.
4. The unborn person must come into existence before the death of the last life estate

holder as per Indian law whereas he must come into existence within 21 years of the death of the last life estate holder in case of English law.

### EXCEPTIONS

- i) Transfer for public benefit. Where property is transferred for the benefit of the people in general, then it is not void under this rule. e.g. for the advancement of knowledge, religion, health, commerce or anything beneficial to mankind.
- ii) Covenants of Redemption. This rule does not offend the covenants of redemption in mortgage.
- iii) Personal Agreements. Agreements that do not create any interest in the property are not affected by this rule. This rule applies only to transfers where there is transfer of interest.
- iv) Pre-emption. In this there is an option of purchasing a land and there's no question of any kind of interest in the property, so this rule does not apply.
- v) Perpetual Lease. It is not applicable to the contracts of perpetual renewal of leases.
- vi) Mortgages. This rule is not applicable to mortgages because there is no creation of future interest.

### **h. Vested and Contingent interest:**

The concept of vested and contingent interest is provided in section 19 and 21:

#### **19. Vested interest**

Where, on a transfer of property, an interest therein is created in favor of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation: An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or

whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

## **21. Contingent interest**

Where, on a transfer of property, an interest therein is created in favor of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception: Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

### **Main features of vested and contingent interest are:**

1. Transfer of property Vested Interest and Contingent Interest
2. Vested Definition • A vested interest is created in favor of a person – without specifying the time when it is to take effect, or specifying that it is to take effect forthwith, or on the happening of a certain event  
Contingent Definition • A contingent interest is created in favor of a person – to take effect only on the happening or not happening of a specified uncertain event, which may or may not happen
3. Vested Nature • It is only a chance of becoming an owner.
4. Vested Fulfillment of condition • It does not depend upon the fulfillment of any condition. It creates an immediate right, though the enjoyment may be postponed to a future date. Thus, owner's title is already perfect  
Contingent Fulfillment of condition • It is solely dependent upon the fulfillment of the condition (after which it becomes vested interest), so that if the condition is not fulfilled, the interest may fall through. Thus, the owner's title is as yet imperfect, but is capable of becoming perfect.

5. Vested Effect of transferee's death • It is not defeated by death of transferee before he obtains possession  
Contingent Effect of transferee's death • Whether it passes on the death of the transferee or not depends on the nature of the contingency

6. Vested Whether transferable and heritable • It is both transferable as well as heritable. If the transferee of a vested interest dies before actual enjoyment, it passes on to his heirs.  
Contingent whether transferable and heritable • It is transferable. Whether it is heritable or not depends on the nature of the contingency. If the transferee dies before obtaining possession, the contingent interest fails, and does not pass on to his heirs.

7. Vested • Example: A makes a gift to B of Rs. 100 to be paid to him on the death of C. B gets a vested interest, as the event, namely, C's death is certain  
Contingent • Example: An estate is transferred to A if he shall pay Rs. 500 to B. A's interest is contingent until he paid Rs. 500 to B.

#### **i. Rule of Election**

**Section 35 deals with rule of election. It says:**

Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

The illustrations attached make the concept clear:

#### **Illustration**

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000. In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another dissent there from.

Exception to the last preceding four rules : Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

#### Illustration

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representative may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.



## **Unit-II: General Principles Governing Transfer of Immoveable Property**

### **a. Transfer by ostensible owner**

The concept of ostensible owner is given in section 41. It says:

Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground 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.

Therefore as per sec.41 the transferor may not be the authorized owner but if he makes the transfer of some immovable property such transfer shall not be voidable provided the transferee has made all reasonable care and has acted in good faith in that regard.

It is further to be noted that sec.41 is talking of immovable property hence it is not applicable on movable property.

### **b. Rule of feeding grant by *estoppel***

**Doctrine - Feeding the Grant by Estoppel** has been discussed in Sec. 43 Transfer of Property Act. It says:

Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

#### Illustration

A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

The principle embodied in Section 43 of the Transfer of Property Act has been variously described as the doctrine of 'feeding the grant by estoppel' or as the doctrine of Equity that 'equity' treats that as done which ought to be done' or as a combination of both, but, a statutory shape having, been given to the principle, it is the section itself which must ultimately determine its scope and the conditions of its application. In order that Section 43 may apply there must obviously have been a fraudulent or erroneous representation by a person that he was authorized to transfer immoveable property and he must have professed to transfer such property, but there is nothing in the section requiring that the transferor should have been aware of the erroneousness of the representation made by him. The transferor might have honestly believed in the truth of the representation that he was authorized to transfer the property which he professed to transfer, but that would not render the Section inapplicable.

It will be noted that even before the introduction of the word 'fraudulently' into the section in 1929, erroneous representation was construed as including all representations whether tainted or untainted with fraud. The amendment has now made it quite clear that the section will be applicable even if the transferor is unaware of the erroneous nature of the representation made by him. The matter is concluded by the following observations of the Supreme Court in the case of **Jumma Masjid Mercara v. Kodimaniandra Deviah, AIR 1962 S C 847:**

"It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given the relevant words of Section 43 were 'where a person erroneously represents', and now,

as amended by Act 20 of 1929 they are 'where a person fraudulently or erroneously represents' and that emphasizes that for the purpose of the section it matters not whether the transferor acted fraudulently or innocently is making the representation, and that what is material is that he did make a representation and the transferee has acted on it."

The point next to be considered is whether a transferee is deprived of the benefit of Section 43 if he is aware of the erroneousness of the representation or could have discovered its erroneousness by exercising reasonable care or pursuing reasonable inquiry. In connection with the first part of the question reference must be made to the Full Bench decision of this Court in the case of **Parma Nand v. Champa Lal, (S) AIR 1956 All 225**, although the question has now to be decided in accordance with what has been laid down by their Lordships of the Supreme Court in the Jumma Masjid case, AIR 1982 S C 847. The question referred to the Full Bench in Parma Nand's case, (S) AIR 1958 All 225 was:

"Does Section 43, T. P. Act, require that the transferee who can take advantage of it should be one to whom not only a fraudulent or erroneous representation about the transferor's authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor."

The answer given by Agarwala, J. in which the other Judges constituting the Full Bench concurred was as follows :

"I am clearly of opinion that the correct view is that Section 43, T. P. Act, does not require that the transferee who can take advantage of it should be one to whom not only a fraudulent or erroneous representation about the transferor's authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor.

If, however, both the transferor and the transferee knew of the true position, and colluded to enter into a transaction which is invalid in law, the state of knowledge of the transferee becomes material and Section 43 cannot be availed of by him."

In the Jumma Masjid case, AIR 1962 SC 847, however, the Apex Court laid down the law as follows:

"Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application "

### **c. Rule of *Lis pendens***

Lis pendens is a maxim which means "a suit pending," in a court. it a written notice that a lawsuit has been filed which concerns the title to real property or some interest in that real property

Section 52 deals with the maxim of lis pendens. It says:

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.

Hence the idea behind the provision is that during the pendency of a suit the parties should be restricted to transfer such property by any mean so that not to cause unfair advantage to any of the parties.

#### **d. Fraudulent transfer**

The principle of fraudulent transfer is given in section 53. It says:

(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.

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

Nothing in this sub-section 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 example, a man transfers his bank account to a relative by putting the account in the relative's name. He informs the relative that he has not relinquished ownership of the funds, but merely wants to isolate the money from the reach of his creditors. This is a fraudulent transfer that can be set aside by the court at the request of the defrauded creditor. A creditor who seeks to set aside a fraudulent transfer must comply with the Act.

### **Fraudulent Intent**

Just because an individual in debt makes a conveyance of his or her property does not mean that it is a fraudulent transfer. Whether a transaction constitutes a fraudulent transfer depends upon the existence of the intent to defraud at the time that the challenged transfer was made. Therefore the intention plays an important role whereas it is found that the intention was to cause delay or defeat the creditors transfer same will be void at the option of creditor.

### **e. Rule of part performance**

The law relating to part performance is given in section 53A. It says:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Hence the language of sec 53A suggests that if transferee the has done something in furtherance of the contract for the consideration with respect to immovable property or takes possession of the property whether whole or in part or continue in possession if already in; then in such case transferor or any person claiming through him shall be debarred to claim any right with respected to that property. Section 53A is a safe guard to transferee.

## **Unit – III: Specific Transfers – I**

### **a. Sale and gift**

**Sale is defined in section 54**, it says:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made: Such transfer, 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, can be made only by a registered instrument.

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.

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: 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.

Therefore sale is transfer of ownership for which seller gets the price or promised to be paid the price or partly paid and partly promised to be paid. However seller as well as buyer has to follow the provisions of sec.55 in which the liabilities of both have been discussed.

### **Gift (Section 122-129)**

**Gift is defined in section 122**; it says

"Gift" is the transfer of certain existing movable or immovable 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.

Therefore the gift must be made voluntarily and without consideration and the donee should be alive at the time of acceptance of gift if he dies before acceptance, the gift is void.

#### 123. Transfer how effected

For the purpose of making a gift of immovable 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 movable 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.

#### 124. Gift of existing and future property

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

#### 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.

#### 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.

#### 127. Onerous gifts

Where a gift 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.

#### 128. Universal donee

Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

#### 129. Saving of donations mortis causa and Mohammedan Law

Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Mohammedan law.

### **b. Mortgage and charge**

**Section 58 deals with "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged"**

(a) A mortgage is the transfer of an interest in specific immoveable 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 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.

(b) Simple mortgage-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.

(c) Mortgage by conditional sale-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 a 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.

(d) **Usufructuary mortgage**-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 a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) **English mortgage**-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.

(f) **Mortgage by deposit of title-deeds**-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 immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

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

Therefore mortgage is a legal agreement that conveys the conditional right of ownership on an asset or property by its owner (the mortgagor) to a lender (the mortgagee) as security for a loan. The lender's security interest is recorded in the register of title documents to make it public information, and is voided when the loan is repaid in full.

Virtually any legally owned property can be mortgaged, although real property (land and buildings) are the most common. When personal property (appliances, cars, jewelry, etc.) is mortgaged, it is called a chattel mortgage. In case of equipment, real

property, and vehicles, the right of possession and use of the mortgaged item normally remains with the mortgagor but (unless specifically prohibited in the mortgage agreement) the mortgagee has the right to take its possession (by following the prescribed procedure) at any time to protect his or her security interest. In practice, however, the courts generally do not automatically enforce this right when it involves a dwelling house, and restrict it to a few specific situations. In the event of a default, the mortgagee can appoint a receiver to manage the property (if it is a business property) or obtain a foreclosure order from a court to take possession and sell it. To be legally enforceable, the mortgage must be for a definite period, and the mortgagor must have the right of redemption on payment of the debt on or before the end of that period. Mortgages are the most common type of debt instruments for several reasons such as lower rate of interest (because the loan is secured), straight forward and standard procedures, and a reasonably long repayment period. The document by which this arrangement is effected is called a mortgage bill of sale, or just a mortgage.

**Charge (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.

Hence as per sec 100 where immovable property is made a security for payment of money to other in such case that security will not amount to mortgage and the latter party is said to have charge on such immovable property, however the provisions of simple mortgage(sec 58( b) will apply on such charge.

## **Unit – IV: Specific Transfer – II**

### **a. Lease and License**

The term ‘lease’ and ‘license’ are defined under Section 105 of the Transfer of Property Act and Section 52 of the Indian Easements Act respectively.

#### **Lease (Section 105 of Transfer of Property Act)**

A lease of immovable 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.

#### **License (Section 52 of the Easements Act, 1882)**

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called, a license.

#### **Main features of Lease and License:**

##### **Lease:**

1. transfer of an interest
2. both transferable and heritable
3. Comes to an end only in accordance with the terms and conditions stipulated in the contract
4. entitled to any improvement or accession made to the property
5. unaffected by the transfer of the property by sale in favour of third party and continues
6. lessee has the right to protect the possession in his own right
7. does not come to an end either by death of the grantor or the grantee

**License:**

1. mere permission to do something without any transfer of interest
2. neither transferable nor heritable
3. can be withdrawn at any time at the pleasure of the grantor
4. not entitled to any improvement or accession made to the property
5. comes to an end immediately if the property is sold to a third party
6. licensee cannot defend his possession in his own name as he does not have any propriety right in the property
7. comes to an end with the death of either grantor or the grantee

**Cases on Lease and License:**

**Mrs. M.N. Clubwala v. Fida Hussain Saheb, [1964] 6 SCR 642 (Supreme Court, 1964)**

Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement.

**Municipal Corporation of Delhi vs. Pradip Oil Corporation and Anr., 100 (2002) DLT 442 (Delhi High Court, 2002)**

A mere license does not create interest in the property to which it relates. Lease on the other hand, would amount to transfer of property.

License may be personal or contractual.

A licensee without the grant creates a right in the licensor to enter into a land and enjoy it.

By reason of a license, no estate or interest in the property is created.

A license, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) it is revocable and (d) it is determined when the grantor makes subsequent assignment.

**Madhu Behal and Anr. vs. Rishi Kumar and Anr., (2009) 3 PLR 628 (Punjab & Haryana High Court, 2009)**

It is never a nomenclature in the document that governs the decision as to whether a document as a 'lease' or a 'licence'.

The essential feature that distinguishes a lease from licence is always a transfer of interest in the demised property in a transaction of lease while a licensee does not involve any such transfer of interest.

The lease is heritable while license is personal to the grantee.

The legal possession of the property is inevitably transferred to a tenant under lease while in a transaction of license the legal possession continues with the licensee and the licensee has a mere right of user of the premises in a particular fashion mentioned under the document.

## **b. Easements**

An easement is a non-possessory right to use and/or enter onto the real property of another without possessing it. It is "best typified in the right of way which one landowner. Easements are helpful for providing pathways across two or more pieces of property or allowing an individual to fish in a privately owned pond. An easement is considered as a property right in itself at common law and is still treated as a type of property in most jurisdictions.

The rights of an easement holder vary substantially among jurisdictions. Historically, the common law courts would enforce only four types of easement:

1. Right of way (easements of way)
2. Easements of support (pertaining to excavations)
3. Easements of "light and air"
4. Rights pertaining to artificial waterways

Modern courts recognize more varieties of easements, but these original categories still form the foundation of easement law.

### **Kinds of Easement:**

#### **Affirmative and negative easements**

An affirmative easement is the right to use another's property for a specific purpose, while a negative easement is the right to prevent another from performing an otherwise lawful activity on their property.

For example, an affirmative easement might allow land owner A to drive their cattle over the land of B. A has an affirmative easement from B.

Conversely, a negative easement might restrict A from blocking B's mountain view by putting up a wall of trees. A has a negative easement from B.

### **Dominant and servient estate**

As defined by Evershed MR in *Re Ellenborough Park* [1956] Ch 131, an easement requires the existence of at least two parties. The party gaining the benefit of the easement is the dominant estate (or dominant tenement), while the party granting the burden is the servient estate (or servient tenement).

For example, the owner of parcel A holds an easement to use a driveway on parcel B to gain access to A's house. Here, parcel A is the dominant estate, receiving the benefit, and parcel B is the servient estate, granting the benefit or suffering the burden.

### **Public and private easements**

A private easement is held by private individuals or entities. A public easement grants an easement for a public use, for example, to allow the public an access over a parcel owned by an individual.

### **Appurtenant and in gross easements**

In the U.S., an easement appurtenant is one that benefits the dominant estate and "runs with the land", i.e., an easement appurtenant generally transfers automatically when the dominant estate is transferred.

Conversely, an easement in gross benefits an individual or a legal entity, rather than a dominant estate. The easement can be for a personal use (for example, an easement to use a boat ramp) or a commercial use (for example, an easement to a railroad company to build and maintain a rail line across property). Historically, an easement in gross was neither assignable nor inheritable, but today commercial easements are freely transferable to a third party. They are divisible, but must be exclusive (original owner no longer uses it and exclusive to easement holder) and all holders of the easement must agree to divide. If subdivided, each subdivided parcel enjoys the easement.



### **Floating easement**

A floating easement exists when there is no fixed location, route, method, or limit to the right of way. For example, a right of way may cross a field, without any visible path, or allow egress through another building for fire safety purposes. A floating easement may be public or private, appurtenant or in gross.

One case defined it as: "(an) easement defined in general terms, without a definite location or description, is called a floating or roving easement..." Furthermore, "a floating easement becomes fixed after construction and cannot thereafter be changed."

### **Structural encroachment**

Some legal scholars classify structural encroachments as a type of easement.

### **Wayleave**

In British energy law and real property law, a wayleave is a type of easement used by a utility that allows a linesman to enter the premises, "to install and retain their cabling or piping across private land in return for annual payments to the landowner." Similar to a license or profit-à-prendre, "[a] Wayleave is normally a temporary arrangement and does not automatically transfer to a new owner or occupier." More generally, a wayleave agreement can be used for any service provider.

In the United States, an easement in gross is used for such needs, especially for permanent rights.

### **Text books:**

1. Mulla D.F. – Transfer of property
2. H.N. Tiwari – Transfer of property Act