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Property Law

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Transfer of Property

MOVABLE/IMMOVABLE PROPERTY

The T.P.A. 1882 has not defined this term. Sec. 3 merely lays down that, "Immovable property" does not include standing timber, growing crops or grass.

The definition of "Immovable property" given in this section is not exhaustive. It simply says: 'Immovable property' does not include standing timber, growing crops or grass. The definition of 'immovable property' in the General Clauses Act is also not exhaustive. That definition is as follows :

According to Sec.3 (26) of the General Clauses Act, the "Immovable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

"Attached to Earth" means —

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of

that to which is attached.

The degree, manner, extent and strength of attachment of the chattel to the earth or building, are main features to be regarded. All the three aspects in the character of the attachment of the trees or shrubs rooted to the earth, or walls or buildings imbedded in that sense, the further test is whether, such an attachment is for the permanent beneficial enjoyment of the immovable property to which it is attached. Held, the attachment of oil engine to earth though it is undoubtedly a fixture, is for the beneficial enjoyment of the engine itself and in order to use engine, it has to be attached to the earth and the attachment lasts only so long as the engine is used. When it is not used it can be detached ans shifted to some other place. The attachment in such a case does not make the engine part of the land and as immovable property.

The English law of fixtures has no strict application to the law in India relating to machinery attached to the earth or permanently fastened to anything attached to earth.

The question whether any machinery such as an oil engine imbedded in earth or permanently fastened to any thing attached to the earth is movable or immovable property, is a mixed question of fact and law depending upon the facts and circumstances of each case.

The test enunciated by the decided cases to determine the character and nature of the property are :

(i) What is the intendment, object and purpose of installing the machinery - whether it is the beneficial enjoyment of the building, land or structure, or the enjoyment of the very machinery?

(ii) The degree and manner of attachment or annexation of the machinery to the earth.

Whether the machinery and the building or land on which it is installed, are owned by one and the same person, normally it should be inferred, unless the contrary is preyed, that the object and purpose of installing the machinery is to have beneficial enjoyment of the entire building or land, but not the role enjoyment of the very machinery itself. However, where the machinery imbedded or installed and the building or land belong to two different persons the intendment and object of the person is in possession and enjoyment of the property in installing or annexing the machinery

must normally be presumed, until the contrary is proved, to be to exploit the benefit of the machinery alone, as he is not interested in the building or the land. Where the building or land or factory is taken on lease for a term by a lessee and he installs certain machinery on that property during the lease period, it as to be held that his object and purpose of installing the machinery was the beneficial enjoyment of the very machinery during the period of his lease. A tenant, who is in possession of land for a certain period, would not intend to make any permanent improvement to the land itself but try to make use of any machine or oil engine during the period of his lease. In alt probability, he may remove the oil engine or machine from that land the moment his object of its beneficial enjoyment during his lease period is achieved.

In a case, the fixture on the land cannot be termed to be permanent one so as to bring it within the meaning of immovable property. The nature of the property on which the machinery was installed, is also a relevant and material factor to be taken into consideration in determining the character of the machinery. Where the building in which machinery such as an oil engine or a cinema projector has been installed by the owner, is not a pucca and permanent one, but is only a temporary shed or tent, his intention and purpose could only be the beneficial enjoyment of the very machinery but not the building. However, where a cinema projector and an oil engine have been installed in a permanent cinema theatre, the purpose and object of installing the same must invariably be the beneficial enjoyment of the very cinema theatre. The intendment, object and purpose of the person who fastens or installs the machinery has to be inferred has to be inferred from the proved facts and admitted circumstances.

The tests enunciated by the decided cases to determine the character and nature of the property are:

In ***Holland v. Hodgson*** looms attached to earth and floor of a worsted mill were held to be fixtures.

In ***Leigh v. Taylor***, held that, certain valuable capacities affixed by a tenant to the walls of a house for the purpose of ornament and for the better enjoyment of them as chattles, had not become part of the house, but formed part of the personal estate of the tenant for life.

In ***Subrahmaniam Firm v. Chindambaram***, the machinery installed by a tenant for running a cinema in the premises taken by him on lease for his own profit, was held to be movable property within the meaning of Section 3 of Transfer of Property Act, as it was not permanent improvement to the premises.

Land.- Considered in its legal aspect, land includes the following elements :

1. A determinate portion of the earth's surface.

2. Possibly the column of space above the surface.

3. The ground beneath the surface.

4. All objects which are on or under the surface in its natural state: for example, minerals. Land includes lakes, ponds and rivers within its boundary. They are called land covered by water.

5. All objects placed by human agency on or under the surface, with the intention of permanent annexation. These become part of the land, and lose their identity as separate movables for example, buildings, walls and fences.

Benefits to arise out of land. - Apart from property being immovable from the physical point of view, every benefit arising out of it and every interest in such property is also regarded as immovable property. A debt secured by a mortgage of immovable property is an interest inland and is, therefore, regarded as immovable property. The right to collect lac from jungle, flash from pond, right to take minerals, rent from 'hat' or market place or house are various illustrations of benefits

arising out of land. In ***Shanta Bai v. State of Bombay***, right to enter land, cut and carry away wood over a period of twelve years was held to be immovable property.

Things attached to earth —

The present section defines the expression "attached to earth" as including —

(a) "Things rooted in the earth" include such things as trees and shrubs, but where such trees constitute standing timber they are not immovable property. For example, Babool trees and Seesham trees are ordinarily standing timber and are, therefore, movable property although they are 'things rooted in the earth'. Trees which bear fruits are not standing timber but are considered as immovable property. There are however, certain fruit-bearing trees, such as mango trees which are also used as a timber. Whether such trees are to be regarded as movable or immovable property depends upon the circumstances of the case. If the intention is to use them for the purpose of enjoying their fruits, they will be regarded as immovable property of enjoying their fruits, they will be regarded as immovable property. But if the intention is to cut them down sooner or later for the purpose of utilizing the wood for building or other industrial purposes, they would be timber and would accordingly be regarded as movable property. Similarly, growing crops and grass although rooted in the earth are not within the definition of the term 'immovable property'. These are all things usually contemplated as severable from the soil and are regarded a movable property.

(b) "Things imbedded in the earth' include such things as houses and buildings. There are, however, certain things which are imbedded in the earth yet they are not immovable property as for example, an anchor imbedded in the land to hold a ship. When the article in question is no further attached to the land by its own weight, it is generally to be considered as movable property. But even in such a case if the intention is to make th articles as part of the land they do become part of the land. Thus, blocks of stones placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land. Everything therefore depends upon the circumstances of each case and mainly on two circumstance, as indicating the intention, viz. (1) the decree or mode of annexation. For example, Looms attached to the floor and beams of a mill or tip up seats fastened to the floor of cinema halls are immovable but not screws vaht resting on brick-work and timber and tapestries, and (2) the object of the annexation. For example : Blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall, will become part of the land but not the stones deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of wall. Anchor of a ship will not be part of land howsoever deeper it may have gone in the earth. But if it is used to support the strain article stands on the earth upto its own weight, it will not be part of the land but if it is caused to go deeper in the earth by external agency, then it is part of a land.

(c) 'Things attached to what is so imbedded' must be as the section says, for the permanent beneficial enjoyment of that to which it is attached. Thus, the doors and windows of a house are attached to the house for the permanent enjoyment of the house. But if the attachment is not intended to be permanent, the things attached are not immovable property, e.g., electric fans or window blinds.

(d) Chattel attached to earth or building. If a chattel, i.e., movable property is attached to earth or building, it is 'immovable property' and it is a mixed question of fact and law. The degree, manner, extent and strength of attachment of the chattel to the earth of building, are the main features to be regarded. All the three aspects in the description show that the attachment should be such as to partake of the character of the attachment of the trees or shrubs rooted to the earth or walls or buildings imbedded in that sense, the further test is whether such an attachment is for the permanent beneficial enjoyment of the immovable property to which it is attached. For a chattel to become part of immovable property and to be regarded as such property, it must become attached

to the immovable property as permanently as a building or tree is attached to the earth. If, in the nature of things, the property is a movable property is a movable property and for its beneficial use or enjoyment it is necessary to imbed it or fix it on earth, though permanently, that is, when it is in use, it should not be regarded as immovable property for that reason.

Standing Timber — Standing timber, growing crops and grass are regarded as severable from the land on which they stand, and, therefore, they are not included in the term 'immovable property'. If, however, they and on which they stand is sold, such standing timber, or growing crops will pass to the Pipal, Banyan, Teak, Bamboo, etc. They do not include the fruit bearing trees like Mahua, Mango, Jack fruit, Jamun, etc. But the fruit bearing tree may become standing timber if the contract for its severance has already been entered into in respect of them. After agreement, the land, where they stand, is deemed to be their warehouse.

It is common knowledge that Deodar, Kail and Rai trees are used for building purposes. The intention of the parties was that to cut the trees immediately. Held, the agreement is related to standing timber and requires no registration.

Growing crops.-- The term includes the creepers like Pan Angoor creepers, the various vegetables like Louki, Kaddoo, etc. and the Sugar Cane, Wheat, Barley, etc. They do not own independent existence beyond their produce.

Grass.-- Grass can only be used as fodder. Its no other use is possible. Therefore it is movable. But a contract to cut the grass will be an interest in immovable. It will be an interest in chattel.

Movable Property :— There is no definition of movable property in the Act. Movable property has been defined in the General Clauses Act to mean 'property of every description except immovable property'. The definition in the Registration Act defines movable property to include property to include property of every description excluding immovable property but including standing timber, growing crops and grass.

Immovable Property Movable Property —

1. It includes land, benefits to arise out of land, and things attached to earth.

2. If the thing is fixed to the land even slightly or it is caused to go deeper in the earth by external agency, then it is deemed to be immovable property.

3. If the purpose of annexation of a thing is to confer a permanent benefit to the land to which it is attached, then it is immovable property.

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; an mortgage-debt; right to cut grass for one year; a factory; etc.

5. Transfer of immovable property requires registration of the document. — i) It includes stocks and shares, growing crops, grass, and things attached to or forming part of that land, and which are agreed to be severed before sale, or under the contract of sale.

ii) If the thing is resting on the land merely on its own weight, the presumption is that it is movable property, unless contrary is proved.

iii) If the purpose was only to enjoy the thing itself, then it is movable property even though it is fixed in the land.

iv) Examples : Right of worship; royalty; a decree fro sale of immovable property; a decree for arrears of rent; Government promissory notes; standing timber, growing crops and grass.

v) No registration is required to transfer a movable property.

ATTESTATION

Meaning of 'attested'

The term 'attested' in this section means that a person has signed the document by way of testimony of the fact that he was it executed. It does not import anything more, and therefore it must be distinguished from cases where a person signs a document not merely as a witness to the execution but also with a view to giving consent to the transaction. A person who is a party to the deed cannot under any circumstances be allowed to sign the instrument as an attesting witness.

Attestation is stated in Sec. 3 of the Transfer of Property Act. In order to constitute valid attestation the essential conditions are :

(1) there must be two attesting witnesses;

(2) each must have seen the executant sign or affix his thumb mark to the instrument ;

(3) each of the two attesting witnesses must have signed the instrument in the presence of the executant.

Ingredients of attestation

The following are the essential ingredients of a valid attestation :—

(i) There must be two or more witnesses in all cases where a document is required by Act to be attested;

(ii) each witness must —

(a) see what the executant sign or affix his mark, or

(b) see some other person sign the instrument in the presence and under the

direction of the executant, or

(c) receive from the executant a personal acknowledgment of his signature or mark or the signature of such other person;

(iii) each witness must sign the instrument in the presence of the executant.

The above three ingredients must be present for a valid attestation. It is, however, not necessary that all the attesting witnesses must be present and sign at the same time, nor need any of them to present when the executant executes the instrument. In cases where the attesting witnesses are not present when the executant executes the instrument, it is essential that each one of them must receive from the executant a personal acknowledgment of its signature or mark.

Attesting witness —

It is essential that the witness should have put his signature animus attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person has put his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. There must be 'animus attestandi' for a valid attestation. The attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Sec. 3 are : (1) two or three witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature, (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of executant. It is essential that the witness should put his signature amimo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a serible or an

identifier or a registering officer, he is not an attesting witness.

In English law attestation implies that the attesting witness was present at execution and can testify that the deed was executed voluntarily by the proper person. In Shamu Patter v. Abdul Kader, the Privy Council held that an attesting witness must have seen the executant sign.

To attest is to bear witness to a fact. The essential conditions of a valid attestation are the two or more witnesses have seen the executant sign the instrument, or have received from him a personal acknowledgment of his signature, and each of them has signed the instrument in the presence of the executant to bear witness to this fact; it is essential that the attesting witness has put his signature animes attestandie ie. for the purpose of attesting the signature.

The essential ingredients of the proof of attestation are that it is necessary that the person relying upon a document must establish that the executant has signed or put thumb impression before the attesting witness and the attesting witness must sign in presence of executant.

The burden is on the propounder to prove due and valid execution of the Will. The propounder is required to show by satisfactory evidence that the Will was signed by the attestator and that at the relevant point of time the attestator was in a sound and disposing state of mind, and that he understood the nature and the fact of dispossess in when he put his signature to the document out of his own free will. If such evidence is brought on record which is clinching and proves the execution and attestation to be genuine and valid, then certainly, the burden would shift on the objector.

Who may attest ?

A party to a deed cannot be an attesting witness, for the object of attestation is protection against fraud and undue influence. But a person interested in the transaction such as a person interested in the money advanced under a mortgage, may be an attesting witness if he is not a party to the deed; and the person who advanced the money may attest a mortgage in favour of his benamidar.

Where the deed was written in English; the executant was an old illiterate lady not knowing English; no evidence was led to show that the contents of the deed were explained to her; and the attesting witnesses also did not know English; here it was held that the execution was invalid.

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature of the effect of what they are doing, on account of certain disabilities.

Forming Attestation

Attestation need not be in any particular form, a mere signature is sufficient; it need not be made at any particular place in the deed, but cannot take place before the execution of the deed. But the section requires that the attesting witness should have signed in the presence of executant; otherwise the deed is not validly attested even though the attestor did actually witness execution.

It is necessary that the attesting witness should have signed for the purpose of authenticating the signature of the executant, and not as a scribe, or as a person merely indicating his consent to the transaction. A scribe however, may perform a dual role. He may be an attesting witness as well as the writer. The fact that he signed as an attesting witness, that he did so with the necessary animus to attest, must be duly proved. A person can be called an attesting witness when he has witnessed the execution of the document and has put his signature by describing himself as an attesting witness. When a person had put his signatures on the document both, as a scribe and as an attesting witness, the inference is that he functioned both a scribe and as an attesting witness.

Registering Officer as Attesting Witness

There was a conflict of decisions as to whether the signature of the registering officer and of the attesting witnesses on the registrar's endorsement made to satisfy the requirement of the Registra - tion Act constitute a valid attestation if made in the presence of the executant. Some decisions had held such attestation to be valid; but there were contrary decision.

In ***Abdul Jabhar v. Venkata Sastri***, the Supreme Court has held that such signatures can only amount to a valid attestation if the attesting witnesses had put their signatures with such animus; the court further held that ordinarily the registering officer put his signature in the perfor- mance of his statutory duty and not with an intention to attest.

If execution is specifically denied, at least one attesting witness must be called to prove the deed, if there be one alive, and subject to process of the court. If the attesting witnesses are dead, their signatures can be proved by evidence of handwriting.

Attestation as Proof of Consent

Mere attestation does not effect an estoppel, for attestation does not fix attesting witness with knowledge of the contents of the document. Attestation does not of itself imply consent; though there may be circumstances which show that the attesting witness had knowledge of the contents of the document he attested and consented to. An attesting witness is not estopped by his mere signature unless it can be established by independent evidence that to the signature was attached the express condition that it was intended to convey something more than mere witnessing to the execution, and was meant as involving consent to the transaction.

NOTICE

The last paragraph of the section 3 states under what circumstances a person is said to have notice of a fact. He may himself have actual notice or he may have constructive notice may be imputed to him when information of the fact has been obtained by his agent in the course of business transacted by the agent for him.

(a) Express or actual notice — An express or actual notice of fact is a notice whereby a person acquires actual knowledge of the fact. It must be definite information given in the course of negotiations by a person interested in the property.

(b) Constructive Notice — It is a notice which treats a person who ought to have known a fact, as if he actually does know it. In other words, a person has constructive notice of all facts of which he would have acquired actual notice had he made those enquiries which he ought reason- ably to have made. The cases of constructive notice into two classes :

(i) Cases in which the party charged has had actual notice that the property in dispute was in some way affected, and the Court has thereupon bound him with constructive notice of facts and documents, to a knowledge of which he would have been led by an inquiry after the circum- stances affecting the property had come to his knowledge.

(ii) Cases in which the Court has been satisfied from the evidence before it that the party charged has designedly abstained from inquiry for the very purpose of avoiding notice - A purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent deter- mination not to learn it.

Notice - Effect of not making enquiry — Property was in possession of tenant. The vendee has not made any enquiry with the tenant in respect of prior agreement for sale executedin favour of the tenant. The vendee purchased the property without taking any enquiry though the property was in possession of the tenant. Held that the vendee would be deemed to have notice of the prior agreement in view of Section 3 of T.P.Act.

Constructive Notice — The explanation in Section 3 of the Transfer of Property Act, which provides for fixing a party with constructive notice in respect of registered transactions, contains a proviso that in order to amount to constructive notice, (1) the instrument has been registered and its registration completed in the manner required by the Registration Act and the Rules made thereunder, (2) the instrument has been duly entered or filed in books kept under Section 51 of the Act, and (3) The particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of the Act.

Constructive notice has roughly been defined as knowledge which the court imputes to a person upon a presumption so strong that it cannot be allowed to be rebutted that the knowledge must have been obtained. This legal presumption arises under this section :

(1) In relation to a fact — (a) when but for wilful abstention from an inquiry which a person ought to have made he would have known the fact; or (b) When but for gross negligence he would have known it;

(2) In relation to a document compulsorily registrable;

(3) In relation to actual possession;

(4) In relation to a notice to an agent.

The possession of a small part of a house will not put a purchaser on constructive notice of that person's rights as to whole house.

In ***Mohd. Mustaffa v. Haji Mohd. Hissa***, it was held that the principle of constructive notice cannot be extended to a case where the person who claims on the basis of prior agreementis in possession of only a small fraction of the property. In such a case, it cannot be said that theperson who purchases the property must make an enqiry about the previous contract from theplaintiff or any other tenant in occupation of a portion of the house.

Wilful abstention from an enquiry or search.

The words "wilful abstention" are said to be such abstention from inquiry or search as would show want of bona fide in respect of a particular transaction.

It should be noted that the abstention from inquiry must be with some purpose or design and due to a desire to avoid an inquiry would lead to ultimate knowledge. This sometimes happens when a person thinks that he has struck a good bargain and wants to purchase the property quickly lest other persons might come forward and compete with him.

GROSS NEGLIGENCE

The doctrine of constructive notice also applies when a person, but for his gross negligence, would have known the fact. Mere negligence is not penalised. It must be gross negligence.

In ***Nawal Kishore v. The Municipal Board, Agra*****, The court felt that there was a principle on which question of constructive notice cold rest, that principle being that all intending purchasers of the property in municipal areas where the property is subject to a municipal tax which has been made a charge on the property by statute have a constructive knowledge of the tax and of the possibility of some arrears being due with the result that it becomes their duty before acquiring the property to make enquiries as to the amount of tax which is due or which may be due and if they fail to make this enquiry such failure amounts to a willful abstention or gross negligence within the meaning of Section 3 of the Transfer of Property Act and notice must be imputed to them.**

It is not necessary to show that the person has been guilty to fraud or negligence amounting to fraud. Fraud is quite different from negligence. The former connotes active dishonesty, the latter simply implies indolence. Gross negligence is "a degree of negligence so gross that a court of

justice may treat it as evidence of fraud, impute a fraudulent motive to it and visit it with the consequences of fraud, although, morally speaking, the party charged may be perfectly innocent.

Registration as Notice.

The doctrine of constructive notice applies also in case of documents which are required by law to be registered. Where any transaction relating to immovable property is required by law to be, and has been, effected by a registered instrument, any person acquiring such property, shall be deemed to have notice of such instrument from the date of registration.

It must be noted that registration amounts to notice only in those cases where the instrument is required law to be registered. That is to say where the registration of a transaction is of a transaction is optional, the fact of registration does not amount to notice.

Finally, it must be noted that the instrument must have been registered in the manner prescribed by the Indian Registration Act, 1908. If the instrument has been registered in the same registration sub-district as that in which the property is situate, it operates as notice from the date of registration. If, however, the property is situate in several sub-districts, or if the registration has been effected in another district, the registered deed will not operate as notice until memorandum of such registration has been received and filed by the Sub-Registrar of sub-district in which the property is situate.

Actual Possession as Notice.

Explanation II says that any person acquiring any immovable property shall be deemed to have notice of the title, if any, of any person who is in actual possession thereof.

In order to operate as constructive notice possession must be actual possession. Thus, if a tenant is not in the actual occupation of the land, his occupation is not constructive notice.

Where a certain party is not in possession, the presumption under the explanation to Sec. 3, does not arise, that the person purchasing the property title shall be deemed to have notice of the title, if any, of any person who is not in actual possession.

Notice to Agent.

Explanation III, of Section 3 which dealt with notice to an agent ran as follows :

"A person is said to have notice of fact. When the information of fact is given to, or obtained by, his agent under the circumstances mentioned in Section 229 of the Indian Contract Act, 1872."

The general principle of the agency law is that an agent stands in the place of the principal for the purpose of the business in hand, his acts and knowledge being considered as the acts and knowledge of the principal.

Scope of the Rule.-- The general rule that the knowledge of the agent is the knowledge of the principal has certain limitations. The notice should have been received by the agent : (i) as an agent, (ii) during the agency, (iii) in the course of the agency business, (iv) in a matter material to the agency business.

Exception : Fraudulent concealment of fact by agent.-- The knowledge of an agent will not be imputed to his principal if the agent fraudulently conceals the facts. It is not sufficient to show that the agent concealed the fact. It must be shown that the party charging the principal with notice was party to the fraud or otherwise knew of the fraud.

In ***Arumilli Surayya v. Pinisetti Venkataramanamma***, it was held that Sec. 100 of the Transfer of Property Act does not apply to auction sales because the transfer within the meaning of the Transfer of Property Act does not include an auction sale. It was added that the position of

a purchaser at an execution sale is the same as that of the judgment-debtor and his position is somewhat different from that of a purchaser at the private sale.

TRANSFER OF PROPERTY

Transfer of Property has been defined in S. 5 of the Transfer of Property Act meaning 'an act by which a living person conveys property, in present or in future to one or more other living persons and "to transfer property" is to perform such act'.

'Living person' has been defined to include a company or association or body of individuals whether incorporated or not, but nothing herein contained shall effect any law for the time being in force relating to the transfer of property to or by companies, associations or bodies of individu- als.

Property —

The Legislature has not attempted to define the word 'property', but it is used n this Act in its widest and most generic legal sense. Section 6 says that 'property of any kind may be transferred', etc. thus an actionable claim is property; and so is a right to a reconveyance of land.

It is used in this dual sense of the thing and the right of the thing in S. 54 which contrasts, 'tangible immovable property' with 'a reversion or other intangible thing'. Property includes rights such as trade marks, copyrights, patents and personal rights capable of transfer or transmission such as debt. A share in the company is a movable property freely alienable in absence of any express restrictions under the Articles of Association of the company. The shares are, therefore, transferable like any other movable property and the vendee of the shares cannot be denied the registration of the shares purchased by him on a ground other than stated in the Article.

The words 'in present or in future' in S. 5 qualify the word 'conveys' and not the word 'prop - erty'. A transfer of property not in existence operates as a contract to be performed in the future which is specifically enforceable as soon as the property comes into existence. Where the opera- tive portion of the sale-deed recorded that all rights and privileges in the concerning the property either in present or accruing in future as vesting in the vendor were the subject matter of the sale and that the vendor retained no right of any kind, it was held that even the right of the vendor of reconveyance of the property was transferred by the sale-deed.

Interests in Property —

As ownership consists of a bundle of rights, the various rights and interests may be vested in different persons. Absolute ownership is an aggregate of component rights such as the right of possession, the right of enjoying the usufruct of the land, and as on. These subordinate rights, the aggregate of which make up absolute ownership, are called in this Act interests in Property. A transfer of property is either a transfer of absolute ownership or a transfer of one or more of these subordinate rights.

Transfer —

The word 'transfer' is defined with reference to the word 'convey'. This word in English Law is its narrower and more usual sense refer to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance inter vivous. Transfer must have an interest in the property. He cannot sever himself from it and yet convey it. A lease comes within the meaning of the word 'transfer'.

The definition of transfer of property in this section does not exclude property situated outside India or the territories to which the Act applies. It matters not that the property is situated outside India, or in the territories where the Act does not apply; for it the transfer is effected where the Act is in force, the rights of the parties are to be determined by the court under the Act leaving it to the

party to prove that by the lex rei sitae, ie by the law of the land where the property is situated, the transaction in invalid or defective.

A transfer is not necessarily contractual, and included a deed of appointment. The section does not require that the 'living person' who conveys should necessarily be the same person as he who owns, or owned, the property conveyed by some living person; under the section, there may be a transfer by a person exercising powers over the property of another.

Partition of joint Hindu family or Deed of partition of joint family property

A partition is not actually a transfer of property. ***The Privy Council in Girja Bai v. Sadashiv Dhundiraj***, held that, partition does not give a coparcener a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purpose of disposition independent of the wishes of his former co-sharers." A partition effects a change in the mode of enjoyment of property but is not an act of conveying property from one living person to another. Partition is not a transfer. It is only renouncement of existing rights in common properties in consideration is only renouncement of existing rights in common properties in consideration of getting exclusive right and possession over the specific plots. Partition is only a process of mutual renunciation by which common unspecified rights in larger extents are converted into exclusive right over specific plots. In ***V. N. Sarin v. Ajit Kr. Poplai*** court observed that 'the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family'. The Supreme Court in that case was considering the provisions of Rent Control Act and did not express any opinion on the correctness of certain decisions holding that a partition is a transfer within the meaning of S. 53. The correct view, it is submitted, is that a partition is not a transfer and therefore, strictly not governed by the Act, but that many of the provisions of the Act may govern partition as embodying rules of justice, equity and good conscience.

Partition of property does not amount to 'transfer' as contemplated by S.5. Doctrine of part performance therefore does apply to partition. Partition is really a process, in and by which a joint enjoyment is transformed into a enjoyment severally. Each one of the co-sharers had an antecedent title and, therefore, no conveyance is involved in the process, as the conferment of a new title is not necessary. The doctrine of part performance does not apply to an unregistered deed of partition.

A partition is possible between two co-owners who may not have absolute or equal rights, but are limited owners. A document executed in settlement of disputes between two persons who are entitled to the same properties and who agree to divide the properties amongst themselves is a partition, and not a settlement.

Where a joint family property is subject to mortgage, there is no transfer of ownership and the coparceners, being its lawful owners, are competent of allot the mortgaged property in an oral partition to any of the coparceners. The coparceners to whom the mortgaged property is allotted, becomes its absolute owner and is entitled to redeem the mortgage. Consequently, where the right to redeem is transferred by that coparcaener, the transferee is also entitled to redeem the mortgage.

Property, subject to mortgage can be allotted in an oral partition to a coparcener, particularly when such oral partition is not going to interfere with the scheme of the mortgage.

Living Person - Will —

These words exclude transfers by will, for a will operates from the death of the testator. Transfer of share or interest in a co-operative society to the nominee of its member operating on his death would also be excluded like transfer by will. When the beneficiary is not a living person, the

expression used is the creation of an interest in an unborn person.

The words 'living person' include a juristic person such as a coportation. A court is not a juristic person.

In present or in future

A transfer of property may take place not only in present, but also in the future, but the property must be existence. The words 'in present or in future' qualify the word 'conveys', and not the word 'property'. A transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence.

SPES SUCCESSIONIS

Sec. 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.

Clause (a) : Spes Successionis

The things referred to in this clauses as non-transferable are :

(1) The chance of an heir succeeding to an estate,

(2) The chance of a relation obtaining a legacy (a gift by will) on the death of a kinsman, and

(3) any other mere possibility of a like nature.

The possibilities referred to in this clause are bare or naked possibilities and not possibilities coupled with an interest such as contingent remainders and future interest.

Illustration —

A has a wife B and a daughter C. C in consideration of Rs. 1,000 paid to her by A, executes a release of her right to share in the inheritance to A's property. A dies and C claims her one-third share in the inheritance. B resists the claim and sets up the release signed by C. The release is no defence, for it is a transfer of a spes successions, and C is entitled to her one-third share but is bound to bring into account the Rs. 1,000 received from her father.

Chance of an heir apparent.

A mere possibility of an heir succeeding to an estate is excluded from the category of transfer- able property. The prohibition enacted in this clause is based on public policy, namely, that if these transfers were allowed speculators would purchase the chance of succession from possible heirs and there would be increase in speculative litigations.

Sec. 6(a), however, prohibits the transfer of a bare chance of a person to get a property. After the death of the husband, for example, if two widows inherit their husband's properties together, the transfer of bare chance of the surviving widow taking the entire estate as the next heir of her husband on the death of the co-widow of her present interest in the properties inherited by her together with the incidental right of survivorship. Such widows could validly partition the proper- ties and allot separate partitions to each and, incidental to such an allotment, could agree to relinquish her right of survivorship in the protion allotted to the other.

Spes Successionis and contingent interest.

While Spes Successionis cannot be transferred, contingent interest is transferable. "A contin- gent interest is something quite different from mere possibility of a like nature of an heir apparent

succeeding to the estate, or the chance of a relation obtaining a legacy, and also something quite different from mere right to sue. It is well ascertained form of property. It certainly has been transferred in this country for generations in respect of which it is quite possible to raise money and to dispose of it in any way the beneficiary choose."

Contingent ownership is based not upon the mere possibility of future acquisition but upon the present existence of an incomplete title. The distinction between contingent interest and spes successionis may be understood by the following illustrations :

(i) A, a Hindu owing separate property, died leaving a widow B and a brother C. C has simply a chance of becoming the owner of A's estate.

(ii) A, a Hindu, owing separate property makes settlement of his property to his wife B for life and then to his son, if he should have one, and in default of a son of C. C's interest is contingent and is transferable. His contingent interest is something more than a simple chance of becoming the owner of it. He has an interest contingent on A having no son.

Chance of Legacy.

The chance of a relation receiving a legacy is a possibility even more remote than the chance of succession of an heir, and therefore, is not transferable.

Other possibilities of like nature

The expression "any other possibility of a like nature" indicates that the possibility referred to herein must belong to the same category as the chance of an heir apparent or the chance of a relation obtaining a legacy.

Transfer by Hindu Reversioner

By the Hindu law the right of a reversionary heir expectant expectant on the death of a Hindu widow is a spes successionis and its transfer is a nullity and has no effect in law. The Privy Council said in a decision :

A Hindu reversioner has no right or interest in prosenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere spes successionis.

The reversioner 'can relinquish his right to say that the properties in dispute form part of the estate to which he is the reversioner.

It was held by the Supreme Court in Jumma Masjid v. Kadimaniandra Deviah, that the principle of feeding th estoppel recognised in S. 43 of the Act would apply to a case where a reversioner purports to transfer properties to which he has only a chance of succeeding if he has represented to the transferee that he was absolutely entitled to the properties and if he subsequently acquires title to the properties. The Court held though S. 43 would not apply when the transferee knew the facts, there was no reason why a transferee who was not aware of the true facts and who acted on the fraudulent representation should not have the benefit of the equitable doctrine embodied in S. 43.

An Agreement by reversionary heir to transfer or to relinquish his right of succession is also void. In Annada v. Gour Mohan, the Privy Council said that it was impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the Contract, while permitting the contract to stand as a contract.

Estoppel of reversioner —

Although both the transfer and the agreement to transfer a reversionary interest are void, yet a

reversioner may be estopped from claiming the reversion by his conduct if he has consented to an alienation by a widow or other limited heir.

Considering the scope of Section 43 on its terms, it clearly applies whenever a person transfers property to which he has no title, on a representation that he has a present and transferable interest therein, and acting on that representation, the transferee takes a transfer for consider - ation. When these conditions are satisfied, the section enacts that, if the transferor, subsequently acquires the property, the transferee becomes entitled to it if the transfer has not in meantime been thrown up or cancelled and is persisting. There is an exception in favour of transferees of consid- eration in good faith and without notice of the right under the prior transfer.

Section 43 embodies a rule of estoppel and enacts that a person who makes a representation, shall not be heard to allege the contrary as against a person who acts on the representation. It is immaterial whether the transferor who acts bona fide or fraudulent in making the representation. It is only material to find out whether, in fact, the transferee has been misled. It matters not whether the transferor acted fraudulently or innocently in making the representation and the transferee has acted on it. 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, and Section 43 would not then apply and the transfer will fail under Section 6(a). But where transferee does act on the representation, he will have the benefit of the equitable doctrine embodied in Section 43, however fraudulent the act of the transferor might have been.

A plea of estoppel cannot be raised against a minor who had transferred property on represen- tation that he was of age, and Section 43 does not apply to such transfers. But section 43 deals with transfers which fall for want of title in the transferor and not want of capacity i him at the time of transfer. Further, the doctrine fo estoppel does not apply to persons who have no contractual capacity where the claim is based on contract.

Feeding the estoppel

The principle of the section is based partly on the English doctrine of estoppel by deed and partly on the equitable doctrine that a man who has promised more than, he can perform must make good his promise when he acquires the power of performance.

Essentials —

To attract the application of the section, three conditions are necessary :

(i) a fraudulent or erroneous representation that the transferor had authority to transfer the property,

(ii) the transfer is for consideration,

(iii) the transferor subsequently acquires the interest which he had professed to transfer.

If a Hindu dies leaving behind two widows, they succeed as joint tenants with a right of survi- vorship. They were entitled to obtain partition of the separate portions of property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the right of survivorship or a future reversioner. If they act together, they can burden the reversion with any debts owing to legal necessity but one of them acting without the authority of the other cannot prejudice the right of survivorship by alienating any part of the estate. The mere fact of partition between the two while it gives each a right to fruits of separate estate to her, it does not imply a right to prejudice the claim of survivorship to enjoy full fruits of the property during her lifetime.

Representation :

In order that Section 43 can apply, it is necessary that there should be misrepresentation, fraudulent or erroneous, about the right to transfer the property. The word "represents" in the section clearly shows that the person in whose favour the enquiry is allowed to operate must have acted on the representation. In other words, the transferee must have been misled into the impression that the transferor had power to transfer.

Transfer for consideration.

The doctrine of 'feeding the estoppel by grant' is applicable only to the transfers of properties for value. This section is not applicable where the transfer is gratuitous, i.e., without consideration. Thus, where the property has been transferred by way of gift, the provisions of this section cannot apply because a gift, the provisions of this section cannot apply because a gift of property in which the donor has no present fixed right at the date of transfer, is void.

Transfer forbidden by law.

The section will not apply if the transfer is invalid as being forbidden by law or contrary to public policy. In such a case the principle of this section cannot be invoked to compel a person to transfer the property. A mortgage made by a disqualified person does not therefore become valid on that person ceasing to be disqualified. Similarly, the interest of a Hindu reversioner is spes successionis or a mere chance of succession under Section 6(a) and this chance of succession is inalienable. If therefore, the reversioner transfers such interest and afterwards acquires the property, this section will not operate so as to compe; such heir to transfer the property. But a Full Bench of the Madras High Court In Juma Masjid v. Kodimaniandra Deviah, has held that even in case of spes successionis, the transferor is precluded from questioning the validity of the transfer if he later on acquires interest in the property. It is submitted that a distinction should be drawn between (1) a transfer which is professedly one of a mere right or a mere chance of succession, and (2) a transfer of a specific property which the transferor erroneously represents that he is authorized to transfer. Transfer of the former class would fall within the purview of Section 6(a) while those of the latter class would come under this section.

Transfer of spes successionis —

When a person transfers property representing that he has a present interest therein whereas he has, in fact, only a spes successionis, the transferee is entitled to the benefit of Section 43 if he has taken the transfer on the faith of that representation and for consideration. To hold that the transfers by the persons have only a spes successionis at the date of the transfer, are not within the protection afforded by Section 43, would destroy its utility to a large extent.

The option of the transferee.

According to the present section the option of the transfer can only be exercised in the respect of an interest acquired by the transferee whilst the contract of transfer still subsists. If the purchaser has repudiated that transaction had recovered his purchase money, or if the transaction were one of mortgage and the mortgage money has been repaid, then the relation of the transferor and transferee has ceased to exist, and no claim in respect of the property can be made by the latter.

The right of the second transferee.

The second paragraph of the section protects the rights of the second transferee in good faith and for consideration who has no notice of the option in favour of the first transferee.

For instance A, a Hindu, who has been separated from his father, B sells to C three fields X,Y and Z representating that he is authorized 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. Before C

calls upon A to deliver Z to him, A again sells Z secretly to E who has no notice of the previous sale to C nor of the option of C. C sues A and E for recovery of Z. This suit is liable to be dismissed for the reasons mentioned above. In this illustration E has paid consideration. Secondly, he has acted honestly. Thirdly, E has no notice of the existence of the option of C Fourthly, E purchased the property before C has exercised the option for these reasons E acquires a good title to Z and cannot be ousted by C.

Section 6(a) and 43 Compared.

Section 6(a) and 43 related to two different subjects, and there is unnecessary conflict between them.

Section 6(a) deals with certain kinds of interests in property mentioned therein, and prohibits in transfer simipliciter of those interest. Section 43 deals with representations to title made by a transfer who had no title at the time of transfer, and provides that the transfer shall fasten itself on the title which the transferor subsequently acquires.

Section 6(a) enacts a rule of substantive law while Section 43 enacts a rule of estoppel which is one of evidence.

The two provisions operate on different fields and under different conditions, and there is no ground for —

(a) reading a conflict between, or

(b) cutting down the ambit of the one by reference to the other

Both of them can be given full effects on their own terms in their respective spheres.

Section 41 and 43 compared. Both sections 41 and 43 are based on the principle of estoppel where on a representation made by one party and acted upon by another, the rights of the latter are affected. Section 41 requires - (a) good faith, and (b) exercise of reasonable care on the part of the transferee and acting upon the representation is enough. The section does not cast on the transferee the duty to make inquiry as regards the power of the transferor to transfer the property.

PART PERFORMANCE

53-A. Part Performance. -- 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 where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore 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 prop- erty 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 right of a transferee for consideration who has no notice of the contract or of the part performance thereof.

The section has been described by Privy Council, and the Supreme Court in *U N Sharma v. Puttegowda*, as a partial importation of the English equitable doctrine of part performance. By virtue of this section, part performance does not give rise to an equity, as in English equity in two respects : (1) there must be a written contract; and (2) it is only available as a defence.

From the decided cases the following may be taken to be the essential elements for the application of the doctrine :

(1) An act of part performance must be an act done in performance of the contract. Accordingly, acts previous to the agreement do not constitute part performance, e.g., making of arrangement for the payment of the purchase price.

(2) The act relied on a performance must be unequivocally, and in their nature, referable to contract as that alleged. This rule is well illustrated by the well-known English case Maddison v. Alderson. In this case, A induced a woman to serve him as a house-keeper without wages for many years by a verbal promise to leave her in his will a life-estate in his land. He died without making any will. The woman sought specific performance of the verbal contract but her action was dismissed because her continuance in service did not refer directly to the contract as alleged but on the contrary was explicable without supposing such contract.

For the same reason, it is well settled that payment of price is not a sufficient act of part-performance because the payment can be explained on many other grounds and does not unequivocally suggest the existence of a contract relating to land.

Indian law prior to 1929.

Various decisions of Courts in India had established that as the doctrine of part performance in England takes an oral contract out of the Statute of Frauds, so in India, it takes a document requiring registration out of the Registration and the Transfer of Property Act. In ***Maddison v. Alderson***, held that :

"In a suit founded on such part-performance, the defendant is really charged upon the equities resulting from the acts done in execution of the contract and not (Within the meaning of the Statute) upon the contract itself, if such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation, would follow."

It is well settled that the English doctrine of the equity of part-performance has been embodied in section 53-A of the Transfer of Property Act. When there is nothing in the document relied on for the applicability of the section to show that the vendor and the vendee were ad idem on the terms for transfer of the property, the provisions of the section would not be applicable.

Doctrine under the Act.

Section 53-A is only meant to bring about a bar against enforcement of rights by a lessor in respect of property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession or to claim any other right on the basis of an unregistered lease. This section is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. After Section 53-A was enacted, the only case in which the English doctrine of equity of part performance can be applied in India, is where the requirements of Section 53-A are satisfied.

To qualify for the protection of the doctrine of part-performance, it must be shown that there is a contract to transfer for consideration immovable property and the contract is evidenced by a writing signed by the person sought to be ascertained with reasonable certainty. These are pre-requisites to invoke equitable doctrine of part-performance. After establishing the afore-mentioned circumstances, it must be further shown that a transferee had in part performance of the contract either 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. There must be a real nexus between the contract and the acts done in pursuance of the contract and must be unequivocally referable to the contract.

Anything done in furtherance of the contract postulates the pre-existing contract and the acts done in furtherance thereof. Therefore, the acts anterior to the contract or merely incidental to the contract would hardly provide any evidence of part performance.

The transferee must himself be willing to perform his part of the contract, for no equities can arise in favour of a person who is not willing to perform his part of the contract. Accordingly, a person who has taken possession cannot resist dispossession if he is not willing to pay the price agreed upon.

Section 53-A affords protection to a transferee on certain conditions, one of which is that the transferee has performed or is willing to perform his part of the contract. Where one party to a contract repudiates the contract, the other party to the contract who claims specific performance of the contract is absolved from his obligation to perform the contract. It is a settled law that where a party to a contract commits an anticipatory breach of contract, the other party to the contract may treat the breach as putting an end to the contract and use for damages, but in that event he cannot ask for specific performance unless he shows his readiness and willingness to perform the contract.

In ***Govindrao Mahadik v. Devi Sahi***, in order to qualify for the protection conferred by the equitable doctrine of part performance as enacted in Section 53-A, the following facts have to be satisfied, namely :

(i) The transferor has contracted 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;

(ii) 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;

(iii) The transferee had done some act in furtherance of the contract; and

(iv) The transferee is willing to perform his part of the contract.

Further it was reiterated that to qualify for the protection of the doctrine of part performance, it must be shown that there is an agreement to transfer of immovable property for consideration and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

Lord Reid said in Steadman's case, that one must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. One must first look at the alleged acts of part-performance are consistent with it. One must first look at the alleged acts of part-performance and see whether they prove that there must be a contract and it is only if they do so prove that one can bring in the oral contract. This view may not be wholly applicable to the situation in India because an oral contract is not envisaged by Section 53-A. Even for invoking the equitable doctrine of part-performance, there has to be a contract in writing from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. Therefore, the correct view in India would be to look at that writing that is offered as a contract for transfer for consideration on any immovable property and then examine the acts said to have been done in furtherance of the contract and find out whether there is a real nexus between the contract and the acts pleaded as in part performance.

Section 53-A postulates a written contract from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

Adverse Possession & Restraining Possession —

Once it is submitted by implication that plaintiff came into possession of land lawfully and continued to remain in possession till the date of suit, the plea of adverse possession would not be available to the defendant. The plea of adverse possession and retaining possession by operation of Section 53-A are inconsistent with each other.

Act of part Performance.

In ***Sunil Kr. Sarkar v. Aghor Kr. Basu***, held that for a tenant continuing in possession of an immovable property after a contract to transfer, written and signed by the landlord, to get the protection under S. 53-A, it is necessary to show that he continues in possession in pursuance of the contract. Mere continuance in possession does not satisfy the requirement of S. 53-A.

Has performed or is willing to perform

The section confers no right on a party who was not willing to perform his part of the contract. A prospective vendee who had taken possession could not resist dispossession, if he were not willing to pay the price agreed upon.

In ***Nathulal v. Phoolchand***, In judging willingness to perform, the court must consider the obligations of the parties and the sequence in which they were to be performed. So a buyer could not be said to be not willing if he was to pay the balance of the purchase money after the revenue records were rectified and did not do so because they were not rectified.

This is also the position in English Law, based on the maxim, 'he who seeks equity must do equity.' So, where a person in possession under an agreement to lease, has failed to perform a condition precedent to the agreement, he was not allowed to raise the equity.

Section 53-A and the Registration Act.

By reason of the part-performance, although the terms of the contract are made binding on the parties thereto, the transferee will not get a good title unless the transfer is effected according to law, that is, executed and registered. In this view, registration would still be necessary in order that the transferee may acquire a perfect and a marketable title.

The application of Section 53-A is not limited to case of contract or transfers which are required to be registered under the Registration Act or the T.P. Act Section 53-A protects the possession of a transferee under a contract or instrument of transfer for consideration which though required to be registered, has not been registered. This right of the transferee is available only against the transferor or any person claiming under him. Section 53-A does not provide either expressly or by necessary implication that the protection is available only in a case where the contract or the instrument of transfer is invalid for non-registration or the same under the Registration Act, or under the T.P. Act.

In Govindrao mahadik v. Devi Sahai, It was held that mere oral agreement to discharge a mortgage can be hardly be said to be an act of part-performance unless in fact such an act is done by a discharged mortgage deed being returned to the mortgagor.

Section 53-A requires that the person claiming the benefit of part performance must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract, he will not qualify for the protection of the doctrine of part-performance.

A transferee in possession of property in pursuance of an agreement of sale and entitled to the protection by Section 53-A of the Transfer of Property Act on the basis of the doctrine of part-performance, is entitled to file a suit with a view to protect his possession and to seek a declaration

that he is entitled to possession and for and injunction restraining the transferor or his alienees from interfering with his possession.

The section cannot be used by the transferee to have his title to the property declared or to seek recovery of possession of the property. The doctrine of part-performance is available to retain the possession and not to get the possession. The benefit of the section to a large number of cases where the transferee may not be able to sustain his possession as against his transferor.

Section 53-A postulates taking possession of the property in part performance of the contract only in a lawful manner. It cannot be predicated that it purports to give protection to those transferees who have taken possession of the property in a manner contrary to law which was in force and applicable to them.

The section applies not only to contracts of transfers as such but also to instruments of transfers.

Although the rules contained in s. 53-A of the Transfer of Property Act are the direct importation of English Equitable Doctrine of Part-performance, yet the Indian Law and its interpretation differs from the English law : (i) In India, the protection of Section 53A is available only when the contract is in writing. In England, however, the contract may be oral as well, (ii) In India, this section does not give any right of action, i.e., it is not any active right. It is simple a right to defend the possession, hence only a passive right, and (iii) In India, the protection under part-performance is available as a matter of statutory right but in England this right is an equitable right only.

Transferee for value without notice.

As is evident from the proviso, the doctrine of part performance as embodied in this section cannot affect the right of a transferee for the value without notice of the previous contract of its part performance.

Defence of part performance to an action of in ejectment —

Supreme Court in Nathulal v. Phool Chand, while interpreting Section 53-A held that, If these conditions are fulfilled, 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 is debarred from enforcing against the transferee 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.

Validity of part performance —

Where bona fide purchasers for value had no knowledge of defect in title of seller, held that such purchasers will be protected by Section 53-A and sale deed in their favour could not be declared as void.

MORTGAGE

S. 58 "Mortgage", "mortgagor", "mortgagee", "mortgage - money" and "mortgage - deed' defined. --

(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

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

The essential nature of mortgage is that it is a transfer of an interest in specific immovable property to the lender, called a mortgagee. The mortgage is simply the transfer of an interest in the property mortgaged. It is not the transfer of absolute interest in the property.

There is necessarily a transfer of interest in specific immovable property by reason of the execution of the mortgage. That would be there irrespective of whether a debt has arisen or not because it is a necessary element of mortgage, but a mortgage is not always executed for securing debt which has already arisen. A mortgage can be executed for securing payment of money to be advanced. Money which may be paid later may be secured by a current mortgage.

Equitable mortgages executed in favour of banks to secure overdraft accounts would operate as mortgages but the debts thereunder would arise only when liability is incurred by reason of a debit being found in the overdraft account as a result of operating the account.

Elements of a Mortgage —

The following are the essential characteristics of a mortgage :

(1) There must be a transfer of an interest.

(2) There must be specific immovable property intended to be mortgaged.

(3) The transfer must be made to secure the payment of a loan or to secure the performance of a contract.

Transfer of Interest

The right of the mortgagee is only an accessory right which is intended merely to secure the due payment of the debt.

Mortgage is simply a transfer of interest in the immovable property while the ownership still retains with the mortgagors. Thus, where a joint family property is subject to mortgage, there is no transfer of ownership and the coparceners being its lawful owners are competent to allot the mortgaged property in oral partition to any of the coparceners. The coparcener to whom the mortgaged property is allotted becomes its absolute owner and is entitled to redeem the mortgage.

The words 'transfer of an interest' also bring out the distinction between : (i) a mortgage and an agreement to mortgage, and (ii) a mortgage and a charge. A mortgage is a transfer of an interest and creates a right in rem, but mere agreement that one person shall lend the money and the other would borrow it by way of mortgage, does not create any interest in the property intended to be mortgaged. Such an agreement is not even capable of specific performance, that is, the court cannot compel the parties to borrow or lend money. Such an agreement only gives rise to an obligation to pay damages. Since a mortgage creates a right in rem, such right is available against all subsequent transferees of the mortgaged property irrespective of notice.

The broad distinction between a mortgage and a charge is --

(1) Whereas a charge only gives a right to the payment out of a particular immovable property without transferring any interest in the property a mortgage is in essence a transfer of an interest in specific immovable property.

(2) a mortgage is good against a subsequent transferee and may be enforced against a bona fide purchaser for value with or without notice, while a charge is good only against a subsequent transferee with notice.

Specific immovable property.

The description of the property in the mortgage deed, if any, must at least be sufficient to identify the property.

Consideration of mortgage.

The consideration of a mortgage may be either : (1) money advanced or to be advanced by way of loan; (2) an existing or future debt; or (3) the performance of an engagement giving rise to pecuniary liability.

Effect of failure of mortgagee to advance amount undertaken.--

A mortgage under the Transfer of Property Act is a transfer of an interest of an interest in the land mortgaged, and not a mere contract. Once a document transferring immovable property has been registered, the transaction passes out of the domain of a mere contract and falls into one of a conveyance.

Therefore, a transaction of mortgage formally, executed does not become void or ineffective merely because the mortgage fails to advance the amount of money undertaken to be advanced by him. If, without advancing the amount agreed to be advanced, he sues on the title created under the deed of mortgages the court will not award him a decree for anything more than what he has advanced. But this does not mean that the mortgage is invalid.

Forms of Mortgage

1. Simple Mortgage —

The characteristics of a simple mortgage are : (1) that the mortgagor must have bound himself personally to repay the loan, (2) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold in the event of his having failed to repay, and (3) that possession of the property is not given to the mortgagee.

No delivery of Possession

The outstanding feature of a simple mortgage is that possession is not delivered to the mortgagee, but remains with the mortgagor. Since the mortgagee is not put into possession of the property, he has no right to satisfy the debt out of the rents and profits, nor can he acquire the absolute ownership of mortgaged property by foreclosure.

It will be seen that the mortgage, has, on default of the mortgagor, a two fold cause of action - One arising out of the breach of the convenant of repay and the other arising out of the mortgage. The mortgagee may, therefore, sue him for the mortgage-money or may proceed against the property or may combine both these remedies in one suit. If he sues on personal undertaking only, he obtains a money decree but if he sues on the mortgage,he obtains an order for the sale of the property.

2. Mortgage by conditional Sale —

The Mohammedan Law forbids the taking of interest and therefore in order to evade the prohibition of interest, a kind of mortgage, known as byebil wafa was devised. The mortgagor purported to make over the property to the mortgagee, by way of an absolute sale, and the mortgagee (the ostensible buyer) agreed to resell the property, at the expiry of a certain stipulated time, on being repaid the money advanced by him.

Essentials of a mortgage by conditional sale.

In a mortgage by conditional sale —

(1) the mortgagor must ostensibly sell the immovable property,

(2) there must be a condition that either,

(a) on the repayment of the money due under the mortgage on a certain date, the sale shall become void or the buyer shall retransfer the property to the seller, or

(b) in default of payment on that date the sale shall become absolute.

(3) the condition must be embodied in the document which effects or purports to effect the sale.

This is, therefore, a mortgage in which the ostensible sale is conditional and intended simply as a security for the debt. The word "ostensible" means that it has an appearance of sale but is really not a sale. It is merely executed in form of sale with a condition attached to it. The ostensible sale need not be accompanied with possession. The mortgagee does not acquire any personal right against the mortgagor.

It is to be noted that the sale does not become absolute in default of payment on the due date by itself until there is a decree absolutely depriving the right of redemption of the mortgagor.

For a transaction to be a mortgage by conditional sale proviso to Section 58 © envisages that the condition effecting or purporting to effect the sale as a mortgage transaction, must be incorporated in one and the same deed.

Where separate documents of sale deed of reconveyance and lease deed were executed in the same transaction and the condition effecting the sale as a mortgage was not embodied in the sale deed itself, the mortgagor was debarred from saying that the transaction was in the nature of mortgage by conditional sale.

3. **Usufructuary Mortgage —** The characteristics of a usufructuary mortgage are :

(1) possession of the property is delivered to the mortgagee;

(2) the mortgagee is to get rents and profits in lieu of interest or principal or both;

(3) no personal liability is incurred by the mortgagor; and

(4) the mortgagee cannot foreclose or sue for sale.

No personal liability.

The mortgagor cannot be sued personally for the debt. The mortgagee is only entitled to remain in possession of the mortgaged property till the principal and interest are defrayed according to the terms of the agreement. Since a usufructuary mortgagee is entitled to remain in possession until the debt is paid off, no time limit can be fixed expressly during which the mortgage is to subsist.

4. English Mortgage —

An English Mortgage is a transaction in which the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgage property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the department. Thus, the main features of this mortgage are —

(i) that the mortgagor should bind himself to repay the mortgage money on a certain day;

(ii) that the mortgage property should be transferred absolutely to the mortgagee; and

(iii) That such absolute transfer should be made subject to a proviso that the mortgagee will recovery the property to the mortgagor, upon payment by him of the mortgage money on the appointment day.

5. Mortgage by deposit of title-deeds —

In England, a mortgage of this kind is called an " equitable mortgage" as opposed to a "mortgage" because in this type of mortgage, there is simply a deposit of document of title without anything more, without writing or without any other formalities. The object of the Legislature in providing for this kind of mortgage is to give facility to the mercantile community in cases where it may be necessary to raise money all of a sudden before an opportunity call be afforded of prepar-

ing the mortgage-deed. This mortgage, therefore, does not require any writing and being an oral transaction, is not affected by the Law of Registration.

The term Equitable mortgage and being inappropriate in India on account of the absence of classification or division of estates or rights into legal and equitable, it is called a mortgage by deposit of title-deeds.

6. Anomalous mortgage —

Several other kinds of mortgages are in use in various parts of India which are in the nature of usufructuary mortgage. These and other types of mortgages have been given the name of 'anomalous' mortgage. Anomalous mortgage has been defined as a mortgage which does not fall under any of the five classes mentioned above.

An anomalous mortgage includes :

1. A simple mortgage usufructuary is a combination of a simple mortgage and a usufructuary mortgage and consequently an anomalous mortgage. In this transaction, the mortgagee is in possession and pays himself the debt out of the rents and 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.

2. A mortgage usufructuary by conditional sale is another instance of an anomalous mortgage. Here the mortgagee is in possession as a usufructuary mortgagee for a fixed period and if the debt is not discharged at the expiry of the period, he gets all the rights of a mortgagee by conditional sale. In case the debt is not paid within the time fixed, the mortgagee gets the right of foreclosure, that is a right to deprive the mortgagor's right of redemption.

MORTGAGE

Mode of transfer in a mortgage — There are three ways in which property may be transferred by way of mortgage :—

(1) Registered instrument.

(2) Delivery of Possession.

(3) Deposit of title-deeds.

Registered instrument.

In the case of a mortgage other than a mortgage by deposit of title-deeds, if the principal money secured is Rs. 100 or upwards, a registered instrument is compulsory.

Registration of mortgage by deposit of title deeds —

When the debtor deposits with the creditor the title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required.

Right of redemption —

The most important right possessed by the mortgagor is the right to redeem the mortgage. Under this section, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage-money to require the mortgagee to reconvey the mortgage property to him. The right conferred by this section has been called the right to redeem anda suit to enforce this right has been called a suit for redemption. In English Law, the mortgagor's right to redemption contained in for Equity of redemption.

This remedy is available to the mortgagor only before the mortgagee has filed a suit for enforcement of the mortgage. Subsequent to the filing of the suit, this remedy is not available.

Clog on Redemption.

The right of redemption is, therefore, invadable in the sense that it cannot be denied to the mortgagor even though he may by express contract abandon his right to redeem the property. Equity in its insistence upon the principle that a mortgage is intended merely to afford security to the lender, has held an agreement which prevents redemption as void.

Lord Lindley in Stanley v. Wilde, expounded the principle as under :

"The principle is this a mortgage is a conveyance of land or an assignment of chattels as securities for the payment of a debt or the discharge of some other obligation for which it is given. That is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given , is what is meant by a clog or fetter on the equity of redemption and is, therefore, void. It follows from this, that 'once a mortgage always mortgage'. A 'clog' or 'fetter' is something which is consistent with the idea of security. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition. The Courts of Equity have fought for years to maintain the doctrine that a security is redeemable. But when and under what circumstances? On the performance of the obligation for which it was given. If the obligation is the payment of a debt, the security is redeemable on the payment of the debt.

Earlier in ***Vemon v. Bethell***, it was said that, this court as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgage can never provide at the time of making the loan for any event or condition which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule,for necessitous men are not, truly speaking, free men but, to answer a present exigency, will submit to any terms that the craft may impose upon them.

In ***Kreligner v. New Patagonia Meat and Cola Storage Co. Ltd.***, it was said that this jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land is indeed a gross one. The land was conveyed to the creditor upon the condition that if the money, he had advanced to the debtor, was repaid on a date and at a place named, the fee simple would revest in the latter, but that if the condition was not strictly and literally fulfilled, he should lose and land for ever. What made the hardship on the debtor a glaring one was the debt still remained unpaid and could be recovered from the debtor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security."

It should be noted that the doctrine of clog on redemption applies only to dealings which take place between the parties to a mortgage at the time when the contract of mortgage is entered into. It does not apply where they subsequently vary the terms upon which the mortgage may be redeemed.

INDIAN LAW

Redemption involves two things : (a) re-transfer of the interest which had been originally transferred to the mortgagee, and (b) delivery of the possession. Both these things are done by virtue of the terms of mortgage, and in pursuance of an agreement between the parties. Thus, the re-transfer of the interest is also by virtue of an agreement.

Under the Indian Law, the right of redemption is a statutory right which cannot be fettered by any condition which impedes or prevents redemption. Any such condition is void as a clog on

redemption. The Legislature has quite advisedly not used any such words as "in the absence of a contract to the contrary" in Section 60 with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of the mortgage. It is, therefore, manifest that the right cannot be clogged.

Illustrative cases on 'Clog'

What is a clog on equity of redemption is a matter of fact in each case. Following instances would make it clear.

(1) Condition of sale in default — The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. Accordingly, if one of the terms of the mortgage is that on the failure of the mortgagor to redeem the mortgage within the specified period, the mortgagor will have no claim over the mortgaged property and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, it cannot be given effect to. It plainly takes away altogether the mortgagor's right to redeem the mortgage after the specified period. This is not permissible for "once a mortgage always a mortgage" and therefore always redeemable. ***(Gangadhar v. Shankar Lal)***

(2) Long term for redemption — A long term is not necessarily a clog on redemption. In ***Gangadhar v. Shankarlala***, it was held by the Supreme Court of India that the terms in the mortgage that it will not be redeemable until the expiry of 85 years was not a clog in the circumstances of the case. Delivering the opinion of the Court, Sarkar J. observed :

The rule against clogs on the equity of redemption no doubt involves that the courts have the power to relieve a party from his bargain. If he has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. But the courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. The Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the money on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief. We then have to see if there was anything unconscionable in agreement that the mortgage would not be redeemed for 85 years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case."

(3) Stipulation barring mortgagor's right of redemption after certain period.

If there is a stipulation which bars mortgagor's right of redemption after cettain period, the stipulation is treated as a "clog" on the mortgagor's equitable right of redemption.

(4) Condition postponing redemption in case of default. —

In ***Mohammad Sher Khan vs. Seth Swami Dayal***, the mortgage was for a term of five years with a condition that if the money was not paid, the mortgagee might enter into possessionfor a period of twelve years during which the mortgagor could not redeem. It was held that such a condition was a clog because it hindered an existing right to redeem.

(5) Restraint on alienation. —

A stipulation that the mortgagor shall not alienate the mortgaged property or shall not take loan on the security of the mortgaged property has been held to be a clog.

(6) Redemption restricted to Mortgagor. —

An agreement that redemption should be available to the mortgagor, and not to his heirs has been held as a clog.

(7) Penalty in case of default. —

Stipulation to charge at enhanced rate of interest from the date of mortgage, in case of default in payment, has been held to be a clog.

The Kreglinger's Case.

The facts were : A firm of woo;-brokers lent 10,000 pounds to a company which carried on business as meat preservers, the agreement being that the company might pay off the loan at the any time by giving a month's notice. The loan was not secured by an ordinary mortgage but by an analogous security called a floating charge. It was further agreed between the parties that for a period of five years from the date of loan, the Company should not sell sheep skins to any person other than the lenders, so long as the mortgagees were willing to pay the best price offered by any other person. It was also agreed that the mortgagees would not demand repayment before five years had elapsed. The loan was repaid within two and a half years. The point that fell to be decided by the House of Lords was: (1) whether the option on the sheep skins continued to exist in favour of the mortgagees after repayment of the loan, or (2) whether it was void as a clog on, or repugnant, to the equity of redemption. It was held that the mortgagees were entitled to an injunction restraining the mortgagors from selling sheep-skins during the remainder to the five years period to any person other than the mortgagees. The court came to the conclusion that the option to purchase was valid because it was not a term of the mortgage at all. It was held that :

There is now no rule in equity which precludes a mortgagee from stipulating for any collateral advantage: provided, such collateral advantage is not either (i) unfair and unfair and unconscionable; or (ii) in the nature of a penalty clogging the equity of redemption, or (iii) inconsistent with the legal or equitable right to redeem."

It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. This does not countenance it. Long term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom if any, prevalent in the community or the society in which the transaction takes place, and the totality of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage, to manage as a matter of prudent management, these factors must be correlated to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption.

It is settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of the circumstances that would be equitable, fair and just and unless there is anything to the contrary in the status, law must take cognizance of the fact and act accordingly. In the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity to redemption should be judged.

Exercise of the right of redemption

The mortgagor's right of redemption exercised,--

(i) by paying or tendering mortgage-money to the mortgagee outside the court, i.e. Privately;

(ii) By depositing the amount in the court; and

(iii) By a suit for redemption, payment or tender.

Before redemption can be claimed the mortgage money must have been : (i) Paid, or (ii) tendered and the payment or tender must have been made at the proper time and place. Payment may be made on the mortgage himself or his authorized agent. When there are several mortgagees, the payment should be made to all of them jointly.

Tender means an unconditional offer to pay the money under such circumstances that the mortgagee may receive the money there.

Mortgagor's rights on redemption

The mortgagor's rights on redemption are, -

(i) delivery of the mortgage-deed and documents of title relating to the mortgaged property,

(ii) Possession, and

(iii) reconveyance or acknowledgment.

LEASE & LICENCE

S.105. Lease defined.-- 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.

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.

A lease of immovable property is a transfer of a right to enjoy such property made for a certain time or in perpetuity. The expression "transfer of a right to enjoy" stands is contrast with the words "transfer of ownership" occurring in Section 54 in the definition of sale. In a sale, all the rights of ownership, which the transferor has, passes on to the transferee. In a lease, there is a partial transfer, that is a transfer of a right of enjoyment for a certain time. The person who transfers the right is called the lessor and the person to whom the right is transferred is called the lessee.

It should be noted that while both a sale and a mortgage to a minor are valid, a lease to a minor is void as the lease imports a covenant by transferee(lessee), to pay rent and perform various conditions which may be imposed in a lease. A contract with a minor is void. The fundamental conception of a lease is that it is the separation of the right of possession from ownership.

Salmand said, a lease, in this generic sense, is that form of encumbrance which consists in a right to the possession and use of property owned by some other person. It is the outcome of the rightful separation of ownership and possession.

Possession is the continuing exercise of a right and, although a right is normally exercised by the owner of it, it may, in special cases, be exercised by somebody else. This separation of owner- ship and possession may be either rightful or wrongful, and , if rightful, it is an encumbrance of the title of the owner.

For a lease of immovable property, there must be a lessor and a lessee. An agreement of lease

must also be executed lawfully by the lessor and the lessee containing the terms and conditions of the lease for lawful consideration. The lessor and lessee must also be persons who are competent to contract. Unless the aforesaid requirements are satisfied, an agreement of lease of immovable property cannot be lawfully made and executed. A lawful agreement of lease of immovable property cannot be lawfully made and executed. A lawful agreement of lease of immediately property is therefore, a contract within the meaning of section 10 of the contract Act.

In every case, there is an implied contract that the lessee will be put in possession of the property of the lessor. The term 'lease' imports a transfer of an interest to enjoy the property. One of the essential conditions of a lease is that the tenant should have the right to the exclusive possession of the land.

The essential elements of a lease are :—

(i) the parties;

(ii) the subject-matter of immovable property;

(iii) the duration of a right to enjoy the immovable property; and

(iv) the consideration.

The parties.

Both parties, i.e., the lessor and the lessee must be competent to contract. A lease cannot be created without any express or implied contract between two parties.

Subject-matter.

The subject-matter of a lease must be immovable property.

Duration.

The next element is that the right to enjoy the property must be transferred for a certain time or in perpetuity. It may commence either in the present or on some date in future or on the happening of a event which is bound to happen. Where day is expressed for the commencement of the lease, such day must be excluded in computing the whole period of lease. Section 110 enacts that if the day of commencement is not stated, the lease begins from the date or execution. If it is expressed to commence from a past day, that is only for the purpose of computation, and the interest of the lessee begins from the date of execution.

Both the time when the lease begins and the time when i ends must be fixed. Apart from leases for certain time, a lease may be in perpetuity. Such leases are generally agricultural leases.

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.

There is no simple Litmus Test distinguish a lease as defined in Section 105 from a licence as defined in Section 52 of the Easement Act, but the character of the transaction turn on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferees to enjoyment, is created, it is a lease, if permission to use land without right to exclusive possession is alone granted, a licence is the legal result. Marginal variations to this broad statement are possible.

Permanent Lease — In India, the permanent leases or a lease in perpetuity may be created either expressly or inferred from the circumstances of a given case. In the latter case it is said to have been created through a presumed grant. The tenancy of a permanent nature in the sense that

it could not be revoked so long as the plaintiff paid rent in cash or kind, may be inferred from various terms and conditions of a lease.

The mere fact that a uniform fixed rent had been paid for a long time or the fact that the lessees had been in possession of the land for a long time making construction of land at their own cost would not raise a presumption that the tenancies were of a permanent character. In every case an inference of permanency of tenancy is a question of fact depending upon the facts of each particular case. The onus of proving that a tenancy is permanent is on the tenant setting up such a case.

(a) Tenancy - at - will.

A lease which is silent as to duration of term would be void as a lease, but if the lessee has taken possession, a tenancy-at-will is created. It arises by implication of law in cases where a person takes possession of the premises with the consent of the owner. It may also arise by an express agreement to let for an indefinite period for compensation accruing from day to day. The tenant in such a case is not a trespasser and his only liability is to pay compensation for use and occupation. A tenancy-at-will is terminable by either party. A demand by the landlord for possession is sufficient to terminate his tenancy-at-will.

Under Section 105 of the Transfer of Property Act, a lease creates right or an interest in enjoyment of the demised property and a tenant or a sub-tenant is entitled to remain in possession of the demised property until the lease is duly terminated and eviction takes place in accordance with law.

For ascertaining whether a document creates a licence or lease, the substance of the document must be prepared to the form. It is not correct to say that exclusive possession of a party is irrelevant but at the same time is not conclusive. The other tests, namely intention of the parties and whether the document creates any interest in the property or not are important consideration.

(b) Tenancy by sufferance.

Another type of a tenancy may be noted here. It is called a 'tenancy by sufferance'. It also arises by implication of law when a person who has been in possession under a valid lease continues in possession even after the expiration of the lease without the consent of the lessor. Thus, a tenant holding over after the expiration of the term is a tenant at sufferance. A tenancy at sufferance is terminated at any time by the landlord entering without notice or demand.

Consideration —

The consideration is either premium or rent. Premium is the price paid or promised to be paidi a lump sum. If the consideration is premium, the transaction may either be zuripeshgi lease or a usufructuary mortgage. In the former case, the premium is not given as a loan and the relationship of a debtor and a creditor does not subsist while in latter transaction, it is essentially a lending and a borrowing transaction.

Rent is a periodical payment. But the definition of rent given in this section is wide enough to include not only money but also the delivery of a share of the crop, of the rendering of service, etc.

Section 105 recognises also a lease of immovable property in consideration of a share of crops.

Nature of payment as premium or rent —

Section 105 bring out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of

rent. The former is a capital income and the latter a revenue receipt.

Agreement to lease —

A document whereby the terms of a lease, are finally fixed and it intended to give the right of enjoyment to the lessee either at once or at a future date is a lease. On the other hand, a document which only binds the parties, the one person promising to grant the lease and the other promising to accept it, is merely an agreement to lease. If the intended lessee enters into possession, he can, under section 53-A, resist the lessor's suit for ejectment :provided the agreement is in writing.

Suit based on possessory title —

Where both parties rely on possessory title, it is necessary that they should prove effective possession over the property in order to succeed on the basis of possessory title. Effective possession means actual possession or possession through a tenant who must have paid the rent voluntarily or under a decree to the person claiming possessory title.

Lease and licence distinguished —

Lease is a transfer of right to enjoyment property made for a certain time in consideration of a price paid or promised. Under Section 108, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor part with his right to enjoy the property during the term of the lease and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the India Easement Act defines a license as a right to do or continue to do, in or upon the immovable property of the grantor, something which in the absence of such right be unlawful, and such right does not amount to an easement or interest in the property.

Under Section 52 of the Easement Act if the document gives only a right to another to come on the land or premises and use them in some way or the other while it remains in possession and control of the owner thereof, it will be a licence. The legal possession continues to be with the owner of the property but the licensee is permission, his occupation or use would be unlawful. It does not create in his favour any estate or interest in the property. There is therefore a clear distinction between the two concepts. The dividing line is clear thought sometimes it becomes very thin. At one time, it was thought that the test of exclusive possession was infallible and if a person was given an exclusive possession of premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in Errington v. Errington, where Lord Denning after reviewing the case law on the subject summaries the result of his discussion as follows :

"The result of all these cases is that, although a person who is let into exclusive possession is prime facie to be considered a tenant, nevertheless he will not be held to do so if the circumstances negative any intention to create a tenancy."

The Supreme Court of India in ***Associated Hotel of India v. R. N. Kapoor***, quoted with approval the above observations and proceeded to lay down the following propositions :—

(1) To ascertain whether a document creates a license or a lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties - Whether intended to create a lease, or a license; (3) if the document creates an interest in the property, it is a lease, but, if it only permits another to make use of the property of which the legal possession continues with the owner, it is a license, and (4) if under the document, a party gets exclusive possession of the property, prime facie he is considered to be a tenant, but circumstances may be established which negative the intention to create.

A lease is the transfer of a right to enjoy the premises, whereas a license is a privilege to do

something on the premises which otherwise would be unlawful. If the agreement is in writing, it is a question of construction of the agreement having regard to its terms and, where its language is ambiguous, having regard to its object, and the circumstances under which it was executed, whether the rights of the occupier are those of a lessee or a licensee.

It was observed by the Supreme Court in ***M. N. Clubwals v. Fida Hussain Saheb***, that —

(a) 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.

(b) Exclusive possession is not conclusive evidence of a lease. If, however, exclusive possession to which a person is entitled under an agreement with a landlord, is coupled with an interest in the property, the agreement would be constructed not a mere license but as a lease.

Distinction Summarised —

A resume of what has been explained in respect of the distinction between a lease and a license is that there lies the following points of distinction between the two :—

(1) A lease is a transfer of an interest in land whereas the license does not create any interest in land in favour of the licensee.

(2) A lessee can sue a trespasser in his own name but a licensee cannot do so.

(3) A lease can be assigned, but a license cannot be assigned.

(4) A lease cannot be revoked until the term , but a license, subject to certain exceptions, can be revoked.

Lease or license, its determination —

The intention of the parties must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude and agreement from operating as a license. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property, the subject-matter of the agreement. If it is in fact intended to create an interest in the property, it is a lease, if it does not, it is a license.

A lessor may after the period for which lease is granted renew the same or resume, that is -re-enter. But if out of the two, that is re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

Decree of eviction passes — Decree could be avoided only by getting a fresh lease —

The right to exclusive possession is the basic feature of the tenancy created by lease. Licencee's possession, on the contrary, is only permissible and he can be thrown out at any time. He does not also get the right to exclusive possession. Since the decree for eviction was passed against the respondent in his capacity as tenant of the premises in question, he could have, if at all, avoided that decree only by getting a fresh lease of the premises and not a license which cannot have the effect of avoiding the decree or superseding or substituting the decree. The intention of the parties clearly was not to extinguish the decree of eviction but to create only a license allowing the respondent to stay in the premises for a while.

License-creation of —

In D'souza's case Court has indicated that for a consideration, as to whether a document creates a license or lease, the substance of the document must be preferred to the form. It is not correct to say that exclusive possession of a party is irrelevant, but at the same time, it is also not conclusive. The other tests, namely, intention of the parties and whether the document creates any interest in the property or not, are important considerations.

Although, normally in a case of license, question of subletting does not arise, but simply for giving such clause in an agreement. An agreement cannot be held to be an agreement for lease. The pith and substance of the document are required to be considered for the purpose of finding out the true import of a document, namely, whether a document creates a lease or a license.

The document containing the terms and conditions under which the defendant was allowed to run the said business and it appears that the said document is consistent with the case of license.

The right of the lessee —

Right of the lessee in the leased property subsists even if the leased property has been destroyed by fire, tempest or flood or violence of an army or of a mob or other irresistible force unless the less exercises is option that on happening of such events the lease has been rendered void. By necessary corollary, therefore, if the leased property is destroyed wholly by fire, the lease cannot be said to be extinguished, nor can it be said that lessee's right in the leased property has come to an end unless the lessee exercises such option.

Eviction Suit-- Section 105 T.P. Act & Section 52 of the Easement Act —

The principles on the construction of a document as to whether it amounts to lease or licence were laid down by the Apex Court in ***Associated Hotels of India Ltd. v. R. N. Kapoor***, and it is considered necessary to record the summarised propositions laid down by the Apex Court in the said judgment.

The following propositions may, therefore, be taken as well-settled : (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties whether they intended to create a lease or licence ; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prime facie he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

The Apex Court in the said judgment has further pointed out the marked distinction between lease and licence as under :

. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a prior paid or promised. Under Section 108 of the said Act, the lee is entitled to be put in possession of the property. A lease is, therefore, a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and if follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Indian Easements Act defines a licence thus :

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 grant or, 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 licence. Under the aforesaid section, if a document gives only

a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred."....

In ***M. N. Clubwala v. Fida Hussain Saheb***, it was laid down that decisive consideration is intention of the parties and the intention has to be gathered on consideration of all the relevant provisions in the agreement.

In ***Capt. B. V. D'Souza v. Antonio Fausto Fernandes***, it was further reiterated that the substance of the document must be preferred to the form and it is not correct to say that exclusive possession of the party is irrelevant, but at the same it is not conclusive and besides that the intention of the parties and whether the document creates any interest in property or not are important considerations.

Unregistered instrument —

In this case the question was regarding the determination of the leave or license. It was held by the Hon'ble Court that to find out whether the document creates lease or license, real test is to find out the intention of the parties; keeping in mind that in cases where exclusive possession is given, the line between lease and license is very thin. The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document endencing the agreement between the parties are not clear, the surrounding circum- stances and conduct of the parties have also to be borne in mind for ascertaining the real relation- ship between the parties.

Perpetual lease permissible in India — Difference between extension of lease and renewal of lease —

In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal de- pends on the facts and circumstances of each case regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is difference between an extension of lease in accordance with the covenant in that regard con- tained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed; as the extension of lease for the terms agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execu- tion of a fresh deed of lease, another lease for affixed terms shall not come into existence though the principal lease inspite of the expiry the term thereof may continue by holding over for year by year or month by month, as the case may be.

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CHAPTER: SALE OF IMMOVEABLE PROPERTY

A. DEFINITION OF SALE

Sale is a transfer of ownership for a money consideration. It implies an absolute transfer of all rights in the property sold. No rights in the property sold are left in the transferor. Under the Transfer of Property Act 1882, Section 54 states that sale is characterized as the transfer of ownership of a property in exchange at a cost paid or guaranteed or part of the way paid or part guaranteed.

Therefore the elements of sale are: -

1. **Transfer of ownership** – ownership is the collection of the multitude of rights and liabilities in a property. When there is the transfer of ownership, the total or absolute, all things considered, and liabilities in a property are transferred from transferor to the transferee.
2. **Money consideration** – the 'price' that is highlighted in section hints to money consideration. Where the ownership of property is transferred in consideration for money it adds up to sale however in the event that it is transferred for whatever else it amounts to deal yet on the off chance that it is transferred for whatever else it adds up to exchange.

B. ESSENTIAL ELEMENTS OF SALE

1. **The parties to the sale (seller and buyer) should be competent to transfer**- The transferor of the immovable property executing the sale is known as the seller. The person who receives the property sold to him for a consideration that is the transferee is known as the buyer. The transferor or the seller must be competent to contract and entitled to the transferable property. A transferee should be competent to receive the transfer and he shall not be disqualified by law to receive the property transferred.
2. **The subject matter of the transfer must be a transferable immovable property**- Section 54 only governs the sale of immovable property. Immovable property can be tangible or intangible. Tangible property is one that can be touched, such as a house, a tree etc., while intangible property refers to property that cannot be touched such as a right of fishery, a right of way etc.
3. **The consideration for the sale must be paid, promised, part paid or part promised**- Price is a consideration paid for the transfer of property. Therefore price is money but not necessarily money immediately paid in notes and coins, it includes money which might be already due or payable at a future date. A transfer is not a sale if no price is paid or promised or partly paid or promised.
4. **There has to be a transfer of ownership by the seller to the buyer**- Under the Transfer of Property Act 1882, Section 54 states that sale is characterized as the transfer of ownership of a property in exchange at a cost paid or guaranteed or part of the way paid or part guaranteed.

C. LIABILITIES/DUTIES OF SELLER

According to section 55(1) of transfer of property act 1882, Liabilities or duties of Seller can be summarised according to the following points which are as follows:-

A. ***LIABILITY/DUTY BEFORE SALE***:- The liabilities of seller before sale can be stated as follows:-

1. **Liability to Reveal Fault:-** It is the duty of the seller, 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;
2. **Liability to Submit Document:-** It is the duty of the seller, to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power.
3. **Answer relevant questions as to title:** It is the duty of the seller 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.
4. **Liability to Execute Conveyance:** It is the duty of the seller on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

B. ***LIABILITY/DUTY AFTER SALE***:- The liabilities of seller after sale can be stated as follows:-

1. **Liability to Deliver up Occupation:** It is the duty of the seller to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits.
2. **Delivery of title deeds:** After completing the sale, the seller has to transfer title deeds to the buyer, who thereafter, becomes the rightful owner of the property and title deeds is no use of the seller. Seller is bound to transfer all other documents related to the property and is required by the buyer.

D. LIABILITIES OF BUYER

According to section 55(5) of transfer of property act 1882, Liabilities of Buyer can be summarised according to the following points which are as follows:-

A. ***LIABILITY/DUTY BEFORE SALE:-*** The liabilities of buyer before sale can be stated as follows:-

1. **Liability to disclose facts**– It is the liability of the buyer 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.
2. **Liability of payment of purchase money-** It is the liability of the buyer 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.

B. ***LIABILITY/DUTY AFTER SALE:-*** The liabilities of Buyer after sale can be stated as follows:-

1. **Liability to bear damages**– It is the liability of the buyer that 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.
2. **Liability to pay due amount-** It is the liability of the buyer that 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. In the case of ***Gangi V/s Govinda*** it was held that the buyer is liable to pay all the charges after sale. Due amount includes revenue, principal, interest etc.

E. RIGHTS OF SELLER

According to section 55(4) of transfer of property act 1882, Rights of Seller can be summarised according to the following points which are as follows:-

A. ***RIGHT BEFORE SALE***:- The Rights of Seller before sale can be stated as follows:-

1. **Right to get Rent and Profit**:- Before completing the sale, the seller has all rights over the property since he still remains the owner of the property and has the right to get rents, profits, and other benefits over the property. But after the transfer of ownership, this right belongs to the buyer, and the seller has no right to get all these benefits.

B. ***RIGHT AFTER SALE:-*** The Rights of Seller after sale can be stated as follows:-

1. **Interest on unpaid price**: Seller also has a right to get interest on the unpaid price. If the buyer is already in possession of the property, the seller is entitled to claim interest on the unpaid amount from the date on which such possession was delivered, and not from the date of transfer of ownership. The seller has a right not only to get his unpaid price but also to an interest in it.
2. **Transfer of sellers charge**: The charge created in favour of the seller is an unsecured money debt, and therefore is an actionable claim. Actionable claim is transferable in nature and therefore, so is charge.

F. RIGHTS OF BUYER

According to section 55(6) of transfer of property act 1882, Rights of Buyer can be summarised according to the following points which are as follows:-

A. ***RIGHT BEFORE SALE***:- The Rights of Buyer before sale can be stated as follows:-

1. **Buyer's charge**: Unless he has improperly declined to accept delivery of the property, the buyer is entitled 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.

B. ***RIGHT AFTER SALE:-*** The Rights of Buyer after sale can be stated as follows:-

1. **Right to get Benefits, Rents**- the buyer is entitled to get all the rights over property inclusive of all rents, profits, and also any other benefits over the property. The buyer becomes the property owner after completion of the sale or, in other words, after the transfer of ownership, and he/she is entitled to all the benefits from the date of transfer of ownership.

G. DIFFERENCE BETWEEN SALE AND EXCHANGE

The differences between Sale and Exchange can be summarised from the following points:-

1. Sale refers to immovable property only, whereas exchange refers to both movable and immovable properties.
2. The consideration in sale is price paid or promised and partly paid or partly promised, exchange on the other hand has the consideration for transfer of one property in exchange for another property.
3. The seller has the charge from unpaid purchase-money in the case of sale and in exchange there can be no seller's charge for unpaid purchase money.

CHAPTER: GIFT OF IMMOVEABLE PROPERTY

A. MEANING OF GIFT

Gift is dealt with under Section 122 of the Transfer of Property Act. 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. 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. This Section defines a gift as a gratuitous transfer of ownership in some property that already exists. The definition includes the transfer of both immovable and moveable property.

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.

B. ESSENTIAL REQUIREMENTS OF A VALID GIFT

1. **Parties to the gift** - There must be two parties i.e. the donor and the donee. The transferor is called the donor and he must be a competent person (competency as defined in Indian Contract act 1872). The transferee is called the donee and he need not be competent to contract. A gift made to a minor or an insane person or even if it is made to an unborn person is valid and can be accepted by their guardian.
2. **Without consideration**: A gift must be gratuitous i.e. without consideration. Any consideration, however negligible, given in exchange of the ownership of the property, would transform the gift into either a sale or barter. Consideration for the purpose of this requirement has the same meaning as envisaged under Section 2(d) of the Indian Contract Act, 1872. A gift should be a gratuitous transfer out of natural love and affection and must be without consideration.
3. **Voluntarily**: It must be made with donor's free will and free consent without any force, coercion, undue influence, fraud, misrepresentation and mistake. If a gift has been obtained through any one of the above-mentioned means, it can be said that such a gift has not been made voluntarily and hence declared void. Voluntarily done also mean that donor had full knowledge about the transaction and its nature.

4. **Acceptance of gift**: A gift must be accepted by the donee or someone on behalf of donee. Acceptance must be made before the death of the donee and before the revocation by the donor. After the donor makes a gift to a donee, the transaction becomes complete only when the donee accepts it. If the donor doesn't accept it, then it is treated as if the gift isn't made. Such acceptance can be either express or implied.

C. UNIVERSAL DONEE

Section 128 of Transfer of Property Act, 1882 talks about universal donee. When a gift is gifted to a donee from a donor, and such gift consists of the donor's whole property, the donee becomes a universal donee. As the donee is gifted with the donor's whole property, the donee is liable to all the benefits and burdens that the donor holds. In this case, the donee is personally liable to pay all the debts and dues of the donor. This liability to pay back all the dues applies only to the extent of the property's value and not more than that.

A universal donee is one to whom the donor's whole property is given and who consequently becomes 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 in the gift. Section 128 incorporates an equitable principle that one who gets certain benefits under a transaction must also bear the burden therein. However, the donee's liabilities are limited to the extent of the property received by him as a gift. If the liabilities and debts exceed the market value of the whole property, the universal donee is not liable for the excess part of it. This provision protects the interests of the creditor and makes sure that they are able to chase the property of the donor if he owes them. The concept of universal donee is not recognised under English law, although universal succession, according to English law is possible in the event of the death or bankruptcy of a person.

For example, A gifts to B all his properties. The value of A's whole property is 10 million. However, if the debts and dues of A are 11 million, B is liable to pay only 10 million as the gift value is only 10 million. B doesn't have to pay back the remaining 1 million from his personal property.

D. VOID GIFTS

The following gifts are considered to be void gifts and they are:-

1. A gift comprising both existing and the future property is void as to the latter.
2. 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.
3. A gift made for an unlawful purpose. A gift in consideration of past illicit cohabitation is immoral and invalid.
4. A gift depending on a condition, the fulfilment of which is impossible or forbidden by law.
5. Where the donee dies before acceptance.
6. Gift by a person incompetent to contract.
7. A gift which under an agreement between the parties is revocable wholly or in part at the mere will of the donor is void wholly or in part as the case may be.

E. REVOCATION OF GIFT

The Section 126 lays down the mode and situations of revocation of gifts. There are two modes of revocation:-

1. **Revocation by Mutual Agreement**- When both the parties i.e. the donor and the donee mutually agree that the gift shall be suspended or revoked upon the happening of an event not dependent on the will of the donor, it is called a revocation of gift subject to a condition laid down by the mutual agreement. It must consist of the following essentials:-

a) The condition must be expressly laid down
b) The condition must be a part of the same transaction, it may be laid down either in the gift deed itself or in a separate document being a part of the same transaction.
c) The condition upon which a gift is to be revoked must not depend solely on the will of the donor.
d) Such conditions must be valid under the provisions of law given for conditional transfers. Eg. a condition totally prohibiting the alienation of a property is void under Section 10 of the Transfer of Property Act.
e) The condition must be mutually agreed upon by the donor and the donee.
f) Gift revocable at the will of the donor is void even if such a condition is mutually agreed upon.

2. **Revocation by the rescission of the contract**- A gift is a transfer and it is thus preceded by a contract for such transfer. This contract may either be express or implied. If the preceding contract is rescinded, then there is no question of the subsequent transfer to take place. Thus, under Section 126, a gift can be revoked on any grounds on which its contract may be rescinded. For example, Section 19 of the Indian Contract Act makes a contract voidable at the option of the party whose consent has been obtained forcefully, by coercion, undue influence, misrepresentation, or fraud.

   For example, 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.

CHAPTER: LEASE OF IMMOVEABLE PROPERTY

A. MEANING OF LEASE

Section 105 of transfer of property act, 1882 defines Lease. Section 105 of the Transfer of Property Act defined Lease as "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".

When there is a lease of immovable property for a year or more than this can be made simply by registered deed. All other leases of immovable property can be made by registered deed or and oral agreement accompanied by possession of that property. In the case of leases of multiple properties lease will be made by both lessor and lessee. In the case of ***Punjab National Bank v. Ganga Narain Kapur***, Court held that if the lease is done through an oral agreement, then the provisions of Section 106 will apply.

B. ESSENTIAL ELEMENTS OF LEASE

There are various essential elements of a contract of lease mentioned under the Transfer of Property Act, 1882 and they are as follows:-

1. **Parties** – For a Lease agreement, the existence of two or more parties is necessary for the proper transfer of rights of the immovable property. The Lessor and the Lessee must be of sound mind, major and not subject to any law which restricts them to be a part of a valid contract. If the transfer of the right of property is done to a minor, then a legal guardian is necessary to work on behalf of the minor till he or she attains a majority age. A lessee can be a juristic person that is, a company or a registered firm etc. If a lease deed is executed by one of the partners of behalf of the firm, the lessee is the firm not the partner.
2. **Subject matter of lease** – The subject matter or the purpose of the lease agreement is compulsory and necessary to be mentioned in the contract. A contract of Lease can be made only for immovable property or assets. It cannot be done for a moveable property.
3. **Duration** – The period for which the right to use the property is transferred is called the term of the lease. The term may be any period of time, longer or shorter, or even for perpetuity, but it has to be mentioned in the deed.

4. **Consideration** – Lawful consideration is necessary for the fulfilment of a contract of lease. The transfer of the rights of the immovable property is made by giving consideration in the form of money as premium or rent, shared profit or as share of crops and services.
5. **Possession of Property** – In the contractual agreement of lease, right of enjoyment can only be done when there is transfer of possession and therefore, transfer of the right of property is made and the parties exchange the right of possession of the property for a certain period of time and do not exchange the ownership of the immovable property.

C. RIGHTS OF LESSOR

Rights of the lessor are as follows:-

1. A lessor has a **right to recover the rent** from the lease which was mentioned in the lease agreement.
2. Lessor has a **right to take back the possession** of his property from the lessee if the lessee commits any **breach of condition**.
3. Lessor has a **right to take back the possession** of his property from the lessee on the **termination of the lease term** prescribed in the agreement.

D. LIABILITIES OF LESSOR

The liabilities of Lessor are as follows:-

1. **Duty to disclose latent material defect:** Lessor must disclose latent material defect in the property to the lessee. Defect in the property is latent if it is not apparently visible but the lessor has knowledge of it. Such defect is material if it is of substantial nature.
2. **Duty to give possession:** Lease is transfer of the right to enjoy or use an immovable property. Without possession, enjoyment of property is not possible. Lessor is therefore, liable to deliver the possession of property to lessee so that he may use it or enjoy it.

E. THE RIGHTS OF LESSEE

The rights of lessee under the transfer of property act, 1882 are as follows:-

1. **Right to Accretions:** Accretions can be defined as the additions made to the property either by human being or by the operation of natural forces. If during the continuance of lease some accretion has been made to the property, it is then presumed to be the part of the property.
2. **Right to avoid lease on destruction of property:** Where the property is rendered substantially and permanently unfit for use due to fire, flood, violence, mob or other uncontrollable reason, the lessee has the right to get the lease terminated before the expiry of the term.
3. **Right to deduct cost of repairs:** The lessor has no obligation to repair the property. But under an express agreement, the lessor may take the obligation of making necessary repairs in the tenanted property.
4. **Right to remove fixtures:** After termination of lease, the lessee has the right to remove the fixtures made by him during the continuance of the lease. The lessee can remove and take out these fixtures even after the determination of the lease.
5. **Right to remove crops:** After the termination of lease, the lessee is entitled to remove the crops sown by him during the subsistence of the lease.

F. LIABILITIES OF LESSEE

The liabilities of lessee under the transfer of property act, 1882 are as follows:-

1. **Duty to pay rent:** The lessee is bound to pay the rent or premium as stipulated in the lease deed. But, the tenant's liability to pay rent begins from the date on which he takes the possession and not from the date from which the landlord signs the deed.

2. **Duty to maintain property:** The lessee is bound to keep and maintain the property in the same condition in which it was given to him. He has, therefore, to take reasonable care in keeping the property in good condition.

3. **Duty to use property reasonably:** The lessee has a duty to use and enjoy the tenanted property as a person of ordinary prudence would use his own property.

4. **Duty not to erect permanent structure:** The lessee cannot erect any permanent structure on the leased property without the consent of the lessor. If a lessee makes permanent constructions without the lessor's consent, he is entitled to remove them without causing damage to the tenanted property. If the permanent structures on the leased property are not removed by lessee, then on the expiry of lease they belong to the landlord.

5. **Duty to restore Possession:** Upon the expiry of the term or determination of the lease before its expiry the lease must re transfer the possession to the lessor. It is the duty of the lessee to vacate the possession and restore it to the lessor after expiry of the term.

CHAPTER : EASEMENT

A. MEANING OF EASEMENT

The Law of Easements under section 4 of the Easements Act, 1882, describes easement as a pre-emptive right of a person. A right which the 'original owner' or 'dominant possessor' of a land has over another land, not his own, for the beneficial enjoyment of his own land or to do or continue to do something or to prevent something being done in respect of another land, not his own. The term 'to do something' includes any and every sort of eradication or appropriation prevented by the dominant owner on the soil of another land held by another called the 'servient owner' in such a case.

For instance, A owns a house alongside B whose house falls in the middle of A's property and the main road. A here owns a right of easement to enjoy free passage between his house and the main road and can prevent B from appropriating or eradicating anything on his property to block A's right to free passage. Although the right is exercised by A, it is not for A to exercise as a personal right. The right of easement is thus a right attached to the house i.e. it cannot be detached from it.

B. CHARACTERISTICS OF EASEMENT

1. **Dominant Heritage and Servient Heritage-** The first essential element of the easement is that there must be dominant heritage & Servient heritage. The heritage (property) in which there are some privileges, is called Dominant heritage and its owner is called dominant and the property upon which some liabilities are imposed is called Servient heritage. Two properties are necessary for the easement.
2. **Dominant and Servient Heritage to be separate-** It is compulsory for an easement that the dominant and servant heritage must be separate properties. An easement is not created on the happening of one property in two properties and it is also expected that the owner of the two properties must be separate or different.
3. **The use of easement done for the beneficial consumption-** The dominant owner must use it for beneficial consumption of the dominant property. Beneficial consumption includes facilities, remote profits, etc.
4. **Non-availability of the easement to Servitude owner-** Easement is available to Dominant owner, not to Servitude owner.

5. **Right-in-rem of easement-** It is a right-in-rem. This right is available not only against servitude owner but also against the whole world. If any person interferes in the easement of the dominant owner, then the dominant owner can file a suit against, the person in court.

C. MODES OF EXTINCTION OF EASEMENT

Section 37 to 47 of the Indian Easements Act, 1882, provides for the mode of extinction of easements and they are:-

1. **Dissolution of Servient Owner's right**- In the situation where the grantor ceases to have any right in the servient tenement because of some reason, then the right of easements ceases to exist as well. This has been specified under Section 37 of the Act.
2. **Expiry of time or happening of an event**- When an easement is acquired on certain conditions or for certain purpose or for certain period of time. On the fulfilment of such condition or purpose or expiry of the time, the right of easement extinguishes as well as in accordance with Section 6 of the Act.
3. **Extinction by release**- Where in a situation the owner of the dominant heritage releases the right of easement to the servient owner, the right ceases to exist. Such a release can be both expressly or impliedly made.
4. **Permanent change in the Dominant Heritage**- When the nature of the dominant heritage changes permanently with increase in burden on tenement, then the right of easement ceases to exist as the purpose of it was the beneficial enjoyment of the dominant heritage. For example- A's house is located such that he has a right of way by passing through B's house. Later, due to earthquake, B's house got cut off and thus, right of easement ends.
5. **Unity by ownership**- By unity of ownership it is indicated that when one person becomes the owner of both the dominant and servient heritage then the right of easement terminates. For instance, A has right of easement over B's property. Later on, A purchases B's property and becomes the owner of B's property. In such a case, easement extinguishes.

D. LICENSE

License is only a personal right. It is only a right in personam and therefore, not so enforceable. License cannot be assigned at all except where it is a license to attend a place of public entertainment. License is so revocable, except where the grantor is stopped by his conduct from exercising the power of revocation conferred by law. A license is permissive right traceable to a grant from the licensor either expressly or impliedly.

License is invariably positive and cannot be negative in character. It may be that there are cases in which a negative obligation might be cast on the licensor with the object of protecting a licence coupled with a grant but such obligation is due to the grant accompanying the licence and not to the licence per se.

Section 60 of the Transfer of Indian Easement Act, 1882 provides that license can also be irrevocable. If the license is coupled with a transfer of property and the transfer is in force, it cannot be revoked. This is subject to the agreement. Hence, the power can be reserved. The rule is that a bare license may be revoked but if coupled with a transfer of the property, then it is irrevocable. A license coupled with an interest in a land is binding. A license coupled with profit a *prendre* is irrevocable, for example, Right to excavate earth and carry it to make earthen wares, right to cut and carry timber on payment of royalty.