

TRANSFER OF PROPERTY ACT

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Class-room live lectures edited, enlarged
and updated**

TRANSFER OF PROPERTY 1929

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INTRODUCTION

Transfer of Property is the most difficult subject, next only to jurisprudence. The reason is that it deals with certain doctrines having their Origin in the Common Law of England, some totally alien to the Indian Concepts.

The Transfer of Property Act 1882, was amended substantially in 1929. The student must lend much attention to the doctrines enshrined in the Act. An attempt is made to present the subject with as much lucidity as possible. Case law is given its due place. No attempt is made either to exhaustively deal with the subject or to intensively probe into each doctrine.

Wherever it is found essential, a comparative picture is drawn comparing the Indian Law with the English. Some topics especially on Gifts, Leases & Exchange. are too simple and easy to understand. Though the preliminary aspects relating to transfer, sale & Mortgage, are simple the various doctrines in their ramification present themselves to be formidable. A careful study should be made to understand the doctrines of "Rule against Perpetuities", of 'Election', of Accumulation, of Acceleration, of "Ostensible Owner", of 'Lis Pendens', of "Feeding the Estoppel" of "Part Performance", "Marshaling & Contribution", of Subrogation, of Tacking etc. Illustrations should be analyzed.

QUESTIONS BANK

1. (1) Explain 'Transfer of Property'
(2) 'Absolute restraint on Transfer of Property is void Discuss.
2. 'Property of any kind may be transferred' Discuss.
3. (1) Explain the principles that govern transfers to Unborn persons.
(2) Write a note on Contingent interest.
4. (1) Discuss the doctrine of 'Rule against perpetuity'. (2) State the English Law of the doctrine.
5. Distinguish conditions precedent from conditions subsequent.
6. Write an essay on the 'doctrine of Election'.
7. Discuss the law relating to Ostensible Owner.
8. Discuss the doctrine of Lis Pendens.
9. State & explain the principle of performance.
10. **Write Short Notes on** : (a) Immovable Property (b) Attestation (c) Actionable Claim (d) Constructive notice (e) Direction for accumulation (f) Doctrine of Acceleration (g) Fraudulent Transfers.
11. Explain: i) Covenants annexed to land, ii) Feeding the Estoppel, iii) Improvement made by bonafide holder with defective title.
12. i) Define Sale. ii) What are the rights and the liabilities of the Vendor & the Vendee ?
13. Explain the characteristic features of
i) Simple Mortgage ii) Mortgage by conditional sale iii) Usufructuary Mortgage iv) English Mortgage v) Mortgage by deposit of title deed vi) Anomalous Mortgage.
14. What are the rights & liabilities of a mortgagee in possession.
15. 'Once a mortgage always a mortgage' Explain.
16. Discuss the doctrines of 'Marshaling' & 'Contribution'. Illustrate.
17. Explain: i) Subrogation ii) Tacking iii) 'Redeem up foreclose down'.
18. What is a lease? How is a lease terminated? Distinguish

between a lease & a licence.

19. What are the rights & the liabilities of a lessor & a lessee?

20. Define 'Gift'. Explain i) Onerous Gift, ii) Universal donee, iii) Donatio mortis causa, iv) Exchange.

21. **State the facts & the decision in** (i) Marshall V Green

(ii) Allcard V Skinner (iii) Tagore V Tagore (iv) Cooper V Cooper (v) Laxman V Kalicharan (vi) Bellamy V Sabine (vii) Ramsden V Dyson (viii) Maddison V Alderson (ix) Tulk V Moxhay (x) Aldrich V Cooper

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CHAPTER1 PRELIMINARY TOPICS

Ch. 1-1 Transfer of Property :

Sn.5 of Transfer of Property. Act defines Transfer of Property'. It means an act by which a living person conveys property in present or in future to one or more living persons, or to himself, or to himself and to one or more other living persons.

Living person includes a Company, Association or body of individuals. The T.P. Act deals with sale, mortgage, gift, lease and exchange. Hence, abandonment is not a transfer. Partition is not a transfer. Transfer to himself and others: This is possible in case of trust. Future property can be transferred (subject to Sn.6.).

The persons must be competent to make a contract. The transfer of property passes all the interests of the transferor and the legal incidents, to the transferee.

Registration, under the Registration Act is compulsory if the value of. the immovable property is worth Rs.100/- and above.

Ch.1-2 Attestation:

The T.P. Act defines attestation in Sn.3. Attesting in respect of an instrument means that the documents must be attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the document. Further each of them must have signed the instrument in the presence of the executant.

The attestors must have animus attestandi (intention of attesting). It is not necessary that more than one should be present at the same time. Law also does not prescribe any particular form of attestation. The usual procedure is that the attestors must sign with address and date.

The Privy Council in Shamu Vs. Abdul Khandir, resolved the controversy whether the attestors should have actually seen he execution or not, of the document. It held that the attestors who sign the document must have actually seen the document executed. This was accepted in Sn.3. but it is given retrospective effect.

In English law attestors should all be present at the same time and must have seen the execution. But it is not so, according to Indian Law.

Attestors should be a sui juris (person legally capable) Even thumb impression is allowed.

Attestation does not mean that attestors have notice of the contents of the document. But attestation estops from denying the factum of execution. They vouch to the execution, not to contents.

Ch.1-3 Immovable Property:

The Transfer of Property Act deals with various transfers relating to immovable property. S.3(2) says, Immovable Property does not include standing timber, growing crops or grass. The General Clauses Act says, Immovable Property includes lands, benefits that arise out of land and things attached to the earth. 'Attached to the earth' means rooted to the earth i.e., trees, shrubs etc., imbedded in the earth i.e., walls or buildings, attached to what is so embedded. Further right to receive future rent is Immovable Property.

Marshall V Green: Sale of trees to be cut and taken away. Held: sale was not for Immovable Property, if the intention of the parties is that the trees should have further nutriment from the land, then it is Immovable Property otherwise not.

In English Law, there is the doctrine of fixtures. Whether a chattel is resetting merely, by its weight on the floor, it is not immovable.

In *Holland V. Hodgson*: a mortgage of a mill was made. Held: Certain looms attached to the stone of the mill, was also covered by the mortgage.

Ch. 1-4 Constructive Notice.

Section 3 defines notice. A notice may be actual or constructive. There is actual notice, when knowledge of a fact is brought directly to the person concerned. It is constructive when there is a presumption of the knowledge of the fact. The following are its different kinds:

i) knowledge is presumed when the party wilfully abstains from making enquiry.

ii) Gross negligence of the party.

iii) Registration:

The privy council had held that registration was not a constructive notice to subsequent transferees. (*Thilak Devikal's Case*). This is now superseded by T.P.Act. Hence, registration of a transfer amounts to notice, from the date of registration.

iv) Possession as notice:

If a person is actually in possession of a property, then the acquirer of the property is deemed to have notice of the title, if any, of the person in possession of the property.

v) Notice to agent is treated as notice to the principal.

The agent must have notice during the course of his business.

If an agent fraudulently conceals the fact, then there is notice to the principal. The principal should not be a privy to the fraud.

Ch. 1-5 Spes Successionis:

Means 'Chance of Succession'.

S.6. of the T.P.Act provides that the chance of an heir succeeding to an estate, or the chance of a relation obtaining a legacy of a Kinsman or such a mere possibility cannot be transferred.

E.g.: The interest of a reversionary on the death of a Hindu widow. In *Amrit Narayana Vs. GayaSingh*: 'A' hoping to succeed to the property of his material grandfather B, sold to C, his such interest, during the life time of B. Subsequently B died. A sued for recovery of property from C. Held: The sale was of a spes successions and therefore void.

Future interests in properties such as contingent interest or executory interest are transferable, as, here, the possibility is coupled with an interest. Similar to spes successions, the possibilities of a like nature are:

- i) Chance of a person deriving income from scavenging work, which he expects to get in future.
- ii) Right of a priest to a share in the offerings at the temple. There is a mere chance and hence inalienable.

The leading case is *Allcard V. Walker*.

Ch. 1-6 Actionable Claim:

Actionable claims include claims recognised by the courts to grant relief either(a) as to unsecured debts or (b) as to beneficial interest in movable property not in possession (actual or constructive), whether present or future, conditional or contingent.

This definition has solved many difficulties that had arisen earlier to 1900.

The leading cases are:

Colonial Bank V, Whinney and Muchiram V.Ishan Chandar.

Sn.130 of the T.P.Act deals with the transfers of Actionable claims. It says that a transfer of an actionable claim (whether with or without consideration) should be made only by the execution of an instrument. Thereupon, all the rights and remedies of the transferor become vested in the transferee, whether notice is given or not. The transferee may sue or proceed in his own name without obtaining the consent of the transferor.

Eg.: (a) A is the debtor and B is the creditor. B transfers the debt to C. B then demand from A to pay; A pays without notice of the transfer. The payment is valid. C cannot sue A for the debt. The debt is an actionable claim and may be transferred by B to C. But, C as transferee has those rights and remedies as B. Hence, C cannot sue 'A' for the debt.

b) A has a life insurance policy. He assigns it to a Bank B for securing a loan. A dies. B is entitled to receive the amount of the policy. B can sue without the consent of A's executors.

The following are actionable claims :

i) Share in a Company ii) Mortgage debt iii) Claim to copyright
iv) Claim to mesne profits v) Mere right to sue.

Ch. 1-7 Exchange: (T.P. Act Sn.111)

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things money only, the transaction is called an 'Exchange'.

Any such transfer can be made in the same manner as is done in respect of sale.

A partition of H.U.F. is not an Exchange. The parties to Exchange are subject to the same rights & liabilities of the Vendor and the Vendee.

Any defect in the title of the property exchanged, is to be set right by that party whose property had the defective title.

A transfers his house to B and B transfers his wet land and pays cash of Rs.5,000/- to A as consideration.

This is an Exchange. If B had given money only, then it is not an Exchange.

Ch, 1-8 Charge : Sn.100

Where immovable property of a person is by act of parties, (or by operation of law) made a security for the payment of money to another, the latter person is said to have a charge on the property.

Conditions:

- i) The transaction should not amount to a mortgage.
- ii) All matters relating to the rights and liabilities of the parties to the charge are governed by those applicable to a simple mortgage.(Sn.59 T.P.Act).
- iii) This will not apply to a trustee who makes a charge on the trust-property.

iv) Bonafide transferees without notice of the charge on the immovable property are protected. A charge is an encumbrance on the property.

v) The formalities to be observed to create a charge are the same as for a simple mortgage.

In a charge, there is no transfer of any interest in the immovable property, as in a mortgage. There is creation of a right of payment out of the property specified.

Charge is less than a simple mortgage & cannot take priority over it. .

It is a jus ad rem, and not jus in rem. There is no personal covenant to pay ; there is merely an obligation on the property for payment.

A charge cannot bind a bonafide purchaser for value who had no notice of the charge.

CHAPTER2
TRANSFER OF ANY KIND OF PROPERTY

Ch. 2 'Property of any kind may be transferred'.

Explained.

Section 6 of the T.P.Act provides for the exceptions to the rule that property of any kind may be transferred. The exceptions are:

- a) Spes Successionis.
- b) Transfer of Right of Re-entry and Easement.
- c) Religious Office.
- d) Serving of Inams.
- e) Maintenance Right.
- f) Mere right to sue.
- g) Public Office, stipends and pensions,
- h) Illegal transfers.

Explanation:

a) Spes Successions means 'chance of succession' such an interest cannot be transferred. [Refer Ch.1-5]

b) Right of re-entry as easement:

A lessor may reserve to himself a right of re-entry on breach of a covenant by his, lessee. This right cannot be transferred apart from the estate. A leases his land blackcare to B on Rs.1,000/- per annum with the right of re-entry on default by lessee. B commits default. A has a right of re-entry. This right cannot be transferred by itself to another person.

An easementary right of way cannot be transferred by itself without the transfer of the dominant heritage.

- c) Religious Office, cannot be transferred
- d) Serving of Inams:

An interest in property restricted in its enjoyment to the owner personally cannot *be* transferred by him. Service of Inams is an example.

A was entitled to an Inams, for his 'Swastivachakam' service at a temple. 'A's successor x sold this interest to B. Held: That the alienation was void. Similarly, a religious office also cannot be transferred.

e) Right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.

W, the wife of H was receiving a maintenance of Rs.3,000/- per year. W is not entitled to recover her maintenance for the next year in advance. But, if H has defaulted in payment she has a right to recover the arrears. This right can be transferred by her to C. Hence, a past maintenance can be transferred but not the future right to maintenance.

f) A mere right to sue cannot be transferred.

A has right to recover damages from B for a tortious liability (e.g. Assault), this right cannot be transferred as it is a mere right to sue. Similarly a mere right to sue for breach of contract, cannot be transferred.

g) Pensions, stipends, public office etc. cannot be transferred,

h) Illegal Transfers:

No transfer can be made if it is i) having unlawful object or consideration, ii) opposed to the nature of interest effected, iii) to a legally disqualified transferee.

Transfer of property to future illicit cohabitation is void. Transfers made for past cohabitation are not bad as the past cohabitation was not the 'object'. In *Nagaratnamma Vs. Ramaiah* the supreme Court upheld such a transfer.

'Champeritous transfer' by itself is not void in India. *Achal Ram Vs. Kasim*. A moiety created to person in a civil suit was held as good, as it is not opposed to public policy.

CHAPTER 3

GIFT

Ch. 3-1 Requisites of a valid gift:

Section 122 of T.P.Act defines a gift. 'It is the transfer of certain existing movable or immovable property made voluntarily and without consideration and accepted by or on behalf of the donee'. The person who makes the gift is the donor.

The donee must accept the gift:

- a) during the life time of the donor and
- b) While the donor is still capable of giving the property gifted.

But if the donee dies before acceptance the gift is void.

Gift of movable property may be registered or may be effected by delivery. However gift of immovable property of any value requires registration under sections 17 (a) of the Registration Act. It must be signed by the donor and must be attested by two witnesses. Gift to God Almighty may be oral or may be in writing or may be registered.

A makes a gift of his jewels to B. This may be done by delivery.

A makes a gift of a piece of land worth Rs.50/-. This is to be registered.

The property must be existing at the time of the gift. A gift of future property is void. When a gift is made to several persons and one or more donees does not accept, then it is void respect of those who do not accept.

Ch. 3-2 Revocation of gift:

(i) Conditional gifts:

The fundamental rule is that '**A resumable gift is not a gift at all.**' A gift once given cannot be revoked at the mere will of the donor; such a gift if made, is void ab initio. But, a conditional gift is void. A conditional gift which attaches a condition subsequent is valid if the condition is not vague or illegal or immoral or opposed to public policy or impossible of performance. Hence conditional gifts may be made.

Ex.: A gifts to B a plot of land, reserving to himself with the consent of B, to take back the plot if B or his descendants die before A. B dies without any descendants during A's life time. The condition is valid and A may take back the plot.

b) A make a gift to C, a concubine, for her continued relationship with the donor. The condition is immoral therefore gift is void.

c) A gives Rs. 1 lakh to B reserving to himself with B's consent,

the right to take Rs. 25,000 at his pleasure. Gift is valid upto Rs.75,000/

- only. It is void in respect of Rs.25,000/-.

(ii) Gift made under coercion, fraud undue influence or misrepresentation may be revoked by the donor.

Protection of Transferees: Transferees who take the property for consideration and without notice are protected against any prejudice that may result due to revocation by the donor. The leading case is: **Allcard Vs. Skinner**

A, a sister executed a gift to S, the lady superior under undue influence. Later A sued to set aside the gift. A would have won but there was too much of delay in suing. Hence, her claim was dismissed.

Ch. 3-3 Onerous Gift :

Section 127 of T.P.Act deals with onerous gift. It means a single transfer made to the donee but some of the properties gifted are burdened by obligations. The donee must take the entire gift. If he accepts only to take those which are without obligations, then the gift is void. But if the gift is in two or more separate and distinct transactions, the donee may select at his liberty and refuse those which are not beneficial to him.

Eg. : A gifts in one transaction, 200 shares of X & Co. a prosperous company and also 100 shares of Y & Co. a company in difficulties. Heavy calls are expected from Y & Co. A may take the entire gift. He is an onerous donee. He cannot take the gift of the shares of X & Co. only.

A minor may repudiate the onerous gift after attaining majority. **Effect of Onerous gift:** The donee is liable to the extent of the total gifted property in his hands.

Ch. 3-4 Universal Donee:

Here a gift of the entire property of the donor is made to a donee. The donee is liable for all the debts, dues and liabilities of the donor at the time of the gift. This liability extends to the extent of the property in the hands of the donee. Such a person who takes the entire rights and liabilities is called a universal donee. Property means here movable and immovable. If A makes a gift of his immovables only and not movables to B, B is not a universal donee.

The universal donee is liable only to the extent of the immovable and movable property comprised in the gift.

The liability is with reference to the time of gift by the donor, that is universal donee is not liable for debts & liabilities incurred by the donor after the universal gift is made.

CHAPTER 4

LEASE

Ch. 4-1 Lease :

Sn.105 of the T.P.Act defines a lease. A lease of immovable property is defined as the transfer of the right to enjoy such property made for a certain time, in consideration of a price paid or promised

. The consideration may be a fixed amount or a share of crops or serving of any other thing to be rendered periodically or otherwise. Lease may be oral or in writing.

If the lease is for one year or above then it must be in writing and must be registered.

Leases for lesser period may be oral or in writing. Registration is optional. Delivery of possession is necessary, in both the circumstances.

Ch. 4-2 Distinction between Lease and Licence:

LEASE	LICENCE
a) A lease creates an interest in the property.	But a licence does not create any interest in the property. It is a permission to do an unlawful act on the immovable property i.e, would have been unlawful had there been no licence.
b) Lessee gets exclusive possession of immovable property.	A licensee does not get such a right.
c) A lease is assignable	A licence is not transferable.
d) A lease is not revocable	A licence is revocable. A
e) A lessee can bring an action for trespass.	licence cannot sue in his own name.

f) According to T.P. Act, lease is to be registered if it is for one year or above.

But for licence registration is not necessary.

g) A lease-hold creates a heritable interest.

A licence does not create such an interest. It is determined by the death of the grantor or of the licensee.

In *Clubvala Vs. Russian* it was pointed out that 'exclusiveness of possession' is a quality that distinguishes the lease from a licence.

Effect of non-registration: If a document of lease which is to be registered has not been registered at all, the position was controversial due to a number of High Court decisions. To put an end to this the T.P. Act was amended in 1920. The Privy Council had held that non-registration would render the lease void. According to the amendment where there is no registration the doctrine of part performance may be invoked to protect the position of the lessee. An unregistered lease may be admitted in evidence only to show that the possession is under a lease. This is under section 27(a) of Specific Relief Act.

Ch. 4-3 Rights and Duties of the Lessor and Lessee.

The T.P. Act under section 108 provides for the rights and liabilities of the lessor and lessee:

i) The rights and liabilities of the lessor.

a) The lessor should disclose any material or latent defects in the property leased.

b) The lessor must put the lessee in possession of the property.

c) There is a covenant for quiet enjoyment of the property if the lessee is paying the rent during the period of the lease.

ii) Rights and liabilities of the lessee.

a) Lessee's right to accretions if there is any accretion to the benefit of the property. The lessee is entitled to such accretions. This

is of course subject to the law relating to alluvion. Hence adjoining waste land brought under cultivation is not accretion.

b) Voidable lease: If the material part of the leased property is destroyed (partially or completely) by fire, tempest or floods or violence or by the enemy, the lease is voidable at the opinion of the lessee. Of course, the lessee should not be the cause causing, for the destruction of the property.

Ex.: A, was a lessee running a shop. But due to mob violence the building was set on fire. The owner claims the value of the building from A. Held: Owner not entitled. A may avoid the lease if he so prefers.

c) Right to Sub-lease :

Unless prohibited by the lessor under the lease deed, the lessee is entitled to sub-lease.

d) Right to fixtures:

Anything affixed to the land becomes part of the land. The lessee is entitled to such fixtures.

e) Right to repairs:

Lessee may, by giving reasonable notice to the lessor, make the repairs if the lessor has neglected it. The lessee may deduct such expenses from the rent or he may recover from lessor.

f) Payment on behalf of lessor :

If the lessor has neglected to make payments (House tax etc), the lessee has a right to pay and get it reimbursed from the lessor.

g) Right to ingress :

The lessee has free ingress (Right to enter) & Egress & to carry any crops grown by the lessee when the lease is terminated.

h) Duty to restore possession:

The lessee is bound to restore the property to the lessor in

good condition i.e., as the property was at the time of the lease (subject to the normal wear and tear). However if the defect is caused by the lessee he should not use the property for a purpose different from a purpose agreed upon. He should not fell timber, pull down or damage buildings or commit any other destructive or injurious acts thereto.

i) The lessee should not erect permanent structures on the property except for agricultural purposes.

j) The lessee is bound to pay the rent as agreed upon.

Leading cases are :

i) Spenser's Case.

ii) Katyayini devi Vs. Udaya Kumar.

Ch. 4-4 Termination of lease:

A lease is terminated:

a) by efflux of time:

If the lease is for a fixed period e.g. for 2 years, the lease terminates on the expiry of 2 years.

b) On the happening of an event, e.g.

The lease is for 20 years or ends on the death of the lessee whichever happens first. Here the lease terminates on the expiry of 20 years or on the death of the Lessee.

c) Merger:

When the lessor and lessee become one. This happens when the lessee buys the lease property; of course he must buy the entire interest in the property.

d) Surrender:

A lease is terminated by surrender. It consists of yielding up of the term by the lessee to the lessor, and of delivery of possession to the lessor, and, acceptance by the lessor. Hence, mutual agreement is essential for surrender.

e) Implied Surrender:

This happens when the lessor accepts a new lease, with different terms and conditions, during the continuance of the existing lease. Here, there is the implied surrender of the original lease. (Gemini Mohan V/s. Devendra)

f) Forfeiture:

By forfeiture the lease is terminated. Three circumstances are provided:

(i) There is forfeiture, when the lessee breaks an express condition. The lessor should serve his notice to the lessee to quit.

(ii) There is forfeiture, when the lessee sets up the title to the property in a third person or in himself. Notice by lessor to quit is essential.

(iii) When there is a provision in the lease, that on the lessee becoming insolvent, the lessor may re-enter, the lease may be terminated by giving notice to the lessee.

In the above three circumstances, acceptance of rent by lessor, amounts to waiver or forfeiture.

g) Notice to quit:

Notice to quit or to terminate the lease should be given by the lessor to the lessee.

If after giving notice the lessor accepts rents, it amounts to waiver of notice to quit.

A, the lessor gives B, the lessee to quit. The period of notice expires. A accepts rents from B. The notice is waived.

CHAPTER 5

UNBORN PERSON

Ch. 5 Unborn Person: (En verte Sa mare) (Sn.13 T.P.Act)

A transfer of property can be made to a person who is not in existence at the date of the transfer. But this is subject to the prior interest created by the transferor. The interest created for the benefit of the unborn person will not take effect unless it extends to the whole of the remaining interest of the transferor, in the property.

This means the transfer to the unborn must be absolute & there should be no further transfer from him to any body.

A transfer in T. P. Act can be made only to a living person. Hence, in making a transfer to an unborn person, the property must vest in some person (e.g. trustee) between the date of transfer and the birth of the unborn person.

Eg.: A transfers his property under a trust deed to B, the trustee. He makes it for A and his wife for their lives & after the death of the survivor to the eldest son of the intended marriage of A, and, after his death to A's second son. Here the interest created for the benefit of the eldest son does not take effect because it does not extend to the whole of A's remaining interest in the property. There is only a life interest to him, and hence it is bad.

In Tagore Vs. Tagore:

The Privy Council had held that transfer by a Hindu to an unborn person who is not in existence **on the date of transfer** was void. In order to over come this decision section 13 was framed.

Ex.: A makes a gift to P, a bachelor for life, and then to his first born son for life and then to M absolutely. Here transfer to the first son of P is to an unborn person. It does not comprise the whole of the interest of the transferor. Only life interest is given to him. Hence even if P has a son, such son cannot take under the transfer, for, to that extent that transfer is void. But, if the gift is given to S absolutely, and not to M, then it is valid.

Leading Case: Sopher V.A.G. of Bengal.

T executed a will. He ultimately vested a bequest in favour of persons not born at the time of the death of testator. There were conditions including forfeiture. On a reading, the privy council held that there was not transfer of the hole of the remaining interest. Hence, the transfer was void.

CHAPTER 6

PERPETUITY

Ch.6 Rule *against Perpetuity*: (Sn. 14 T. P. Act.)

The rule against perpetuities was announced in *Whitby Vs. Mitchell*. This has been suitably changed and the rule is laid down in Sn. 14 of the T.P. Act.

The transfer of property is void if it creates an interest which is to take effect after the life time of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created, is to belong.

The leading case is *Cadell Vs. Palmer*:

A trust was created for a term of 120 years, if 28 named persons or any of them should so long live and from the determination of that term for a further period of 21 years, and after the end of both terms, for the benefit of persons to be then ascertained. The House of Lords held that the transfer was valid in respect of the persons in being and 21 years thereafter.

English Law

- a) The period is a life, or any number of lives in existence plus 21 years thereafter.
- b) 21 years are allowed in gross without reference to the infancy of any person.
- c) The period of Gestation (9 months period) may be added at both ends of the perpetuity period.

Indian Law

- a) It is life or lives in existence on the date of transfer plus the period of minority.
- b) The period is the minority of the person to whom if he attains full age the interest created is to belong.
- c) It cannot be added at the end of the perpetuity period.

English Law:

Eg.: X makes a transfer to his posthumous child A for life and 21 years after his death to the children. The bequest to A's child is valid even if it is en vetra on the expiration of the period of 21 years. Hence for the vesting of the interest in A's children it is period of gestation of A's child, plus life of the child plus 21 years plus period of gestation of A's child, B in Womb.

Indian Law :

X's child A's -I- Life of + 18 years (Minority)
Gestation Period 'A'

English Law :

X's Child A's
Gestation of
Gestation + Life of + 21years + A's child
Period A B in Womb.

In Indian law it will be to the posthumous child and then to the children of A at 18. Hence the vesting will be a period of gestation of X's child, plus life of the child, plus period of minority of child (i.e., 18 years). Hence there is no addition of period of gestation at the end according to the Indian Law.

Eg.: A transfer is made to the bachelor A for life & to A's son when he (that son) marries. The calculation will be A's life time plus time during which A's son remains unmarried after A's death. The marriage may be beyond 21 years. So the transfer to A's son is void under the perpetuities.

The reason is that at the date of the transfer there is the slightest possibility of making the gift beyond the period of perpetuity.

Eg.: A transfer is made to A for life (bachelor) and to his eldest son at 25. A dies leaving child of 2 years. The transfer is void because the maximum period allowed under the rule of perpetuity is age of child+21 years i.e., 23 years but here the child is to get the property at 25. As this age is beyond 21 years allowed, the transfer is void.

CHAPTER 7

CONDITIONS-PRECEDENT AND SUBSEQUENT

Ch 7. Condition precedent :

Is one where a valid condition is imposed and the property becomes vested on the fulfillment of the condition thereof. Here the rule of Cypres is applied i.e, there must be a substantial compliance with the condition imposed. The leading case is *Edwards Vs. Hammand*.

Illustrations (i) A transfers Rs.1'0,000/- to B on a condition that B should marry with the consent of C, D & E. E dies. Subsequently B marries with the consent of C and D. Under the doctrine of cypress (substantial compliance) the property comes to B.

(ii) If in the above case C, D & E are all living and B marries without their consent, but subsequently gets ratified by C,D and E, the condition is not fulfilled.

Condition Subsequent:

A condition subsequent is one where a disposition of property effects only when the condition is fulfilled subsequently. Here the condition should be strictly fulfilled.

Eg.: A transfers Rs.50,000 , to be paid to B on his attaining majority with a condition that if B dies a minor, or marries without C's consent, the said amount shall go to D. B marries when only 17 years of age without C's consent. The transfer to D takes effect. This is under doctrine of acceleration.

B transfers property to A absolutely but subject to the condition that the property should revert to the grantor if the property is attached under an execution decree against A. Here the subsequent condition is invalid and therefore to be ignored, but the transfer to A is valid.

B transfers to A absolutely but puts condition that the property could revert to B if A becomes insolvent. The condition is bad but the transfer is valid.

Hence in a condition subsequent an estate, pre-vested in one person becomes divested on the fulfillment of the condition.

b) In condition precedent, if the fulfilment is impossible the condition fails and previous estate becomes absolute,

c) In condition precedent it is enough if there is substantial compliance with the condition(Cypres)

However, in condition subsequent there must be a strict fulfilment of the condition.

d) If the condition precedent is illegal, the estate limited upon it, fails.

But in condition subsequent if the condition is illegal the estate becomes vested and the condition is ignored.

CHAPTERS

ELECTION

Ch. 8. Doctrine of Election. (Sn.35).

The doctrine of election was enunciated by the House of Lords in the leading case Cooper Vs. Cooper. It states that there is an obligation on him who takes a benefit under a will or other instrument, to give full effect to that instrument under which he takes a benefit. If the transferor has transferred some thing which was beyond his power but to which effect could be given by the consent of the transferee, the law provides that the person who takes the benefit must also take the obligations thereof. This principle is embodied in Sn.35 of T.P.Act.

Eg.: 1. A makes a gift of the property of C worth Rs.8,000/- to B and provides in the same deed Rs.10,000/- to C. C may elect either to retain the property himself or to have Rs.10,000/-. If the elects to have the property, he forfeits Rs.10,000/-.

Hence according to 'the doctrine the following are essentials:

- a) The transferor should have no right in the property he has transferred.
- b) The transferor should confer a benefit on the owner of that property.
- c) In one and same transaction there must be the transfer of property and the benefit conferred.

In the above circumstances the owner is given a right of election. He may elect either to have the benefit conferred or to retain the property.

Hence the acceptance or rejection must be in to-to i.e., he cannot approbate and reprobate at the same time. He cannot blow hot and cold in the same breath. **Exceptions:**

The doctrine is subject to the following:

i) A transfers property of C to B worth Rs.800/- but confers a benefit of Rs.1,000/- to C. C elects to retain the land. Hence he cannot claim Rs.1,000/-.

If A dies before C makes election, A's representative must pay Rs.800/- to B, as the object of A was to transfer property worth Rs.800/-

ii) If the person to elect has got some other benefit separately • in the same transaction, he is entitled to it.

iii) Acceptance of the benefit conferred amounts to election, if he is aware of the duty to elect as a reasonable man. He may waive

enquiry and accept. Such knowledge is presumed if the person has enjoyed the benefit for two years. Such knowledge can also be inferred, if that person who gets the benefit makes himself impossible of getting the benefit.

A transfers C's estate to B and as part of the transfer gives C a coalmine. C exhausts the coalmine. C has elected to have the benefit.

iv) Election must be made within one year from the date of transfer otherwise the transferor or his representative may request to make the election within a reasonable time. If he does not elect, he is deemed to have elected to get the benefit.

v) If the person to make the election is under a disability (minority, idiocy or lunacy) he must take the election after the disability ceases. (Limitation Act), within 3 years.

CHAPTER 9

OSTENSIBLE OWNER

Ch. 9-1. Ostensible Owner (Benami Transaction) (Sn. 41 T.P.Act)

This principle was explained by the Privy Council in *Lakshman Vs. Kali Charan*.

A held out that his wife W is the owner of immovable property called K, as she had bought it from her Stridhana. When A died W sold the property K to D who bought bonafide for value. A's son S, sued D to recover the property. Here the court held that S could not recover the property. Of course, the innocent purchaser was protected.

The doctrine of Ostensible owner must have the following conditions:

- a) The transferor should be the ostensible owner of the property (benamidar) without name.
- b) He must be holding the property with the express or implied consent of the real owner.
- c) The transferee from the ostensible owner must have paid consideration and acted with reasonable care & in good faith.

In such a case the real owner cannot set aside on the ground that the transfer is voidable.

The general rule is that no person can pass a title better than what he himself has. Sn.41 dealing with ostensible owner is an exception to this rule provided all the conditions set out above are fulfilled.

Eg.: A sent money to B and purchased an immovable property in B's name. B was managing the property but sold it to C. Can A recover it from C? A cannot recover, if C has acted in good faith and taken the property for valuable consideration.

Ch. 9-2 Feeding the estoppel: Sn. 43 T.R Act.

A, a Hindu separating from his father B, sells to C, three pieces of land X, Y & Z. Of these lands, Z does not belong to A. This has been retained by B under a partition. Subsequently B dies. A gets Z as heir to B. C the purchaser may require A to deliver the land Z to him. This is called feeding the estoppel. The principle was laid down in *Smith V. Osborne*.

The essential conditions are as follows:

- a) The transferor should have made a fraudulent or erroneous representation..
- b) The transferor should have acted on the representation .
- c) The transfer should not be one which is forbidden by law.
- d) Subsequent to the transfer but while the contract is still subsisting the transferor should have acquired an interest(or title) in the property.

In the above circumstances the transferee may take advantage of the subsequent acquisition by the transferor, and claim for that interest.

This section does not apply to a bonafide transferee for value without notice.

Explanation with cases:

Fraudulent or erroneous representation:

S, sold the equity of redemption of the property of his brother B. B was unheard of for some years. S had represented that it was ancestral property & that he was the owner. B died leaving S as the sole heir. The purchaser P sued S. Held, he was entitled under "feeding the estoppel". (*Sunderlal V. Ghisa*)

The essential condition is that the transferor should have made a fraudulent or erroneous representation, and, the transferee should have acted on that representation. If the truth or the real position is known to him, this section is not applicable. M, a mother sold the immovable property of her infant son, representing that she is the 'mother and guardian'. The son died & M inherited the property. When the transferee sued, it was held that the truth was known to the transferee & hence, this section was not applicable.

The leading case is *Jumma Masjid V. Deviah*. In this case, the Supreme Court held that when A, represented that he was the owner (he had only a chance to succeed), and sold the property to T, he is making a false representation. If subsequently, he acquires that property, then T, is entitled to that property under "feeding the estoppel" by grant.

CHAPTER 10 LIS PENDENS

Ch. 10. Doctrine of Lis Pendens' (Sn. 52)

The Doctrine of 'Lis Pendens' has its origin in Bellamy Vs. Sabine. It means pendente lite (pending litigation) neither party to the litigation can transfer the property in dispute so as to affect the interests of his opponent.

The essentials are as follows:

- a) The transfer should take place during the pendency of a suit or proceeding.
- b) The case must be pending in a court of competent jurisdiction.
- c) The case should not be collusive.
- d) The litigation should be specifically in respect of the immovable property transferred.

It is evident from the above that the doctrine does not prohibit transfer 'pendente lite' but what it says is that the transfer should not defeat the rights of the other party, & any decree which may be passed by the court.

The suit or proceeding commences on the date of the presentation of the plaint or the institution of the proceeding in a court which has got jurisdiction.

The case is pending until it has been disposed off by a final decree or order of the court. Further, there must be complete satisfaction of the decree or order of the court thereof.

i) In Bellamy Vs. Sabine the facts were:

E sold immovable property to S. E's son F as heir of E sued S in a competent court to set aside the sale. Pendente lite the defendant

S, sold the property to B who took without notice of pendents lite. Ultimately the court held that F was entitled to the property. The sale was set aside. The transferee. B does not get any title to the property (He who has no title cannot pass title).

ii) A Hindu wife sued her husband B for maintenance over certain immovable properties in dispute. B transferred the property to C. The wife got a decree declaring a charge over the property. Question was whether C was bound by the decree.

Held : Right to maintenance was a personal obligation independent of the property. Hence the doctrine of lis-pendens was not applicable.

CHAPTER 11
BONAFIDE HOLDER & FRAUDULENT
TRANSFER

Ch. 11-1 Improvements made by bonafide holders under defective title. (Sn. 51 T.P.Act) Doctrine of acquiescence.

A transferee of immovable property, believing in good faith that he is absolutely entitled thereto, may make improvements on the property. But, if he is subsequently evicted by a person who has a better title, then the transferee has a right to the value of the improvements estimated and paid. He may get this value secured or realised by getting the property sold by the owner to the transferee. The owner has an option either to sell or to pay compensation to the person who has made the improvements.

Crops: If the transferee has growing crops, on the property, he is entitled to such crops and also has free access to enter and collect the same.

This principle has its origin in *Rams den V.Dyson*.

T was the tenant of land and D was the owner. T erected a building on the land, and sued D for declaration that he was entitled to a 60 years lease, renewable at his option. He alleged that D's agent had promised such a grant. The House of Lords held that the plea of T was bad and that D could eject T.

The principles of Sn.51 are explained by the Supreme Court in *Narayan Rao V. Basavarayappa*. P sued for possession of the property from D, who had a defective title. D had put up a building with bonafide intention. The trial court found in favour of P, but asked him to pay, that the payments are to be calculated upto the date of actual eviction.

H, a Hindu Widow sold certain lands to B who made a substantial improvement therein. H died. The reversioner sued B and the sale was set aside. The purchaser B had not made enquiry in good faith as to the title of the lands. Hence, it could not be said that D was right in believing that he was absolutely entitled. Held, D cannot recover.

In *Forbes V. Ralli*, the landlord D, leased his land to P for erecting a building for trade. He gave oral permission to build a houses to the Manager. When the building was ready, D sued to evict P. Held, D is estopped.

Ch. 11-2 Fraudulent transfer (Sn.53 T.P.Act).

Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the

opinion of any creditor so defeated or delayed.

Exceptions: (i) This will not affect the rights of the bonafide transferee for consideration.

(ii) This shall not affect insolvency law.

The leading case is *Twyne's Case*.

Debtor D, secretly transferred the whole of his property, but retained only possession with him. This was done when C, a creditor had sued him.

Held, secrecy is a badge of fraud. The transfer was fraudulent.

The creditors should bring a representative suit against the transferor.

A transfer of immovable property made with intent to defeat subsequent transferees is voidable at the option of such transferee.

Scope:

i) The section applies only to immovable properties.

ii) The intention of the transferor must be to defeat or delay the creditors. Hence, it does not apply when the debtor prefers one creditor over the other. The leading case is: *Musahar Sahu V. Hakim Lai*.

A was the creditor and B was the debtor. A filed a suit against B and applied for "attachment before judgment" of some properties belonging to B. But, B filed an affidavit stating that he had no intention, to alienate his properties. On the basis of this affidavit A's application for attachment was dismissed.

A few months later B sold his properties to C, another creditor. Held, Sn.53 dealing with fraudulent transfer was not applicable. The result was the suit failed. It was held that 'C' was a genuine creditor, this was a case of debtor preferring one creditor over the other.

iii) If the creditor is fictitious or if money realised in selling the secured property is in excess, then Sn.53 applies and the creditor is entitled to a decree.

iv) C sued W, a widow and obtained a decree against her life-estate. W surrendered her properties to her son S. Held, this was fraud. (*Natha V. Dhunbhaji*).

v) A wakf created by a Muslim to keep his creditors out of reach of his properties, was hit by Sn. 53, as the intention was to defeat the creditors

CHAPTER 12

PART PERFORMANCE

Ch.12 Doctrine of part performance (Sn. 53A) (i)

Introduction.

The doctrine originated in England and the leading case in *Maddison V. Aiderson*. The Statute of Frauds required that all contracts relating to land must be in writing. This led to many difficulties. If A orally agreed to sell his land to B, received the price and put B in possession. A could eject B simply because the agreement was oral. Equity demanded that the statute of frauds itself should not be an instrument of fraud. This led to the enunciation of the doctrine of part performance.

If, due to the absence of a written document, the agreement cannot be proved in a court, it is enforceable in equity provided the party seeking the remedy has acted in part performance of the agreement.

In *Maddison V. Aiderson*, A agreed to remain in B's service in consideration of an oral agreement by which B was to give by a will an estate in a land. The will failed due to want of attestation. The heirs of A sued to recover the land.

Held, A could not invoke 'part performance doctrine'. There was no direct correlation between the land and the services of A.

(ii) The doctrine.

When a person contracts to transfer any immovable property by writing signed by him (or his agent) using such terms necessary to constitute a transfer with reasonable certainty,

and, the transferee has performed or is willing to perform his part of the Contract, then, it is cured of the defects of :

a) Non-registration

b) Non-compliance with the prescribed manner of execution according to Jaw.

Further, the transferor is barred from enforcing against the transferee any right in respect of the said property.

The section also has protection of bonafide transferee for valuable consideration, who has acted without notice of Contract or of part performance.

Essentials:

i) The transfer is for valuable consideration. Hence, gifts are excluded.

ii) Writing : There must be a written agreement. Hence, Oral agreement will not suffice.

iii) The agreement should be signed by the transferor or by his duly authorised agent.

iv) Applies to immovables only.

v) The terms of the Contracts must, be capable of being ascertained with reasonable certainty.

vi) The transferee must be in possession of the immovable property.

vii) The transferee must be ready and willing to perform his part of the Contract.

Nature of the right:

This right in respect of part performance is only a defence to the transferee. This is a shield and not a sword. It does not create a title. The transferor is barred from asserting his title. The transferee cannot maintain a suit on title. This is the limited scope according to the Supreme Court (Ram Gopal V. Custodian 1966).³⁵

In *Nathulal V Phoolchand*, A sold his ginning factory with land to B. B gave part of purchase-money & got possession. A sued B for eviction for not paying balance of money. A as agreed had not opened khata & attended properly. Held, B could claim part performance doctrine.

In *Technicians Studio V Lila*, L had leased her premises for 5 years to T. L sued T for eviction within 5 years. Held, T may invoke part performance doctrine.

Chapter 13

CONVENANT ANNEXED TO LAND

Ch.13. Covenant annexed to land (Sn. 40 T.P. Act)

(i) **This is called rule in Tulk V. Moxhay,**

A contract made in a deed of transfer is a Covenant. A seller's promise that he will be answerable for any defects in the title to the property is a Covenant

A covenant annexed to land or running with the land is one which affects the nature, quality, use or value of the immovable property. (Restrictive covenant)

In *Tulk V. Moxhay*, P owned a vacant site and an adjoining house. He sold the site to A with a condition that A should not build therein. The site passed several hands & came to D. D had notice of the Covenant. D wanted to build. P sued in equity to restrain D from building.

Held, P is entitled to succeed. An injunction was granted.

(ii) Sn. 40 T.P. Act provides that where for the more beneficial enjoyment of his own property a third person has a right to restrain enjoyment or is entitled to the benefit of an obligation arising out of Covenant or annexed to the ownership of immovable property, such a right or obligation can be enforced against the transferee with notice thereof.

This may be enjoyed against a gratuitous transferee of property. The bonafide transferee for valuable consideration without notice is however protected.

- Eg. a) to build roads in the estate
b) not to use for fish market
c) not to build so as to affect light and air
d) not to put up a hotel

If these Covenants are for the more beneficial enjoyment to the property, the transferor may put such conditions.

(iii) This section does not apply to Easements

(iv) English Law:

Covenants are divided into two:

(1) grant or reservation in land or an easement and

2) personal contract. In case of the first, the transferee takes subject to the covenant. In the case of the second category, they are personal and hence do not bind the transferee.

However to this there are two exceptions: a) Lease & b) Covenants annexed to land.

Sn. 40 deals with the covenants annexed to land. There are a number of implied covenants such as right to quiet enjoyment, freedom from encumbrances, right to convey etc.

The express covenants are those specified in the contract. The leading case is **Dyson V Forster**.

A Company C covenanted with P, a colliery owner, to pay compensation for all damages that may occur in working the mine. Lord McNaughton held that this was a covenant annexed to the land., &, not a personal contract.

CHAPTER 14

SALE

Ch. 14-1 Sale: Contract of Sale:

Sale (Sn.54 T.P.Act) is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

Sale of immovable property can be made by a registered deed if the value is Rs.100/- or above. Delivery of the property takes place, when the buyer is placed in possession of the property.

Contract for sale is an agreement to sell. It is a Contract for sale of the immovable property on terms settled by parties. This by itself will not create any charge or interest in the property.

Ch.14-2 Rights and duties of the seller:

a) Duties of seller:

The seller is bound

i) to disclose to the buyer any material defect in the property, which the seller is aware and which cannot be discovered with ordinary care by the buyer, (caveat emptor). Otherwise it becomes fraudulent.

ii) to produce to the buyer all documents of title relating to the property.

iii) to answer all relevant questions relating to the title etc. of the property.

iv) to execute a sale deed when the buyer renders the price.

v) to take care of the property from the date of agreement until the date of the sale.

vi) to give possession to the buyer.

vii) to pay all public charges and rents due upto the date of the sale: he should also discharge encumbrances, if any, unless the sale is made subject to any encumbrances.

viii) There is a warranty that the seller has the power to transfer and also professes that interest which he is transferring.

ix) When the sale price is fully paid-up the seller is bound to deliver all the documents of title, to the buyer.

b) Rights of the seller :

i) He is entitled to all the rents and profits of the property till the ownership passes to the buyer.

ii) Vendor's lien:

a) When the buyer has become the owner and b) When the sale

price has not been fully paid, the Vendor gets a charge over the property for amounts unpaid by the buyer.

Ch. 14-3 Rights and duties of the buyer.

(a) Buyer's duties.

The buyer is bound

i) To disclose to the seller any fact which would materially enhance the value of the property; otherwise it becomes fraudulent.

ii) To pay or tender the price at the time and place to complete the sale. He may adjust pre-paid or earnest money if any.

iii) Where the property has passed to the buyer, the buyer becomes liable for any loss or destruction to the property. Further as between the seller & buyer, the buyer should pay public charges and rents which may become payable.

(b) Rights of the buyer

i) The buyer is entitled to any benefit and increase in the value, rents etc, after the property has passed on to him.

ii) The buyer has a charge on the advances made in anticipation of the delivery and for interest on such advances.

CHAPTER 15

MORTGAGE

Ch.15-1. Definition and kinds:

a) A mortgage according to section 58 of the T.P. Act is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced. The money may be advanced by way of loan (existing or future) or performance of an act giving rise to a pecuniary liability. The transferor is called the mortgagor and the transferee the mortgagee.

b) If the mortgage is made under an instrument it is called mortgage deed. The amount secured is the mortgage-money.

c) The deed must be registered if the value is Rs. 100 and above. It must be in writing, signed and duly attested.

d) Kinds: There are different kinds of mortgages recognised by the T.P. Act:

i) Simple mortgage, ii) Mortgage by conditional sale, iii) Usufructuary mortgage, iv) English mortgage

v) Equitable mortgage (mortgage by deposit of title deeds)

vi) Anomalous mortgage.

Ch.15-2.1 Simple mortgage :

a) There is no delivery of the mortgaged property to the mortgagee.

b) The mortgagor binds himself personally to pay the mortgaged money to the mortgagee.

c) If the mortgagor fails to pay, there may be an express or implied contract that the mortgagee has a right to sell the property and to apply the proceeds towards the mortgaged money plus interest.

Hence in a simple mortgage there is a personal covenant to pay and there is also a transfer of power of sale to the mortgagee.

Ch.15-2.2 : Equitable Mortgage :

This is a mortgage, generally called "Mortgage by deposit of title deeds".

Hence, the mortgager delivers to the creditor (or Bank) or agent, documents of title to immovable property with intent to create a security thereon. S.58 (f) T. P. Act.

The essence of the transaction is that the parties have the intention that the **title deeds deposited** shall be the security for the debt.

Through the equitable mortgage is made in writing, it may be oral if the intention or the deposit of title deeds, are as required by law. The intention should be made out clearly.

Generally there will be a memorandum & deposit of title deeds. The deposit of title deeds is independent of memorandum. Hence, registration of memorandum is not necessary.

Ch.15-3. Mortgage by conditional sale:

In case of mortgage by conditional sale, the mortgagor makes an ostensible sale of mortgaged property to the mortgagee. But, this is subject to the condition that if the mortgage money is not duly paid on or before the date agreed, the sale shall become absolute. If the amount is duly paid, then the sale shall be void, and in such a case the buyer shall transfer the property to the mortgagor. The mortgage deed should specifically mention the condition stated above. Only on default, the sale becomes absolute.

a) The order of the court foreclosing the mortgagor and extinguishing the rights of the mortgagor will convert the transaction into a sale.

b) Condition of re-transfer should be embodied in the document making the Ostensible sale, otherwise, it is not a mortgage by Conditional sale.

Ch.15-4 Usufructuary mortgage:

a) Here the mortgagor delivers possession of the mortgaged property to the mortgagee (He may bind himself to deliver possession).

b) The mortgagor authorises the mortgagee to retain such possession until the mortgaged money is paid.

c) The mortgagor authorises the mortgagee to collect rents and profits arising from the property in lieu of the interest (or in lieu of the interest on mortgage money) such a transaction is called usufructuary mortgage.

Here the mortgagee gets the possession of the property & therefore he has a right to retain possession. Delivery of physical possession was formerly essential according to Subbamma Vs. Nariah (Madras High Court). This has been overruled by the T.P.Act.

There is no personal liability of the mortgagor to pay beyond the mortgaged property.

Ch.15-5. English Mortgage:

a) Here the mortgagor binds himself to repay on a certain date. If no date is prescribed it is no English mortgage. Further, there is a personal undertaking to repay.

b) Mortgagor transfers the mortgaged property to mortgagee absolutely. This means it is an absolute transfer only in form but not in reality.

c) The mortgagor imposes a condition that the mortgagee will re-transfer the mortgaged property to the mortgagor on payment of the mortgaged money. Such a transaction is called an English mortgage.

d) Here there is a transfer of ownership of the property, with a promise to pay back the debt on a certain date. Further there is a personal covenant or personal liability on the part of the mortgagor to repay the mortgage money.

Ch.15-6. Anomalous mortgage:

This is a composite mortgage consisting of two or more types of mortgage. Hence it is neither a simple mortgage nor a mortgage by conditional sale nor an usufructuary mortgage nor an English mortgage nor an Equitable mortgage.

E.g.: Combination of simple and usufructuary mortgage.
Narasingh Pratap Vs. Mohammed Yaqoob.

The mortgagor covenanted to repay the mortgage-money in 35 years. The mortgagee was to take possession of the property and enjoy the usufruct in lieu of interest. Possession was not delivered. The mortgagee sued for the enforcement of the mortgage by the sale of the property. If it is a usufructuary mortgage a suit for sale would not lie. If it was a simple mortgage the suit is premature.

The Privy Council held: that it is an Anomalous mortgage. That is, the mortgage is partly usufructuary, the mortgage money becomes payable when possession was not given. Since it had the complexion of simple mortgage, a decree for sale was granted.

Ch.15-7. 'Once a Mortgage always a Mortgage' or Doctrine of equity of Redemption. Sn.60

Mortgagor has a right to redeem the mortgage. The courts guard this right called the Equity of redemption. Any contract entered into between the mortgagor and mortgagee imposing condition against this right to redeem, cannot be enforced. Right to redeem is part of the transaction. Mortgage is only security for repayment of debt. Hence, when the debt is paid the mortgagor is entitled and the mortgagee should release the property thereof. Any condition against this right to redeem is called a 'clog on the equity of redemption'.

The leading case is *Sher Khan V. Swami Dayal*.

The mortgagor may pay or tender at a proper time and place the mortgage-money, which has become due. The mortgagee should deliver all the concerned documents; if he had been in possession he

must deliver possession of the immovable property to the mortgagor. Further, the mortgagor may require an acknowledgment in writing that all the rights of the mortgagee have been extinguished.

Limitation : The period of limitation fixed to redeem the mortgage is 30 years, starting from the date when the right to redeem accrues.

The right of the mortgagee for foreclosure is 30 years starting from the date when the money became due.

Under section 67 the mortgagee has a right to foreclosure or to sell the mortgaged property. If the mortgage money has not been paid within time, the mortgagee has got a right to foreclose. He may sue in a court and obtain a decree to the effect that the mortgagor shall be absolutely debarred of his right to redeem the mortgaged property. Such a suit is called a suit for foreclosure. This can be done after the period of 30 years, the period of limitation.

Eg.: A mortgaged his property to B for Rs.5,000/- to be redeemed in 5 years. On failure, B could take possession and stay there for 12 years. During this period A was barred from redeeming the property. Held, such a condition was void, as it is a clog on the equity of redemption.

Ch. 15-8 Doctrine of Marshaling and Contribution.

A mortgages his properties named X & Y to B. Subsequently, he mortgages the property X to C. C brings property X to sale in execution of his mortgage and purchases the property X. B thereupon obtains a decree and proceeds against X. Can C claim marshaling? The answer is Yes. X & Y should be put together, so as not to defeat the interests of A & B.

The doctrine of marshaling is stated in Section 81. The owner of two (or more) properties mortgages one (or more) of the properties to another person, the subsequent mortgagee is entitled to have the prior mortgage debt satisfied out of the property (or properties) not mortgaged to him, so far as the same will extend. However, this will not prejudice the rights of the prior mortgagee or any person who has for value acquired an interest in any of the properties.

Leading case is : **Aldrich Vs. Cooper**: In this case:

The first creditor C had a right against the property of the debtor D. The second creditor, S, had certain rights against the property of the debtor. In these circumstances if the first creditor C is allowed to proceed against the property the rights of 2nd creditor S would be affected. The principle is that one creditor shall not disappoint

another creditor. Hence, if one creditor has a security in respect of two properties of the mortgagor and another creditor has a security in one of the properties only, then the two properties shall be marshaled i.e., ranged so as to throw the burden as far as possible on the property not included in the second security.

Eg.: Properties X & Y of P are subject to an encumbrance of A. Property Y is subject to an encumbrance of B. According to the doctrine of marshalling the amounts given by A must be satisfied from property X so as not to affect the amounts given by B.

Contribution:

The converse of marshalling is contribution. This occurs when the mortgaged property belongs to two or more persons, having distinct and separate rights of ownership. In such a case if there is a mortgage debt both or all should contribute rateably. The value as on date of mortgage shall be taken to calculate the contributions.

Eg.: Property X is mortgaged to A for Rs.200/- and sold to C. Properties X & Y are mortgaged to B for Rs.400/- & sold to D.

The value of X & Y is Rs.500/- each.

The contributions of C & D are Rs.150/- and 250/- respectively

The two properties X & Y have the mortgage-amount of Rs.400/- advanced by B. Hence B may recover this amount from C & D. From C : $500-200=300$ Rs. Half of this = 150 Rs. From D : Value 500 Rs. Half of this = Rs.250/-

Ch. 15-9 Subrogation Sn.91.

Subrogation means 'Substitution'. This enables a person to pay off a creditor and get into his shoes and exercise the rights of the creditor.

Any person redeeming a mortgaged property has the same rights (of redemption, foreclosure or sale), as the mortgagee may have against the mortgagor or any other mortgagee.

This right is subrogation. There must be full redemption to apply this doctrine.

A mortgages his property to B.

A makes second mortgage to C.

A makes third mortgage to D.

Here, D may redeem B in which case D becomes subrogated to B. He has the same rights as B has.

Persons who may claim subrogation.

i) Any person having interest in or charge on the mortgaged property.

- ii) Any surety.
- iii) Any creditor of mortgagor.

Exception: Subrogation does not apply to a mortgagor.

Gases of legal subrogation are:

- a) A puisne mortgagee redeeming a prior mortgagee.
- b) A co-mortgagor redeeming the mortgagee.

c) A mortgagor's surety redeeming the mortgagee.

d) A purchaser of equity of redemption redeeming a mortgage.
These person may claim the right of subrogation.

Ch. 15-10 Tacking: (Tacking=To shift one's position).

The rule relating to prohibition of Tacking is in Sn.93 of T.P. Act The rule is: No mortgagee paying off a prior mortgage-(with or without notice of any intermediate mortgage) shall acquire any priority in respect of his Original security.

Eg.: Three mortgages are made by A:

- I Mortgage to B
- II Mortgage to C
- III Mortgage to D

D may pay off B and get into the shoes of B. With this he gets priority over 'C' in respect of mortgage B only and not **in respect of his own mortgage D**. This shifting is the doctrine of tacking, but, such a shifting is prohibited by T.P.Act.

Ch.15-11. 'Redeem up, foreclose down':

Every mortgagee has a right to redeem a prior mortgagee. But, under this rule, every subsequent mortgagee may foreclose a subsequent mortgagee. This is familiarly called 'redeem up and foreclose down'.

Eg.: A mortgages his property to B C D

Here, D may redeem B or C by paying off the mortgage debt. But, B can foreclose 'A' (fulfilling the conditions).

B can foreclose C and D or both who are subsequent to him. This rule protects the interest of the mortgagees (creditors).

Ch.15-12. Rights and Liabilities of Mortgagee in possession.

A) Rights of the mortgagee:

- i) The mortgagee may spend any necessary amount for
 - a) The preservation of the mortgaged property from destruction, forfeiture or sale.
 - b) for supporting mortgagors title.
 - c) to make his title good against the mortgagor (defending suits against mortgagor).
- ii) Where the mortgaged property is sold under Revenue sales or acquired by Govt., the mortgagee is entitled to claim his money the surplus of proceeds of such sale or acquisition.

B) Liabilities of the mortgagee:

- i) Mortgagee should prudently manage the property.
- ii) He must make endeavours to collect the rents & profits.
- iii) He must pay all Govt. revenues & Public charges and all rents due. (This is subject to agreement)
- iv) Necessary repairs to property are to be made from collection of rent etc.
- v) He should not do anything to destroy or damage the property.
- vi) He must maintain clear, full and accurate accounts.
- vii) When the mortgagor tenders or deposits any money, the mortgagee should account for the same.

The mortgagee becomes liable, for loss incurred by the mortgagor due to violation of these provisions.

Ch. 15-13 Substituted Security : Sn.73:

Sn. 73 of the T.P. Act deals with Substituted security, with reference to mortgage. This means, the mortgagee for the purpose of his security is not only entitled to the subject-of mortgage property, but also to anything that may be substituted for it.

Hence, if the mortgaged property takes a new form, the security extends to that also.

In *Punniah V. Venkatappa Rao*, A had mortgaged his house to B. A's representatives pulled down the house, and, used the building materials to build new house

. Held that the new house was a "substituted security" to protect the interests of the mortgagee.

The rule in Sn.73 provides that where the mortgaged-property is sold for recovery of land revenue or other charges, the mortgagee is entitled to claim the payment of mortgage-money after satisfying the govt. arrears: Similarly when land is acquired by Govt. the mortgagee is entitled to his money from the compensation paid by Govt. to the mortgagor.

The section applies to Partition, court sales etc,

Exceptions:

The mortgaged property must be free from other encumbrances; otherwise, this section will not apply.

Ch. 15-14 Doctrine of Consolidation (Sns.61 & 67 A):

This has its origin in the English concept of the "Equity of consolidation" and with some modification, it is incorporated in our T.P. Act.

When a mortgagor executes two or more mortgages in favour of the same mortgagee, and, when the mortgage-money of two or more become due, the mortgagor may redeem each mortgage separately or may consolidate two or more of such mortgages together.

This applies to cases of two (or more) mortgages by the same mortgagor to the same or any number of mortgagees.

Parties may exclude this principle of consolidation in the mortgage deed if they so prefer. E.g., A mortgages his property X to Y

" " X to Y (called puisne mortgage)

A may redeem separately or may consolidate and redeem.

Sn.67 A : A Mortgagee who holds two or more mortgages of the same property, and, who sues for mortgage-money, must do so by consolidating all the mortgages together. This means the mortgagee is bound to consolidate, i.e, he must sue on all or none.

A mortgages his property X for Rs.5,000/- to B. He makes a second (puisne) mortgage of the same property to B for Rs.3,000/-

In filing a suit, for mortgage-money, (which becomes due from both) mortgagee B should consolidate and file together. He is not allowed to file separate suits.

CHAPTER 16 MISCELLANEOUS

Ch.16-1 : Rule against inalienability. Sn. 10. Absolute restraint

The main principle of the T.P.Act is that the right to transfer property is incidental to and inseparable from its beneficial ownership. Any condition absolutely restraining alienation is void according to the Act.

Sn. 10 states that when a property is transferred subject to a condition absolutely restraining the transferee (or any claimant through him) from parting with or disposing of his interest in the property, the condition or limitation is void.

This applies to sale, gift, exchange etc. The rule is based on Justice, equity and good conscience, and includes other transfers not covered by the T.P.Act e.g. will, partition, settlement etc.,

Exceptions:

(i) **Lease:** A lease is an exception. The lessor retains his interest. A condition that the lessee should not sub-lease the property is valid.

(ii) **Married Woman:** A property may be transferred for the benefit of a woman with a condition that during her marriage coverture, she should not alienate or charge. Such a condition is valid. (This is not applicable to Hindus, Muslims and Buddhists as they are governed under their own personal laws.

Scope:

Absolute restraint: The transfer of property is void, if there is an absolute restraint on the right to transfer or alienate.

e.g. A, B, C & D made a partition with a condition that if any one dies, leaving no heirs, then his share gets merged with others and that such a person should not alienate his interest.

A sold his share of property and died without issues. B, C & D sued to recover the property. Held, the condition was void under Sn.10.

Partial restraint on transfer is not void.

A gift of property made to the donee, that he should not alienate during his lifetime, is void under Sn.10.

Sn.12: Insolvency or attempted alienation:

In order to protect the interests of the creditors, provision are made in the T.P.Act. Where a transfer is made by a person, with a condition that the interest of the transferee would cease on the transferee becoming insolvent or attempting alienation, such a condition is void.

A settles his property in trust for himself until his death or bankruptcy. On the happening of any of these events, the property would

vest in his wife. A is adjudged insolvent. The property vests in the official assignee, and, the condition in the trust is void.

Ch. 16-2. Doctrine of Acceleration Sn.27

Sn. 27 of the T. P. Act deals with the English doctrine of acceleration.

In a transfer of property, A may create an interest in favour of one person, and by the same transaction, he may create an ulterior disposition in the same property in favour of another. If in such a case, the first transfer fails, then the ulterior disposition takes effect, even though the failure may not have occurred as contemplated by A.

However, if the failure is to take effect in a particular manner, then the ulterior effect will not take effect, unless the failure is in that manner.

(i) In *lull V. Jones*, A made a request to B for life and then to his children. The gift failed as B was one of the attestors. Held, according to acceleration, the gift to B failed but, took effect in favour of the children.

(ii) *Avelyn V. Ward*: A transfers Rs.5,000/- to B on condition that he shall execute certain lease in 3 months after A's death. If he neglects, the transfer is to C. B dies in A's lifetime. Here, the disposition to 'C' takes effect.

(iii) *Underwood V. Wing*: A transfers his property to his wife W ; if she dies in his lifetime, the property goes to 'B'. A & W die in an air -crash. It is not proved that W died before A. The transfer to B will not take effect.

A bequests a sum of money to his own children who survive him. If they die before him, then bequest goes to B. A dies without issues. Held, according to acceleration, the bequest to B takes effect.

Ch. 16-3 Doctrine of Apportionment: Sn. 36 & 37

There are two types: i)

Apportionment by time Sn. 36 ii)

Apportionment by estate Sn. 37 i)

Apportionment by time:

All rents, annuities, pensions, dividends and, other periodical payments i.e, incomes, when transferred to the transferee, shall be considered as accruing from day to day and shall be apportioned accordingly. These are payable on the days appointed for the payment.

A lets his house to B on Rs.1,000/- per month payable on the last day of each month. A sells the house to B on the 15th June. On the 30th June, A is entitled to Rs.500/- rent from 1st to 15th. B is

entitled to Rs.500/- from 15th to 30th. This apportionment is by time.

Execution: This rule does not apply to execution sale made by the Courts.

ii) Apportionment by estate:

Where as a result of transfer, a property is divided and held in several shares and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, then law fixes a corresponding duty which shall be performed in favour of each owner in proportion to his share in the property.

The duty should be one which can be severed and performed without any burden.

Reasonable notice must be given of the severance, by the person who is obliged to follow the duty.

Exception: This does not apply to leases for agricultural purposes.

i) A lets his house to B at a rent of Rs.800/- per month. A sells half of the house to C. A gives notice to B. B should pay Rs.400/- to B & Rs.400/- to A per month. This is apportionment by estate.

ii) A has leased his house to B,C & D. B pays half, C & D a quarter each of the sale-value. A gives notice of this to E. E must pay Rs.1000/- to A and Rs.500/- to each of C & D.

Ch. 16-4 Rule against Accumulation Sn.17.

The principle underlying this concept is that property should not be tied up beyond a period fixed by law. The rule against perpetuities is based on a similar principle.

Sn.17, deals with a direction for valid accumulation. If the terms of property direct that the income from such property shall be accumulated (wholly or in part), during i) the life of the transferor or ii) a period of 18 years from the date of the transferor the direction is valid. However, if the direction extends beyond the longer of the aforesaid periods, then the direction is invalid, In such a case, the income shall be disposed of ignoring the direction, after the allowed period.

Exceptions:

The section does not apply in the following circumstances: (i) payment of debts of the transferor or any other,

- (ii) provision of portions for children etc.
- (iii) preservation and maintenance of property transferred.

Leading Cases: *Thalluson & Woodford*,
and, *Berry V. Green*.

Thalluson V. Woodford: In this case A directed that the income of his property should be accumulated during the lives of his 3 sons and 4 grandsons. The accumulated income at the end of the lives of these 7 persons, were directed to be distributed among the then existing descendants. Held, the direction was valid, as it was within perpetuity rule.

Illustration:

A transfers his property to B for life and then to the son of B who shall attain the age of 25. This condition is void, as it violated the perpetuity rule going (Beyond 21 years).

However, if the transfer is to B for life and to B's son who shall attain 18 years, it is valid.

THE END

REFERENCE SECTION
Selected Sections

TRANSFER OF PROPERTY ACT, 1882

3. Interpretation clause

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

"**actionable claim**" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;

CHAPTER II OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

(A) Transfer of property, whether movable or immovable

5. Transfer of property defined

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

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

6. What may be transferred

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

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

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

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

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

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

(e) **A mere right to sue cannot be transferred.** (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable. (g) Stipends allowed to military, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.

7. Persons competent to transfer

Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

.13. Transfer for benefit of unborn person

Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. Rule against perpetuity

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

15. Transfer to a class, some of whom come under sections 13 and 14

If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class.

16. Transfer to take effect on failure of prior interest

Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

17. Direction for accumulation

(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than-

(a) the life of the transferor, or (b) a period of eighteen years from the date of transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any **direction for accumulation** for the purpose of- (i) the payment of the debts of the transferor or any other person taking any interest under the transferor; or(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer; or (iii) the preservation or maintenance of the property transferred, and such direction may be made accordingly.

18. Transfer in perpetuity for benefit of public

The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

19. Vested interest

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

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

20. When unborn person acquires vested interest on transfer for his benefit

Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

21. Contingent interest

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

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

22. Transfer to members of a class who attain a particular age

Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

23. Transfer contingent on happening of specified uncertain event

Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless

such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

24. Transfer to such of certain persons as survive at some period not specified

Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer. **Illustration** A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the lifetime of B. D survives B. At B's death the property passes to D.

25. Conditional transfer

An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy.

Illustrations (a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void. (b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void. (c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void. (d) A transfers Rs. 500 to his niece C, if she will desert her husband. The transfer is void.

26. Fulfillment of condition precedent

Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with. **Illustrations** (a) A transfers Rs. 5000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition. (b) A transfers Rs. 5000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

27. Conditional transfer to one person coupled with transfer to another on failure of prior disposition

Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do

so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his life-time, transfer to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

28. Ulterior transfer conditional on happening or not happening of specified event

On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

29. Fulfilment of condition subsequent

An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies as minor or marries without C's consent, Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

30. Prior disposition not affected by invalidity of ulterior disposition

If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration A transfers a farm to B for her life, and, if she does not desert her husband to C. B is entitled to the farm during her life as if no condition had been inserted.

31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen

Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen. **Illustrations** (a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm. (b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

32. Such condition must not be invalid

In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. Transfer conditional on performance of act, no time being specified for performance

Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

34. Transfer conditional on performance of act, time being specified

Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

CHAPTER II OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

ELECTION

35. Election when necessary

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

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations

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

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own. A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect. A person who in his own capacity takes a benefit under the transaction may in another dissent therefrom.

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

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his

duty to elect and of those circumstances which would influence the judgement of a reasonable man in making an election, or if he waives enquiry into the circumstances.

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

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

Illustration

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

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

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

APPORTIONMENT

36. Apportionment of periodical payments on determination of interest of person entitled

In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

37. Apportionment of benefit of obligation on severance

When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract, to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

PROVIDED that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in the manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the Official Gazette so directs.

Illustrations

(a) A sells to B, C and D a house situated in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7.50 to C, and Rs. 7.50 to D and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation. E had agreed as a term of his lease to perform this work for A, B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

(B) Transfer of immovable property

39. Transfer where third person is entitled to maintenance

Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

41. Transfer by ostensible owner

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

42. Transfer by person having authority to revoke former transfer

Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.
Illustration A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43. Transfer by unauthorized person who subsequently acquires interest in property transferred

Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option

of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

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

50. Rent bona fide paid to holder under defective title

No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

51. Improvements made by bona fide holders under defective titles

When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. Transfer of property pending suit relating thereto

During the pendency in any court having authority ³[⁴within the limits of India excluding the State of Jammu and Kashmir] Government or established beyond such limits] by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

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

prescribed for the execution thereof by any law for the time being in force.

53. Fraudulent transfer

(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

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

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

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

53A. 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 the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

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

CHAPTER III OF SALES OF IMMOVABLE PROPERTY

54. "Sale" defined

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

Sale how made: Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case

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

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

55. Rights and liabilities of buyer and seller

In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:

(1) The seller is bound-

- (a) 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;
- (b) 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;
- (c) 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;
- (d) 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;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same: PROVIDED that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. (3) Where the whole of the

purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

PROVIDED that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyers of the lot of greatest value is entitled to such documents.

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

(4) The seller is entitled-

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

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

(5) The buyer is bound-

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest; (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs:

PROVIDED that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

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

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

(6) The buyer is entitled-

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

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

56. Marshalling by subsequent purchaser

If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

CHAPTER IV OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.

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

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

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

(c) **Mortgage by conditional sale**-Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

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

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

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

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

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

RIGHTS AND LIABILITIES OF MORTGAGOR

60. Right of mortgagor to redeem

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

PROVIDED that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption. Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property-Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

60B. Right to inspection and production of documents

A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's cost and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

61. Right to redeem separately or simultaneously

A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,-when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in court hereinafter provided.

63A. Improvements to mortgaged property

(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

64. Renewal of mortgaged lease

Where mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

65. Implied contracts by mortgagor

In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,-

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same; (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title. thereto; (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property; (d) and, where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all the claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(e) and, where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance. The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

RIGHTS AND LIABILITIES OF MORTGAGEE

67. Right to foreclosure or sale

In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold. A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed- (a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or a usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the

property, to institute a suit for foreclosure; or (c) to authorise the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or (d) to authorise a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

69. Power of sale when valid

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely,-

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the government;

(c) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until-

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall

have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.

69A. Appointment of receiver

(1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the court for the appointment of a receiver, and any person appointed by the court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the court on application made by either party and on due cause shown.

72. Rights of mortgagee, in possession

A mortgagee may spend such money as is necessary-(b) for the preservation of the mortgaged property from destruction, forfeiture or sale;(c) for supporting the mortgagor's title to the property; (d) for making his own title thereto good against the mortgagor; and (e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease,

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine percent per annum: '

PROVIDED that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

76. Liabilities of mortgagee in possession

When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, -

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(b) he must try his best endeavours to collect the rents and profits thereof; (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;

(d) he must in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;(e) he must not commit any act which is destructive or permanently injurious to the property;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c)

and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

(i) when the mortgagor tenders, or deposits in the manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court, as the case may be, and shall not be entitled to deduct any amount there from on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss occasioned by his default- If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure.

CHAPTER IV OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES

PRIORITY

78. Postponement of prior mortgagee

Where, through the fraud, misrepresentation or gross neglect of prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

79. Mortgage to secure uncertain amount when maximum is expressed

If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co.

subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

80. Tacking abolished

[Repealed by the Transfer of Property (Amendment) Act, 1929 (20 of 1929).]

MARSHALLING AND CONTRIBUTION

81. Marshalling securities

If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgage is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

82. Contribution to mortgage-debt

Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the subsequent

92. Subrogation

Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated. .

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

93. Prohibition of tacking

No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

94. Rights of mesne mortgagee

Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

CHARGES

100.

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

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

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CHAPTER V LEASES OF IMMOVABLE PROPERTY

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.

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

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

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

107. Leases how made

A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

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

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

PROVIDED that the State Government from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral

agreement without delivery of possession.

108. Rights and liabilities of lessor and lessee

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

(A) Rights and liabilities of the lessor

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;

(b) the lessor is bound on the lessee's request to put him in possession of the property;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

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

(B) Rights and liabilities of the lessee

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

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

PROVIDED that, if the inquiry be occasioned by the wrongful act or default of the lessee, he shall be entitled to avail himself of the benefit of this provision;

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

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

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

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

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

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

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

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

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

(n) if the lessee becomes aware of any proceeding to recover the

property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

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

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

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

109. Rights of lessor's transferee

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

PROVIDED that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

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

111. Determination of lease

A lease of immovable property determines-

(a) by efflux of the time limited thereby,

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

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

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

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

(f) by implied surrender,

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

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

Illustration to clause (f)

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

116. Effect of holding over

If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

CHAPTER VI : OF EXCHANGES

118. "Exchange" defined

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. Right of party deprived of thing received in exchange

If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

120. Rights and liabilities of parties

Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

121. Exchange of money

On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII OF GIFTS

122. "Gift" defined

"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made-Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

123. Transfer how effected For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at

least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

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

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

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

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked. Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

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

127. Onerous gifts

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

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous. Onerous gift to disqualified person: A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

(a) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He

cannot take the shares in X.

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

128. Universal donee

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

129. Saving of donations mortis causa and Mohammedan Law

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

CHAPTER VIII : OF TRANSFERS OF ACTIONABLE CLAIMS

130. Transfer of actionable claim

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

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

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

THE END

