PROPERTY LAW

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Introductory

The Transfer of Property Act, 1882 happened to be one of the early legislations of the nineteenth century. The Act is having an important place in the statute book with the main objective to render the system of transfer of immovable property a system of public transfer. Registration is therefore generally insisted upon for completing transfer, except in cases of transactions of small value.

Property is a very wide term and would include anything which carries some value and over which the right of ownership may be exercised. The word property in its most comprehensive sense includes all legal rights of a person except his personal rights, which constitute his status or personal condition.[1]

Under English law, property is generally classified into real property and personal property. Real property comprises of all properties admitted to specific recovery and is freehold interests in land. Property in respect of which only a personal action lay was classified as personal property, *i.e.*, which comprised of all forms of property other than real property. The distinction in English law between real and personal property is paralleled in Indian law by the distinction between immovable and movable property.

Interests in property

Definition of immovable property: The term "property" signifies the subject matter over which the right of ownership or any lesser right carved out of ownership (*e.g.*, mortgage right) is exercised. The Transfer of Property Act, 1882 deals with various specific transfers relating to immovable property. It also lays down general principles relating to transfer of property, which apply equally to movable and immovable property. Movable property

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1. *Raichand* v. *Dattatrya* AIR 1964 Bom. 344.

may be regarded as comprising of all property other than immovable property. What then is immovable property?

It is a surprising fact that the Transfer of Property Act does not contain a comprehensive definition of immovable property. Section 3, Para 2 merely says: "Immovable property does not include standing timber, growing crops or grass". This is a negative definition and is not satisfactory. We can find a workable definition of immovable property in the General Clauses Act, 1897, which reads as follows; "Immovable property include land, benefits to arise out of land and things attached to the earth".

The Transfer of Property Act has supplied us in Para 6 of section 3 a definition of the expression "attached to the earth". This expression means:

(a) "Rooted to the earth, as in the case of trees and shrubs;

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

(c) Attached to what is so imbedded for the beneficial enjoyment of that to which it is attached."

Things rooted to the earth are immovable property. It should be noted, however, that standing timber, growing crops and grass are not immovable property. The reason for the exclusion of these from the category of immovable property is that they are useful as timber, corn and fodder only after their severance from the land. In case of trees apart from the size of the trees the relevant consideration would be the intention to cut the tree or to let it remain attached to the earth and in the former case it will be deemed as standing timber while in the latter it remains as immovable property.[2]

From the foregoing it is clear that land is immovable property. *Land* means the surface of the earth and includes subjacent things such as minerals. So also are buildings. Benefits arising out of land, *e.g.*, a right to receive future rent, are also immovable property. Trees so long as they are rooted in the earth are immovable property provided they are not standing timber. Timber is useful for house construction, but to be used as timber it has to be severed from the land. So even while it is standing on land, when the wood is useful as timber, the tree is treated only as movable property. *Shisham, nim* and jack trees, for instance, are useful as timber. So when these trees are ripe for use as timber, even though they are still rooted in the earth, they are treated only as movable property.

Doctrine of fixtures (Things imbedded in the earth or attached to what is so imbedded)

In Indian law movable property sometimes assumes for legal purposes the

2. *Jagdish* v. *Mangal Pandey* AIR 1986 All. 182.

character of immovable property. In English law also chattels are sometimes treated as real property. They are then called fixtures. In England the general rule is that whatever is planted on (or built in) the soil belongs to the soil. When a chattel is annexed to the soil and so becomes a fixture, the person who was owner of it when it was a chattel loses his property in it for it immediately vests in the owner of the soil. Thus a house becomes part of the land on which it stands and anything affixed to the building is by common law treated as an addition to the property of the owner. In Indian law also things imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached are regarded as immovable property. When a property is treated as fixtures any dealing with the property to be valid should conform to the legal requirements laid down for such dealings in relation to immovable property.

Hence we can see the movable property or chattels, to use the expression familiar in England, when attached to buildings, sometimes become immovable property and are then called fixtures. Thus machinery, ceiling fans, doors and windows, *etc.*, can become fixtures. Suppose A sells his house. The fixtures appertaining to the house pass along with the house and need not be separately mentioned in the sale deed. They are treated as part of the immovable property sold. So A cannot remove the doors and ceiling fans after he has sold the house. He may, however, remove the coat-stands; boxes and bookracks for these are not fixtures and are only movable property.

Transfer of Property Act not applicable in certain cases

When there is a special law enacted by the Parliament to safeguard certain specific rights and thereby the Transfer of Property Act, 1882 is excluded, that special law will prevail over the general Act. For example, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is a special law for the purpose, which rules out the application of a general law like the Transfer of Property Act to matters covered by the special law. The Supreme Court in *Mardia Chemicals Ltd.* v. *Union of India*[3] upheld the validity of the special law, which contained provisions inconsistent with the Transfer of Property Act, 1882.

Interests in *praesenti* and *de futuro*

A transfer of property may confer upon the transferee an interest, which carries with it the right to immediate possession. Then that interest is said to be an estate in *praesenti.* If there is no right to immediate possession, then the interest in question is said to be an estate *de futuro.*

3. (2004) 4 SCC 311.

(a) Reversion: Suppose A the owner of immovable property (tenant in fee simple as he is called in England) transfers to another a lesser interest than what he has, *e.g.*, a life estate. Then the transferee as the holder of the life estate acquires the right of enjoying the property for his life. Once the life estate expires by the death of the life-estate holder, A resumes possession of the property. Even at the time of the transfer he has the residual interest in the property but it is bereft of possession until the life-estate comes to an end. Because the right to possession is thus postponed, it is a future estate. The interest, however, exists from the date of the transfer itself. What is postponed is only the right to possession. The interest remaining in the transferor who has granted to another a lesser interest than what he has is called a reversion. He secures possession when the lesser estate comes to an end.

(b) Remainder: Suppose A, the owner, conveys a lesser estate than what he has to B and also by the same instrument of transfer conveys to C the remaining interest. The transfer would be as follows:

To A for life,
then to B.

The life estate of A is called a particular estate because it is a *particular* part of the owner's interest. The interest of B is called a remainder because it is what remains after carving out the particular estate.

(c) Vested remainder: A remainder is said to be vested in interest when the only obstacle to the remainderman securing possession is the existence of the particular estate. The remainder is ready to take effect in possession the very moment the particular estates ends. This is the situation when there is no condition precedent, which has to be satisfied by the remainderman before he can claim possession.

Suppose there is a transfer: To A for life, then to B. Here B's interest is a vested remainder because B need not fulfil any condition precedent and is ready to take possession the moment A dies. Suppose B dies during A's life. Then B's heir would step into his place and he will get possession after A's death. A vested remainder is not defeated by the death of the remainderman before the determination of the prior estate. It is a heritable interest. It is also alienable. If B sells his interest to C during A's lifetime, on the death of A, either C or in case he predeceases A, C's heir will take possession by virtue of his vested remainder.

(d) Contingent remainder: Suppose there is a transfer : To A for life, then to B if he marries C. Here B's interest is such that it cannot be said that he can take possession the moment the particular estate of A clears out. There is a condition to be fulfilled by B, namely marrying C. Till B fulfils this condition, his interest is said to be contingent, *i.e.*, dependent upon the fulfillment of the condition. B's interest is, therefore, a contingent remainder

to start with. If B dies without marrying C in A's lifetime, on the death of A the possession will not go to B's heir. A contingent interest is not heritable. The contingent remainder fails in such a case. Thus a contingent remainder is weaker than a vested remainder. No doubt the contingent remainder may be alienated. Thus B may transfer his interest to D. But if B dies without marrying C in A's lifetime, D also cannot secure possession and his interest fails. This is the peculiarity of the contingent remainder.

Suppose B marries C during A's lifetime. He has fulfilled the condition precedent and is now in a position to take possession as soon as A's life estate is out of his way. His interest, which to start with was a contingent remainder, has now become vested remainder. Thereafter if B, predeceases A, B's heir can take the property when subsequently A dies. If that heir predeceases A, then that heir's heir will take the property. That is, the estate of the remainderman has become a heritable estate because it has ceased to be a contingent remainder and become a vested remainder. A contingent remainder is converted into a vested remainder as soon as the condition is fulfilled. But the condition should be fulfilled before the determination of the prior estate. A contingent interest is alienable but not heritable while a vested interest is both alienable and heritable.

Subject-matter of Transfer

Inalienable property

The general rule is that property of any kind may be transferred. To this rule there are some exceptions which are set forth in section 6 of the Transfer of property Act. These exceptional types of property whose transfer is forbidden by the law are the following:

(a) Spes successionis: 'Spes successionis' means chance of succession. On the death of a person his legal heir inherits his property. During the lifetime of the owner, however, the future heir has no proprietary interest in the property. During that time he has only chance of succession. If he does not outlive the owner, obviously there is no possibility of his taking that property. The policy of the law is that this *spes successionis* should not be alienable. One familiar instance of Hindu Law of spes successionis is the interest of the reversionary heir expectant on the death of a Hindu widow under the Customary Law. In *Amrit Narayan* v. *Gaya Singh*,[4] a minor's reversionary interest in his maternal grandfather's property was released by his guardian. On attaining majority he sued for recovery of the property. The court held that the suit could be decreed since the release was void dealing as it did with an interest, which could not be the subject of a bargain. The judicial Committee observed thus:

4. ILR 45 Cal. 590.

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

(b) Interests in property restricted in enjoyment to the owner personally: Sometimes the interest which a person has in property may be such that he alone can enjoy it and no one else. Such interests are inalienable. A service *inam* is an illustration of such interest. In *Anjeneyulu* v. *Sri Venugopala*[5] A's ancestors were granted by the government a *swastivachakam* service *inam*. The object of the *inam* (grant) was that the grantee and his successors should perform service in a temple (called *swastivachakam* service consisting of invoking benedictions) and as a compensation for the service enjoy the income of that property. If the service is discontinued, the government can resume the grant. In the line of A's heirs, the property came into the hands of X. X sold the property to Z. Subsequently he sued to recover the property from Z. It was held that X had no transferable interest for he could only enjoy the property. The alienation was void and so X could recover the property.

(c) Mere right to sue: Suppose A assaults B. B can sue A in tort and recover damages. But can B, instead of bringing a suit himself, transfer to X the right to recover damages from A? He cannot do so. This is because A has only a mere right to sue and such a right is not transferable. A enters into contract with B to buy 100 bales of cotton. B commits defaults and does not deliver the cotton bales. A can sue B in damages for breach of the contract. He cannot, however, transfer this right to any one else. It is only a mere right to sue. Suppose after entering into the contract, A transfers his right under the contract to C. C can enforce the contract. This is because the transfer here is not of a mere right to sue. It is a transfer of subsisting rights under a contract. Such a right is called an "actionable claim". It is not a mere right to sue and is transferable.

The question is whether the subject matter of transfer is a property with incidental remedy for its recovery or is a bare right to bring an action either at law or in equity. In India there is conflict of decisions on the issue that whether mesne profit is transferable or not.In *Sankarappa* v. *Khatumbi*,[6] there was a sale of property along with the right to recover past mesne profts. It was contended that since the right to recover mesne profits was only a right to sue and so could not be legally transferred. The contention was negatived on the ground that since the property itself was transferred, what was

5. 45 Mad. 620.
6. ILR 56 Bom. 403.

transferred could not be regarded as a bare right to sue. But the Madras High Court in *Seetamma* v. *Venkataramanayya*[7] held that a right to past mesne profits could not be transferred even along with property.

(d) Public offices or salary of a public officer: A public office or salary of a public officer cannot be transferred. (The Code of Civil Procedure defines who is a 'public officer'. The Indian Penal Code defines a ' public servant'). Since the public are interested in the performance of the duties of a public officer, such offices as well as the salaries attached to them are made inalienable.

(e) Right to future maintenance: A Hindu widow's right to maintenance is purely a personal right and cannot be transferred. Arrears of maintenance that have accrued due can be assigned. But the right to future maintenance is not alienable even if it is charged on inalienable property. A is deserted by her husband B. She is entitled to receive maintenance from B who agrees to pay her Rs. 1000 a year for her maintenance. Can A recover in 1978 the maintenance amount which will be payable to her in 1979. She cannot anticipate the future maintenance and transfer it to some one else in advance. This is forbidden by the law. Suppose B has defaulted in payment of the maintenance due for 1976. The arrears that have accrued due in this way can be alienated. A can transfer to C her accrued claim to past maintenance which has fallen in arrears. Then the transferee C can sue B and recover the amount for the transfer is perfectly valid. What the law forbids is only the alienation of a claim to future maintenance.

Rule against inalienability

To give effect to the principle that generally all property should be transferable, the law invalidates any conditions in restraint of alienation that may be attached to a transfer by the transferor. Suppose A who is the owner of a house transfers it to B with a condition that B should not alienate the property. This condition is illegal and void. B can ignore it and transfer the property to whomsoever he pleases. The court would uphold his transfer.

Suppose in the illustration given above, instead of putting an absolute restraint, the condition imposed only a partial restraint that B should not alienate the property to X but may alienate it to any one else. Strictly speaking, such a restraint also should be invalidated. Courts, however, have not taken this legalistic view and have given effect to such partial restraints on the ground that the right of alienation of B is not substantially taken away since he is free to alienate to any one other than X. The test thus propounded is whether the power of alienation is taken away substantially. If a condition involves a substantial privation of the right of alienation, it is

7. ILR 38 Mad. 308.

treated virtually as a total restraint and is void. If on the other hand, it is only a partial restraint upon the alienatory power, it can be given effect to.

In *Re Rosher*,[8] the condition was that the transferee should not during the lifetime of A, the transferor's wife, sell the property to any one other than A who was to have an option to buy the property at one-fifth of its market value. It was held that the restraint involved in this condition was substantially a total restraint and was void.

Exceptions to the rule in the case of leases: There is an exception to the rule against inalienability. Suppose A leases *Blackacre* to B with a condition that B should not alienate his interest. This condition is valid provided A also stipulates for a right for re-entry in the event of B committing a breach of that condition. In such a case when B assigns his leasehold interest to G, A can forfeit the lease and re-enter upon the property. This exception is thus recognized in the interest of landlords who do not want their tenants to assign the lease or to sublet the property.

General Principles of Transfer

Definition of transfer

The Transfer of Property Act, 1882, deals with transfers in which the transferor and the transferee are living persons. In other words, it is concerned with transfers *inter vivos* (between living persons).

Capacity to transfer

A person has capacity to transfer property when he is competent to enter into a contract and he has title to the particular interest in the property, which he proposes to transfer.[9] Contractual competency is governed by the provisions of the Indian Contract Act, 1872. So far as the second requirement, viz. ownership of the right, which is to be transferred, is concerned, the general rule is *Nemo dat quod non habet* (no person can give that which he has not). But to this general rule there are important exceptions. One exception is the doctrine of holding out.

(a) Doctrine of holding out

Suppose A is the real owner of the property but he allows B to hold himself out to the world as the owner. Then if B as such ostensible owner transfers the property to C who is a *bonafide* transferee for consideration and without notice of A's title, C acquires a good title to the property. The ostensible owner B, though he himself did not have a valid title, is able to transfer a good title to C.

8. (1884) 26 Ch. 801.
9. S. 7 of The Transfer of Property Act, 1882.

The doctrine of holding out has been embodied in section 41 of the Transfer of Property Act.

(b) Doctrine of feeding the grant by estoppel

Suppose A, who has no title to *Blackacre*, professes to transfer it to B for consideration. Since A has no title, B can acquire none from him although B made a representation to the effect that he has a good title. Subsequently, let us suppose that A purchases *Blackacre* from the true owner. Can A retain *Blackacre* or is he bound to hand it over to B? The representation previously made by A that he is the owner and can transfer ownership to B gives rise to the rule of estoppel, which precludes him from denying that representation now. This rule of estoppel was no doubt ineffective to start with, for there was nothing on which it could operate at the time of the transfer. As soon as A subsequently acquire title to *Blackacre*, the rule of estoppel can operate upon that title. It feeds this subsequently acquired title of A to the empty grant, which A had previously made. When that empty grant is fed with this title by the rule of estoppel, it becomes perfect. Thus B acquires a good title eventually although at the time when he purchased he could not receive a good title to the property. The defect in his title arising from the transferor not having a title is cured by the doctrine of feeding the grant by estoppel. B has the option of relying upon this doctrine. If he does not want to invoke this doctrine he can, of course, recover damages for the misrepresentation made by A. In fact, if before A subsequently acquired a good title, B had already chosen to recover damages, he cannot fall back upon the doctrine of feeding the grant. It is only if he stays his hand, keeps the transaction alive, waits for the eventuality of A's subsequently acquiring title and exercises his option to invoke this doctrine that B can perfect his title to the property under the doctrine of feeding the grant. The doctrine has been embodied in section 43 of the Transfer of Property Act. The Supreme Court applied the said doctrine to a case wherein a person after getting a preliminary decree in a partition suit but before getting the final decree executed a gift deed of the property he was expecting in the said partition suit. The Court upheld the validity of the gift deed on the basis of the above doctrine.[10]

Operation of transfer

(a) Doctrine of election: When the owner transfers his property to another without any reservations, the entire interest in that property, which the owner had, would pass to the transferee. This principle is stated in section 8 of the Transfer of Property Act.

Some transfers give rise to complications. Suppose A, the owner, transfers his property *Blackacre* to B, but as part of the same transfer he (A)

10. *Renu Devi* v. *Mahendra Singh* AIR 2003 SC 1608 (Supp 1).

transfers B's property *Whiteacre* to C, can B now say: "I will keep *Blackacre* because its owner A has transferred it to me. I will also keep *Whiteacre* because it is already my property and A had no right to transfer it to C". This is obviously inequitable. So the doctrine of election is propounded to govern such transfers. Under this doctrine B is told: "You can keep *Blackacre* provided you give effect to the entire transfer, *i.e.*, if you allow C to take *Whiteacre*. You cannot take one property under the instrument and another property against the instrument. This doctrine of election is embodied in section 35 of the transfer of property Act, 1882. You cannot approbate and reprobate. So confirm the entire transfer, accepts it *in toto*, take *Blackacre* and give *Whiteacre* to C. If you want to keep *Whiteacre* you will forfeit *Blackacre*. So elect between the two benefits." B can then elect, *i.e.*, choose either under the instrument or against it. He chooses under it if he gives up *Whiteacre* to C. He elects against the instrument when he retains *Whiteacre*, his own property. He is then called refractory donee.

When the transferee elects against the instrument, he cannot keep the property transferred to him even if he is prepared to pay compensation to the disappointed donee. He forfeits the property transferred to him.

When the refractory donee has elected against the transfer, the property intended to be transferred to him reverts to the transferor. The transferor need not pay compensation to the disappointed donee except when the transfer to the disappointed donee was made for consideration. When the election of the refractory donee was made after the death of the transferor, the property reverts to the representatives of the tranferor. Such representatives are bound to make compensation to the disappointed donee even if the transfer was gratuitous. The compensation cannot be recovered personally against the transferor or his representative. A charge is imposed upon the property, which has reverted, to make good to the disappointed donee the amount of the value of the property attempted to be transferred to him.

Transfers in fraud of creditors

Sometimes the operation of a transfer is affected by the illegal purpose of which it is made. Of such purposes the one most frequently encountered is that of defeating and delaying unsecured creditors. An unsecured creditor has only the remedy of obtaining a money decree from court and then proceeding to realize that decree by selling through court the property of the judgment-debtor. For defeating the creditors, the debtor transfers his property to someone in whom he has confidence, usually a near relative. Then, when the creditor proceeds to execute his decree against the property this transferee intervenes, claims the property to be his and delays the proceedings. If his claim is successful, the creditor may be defeated in his attempts to realize the decree.

Such a transfer may be a purely nominal transfer, sometimes called a *benami* transfer. In such a case the intention of the transferor is not to transfer the property at all. It is only to keep it nominally in the name of someone else until the crisis blows over. It is in fact a fictitious transfer. Such a transfer can be completely ignored by the creditor. The creditor can proceed against the property just as though there was no transfer at all, for in the eyes of the law it was no transfer at all being a sham transaction. But if the transfer is, as between the parties to it, intended to be operative, if it is a genuine transfer though one intended to defeat and delays the creditors, section 53 of the Transfer of Property Act becomes applicable.

The question that frequently arises before the courts is whether the transfer was one intended to defeat and delay the creditor. Suppose the transfer is of the entire property of the debtor and is made in favour of only one creditor for discharging his debt. Obviously the other creditors would be defeated and this is known to the transferee also. Still section 53 does not apply to this case because so long as the debt of even one creditor is satisfied, how can we say that the creditors are defeated? Defeating or delaying "creditors" must be understood to mean "all the creditors as a body". That is, of the transfer is intended to take away the property from the whole body of creditors and is made to a non-creditor, and then the creditors can invoke section 53. There is nothing wrong in a vigilant creditor or favoured creditor trying to realize his debt and obtaining from the debtor a transfer of property for that purpose. This was decided by the Privy Council in Musahar *Sahu* v. *Hakim Lal.*[11] A debtor may pay his creditor in any order that he chooses; he may pay one creditor he chooses and leave others unpaid. The other creditors cannot invoke section 53. This does not mean that the other creditors are without a remedy altogether. The remedy is, however, to file within three months of the transfer a petition for adjudicating the debtor an insolvent. When the debtor is adjudged insolvent in the insolvency proceedings, the transfer made by the creditor which is in the nature of a fraudulent preference of one creditor over the other creditors, may be set aside. This is an efficacious remedy but the creditors have to be prompt in filing the petition for insolvency against the debtor.

When it is established that the transferor had the intention of defeating or delaying the creditors and the transferee cannot claim any special protection on the ground that he is a transferee in good faith and for consideration, the creditors can avoid the transfer. If each such creditor is allowed to bring a separate suit for this purpose, it would result in harassment of the debtor. So section 53 provides that a suit to set aside the fraudulent transfer should be a representative suit on behalf of all the creditors. Under the Code of Civil Procedure, such suits can be filed after

11. 43 Cal. 521 (P.C.).

obtaining the permission of the court under Order 1, Rule 8 of that Code. A representative suit achieves the object of the creditors and at the same time protects the debtor against undue harassment.

Doctrine of *lis pendens*

Section 52 of the Transfer of Property Act prohibits transfer of immovable property during the pendency of a suit relating to that property without the leave of the court. The operation of a transfer is affected by *lis pendens, i.e.*, pendency of legal proceedings. Suppose A brings a suit against B for recovery of possession and declaration of title to certain immovable property. Pending this suit, B transfers the property to C. A proceeds with the suit and obtains a decree against B. When he tries to take possession, C objects and says that he was not a party to the suit and so is not bound by the decree. If this objection is well founded, it means A will have to file a suit over again this time against C. He may again be foiled by C in his turn selling the property to D while the suit is pending. Obviously the law cannot allow its proceedings to be rendered futile in this way. So it has enunciated the doctrine of *lis pendens.* According to this doctrine the transfer to C *pendente lite,* (while the suit is pending), cannot prevail over the rights declared by the court. The transferee *pendente lite* is as much bound by the decree as the transferor himself though the transferee was not himself made a party to the suit. The law does not prohibit a transfer of the property being made simply because there is a pending *lis* but it requires that the transfer should be subservient to such rights as may be declared by the court. The transferee takes the property subject to whatever decree the court may pass in that suit even in his absence so long as proceedings in court are not collusive. It is immaterial that he was not aware of the existence of the pending *lis.* This is the doctrine of *lis pendens.* It has been embodied in section 52 of the Transfer of Property Act, 1882. The section was not as clear as it should have been and so it has been completely recast by the amending Act of 1929.

Doctrine of part performance

A title to property cannot be acquired without complying with the formalities prescribed by law. Still the law sometimes clothes a person with certain rights (though short of a perfect title), even in the absence of these formalities, in order to meet the equities of a situation. The doctrine of part performance embodied in section 53A of the Transfer of Property Act is an illustration of this.

Suppose a person has in his favour an agreement for a transfer, but there is no registered transfer deed in his favour. The transferor will not be allowed to evict the transferee from the land on the basis of his legal title, if

certain conditions are satisfied. Under section 53 A, introduced by the amending Act of 1929, the following conditions should be satisfied:

(1) The contract should be in writing signed by the party sought to be bound.

(2) The transferee should take possession in furtherance of the contract

(3) If the transferee was in possession even prior to the contract, he should continue in possession and also do some other act in furtherance of the contract.

When these conditions are fulfilled, the transferor will not be allowed to evict the transferee from the property. The equity is a passive equity because it enables the transferee to defend his possession against the onslaughts of the transferor.

So we can see that the equitable doctrine of part- performance was evolved to protect a *bonafide* purchaser for value who was willing to perform his part. The Supreme Court in one of its detailed judgment restated the evolution and development of the law.[12] In this case, C was claiming possession from A, the original owner with whom he had not entered into an agreement for sale. He had entered in to agreement for sale with B who did not possess any title and had no right to sell or right to convey any title. Since the proposed purchaser had no agreement with the owner and hence no privity of contract between the owner and the purchaser. The Court held that in view of the peculiar facts and circumstances of the case, the doctrine of part performance had no application. In India the people, particularly the villagers, are largely illiterate. They very much need the protection of the equitable doctrine of part performance. So this doctrine was introduced into India by section 53A of the Transfer of Property Act.

Rule against perpetuities

The rule against perpetuities fixes the maximum period of time for which vesting of property can be postponed. If a future estate is granted in such a way that it may possibly vest beyond that period, then it is invalid from the very beginning. We do not wait to see whether actually it vests within the maximum permissible time limit allowed by the law. On the date of the transfer, if we can say that there is a possibility of vesting taking place outside the maximum period (called perpetuity period), the transfer fails so far as this remote limitation is concerned. The rule against perpetuities fixes the perpetuity period. It is contained in section 14 of the Transfer of Property Act. It fixes the perpetuity period as follows: life (or lives) in existence at the time of the transfer + actual minority of the then unborn ultimate transferee. Actual period of gestation may also be added.

12. *Rambhau Namdeo Gaire* v. *Narayan Bapuji Dhotra* (2004) 8 SCC 614.

The utmost limits of the perpetuity period in India would be observable in the following transfer:

> To the child (then *in utero, i.e.*, in the womb) of A for life, then, to B's son at 18.

B's son may be in the womb at the death of A's child. So the maximum period of postponement of vesting would be the period of gestation of A's child + life of A's child + period of gestation of B's child + 18 years.

Conditions infringing the rule against perpetuities

Conditions that infringe the rule against perpetuities are void. If a gift over is void for remoteness, the prior gift becomes indefeasible. An interest, which is to take effect upon an event too remote, is ineffectual.

Doctrine of restrictive covenants (Rule in *Tulk* v. *Moxhay*)

Upon the sale of land it often becomes desirable to impose conditions restrictive of the enjoyment of the land by the purchaser. These restrictions are intended to preserve the general character and amenities of other land reserved by the covenantee. Thus, for instance, the purchaser may be required to enter into a covenant to keep his land vacant uncovered with buildings or not to use any house that may be erected on it as a shop. Such a covenant is called a negative or restrictive covenant. It restrains the covenantor in putting his land to certain specified uses. It does not compel him to enjoy the land in any particular manner. A covenant, however, may also be positive or affirmative. A covenant to dig a well on the land for the supply of water for the covenantee's dwelling house in the neighborhood or to lay out money in maintaining a road is a positive covenant. Positive covenants invariably involve the expenditure of money on the land and their enforcement necessitates compelling the covenanter to put his hand into his pocket.

The rule as to restrictive covenants was propounded in the leading case of *Tulk* v. *Moxhay*.[13] The facts of the case were as follows: the plaintiff was the owner of a vacant site in Leicester Square as well as of several houses forming the square. He sold the site by a deed, which contained a covenant that the vendee, his heirs and assignees would keep the site in its then form as a square garden and pleasure ground in an open state, uncovered with buildings. The land after several intermediate purchases passed to the defendant who desired to build on it although he had notice of the original covenant. The plaintiff sued for an injunction to restrain him. It was held that the covenant was in substance negative and could be enforced against the defendant. Lord Cottenham granted the injunction sought and observed

13. (1848) 2 Phill 774.

as follows:

> "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed..... If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different position from the party from whom he purchased".

Scope of the rule in *Tulk* v. *Moxhay*

The rule in *Tulk* v. *Moxhay,* as interpreted and developed by later decisions may be stated thus: "Anyone coming to the land with notice actual or constructive of a covenant entered into by some previous owner of the land, restricting the use to be made of the land, will be prohibited from doing anything in breach of that covenant".[14]

The Transfer of Property Act has embodied in section 40 the rule as to restrictive covenants. It provides that as between the immediate parties both positive and negative covenants are enforceable when the covenant is made for the benefit of other adjoining land of the covenantee. When land burdened with a negative covenant is transferred, the covenant may be enforced against the transferee unless he is a transferee for consideration and without notice. The distinction between them and easements consists in that a restrictive covenant binds only purchasers with notice whereas an easement is binding even on transferees without notice.

Mellish, L J., observes in *Leech* v. *Schweder*,[15] "Though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the Court of Equity says that if a purchaser has taken the land with notice of that contract, it is contrary to equity that he should take advantage of that rule of law to violate that covenant". Negative covenants for this reason are called Equitable Easements.

Other restrictions on enjoyment

When a transfer creates an interest absolutely in favour of a person, his right of enjoyment cannot be restricted except as provided by the rule in *Tulk* v. *Moxhay.* This is because a restriction on enjoyment is repugnant to an absolute interest. The doctrine is applicable only to restrictive or negative covenants. Positive or affirmative covenants, which require the doing of some positive act on the part of the covenantor, do not run with the land even in equity. That is, though they are binding on the covenanters, they are not enforceable against the assignees of the covenanter's land.

14. Maitland: *Equity*, 2nd ed., p. 163.
15. (1874) 9 Ch. App. 463.

Law of Vendor and Vendee (Sales)

Chapter III of the Transfer of Property Act deals with the sale of immovable property. It is a kind of specific transfer in which the rights and liabilities of the seller and buyer are separately given under the Act. Section 54 defines sales and section 55 lays down rights and liabilities of buyer and seller.

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

Formalities: Immovable property of the value of Rs. 100 and upward can be sold only by a registered instrument. If the value is less than Rs. 100, the sale can be made either by a registered instrument, or by delivery of possession. A has leased the land to B and B is in possession. A sells the property to C for Rs. 50. Here a registered instrument is required for A cannot deliver possession.

Rights and duties of seller in the absence of contract to the contrary

Before sale deed is executed: The seller has to disclose material latent defects of the property which cannot be found out by mere inspection of the property. He has to produce title deeds, answer questions as to the title to the property and show a marketable title. He has to execute a conveyance on payment of the price. He has the right to take the rents till the ownership passes to the buyer.

After sale deed is executed and ownership is transferred: The seller should deliver possession to the buyer. He has to pay the taxes on the property up to the date of sale. He has to discharge the encumbrances when the property is sold free from encumbrances. He has to give covenant for title guaranteeing that he has the interest which he professes to sell and that he has power to transfer it. He has to deliver title deeds when he does not retain any part of the property comprised in those documents and the whole of the purchase-money has been paid. When part of the purchase-money remains unpaid, the seller has a charge on the property for recovering the unpaid price. This is called a seller's charge for unpaid purchase-money.

In a case decided by the Supreme Court, clause (6) (b) of section 55 came up for interpretation in deciding the refund of earnest money with interest.[16] In this case the parties had entered in to an agreement to sell immovable property and a sum of Rs. 38 lakhs was paid as deposit or earnest money. The agreement specifically mentioned that if for any reason the agreement is cancelled "the seller shall return to the purchaser the earnest money with interest at 21% per annum". The agreement was dated

16. *Videocon Properties Ltd* v. *Dr. Bhalchandra Laboratories* (2004) 3 SCC 711.

13.05.1994. But sellers could not complete the sale for five years. Ultimately the purchasers had to cancel the agreement on 27. 09. 1999. The sellers returned Rs. 38 lakhs but disputed the claim for interest thereon.

The purchaser filed a suit in original side of the Bombay High Court claiming a huge sum as interest on Rs. 38 lakhs from 1994 till payment. In the opinion of the High Court, section 55 (6) (b) makes a distinction between purchase money and earnest money and held that interest is payable on earnest money but not on purchase money. On appeal the Supreme Court held that interest is payable on entire sum of Rs. 38 lakhs as the sale could not be completed due to delay and other lapses on the part of the sellers. The terms of agreement clearly show that Rs. 38 lakhs was paid as per purchase money as advance part payment duly covered by section 55(6)(b).

Rights and duties of buyer in the absence of contract to the contrary

Before purchase is complete: The buyer should disclose facts materially increasing the value of the property and relating to the vendor's title. Suppose A is selling a field. B the buyer knows that there is a coalmine underneath the land but A does not know it. Is B bound to disclose the fact to A? No, because it does not relate to the title of the vendor. But suppose A is thinking that he has a life-estate in the property while B knows that A has an absolute interest. The B should disclose the fact for it relates to A's title.

The buyer should pay the price at the proper time and tender the conveyance for execution by the seller.

At the time of the contract, the buyer usually pays earnest money to show his earnestness to complete the sale. If the transaction fails through no fault of the buyer, he is entitled to get back the earnest money and he can claim a charge on the property. But if it fails through owing to the buyer's default, earnest money may be forfeited by the seller. If the buyer has paid the price or an installment of it but the transaction fails, he can get back the amount. He can claim a charge for this amount if he can prove that there was no default on his part. This right of the buyer is called the buyer's charge for prepaid price.

After purchase is complete: The buyer has to bear the loss arising from the destruction and depreciation of the value of the property. He has to pay the public charges. He is entitled to the rents and profits. He has to pay up the encumbrances of the property is purchased subject to encumbrances.

Cancellation of sale deed

An old lady sold a small piece of land, which was a homestead by a registered sale-deed. Her daughters filed a suit for cancellation of sale deed.

The suit was dismissed. But on appeal the suit was decreed. The vendee had already constructed a house and was living in it. He came in appeal to the Supreme Court. The Supreme Court did not see any justification to maintain the decision of the appeal court. It set aside the order, dismissed the suit, admitted the appeal but directed the appellant to pay a sum of Rs. 10000 over and above what was already paid as price of land. The said direction was given to maintain the possession of the vendee and to do complete justice to the parties in view of peculiar facts and circumstances of the case and added that the order be not taken as a precedent for any future reference.[17]

Gifts

Definition: In a gift, property is transferred without any consideration. It is complete when it is accepted by or on behalf of the donee.

Formalities: A gift of immovable property can be effected only by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. The gift is complete when it is accepted by the donee or on his behalf. The aceptance should be during the life time of the donor. If the document is executed and the donee accepts the gift, even if the donor dies, the document may be registered. The donor cannot revoke the gift after acceptance even if registration of the document has not been effected. Registration is a ministerial act. Even if the document is registered, the donor can revoke the gift before it is accepted by the donee. So it is acceptance that completes the gift.

Gift of immovable properties to a minor

The law on gifts is contained in Chapter VII of Transfer of Property Act from sections 122 to 129. Gift of immovable property to a minor is of crucial importance since the element of acceptance of gift cannot be done at the instance of the minor. When a gift is made to a child, generally there is presumption of its acceptance because express acceptance in his case is not possible and only an implied acceptance can be expected. Section 126 permits the donor to revoke the gift only in extreme circumstances as the section expressly mentions, " save as aforesaid, a gift cannot be revoked". In *K. Balakrishnan* v. *K. Kamalam* [18] the Supreme Court examined the issue as to whether a minor can be held to have legally accepted the property gifted to him and the said gift deed was irrevocable or not. The Court held, "A minor donee, who can be said to be in law not competent to contract under Section 11 of the Contract Act is, however, competent to accept a non-onerous gift."

17. *kotakisahu* v. *Laxmi Devi* AIR 2004 SC 3681.
18. (2004) 1 SCC 581.

The Court also referred to the definition of gift in section 122 of the Transfer of Property Act especially to the words *accepted on behalf of the donee.* Coming to the facts of the case the court presumed that since the gift deed was executed by the mother of the donee of her property in the presence of the father of the donee, his natural guardian the same was accepted by them on his behalf.

Revocation of gift: A gift may be revoked on the ground of undue influence, fraud, misrepresentation or mutual mistake. It may be made revocable on the happening of a subsequent event not depending upon the will of the donor.

A father executed a registered gift deed giving a part of his property including a house to his married daughters and handed over possession of the house to them. After nearly five years, he and his associates asked the daughters to vacate the property and tried to trespass into the property. The daughters filed a civil suit seeking relief of restraining father and his associates from interfering with their peaceful possession and enjoyment of suit property in any way by permanent injunction. The father denied having executed any gift deed. He alleged that his son in law by fraud and misrepresentation got his signatures on some document as a witness to a purported sale deed to buy some property. He also took the plea that he was a member of a joint Hindu family and was not competent to execute a gift deed without his son's knowledge and consent. The trial court dismissed the suit of the daughters.

When the matter finally reached the Supreme Court in appeal in 1996, the court reappraised the evidence led by the parties and concluded the matter by following observations:[19]

> It is held that the respondent had the capacity to make a gift of a reasonable extent for ancestral immovable property in favour of his daughters. The gift was not vitiated by fraud or misrepresentation. The appellants are held to be the absolute owners of the suit property and the respondent is injuncted from interfering with the peaceful possession and enjoyment of the suit property by the appellant perpetually.

In this case the daughters were in possession since 1985. In 1990 the father changed his mind and asked them to vacate. The daughters were forced to seek justice, which they got from the Supreme Court. They were subjected to unnecessary harassment and face expensive litigation from the civil court to the Supreme Court. The court took the bold step to interfere with the concurrent findings of all courts below and set aside the orders passed by them.

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19. *R. Kuppayee* v. *Raja Gounder* AIR 2004 SC 1248.

But in a case decided by the Rajasthan High Court a gift deed executed by an illiterate agricultural land holder giving all his agricultural land to a person not related to him and ignoring his own daughters was held to have been executed under fraud and undue influence of the donee and cancellation of the said gift deed by the donor was held to be proper.[20] In this case the donee was the son of donor's advocate who was in position to dominate the will of the donor, an illiterate client. The advocate showed his son to be the adopted son of his clients and got the gift deed executed under undue influence by the fraud. The court took all these circumstances into account and ensured justice to a poor man.

The Punjab and Haryana High Court held that the gift deed executed by a grand father in favour of his minor grandsons where his son who is the father of his grandsons put his thumb impression as witness, the gift is deemed to have been accepted by donees' guardian. This was held to be a valid acceptance of the gift.[21]

The nephew of an old and illiterate person by practicing fraud got a gift deed executed which was cancelled at the instance of the donor. The Allahabad High Court upheld the cancellation and declined to interfere and dismissed the appeal by donee.[22]

But the Calcutta High Court took a different view in a similar case where the widow had executed a deed of gift giving some land to the domestic servant for whom she and her late husband had love and affection because of his work and behavior. The donee accepted the gift. The gift deed was attested by the scribe and two witnesses. The deed was signed by the donor. There was neither coercion nor undue influence. The Court held that the deed could not be revoked at the instance of the sons of the widow.[23]

Universal donee: Where the gift is of the whole property of the donor, the donee is called a universal donee. Such a donee has to pay the donor's liabilities to the extent of the property gifted.

Exchange

Definition: A mutual transfer of the ownership of one property for the ownership of another, neither property nor both properties being money only, is called an exchange.

Formalities: The formalities of a sale are applicable to an exchange.

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20. *Vijendra Singh* v. *Kashiram* AIR 2004 Raj. 196.
21. *Gurjant Singh* v. *Surjit Singh* AIR 2004 P&H 257.
22. *Girraj Prasad* v. *Triveni Devi* AIR 2004 All 348.
23. *Balaichandra Parni* v. *Durgh Bala Dasi* AIR 2004 Cal. 276.

Rights and duties: As to that which he gives a party to an exchange has the rights and duties of a seller and as to that which he takes he has the rights and duties of a buyer.

Law of Landlord and Tenant

Lease defined: A lease is a transfer of a right to enjoy the property in consideration of a price (called premium) or a rent which may consist of money, a share of crops, service or any other thing of value to be rendered periodically by the transferee to the transferor.

Kinds of tenancy

(1) Perpetual lease.

(2) Lease for a term: *e.g.*, for 10 years.

(3) Periodic lease: *i.e.*, monthly or yearly lease. A lease for an agricultural or manufacturing purpose is presumed to be a yearly lease. A lease for any other purpose is presumed to be a monthly lease.

(4) Tenancy at will: In this either party may put an end to the lease at any time.

(5) Tenancy by holding over: When a lease for a term comes to an end, if the tenant continues in possession and the lessor has received rent or otherwise agrees to his continuing in possession, the lease is renewed, in the absence of a contract to the contrary. The renewed lease is periodic lease. It is yearly if the lease is for agricultural or manufacturing purposes and monthly if the lease if for any other purpose.

Formalities: A lease should be executed by both the lessor and the lessee. If the lease is from year to year, or for a term exceeding one year, or reserves a yearly rent (*i.e.*, as so much per year) a registered instrument is necessary. Other leases may be made either by a registered instrument or by delivery of possession. These formalities do not apply to a lease of agricultural land unless the state government makes them applicable by notification in the official gazette.

Rights and duties of landlord

The rights and duties of the lessor, in the absence of a contract to the contrary, are the following:

(1) Lessor should disclose latent defects of the property.

(2) He is bound to deliver possession at the lessee's request.

(3) He should see that the lessee has quiet enjoyment during the term of the lease. This is called the lessor's covenant for quiet enjoyment. This will protect the lessee against the acts of the lessor and of persons

claiming under him and even of persons claiming to have a paramount title (*i.e.*, a title superior to that of the lessor). It does not protect the lessee against the acts of trespassers for the lessee is expected to protect himself against trespasser by taking suitable action against them.

In a case where the landlord had offered the shop after renovation to the old tenant on a condition precedent of an enhanced rent enhanced by him unilaterally and arbitrarily, it was held contrary to the provisions of the Andhra Pradesh Buildings (Lease, Rent and eviction) Control Act, 1960.[24]

Rights and duties of tenant

The rights and duties of the lessee, in the absence of a contract to the contrary, are as follows:

(1) If the property is destroyed by act of God (flood, tempest, fire, *etc.*) or violence of a mob or of an army, the lessee may put an end to the lease.

(2) If the lessor does not make the repairs, which he has to make, the lessee may make them himself and deduct the expenses with interest from the rent or recover such expenses otherwise.

(3) If the lessor fails to pay the tax, the lessee may pay it and deduct it with interest from the rent or otherwise recover it.

(4) He can remove all things attached by him to the property when the lease has terminated. He should remove them before he leaves the property. Such things are called tenant's fixtures. Things attached to the property by the landlord himself should not be removed by the tenant. They are landlord's fixtures.

(5) If a periodic lease or tenancy at will has come to an end by notice, the tenant is entitled to the crops, planted or sown by him and growing upon the property at the determination of the lease. This is called the right to emblements.

(6) The lessee may sublease the property or assign his interest.

As for his duties, there is (1) a duty of disclosure of facts in regard to the interest, that is, title of the lessor as to which the lessor has no knowledge but of which the lessee is aware and which materially increases the value of such interest. (2) He should pay the rent at the proper time and place. (3) He should restore the property at the end of the lease in as good a condition as he had received it subject to reasonable wear and tear. (4) He should allow the lessor and his agents to enter upon the property for inspecting its condition. (5) If any encroachments are made, he should inform the lessor. (6) He should not commit any act that could be destructive or permanently injurious to the property or use it for any

24. AIR 1936 Mad. 171 and AIR 1938 All. 23.

purpose for which it was not leased.(7) When the lease determines he should deliver possession to the lessor.

The Supreme Court in *Raichurmatham Prabhakar* v. *Rawatmal Dugar*[25] construed the provisions of section 108 of the Transfer of Property Act, 1882 on the rights and liabilities of lessor and lessee in the light of doctrine of justice, equity and good conscience. The tenant of a shop handed over the vacant possession of his shop under an order of the rent controller to his landlord for demolition, renovation and reconstruction on an undertaking by the landlord that the tenant could re-enter in it after reconstruction. The landlord on reconstruction offered to the tenant the said at a higher rent. The tenant applied for the same to the rent controller after the delay of more than six months. There was some litigation up to the high court on question of limitation whether his application for re- entry was barred by limitation. The high court in revision held that it was not barred. The landlord took the matter in appeal to the Supreme Court.

The Supreme Court held that the application was not time-barred. Applying the doctrine of justice, equity and good conscience, the Court held that the tenant had an implied covenant for peaceful possession and enjoyment of the leased property. On the question of the demand of enhanced rent the Court left the matter to be dealt with by the rent controller keeping in view all the relevant factors such as cost of renovation, reconstruction, *etc.* However, the Court observed as follows:

> "The tenant, when re-enters in to possession, does so under the original tenancy which stands statutorily protected under the Act and he has not been evicted nor held liable to be evicted.. In spite of the building having been repaired, altered, added to or re-erected, the tenant shall re- enter to occupy the premises on the same terms and conditions on which he was occupying the building on the date on which he delivered the possession to the landlord pursuant to the order of the controller. On the tenant's re- entering in to the possession of the building his obligation to pay the same rent which he was paying on the date of delivery of possession by him to the landlord, shall stand revived. If the law permits a revision of rent or fixation of rent afresh, the landlord could be at liberty to invoke that provision and revise the rent consistently with such provisions. But the revision of rent cannot be insisted on by the landlord as a condition precedent to re-entry by the tenant".

Law of Mortgages

Definition of mortgage: A mortgage is the transfer of an interest in

25. (2004) 4 SCC 766.

specific immovable property as security for repayment of a loan advanced or to be advanced or the performance of an engagement which may give rise to a pecuniary liability.

Effect of mortgage: In the case of a simple money debt (*e.g.*, debt on a promissory note), the lender can obtain a decree which can be executed against any property of the debtor. If the debtor alienates his property or becomes an insolvent, the creditor's rights are prejudiced. In the first case there may be no assets against which he can proceed and in the latter he may have to be satisfied with the dividend paid to him by the official receiver. To safeguard his position a lender insists upon security. A mortgage is a form of security. The property mortgaged is earmarked for the creditor. There is a remedy against the property as distinguished from the personal remedy. This protects the interests of the creditor.

Kinds of mortgage

1. Simple mortgage: This is non-possessory. The mortgagor transfers to the mortgagee the right to bring the property to sale through court for realizing the debt. This is the remedy of judicial sale. There is also a personal covenant by the mortgagor. So if the property proves insufficient, the creditor can proceed against the mortgagor personally. The personal decree can be executed against other property of the mortgagor. Both remedies can no doubt be pursued concurrently. But the court will stay the suit on the personal covenant until the mortgagor has exhausted his remedy against the property. So usually a petition for passing a personal decree is filed in execution after the mortgage decree for sale of the mortgaged property has been executed and it is found that the decretal dues are not satisfied.

A simple mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. The period of limitation for a suit on the personal covenant is six years and for a suit for sale of mortgaged property is twelve years from the date when the money falls due.

Charge: A charge arises when property without being transferred is made security for the payment of money to another. The remedy of a charge-holder is the remedy of judicial sale. There is no personal covenant. A charge, unlike a mortgage, can arise even by operation of law, *e.g.*, vendor's charge for unpaid purchase money. A charge is not binding on transferees for value without notice of the charge. An exception to this is the vendee's charge for earnest money and for prepaid sale consideration.

2. Mortgage by conditional sale: In this the property is ostensibly sold to the mortgagee. To this ostensible sale one or other of the following conditions is attached:

(1) If the money borrowed is not paid on a certain date the sale shall become absolute.

(2) If such payment is made the sale shall become void.

(3) If such payment is made the property should be re-transferred.

In mortgages effected on or after 1 April, 1930 the condition mentioned above should be incorporated in the deed of ostensible sale itself. If it is in a separate document, though contemporaneous with the ostensible sale, the transfer cannot be regarded as a mortgage.

This type of mortgage should be distinguished from a real sale with a condition for re-transfer. If it is only a mortgage the date fixed for payment is not of the essence of the transaction. Payment may be made and a re-transfer obtained even after the due date. If, on the other hand, it is a real sale, the condition as to payment on a certain date would be strictly enforced. If the amount is not repaid as agreed, the seller cannot obtain a re transfer. Whether it is an ostensible sale or a real sale will depend upon the intention of the parties. The usual way of ascertaining this intention is to consider the market value of the property on the date of the transaction. If the market value was approximately equal to the amount advanced, it is probably a real sale. If it is very much more than what is advanced, it is probably a mortgage and not a sale.

The remedy of the mortgagee by conditional sale is foreclosure. Foreclosure is an order by court to the effect that the mortgagor shall be debarred from redeeming the property. This remedy can be pursued within twelve years from the mortgage money becoming due. Without a foreclosure order the mortgagee cannot become the owner of the property. The condition in the mortgage that the ostensible sale would operate as an absolute sale if there is default in payment enables the mortgagee to seek a foreclosure order from the court and cannot make him the owner of the property straightway without such an order. Before passing a foreclosure order the court gives time to the mortgagor to redeem. A preliminary decree is first made giving six months time. The time may be extended by the order of the court. When the money is not paid as directed by the court a final foreclosure decree is passed. This makes the mortgagee the owner of the property.

3. ***Usufructuary mortgage:*** This is a possessory mortgage. Possession is delivered to the mortgagee. The mortgagee can retain such possession until payment of the mortgage-money. He can receive the income from the property. The agreement of the parties may provide that the income should be appropriated in lieu of interest or in payment of the mortgage-money or partly in lieu of interest and partly in payment of the mortgage-money. If the agreement is that the income should be taken by the mortgagee in lieu of interest and defined portions of the principal, the mortgagee need not

render any account of the receipts from the property. In all other cases he has to maintain an account of the income and expenditure. He cannot get rid of this liability even by a contract with the mortgagor. A mortgagee in possession has to manage the property like a prudent owner, collecting the rents, *etc.* He should restore possession to the mortgagor when he has recouped his mortgage-money from the net income according to the agreement between the parties.

When the agreement is that only a part of the mortgage-money is to be recovered from the income, the mortgagee usually fixes a date for payment of the balance by the mortgagor. The mortgagor on or after that date should pay the balance or deposit it in court and then the mortgagee would be liable to restore possession to the mortgagor. If the mortgagee does not do so, from that date he will be treated as a trespasser and will be liable to be evicted and has also to account for *mense* profits, *i.e.*, income which he could have received, even if he had not actually received it.

The usufructuary mortgagor need not go to court for he is in possession of the property and can set off the net income against his dues. Where the mortgagor fails to deliver possession of the property, then the mortgagee has the remedy of suing for possession. Further, the mortgagee in such a case can immediately sue for the mortgage money. Though there is no personal covenant, the mortgagor becomes personally liable if he fails to deliver possession to the mortgagee. This liability arises also when the mortgagor or some one claiming by a superior title dispossesses the mortgagee.

*4. **English mortgage:*** In this the mortgagor transfers the mortgaged property absolutely to the mortgagee. He binds himself to repay the mortgage-money on a certain date. Upon such payment, it is provided that the property is to be transferred to the mortgagor.

In the English mortgage there is a personal covenant. The English mortgagee is entitled to the possession of the property. Since possession brings with it liability to strict accounting, usually the mortgagor is allowed to remain in possession.

The remedy of the English mortgagee is to bring the property to sale. He has also the remedy on the personal covenant which enables him to proceed against other property of the mortgagor not mortgaged to him. Further, he can bring the property to sale without the intervention of the court provided neither the mortgager nor the mortgagee is a Hindu, Muslim or Buddhist.

*5. **Mortgage by deposit of title deeds:*** When a person delivers to a creditor or his agent documents of title relating to immovable property with intent to create a security, a mortgage by deposit of title deeds takes place. This avoids publicity. The transaction can be oral. In this mortgage the

documents of title should be delivered in certain specified towns, *viz.*, Calcutta, Madras, Bombay or any other town notified for that purpose by the state government concerned in the official gazette. Towns of commercial importance like Kanpur, Allahabad, Coimbatore, Madurai, Ahmedabad, Agra, Guntur, *etc.*, have been notified.

Mere delivery of title deeds with intent to create a security is sufficient. Usually, however, a memorandum is taken so that the mortgagor may not afterwards contend that he delivered the documents for some other purpose. Such a memorandum merely stating the fact of deposit as security does not require registration. If, however, it contains the terms of the mortgage transaction, if requires registration. The remedy of the mortgagee by deposit of title deeds is the remedy of judicial sale.

6. Anomalous mortgages: These are usually combinations of the types of mortgages above mentioned. The rights and remedies of the parties depend upon the terms of the transaction.

Persons entitled to redeem

The mortgagor can redeem. Under section 59 A, mortgagor includes a person deriving title from him. So his heirs, lessees, puisne mortgages (*i.e.*, subsequent mortgages), charge-holders, donees and other transferees of the mortgaged property can redeem.

Under section 91 a surety for the payment of the mortgage debt can redeem. So also a creditor of the mortgagor provided he has obtained a decree for sale of the property in a suit for administration of the estate of the debtor.

A person who has no interest in the mortgaged property and has no right to redeem under section 91 is called a mere volunteer. Persons entitled to redeem (other than the mortgagor) can claim the right of subrogation. A volunteer cannot claim subrogation.

Clog on equity of redemption

Definition: A clog on equity of redemption may be defined as a contract forming part of the mortgage and negativing or hampering the contractual or equitable right to redeem. Such contracts need not be canvassed with reference to the question whether they are conscionable or oppressive. They are in law invalid in so far as they clog or interfere with redemption which is of very essence of a mortgage.

In one case the mortgagor executed a deed of usufructuary mortgage and handed over possession of the property to the mortgagee as a security for the loan. The property mortgaged was a homestead. There was a stipulation in the mortgage deed that if the mortgage money is not paid within a period of four month, the mortgagee may have his name mutated.

The High Court of Gauhati held that the condition amounted to a clog on the equity of redemption under section 60 of the Transfer of Property Act, 1882 and was not an out right sale; it did not convey any title to the property in favour of the mortgagee.[26]

Doctrine of subrogation

Subrogation means substitution. The doctrine of subrogation enables a person to stand in the shoes of a creditor whom he has paid off a claim to be entitled to all the remedies open to that creditor in respect of securities held by him. In other words, where the rights of subrogation exist, the discharged incumbrance is treated as kept alive and its benefit transferred to the subrogee, *i.e.*, the person who has paid it off.

Reason for recognition of the doctrine of subrogation: If a person advancing money to pay off an incumbrance is not subrogated to the rights and remedies of the discharged creditor, subsequent incumbrancers gain priority to his detriment. The discharge of a charge on the estate by a tenant for life would operate as a gift to those in remainder unless the discharged incumbrance is preserved and kept on foot for his benefit. The doctrine of subrogation, which obviates such hardships, is founded in great equity.

Legal and conventional subrogation: When the substitution of one creditor for another takes place by agreement or act or parties, the subrogation is designated conventional or consensual. Apart from and independently of agreement between the parties, on principles of equity and justice, a person who discharges a mortgage debt is given, in certain circumstances, the benefit of the security discharged by him. Such substitution of creditors by operation of law is generally known as legal subrogation.

If a person who has an existing interest in the property by virtue of which he is entitled to redeem a mortgage on it, discharges the mortgage, a claim to legal subrogation may be sustained. In such a case no registered instrument is required to confer the right of subrogation. On the other hand where a person who has no interest in the property and so no right to redeem, advances money to the mortgagor for discharging a mortgage, the claim to subrogation can only be based on convention or agreement which is now required to be in writing and registered. Before section 92 was inserted by the amending Act of 1929, a claim to conventional subrogation could be based upon an express agreement and even that should be evidenced by a registered instrument. This is an important change effected by the Act of 1929.

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26. *Serajuddin* v. *Abdul Khalique* AIR 2004 Gau 126.

The last paragraph of section 92 makes it clear that there can be no claim to partial subrogation. That is, a claim to subrogation can be put forward only when the mortgage to which the claim relates has been fully discharged.

In view of the requirement of a registered document for the recognition of a claim to conventional subrogation, the question whether the section is retrospective assumes importance. Now it is an agreed position that section 92 as amended does not apply to transactions concluded before 1 April, 1930, which were the subject matter of suits pending on that date.[27]

"A volunteer" cannot claim subrogation: A volunteer is one who has paid the debt of another without obtaining any assignment of the debt from the creditor and without any agreement for subrogation with the debtor, and without having any rights of his own. When a person has a pre-existing interest in the property, he can redeem and claim legal subrogation. If there is an agreement (which from 1 April, 1930 should be by a registered instrument) for subrogation, he can claim conventional subrogation even though he may have no pre-existing interest in the property. In other cases he is only a volunteer and is not entitled to the equitable right of subrogation for "there is no equity in favour of a volunteer".

Doctrine of priority

When there are successive mortgages in favour of different persons in respect of the same property, questions of priority arise as between the mortgages *inter se.* The property may be insufficient to meet all the incumbrances and so the question as to the order in which the liabilities are to be discharged in such cases assumes great importance. The earlier in time will have priority. But if the earlier mortgagee by fraud, misrepresentation or gross negligence, induced another person to lend on the security of the mortgaged property, he forfeits his priority.

Suppose A mortgages his house to a bank to secure his overdraft to the extent of Rs. 10,000. When his overdraft is only Rs. 3,000, he mortgages the same house to X and borrows Rs. 8,000. Later on his overdraft with the bank rises to Rs. 12,000. The house is sold in enforcement of the bank's mortgage and fetches Rs. 13,000. How should the money be paid?

If X had notice of the mortgage to the bank, the amount should be distributed thus: first to the bank Rs. 10,000 (though part of it was advanced after X's mortgage), then Rs. 3,000 to X. This is because the bank can claim priority for its subsequent advances also when the later mortgagee had notice of its earlier mortgage.

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27. *Lakshmi Amma* v. *Sankaranarayana Menon* AIR 1936 Mad. 171. See also, *Munna Lal* v. *Chunni Lal* AIR 1938 All. 23.

If X had no notice of the bank's mortgage, first to the bank Rs. 3,000, then to X Rs. 8,000, then to bank Rs. 2,000. Here no priority can be claimed by the bank for the subsequent advance.

Doctrine of marshalling

***Principle of Marshalling*:** The doctrine of marshalling is contained in section 81 of the Transfer of Property Act, 1882. The right of marshalling is a right given to the puisne mortgagee for the protection of his junior lien. If one incumbrancer has a security in respect of two properties of the mortgagor, and another mortgagee has a security as to one of the properties only, the two properties will be marshalled so as to throw the first incumbrance, as far as possible, on the property not included in the second security.

A mortgages X and Y to B. Then A mortgages X to C. B wants to proceed against property X. If he does so, C's security would be lost. C is a puisne mortgagee. If the property mortgaged to him is found insufficient or just sufficient to pay a prior mortgage, nothing remains out of it to satisfy his own mortgage. This would work hardship on C. The law, therefore, recognizes the right of marshalling. C can claim this right. When this right is claimed B has to proceed first against the other property mortgaged to him, namely, Y. He has to marshal or arrange his securities in such a way as not to prejudice C. So he will have to proceed first against property Y and then only against property X. This right cannot be exercised by C if other persons have acquired for consideration rights in the other property.

This principle underlying the doctrine is stated in *Aldrich* v. *Cooper*[28] by Lord Chancellor Eldon to be "that it shall not depend upon the will of one creditor to disappoint the another" so that " if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall to take that which, paying him will leave another fund for another creditor".

Rights of the mortgagor

Right of redemption: At any time after the mortgage money has become due, the mortgagor has the right to redeem. On payment of the mortgage-money he should get back his property free from all traces of the mortgage. This is the right of redemption. It is of the essence of a mortgage. It cannot be excluded by a contract to the contrary. It cannot even be impeded or hampered in its exercise. A contract designed to impede redemption is a clog on redemption and is void. This may be illustrated by a few examples:

(1) "The mortgagor alone may redeem not his heirs or assignees." This is void. Even heirs and transferees from the mortgagor may redeem.

28. (1803) 8 Ves. 382; 32 E.R. 402.

(2) "The mortgagor should repay out of his own pocket, without borrowing from others." This is void. The mortgagor can borrow and repay.

(3) "The mortgagor should repay without selling the mortgaged property." This is a clog.

(4) "When the mortgagor repays, he can take back only a part of the property while the remaining property will be retained by the mortgagee as owner." This is a clog.

(5) "If the mortgagor does not repay on the stipulated date, he cannot repay for twelve years thereafter." This is a clog. The mortgagor can repay after the stipulated date ignoring this condition.

(6) "If the mortgagor does not repay on the specified date the mortgage shall be treated as a sale." This is a clog. *Once a mortgage always a mortgage.* A mortgagor cannot be deprived of his right to redeem by a penal clause converting the mortgage into a sale.

By the doctrine of clogs on redemption, the mortgagor's right to redeem is jealously guarded by the courts. The period of limitation for exercising this right is sixty years.

Right of partial redemption: One of several mortgagors can redeem the whole mortgage. He cannot redeem only his share except when the mortgagee has acquired the share of a mortgagor.

A, B & C together mortgage properties X, Y, and Z, belonging to them respectively, for Rs. 15,000. Each property is worth Rs. 10,000. Now B can redeem by paying Rs. 15,000. He can redeem Y by paying Rs. 5,000, his share of the debt. Suppose the mortgagee acquires A's interest in X, say, by transfer or by inheritance. The effect is to wipe out a part of the debt. Since A's share in the entire property mortgaged is 1/3, a third of the debt will be wiped out. The balance due is Rs. 10,000. B may pay Rs. 10,000 and redeem both Y and Z. However, he has also the right of partial redemption in such a case. He can pay Rs. 5,000 and redeem Y alone.

Doctrine of consolidation

Right against consolidation: If the mortgagor has executed more than one mortgage in favour of the same mortgagee, he may redeem *any* of them without being compelled to redeem all at the same time. The mortgagee cannot consolidate the mortgages. He cannot treat all the mortgages as one mortgage and ask the mortgagor to redeem all or none. The right of consolidation can be secured by the mortgagee by means of a contract with the mortgagor. Strictly speaking, such a contract would be a clog as it hampers redemption. A concession, however, is made to the mortgagee in such a case. When the mortgagor has defaulted, he may be obliged to pay up all the mortgages that have fallen due as a condition of being allowed to pay any of them. This right of consolidation enables a mortgagee to compel the

mortgagor to pay up other barred mortgage debts also if the mortgage sought to be redeemed is alive. Consolidation can be claimed only under a contract. A simple money debt cannot be consolidated with a mortgage debt even by contract. Such a contract would be a clog and so void.

Section 61 of the Transfer of Property Act, 1882 which deals with this subject has been remodelled in 1929. The new section is more comprehensive and abolishes consolidation of successive mortgages even over the same property, where there is no express reservation of the right. It is not retrospective in operation and if a claim to consolidation accrued before it came in to force, that right can be asserted in a suit brought after the amending legislation came in to force.[29]

Doctrine of contribution

Contribution among mortgagors: While the mortgagor's right of redemption is a right exercisable against the mortgagee, the right of contribution is one that arises between mortgagors interse. The rule as to contribution is embodied in section 82 of the Transfer of Property Act, 1882. When there are several mortgagors, the burden of the mortgage is to be borne by the properties mortgaged by them in proportion to the values of the properties mortgaged. Suppose A and B mortgage X and Y respectively. The amount borrowed is Rs. 12,000. The value of X is 7,500; and that of Y 15,000. A alone pays the entire debt. He can recover contribution from property Y belonging to B. Since the value of X and that of Y are in the ratio of 1:2, Y should bear 2/3 of the debt. So A can recover Rs. 8,000 by way of contribution from B. This is not a personal liability of B. The amount can be recovered by sale of Y. If the sale does not fetch that amount, B cannot be made liable for the balance. Suppose A alone received the entire mortgage-money. Even then he can sue for contribution in the absence of a contract to the contrary.

There can be no claim to contribution against the owner of the items which have been sold to discharge the mortgage.[30] By means of these doctrines the mortgagor's position is safeguarded *vis-à-vis* the mortgagee and the interests of the mortgagors *inter se* are also adequately protected.

Constitutional Provisions regarding Property

Rent and accommodation control

The scheme of the Indian Constitution proceeds upon a distribution of legislative powers between Parliament and state legislatures. In this scheme

29. *Nacappa Goundan* v. *Samappa Goundan* AIR 1947 Mad. 18.
30. *Hari Raj Singh* v. *Ahmad Uddin* ILR 19 All. 545.

'land tenures' (list II, entry 18) is allotted exclusively to the states. The expression 'land tenures' does not cover the relationship of landlord and tenant in respect of buildings. This is governed by entry 6 in list III, 'Transfer of Property'. This subject is in the concurrent legislative list and state legislature list and state legislatures have assumed jurisdiction over this subject under this entry. Rent control legislation by the states is also traceable to this power. The objects of rent restriction legislation are two-fold: (1) To protect the tenant from eviction except for defined reasons and (2) to protect him from having to pay more than fair rent. Legislation relating to control of rent can be effective only if it also regulates eviction of tenants. The Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 is an illustration of such comprehensive legislation.

Land acquisition

Acquisition and requisition of properties is provided by entry 42 of list III. A public purpose is a pre-condition for the exercise of this power.

Ceiling on land holdings

While the acquisition of "surplus" land is covered by entry 42 of list III, its subsequent distribution amongst landless peasants is governed by entry 18 of list II.

Property as a fundamental right

The Constitution (44th Amendment) Act, 1978 omitted article 19(1) (f), *i.e.*, right to acquire, hold and dispose of property and the sub-heading Right to Property under article 31. The effect of this change is that the Right to Property is no more a fundamental right. A new chapter IV has been inserted in Part XII of the Constitution and the provision in article 31 has been transferred to article 300A. Thus the right to property though a constitutional right is not a fundamental right. If this right is infringed the aggrieved person cannot access the Supreme Court directly under article 32.

The new article 300A states: *"No person shall be deprived of his property save by authority of law"*. It is the only article, which was inserted by a constitutional amendment with the express purpose of creating a legal right, which is not a fundamental right. The earlier article 31 applied to all persons. The citizens were given the right to acquire, hold and dispose of property by article 19(1) (f). Both articles 19 and 31 were fundamental rights. The right to property had been changed and modified by 1st, 4th, 7th, 25th, 39th, 40th, and 42nd Amendments. Most of them were aimed at nullifying the effect of judgments and doing away with the obligation of the State to pay compensation. The expression 'law', used in article 300A would mean a Parliamentary Act or an Act of the State Legislature or a Statutory

Order having the force of law. The State cannot deprive a person of his property by recourse to its executive power. The power can be exercised only by authority of law and not by mere executive order.[31]

If it provides for the transfer of ownership or right to possession to the state or a corporation owned or controlled by the state, it should also provide for compensation to the person deprived of the property. The amount of compensation, however, is in the discretion of the legislature and its adequacy cannot be called in question in a court of law.[32] This right to property enjoyed a greater measure of protection under the Constitution as originally adopted but it was found to be an impediment to the establishment of a socialistic pattern of society in India. Hence the right has been attenuated by constitutional amendments. Under the Twenty-fifth Amendment the word 'amount' has been substituted for 'compensation' to enable the legislature to fix whatever "amount" it likes while taking over private property for public purposes.

The Supreme Court in *Golak Nath* v. *Union of India*[33] held that a constitutional amendment abrogating or abridging a fundamental right would be hit by article 13 (2) and so would be void. This decision overrules the earlier decision to the contrary in *Shankari Prasad's* case.[34]

The Constitution (Twenty-fourth Amendment) Act has superseded the decision in *Golak Nath's case.* It provides that the expression "law" in article 13 does not include a constitutional amendment. The validity of 24th Amendment has been upheld in *Kesavananda Bharati* v. *State of Kerela.*[35]

Fundamental rights and directive principles

Fundamental rights are intended to guarantee individual liberty. Divertive principles are socialistic. They indicate the way in which the state should legislate for ensuring economic and social justice.

In *State of Madras* v. *Champakam*[36] it was held that if a law conflicts with fundamental rights it is void even if it may have been passed for implementing the directives of state policy. In 1971 the Constitution (Twenty-fifth Amendment) Act has provided that if the law contains a declaration that it is intended to give effect to the policy embodied in article 39 clause (b) or clause (c), the law shall not be challenged on the ground that it conflicts with articles 14, 19 and 31 of the Constitution.

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31. *Hindustan Times* v. *State of U.* P. (2003) 1 SCC 591.
32. See the Fourth Amendment of the Constitution.
33. AIR 1967 SC 1643.
34. AIR 1951 SC 458.
35. AIR 1973 SC 1461.
36. AIR 1951 SC 226.

Article 39 contains the following directive principles:

(1) Citizens should have the right to an adequate means of livelihood.

(2) Resources of the community should be equitably distributed.

(3) Concentration of wealth should be avoided.

(4) Equal wage for equal work for men and women.

(5) Childhood and youth should be protected against exploitation.

(6) Health and strength of workers should not be abused.

To give effect to these principles even fundamental rights can be overridden by means of law. This is the effect of the Constitution (Twenty fifth Amendment) Act. The result of the 44th amendment is that the right to property cannot hereafter retard or frustrate legislative efforts for the socio-economic regeneration of our country and the achievement of a truly socialistic pattern of society based upon economic freedom and equality, in response to the challenges posed by modern times and the aspirations of the younger generation.

Suggested Readings

1. B.B. Mitra on *Transfer of Property Act 1882*, 18th ed. by S.P.Sen Gupta, 2004.
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3. D. F. Mulla, *The Transfer of Property Act 1882*, 6th ed. by A. M. Setalvad, 1973.
4. G. S. Sharma (ed.), *Property Relations in Independent India: Constitutional and Legal Implications*, I.L.I., Publication, 1967.
5. G.C.V. Subbarao, *Law of Transfer of Property*, 4th ed. by Vepa. P. Sarathi, 2004.
6. H. S. Gour, *The Law of Transfer in India and Pakistan*, 8th ed. by T. P. Mukerjee and R. B. Sethi, 4 vols. 1971-74.
7. S . Lahiri, *The Transfer of Property Act*, 9th ed., 1970.
8. S. M. Shah, *Principles of the Law of Transfer*, 7th ed., 1969.
9. V.N.Sukla, *Constitution of India*, 9th ed., 1994.