

SUMMARY

THE TRANSFER OF PROPERTY ACT

DEFINITIONS (S. 3)

Immovable property : *Immovable property* does not include :

- (a) standing timber,
- (b) growing crops, or
- (c) grass.

Instrument : *Instrument* means a non-testamentary instrument.

Attested : *Attested* means attested by two (or more) witnesses, each of whom has—

- (a) seen the executant sign the instrument;

or

- (a) seen some other person sign the instrument in the presence, and under the direction of the executant;

or

- (a) received from the executant a personal acknowledgement of his signature (or the signature of such other persons);

and

- (b) signed the instrument in the presence of the executant.

Attached to the earth : *Attached to the earth* means anything—

- (a) rooted in the earth (e.g. trees and shrubs); or
- (b) imbedded in the earth (e.g. walls or buildings); or
- (c) attached to what is so imbedded (e.g. doors and windows).

Notice : A person is said to have *notice* of a fact—

- (a) when he actually knows that fact; or
- (b) when, but for (i) wilful abstention, or
(ii) gross negligence,—

he would have known it.

Registration of an instrument operates as a notice, if —

- (1) The instrument is compulsory registrable.
- (2) The registration is completed in the manner prescribed by the Indian Registration Act.
- (3) The instrument and its particulars are correctly entered in the Register and in the Index.

Actual possession by any (other) person is also *notice* of the title, if any, of such other person.

Notice to the agent also operates as *notice* to the principal, if the agent gets such notice—

- (i) whilst acting of the principal's behalf,
- (ii) in the course of business,
- (iii) to which business that fact is material.

But, if the agent *fraudulently* withholds the notice from his principal, the latter is not deemed to have had notice as against any person who was (a) a party to, or (b) otherwise cognizant of, the fraud.

"Transfer of property" (S. 5)

Transfer of property means any act by which a living person conveys property, in *present*

or in *future*, to :

- (i) one or more other living persons; or
- (ii) himself; or
- (iii) himself and one or more other living persons.

What property can be transferred (S. 6)

Property of any kind can be transferred. However, the following *nine* rights or interests cannot be transferred :

1. *Spes successionis*, namely,—
 - (i) the chance of an heir-apparent succeeding to an estate; or
 - (ii) the chance of a relation obtaining a legacy on the death of a kinsman; or
 - (iii) any other *mere possibility* of a like nature.
2. A *mere right of re-entry* for breach of a condition subsequent (*unless* the transfer is to the owner of that property).
3. An easement apart from the dominant heritage.
4. An easement in property restricted in its enjoyment to the owner personally.
5. A right to future maintenance, in whatsoever manner arising, secured or determined.
6. A *mere right to sue*.
7. A *public office*, or the *salary of a public officer*, whether before or after it has become payable.
8. *Stipends* allowed to military, naval, air-force and civil pensioners of Government, as also political pensions.
9. A transfer —
 - (a) opposed to the nature of the interest affected thereby; or
 - (b) for an unlawful object or consideration (within the meaning of S. 23 of the Indian Contract Act); or
 - (c) to a person who is legally disqualified to be a transferee.

Persons who are competent to transfer (S. 7)

Every person who is :

- (a) competent to contract (under S. 11 of the Indian Contract Act)
- and
- (b) entitled to transferable property
- or
- (b) authorised to dispose of transferable property which is *not* his own,—
is competent to transfer such property.

Persons who cannot assign their interests (S. 8)

1. A *tenant* having an untransferable right of occupancy *cannot* assign his interest as such tenant.
2. A *farmer* of an estate in respect of which a default has been made in paying revenue, *cannot* assign his interest as such farmer.
3. The *lessee* of an estate under the management of a *Court of Wards* *cannot* assign his interest as such lessee.

Operation (effect) of transfer (S. 8)

Unless a different intention is expressed or implied, a transfer passes to the transferee *all* the interest which the transferor is capable of passing in the property and its legal incidents. Thus, —

| | | |
|---|--------------------------|---|
| (i) Transfer of <i>land</i> | passes to the transferee | (i)(a) the <i>easements</i> ; (b) <i>rent and profits</i> after the transfer; and (c) all things attached to the earth. (ii) the <i>movable parts</i> thereof. |
| (ii) Transfer of <i>machinery attached to the earth</i> | | (iii) (a) the <i>easements</i> , (b) <i>rents</i> after the transfer, and (c) locks, keys, bars, doors, windows etc. |
| (iii) Transfer of a <i>house</i> | | (iv) the interest (or income) <i>after</i> the transfer. |
| (iv) <i>Money</i> (or other property yielding income) | | (v) the <i>securities</i> therefor, <i>but not</i> arrears of interest accrued <i>before</i> the transfer. |
| (v) <i>Debt</i> (or other actionable claim) | | |

Oral transfer (S. 9)

A transfer of property can be effected orally, if writing is not expressly required by law.

Condition restraining alienation (S. 10)

If property is transferred subject to a condition which absolutely restrains the transferee from parting with (or disposing of) his interest in the property, such condition is void, *unless—*

- (i) such a condition is in a *lease*, and the condition is for the benefit of a lessor; or
- (ii) such a condition is in a transfer to a *woman* (not being a Hindu, Muhammedan or Buddhist), and provides that during her marriage, she would *not* have the power to transfer or charge the property (or her beneficial interest in it).

Restriction on free enjoyment of property (S. 11)

In the case of an absolute transfer, if it is directed that the transferee is to apply or enjoy the property in a particular manner, the *direction is invalid, unless* such direction is made in respect of one immovable property for the beneficial enjoyment of another immovable property.

Condition making interest determinable on insolvency or attempted alienation (S. 12)

A transferor *cannot* direct that the transferee's interest in the property will cease if (i) he becomes insolvent, or (ii) he tries to dispose of such property, — *unless* the direction is in a lease, and is for the benefit of the lessor or persons claiming under him.

Directions for accumulation of income (Ss. 17 & 18)

If, under a transfer, the income of the property is to be accumulated longer than —

- (a) the life of the transferor, or
- (b) 18 years from the date of the transfer,—

such direction is *void* to the extent that the accumulation which is directed exceeds the longer of the above periods, and at the end of such period, the property can be disposed of, *as if* the accumulation period has elapsed.

But, a direction for accumulation *beyond* the above period is valid, *if* such direction is for —

- (i) the payment of the transferor's debts; or
- (ii) the provision of portions for children (or remotes issue) of the transferor; or

- (ii) the preservation or maintenance of the property transferred; or
- (iv) the benefit of the public.

Transfer for benefit of unborn persons (Ss. 13 & 14)

1. If a transfer of property creates an interest in favour of a person who is *not in existence* on the date of transfer (subject to a prior interest), the unborn person's interest will *not* take effect *unless* it extends to the *whole* of the transferor's interest in the property.
2. Under the *rule against perpetuity*, a transfer *cannot* create an interest which is to take effect *after* (i) the life-time of one or more persons living at the date of the transfer *and* (ii) the minority of some person who must be in existence at the expiry of that period, and to whom the interest is to belong if he attains majority.

Transfer to a class (Ss. 15, 16 & 22)

1. If an interest is created for a *class of persons*, and it fails as regards some such persons because of S. 13 or S. 14 (above), such interest will fail only as regards *such* persons, and *not* as regards the whole class of person.
2. If an interest fails because of S. 13 or S. 14, any interest created in the same transaction and intended to take effect on such failure, also fails. Thus, a limitation following upon a limitation which is *void* under S. 13 or S. 14 is *also void*.
3. If a transfer creates an interest only for the benefit of those persons of a class who have attained a particular age, the interest does *not* vest in any person who has *not* attained that age.

Vested Interest (Ss. 19-22)

1. On a transfer of property, an interest is said to be *vested* if it is created :
 - (i) without specifying when it is to take effect; or
 - (ii) in terms specifying that it is to take effect —
 - (a) forthwith (*i.e.* immediately), or
 - (b) on the happening of an event which *must* happen.
2. A vested interest is *not defeated* if the transferee dies before he obtains actual possession of the property.
3. An interest will be a *vested interest*, even if :
 - (i) the enjoyment thereof is postponed; or
 - (ii) a prior interest in the same property is given to some other person; or
 - (iii) income of the property is directed to be accumulated until the time of enjoyment arrives; or
 - (iv) there is a provision that, if a particular event happens, the interest is to pass to another person.
4. If an interest in property is created in favour of an unborn person, he acquires a vested interest *immediately upon his birth*, although enjoyment thereof is postponed.
5. If a person is entitled to property only on attaining a particular age, but is entitled to the income thereof before he reaches that age (or if such income is to be applied for his benefit), the interest is said to be *vested*.
6. If a transfer creates an interest only for the benefit of those persons who have attained a particular age, the interest does *not* vest in any person who has *not* attained that age.

Contingent interest (Ss. 21-24)

If a transfer creates an interest in favour of a person, to take effect only on the happening (or not happening) of a specified *uncertain event*, such interest is *contingent*.

Such *contingent* interest becomes a *vested* interest on the happening (or not happening) of that event.

DIFFERENCE BETWEEN

| Vested Interest | Contingent Interest |
|--|--|
| 1. <i>Definition</i> (See above) | 1. <i>Definition</i> (See above) |
| 2. <i>Fulfilment of condition</i> : It does <i>not</i> depend on the fulfilment of any condition. | 2. It is solely dependent on the fulfilment of a condition. |
| 3. <i>Effect of transferee's death</i> : It is <i>not</i> defeated by the transferee's death, if he dies without obtaining possession. | 3. Whether or not it passes on the death of the transferee depends on the nature of the contingency. |
| 4. <i>Whether transferable and heritable</i> : It is <i>both transferable and heritable</i> . | 4. It is transferable. Whether it is heritable or not depends on the nature of the contingency. |
| 5. <i>Present right of enjoyment</i> : It confers a <i>present</i> and immediate right to the property, <i>even if</i> enjoyment thereof is postponed. | 5. There is no present or immediate right of enjoyment. |

Conditional Transfers (Ss. 25-34)

Conditions are of 3 kinds :

- (i) A *condition precedent* is one which delays the vesting of a right until the happening of an event.
- (ii) A *condition subsequent* is one which destroys or diverts a right on the happening of an event.
- (iii) A *conditional limitation* is one which diverts an estate (which had already vested), and vests it in another person.

Characteristics of a condition precedent

1. It *must* happen before the estate can vest.
2. The estate will *not* vest until the condition is performed.
3. If the condition precedent is impossible or immoral or opposed to public policy, the transfer is *void*.
4. It is deemed to be fulfilled, if it is *substantially complied with*.

Characteristics of a condition subsequent

1. It is one, on the happening of which an existing estate is defeated (or divested).
2. When there is a condition subsequent, the estate vests immediately, subject to being divested if the condition is broken.
3. If the condition subsequent is impossible, immoral or opposed to public policy, the transfer will be *valid*, and the condition will be ignored.
4. A condition subsequent must be *strictly complied with*.

Two Rules governing Conditions Precedent (Ss. 26 & 27)

1. A condition precedent is deemed to be fulfilled, if it has been *substantially complied with*.
2. If an interest is created in favour of one person, and by the same transaction, an ulterior disposition of the same interest is made in favour of another person, if the first disposition fails, the ulterior disposition immediately takes effect. *even if* the failure has not occurred in the manner contemplated by the transferor. (This is known as the *doctrine of acceleration*.)

But, if the intention of the parties is that the ulterior disposition is to take effect *only if* the prior disposition fails *in a particular manner*, then the ulterior disposition will take effect *only if* the first disposition fails in *that particular manner*.

(See also Rule 4, below.)

Four Rules governing Conditions Subsequent (Ss. 28-34)

1. The ulterior disposition will *not* take effect unless the condition subsequent is *strictly complied with*.
2. If the ulterior disposition is *not valid*, the prior disposition is *not affected* (i.e. the prior disposition remains valid).
3. If no time is specified in a condition subsequent, the condition is deemed to be broken if the person renders the performance of the act impossible,— permanently or indefinitely.
4. If fulfillment of a condition is prevented by *fraud*, further time (equal to the delay caused by such fraud) is to be given to the person to perform the act. (*This rule also applies to a condition precedent.*)

DIFFERENCE BETWEEN

| <i>Condition Precedent</i> | <i>Condition Subsequent</i> |
|---|---|
| 1. <i>Precedes</i> the vesting of the estate. | 1. <i>Follows</i> the vesting of the estate. |
| 2. Vesting is postponed until performance of the condition. | 2. Vesting is immediate. |
| 3. Once the interest is vested, it <i>cannot</i> be divested. | 3. Even if interest vests, it is <i>liable to be divested</i> . |
| 4. A condition precedent affects the <i>acquisition</i> of an estate. | 4. A condition subsequent affects the <i>retention</i> of an estate. |
| 5. If the condition is impossible, immoral or opposed to public policy, the transfer is <i>void</i> . | 5. If the condition is impossible etc., transfer will be absolute, and the condition will be ignored. |
| 6. The condition must be valid in law. | 6. If the condition is not valid in law, it will be ignored. |
| 7. It may be substantially complied with (i.e. the doctrine of <i>cy-pres</i> applies). | 7. It must be <i>strictly</i> complied with (i.e. the doctrine of <i>cy-pres</i> does not apply). |

Election (S. 35)

The *doctrine of election* arises when a person professes to transfer property which he has no right to transfer, and as a part of the same transaction, confers any benefit on the owner of the property.

In such cases, the owner of the property must either *confirm* the transfer *or dissent* from it.

If the owner dissents,—

(a) he also relinquishes the benefit conferred on him;

and

(b) the benefit so relinquished reverts to the transferor.

Although the benefit reverts to the transferor, it is subject to the charge of making good, to the disappointed transferee, the amount or value of the property, *if* —

- (i) the transfer is gratuitous, and before the election, the transferor dies *or becomes* incapable of making a fresh transfer; or
- (ii) the transfer is for consideration.

The following further points are also to be kept in mind :

1. It is immaterial whether the transferor does or does not believe that the property which he professes to transfer is his own property.
2. A person who takes on benefit *directly* under a transaction, but derives a benefit under it *indirectly*, need *not* elect.
3. Likewise, a person who takes a benefit in *one capacity* may dissent therefrom in *another capacity*.
4. In case of a dissent, only *that particular benefit* is to be relinquished; *any other benefit* conferred on him by the same transaction is *not* to be relinquished.
5. If a person accepts a benefit for 2 years (or more), there is a *presumption* that he has elected *in favour* of the transfer.
6. If the owner does not, *within a year's time*, signify to the transferor, his intention to confirm or dissent, the transferor may require him to make an election. If he does *not* comply with such requisition, he is deemed to have elected to *confirm* the transfer.

DIFFERENCE BETWEEN

| <i>English Law</i> | <i>Indian Law</i> |
|--|--|
| 1. The <i>doctrine of compensation</i> applies. | 1. The <i>doctrine of forfeiture</i> applies. |
| 2. There is <i>no fixed time</i> for making an election. | 2. A period of <i>one year</i> is prescribed for making an election. |

Apportionment (Ss. 36 & 37)

1. All rents, annuities, pensions, dividends and other periodical payments are deemed to accrue from *day to day*. The transferor is entitled to such payments for the period *before* the transfer, and the transferee for the period *after* the transfer. However, the actual payments are to be made only on the appointed days.
2. When, as a result of a transfer, property is divided and held in several shares, the benefit of any obligation relating to the property passes from one to several owners. The corresponding duty is to be performed in favour of each owner in proportion to the value of his share in the property.

Transfer by person authorised to transfer only under certain circumstances (S. 38)

If a person is authorised to dispose of immovable property only under certain circumstances, and he transfers such property,

- (i) for consideration,
- (ii) alleging the existence of such circumstances,

then those circumstances are deemed to have existed, as far as the transferee is concerned, *provided—*

- (a) he acted in good faith, *and—*
- (b) he took reasonable care to ascertain the existence of such circumstances.

Transfer of ostensible owner (S. 41)

Where—

- (a) a person is the ostensible owner of immovable property,
- (b) with the consent of the persons interested in such property,—

and he transfers it for consideration, the transfer is *not voidable* on the ground that the transferor was *not* authorised to make such transfer, *provided that* the transferee—

- (a) took reasonable care to ascertain the transferor's power to transfer; *and*
- (b) acted in good faith.

Transfer by unauthorised person who subsequently acquires interest (S. 43)

If a person—

— *fraudulently* or *erroneously* represents that he is authorised to transfer immovable property

and

— proposes to transfer such property for consideration,—

if the transferee so opts, such transfer will operate on any interest which the transferor may subsequently acquire in the property.

The above rule will *not*, however, affect the right of a transferee who (a) acts in *good faith*, (b) *for consideration*, and (c) *without notice*.

Transfer when a third person is entitled to maintenance (S. 39)

If a third person has a right—

(i) to receive maintenance, or
(ii) to a provision for advancement or marriage } from the profits of immovable property,
and such property is transferred,

— the right can be enforced against the transferee—

IF (i) he has notice thereof, or

(ii) the transfer is gratuitous;

BUT NOT (a) against the transferee for consideration, and

(b) without notice of such right.

Burden of obligation imposing restriction on use of land (*Covenant running with land*) (S. 40)

(a) If a third person has,—

—for the more beneficial enjoyment of his own immovable property, and independently of—

(i) any interest in the immovable property of another, or

(ii) any easement thereon,

a right to restrain the enjoyment of the other's property in a particular manner;

OR

(b) If a person is entitled to the benefit of an obligation—

(i) arising out of a contract and

(ii) annexed to the ownership of immovable property (but *not* amounting to an interest or easement),

such right or obligation *can* be enforced against—

(i) a transferee with notice thereof, or

(ii) a gratuitous transferee.

However, such right or obligation *cannot* be enforced against a transferee (a) for consideration and (b) without notice.

Transfer by person having authority to revoke former transfer (S. 42)

On a transfer of property, if the transferor reserves the power to revoke the transfer, any subsequent transfer of that property for *consideration* to another transferee operates as a *revocation* of the earlier transfer.

Transfer by co-owners (Ss. 44 & 47)

1. If one co-owner of immovable property transfers *his share*, the transferee acquires the transferor's right—

- (a) to joint possession of the property; and
 - (b) to enforce a partition of that property.
2. If several co-owners of immovable property transfer a share in such property *without specifying* that the transfer is to take effect on any particular share (or shares), such transfer takes effect:
- (a) equally, *if the shares were equal, and*
 - (b) *if the shares are unequal*, in the same proportion as the shares.

Joint transfers (Ss. 45 & 46)

1. When immovable property is purchased by two or more persons and the consideration is paid by them from a *common fund*, their interests in such property will be in the *same proportion* as their respective interests in the fund.
But, when such purchase is made from *separate funds*, their interests in the property will be in proportion to the amounts advanced by each of them.
2. Likewise, when immovable property is transferred for consideration by persons having distinct interests in the property, the transferors are entitled to :
 - (a) an equal share in the consideration, if their interests were of an equal value; *or*
 - (b) a proportionate share in the consideration, if their interests were *not* of an equal value.

Priority of rights (Ss. 48 & 78)

1. If a person transfers the *same* immovable property at different times, and all such rights *cannot* exist together, each later right is subject to the rights previously created. (This is, however, subject to a contract to the contrary.)
2. If, through the fraud, misrepresentation or gross neglect of a prior mortgagee, a subsequent mortgagee is induced to advance money, on the security of the mortgaged property, the subsequent mortgagee gets a preference over the prior mortgagee.

Transferee's right under insurance policy (S. 49)

When immovable property, which is insured against loss or damage by fire, is transferred *for consideration*, in case of such loss or damage, the transferee can call upon the transferor to apply any money which he actually receives under the policy (or a part of such money) to *reinstate* the property. (This rule is, however, subject to a contract to the contrary.)

Bona fide holders under defective title

1. If a person has, *in good faith*, paid any *rent (or profit)* to another person from whom he held such property, he *cannot* be made liable to pay it once again, if it afterwards turns out that such other person had no right to receive such rent (or profit).
2. If a transferee of immovable property makes an *improvement* on the property, *believing in good faith* that he is absolutely entitled to such property, and he is subsequently evicted by any person having a better title, he can call upon the person causing the eviction :
 - (a) to pay him the value of the improvement; *or*
 - (b) to sell his interest in the property to the transferee at the market-value of the property, irrespective of the value of the improvement.

Transfer of property pending suits (*Lis Pendens*) (S. 52)

When a suit or proceeding (which is *not collusive*) is pending in any Court, and any right to immovable property is *directly and specifically* in question, such property *cannot*

be transferred (or otherwise dealt with) by any party to the suit, *except* with the authority of the Court.

Such pendency commences from the date of the presentation of the plaint or the institution of the proceeding in a competent court.

The pendency continues until a final decree is passed, and the decree is completely satisfied (or if it cannot be satisfied because of limitation).

Fraudulent transfer (S. 53)

If a transfer of immovable property is made –

- (a) to delay or defeat the transferor's creditors – it is *voidable* at the option of such creditors;
- (b) to defraud a subsequent transferee, the first transfer being without consideration, it is *voidable* at the option of the subsequent transferee.

The above does *not* –

- (i) impair the rights of a transferee in good faith for consideration;
- (ii) affect any law relating to insolvency.

Part performance (S. 53A)

If a person contracts to transfer any immovable property –

- (a) for consideration,
- (b) by a signed document, –

and the transferee has taken possession of such property in part performance of the contract, then *even if* –

- (i) the contract is not registered (though required to be so); or
- (ii) the document of transfer is *not* completed in the prescribed manner, –

the transferor *cannot* enforce against the transferee any right in respect of such property, *except* a right expressly allowed under the contract.

This rule does *not* affect a transferee for consideration, who has no notice (i) of the contract, or (ii) of the part performance thereof.

SALE (Ss. 54-57)

Definition of "sale" (S. 54)

A *sale* is a transfer of ownership in exchange for a price paid or promised, or partly paid and partly promised.

How sale is effected (S. 54)

A sale requires a registered instrument in case of :

- (i) tangible immovable property of the value of *Rs.100 or more*;
- (ii) a reversion;
- (iii) any other intangible thing.

In case of tangible immovable property *worth less than Rs.100*, a sale can be made by :

- (a) a registered instrument, or
- (b) delivery of the property.

Definition of "contract of sale"

A contract for sale of immovable property is a contract that a sale of such property *shall* take place on terms settled between the parties.

THE TRANSFER OF PROPERTY ACT
DIFFERENCE BETWEEN

| SALE | CONTRACT FOR SALE |
|---|---|
| 1. Sale involves a transfer of ownership | 1. There is no transfer of ownership. It does <i>not</i> even create an interest or charge on the property. |
| 2. Sale conveys a legal title to the purchaser. | 2. A contract for sale does <i>not</i> convey any legal title. |
| 3. It creates a right in rem. | 3. It creates a <i>right in personam</i> . |
| 4. A registered instrument is required in three cases stated above. | 4. A contract for sale need <i>not</i> be registered at all. |

Rights and liabilities of buyer and seller (S. 55)

Rights of buyer

Before completion of sale, the buyer is entitled to :

- (i) a *charge* on the property for purchase-money already paid by him;
- (ii) *interest* on such purchase-money;
- (iii) earnest and costs awarded to him in a suit for specific performance, in case he properly declines to accept delivery.

After completion of sale, the buyer is entitled to :

- (i) the benefit of any improvement or increase in the value of the property; and
- (ii) the rents and profits of the property.

Liabilities of buyer

Before completion of sale, the buyer is bound :

- (i) to disclose to the seller any fact which materially increases the value of the property, and of which the buyer, but *not* the seller, is aware;
- (ii) to pay or tender the purchase money.

After completion of sale, the buyer is bound :

- (i) to bear any loss arising from destruction, injury or loss in the value of the property;
- (ii) to pay public charges and rents payable in respect of the property.

Rights of seller

Before completion of sale, the seller is entitled to the rents and profits, until ownership passes to the buyer.

After completion of sale, the seller is entitled to a charge on the property for his unpaid purchase money.

Liabilities of seller

Before completion of sale, the seller is bound :

- (i) to disclose to the buyer, any material defect in the property of which the seller *is*, but the buyer *is not*, aware, and which the buyer could *not* discover with ordinary care;
- (ii) to produce all documents of title for examination by the buyer;
- (iii) to answer all relevant questions of the buyer as regards the *property* and the *title* thereto;
- (iv) to execute a proper conveyance – on payment or tender of the price;
- (v) between the date of the contract of sale and delivery, – to take prudent care of the property and the documents of title; *and*
- (vi) to pay all public charges and rent *upto* the date of the sale.

After completion of sale,—

- (i) the seller is bound to give possession of the property to the buyer;
- (ii) the seller is bound to deliver all documents of title to the buyer when the entire purchase-money has been paid;
- (iii) the seller is deemed to contract with the buyer that the seller's interest subsists and that he has the power to transfer the same.

Marshalling by subsequent purchaser (S. 56)

If the owner of two (or more) properties mortgages them to *one person*, and then sells one (or more) of such properties to *another person*, the buyer is entitled to have the mortgage-debt satisfied (so far as is possible) from the property (or properties) *not* sold to him.

However, this *cannot* be done so as to prejudice the rights of :

- (a) the mortgagee, *or*
- (b) any person claiming under him, *or*
- (c) any other person who has acquired any interest in any such property *for consideration*.

MORTGAGES (Ss. 58-104)

Terms defined

A *mortgage* is the transfer of an interest in specific immovable property, for the purpose of securing :

- (a) the payment of money-advanced or to be advanced, by way of a loan; *or*
 - (b) an existing or future debt; *or*
 - (c) the performance of an engagement which may give rise to a pecuniary liability.
- The transferor is called the *mortgagor*.
 - The transferee is called the *mortgagee*.
 - The principal money and interest of which payment is secured is called the *mortgage-money*.
 - The instrument by which such a transfer is effected is called the *mortgage-deed*.

Six kinds of mortgages

(i) Simple mortgage

In a simple mortgage,—

- (a) possession of the mortgaged property is *not* given to the mortgagee;
- (b) the mortgagor gives personal obligation to pay the mortgage-money;
- (c) the mortgagor agrees that if he fails to pay, the mortgagee can have the property sold *through the Court*.

Remedies available :- Sale through the intervention of Court. - No foreclosure.

(ii) Mortgage by conditional sale

In this type of mortgage, the mortgaged property is ostensibly sold to the mortgagee on the following conditions, *viz.*—

- (a) if the mortgage-money is *not* paid on a certain date, - the sale is to become *absolute*;
- (b) but, if such payment is made,—
 - (i) the sale is to become *void*; *and*
 - (ii) the buyer is to re-transfer the property to the seller.

Remedies available:- Foreclosure only. - No sale.

(iii) Usufructuary mortgage

In a usufructuary mortgage, the mortgaged property is delivered to the mortgagee, who is authorised to retain such property until payment of the mortgage-money, and in the meanwhile, to receive rents and profits accruing from the property.

Remedies available: - No sale. - No foreclosure. - Only remedy is to retain the property until the mortgage-money is paid.

(iv) English Mortgage

In an English mortgage, the mortgagor (a) binds himself to repay the mortgage-money, and (b) transfers the property to the mortgagee, on condition that when the mortgage-money is paid up, the property will be re-transferred to the mortgagor.

Remedies available: - Sale only. - No foreclosure.

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

In this type of mortgage (which can be created only in specified towns), the mortgagor delivers to the mortgagee, documents of title of the mortgaged property, with intent to create a security thereon.

Remedies available: - Sale through intervention of the Court. - No foreclosure.

(vi) Anomalous mortgage

An anomalous mortgage is one which is *not* any of the five types of mortgages seen above.

Remedies available: - Sale, if allowed by the terms of the mortgage. - Foreclosure, if allowed by the terms of the mortgage.

Whether registration and attestation necessary for a mortgage (S. 59)

- (i) If the principal-money is Rs.100 or more, the mortgage (other than an equitable mortgage) must be by (a) registered document, (b) signed by the mortgagor, and (c) attested by at least 2 witnesses.
- (ii) If the principal-money is less than Rs.100, the mortgage may be effected as above, or (except in the case of a simple mortgage), by delivery of the property.

Rights of a mortgagor**(i) Redemption**

At any time *after* the principal money has become due, on payment (or tender) of the mortgage-money, the mortgagor has the right :

- (a) to get back his property; and
 (b) to demand :
- (i) return of the mortgage-instrument and title-deeds;
 - (ii) delivery of possession of the mortgaged property; and
 - (iii) a re-transfer of the property.

This right of redemption is a statutory right based on the maxim, "Once a mortgage, always a mortgage". Any condition in the mortgage-deed which takes away this right will be a *clog on redemption*, and will *not* be valid.

Redemption can be exercised :

- (a) by paying (or tendering) the mortgage-money to the mortgagee; or
- (b) by depositing the mortgage-money in Court; or
- (c) by a regular suit for redemption.

The *right of redemption is extinguished* :

- (a) by act of parties; or
- (b) by an order of the Court.

If the mortgagor has executed two or more mortgages in favour of the same mortgagee, he can, in the absence of any contract to the contrary, redeem one (or more) of such mortgages separately. Thus, the *doctrine of consolidation does not apply*.

(ii) Re-transfer to a third party (S. 60A)

The mortgagor can require the mortgagee to assign the mortgage-debt to a third party, and transfer the property to such person instead of re-transferring it to the mortgagor.

(iii) Right to inspection and production of documents (S. 60B)

As long as his right of redemption subsists, the mortgagor can, at his cost, inspect and make copies from documents of title of the property, which are with the mortgagee.

(iv) Right to accession (Ss. 63 & 64)

Accessions to the mortgaged property enure for the benefit of the mortgagee's security, and on redemption, belong to the mortgagor, in the absence of a contract to the contrary.

But, if the accession is acquired at the mortgagee's expense and is capable of separate possession, the mortgagor must pay for it, if he desires to acquire it. If, however, it is *not* capable of separate possession, it must be delivered to the mortgagor with the property and the mortgagor must pay the cost thereof.

(v) Right to grant lease (Ss. 65 & 65A)

Unless a contrary intention is expressed in the mortgage-deed, the mortgagor who is lawfully in possession of the property, can grant a lease of the property, subject to certain conditions laid down in S. 65A.

(vi) Right to reasonable waste (S. 66)

A mortgagor in possession is *not liable* for allowing the property to deteriorate. But, he *cannot* commit any act which is destructive or permanently injurious to the property, if the security would thereby be rendered insufficient.

Implied contracts by the mortgagor (S. 65)

In the absence of a contract to the contrary, the mortgagor is deemed to have entered into the following *five implied contracts* with the mortgagee :

1. *Covenant for title*,—namely that the interest which he professes to transfer to the mortgagee subsists, and that he has the power to transfer the same.
2. *Covenant for defence of title*,—namely, that he will defend his title to the property, and if the mortgagee is in possession, that he will enable the mortgagee to defend the mortgagor's title to the property.
3. *Covenant for payment of public charges*,—namely, that he will pay all public charges in respect of the property, as long as he is in possession of the property.
4. *Covenant for payment of rent*,—namely, that when the mortgaged property is a lease, he will pay the rent payable under the lease and observe all other conditions of the lease.
5. *Covenant for payment of prior encumbrances*,—namely, that when the mortgage is a second (or subsequent) encumbrance, the interest and principal money due on prior encumbrances will be paid, as and when they become due.

All the above five covenants run with the land.

Rights of a mortgagee

The mortgagee has the following *nine rights* :

1. *Right to foreclose or sell* (S. 67)—After the mortgage-money is due and *before* redemption, the mortgagee can obtain from the Court a decree for *foreclosure or sale* of the property. (A decree of foreclosure is one where the mortgagor is absolutely debarred from redeeming the mortgaged property.)
2. *Right to sue for mortgage-money* (S. 68)—The mortgagee can sue for the mortgage money :
 - (a) when the mortgagor binds himself to repay the same; or
 - (b) when the mortgaged property is destroyed or the security is rendered insufficient (by any cause other than the wrongful act or default of the mortgagor or the mortgagee), and the mortgagor has failed to provide further security; or
 - (c) when the mortgagee is deprived of the security, due to the wrongful act or default of the mortgagor; or
 - (d) when the mortgagee is entitled to possession of the mortgaged property, and the mortgagor has failed to deliver the same to him.
3. *Right to sell without intervention of the Court* (S. 69)

The mortgaged property can be sold without the intervention of the Court in *three cases* :

 - (a) in the case of an *English mortgage*, if neither the mortgagor nor the mortgagee is a Hindu, Muhammedan, Buddhist or a member of a specified race or tribe;
 - (b) when the Government is the mortgagee, and the mortgage-deed contains an express power of sale without intervention of the Court;
 - (c) when the mortgaged property is situated in Calcutta, Madras, Bombay or any other Gazetted town, and the mortgage-deed contains an express power of sale without intervention of the Court.
4. *Right to appoint a Receiver* (S. 69A)—A mortgagee who has the power to sell *without* intervention of the Court, can also appoint a Receiver of the income of the mortgaged property.
5. *Right to accession* (S. 70)—After the date of the mortgage, if any accession is made to the mortgaged property, the mortgagee is entitled to such accession. However, this is subject to a contract to the contrary.
6. *Right to renewal of mortgaged lease* (S. 71)—If the mortgaged property is a lease, and the mortgagor renews the lease, the mortgagee is entitled to the new lease (for the purpose of the security). This is also subject to a contract to the contrary.
7. *Right to spend money* (S. 72)—A mortgagee can spend such money as is necessary :
 - (i) for the preservation of the mortgaged property from destruction, forfeiture or sale;
 - (ii) for supporting the mortgagor's title to the property;
 - (iii) for making his own title to the property good as against the mortgagor; and
 - (iv) for renewal of the leasehold mortgaged to him.

The amount spent as above can be added to the mortgaged-debt, and recovered by the mortgagee, with interest at the stipulated rate (or at 9% p.a.).

8. *Rights of proceeds of revenue sale or compensation on acquisition* (S. 73)

- (a) If the mortgaged property is sold for failure to pay revenue, public charges or rent in respect of the property, and such failure is *not* due to any default of the mortgagee, then the mortgagee can claim payment of the mortgage-money from the proceeds, after payment of such revenue, charges, rent etc.
- (b) Similarly, if the mortgaged property is acquired under the Land Acquisition Act, the mortgagee can claim payment of the mortgaged money out of the payment due to the mortgagor as compensation.

9. *Right of mesne mortgagees*.—When a property is mortgaged to successive mortgagees, a mesne (or puisne) mortgagee has the same rights against subsequent mortgagees, as he has against the mortgagor. This is an application of the maxim, "*Redeem up, foreclose down*".

Liabilities of a mortgagee

1. *Mortgagee must bring one suit on several mortgagees* (S. 67A).—When a mortgagee holds two or more mortgagees executed by the same mortgagor, if he sues to obtain a decree on *any* of the mortgagees, he must sue on *all* the mortgagees in respect of which the mortgage-money has become due. However, this is subject to a contract to the contrary between the parties.
2. *Liabilities of a mortgagee in possession* (Ss. 76-77).—If the mortgagee takes possession of the property during the continuance of the mortgage, the mortgagee is bound :
 - (i) to manage the property as a man of ordinary prudence would manage his own property;
 - (ii) to use his best endeavours to collect rents and profits;
 - (iii) to pay Government revenue and other public charges out of the income of the property, in the absence of a contract to the contrary;
 - (iv) to make necessary repairs, the income of the property permitting (in the absence of a contract to the contrary);
 - (v) *not* to commit any act which is destructive or permanently injurious to the property;
 - (vi) if he has insured the property against fire, and receives insurance money for this reason, he must either (a) reinstate the insured property from such money, or (b) discharge the mortgage-debt from such money, - as may be directed by the mortgagor;
 - (vii) to keep clear, full and accurate accounts of all amounts received and spent by him, and give such accounts to the mortgagor, whenever asked for;
 - (viii) to debit receipts from the property, first against interest on the mortgage money, and then against the principal amount;
 - (ix) to account for receipts from the property, when the mortgagor tenders and deposits the amounts due.

Priority of securities (Ss. 78 & 79)

If, on account of the *fraud, misrepresentation or gross neglect* of a prior mortgagee, another person is induced to advance money on the security of the same property, the prior mortgagee is postponed to the subsequent mortgagee.

This rule is an *exception* to the application of the maxim of equity, "*Qui prior est tempore, potior est jure*". (He who is first in time is first in law.)

Tacking not allowed (S. 93)

- (a) By paying off a prior mortgage, a mortgagee *cannot* thereby acquire any priority in respect of his original security.
- (b) Similarly, **subject to one exception (below)**, a mortgagee making a subsequent advance to the mortgagor, *cannot* thereby acquire any priority in respect of his security for such subsequent advance.

Exception (S. 79)

However, an exception is made in the case of a mortgage to secure —

- (a) future advances; or
- (b) performance of an engagement; or
- (c) balance of a running account.

In such cases, if the mortgage expresses the maximum amount secured, a subsequent mortgage of the same property, *made with notice of the prior mortgage*, will be postponed to the prior mortgage, in respect of all advances (within the maximum amount), although made with notice of the subsequent mortgage.

Marshalling (S. 81)

If the owner of two (or more) properties mortgages them to one person, and then mortgages one (or more) of the same properties to another person, the subsequent mortgagee can have the prior mortgage-debt satisfied out of the properties *not* mortgaged to him, to the extent possible.

This is, however, subject to a contract to the contrary.

The above rule *cannot* also be applied so as to prejudice the rights of the prior mortgagee or any person acquiring an interest in any of the properties for consideration.

Contribution (S. 82)

If the mortgaged property belongs to two (or more) persons, who have distinct and separate rights of ownership, the different shares of such property are liable to contribute rateably to the mortgage-debt.

This rule is, however, subject to a contract to the contrary.

CHARGES**(Ss. 100 & 101)**

When immovable property of one person is made security for the payment of money to another person, and the transaction *does not amount to a mortgage*, a *charge* is said to be created on the property. (This can take place either by act of parties or by operation of law.)

All the provisions which apply to a *simple mortgage* also apply to a *charge*.

The above does *not*, however, apply to the charge of a *trustee* on the trust-property, for expenses properly incurred by him in executing the trust.

It is also to be noted that a charge *cannot* be enforced against property in the hands of a person who is a transferee for consideration, without notice of the charge.

No merger in certain cases (S. 101)

A mortgagee of immovable property (or any transferee from him) can purchase that property, without causing the mortgage to be merged as between himself and any subsequent mortgagee of the same property.

(The same rule applies to a person having a *charge* on immovable property.)

Also, a subsequent mortgagee (or charge-holder) *cannot* foreclose or sell such property without redeeming the prior mortgage or charge.

DIFFERENCE BETWEEN MORTGAGE AND CHARGE

| Mortgage | Charge |
|---|--|
| 1. A mortgage is a security for the payment of a <i>debt</i> . | 1. A charge is a security for the payment of <i>any money</i> . |
| 2. A mortgage may be a security for the performance of an act giving rise to a pecuniary liability. | 2. Not so, in the case of a charge. |
| 3. A mortgage may contain a covenant to pay. | 3. There is no covenant to pay in the case of charge. |
| 4. A mortgage involves a transfer of an interest in specific immovable property. | 4. A charge does not transfer any interest in the property. |
| 5. A mortgage arises only by an act of parties. | 5. A charge can arise (i) by act of parties or (ii) by operation of law. |
| 6. A mortgage gives rise to a <i>right in rem</i> . | 6. A charge does not create any <i>right in rem</i> . |
| 7. A mortgagee can follow his security in the hands of a third person. | 7. A charge-holder cannot do so. |
| 8. A mortgagee can follow a <i>bona fide</i> purchaser for value without notice. | 8. A charge-holder cannot do so. |
| 9. The defence of <i>bona fide</i> purchase without notice cannot be set up against a mortgagee. | 9. The defence of <i>bona fide</i> purchase without notice is a good defence against a charge. |

LEASES (Ss. 105-117)

Definition:- A lease of immovable property is a transfer of a right to enjoy such property for a certain time (or in perpetuity), in consideration of :

- (i) a price, paid or promised, or
- (ii) money, or
- (iii) a share of crops, or
- (iv) service, or
- (v) any other thing of value,

to be rendered periodically (or on specified occasions) to the transferor by the transferee, who accepts the transfer on such terms.

- The transferor is called the *lessor*.
- The transferee is called the *lessee*.
- The price is called the *premium*.
- The money, crops, service or other thing to be rendered is called the *rent*.

How made :- In the following three cases, a lease of immovable property can be made *only* by a registered instrument, viz. :

- (a) a lease from year to year;
- (b) a lease for a term exceeding one year; and

(c) a lease reserving a yearly rent.

In all other cases, a lease can be made :

(i) by a registered instrument,

or

(ii) by an oral agreement along with delivery of possession.

Duration & Termination

— A lease *for agricultural or manufacturing purposes* is deemed to be a lease from *year to year*.

— It is terminable by a *six months' notice* expiring with the end of a *year* of the tenancy.

— A lease *for any other purpose* is deemed to be a lease from *month to month*.

— It is terminable by *15 days' notice* expiring with the end of a *month* of the tenancy.

Rights and Liabilities of Lessor

1. The lessor must *disclose* to the lessee any *material defect* in the property, of which the lessor is aware, but the lessee is not, and which the lessee could not discover with ordinary care.
2. The lessor is bound, at the request of the lessee, to put him in possession of the property.
3. The lessor is deemed to contract with the lessee that if the lessee pays the rent and performs his conditions, he may hold the property without interruption.

Rights of the lessee

1. Any accession to the property, made during the continuance of the lease, is deemed to be comprised in the lease.
2. If any part of the property is destroyed or rendered unfit by fire, tempest, flood etc., the lease becomes *void* at the option of the lessee.
3. If the lessor neglects to repair the property, the lessee may make such repairs, and deduct the expenses from the rent payable to the lessor.
4. If the lessor neglects to make any payment which he is bound to, and which payment can be recovered from the lessee, the latter may make the payment, and deduct it from the rent payable to the lessor.
5. Even after termination of the lease, the lessee may, whilst he is in possession, remove all things attached to the earth.
6. When a lease of uncertain duration comes to an end, the lessee can remove all crops on the property planted or sown by him. He is also entitled to free ingress and egress to gather and carry such crops.
7. The lessee can transfer the whole or any part of his interest in the property, and the transferee can do so again. However, in such cases, the lessee continues to be subject to the liabilities attaching to the lease.

Liabilities of the lessee

1. The lessee must disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessor is not aware, and which materially increases the value of such interest.

2. The lessee must pay (or tender) the premium and rent to the lessor at the proper time and place.
3. The lessee must keep the property in good condition, reasonable wear and tear excepted. (The lessor and his agents can enter the property to inspect the same.)
4. If the lessee becomes aware of any encroachment on the property or any proceedings to recover the property, he must inform the lessor about the same with reasonable diligence.
5. The lessee must use the property as a man of ordinary prudence would use his own, but he cannot use it for any other purpose or commit any act which may destroy or permanently injure the property.
6. Without the lessor's consent, the lessee *cannot* erect any permanent structure on the property (except for agricultural purposes).
7. When the lease is over, the lessee must put the lessor in possession of the property.

Rights & Liabilities of lessor's transferee

1. The lessor's transferee possesses all rights, and if the lessee so elects, is subject to all the liabilities of the lessor, as regards the property.
2. The lessor's transferee is *not entitled* to the arrears of rent due before the transfer.

Determination (i.e. termination) of lease

A lease terminates in *eight* ways :

1. By efflux of time.
2. If the duration of the lease is until the happening of some event, — when that event happens.
3. If the lessor's interest in the property is to terminate on the happening of some event, — when that event happens.
4. By merger.
5. By express surrender.
6. By implied surrender.
7. By forfeiture.
8. On expiry of a notice to determine the lease or a notice to quit.

Forfeiture of lease:— A lease determines (i.e. terminates) by forfeiture in *three* cases :

- (i) if the lessee breaks an express condition, which provides that on breach of the condition, the lessor may re-enter;
- (ii) if the lessee renounces his character, —
 - (a) by selling up a title in a third person; or
 - (b) by claiming title in himself;
- (iii) if the lessee is adjudicated insolvent, and the lease provides that if that happens, the lessor may re-enter.

However, in all such cases, the lessor *must* give *notice in writing* to the lessee of his intention to terminate the lease.

A forfeiture is waived in *three* cases :

- (i) by acceptance of subsequent rent; or
- (ii) by distress for such rent; or

(iii) by any action on the lessor's part showing an intention to treat the lease as subsisting.

Holding over (Tenancy-at-will)

If the lessee remains in possession of the property after the termination of the lease, and the lessor accepts the rent (or otherwise assents to the lessee's continuing in possession), the lease is renewed (from year to year, or month to month, as the case may be).

EXCHANGE
(Ss. 118-121)

In an exchange, —

- two persons mutually transfer the ownership of one thing for the ownership of another thing, *and*
- neither thing or both things are money *only*.

An *exchange* is to be made in the same manner as a *sale*.

If any party to an exchange is deprived of the property due to a defect in the title of the other party, such other party is liable to him :

- (a) for any *loss* caused thereby; *or*
- (b) at the option of the party so deprived, for the *return* of the thing transferred, if it is still in the possession of (i) the other party, (ii) his legal representatives, *or* (iii) a transferor from him without consideration.

Each party to an exchange has the rights and is subjected to the liabilities of a *seller* as regards that which he *gives*, and the rights and liabilities of a *buyer* as regards that which he *takes*.

When there is an exchange of money, each party is deemed to warrant the genuineness of the money given by him.

GIFTS
(Ss. 122-129)

A *gift* is the transfer of property made —

- (i) voluntarily, and
- (ii) without consideration, —

by one person (*donor*) to another person (*donee*), *and* accepted by the donee.

This acceptance must be made during the donor's lifetime, and while he is still capable of giving. If the donee dies before acceptance, the gift will be *void*.

A gift of *immovable property* can be made only by a *registered instrument* signed by the donor and *attested* by two witnesses.

A gift of *movable property* can be made by a *registered instrument* signed and attested as above, *or* by the delivery of the property.

Onerous gifts

1. If the gift is one *single* transfer, and a part of it is burdened with an obligation, the donee gets nothing *unless* he accepts it *fully*.
2. But, if the gift is in the form of two or more separate and independent transfers, he can accept one and refuse the others.
3. If a donee who is *not competent* accepts an onerous gift, he is *not* bound by his acceptance. But, if after becoming competent to contract, he retains the property, being aware of the obligation, he is bound by the obligation.

Universal donee

If a gift consists of the donor's *whole property*, the donee is personally liable for *all* the debts of the donor at the time of the gifts, to the extent of the property comprised in the gift.

Revocation (or suspension) of gifts

Once a gift is made, it is *irrevocable*,—except in *two* cases :

1. When the parties agree that on the happening of a specified event (not dependent on the donor's will), the gift is to stand suspended or revoked.
2. A gift can also be revoked in those cases in which a contract can be rescinded (e.g. for fraud, misrepresentation etc.)

These rules do *not*, however, affect the rights of a transferee for consideration without notice.

Gifts not covered by the Act

The above provisions do *not* :

- (i) apply to gifts of movable property made in contemplation of death; or
- (ii) affect any rule of Muhammadan law.

ACTIONABLE CLAIMS**(S. 130-137)***Definition*

An *actionable claim* is a claim to :

- (a) any debt, *not* being a debt secured —
 - (i) by mortgage of *immovable* property, or
 - (ii) by hypothecation or pledge of *movable* property; or
- (b) any beneficial interest in *movable* property which is *not* in the possession of the claimant, —

which the civil courts recognise as affording grounds for relief. (The debt or beneficial interest may be existent, accruing, conditional or contingent.)

Transfer, how effected

An actionable claim can be transferred only by an instrument in writing signed by the transferor.

Rights of transferee

1. All rights and remedies of the transferor vest in the transferee.
2. The transferee can sue (i) in his own name, (ii) without the transferor's consent, and (iii) without making him a party to the suit.

(These rules do *not* apply to the transfer of a *marine* or *fire* insurance policy.)

Liability of transferee

The transferee takes the transfer subject to *all* the liabilities and equities to which the transferor was subject.

Rights of assignee of marine and fire policies

An assignee of a marine or fire policy has all the rights of suit as *if* the insurance contract had been made with him.

Court officers not to deal in actionable claims

Judges, legal practitioners and Court Officers are debarred from buying, or trafficking in, actionable claims, and no such claim can be enforced in a court of law at his instance.

Saving of negotiable instruments etc.

The above provisions do *not* apply to stocks, shares, debentures and negotiable instruments.