16
Charges

Charge

Charge is defined in Section 100. It provides:

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

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

Does not amount to a mortgage

'The broad distinction between a mortgage and a charge is this: that whereas a charge only gives right to payment out of a particular fund or a particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property.' This idea is also expressed by saying that a mortgage is a *jus in rem*, that is, it is a *right against the property*, whereas, a charge is *jus ad rem*, that is, it is a *right to a thing*. Being a right against the property, a mortgage prevails over subsequent transferees, whereas, under the second paragraph of this section, a charge does not prevail against a transferee for consideration without notice of the charge. Again, whereas a mortgage can be created over a specific item of immovable property, under the company law there can be a floating charge over all the assets of the company. In a mortgage, there can be sometimes (as in the case of simple mortgage) be a personal liability unlike in the case of a charge. Another distinction is that a mortgage can only be created by the act of the parties, whereas a charge can also be created by operation of law. Though the Act generally deals with transfers *inter vivos* between parties, Section 2(*d*) shows that Section 100, which is in Chapter IV, applies to

charges by operation of law. In *Laxmi Devi* v. *Mukand Kumar*[1], the properties of the 3rd respondent were subject to a charge in favour of the 1st respondent. In execution of a decree obtained by the second respondent, the appellant purchased the property in ignorance of the charge as it was not referred to in the proclamation of sale. In an application by the first respondent to have the sale set aside, it was held:

> Section 2(*d*) provides that nothing herein contained shall be deemed to affect, save as provided by Section 57 and Chapter IV of this Act, any transfer by operation of law or by or in execution of, a decree or order of a court of competent jurisdiction. The effect of this provision is that the provisions of the Transfer of Property Act will not apply to any transfer by operation of law or by, or in execution of, a decree or order of a court of competent jurisdiction. The effect of this provision is that the provisions of the Transfer of Property Act will not apply to any transfer by operation of law or by, or in execution of, a decree or order of a court of competent jurisdiction. The provision is clear and emphatic. It says that nothing in the Transfer of Property Act will apply to the transfers just indicated; and that would naturally take in whole Section 100. But there is an exception made in this provision by Section 2(*d*) itself by the saving clause, and this exception covers cases provided by Section 57 and Chapter IV. Chapter IV deals with the mortgages of immovable property and charges, and includes Sections 58 to 104. Section 100 therefore, falls within Chapter IV; and the result of the saving clause is that Section 100 would apply to transfers by operation of law. There is, therefore, no doubt that if the question as to the applicability of the latter part of Section 100 to cases of auction sales had to be determined only by reference to Section 2(*d*), the answer would clearly be in favour of such applicability.
>
> It is true that when Section 2(*d*) was originally enacted, the latter part of Section 100 was not included in the Transfer of Property Act; this was added in 1929 by Section 50 of the Act 20 of 1929. That however would make no difference to the interpretation of the relevant clause in Section 2(*d*). The fact that the saving clause included in Section 2(*d*) as it was originally enacted, could not have

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1. (1959) 1 SCR 726. *State Bank of Bikaner & Jaipur* v. *National Iron & Steel Rolling Corpn.*, (1995) 2 SCC 19; *R.M. Arunachalam* v. *CIT*, (1997) 7 SCC 698; *K. Muthuswami Gounder* v. *Palaniappa*, AIR 498 SC 3118.

taken in the latter part of Section 100, makes no difference to its construction, because as soon as the latter provision was added to Section 100, it became a part of the provisions contained in Chapter IV and automatically fell within the terms of the saving clause. If the Legislature had intended that the provision added to Section 100 in 1929 should not fall within the saving clause, an appropriate provision would have been made by amending Section 2(*d*) in that behalf. Therefore, Section 2(*d*) by itself clearly supports the contention that the appellant, who is an auction-purchaser, would be able to claim immunity against the enforcement of the charge in favour of respondent No. 1 by virtue of the provisions contained in the latter part of Section 100.

In *Girish Chandra* v. *Annundamoy*[2], a testator gave certain properties to his nephew and provided that the loan of Rs 15,000 which I took from your father you will repay with interest from the properties'. It was held that a charge was created on the properties. Therefore, all that charge requires is that certain property is earmarked for the payment of a debt. The general view is charges created by act of parties in writing of value of Rs 100 or more should be registered. Since, however, no interest is transferred and Section 100 specifically states that charges do not affect third parties who take the property for consideration and without notice, perhaps registration may not be necessary.

Again, if the transaction on the face of it purports to be a mortgage, but the instrument is not operative as such by reason of defective execution or, non-compliance with the formalities prescribed by the law, the transaction is not converted into a charge. 'A bad mortgage does not amount to a good charge'.

Operation of law

The section itself recognises that there can be charges by operation of law, and this Act itself contains illustrations of such charges. They are: (1) under Section 55(4)(*b*) which deals with a vendor's charge for unpaid purchase money; (2) under Section 55(6)(*b*) which deals with a purchaser's charge for the amount of purchase money paid in anticipation of delivery of property; (3) under Section 73 with respect

2. ILR 15 Cal 66 (PC); *Rama* v. *Kamala*, AIR 1982 AP 107; *Hema* v. *Sakuntalamma*, AIR 1983 AP 49; *Rundibala* v. *Putubala*, AIR 1985 Cal 47.

to surplus sale-proceeds of a revenue sale; and (4) under Section 82 for contribution.

Proviso

Under the second clause, two exceptions are recognized when a charge is not enforceable. They are: (1) A trustee cannot enforce his charge against trust property. His right is only under Section 32 of the Trusts Act; and (2) a charge cannot be enforced against a transferee for consideration without notice. The second category would include even charges created by a decree of court, except in the case of a transferee *pendente lite*, that is, in the case of a transferee during the pendency of a litigation in which the court creates a charge by its decree.[3]

Lien

The differences between a charge and a lien are: (1) a charge may be created by act of parties or operation of law, whereas, a lien can be created only by operation of law; and (2) a charge can only be with respect to immovable property, whereas, a lien can be with respect to movable as well as immovable property.

Exercises

1. Distinguish between a mortgage and a charge. (pp. 300-302)

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3. See *Dattatraya Shanker Mote* v. *Anand Chintaman*, (1974) 2 SCC 799.

17
Merger

Merger

Merger is one of the methods by which a mortgage is extinguished. The other methods are—

(1) by a decree for foreclosure or sale under Section 60;

(2) by payment by the mortgagor;

(3) by the mortgagee himself releasing the security.

But under Section 101 when there is a subsequent mortgage, the purchase by a prior mortgagee of the equity of redemption does not bring about a merger.

It provides:

> Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

Under Section 92, I have shown how the doctrine in the case of *Toulmin* v. *Steere*[1] was held not to be applicable in India, and how the presumption regarding the intention to keep alive a discharged encumbrance underwent a change to the effect that in the absence of any indication to the contrary the courts would presume that the person discharging an encumbrance kept it alive if it would be for his benefit. The rule in this section is to the same effect. A mortgagee purchasing the equity of redemption would certainly keep alive his own encumbrance if there was subsequent encumbrance, because, it would be to his benefit to keep it alive; for, the subsequent mortgagee will then have to redeem the prior mortgage.

Exercises

1. Explain the scope of 'Merger' in relation to mortgages. (p. 304)

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1. 3 Mer 210; *Melegowda* v. *Gaibu*, AIR 1978 Kant 71 (case of lease followed by a mortgage); *Gambangi Appalaswamy* v. *Behara Venkatramanayya*, (1984) 4 SCC 382: AIR 1984 SC 1728; *Shafiq Ahmad* v. *Sayeedan*, AIR 1984 All 140.

18
Miscellaneous

The next three sections deal with certain procedural matters. They provide as follows:

Section 102:

Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any court in which a suit might be brought for redemption of the mortgaged property, and such court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

Provided that, in the case of a notice required by Section 83, in the case of a deposit, the application shall be made to the court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit, in any court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered and such deposit shall have the effect of a tender of such amount.

Section 103:

Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of court by any person incompetent to contract, such notice may be served on or by or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provision of Order XXXII in the First Schedule to the Code of Civil Procedure, 1908 shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Section 104:

The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.

19

Leases

Sections 105 to 116 which deal with leases do not apply to agricultural leases. This is laid down in Section 117 which provides:

None of the provisions of this chapter apply to leases for agricultural purposes except in so far as the State Government may by notification published in the Official Gazette declare all or any of such provisions, to be so applicable in the case of all or any such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Most agricultural leases are subject to local State laws and that is the reason why this chapter is not made applicable to them. Since the chapter does not apply, Section 107 also does not apply, that is, agricultural leases can be made orally.

Agricultural purpose refers to tilling and cultivation for purposes of raising crops. The expression has been construed liberally and many purposes, subservient and ancillary to agricultural purposes defined strictly as above, are considered to be also agricultural purposes.[1]

Section 105 defines 'lease', 'lessor', 'lessee', 'premium', and 'rent' as follows:

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.[2]

1. *Sardamani* v. *State*, AIR 1979 Pat 106; *Roshanlal* v. *Munshi Ram*, AIR 1981 P&H 73; *Kallan* v. *Distt. Judge*, AIR 1981 All 168; *Rampur Engg. Co.* v. *State*, AIR 1981 All 396; *Syed Jaleel* v. *Venkata*, AIR 1981 AP 328; *Santilal* v. *Ramesh*, AIR 1981 Cal 413 (Lein of lessor); *Sher Singh* v. *Md. Ismail*, AIR 1981 All 114; *Hadibandu* v. *Luchia*, AIR 1982 Ori 73; *Vijay Kumar* v. *Indu Jain*, AIR 1982 Del 260; *Kalloo* v. *Dhakadevi*, (1982) 1 SCC 633: AIR 1982 SC 813 (Compromise decree); *Seetaramaswami* v. *Ugra Narsimha*, AIR 1982 AP 454; *Punjab Montgomery Transport Co.* v. *Raghuvanshi*, AIR 1983 Cal 343; *Anisur Rehman* v. *Sukhdev*, AIR 1984 Pat 245; *P.R. Catholic Mission* v. *Murugan*, AIR 1984 Mad 125.

2. *U. Nagarathnan* v. *R.S. Murthi*, (1976) 4 SCC 20; *Jaswantsingh Mathurasingh* v *Ahmedabad Municipal Corpn.*,1992 Supp (1) SCC 5; *State of Karnataka* v. *Subhash*, AIR 1993 SC 860; *Juthika* v. *Mahendra*, AIR 1995 SC 1142; *Puran* v. *Sundari*,

Sub-lease

A lease can be granted by a lessee. Such a lease is generally known as a sub-lease. In *Mineral Development Ltd.* v. *Union of India*[3], the appellant, who was the lessee of a mining lease granted a sub-lease. Its officers were prosecuted for violating the provisions of Mines and Minerals (Regulation and Development) Act, 1948, and Rules, by granting such sub-lease. It was contended that the sub-lease was not a 'mining lease' under the Act. It was held:

> If one takes the plain meaning of the words used in Section 3(*d*) of the Mines Act it is clear that the term 'mining lease' means any kind of lease granted for the purpose of searching for, winning *etc.* of minerals or for purposes connected therewith. It is significant that the definition does not require that the lessor must be the proprietor; and so on a fair reading it would include a lease executed by the proprietor as much as a lease executed by the lessee from such a proprietor. If we turn to the definition of lease in Section 105 of the Transfer of Property Act, what a lease requires is a transferor and a transferee and a transfer of immovable property on the terms and conditions mentioned in Section 105. How the transferor gets his title to make a lease is immaterial so long as the transaction is of the nature defined in Section 105. Applying therefore the plain words of Section 3(*d*) of the Act and the definition of lease as contained in Section 105 of the Transfer of Property Act, it is perfectly clear that there is a transferor in this case (appellant), and a transferee (sub- lessee) who has accepted the transfer; the transaction is with respect to immovable property and creates a right to enjoy such property for a certain term and for consideration on the conditions mentioned in it. Though, therefore, the document may be termed a sub-lease in view of the fact that the transferor is not the owner of the property transferred but is itself a lease, the transaction between the appellant and the sub-lessee is nothing but a mining lease.

(1991) 2 SCC 180; *State of Maharashtra* v. *Atur India*, (1994) 2 SCC 497; *Raghubar Dayal* v. *U.P.*, 1995 Supp (3) SCC 20; *Union Bank of India* v. *Cooks and Kelvey*, (1994) 5 SCC 9; *Tulsi* v. *Paro*, (1997) 2 SCC 706; *Aundiappa* v. *Gnanambal*, AIR 1998 SC 3207.

3. (1961) 1 SCR 445; *Bans Raj* v. *Krishna*, AIR 1981 All 280; *Madhusudanlal* v. *Sadhu*, AIR 1985 P&H 172; *Ganesh Trading Co. In re*, AIR 1985 Cal 32.

Transfer of a right to enjoy property

What the lessor transfers is a right to the lessee to enjoy whatever property the lessor has in the immovable property. In *Rajkumar Thakur Giridhari Singh* v. *Meghlal Pandey*[4], the appellant, a proprietor of a zamindari, granted a lease to the respondent 'with all rights'. Minerals having been discovered, the respondent began to work them claiming that they were granted under the lease and the appellant resisted the claim. It was held:

> In *Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti*[5], this Board held: 'that the zamindar must be presumed to be the owner of the underground rights in the absence of evidence that he ever parted with them'....This case was followed in *Durga Prasad Singh* v. *Baijnath Bose*[6] in which Lord Macnaghten pronounced 'that it must be presumed that the mineral rights remain in the zamindar in the absence of proof that he had parted with them....' Finally in *Sashi Bhushan Misra* v. *Jyoti Prasad Singh Deo*[7], it was held in the language of Lord Buckmaster: 'These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by zamindar of tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect'....The words 'with all rights' only give expressly what might otherwise quite well be implied, namely, that the corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be rights of passage, water or the like, which enure to the subject of the pattah and may even be derivable from outside properties. It must be borne in mind that the *essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of*

4. (1918) LR 44 IA 246; *Babulal* v. *Kantilal*, AIR 1979 Guj 5; *Hirendra* v. *Shibendra*, AIR 1979 Cal 135; *Tarkeshwar Sio Thakur Jiu* v. *Dar Dass Dey & Co.*, (1979) 3 SCC 106: AIR 1979 SC 1669 (Mineral lease); *D. Dondeti Gopi Reddy* v. *Anjaneya*, (1980) 1 SCC 498: AIR 1980 SC 105; *Jaswantsingh Mathurasingh* v. *Ahmedabad Municipal, Corpn.*, 1992 Supp (1) SCC 5.
5. (1910) LR 37 IA 136.
6. (1912) LR 39 IA 133.
7. (1916) LR 44 IA 46.

things and by reason of the user disappear. In order to cause the latter specially to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased. Their Lordships accordingly are of opinion that the words founded on do not add to the true scope of the grant nor cause mineral rights to be included within it.

In *Raghunath Roy* v. *Raja of Jheria*[8], a zamindar granted a zamindari village as *rent free* Brahmottar and that the grantee should enjoy it comfortably by cultivating and getting the same cultivated by others. On the question whether the subjacent minerals passed under the grant it was held:

> The result at which their Lordships have arrived after a consideration of the decisions of the Board is that where a zamindar grants a tenure in lands within his zamindari, and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee (The fact that the grant was rent free made no difference).

Kinds of tenancies

(1) A tenancy at will is a tenancy which can be terminated at the will either of the lessor or the lessee. It does not mean that the landlord can evict him whenever he pleases. He must be given a reasonable notice to quit.

(2) Periodic leases are tenancies from year to year or month to month. They are the kind of leases referred in Section 108 as leases of uncertain duration. A monthly tenancy does not mean a tenancy which begins on the first of every month and expires on the last day of the month and a fresh tenancy is created for the next month automatically. It means a tenancy of uncertain duration which can be put an end to by either party by giving one month's notice.

(3) Permanent leases or leases in perpetuity.

(4) A tenancy for a term of years. It is also called termor in English law.

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8. (1919) LR 46 IA 158.

In *Sivajogeswara Cotton Press* v. *Panchaksharappa*[9], a lease of land was executed between the predecessors in interest of the parties, for the purpose of erecting a ginning and pressing cotton factory. The lessee was given the right to give up possession at will. The lessor's successor in interest sought to terminate the lease on the ground that it was a tenancy-at-will, and the lessee resisted the suit on the ground that it was a case of permanent tenancy. It was held:

> The first argument in support of the conclusion we are asked to arrive at (that it is a permanent tenancy) is that it is clearly a lease for building purposes; and it is rightly pointed out that when the land is let out for building purposes without a fixed period, the presumption is that it was intended to create a permanent tenancy. Reliance was placed upon the leading case in *Navalram* v. *Javerilal*[10], where Sir Lawrence Jenkins, C. J., laid it down that a presumption in favour of a permanent tenancy arises on a transaction like the one we have before us....In this connection the following observations of the Privy Council in the case of *Baboo Lekhraj Roy* v. *Kunhya Singh*[11], may be quoted: 'If a grant be made to a man for an indefinite period, it ensures, generally speaking for his lifetime and passes no interest to his heirs unless there are some words showing an intention to grant a hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained'....In *Janki Nath Roy* v. *Dinanath Kundu*[12], the Judicial Committee of the Privy Council observed: 'On the other hand, restrictions on the powers of the tenant to dig tanks and build masonry structures and other provisions in the document were relied upon by the appellants as indicating a tenancy not of a permanent nature.' That some provisions are to be found which point in that direction cannot be denied, though some of them may be explained by the existence of special powers to recover *khas* possession referred to above. But, the question, after all, is one of construction of a document, namely, what is the correct view to take of the rights of the parties

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9. (1962) 3 SCR 876; *Chapsithai* v. *Puroshotham*, (1971) 2 SCC 205: AIR 1971 SC 1878; *Pattabhirama* v. *Sri Ramanuja*, AIR 1984 AP 176; *Aras* v. *Ali*, AIR 1985 Cal 47.
10. 7 Bom LR 401.
11. LR 4 IA 223.
12. 35 CWN 982 (PC).

> after considering all the clauses of the kabuliyat and giving due weight to the several indications which point in the different directions?....It must therefore be held that a stipulation entitling the lessee to surrender possession of the premises at his will is not wholly inconsistent with the tenancy being permanent.

In *Afzalunnisa* v. *Abdul Karim*[13], the appellant's predecessors invited the respondent's predecessors to occupy land for building purposes in 1859. There was no document showing the terms, but from 1859 onwards a uniform rent was paid and some of the receipts used the word 'permanent'. The tenants had also erected substantial buildings without objection by the landlord. There were sales and mortgages and properties passed by succession. It was held:

> The case is substantially the same as that of *Caspersz* v. *Kadarnath*[14], where it was correctly held: 'Although the origins of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a pucca house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a court is justified in presuming that the tenure is of a permanent nature.

Premium and rent

In a lease there can be both premium and rent, though the definition seems to be to the contrary. In *D.D. Khanna* v. *CIT*[15], it was observed: 'Fazl Ali, J., (as he then was) in *CIT, Bihar and Orissa* v. *Visweshwar Singh*[16], referred to the distinction between a single payment made at the time of the settlement of demised property and recurring payments made during the period of its enjoyment by the lessee. This distinction, accord-

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13. (1919) LR 46 IA 131.
14. ILR 28 Cal 738.
15. (1969) 1 SCC 429; *Tej Kumar* v. *Purushottam*, AIR 1981 MP 55; *Harbilas* v. *Roshan*, AIR 1983 P&H 256; *D.K. Trivedi* v. *State of Gujarat*, 1986 Supp SCC 20: AIR 1986 SC 1323.
16. (1939) 7 ITR 536.

ing to the learned Judge is clearly recognised in Section 105 of the Transfer of Property Act which refers to both premium and rent'.

Lease and licence

There are certain fundamental differences between a lease and a licence.

In *Associated Hotels of India Ltd.* v. *R.N. Kapoor*[17], the appellant was a proprietor of a hotel and the respondent was occupying a certain space in the 'Ladies and Gents' cloak rooms. The respondent applied under the Rent Control Act for fixation of fair rent alleging that he was a tenant. The appellant contended *inter alia* that he was only a licensee and not a lessee. It was held:

> There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property, whereas Section 52 of the Indian Easements Act defines a licence....The following propositions may be taken as well-established: (1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties—whether they intended to create a lease or a licence; (3) if the document *creates an interest in the property*, it is a lease; but if it only permits another *to make use of the property*, of which legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property *prima facie* he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

[Since the respondent had exclusive possession of the room occupied by him, was free from any direction from the appellant and had a right to

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17. AIR 1959 SC 1262: (1960) 1 SCR 368; *Kidar Nath* v. *Swami*, AIR 1978 P&H 204; *Chandu Lal* v. *Delhi Municipality*, AIR 1978 Del 174; *Ram Awatar Singh* v. *Khajan*, AIR 1978 Cal 337; *Tarkeshwar Sio Thakur Jiu* v. *Dar Dass Dey & Co.*, (1979) 3 SCC 106: AIR 1979 SC 1669; *Makwana* v. *Rainbow*, AIR 1979 Guj 178; *Laxman* v. *Shyam*, AIR 1980 All 242; *Balwant Singji* v. *Bhagwantrao*, AIR 1980 Bom 333; *Tejoomal* v. *Taleggaonkar*, AIR 1980 Bom 369; *Prakash Rao* v. *SRT Corpn.*, AIR 1981 Pat 142; *Ratilal* v. *Abdul Hussain*, AIR 1982 Guj 266; *Thrab Gosin* v. *Laxmi*, AIR 1984 All 180; *Shri Ram* v. *Kasturi Debi*, AIR 1984 All 66; *Bholanath* v. *Maharao*, AIR 1984 All 60; *Sant Lal* v. *Avtar Singh*, (1985) 2 SCC 332: AIR 1985 SC 857 (lessee and his licensee); *Ratan Kumar* v. *U.P.*, AIR 1996 SC 2710.

transfer his interest (although with the consent of the appellant) the respondent was a lessee and not a licensee.]

In *M.N. Clubwala* v. *Fida Hussain Saheb*[18], the respondents were meat-stall holders in the private market of the appellant. On the question whether the respondent was a lessee or a licensee, it was held:

> While it is true that the essence of a licence is that it is recoverable at the will of the grantor, the provision in the licence that the licensee would be entitled to a notice before being required to vacate is not inconsistent with a licence. (*See* Halsbury's Laws of England, 3rd Ed., Vol. 23, p. 431.) Indeed Section 62(*c*) of the Indian Easements Act, 1882, provides that a licence is deemed to be revoked when it has been either granted for a limited period, or acquired on condition that it shall become void on performance or non-performance of a specified act, and the period expires or the condition is fulfilled. In the agreement in question the requirement of a notice is a condition and if that condition is fulfilled the licence will be deemed to be revoked under Section 62....Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. The intention has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstances and conduct of the parties. Here the terms of the document evidencing the agreement between the parties are not clear and so the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties. One of these circumstances is whether actual possession of the stalls can be said to have continued with the landlords or whether it had passed to the stall-holders. Even if it had passed to a person, his right to exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. That is what was held in *Errington* v. *Errington*[19], *Cobb* v. *Lane*[20], and *Vurum Subba Rao* v. *The Eluru Municipal*

18. AIR 1965 SC 610: (1964) 6 SCR 642.
19. (1952) 1 All ER 149: (1957) 1 KB 290.
20. (1952) 1 All ER 1199.

Council[21],....If however, exclusive possession to which a person is entitled under an agreement with a landholder is coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. See *Associated Hotels of India Ltd.* v. *R. N. Kapoor*[22]. In the case before us, however, while it is true that each stall-holder is entitled to the exclusive use of his stall from day to day it is clear that he has no right to use it as and when he chooses to do so or to sleep in the stall during the night after closure of the market or to enter the stall during the night after 11 p.m. at his pleasure. He can use it only during a stated period every day and subject to several conditions. These circumstances coupled with the fact that the responsibility for cleaning the stalls, disinfecting them and of closing the market in which the stalls are situate is placed by the Madras City Municipal Act, 1919, the regulations made thereunder and the licence issued to the landlords, on the landlords, would indicate that the legal possession of the stalls must also be deemed to have been with the landlords and not with the stall-holders. The right which the stall-holders had was to the exclusive use of the stalls during stated hours and nothing more. Looking at the matter in a slightly different way it would seem that it could never have been the intention of the parties to grant anything more than a licence to the stall-holders.

Apart from these there are some other differences also between a lease and licence. They are: (1) a lease is generally transferable whereas a licence is not; (2) a lease is generally not revocable, whereas a licence is; (3) if the lessor transfers the property, a lease is unaffected, whereas a licence is determined; (4) a lessee can himself sue for trespass, but not a licensee; (5) death of the grantor terminates a licence, but not a lease, and the death of the grantee passes on the interest to the heirs in the case of a lease, but not in the case of a licensee.

In *Sridhar* v. *Sri Jagannath Temple*[23], the Supreme Court held:

In *Qudrat-ullah* v. *Municipal Board, Bareilly*[24], this Court observed "There is no simple litmus test to distinguish the lease as defined in Section 105, Transfer of Property Act from a licence as

21. ILR (1956) AP 515.
22. AIR 1959 SC 1262: (1960) 1 SCR 368.
23. (1976) 3 SCC 485.
24. (1974) 1 SCC 202: (1974) 2 SCR 530.

defined in Section 52, Easements Act; but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property entitling the transferees to enjoyment is created it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result. (In the present case, the sanad granted by the Superintendent of a temple to the plaintiff's ancestor did not create any interest in the site in question in favour of the plaintiff or his ancestors.) It merely permitted him to open a saragarh which meant a room for storing articles for the sole purpose of preparing *bhog* for the three presiding deities. The sanad also did not confer the right of exclusive possession of the suit property on the grantee. This is evident from the right of "dakhale khas" of the respondents in the suit property as also from the proved fact that the saragarh was not kept open by the temple authorities from mid-night to 6 a.m. during which interval the plaintiff could in no case occupy it nor could he have access to it. It has also been found to have been established from the plaintiff's evidence itself that the employees of the [grantor] used to clean the refuse etc. which got accumulated before the suit saragarh. Thus, none of the elements of lease can be said to be present in the instant case. In *M.N. Clubwala* v. *Fida Hussain Saheb*[25], this Court rejected the claim of holders of certain stalls in a market that they were lessees and not licensees thereof on the ground that they had no right to use them after the closure of the market at night and the responsibility of cleaning and disinfecting the stalls and closing the market at night lay on the landlord and not on the stall-holders.

In *Revenue Board* v. *A.M. Ansari*[26], the forest department of the Government of Andhra Pradesh after giving a sale notice held, in accordance with the terms and conditions thereof, an auction in respect of various items of forest produce. The respondents being the highest bidders in respect of some of the items of the forest produce were called upon to pay in terms of the conditions of the notice the stamp duty on the agreement to be executed by them as if they were leases of immovable property falling under Article 31(*c*) of the Indian Stamp Act, 1899. Aggrieved by the said notices the respondents moved the High Court

25. AIR 1965 SC 610: (1964) 6 SCR 642.
26. (1976) 3 SCC 512: AIR 1976 SC 1813.

under Article 226 of the Constitution and the High Court held in favour of the respondent. Dismissing the appeal to it, the Supreme Court held:

> A close study of the definitions of immovable property in the General Clauses Act, the Transfer of Property Act, the Registration Act and the Sale of Goods Act shows that it is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is, in other words, transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred by the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence it is essential therefore to look to the substance and essence of the agreement and not to its form. We are fortified in this view by the decision of the Court in *Associated Hotels of India Ltd.* v. *R.N. Kapoor*[27], where Subba Rao, J. observed:
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> "If a document gives only a right to use the property in a particular way or under certain terms while remains in possession and control of the owner thereof it will be a licence. The legal possession, therefore, continues to be with owner of the property but the licensee is permitted to make use of the premises for a particular purpose. But for the permission the occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises it would conclusively be established that he was a lessee. But there was a change of opinion and the recent trend of judicial opinion is reflected in *Errington* v. *Errington*[28], wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion at page 155. 'The result of these cases is that although a person who is let into exclusive possession is *prima facie* considered to be tenant, nevertheless, he will not be held to be so if the circumstances

27. AIR 1959 SC 1262: (1960) 1 SCR 368.
28. (1952) 1 All ER 149: (1957) 1 KB 290.

negative any intention to create a tenancy.' The Court of Appeal again in *Cobb* v. *Lane*[29], considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of document. At page 1201 Somerwell, L.J. stated 'the solution that would seem to have been found is as one would expect that it must depend on the intention of the parties'. Denning, L.J. said much to the same effect at page 1202. 'The question in all these cases is one of intention. Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land'....The crucial test to be employed in a case of the present nature could be gathered from the observations made by Lord Shaw while delivering the judgment of the Board in *Kaury Timber Co. Ltd.* v. *Commissioner of Taxes*[30]. According to these observations in order that an agreement can be said to partake of the character of lease it is necessary that the grantee should have obtained an interest in and possession of the land. If the contract does not create an interest in land then to use the words of Coleridge, C.J. in *Marshal* v. *Green*[31], the land would be considered as a mere warehouse of the things sold and the contract would be a contract for goods. [It is, therefore, necessary to notice the salient features of the agreement of the present case.] The first salient feature is that they were for a short duration of 9-10 months. The second important feature is that they did not create any estate or interest in land. The third salient feature is that the respondents were not granted exclusive possession and control of the land but were merely granted the right to pluck, cut, carry away and appropriate the forest produce that might have been existing at the time the contract or which might have come into existence during the short period of the currency of the agreement. The right to go on the land is only ancillary to the real purpose of the contract. Thus, the acquisition by the respondents not being an interest on the sale but merely right to the *fructus naturalis*, we are clearly of the view that the agreement in question possessed the characteristics of a licence and did not amount to leases so as to attract the applicability of Article 31(*c*) of the Indian Stamp Act.

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29. (1952) 1 All ER 1199.
30. (1913) AC 771.
31. (1875) 1 QBD 35.

English and Indian Law

A lease in perpetuity cannot be granted in England. In English law where a lessee had not taken possession, he did not have the rights of a lessee, but only a right to enter known as an *intersee termini*. In India, if the lease is created by a registered document, delivery of possession is not necessary. Section 107 sets out the cases in which a registered instrument is necessary, but that section does not apply to agricultural leases. In those cases delivery of possession is necessary.

See Section 10 in this connection.

The formalities for creating a lease are set out in Section 107 as follows:

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

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

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

Provided that the State Government may, from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

Even a lease for a period of less than one year *cannot be made by an unregistered instrument*. It can only be made either by a registered instrument or an *oral* agreement accompanied by delivery of possession. When the rent is fixed by a registered deed it can be altered only by a registered deed.[32] Where a lease is not valid because the deed was not registered, the deed can be used for the collateral purpose of showing the nature of possession.

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32. *S.K. Roy* v. *B.K. Collieries*, AIR 1971 SC 751; *Batakala* v. *Dergasi*, AIR 1978 Ori 103; *Thayarammal* v. *People's Charity Fund*, AIR 1978 Kant 125; *Antonio* v. *Upendra*, AIR 1978 Goa 19; *Proban* v. *Deb Kumar*, AIR 1978 Cal 33; *Sultan Moideen* v. *Official Trustee*, AIR 1978 Mad 248; *Vaidyanathan* v. *Kochuraman*, AIR 1980 Ker 207; *State* v. *Phoolchand*, AIR 1982 All 260 (lease in favour of Govt.); *T.N. Habib* v *Arogya Manj*, AIR 1982 Mad 156; *Pankaj* v. *Mohinder*, AIR 1991 SC 1233; *Sri Janaki Devi* v. *Ram Swarup*, (1995) 5 SCC 314; *Weney D'Souza* v. *Conceicao*, AIR 1991 SC 1551; *Neki* v. *Satnarayan*, AIR 1997 SC 1334; *Rajendra* v. *Rameshwar*, (1998) 5 SCC 6 ?

As regards the duration of a lease, in the absence of a contract to the contrary, the law is set out in Sections 106 and 111. Section 106 provides:

> In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes[33] shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.
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> Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

In *Ram Kumar Das* v. *Jagdish Chandra*[34], on December 8, 1924, the defendant executed a registered kabuliyat in favour of the Receiver of the property for a period of ten years at a certain rent per annum. It was for building structures on the land. The lessee paid the annual rent in 1925 and 1926 and thereafter no payment of rent was made. After the Receiver was discharged, the plaintiff took possession of the estate and sued for the eviction of the lessees. The Courts found that the kabuliyat was ineffective as a lease, that the lessee was a tenant from month to month, but as the notice to quit was defective it dismissed the suit. The plaintiff, after giving a proper notice, filed another suit for eviction. On the question of the nature of tenancy, it was held:

> Section 106 lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In

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33. *B.G. Devakate* v. *V. M. Gangawal*, (1975) 2 SCC 246; *Pooran Chand* v. *Motilal*, 1965 Supp (2) SCR 906 (Notice not necessary); *Chandika* v. *Sukhnandan*, AIR 1981 All 312; *Ramgopal* v. *Manchand*, AIR 1981 All 352; *Rawat* v. *State*, AIR 1981 Raj 286; *Gordhan* v. *Ali Bux*, AIR 1981 Raj 206; *Kochunnni* v. *Kuriakose*, AIR 1982 Ker 87; *Krishnan* v. *Arulmighu*, AIR 1983 Mad 142; *Lala* v. *Mangal*, AIR 1983 All 274; *Bengal Electric Lamp Works* v. *S.C. Singh*, AIR 1983 Cal 389; *S.K. Gupta* v. *R.C. Jain*, AIR 1984 Del 187; *Karayadathil* v. *Valiaparambath*, 1995 Supp (3) SCC 403; *Jiwan Das* v. *LIC*, 1994 Supp (3) SCC 694; *Raptakos Brett* v. *Ganesh*, AIR 1998 SC 3085.

34. 1952 SCR 269; *Jagdish* v. *Ratanchand*, AIR 1979 MP 186; *Bhagabandas Agarwalla* v. *Bhagwandas Kanu*, (1977) 2 SCC 646; AIR 1977 SC 1120; *James* v. *Madhawanand*, AIR 1979 All 104; *Madhusudan* v. *Sushma*, AIR 1979 Pat 104 (Several lessors); *Hashmatrai* v. *Tarachand*, AIR 1979 Bom 95; *Baidyanath* v. *Radheshyam*, AIR 1979 Cal 97; *Jagat Taran* v. *Sant Singh*, AIR 1980 Delhi 7; *Biswabani* v. *Sadutosh*, (1980) 1 SCC 185; AIR 1980 SC 226.

such cases the duration has to be determined by reference to the object or purposes for which the tenancy is created. The rule of construction embodied in the section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. It is conceded in the case before us that the tenancy was not for manufacturing or agricultural purposes. The object was to enable the lessee to build structures upon the land. In these circumstances, it could be regarded as a tenancy from month to month, unless there was a contract to the contrary. It is not disputed that the contract to the contrary, as contemplated by Section 106 of the Transfer of Property Act, need not be an express contract; it may be implied, but it certainly should be a valid contract....But the difficulty in applying this rule to the present case arises from the fact that a tenancy from year to year or reserving a yearly rent can be only by registered instrument as laid down in Section 107 of the Transfer of Property Act....A lease for one year certain cannot be inferred from the payment of annual rent....It is one thing to say that in the absence of a valid agreement, the rights of the parties would be regulated by law in the same manner as if no agreement existed at all; it is quite another thing to substitute a new agreement for the parties which is palpably contradicted by the admitted facts of the case.

Manufacturing purpose

This means production of articles of commercial use by means of machinery.[35]

Notice

A notice to terminate, which is otherwise valid does not become invalid merely because something else is added to it.[36] But it should not

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35. See *Allenbury Engineers Pvt. Ltd.* v. *Ram Krishna Dalmia*, (1973) 1 SCC 7: AIR 1973 SC 425.

36. *Mangilal* v. *Sugan Chand*, AIR 1965 SC 101; *Budh Sen* v. *Rahiman*, AIR 1978 All 549; *Pramode Das* v. *Sharmadutta*, AIR 1978 Gau 95; *Ram Chandra* v. *Ram Saran*, AIR 1978 All 173 (case of co-owner saving for rent for a portion after partition); *JMC Gaffar* v. *LIC*, AIR 1978 Cal 123; *Pravash* v. *Chand*, AIR 1978 Cal 224; *Brij Bihari* v. *Devki*, AIR 1978 Pat 116; *Gosto* v. *Ramesh*, AIR 1978 Cal 235 (surrender by tenant); *Dineshwar* v. *Manorama*, AIR 1978 Pat 256; *Shew Karan* v. *Satyanarain*,

be conditional. If in a notice terminating tenancy there is a clause threatening enhanced rent, there is a difference of opinion whether or not it amounts to a conditional notice.

In *Puvada Venkateswara* v. *C.V. Ramana*[37], the defendant-appellant had taken a house on rent for a period of five years for running a lodging house. After the lease had expired, according to the landlord respondent the appellant had continued to hold-over as a tenant on the same terms by which presumably it was meant that it was a month-to-month tenancy. The respondent filed a petition under Section 10 of the Andhra Pradesh Building (Lease, Rent and Eviction) Control Act, 1960 before the Rent Controller and he ordered eviction of the appellant after holding all the defences of the appellant to be flimsy and unsubstantiated. The appellant's revision to the High Court was also rejected. In appeal to the Supreme Court, the appellant contended that the petition could not succeed because notice under Section 106, Transfer of Property Act had not been served upon the appellant. Dismissing the appeal, following the decision of the Supreme Court in *Ravel & Co.* v. *K.C. Ramachandran*[38], it was held: The Act provides for eviction of tenants and is self-contained so that no recourse to the provisions of Section 106 of the Transfer of Property Act was necessary. The Supreme Court explained the decision in *Mangilal* v. *Sugan Chand*[39], as follows:

AIR 1978 Cal 495; *S.K. Roy* v. *Narayan*, AIR 1978 Cal 174; *Hisi* v. *Raj Kishore*, AIR 1981 Pat 215; *Manohar* v. *Ramanath*, AIR 1981 Del 129; *Budha* v. *Bedariya*, AIR 1981 MP 76; *Shiva Narain* v. *Mang & Co.*, AIR 1982 All 44 (notice to company or firm).

37. (1976) 2 SCC 409: AIR 1976 SC 869.

38. (1974) 1 SCC 424: (1974) 2 SCR 629; *V. Dhanapal* v. *Yesodai*, (1979) 4 SCC 214 : AIR 1979 SC 1745; *Premlal* v. *Jalav*, AIR 1979 Raj 44; *Pradesh Kumar* v. *Benod Behari*, (1980) 3 SCC 348: AIR 1980 SC 1214; *Peter* v. *Constance*, AIR 1980 Kant 28; *Bafal* v. *Ist Addl. Distt. Judge*, AIR 1980 All 142 ('Now' in notice means 'hereby'); *Maharaj* v. *Pran*, AIR 1980 MP 117; *Ram* v. *Abdul*, AIR 1980 All 262; *Radheylal* v. *Bimal*, AIR 1980 All 84 (notice to joint tenants); *Shiv Datt* v. *Ramdas*, AIR 1980 All 280; *Jagjit Industries* v. *Rajiv*, AIR 1981 Delhi 359; *Jawarlal* v. *Labhsankar*, AIR 1982 Guj 152; *Rahimtulla* v. *Chandrakant*, AIR 1982 Bom 282; *Dutta & Associates* v. *State*, AIR 1982 Cal 226; *Fernandez* v. *Cardoza*, AIR 1984 Kant 227; *Sallomal* v. *Naina*, AIR 1977 All 32; *P.C. Cheriyan* v. *Barfi*, (1980) 2 SCC 461: AIR 1980 SC 86 (Retreading tyres not a manufacturing purpose); *Derichand* v. *Kisan*, AIR 1981 Bom 226; *Idandas* v. *Anant*, (1982) 1 SCC 27: AIR 1982 SC 127 (Each product having a different name); *Veena* v. *Ishrati*, AIR 1985 Pat 207; *H.C. Gupta* v. *Ramona Rao*, AIR 1985 AP 193; *Bal Kissen* v. *Kanupada*, AIR 1985 Cal 129; *Bholanath* v. *Bholanath*, AIR 1983 Cal 387; *Sibendranath* v. *Ganesh*, AIR 1985 Cal 269; *Jiwan Ram* v. *Tobgyal*, AIR 1985 Sik 10.

39. AIR 1965 SC 101.

"In that case, however, Section 4 of the M.P. Act merely operated as a bar to an ordinary civil suit so that service of a notice under Section 106, Transfer of Property Act, became relevant in considering whether an ordinary civil suit filed on a ground which constituted an exception to the bar contained in Section 4 had to be preceded by a notice under Section 106 of the Transfer of Property Act. In the context of the remedy of ejectment by an ordinary civil suit it was held that the usual notice of termination of tenancy under Section 106, Transfer of Property Act was necessary to terminate a tenancy as a condition precedent to the maintainability of such a suit."

In *Rattan Lal* v. *Vardesh Chander*[40], the appellant was a tenant of a building in Delhi having been inducted into possession by the respondent landlord in 1954. At the time of the lease, the Transfer of Property Act had not been extended to Delhi although later on December 1, 1962 the Act was made applicable. The term of the lease was said to be less than a year. But the landlord had been receiving the rent from the tenant until the time he filed a petition for eviction in 1967. In a petition by the respondent under the Delhi Rent Control Act for eviction of the appellant, the appellant relied on certain defences grounded on Sections 106 and 111 of the Transfer of Property Act on the score that no notice to quit had been given nor notice of forfeiture as prescribed by those sections. The petition was allowed and the appellant's appeal was dismissed right up to the High Court. Dismissing the appeal to it, the Supreme Court held that the respondent was not correct in his contention that no notice was required as the lease was for a specified period and expired by efflux of time. "A lease merely stating that it is for a period less than one year is *ex-facie* for an indefinite period and as such cannot expire by efflux of time.... A notice in writing formally determining the tenancy is not a rule of justice or canon of common sense. Realism married to equity being the true test we are persuaded the pre-amending Act provision of Section 111(*g*) is in consonance with justice. If so, the mere institution of the legal proceeding for eviction fulfils the requirements of law for determination of the lease. The conscience of the court needs nothing more and nothing else."

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40. (1976) 2 SCC 103: AIR 1976 SC 588; *Manujendra* v. *Purender*, AIR 1967 SC 1419.

In *Bhagbandas Agarwalla* v. *Bhagwandas Kanu*[41], the Supreme Court of India held that under Section 106 of the Transfer of Property Act the notice to quit must expire with the end of the month of the tenancy, or in other words, it must terminate the tenancy with effect from the expiration of the month of the tenancy. If it terminates the tenancy with effect from an earlier date, it would be clearly invalid. In the present case the notice to quit required the respondents to vacate the premises "within the month of October 1962" and intimated to them that otherwise they would be treated as "trespassers from November 1, 1962" in respect of the premises. The Supreme Court observed:

"It is settled law [*Sidebotham* v. *Holland*[42], and *Harihar Banerji* v. *Ramsashi Roy*[43],] that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed *ut res magis valeat quam pereat*. The validity of a notice to quit, ought not to turn on the splitting of a straw. It must not be read in a hypercritical manner, nor must its interpretation be affected by pedogogic pendantism or over-refined subtlety, but it must be construed in a common sense way. So judged the tenancy was sought to be determined on the expiration of the month of October 1962 and not earlier and the notice to quit expired with the end of the month of tenancy as required by Section 106 of the Transfer of Property Act. It was in the circumstances a valid notice which effectively determined the tenancy of the respondents with effect from the midnight of October 31, 1962. There is no difference between a notice asking a tenant to vacate "within the month of October 1962" and a notice requiring a tenant to vacate latest "by the midnight of October 31, 1962", because in both cases, the tenant would be entitled to occupy the premises up to the expiration of October 31, 1962, but not beyond it."

Section 116 provides:

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

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41. (1977) 2 SCC 646; *Ram Kali* v. *Sita Ram*, AIR 1978 All 546.
42. (1895) 1 QB 378.
43. 1919 ILR 46 Cal 458 (PC): (1918) LR 45 IA 222.

Illustrations

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

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

When a tenant continues in possession without assent or dissent from the lessor, in English law, he is known as a tenant at sufferance. If however the landlord signifies his assent, a tenancy is created and the terms of the new tenancy are to be ascertained by referring to the terms of the old. Under Indian law, the terms of the new tenancy are determined by the purpose of the lease. Further, under Indian law, if there is no consent of the landlord, the possession of the tenant after the termination of the tenancy is wrongful, but his possession unlike that of a trespasser, is protected by law. A tenant at will is in possession with the consent of the lessor, whereas a tenant by sufferance is in possession after the tenancy period has come to an end without the consent of the lessor. The latter is not responsible for rent, but only for compensation for use and occupation, but since he is not a trespasser he is not liable for damages.[44]

In *Ganga Dutt Murarka* v. *Kartik Chandra Das*[45], the respondent—owner of certain premises—gave notice to the appellant—a contractual tenant of those premises—to vacate and deliver vacant possession on the ground that they *bona fide* wanted the premises for their occupation. The tenant was protected by the local Rent Control Act, but the notice was given after the period of tenancy fixed by the contract had expired. It was held:

> Section 116 of the Transfer of Property Act in so far as it is material that if a lessee of property remains in possession thereof

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44. *Bai Chanchal* v. *Jallaluddin*, (1970) 3 SCC 124: AIR 1971 SC 1081; *Bhawanji Lakhamchi* v. *Himmat Lal Jamnadas Dano*, (1972) 1 SCC 388: AIR 1972 SC 819; *Badrilal* v. *Municipal Corpn.*, (1973) 2 SCC 388; *Govt. of A.P.* v. *Gnaneshwar Rao*, AIR 1982 AP 252; *Ramakrishna* v. *Asstt. Director*, AIR 1982 Mad 431; *Hukum Chand* v. *Hazara*, AIR 1982 All 215; *Thakuruddin Ramjash* v. *Soureudra Nath*, AIR 1982 Cal 133; *Ram Singh* v. *Nathilal*, AIR 1983 Del 115; *M/s Burma Shell* v. *State*, AIR 1984 All 89; *Satish Chand* v. *Govardhan*, (1984) 1 SCC 369: AIR 1984 SC 143; *Sudarshana* v. *L.D'Souza*, AIR 1984 Kant 214; *Gourprasad* v. *Nirmal*, (1984) 2 SCC 286: AIR 1984 SC 930; *Rajendra* v. *Ramprasad*, AIR 1985 Pat 104.

45. AIR 1961 SC 1067; *Devaki* v. *Alaci*, AIR 1979 Ker 108; *R.V. Bhupal* v. *A.P.*, (1995) 5 SCC 698; *B. Sharma Rao* v. *Headquarters*, (1998) 9 SCC 577.

after the termination of the lease granted to him and the lessor accepts rent from the lessee or otherwise assents to his continuing in possession, the lessee is, in the absence of an agreement to the contrary, renewed from year to year or from month to month according to the purpose for which the property is leased as specified in Section 106. It is however well-settled that where contractual tenancy to which the rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises acceptance of rent from the tenant by the landlord after the expiration or determination of the contractual tenancy will not afford ground for holding that the landlord has assented to a new contractural tenancy. It was observed by B.K. Mukherjee, J. (as he then was) in *Kai Khushroo* v. *Bai Jerbai*[46], on the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or sub-lessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of the occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession a new tenancy comes into existence as is contemplated by Section 116 of Transfer of Property Act, and unless there is an agreement to the contrary such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of the Section 106 of the Act....In cases of tenancies relating to dwelling houses to which the Rent Restriction Act apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired. The landlord cannot eject him except on specific grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant whose lease has already expired could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge by way of defence, in a suit for ejectment brought against him under the provisions of the Rent Restriction Act

46. 1949 FCR 262.

that by acceptance of rent a fresh tenancy was created which had to be determined by a fresh notice to quit.

In such cases, that is, in cases coming under Rent Control Acts, no tenancy by holding over can be postulated under this section. The tenant is a *statutory* tenant who, however, is not entitled to any notice to quit.[47]

In *Karnani Industrial Bank* v. *The Province of Bengal*[48], on February 17, 1928, a lease deed of land was executed, the lease to commence from February 24, 1928 for a period of ten years. The lessee (appellant) paid the rent reserved for one year and in February 1929 paid the rent up to March 31, 1930 and continued to do so the last being in April 1937 for the year ending March 31, 1938. The lease having expired on February 23, 1938 by efflux of time, the respondent sued for the eviction of the appellant and the appellant sought the protection of Section 116. It was held:

> A reference to the section will show that for the application of that section, two things are necessary: (1) the lessee should be in possession after the termination of the lease; and (2) the lessor or his representative should accept rent *or otherwise* assent to his continuing in possession. This section was construed by the Federal Court in *K.B. Capadia* v. *Bai Jerbai Warden*[49], and it was held that where rent was accepted by the landlord *after the expiration of the tenancy* by efflux of time, Section 116 applied even though the landlord accepted the amount remitted to him as 'part deposit towards his claim for compensation for illegal use and occupation, and without prejudice to his rights'. It is to be noted that in that case rent had been accepted *after the expiry of the tenancy* and the present case cannot be governed by that decision because of the fact that here the payment of rent up to March 31, 1938 was made not after the expiry of the tenancy, but nearly a year before the expiry of the lease. The use of the word 'otherwise' suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance of possession. There can be no question of the lessee 'continuing in possession' until the lease has expired and the context in which the provision for acceptance of rent finds a

47. *Firm Sardarilal* v. *Pritam Singh*, (1978) 4 SCC 1: AIR 1978 SC 1518.
48. 1951 SCR 560.
49. 1949 FCR 262.

place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession.

In *Kumar Kamakhya* v. *Ram Rakshad*[50], there was a *mukarrari* lease conveying a life-estate, and on the death of the original *mukarraridar* his heirs remained in possession and paid rent to the lessor, who gave receipts in the name of the original *mukarraridar* and mentioning the names of those who paid the rent. On the question, whether the heirs could be considered as tenants holding over, it was held:

> It was argued that the principle contained in the provisions of Section 116, Transfer of Property Act, 1882, should be applied, for although it could not be said that this case came expressly within the provisions of the section, it was argued that the provisions thereof should be used by way of analogy as laying down a rule of equity and good conscience. In Their Lordships' opinion this is not a case of the lessee or underlessee holding over within the meaning of the section but even if the case were to be considered on the assumption that the provisions of the section were applicable, the facts of this case would go to show, as already stated, that the parties in paying and accepting rent after the expiration of the lease for lives were acting without prejudice to their respective contentions, and it would have to be held that there was an 'agreement to the contrary' which would prevent the application of the provisions of the section in the present case.

The payment of rent to and its acceptance by must be a competent person.[51]

In *B.G. Devakate* v. *V.M. Gangawal*[52], the appellant was a tenant of the suit-property when the respondent purchased it in August 1968 and became his tenant from that date. The latter gave notice of termination of tenancy and filed an application under Section 21(1)(*a*) and (*h*) of the Mysore Rent Control Act, 1961 for eviction. The appellant resisted it and the trial Court dismissed the application but the appellate court allowed the appeal. The District Judge in appeal reversed all the findings of the

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50. 1928 LR 55 IA 212.
51. *H.S. Rikhy* v. *N. Delhi Municipal Committee*, AIR 1962 SC 554.
52. (1975) 2 SCC 246.

trial Court and held that the landlord acquired the premises reasonably and *bona fide* for occupation by himself and that no hardship would be caused to the tenant by passing the decree for eviction and that the lease was not for a manufacturing purpose nor an yearly one. The notice terminating the monthly tenancy was held to be good and valid. The revision application to the High Court was dismissed. The appellant in the Supreme Court challenged the findings of the first appellate Court (District Judge). Allowing the appeal, it was held: The lease in this case was for the year which expired on April 9, 1946 and a tenant held-over under Section 116, Transfer of Property Act. Although in the lease deed the purpose of the lease was not mentioned the appellate Court held that the appellant started manufacturing soda in a small portion of the demised premises. In any view of the matter the dominant purpose of the lease was not a manufacturing one and holding-over under Section 116 created a month-to-month tenancy terminable by 15 days' notice ending with the tenancy month given under Section 106. The oral tenancy commenced on April 9, 1945 and that day had to be excluded in computing the period of one year under Section 110 and, therefore, one year's tenancy ended on April 9, 1946 and by holding-over the tenancy from month-to-month started from April 10, 1946 ending on the 9th day of the following month. The view taken by the appellate Court and the High Court that one year's tenancy ended on April 8, 1946 and monthly tenancy started from 9th of the month ending on the 8th of the following month was erroneous in law. There was, therefore, no valid legal termination of the contractual tenancy. The appellant was a contractual tenant who would have become statutory tenant within the meaning of Section 2(*r*) of the Mysore Act if he would have continued in possession after the termination of the tenancy in his favour, otherwise not. Without the termination of the contractural tenancy by a valid notice or other mode set out in Section 111 of the Transfer of Property Act it was not open to the landlord to treat the tenant as a statutory tenant and seek his eviction without service of a notice to quit. Where a lease is determined by efflux of time under Section 111-A, T.P. Act, a notice would not be necessary.

Section 110 provides for computing the duration of the period of a lease and of notices to quit. It provides:

> Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded.

Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Scope

If the time is not limited as is usual in monthly tenancies, the section will not apply to such tenancies.

In *Benoy Krishna Das* v. *Salsiccioni*[53], a lease of residential property was expressed to be from June 1, 1921 for the next four years. The tenancy continued after four years and on February 1, 1928, the tenant gave notice terminating it. The one month's clear notice was stated to take effect on that day and the possession was to be given on March 1. On the question whether it was a valid notice, it was held:

> The question depends, first of all, on the date of the expiry of lease. That date determines the beginning of the respondent's tenancy, which was capable of determination by monthly notice in accordance with Section 106.
>
> Turning to the terms of the lease of 1921, and applying to it the language of Section 110 of the Transfer of Property Act, it would appear that the first day of June 1921, is excluded from the term.... It further appears that June 1, 1925, is included....and the lease ended at mid-night of June 1, 1925. That being so it must be taken that the lease ended at midnight on June 1, 1925, and that any notice to determine thereafter given must be a notice to quit expiring with the month ending at midnight on the first day of any month. The notice in fact given on February 1, 1928, clearly is a notice in regard to March 1, 1928 and not in regard to February 29, 1928. It therefore, is a notice which, in the language of Section 106, expired with the end of a month of the tenancy, because the month of the tenancy expired

53. (1933) LR 59 IA 414; *H.V. Rajan* v. *C.N. Gopal*, (1975) 4 SCC 302; *Seshagiri Rao* v. *Kalabai*, AIR 1982 AP 186; *Kishan* v. *Sayeeda*, AIR 1983 AP 253; *Khudiram* v. *Sameel*, AIR 1983 Cal 303.

at midnight on March 1, 1928. [The reason for including the anniversary is that the first day is excluded.]

As regards the rights and liabilities of the lessor and the lessee they are set out in Sections 108 and 109. These are subject to a contract to the contrary.

Suppose a residential lease is for 4 years commencing from 1-6-1991 and the tenant holds over. A notice to quit given on 1-2-1996 for *leaving the premises on 1-3-96 will be valid because it is equivalent to* quit at midnight on 1-3-96.

Suppose a monthly lease for 4 years provided that the lease commences on 1-5-1991, but that it would terminate on 30-4-1995, and that the landlord should give two months notice if he desired that the tenant should quit at the end of the lease period. A notice given by landlord on 18-2-1995 asking the tenant to vacate on 30-4-1995 will be valid because there is a contract to the contrary. If the tenant holds over, the notice should be only a fifteen-days notice under Sections 106 and 116.

Suppose there is an oral lease of a house, which was taken possession of on 1-4-1994, for 4 years. The landlord gives notice on 11-10-98 for vacant possession on 1-11-98. Such a notice would be invalid because the lease being for a period exceeding 1 year, it should be in writing and registered. In its absence it should be treated as a monthly tenancy. Since admittedly, it was to commence on 1-4-94 (the day of taking possession) it would expire on the midnight of the last day of the month that is in the present case on 31-10-98. Hence, the notice to quit on 1-11-98 is invalid.

If a notice to quit says "within the month of ... ", it is construed to mean " Midnight of the last day of the month". But if a notice to quit says " Before the beginning of next month", it is construed as "before the end of the previous month" , and hence would be invalid. If a notice to quit reaches the tenant on 15-2-1988, it would be invalid because even though 1988 is a leap year, it has only 29 days. Since the receipt of the notice is on the 15th, it is not a case of 15 clear days notice.

Section 108 provides:

In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are

subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased.

(A) Rights and Liabilities of the Lessor

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

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

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

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

(B) Rights and Liabilities of the Lessee

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

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

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

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

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

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

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted

or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;

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

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

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

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

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

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

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

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

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.[54]

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54. *Madan Lal* v. *Bhai Anand*, AIR 1973 SC 721.

Clause (*a*)

The duty to disclose is with respect to defects which are latent, but of which the lessor is aware. In *Low and Co.* v. *Jyothi Prasad*[55], the appellants entered into a contract of lease for working underground coal rights, but refused to take the lease, because, they discovered that an ancestor of the respondent had made Brahmottar grants of the property and the respondent was unable to produce copies of those grants to show that the Brahmottar grants did not include minerals. The appellants sued the respondent for recovery of the premium forfeited. It was held:

> The real question at issue, therefore, is whether the appellant company has shown that the respondent's title to grant a lease of the mineral rights in the two villages is not free from reasonable doubt, or may be fairly described as imperfect. It is obvious that the question is one of degree. The doubt suggested must be a reasonable doubt; the imperfection must be material.... The result is that appellant company is unable to do more than conjecture that the grant made by the respondent's predecessors may have comprised the underground rights. On the other hand, there is no evidence that the grantees have ever asserted any rights to the minerals under the villages or that they have ever been worked by them or their predecessor....a long series of recent decisions by the Board has established that if a claimant to subsoil rights holds under the Zamindar or by a grant emanating from him, even though his powers may be permanent, heritable and transferable he must still prove the express inclusion of subsoil rights.... The rights and liabilities of lessor and lessee are defined in Section 108, Transfer of Property Act. These contrast markedly with the rights and liabilities of buyer and seller as defined in Section 55, particularly in the matter of requirements as to title which the seller must satisfy. The appellant company has not shown that the respondent has failed, or is not in a position, to perform any of the duties incumbent on a lessor, under Section 108.

From the words 'with reference to its intended use' it follows that there is an implied covenant by the lessor that the property is suitable for the particular purpose. The sub-section applies only to physical defects and as quotation from the judgment above shows, not to defects

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55. (1931) LR 58 IA 392.

in title. The judgment in fact refers to Sections 18 and 25 of the Specific Relief Act, 1877, corresponding to Sections 13 and 17 of the 1963 Act and the discussion shows that in a lease it is merely the right to possess and enjoy the property that is given, and as that is provided for in sub-sections (*b*) and (*c*), the lessee is not allowed to insist that the lessor has a valid title.

Clause (*b*)

The duty arises only when the lessee requests, and his remedy, when the lessor fails to put him in possession, is to sue the lessor for damages.

In *Ramlal Dutt* v. *Dhirendranath*[56], the lessor demised land at a lump sum rent, but failed to give possession to the lessee of a part of the land leased. The lessee claimed that no part of the rent was payable by him under the doctrine of suspension of rent. It was held:

> So far the only rule laid down by the Board has been the negative proposition that 'the doctrine of suspension of payment of rent, when the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where stipulated rent is so much for acre or bigha'—*Katyayani Debi* v. *Udyog Kumar Das*[57]....The observations of the Board in *Katyayani's* case have only added to the perplexity, since they have been in some cases wrongly taken to lay down that if the rent is a lump sum rent then in all cases of failure to give possession of any part there must be a suspension of the entire rent. They were intended only as showing that on its facts that case raised no question of suspension....The English context of English decisions must be borne in mind—the social system, the character of the countryside, the well-settled boundaries, the limited term of leases....The purely accidental or aleatory character of the penalty with which the lessor is visited prevents it from being the medium or the object of a judicial decision in such cases.... [There] is no reason why a scientific and careful attempt to adjust the rights of the parties should discard the ordinary form of relief—damages, apportionment,

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56. (1943) LR 70 IA 18.
57. (1925) LR 52 IA 160; *Naushi Ali* v. *Md. Siddiq*, AIR 1981 All 307; *Bidhu* v. *Ranajit*, AIR 1981 Cal 154; *Hosali Pran* v. *Ganeswari*, AIR 1982 Kant 150.

specific performance, the right to avoid the lease as the case may require—for a method which proceeds by giving one party to the transaction a windfall, or a right to retain and use another party's property without making payment therefor.

Clause (*c*)

This is known as the implied covenant for quiet enjoyment. It is intended for the lessee's benefit, runs with land and can be enforced by an assignee or underlessee. This covenant protects a lessee even with respect to a title paramount. Suppose *A* leases property *B* and prohibits a sub-lease. Suppose *B* sublets to *C*. If *C* is evicted, he has a right of action against *B*, even though *C* was evicted by a title paramount. *A*'s title is paramount to *B*'s.

The law in England is different. Under that system the covenant for quiet enjoyment could be restricted or absolute. An implied covenant in English law is only a restricted covenant and does not cover acts under title paramount. If it should be an absolute covenant extending to interruptions even by title paramount, it has to be expressly entered into.

The implied covenant under this clause does not apply to tortuous acts, because, the lessee can have his own remedies against the tortfeasors. In *Katyayani Debi* v. *Udyog Kumar Das*, (supra) a perpetual tenancy was sold for arrears of rent under the Bengal Tenancy Act. The purchaser claimed abatement of rent in respect of a part of the land, on the ground that at the date of his purchase, that part was in possession of a trespasser, who by being allowed to remain in possession acquired title against the purchaser. It was held:

> (1) The duty of a tenant under a perpetual tenure such as the one in question is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so he cannot prejudice the landlord's claim for rent. The consideration which appears to Their Lordships to be conclusive are those stated by Peacock, C.J., in *Womesh Chunder Goopto* v. *Raj Narain Roy*[58]....It has also been pointed out in other judgments that the landlords cannot in the ordinary case know whether the possession of a particular area of land is adverse to the tenant or has

58. (1868) 10 WR 15.

taken place with his consent. He could not therefore sue an action at his own hand for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant, who can deal with the land as he pleases.

(2) The further contention was that as this plot of land was originally embraced within the boundaries of the tenure as the appellant was not in possession, the appellant was entitled to suspend payment of rent of the remaining area....The doctrine of suspension of payment of rent, when the tenant has been put in possession of part of the subject's lease, has been applied when rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case when the stipulated rent is so much per acre or Bigha.

Clause (*d*)

To be an accretion it is not necessary that it should be an imperceptible addition; but it must be gradual and not sudden.

When the lessee encroaches upon neighbouring land, it is deemed to be an accretion, and if the lessee acquires a prescriptive title to the accretion, the lessor gets the benefit to the accretion at the end of the lease period. If the lessee however encroaches upon the lessor's land then the land would be treated as if leased by the lessor to the lessee and the lessor may recognise the lessee as the lessee of the portion encroached upon. If he does not want to so recognize him, he may evict him.

Clause (*e*)

In English law the destruction of the subject-matter of lease does not affect the lease, because, the doctrine of frustration as understood in that system of law does not apply to leases. The Indian doctrine of frustration also does not apply to leases in India, because the rights and liabilities of the parties are governed by Section 108; and, under Section 108(*e*), in the case of the destruction of the subject-matter of lease, the lessee, if he is not to be blamed for such destruction, could avoid the lease at his option, but there is no automatic termination of the lease.[59] In cases where the

59. *Rahim Bux* v. *Mohd. Shafi*, AIR 1971 All 16; *Rajendra Nath* v. *Ramdhin*, AIR 1971 Assam 160; *Thomas* v. *Moram*, AIR 1979 Ker 156; *Siddharthan* v. *Ramadesan*, AIR 1984 Ker 181.

whole rent has been paid in advance, and the property is destroyed before the period of lease expires the lessee has a right to recover the proportionate part of the rent already paid, provided, the lessee is not at fault. In cases where the property is acquired by Government also, the lessee can claim the same right.

Clause (*f*)

The wording of the section shows that there are certain repairs which the landlord is bound to make and others which he need not. Those which he is bound to make are those which he had expressly covenanted to make, and where the lessor had so agreed, he can enter the premises to carry out the repairs, notwithstanding that under clause (*c*), the lessee has a right to hold the property without interruption. *See* clause (*a*). If the lessor does not make the repairs, the lessee himself can do so and deduct the expenses after notice to the lessor.[60]

Clause (*g*)

This is nothing more than the right to recover recognised by Section 69 of the Indian Contract Act.

Clause (*h*)

In *Dhiryawan* v. *Thakur*[61], the scope of Section 108(*h*) of the Transfer of Property Act was explained thus:

> Normally, under the section, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. The ownership, therefore, of the building in this case was not with the lessors but was with the lessees. Under Section 108 of the Transfer of Property Act, there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under Section 108 the

60. *Eashwar* v. *Sudershan*, AIR 1985 AP 4; *M/s Apparel Trends* v. *Krishna*, AIR 1985 Del 106 (Doctrine of suspension of rent.)

61. 1959 SCR 799; *Basant Lal* v. *U.P.*, (1980) 4 SCC 430: AIR 1981 SC 170; *Baljit* v. *Cunningham*, AIR 1984 All 209; *Manavar* v. *Narayanan*, AIR 1984 Mad 47.

lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessor without the right to receive compensation at the end of the lease, the matter being entirely one of contract between the parties. Such a contract, however, did not transfer the ownership in the building to the lessors while the lease subsisted.

Clause (*i*)

This right is known as the right to emblements[62] and the tenant's right by custom even extends to away-going crops. This applies only to cases of lease of uncertain duration.

Clause (*j*)

A lessee cannot, by his act of assignment get rid of the obligations he had agreed to.

In *Pandit Kishan Lal* v. *Ganpat Ram Khosla*[63], the tenant—a company—of certain premises wrote to the appellant-landlord—that it was closing down its office and that the business would be carried on by the respondent. The appellant objected, but in spite of the objection, the company delivered the premises to the respondent. In a petition by the appellant, for eviction of the respondent, it was held:

> A tenancy, except where it is at will, may be terminated only on the expiry of the period of notice of a specified duration under the contract, custom or statute governing the premises in question. A tenant does not absolve himself from the obligations of his tenancy by intimating that as from a particular date he will cease to be in occupation under the landlord and that someone else whom the landlord is not willing to accept will be the tenant. It is one of the obligations of a contract of tenancy that the tenant will, on determination of the tenancy, put the landlord in possession of the property demised [*See*: Section 108(*q*) of the Transfer of Property Act]. Unless possession is delivered to the landlord before the expiry of the period of the requisite notice, the tenant continues to

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62. *Mariappa Thewar* v. *Kaliammal*, AIR 1971 Mad 198. (No right in case of forfeiture).
63. (1962) 2 SCR 17; *K.K. Krishnan* v. *Vijaya Raghavan*, (1980) 4 SCC 88: AIR 1980 SC 1756; *Surjit* v. *Rattanlal*, AIR 1980 HP 319; *Tirath Ram* v. *Gurbachan*, (1987) 1 SCC 712.

hold the premises during the period as tenant. Therefore, by merely assigning the rights, the tenancy of the company did not come to an end. It was observed by this Court in *W.H. King* v. *Republic of India*[64]. 'There is a clear distinction between an assignment of tenancy on the one hand and a relinquishment or surrender on the other. In the case of an assignment, the assignor continues to be liable to the landlord for the performance of his obligations under the tenancy and this liability is contractual, while the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary in the absence of a contract or local usage to the contrary. But in the case of relinquishment it cannot be a unilateral transaction, it can only be in favour of the lessor by mutual agreement between them. Relinquishment of possession must be to the lessor or one who holds his interest; and surrender or relinquishment terminates the lessee's rights and lets in the lessor.' [The present case is one of transfer to the respondent and not a surrender to the appellant as it should be if the respondent wanted to be free of the obligations of tenancy].

The basis of the decision is as follows: Between the lessor and the lessee there is a privity of estate as well as a privity of contract. The first arises because he occupies the lessor's land or estate and the second because of agreement between them. If the lessee assigns the whole of his tenancy, the assignee, because of his occupation, becomes liable to the lessor on account of privity of estate, but the original lessee continues to be liable on account of the privity of contract. Privity of the estate can arise only if the *entire* right of the lessee is transferred to the assignee. Where there is a sub-letting of a part of the estate, or for a part of the period of lease or where there is a mortgage by possession created by the lessee, there cannot be a privity of estate because it can arise only if the entire right of the tenant is transferred to transferee. In the absence of a privity of contract between the lessor and the transferee, therefore, the lessor cannot sue the sub-lessee.

The assignee is of course subject to the covenants running with the land, under Section 40.

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64. 1952 SCR 419.

The right to assign or alienate or transfer which a lessee ordinarily has can be restricted by the lessor (*see* Section 10).

In *Hansraj* v. *Bejoy Lal Seal*[65], the lessees executed a sub-lease of the leasehold premises, sub-letting them for the unexpired residue of the term. The lessor's representatives instituted the suit to enforce a forfeiture. It was held:

> The question having arisen in India, it has, of course to be decided in accordance with the law, not of England but of India; it does not however, seem to have occurred to any one in the courts below to see, in the first place, before resorting to English decisions, whether under the law of landlord and tenant in India a sub-lease by a lessee for the unexpired residue of the term operates as an assignment of the term. That law is to be found in the Transfer of Property Act, 1882, which has now been in force for nearly half a century. Though founded on English law, and drafted in the first instance by eminent lawyers in England, it has only applied the English law in so far as it was considered applicable to India. It is not surprising to find that the rule, arising out of the special conditions of land tenure in England, that a conveyance to operate as a lease must reserve a reversion to the lessor finds no place in the Act. In India a lessor is expressly empowered to grant a lease in perpetuity, and is not obliged for that purpose as in England, to grant a lease for lives or for a term, with a covenant for perpetual renewal; and similarly, a lessee as sub-lessor can create a sub-lease for the unexpired residue of the term with the same incidents as any other sub-lease.

Leases in perpetuity are expressly included in the definition of 'lease' in Section 105....The provision in Section 108(*j*) is that, in the absence of a contract to the contrary, a lessee may grant a sub-lease for the unexpired residue of the term in the same way as a sub-lease for any shorter term is equally clear....There is therefore no ground for the contention that in India a sub-lease for the unexpired residue of the term operates otherwise than as a sub-lease.

Clause (*k*)

This clause may be compared with clause (*a*) and also Section 55(5)(*a*). Like Section 55(5)(*a*) it deals more with title than physical

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65. (1930) LR 57 IA 110.

advantages and hence the lessee's duty under this clause is more limited than that of the lessor under clause (*a*). The lessor's right on a breach of this duty by the lessee is an action for damages; but since under Section 17, Contract Act, silence, when there is a duty to speak, amounts to fraud, perhaps the lessor would also have a right of re-entry.

Clause (*l*)

The lessee's obligation to pay rent arises as soon as the lessor discharges his obligation of putting the lessee in possession. What are proper time and place may be agreed upon or be regulated by custom. Otherwise, the time is the end of the period and the place is the property leased.

Clause (*m*)

While the tenant or lessee is not liable for reasonable wear and tear, he would be liable for permissive waste, that is, for allowing the property to fall into a state of disrepair. That is, he is not liable to repair any reasonable wear and tear, but will be liable for the consequences which flow from such wear and tear.

Clause (*o*)

In *U. Po. Naing* v. *Burma Oil Co.*[66], the appellant leased a site to the respondent for winning oil. During the operations no oil was obtained but gas came up from the wells which were dug. The gas was enclosed in pipes and utilised by the respondents. The appellant filed a suit for compensation for the use of *their gas*. It was held:

In Their Lordships' opinion it is quite clear that oil does not include gas....No authority could be produced for the view that gas under the soil before it had been tapped or released was the property of the appellant, and it seems to Their Lordships difficult to reconcile any such view with the well-known authorities as to underground water not flowing in any defined channel. No doubt it is true that the gas could be reduced into possession, and when reduced to possession it became the property of the

66. (1929) LR 56 IA 140; *Kasturchand* v. *Yashwant*, AIR 1980 Bom 270; *Leena* v. *Indumati*, AIR 1980 Pat 120 [case under cl. (*f*)]; *Parameshwari* v. *Bholanath*, AIR 1981 Del 77.

person who had so reduced it. But in Their Lordships' opinion the gas was not reduced into possession by the appellant but by the respondents....In Their Lordships' judgment it is not necessary exhaustively to discuss the limits of that provision under Section 108(*o*), T.P. Act but there seems to be nothing inconsistent with its terms in the use of gas which is necessarily set free by reason of the sinking of the oil well for the respondent's own purposes without doing any damage or any injury to the property leased.

Section 109 deals with lessor's right to transfer and the consequences of such transfer.

It provides:

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

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

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

The section however is silent on the question whether the assignee can take advantage of any breach committed by the lessee before the assignment. The English law on the point is in Section 141(3) of the 1925 Act.[67]

Section 111 provides

A lease of immovable property, determines—

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67. *Amar* v. *Arun*, AIR 1979 Cal 367 (Partial eviction, not permissible); *Sardarilal* v. *Narayan Lal*, AIR 1980 MP 8; *Ramchandra* v. *Ved Prakash*, AIR 1980 All 27; *Nuratmal* v. *Tarini*, AIR 1980 Gau 30; *Prabati* v. *Bikul*, AIR 1987 Gau 52; *K. Assima & Co.* v. *Joseph*, AIR 1984 Ker 113; The transferee can take advantage of the notice to quit by the transferor. *Vasanth Kumar* v. *Board of Trustees*, AIR 1991 SC 14; *Krishan Kishore* v. *A.P.*, AIR 1990 SC 2192; *Sk. Sattar Sk. Mohd. Choudhari* v. *Gundappa Amabadas Bukate*, (1996) 6 SCC 373.

(*a*) by efflux of the time limited thereby;[68]

(*b*) where such time is limited conditionally on the happening of some event—by the happening of such event;[69]

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

(*d*) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;[70]

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

(*f*) by implied surrender;

(*g*) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;[71]

(*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.[72]

Illustration to clause (f)

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

Clause (*a*)

Generally leases have a term permitting renewal and it requires the lessee to give notice to the lessor of his intention to renew, a reasonable time before the expiry of the lease. Consent of the lessor is not necessary unless expressly provided for.[73]

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68. *Rattan Lal* v. *Vardesh Chander*, (1976) 2 SCC 103; *Sameer* v. *Tracks Trade*, AIR 1996 SC 2102.
69. *Sundershan* v. *L. D'Souza*, AIR 1984 Kant 214.
70. *Shah Mathuradas Maganlal & Co.* v. *N.S. Malage*, (1976) 3 SCC 660.
71. *Rattan Lal* v. *Vardesh Chander*, (1976) 2 SCC 103.
72. *Jagat Ram Sethi* v. *Rai Bahadur D.D. Jain*, (1972) 2 SCC 613: AIR 1972 SC 1727; *Hamidullah* v. *Abdullah*, (1972) 4 SCC 800: AIR 1972 SC 410.
73. *Shanti Devi* v. *Amal*, (1981) 2 SCC 199: AIR 1981 SC 1550; *Thakuruddin Ramjash* v. *Sourendra Nath*, AIR 1982 Cal 133; *R.V. Bhupal* v. *A.P.*, (1995) 5 SCC 698.

Clause (*c*)

Examples of such leases are: (1) When a Hindu widow, having only a widow's estate grants a lease without legal necessity. On her death the lease is also determined. (2) When a mortgagee in possession grants a lease. It only extends up to the term of the mortgage, but it does not automatically end. In such a case, the mortgagor has right to terminate the lease.[74]

Clause (*d*)

This is known as merger, that is when a greater and a lesser interest coincide. It is obvious that a man cannot be both a landlord and a tenant. Therefore, if by purchase or inheritance, the two rights become vested in one, the tenant's interest, being the lesser merges in that of the lessor, which is the larger and the lease comes to an end. One condition is however essential, namely, the merger must be of the interests of the lessor and lessee in the whole estate. Thus in *Faqir Baksh* v. *Murlidhar*[75], the lessee of certain shops acquired a share in the property. On the question whether there was a merger, it was held:

> The matter, however, is put beyond dispute by the terms of Section 111 of the Transfer of Property Act....That section enumerates in eight paragraphs the various modes in which 'a lease of immovable property determines' and the *enumeration is exhaustive*. The only paragraph relating to determination by merger is (*d*).... 'The fusion of interests required by law is to be in respect of the whole of the property'. There was no such fusion in the present instance.

Since, for a merger the entire interests of the lessor and lessee must unite, if there is a sub-lease granted by the lessee, then there cannot be a merger.

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74. *Champa* v. *Gulati*, AIR 1981 Raj 130.

75. (1931) LR 58 IA 75; *Ganesh* v. *Badri*, AIR 1980 All 361; *Nand Lal* v. *Ramjilal*, AIR 1981 Raj 243; *Syed Ahmed* v. *Salima*, AIR 1982 Mad 44; *Santosh Kumar* v. *Chameli Devi*, AIR 1983 All 195; *Gambangi Appalaswamy* v. *Behara Venkatramanayya*, (1984) 4 SCC 382: AIR 1984 SC 1728; *Pancholi* v. *Sidhaojee*, AIR 1984 All 130; *D.S. Commercial* v. *S.S. Jain Sabha*, AIR 1984 Cal 194; *Parmar* v. *Makhwana*, (1995) 2 SCC 501; *Narayan* v. *Baburao*, (1995) 6 SCC 608; *Huchappa* v. *Ningappa*, 1993 Supp (3) SCC 654; *Gopalan* v. *Kunjamma*, AIR 1996 SC 1659; *Muralidhar* v. *Meghalaya*, AIR 1997 SC 2690.

Another important condition recognised by the section is that the two rights must be vested in one person *in the same right.*

Clause (*e*)

Express surrender can only be to the lessor or his representative and that too with his consent.[76]

Clause (*f*)

This clause deals with implied surrender. Suppose a lessee, before the expiry of the term, enters into a new lease, then there is an implied surrender of the old one.[77]

Clause (*g*)

The law generally views with strictness conditions relating to forfeiture. For example, a condition against *assignment* was held not to include *sub-letting* or *mortgage* and a condition against *alienation* of the lessee's tenure was held not to include *a sale of a portion* of it; and alienation is interpreted to mean voluntary alienation and not alienation as a result of execution of a decree.

In this connection, *see* Section 12.

The amendments made in this section are not retrospective.

In *Namdeo Lokman Lodhi* v. *Narmadabai*[78], in 1870, the purchaser of the tenancy rights from a lessee agreed with the lessor that he would pay the agreed annual rent and that in case of default the tenant or his heirs would have no right over the land. The new lessee was a habitual defaulter, and the last default was in 1941. In a suit for possession on the

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76. *Puttegodida* v. *State*, AIR 1980 Kant 102.

77. *Madhubala* v. *Budhiya*, AIR 1980 All 266; *Nand Lal* v. *Ramjilal*, AIR 1981 Raj 243; *PMC Kunhiraman* v. *Naganatha*, (1992) 4 SCC 254; *Narayan* v. *Baburao*, (1995) 6 SCC 608; *Munisami* v. *Ranganathan*, AIR 1991 SC 492; *Gopalan* v. *Kunjamma*, AIR 1996 SC 1659.

78. (1953) SCR 1009; *Sri Ram* v. *Pritam Singh*, AIR 1978 HP 30, *Tarakpada* v. *Ruplekha*, AIR 1978 Cal 189; *Lalitha* v. *Ajisurmana*, AIR 1978 Ker 167; *Ratanlal* v. *Chandbasappa*, AIR 1978 Bom 216; *Gyasi Ram* v. *Ramchandra* , AIR 1978 All 376; *Ved Prakash* v. *Chotelal*, AIR 1978 MP 250; *Shiv Balak* v. *Ram Kishore*, AIR 1980 All 178; *Chandra* v. *Tara*, AIR 1980 All 270; *Apparao* v. *Margathammal*, AIR 1981 Mad 57; *Rachayya* v. *Kariappa*, AIR 1987 Kant 76; *Thirumal* v. *Masjid*, (1994) 3 SCC 375; *Guru Amarjit* v. *Ratanchand*, (1993) 4 SCC 349.

ground of forfeiture and for arrears of rent, the lessee contended that notice as contemplated by Section 111(*g*) of the Transfer of Property Act was necessary. It was held:

> As the law stands today under the Act, notice in writing by the landlord is a condition precedent to a forfeiture and the right of re-entry. Section 63 of Act 20 of 1929, restricts the operation to transfers of property made after April 1, 1930. The lease in the case was executed before the Transfer of Property Act came into force in 1882. The amendment therefore made in this sub-section by Act 20 of 1929 not being retrospective cannot touch the present lease and is also excluded from the reach of the Transfer of Property Act by the provisions of Section 2....It was however strangely argued that the amendment made in 1929 to Section 111(*g*) of the Act embodies a principle of justice, equity and good conscience and notwithstanding Section 2 of the Act, the principle was applicable in this case....It is axiomatic that courts must apply the principle of justice, equity and good conscience to transactions which come up before them for determination, when the statutory provisions of the Transfer of Property Act are not made applicable to these transactions. It follows therefore that those provisions of the Act which are but a statutory recognition of the rules of justice, equity and good conscience also govern such transfers....But it may be observed that it is erroneous to suppose that every provision in the Transfer of Property Act and every amendment effected is necessarily based on principles of justice, equity and good conscience....Now, so far as Section 111(*g*) of the Act is concerned, the insistence therein that the notice should be given *in writing* is intrinsic evidence of the fact that the formality is merely statutory and it cannot trace its origin to any rule of equity. Equity does not concern itself with mere forms or modes of procedure. If the purpose of the rule as to notice is to indicate the intention of the lessor to determine the lease and to avail himself of the tenant's breach of covenant it could as effectively be achieved by an oral intimation as by a written one without in any way disturbing the mind of a Chancery Judge. The requirement as to written notice provided in the section therefore cannot be said to be based on any general rule of equity. That it is not so is apparent from the circumstance that the requirement of a notice in writing to complete a forfeiture has been dispensed with by the Legislature in respect to leases executed before April 1, 1930. Those leases are still governed

by the unamended sub-section (*g*) of Section 111. All that was required by that sub-section was that the lessor was to show his intention to determine the lease by some act indicating that intention. The principles of justice, equity and good conscience are not such a variable commodity, that they change and stand altered on a particular date on the mandate of the Legislature and that to leases made between 1882 and 1930 the principle of equity applicable is the one contained in sub-section (*g*) as it stood before 1929, and to leases executed after 1st April, 1930, the principle of equity is the one stated in the sub-section as it now stands....The provision with regard to the giving of notice before a right of re-entry accrues to the landlord (in England) is expressly excluded by Section 146(11) of the Law of Property Act, 1925. In England it is not necessary in case of non-payment of rent for a landlord to give notice before a forfeiture results. It cannot, therefore, be said that what has been enacted in Section 111(*g*) is a matter which even today in English law, is considered as a matter of justice, equity and good conscience. In English law the bringing of an action which corresponds to the institution of a suit in India is itself an act which is definitely regarded as evidencing an intention on the part of the lessor to determine a lease with regard to which there has been a breach of covenant entitling the lessor to re-enter. In India there is a substantial body of judicial authority for the proposition that in respect of leases made before the Transfer of Property Act forfeiture is incurred when there is a disclaimer of title or there is non-payment of rent....The lessor has to simply express an intention that he is going to avail of the forfeiture and that can be done by filing of suit, as in English law, in all cases governed by the Transfer of Property Act....Considerable reliance was based on the decision of Chandrasekhara Aiyar, J., sitting singly in the case of *Umar Pulavar* v. *Dawood Rowther*[79], wherein the learned Judge said that Section 111(*g*) as amended in 1929 embodied a principle of justice, equity and good conscience and must be held to govern even agricultural leases and when there was a forfeiture by denial of the landlord's title, a notice in writing determining the lease was necessary....The learned Judge, for this view, placed reliance on the decision in *Krishna Setti* v. *Gilbert Pinto*[80], in which it was said that the Transfer of Property Act was

79. AIR 1947 Mad 68.
80. (1919) ILR 42 Mad 654.

framed by eminent English lawyers to reproduce the rules of English law, in so far as they are of general application and rest on principle as well as authority and its provisions are binding on us as rules of justice, equity and good conscience. With respect, we are constrained to observe that this is too broad a statement to make. It seems that the attention of the learned Judges was not drawn to the fact that the provision as to notice for determining a lease for non-payment of rent was not a part of the English law....In *Brahmayya* v. *Sundaramma*[81], it was said that although Section 106 of the Transfer of Property Act does not apply to leases for agricultural purposes by virtue of Section 117 of the Act, nevertheless the rules in Section 106 and in the other sections (Ss. 105 to 116) in Chapter V of the Act are founded upon reason and equity and they are the principles of English law and should be adopted as the statement of the law in India applicable also to agricultural leases. In our opinion, the above statement is again formulated in too wide a language....Reference was also made to the decision in *Tatya Savla Sundrik* v. *Yeshwanta Kondiba Mulay*[82], where it was said that the principle embodied in Section 111(*g*) of the Transfer of Property Act that in the case of forfeiture by denial of landlord's title a notice in writing determining the lease must be given is a principle of justice, equity and good conscience which must be held to govern even agricultural leases. In that case it was contended that following upon forfeiture which had been incurred a suit was filed by the plaintiffs for eviction and nothing more needed to be done by the plaintiffs. This contention was negatived in view of the decision of Chandrasekhara Aiyar, J., above referred to....With respect we think that decision did not state the law on the point correctly. Under English law the institution of a suit for ejectment has always been considered an unequivocal act on the part of the landlord for taking advantage of the default of the tenant and for enforcing the forfeiture in case of non-payment of rent, and even in other cases except when statutory provisions were made to the contrary. Reference was also made to the observations of Their Lordships of the Privy Council in *Aditya Prasad* v. *Ramratanlal*[83]. Their Lordships dealing with the question whether a certain document created a charge upon a village observed that the

81. AIR 1948 Mad 275.
82. (1950) 52 Bom LR 909.
83. (1930) LR 57 IA 173.

appellant could not redeem it without paying both the mortgage debt and the amount subsequently raised and it was said that the provisions of the Transfer of Property Act on the point were identical with the principles of justice, equity and good conscience. The observation made in that case must be limited to that case and cannot be held as applicable to all cases irrespective of the nature of the provisions involved. Similar observations are contained in another decision of Their Lordships of the Privy Council in *Mohd. Raja* v. *Abbas Bandi Bibi*[84], which concerned the provisions of Section 10 of the Transfer of Property Act which recognises the validity of a partial restriction upon a power of disposition in the case of a transfer *inter vivos*. It was held that there was no authority that a different principle applied in India before the Act was passed and that under English law a partial restriction was not repugnant even in the case of a testamentary gift.

On the happening of any of the three conditions of forfeiture mentioned in the section, the lease does not automatically become void. It only gives the lessor a right to avoid the lease and to re-enter. Some act on the part of the lessor showing an intention to re-enter is necessary[85] and the section as it now stands provides for the giving of notice as the essential requisite. (*See* also Section 116 of the Evidence Act.)

In *Md. Amir* v. *Municipal Board of Sitapur*[86], the appellant held land paying a nominal rent. There was no document and the origin of the lease was unknown. In certain land acquisition proceedings, he claimed compensation as owner. On the question whether it amounts to a denial of the landlord's title entailing forfeiture, it was held:

The principles embodied in Section 111(*g*) are equally applicable to tenancies to which the Act does not apply on the ground of the same being in consonance with justice, equity and good conscience. See: *Maharaja of Jaypore* v. *Rukmini Pottamahadevi*[87]. It is also clear that permanent tenancies are within the rule and are liable to forfeiture if there is a disclaimer of the tenancy or a denial of the landlord's title. That the disclaimer or repudiation of the landlord's title must be clear and unequivocal and made to the knowledge of the landlord is also

84. (1932) LR 59 IA 236.
85. See *Parkash Chand* v. *Harnam Singh*, (1973) 2 SCC 484: AIR 1973 SC 2065.
86. AIR 1965 SC 1923.
87. LR 46 IA 109.

beyond dispute....(When) the tenant (appellant) stated that the land 'belonged to him' he was asserting merely the substantial character of his interest in the property and not disclaiming the reversionary interests of the Government or its right to demand and receive a fixed rent in respect of the property. We consider that the words employed did not, in the circumstances, amount to a disclaimer or renunciation of tenancy.

In suits for eviction, the title of the landlord is irrelevant and it is only the relationship of landlord and tenant that is relevant.

In this connection we may note Sections 114 and 114-A and 112. Section 114 provides:

> Where a lease of immovable property has been determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the court thinks sufficient for making such payment within fifteen days, the court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

This section is based on the principle that relief against forfeiture should be given whenever compensation is an adequate alternative relief. This reflects the same attitude expressed by Bowen LJ, in *Cropper* v. *Smith*[88] in relation to amendments of pleadings:

> There is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine.

In *Namdeo Lokman Lodhi* v. *Narmadbai*[89] (p. 345) it was observed:

Reference was made to the decision in *Debendra Lal Khan* v. *F.M. A. Cohen*[90] wherein it was held that the court normally would grant relief against forfeiture for non-payment of rent under Section 114 of the Transfer of Property Act and that if the sum required under the

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88. (1884) 26 Ch D 771.

89. (1953) SCR 1009; *Pradesh Kumar* v. *Binod Behari*, (1980) 3 SCC 348: AIR 1980 SC 1214; *Phukan* v. *Madhav*, AIR 1980 Gau 68; *Ramachandra* v. *Ramniwas*, AIR 1983 Bom 417; *Geeta* v. *Manjrekar*, AIR 1984 Bom 400; *Aboy* v. *W. Evans Co.*, AIR 1984 Cal 88; *Sadhu* v. *Rabindra*, AIR 1985 Cal 1.

90. ILR (1927) 54 Cal 485.

section was paid or tendered to the lessor at the hearing of the suit the court has no discretion in the matter and must grant relief to the tenant. We do not think that the learned Judge intended to lay down any hard and fast rule. Indeed the learned Judge proceeded to observe as follows: 'In exercising the discretion with which it is invested under Section 114 a court in India is not bound by the practice of a Court of Chancery in England and I am not disposed to limit the discretion that it possesses. Those who seek equity must do equity, and I do not think merely because a tenant complies with the conditions laid down in Section 114 that he becomes entitled as of right to relief'. In our opinion, in exercising the discretion, each case must be judged by itself, the delay, the conduct of the parties, and the difficulties to which the landlord has been put, should be weighed against the tenant. This was the view taken in *Appaya Shetty* v. *Mohd. Beari*[91] and the matter was discussed at some length. We agree with the ratio of that decision. It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands and if the conduct of the tenant is such that it disentitles him to relief in equity, then the court's hands are not tied to exercise it in his favour. Reference in this connection may also be made to *Ramakrishna Malhya* v. *Baburaya*[92] and *Ramabrahman* v. *Rami Reddi*[93].

Section 114-A provides:

> Where a lease of immovable property has been determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—
>
> (*a*) specifying the particular breach complained of; and
>
> (*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;
>
> and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.
>
> Nothing in this section shall apply to an express condition against assigning, underletting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.[94]

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91. ILR (1916) 39 Mad 834; *Hindustan Petroleum* v. *Chandra*, 1995 Supp (3) SCC 167.
92. (1914) 24 IC 139.
93. AIR 1928 Mad 250; *Prithvichand* v. *Shinde*, AIR 1993 SC 1929.
94. *Tarakpade* v. *Ruplekha*, AIR 1978 Cal 189.

This section does not give relief against forfeiture which the lessee incurs by denying his landlord's title. The section only contemplates covenants for repairs, maintenance or insurance of the property leased. It does not apply to the breach of the covenant to pay rent.[95]

Section 112, which deals with what is called implied waiver is as follows:

> A forfeiture under Section 111, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:
>
> Provided that the lessor is aware that the forfeiture has been incurred:
>
> Provided also that, where rent is accepted after the institution of a suit, to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

A waiver of forfeiture however cannot be implied by acceptance of rent due for a period before the occurrence of forfeiture. This follows from the words 'which has become due since the forfeiture' in the section.[96]

Clause (*h*) of Section 111

See Section 106, which provides for the period of notice in the case of the various kinds of leases.

Though the section has enumerated eight methods of determining a lease, in the case of houses used for residential as well as non-residential purposes, these rules are superseded by local enactments in order to give greater protection to tenants against eviction by greedy landlords: but like any other beneficial legislation, these enactments have been misused by recalcitrant tenants.[97] It is said that when one landlord gave notice to his tenant, the latter replied: "Sir, I am in receipt of your notice. I beg to remain. Yours sincerely".

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95. *Chandrawati* v. *Surendra*, AIR 1979 All 406; *Bhagaban* v. *Bijay*, AIR 1980 Cal 70; *Hiralal* v. *Shiv Shankar*, AIR 1980 All 401; *P.S. Singh* v. *Mintok*, AIR 1984 Sik 1; *Nikhil* v. *Ajit*, AIR 1984 Cal 31; *Suganchand* v. *Jisat*, AIR 1984 Pat 184.

96. *Sen & Co.* v. *Mani*, AIR 1980 Cal 155.

97. *Tralok Chand* v. *Arjun Singh*, AIR 1978 AP 2; *Mohanlal* v. *Sri Kishan*, AIR 1978 Delhi 92; *P.N. Rai* v. *Radhakrishnamacharyulu*, AIR 1978 AP 319; *Doddappa* v. *Basavanappa*, AIR 1978 Kant 143 (notice to court); *Metal Press Works* v. *J. K. Sons*, AIR 1978 Cal 472 (Waiver of forfeiture); *Rajendra* v. *Kaushalla*, AIR 1978 Pat 292 (Withdrawal of deposits, effect of); *Krishnadeo* v. *Ramkrishna*, AIR 1982 SC 783; *Hansraj* v. *Hardeo*, AIR 1984 P&H 229; *D.C. Sentre* v. *Denraj*, AIR 1985 Sik 17.

In *Harihar Banerji* v. *Ramsashi Roy*[98], it was observed by the Privy Council:

> The test of sufficiency is not what they [notice] mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances.... They are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat pereat*....If a letter properly directed containing a notice to quit is proved to have been put into the post office, it is presumed that the letter reached the destination at the proper time according to the regular course of business at the post office and was received by the person to whom it was addressed.

In the case of joint lessors, notice must be given by all of them or by one of them on behalf of all, and when there are joint lessees notice should be given to all of them.

A notice given may however be waived. This is provided for in Section 113 as follows:

> A notice given under Section 111, clause (h) is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.
>
> *Illustrations*
>
> (*a*) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders and *A* accepts rent which has become due in respect of the property since the expiration of the notice. The notice is waived.
>
> (*b*) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

Scope

Unlike the previous section the consent of the person to whom notice is given is necessary to constitute waiver. The consent could be express or

98. 1919 ILR 46 Cal 458 (PC): (1918) LR 45 IA 222; *Mani Kant* v. *Babu*, AIR 1978 All 144; *Sharad* v. *Vishnu*, AIR 1978 Bom 186; *Md. Indris* v. *Daman*, AIR 1978 Pat 82; *Tarachand* v. *Ishwar Das*, AIR 1982 HP 29; *Palani* v. *Vishwanath*, AIR 1998 SC 1309.

implied.[1] In the illustrations, notice is given by the lessor and the consent of the lessee is implied in illustration (*a*), by his tender of rent, and in illustration (*b*), by his remaining in possession. Illustration (*a*) shows that acceptance of rent for the period before the notice expired does not operate as waiver. How far acceptance of rent and issue of a second notice operate as waiver depends on the facts and circumstances of each case.

In *Tankiwala* v. *Asha and Co.*[2], property of appellant was let to the respondent as a monthly tenant. By means of a notice, the tenant was informed by the landlord that he was in arrears and that his tenancy was terminated. The tenant did not vacate and a second notice was sent also claiming the premises for personal occupation, but prior to the second notice the landlord received the amount referred to as arrears in the first notice. In a suit for eviction of the tenants and for recovery of rent, it was held:

> It seems to us that on the facts which have been established the landlord was bound to fail. It is abundantly clear that he had in the second notice, treated the tenancy as subsisting and not only the respondent was described as a monthly tenant but also in the plaint, even after the amendment had been allowed rent was claimed up to the period covered by the second notice; thereafter the amount due was described as compensation for use and occupation. The plaintiff was thus fully aware of the distinction between rent and damages for use and occupation and it cannot be said that he had abandoned the second notice and asked for the same to be treated as *non est* or that he had relied solely on the first notice. Under Section 113 of the Transfer of Property Act a notice given under Section 111(*h*) is waived with the express or implied consent of the person to whom it is given by any act on the part of the person giving it showing an intention to treat the lease as subsisting. If only the language of illustration (*b*) were to be considered, as soon as the second notice was given the first notice would stand waived. Counsel for the appellant has relied on the observation of Denning, J., (as he then

1. *Munilal* v. *Nandlal*, AIR 1971 Delhi 300; *Rambandhan* v. *Guddar Ram*, AIR 1971 All 485; *Dabyabhai* v. *Amarchand*, AIR 1971 Guj 73 (This principle of waiver is applicable even in cases of statutory tenancies under Rent Control Acts).
2. (1970) 1 SCC 46; *Ramjilal* v. *Gulabrai*, AIR 1979 Bom 44; *Shrivastave* v. *Poori Bai*, AIR 1981 Delhi 334; *Gaiware* v. *Premchand*, AIR 1984 All 364.

was) in *Lowenthal* v. *Vanhowte*[3] that where a tenancy is determined by a notice to quit it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect and further that a subsequent notice to quit is of no effect unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first. The Privy Council in *Harihar Banerji* v. *Ramsashi Roy*[4] had said that the principles governing a notice to quit under Section 106 of the Transfer of Property Act were the same in England as well as in India. For the purpose of the present case it is wholly unnecessary to decide whether for bringing about a waiver under Section 113 of the Transfer of Property Act a new tenancy by an express or implied agreement must come into existence. All that need be observed is that the section in terms does not appear to indicate any such requirement and all that has to be seen is whether any act has been proved on the part of the present appellant which shows an intention to treat the lease as subsisting provided there is an express or implied consent of the person to whom the notice is given.

In the present case there can be no doubt that the serving of the second notice and what was stated therein together with the claim as laid and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that this was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice.

It further appears that the rent was sent by the tenant treating the tenancy as subsisting and not as having come to an end by virtue of the first notice.

The effect of surrender and forfeiture on under-lessees is provided in Section 115 as follows:

> The surrender, expressed or implied, of a lease of immovable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease: but, unless the surrender is made for the purpose of

3. (1947) 1 KBD 342.
4. 1919 ILR 46 Cal 458 (PC): (1918) LR 45 IA 222.

obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under Section 114.

Whereas forfeiture destroys the right of an under-lessee, surrender does not, because, the lessee, by surrendering his right cannot derogate from his grant by which he has created rights in an under-lessee. And if the surrender is for obtaining a fresh lease, the under-lessee or sub lessee will continue to hold under his lessor, namely, the original lessee.[5]

Exercises

1. Distinguish between a lease and licence. (pp. 312-317)
2. What are the legal presumptions in relation to the duration of a lease? (pp. 319-323)
3. What is the scope of the lessor's obligation to put the lessee in possession? (pp. 334-335)
4. What is the implied covenant for quiet enjoyment? (pp. 335-336)
5. What is the law in relation to fixtures between a lessor and a lessee? (p. 337)
6. What is the law as to emblements? (p. 338)
7. What is the effect of a lessee's covenant not to alienate? (pp. 338-340)
8. What is the scope of a lessee's liability for waste? (p. 341)
9. What are the rights of a lessor's transferee? (p. 342)
10. Explain 'Law abhors forfeiture'. (pp. 350-352)
11. What is the difference in effect on a sub-lessee of a 'surrender' and a 'forfeiture'? (pp. 355-356)
12. What is the difference between 'a tenant holding over', 'a tenant by sufferance' and 'a tenant at will'? (pp. 323-328)

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5. See *Maneksha Ardashir Irani* v. *Manekji Edulji Mistry*, (1974) 2 SCC 621: (1975) 2 SCR 341.

20
Exchanges

Exchanges

Sections 118 to 121 deal with the law relating to exchanges.

They are as follows:

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

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

A partition is not an exchange, because, the parties are not in exclusive possession of properties which they inter-change.[1]

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

This deals with warranty of title and remedies for its breach.[2]

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

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

Money means both coins and currency notes.

The following further points may be noticed with respect to exchanges:

(1) If in addition to the property, some money is paid or agreed to be paid to set off any inequality, the transaction does not cease to be an exchange.

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1. *See* Section 5. *Than Singh* v. *Nandu*, AIR 1978 P&H 94; *Jattu Ram* v. *Hakam*, (1993) 4 SCC 403.
2. *C. Gander* v. *Royal*, AIR 1979 Mad 285.

(2) But, unlike a sale if such money is not paid, the other party cannot have any charge for the unpaid money, on the exchanged property.

(3) If one of the parties is deprived of a part, the other can, (*a*) retain the rest and ask for compensation, or (*b*) repudiate the whole transaction.

Exercises

1. Is 'Partition' an 'exchange'? (p. 357)

21
Gifts

Gifts

The law relating to 'Gifts' is set out in Sections 122 to 129.

Section 122 provides:

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

Acceptance when to be made.—Such acceptance must be made during the life-time of the donor[1] and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Consideration means *valuable* consideration.[2] While a minor cannot be a donor, he could be a donee unless onerous conditions are attached to the gift.[3] This follows from the words 'on behalf of the donee'. The donee must be in existence at the date of gift. He could be *en ventre de sa mere* so that a gift could even be made to a child in its mother's womb, provided it is properly accepted on its behalf.

The property gifted must be *existing*, that is not future property. It must also be transferable under Section 6.

This chapter deals only with gifts *inter vivos*. Gifts *mortis causa* of movable property and gifts by will are not covered by this Act.

A gift can only be in favour of an ascertainable person. Therefore, it cannot be in favour of the public, though it can be in favour of an idol.

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1. *Vasudev* v. *Pranlal*, (1974) 2 SCC 323: AIR 1974 SC 1728.
2. *Shakuntala* v. *State of Haryana*, (1979) 2 SCC 226: AIR 1979 SC 843; *Santosh* v. *Spl. Tahsildar*, AIR 1980 AP 139; *Sonia Bhatia* v. *State of U.P.*, (1981) 2 SCC 585: AIR 1981 SC 1274; *Doraiswami* v. *Saroja*, AIR 1981 Mad 351; *Rajammal* v. *Mookan*, (1981) 3 SCC 518: AIR 1981 SC 1664; *Tirath* v. *Manmohan*, AIR 1981 P&H 174; *Janardan* v. *Girija*, AIR 1981 All 86 (Gift to a minor); *Ponnuchami* v. *Bulasubramaniam*, AIR 1982 Mad 281; *Munni* v. *Chhote*, AIR 1983 All 44; *Brindaban* v. *Eswar*, AIR 1983 Ori 172; *Sunder* v. *Anandilal*, AIR 1984 All 33; *Charan Singh* v. *Pritam*, AIR 1984 P&H 153; *Shri Ram Kishan Mission* v. *Dogar Singh*, AIR 1984 All 72; *Subhash* v. *Nagar Mahapalika*, AIR 1984 All 218; *Sakuntala* v. *Amar*, AIR 1985 HP 109; *Sukhdeo* v. *Champa*, AIR 1985 Pat 89; *Ajmer Singh* v. *Atma*, AIR 1985 P&H 315; *CIT* v. *R.S. Gupta*, (1987) 2 SCC 84; *Controller of Estate Duty* v. *Vithal Das*, (1987) 2 SCC 37.
3. *See* Section 7.

Unlike English law, under this Act, acceptance by the donee is essential, though it need not be express and may be inferred from the circumstances of the transaction.

Section 123 provides:

> For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered.

A registered instrument is necessary for the gift of immovable property whatever its value. Unlike a sale, but like a mortgage, attestation by two witnesses is also necessary.

When another signs 'on behalf' of the donor he signs only the donor's name and not his own.

In *Kalyanasundaram* v. *Karuppa*[4], a gift deed was duly executed and attested and handed over to the donee. It was not registered, but the donee accepted the gift. The donor sought to revoke it as he had taken a boy in adoption thereafter. It was held:

> The circumstances in *Atmaram Sakharam* v. *Vaman Janardhan*[5] were very much the same as in the present, and the decision is thus correctly expressed: 'When the donor of immovable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument'....When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary

4. (1927) LR 54 IA 89; *State of U.P.* v. *Sayed Abdul Jalil*, (1973) 2 SCC 26: AIR 1972 SC 1290; *State* v. *Shanti*, (1979) 3 SCC 266: AIR 1979 SC 843.
5. ILR 49 Bom 388 (FB); *Swarup Chand* v. *Suresh Chandra*, 1995 Supp (2) SCC 36; *Gomtibai* v. *Mattu Lal*, (1996) 11 SCC 681; *Narmada Ben* v. *Praan Jivan Das*, (1997) 2 SCC 255; *Baby* v. *Rajan*, (1997) 2 SCC 636.

interest within the prescribed period. Neither death, nor the express revocation by the donor is a ground for refusing registration, if the other conditions are complied with.

Acceptance of the gift by the donee is thus the most important part of the transaction. Registration can be later. A gift, in fact, takes effect from the date of *execution* of the deed and *not from the date of the registration*. Also if a person wants to make a gift *inter vivos*, but fails because of some defect in the transaction, it cannot be construed as creating a trust.

The next group of sections, Sections 124 to 129 provide as follows:—

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

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

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

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract[6], it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the right of transferees for consideration without notice.

Illustrations

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

(*b*) *A* gives a lakh of rupees to *B*, reserving to himself, with *B*'s assent, the right to take back at pleasure Rs 10,000 out of the lakh. The gift holds good as to Rs 90,000 but is void as to Rs 10,000 which continues to belong to *A*.

See Sections 21, 25 and 31. Section 19 of the Contract Act lays down the cases in which a contract may be rescinded.

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6. *Afsar Sheikh* v. *Soleman Bibi*, (1976) 2 SCC 142.

The first part of the section relates to a condition subsequent agreed to, between the donor and donee, on the happening of which the gift is put an end to. It must be express and should not be violative of Sections 10 and 11.

If the revocation depends on the will of the donor then the gift is void.

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

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.—A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations

(*a*) *A* has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in *Y*, *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

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

See Section 35.

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

If the universal donee is a person not competent to contract, he is not liable under this section unless he retains the property after the incapacity is removed.

Donor's whole property means his entire property both movable and immovable.[7]

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7. *Sreenivasulu* v. *Munirathnam*, AIR 1978 AP 173; *Sk. Fatima* v. *Chalapati*, AIR 1978 AP 401.

129. *Saving of donations mortis causa and Muhammedan law.*— Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammedan law.

The death-bed gifts are confined to movable property and take effect only if the donor dies. *See* Section 191 of the Indian Succession Act.[8]

Exercises

1. Resumable gifts are void, but conditional gifts are valid. Explain. (pp. 361-362)
2. When can a gift be revoked? (p. 361)
3. Who is a universal donee? (p. 362)
4. What is a donatio mortis causa? (pp. 1, 363)

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8. *Md. Hesabuddin* v. *Hesaneddin*, AIR 1984 Goa 41.

22
Actionable Claims

Actionable Claims

Section 3 defines an actionable claim. *See* pp. 39-41.

Sections 130 and 131 provide for the mode of transfer of an actionable claim and the right of the transferee.[1]

Section 130 says:

(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing[2] signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

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

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.— Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of Section 38 of the Insurance Act, 1938 (IV of 1938).

Illustrations

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

(*ii*) *A* effects a policy on his own life with an insurance company and assigns it to a bank for securing the payment of an existing or future debt. If *A* dies the bank is entitled to

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1. *Union of India* v. *Sarada Mills*, (1972) 2 SCC 877: AIR 1973 SC 281 (claim of damages held not to be transferable).
2. *Kotaiah* v. *Seshamma*, AIR 1971 AP 315 (case of promissory note); *Champalal* v. *Padam Chand*, AIR 1971 MP 133; *Dabyabai* v. *Ambalal*, (1981) 3 SCC 644: AIR 1981 SC 1556; *Krishnamurti* v. *Kamalakshi*, AIR 1983 Kant 233.

receive the amount of the policy and to sue on it without the concurrence of *A*'s executor, subject to the proviso in sub-section (1) of Section 130 and to the provisions of Section 132.

See Section 3 under 'actionable claim' and Section 8 under 'Debts and Securities'.

The proviso is intended for the benefit of the debtor and he is protected when he pays off the debt without notice of the transfer.

The section does not prevent the assignment of a part of the debt.

Curiously, though a gift of immovable property by a Muslim does not require a document because of Section 129, since there is no such saving provision in this Chapter, a gift of an actionable claim by Muslim must comply with the requirements of this section.

Section 131 says:

Every notice of transfer of actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

As regards the rights of the transferee, they do not depend on the notice, because, under Section 130 he gets the right upon the execution of the instrument of transfer. But in the absence of notice to the debtor his dealings with the debt are protected under the proviso to that section.

Section 132, which provides for the liability of a transferee of an actionable claim reads:

The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations

(*i*) *A* transfers to *C* debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him, although *C* was unaware of it at the date of such transfer.

(*ii*) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

Section 133 provides:

Warranty of solvency of debtor.—Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

The rest of the sections deal with certain exceptions and how the money received is to be applied:

134. *Mortgaged debt.*—Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Section 130 deals with the rights of the transferee as against the debtor, while this section deals with the rights between the transferor and transferee.

135. *Assignment of rights under policy of insurance against fire.*—Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

The enforceability of the policy of insurance against fire depends not merely on the assignment of the policy but also on the assignment of the property insured.[3]

136. *Incapacity of officers connected with Court of Justice.*—No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce at his instance, or at the instance of any person claiming by or through him, any actionable claims, so dealt with by him as aforesaid.

The reason for this rule is that officers of a Court of Justice should like Caesar's wife be above suspicion.

137. *Saving of negotiable instruments, etc.*—Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom negotiable, or to any mercantile document of title to goods.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper's certificate, railway receipt[4], warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document, to transfer or receive goods thereby represented.

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3. *Panmal* v. *OFG Insurance Co.*, AIR 1979 Gau 70.

4. *Shree Shyam Stores* v. *Union of India*, AIR 1971 A&N 59; *Mulji Deoji* v. *Union of India*, AIR 1957 Nag 31; *Sheoprasad* v. *Dominion of India*, AIR 1954 All 747; *Shamji Bhanji* v. *N.W. Rly.*, AIR 1947 Bom 169; *Union of India* v. *Taberale Isaji*, AIR 1956 Bom 600; *Commr. for Port of Calcutta* v. *General Trading Corpn.*, AIR 1964 Cal 290; *Ibrahim* v. *Union of India*, AIR 1961 Guj 9; *Controller of Estate Duty* v. *Godavari Bai*, (1986) 2 SCC 264: AIR 1986 SC 631.

Exercises

1. Compare 'actionable claim' and 'a chose in action'. (pp. 46-48)
2. What is the scope of the warranty of debtor's solvency? (p. 365)

23
Law Relating to Wills

The Indian Succession Act, 1865, and the Hindu Wills Act, 1870, originally constituted the statute law on the subject of wills in India. These two enactments were later consolidated into the Indian Succession Act, 1925. Under Sections 57 and 58, the formalities prescribed by the Act, for the execution of a will, apply to all Indians except Muslims. According to Sir Dinshaw Mulla, a Muslim will need not be in writing. If it is in writing it need not be signed, and if it is signed it need not be attested or registered. A will in the handwriting of the testator is called a holographic will.

The Indian statute, unlike the English law, does not require that the attesting witnesses should be present simultaneously when the testator signs or acknowledges his signature.

Both systems of law recognise what are known as privileged wills. These are wills executed by soldiers and sailors on active duty. They are exempt from the ordinary formalities, because, it may not always be possible for them to comply with the formalities. They could also be oral in which case they are called nuncupative wills.

A will is revoked: (1) by a subsequent will or codicil containing an intention to revoke and provided it is executed according to law. The mere fact of making a subsequent will would not always operate as a revocation of the prior will, unless the two are irreconcilable. If they are reconcilable and not contradictory to one another they can both be admitted to probate as the last will and testament of the deceased. If there is partial inconsistency between the two, then the latter revokes the former regarding those inconsistent parts only. (2) By the testator destroying the will with the intention of revoking it. In one case the testator ran his pen through various lines in his will, wrote on the back of it : 'This is revoked' and threw it away in the waste paper basket in his sitting room. His servant retrieved it and put it on the kitchen table where it remained till the testator died 7 years later. The court held that there was no proper destruction and that the will was not revoked, because, there must be destruction and an intention to destroy. In another case, the

descendant of the testator and he dies, leaving his lineal descendant; and (5) when the bequest is made to *A* for the benefit of *B* and *A* predeceases but *B* survives the testator.

A legacy is said to be specific when it is of identifiable property. It is said to be general when it cannot be identified as for example, a payment of Rs 1000. A demonstrative legacy is a general legacy payable out of a specific fund.

Suppose a testator bequeaths his diamond ring, but later sells it or converts it into something else. Then on the testator's death, the diamond ring ceases to exist and the legacy is then said to be adeemed, that is, taken out from the will. Therefore, there can be an ademption of a specific legacy. If however the legacy was a demonstrative one and the specified fund ceases to exist at the time of the testator's death, there will not be ademption and the legacy will be paid from out of the general assets of the testator.

The priorities are as follows:

From the assets of the testator, debts must be paid first, then necessary expenses and thereafter the specific legacies. If the balance of the assets are not sufficient to pay the general legacies, the general legacies abate proportionately, that is they will be diminished proportionately. If however there is a demonstrative legacy, then it must be paid out of the specified fund. If there is a balance of the specified fund, that is included in the balance of assets for paying the general legacies. If however the specified fund is not sufficient, the legatee of the demonstrative legacy will rank with other general legatees for the balance and can claim to be paid out of the general assets. Thus, while a specific legacy has the advantage of priority it is in danger of being adeemed, a demonstrative legacy, though it is postponed to a specific legacy, has a claim not only over a specified fund, but also against the general assets, in case the specified fund proves insufficient.

If the testator does not appoint an executor, the court will then appoint an administrator to administer the estate. He gets his authority to administer the estate from the letters of administration granted to him by the court.

When there is an executor he obtains, after the death of the testator, a probate of the will, that is, he obtains from the court an order that the will is genuine and a certified copy of the will. If the executor is not so

testator while drunk, tore up his will, but next day when he was sober he gathered the pieces and pasted them together. It was held that probate could be granted of the will, because, though there was destruction, the necessary intention was not there. Such intention is known as *animus revocandi*. What amounts to destruction would depend on the facts of each case. but a destruction of material facts, like signature, or signatures of the witnesses or the clause disposing of the property amount to sufficient destruction. (3) By marriage of the testator subject to certain exceptions. Under modern English law, however, a will expressed to be made in contemplation of marriage is not revoked by solemnization of the contemplated marriage. This method of revocation does not apply to the wills of Hindus, Buddhists, Sikhs or Jains.

In the case of privileged wills, the methods of revocation are: (1) execution of an unprivileged will; (2) by a privileged will with intention to revoke; and (3) by destruction with the *animus revocandi*.

The revocation of the will may be absolute or conditional. In the case of conditional revocation, if the condition fails the revocation also fails. If the condition is the execution of another will, then it is known as *dependent relative revocation*. In one case the testator gave instructions to his solicitor for drawing up a fresh will, cut out his signature in the first, but died without executing the fresh will. It was held it was only a conditional revocation and probate of the first will was granted. A revoked will or codicil can only be revived by fresh execution.

A will speaks only from the moment of the testator's death and therefore before that it can be altered as often as the testator likes.

When a testator bequeaths legacies, he generally appoints a person called the 'executor' to administer the estate and distribute the bequests. When there is a residuary clause in favour of a legatee, he takes: (1) the residue of the estate after distribution of valid legacies, (2) any property not disposed of by the testator, and (3) property which falls into the residue because a particular legacy lapses. A legacy lapses, when the legatee dies during the lifetime of the testator. There are, however, five exceptions to this rule where the legacy does not lapse: (1) when it appears from the will that the legacy should be granted to another person if the grant in favour of the legatee fails; (2) when the legacy is given in discharge of a moral obligation, for example, payment of a time-barred debt; (3) when the legacy is in favour of two persons jointly and one dies, the survivor takes the whole; (4) when the legacy is in favour of a lineal

expressly named in the will, but the implication is that a particular person should act as executor, then he is known as an executor according to the tenor of the will. There is one fundamental difference between an executor obtaining probate and an administrator obtaining letters of administration. When probate is granted all the acts of executor in relation to the estate, between the dates of the death of the testator and obtaining the probate are validated, whereas, in the case of an administrator his acts after obtaining letters only are valid, but his acts intermediate between the date of the death of the testator and the date of obtaining letters are not rendered valid. The rules regarding the right to act as an executor flowing from an order of the court and his exclusive right to the possession of the testator's estate, do not apply in the case of certain wills of Hindus, Buddhists, Sikhs or Jains and also of Muslims.

For the effect of grant of probate or letters of administration *see* Section 41 of the Evidence Act and pages 150 to 153 of *The Law of Evidence* by Vepa P. Sarathi. The conclusive character of a judgment granting probate or letters of administration does not import that the various dispositions in the will are all valid. It only establishes that the will is genuine and was properly executed. If a disposition therein is legally void, such invalidity is not at all affected or cured.

An *executor de son tort* is an executor of his own wrong. He is one who does acts which belong to the office of an executor without having such a right to act. He will be answerable to the real executor or administrator for his acts.

The dangers of acting as an administrator or executor are well illustrated by the fate of one such, described by Charles Dickens in the *Pickwick Papers*. Sam Weller accompanies his master Pickwick into the debtors' prison in Fleet Street and there meets a cobbler who had been there already for twelve years.

"What do you suppose ruined me?", asked the cobbler.

"You did not go to law, I hope", said Sam suspiciously.

"Never in my life. The fact is, I was ruined by having money left me", replied the cobbler.

"How was it?", inquired Sam.

The cobbler replied "Just this, an old gentleman that I worked for, down in the country, and a humble relation of whose I married—she's

dead, God bless her, and thank Him for it!—was seized with a fit and went off''.

''Where?'', inquired Sam.

''How should I know where he went. He went off dead, and left £ 5000 behind him. One of which he left to me, because I married his relation; and being surrounded by a great number of nieces and nephews who were always quarrelling and fighting among themselves for the property, he made me his executor and left the rest of the property to me in trust to divide it among them as the will provided. When I was going to take out a probate of the will, the nieces and nephews who were desperately disappointed at not getting all the money, entered a caveat against it.''

''What's that?'', inquired Sam.

'A legal instrument, which is as much as to say, ''It's no go''. replied the cobbler.

''I see, a sort of brother-in-law of the have-his carcass (habeas corpus)'', said Sam.

The cobbler continued, ''But finding that they couldn't agree among themselves, and consequently couldn't get up a case against the will, they withdrew the caveat, and I paid all the legacies. I had hardly done it, when one nephew brings an action to set the will aside. The case comes on, some 4 months afterwards before a deaf old gentleman, in a backroom somewhere down by Paul's Churchyard; and after four counsel had taken a day apiece to bother him regularly, he takes a week or two to consider and read the evidence in 6 volumes, and then gives his judgment that the testator was not quite right in his head, and I must pay all the money back again, and all the costs. I appealed; the case came on before 3 or 4 very sleepy gentlemen and they very dutifully confirmed the decision of the old gentleman below. After that, we went into Chancery, where we are still, and where I shall always be. My lawyers have had all my thousand pounds long ago; and what between the estate, as they call it, and the costs, I'm here for £ 10,000 and shall stop here, till I die, mending shoes?''

In construing a will the intention of the testator is the pole star by which the court should be guided. But such intention must be gathered from the words used. Though the court must endeavour to sit in testator's arm-chair to gather his intention it should not speculate as to what the testator might or might not have intended. Extrinsic evidence cannot be

considered except to clear up latent ambiguities. If the testator uses technical words, he will be presumed to have used them in their legal sense and where the same words are used in different parts of the will, they will be taken to have been used by the testator everywhere in the same sense. The testator ought to direct his meaning according to the law, and not seek to mould the law according to his meaning. For, if a man were assured, that, whatever words he uses, his meaning only will be considered, then, he would be very careless about the choice of words and the attempt to explain his meaning in each particular case would give rise to infinite confusion and uncertainty. To add or to relinquish words is *maledicta glossa*. Every string ought to give its sound. But if two clauses are totally irreconcilable the last will prevail on the assumption that second thoughts are better. If a clause in a will is susceptible of two meanings, one of which would be effective and the other not, then the former should be preferred.

I have used the words 'codicil' in the above paragraphs.

It is an instrument made in relation to a will and explaining, adding, or altering its terms. It should be executed and attested in the same manner as a will.

These rules show that one has to be very careful in drawing up a will. That is why, when solicitors meet at a social gathering they always drink a toast 'to the testator who makes his own will', for he is sure to mess it up and provide a rich source of litigation. Bertrand Russell in his *Autobiography* says that Sanger, a great friend of his in Cambridge, became a Chancery Barrister and was well known for his erudite edition of Jarman *On Wills*, and that he used to lament that Jarman's relatives had forbidden him to mention in the preface that Jarman died intestate after writing two volumes on wills.

24
The Law Relating to Trusts

Suppose *A* transferred his property to *B* directing him to hold it for the use of *C* there was a conveyance to uses known as feoffment to uses in English law. *B* was the *feoffee to uses* and *C* the *cestui que use*. The use was not recognised by the Common Law Courts of England, because the Common Law recognised only the rights of person in whom the seisin vested; but what was once merely a confidence reposed in *B* developed into an equitable interest recognised by Courts of Chancery. Under the Modern English law uses are called trusts, the feoffee being known as the trustee and the *cestui que use* or *cestui que trust* as the beneficiary.

The origin of uses can be traced to various sources: (1) if a person had merely a use and committed treason his property could not be forfeited, (2) if such a person defaulted in paying his debts, the creditors could not proceed against his property, (3) a tenant by transferring the legal ownership to another retaining the beneficial interest, escaped the various feudal services and finally (4) because the Statute of Mortmain prohibited the transfer of lands to churches and monasteries and to charitable institutions. In the last case the grantor adopted the device of conveying property to a natural person to use it for the benefit of the institution. The device was however put an end to by Henry VIII by the Statute of Uses which has been described by Maitland as a 'marvellous monument of legislative futility, a statute not merely of uselessness but of abuses'.

The effect of the statute was to merge the legal and beneficial ownerships in the beneficial owner. But the Common Law provided a chance to the Court of Chancery to resurrect it. In *Tyrrel* v. *Tyrrel*[1], the Common Law Court decided that there cannot be a use upon a use. That is, if property is conveyed to *A* to the use of *B* to the use of *C*, legal interest passed to *B* and use in favour of *C* was held to be void. The Court of Chancery seized upon this decision and gave relief to *C* in equity. Thus the statute of uses was rendered ineffective by the introduction of an intermediate person. The Law of Property Act, 1925,

1. 73 ER 336.

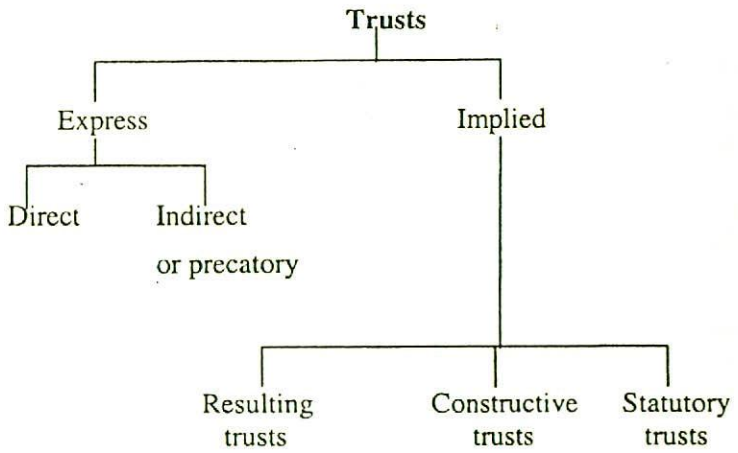
abolished the Statute of Uses, so that, it is no longer necessary to introduce the man of straw.

In India, trusts were recognised both in the Hindu and Mohammedan periods. Though public trusts were more common, private trusts were not unknown as has been recognised in the case of *Tagore* v. *Tagore*[2].

The law relating to private trusts, that is, trusts in favour of individuals is in the Indian Trusts Act (2 of 1882). Public trusts are dealt with in statutes such as the Hindu Religious Endowments Act, but the principles of the Trusts Act are also applied to public trusts wherever applicable.

The definition of trust in the Act does not import the duel ownership of English law—the legal ownership in the trustee and the equitable interest in the beneficiary. Under Indian law it is a legal obligation attaching to the property in the hands of the trustee and enforceable against him. The owner himself could be a trustee by a mere declaration.

One method of classifying trusts is as follows:



Express trusts are created by the settlor declaring his intention and defining the objects and the property.

2. (1874) LR 1 IA 389.

When the declaration is clear and specific they are known as Direct trusts. When they have to be implied they are known as Indirect or precatory trusts. According to Jarman:

> It has been long settled, that words of recommendation, request, entreaty, wish or expectation addressed to a devisee or a legatee will make him a trustee for the person or persons in whose favour such expressions are used; *provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object of the intended trust.* (Emphasis supplied)

Implied trusts arise by operation of law without any intention to create such a trust by the transferor or settlor. Resulting trusts are dealt with in Sections 81 to 87 of the Indian Trusts Act. (1) Suppose *A* without consideration conveys property to *B*. Suppose also there is no indication that *A* intended to confer the beneficial interest on *B*. At the same time no trust is declared. A trust results from the transaction, so that *B* holds the property in trust for the benefit of *A*. (2) Suppose *A* pays the consideration and gets a sale in the name of *B*. There is nothing to indicate that *A* wanted to benefit *B*. In such a case also a trust results, and *B* must hold the property in trust for the benefit of *A*. Students of law may console themselves that Lord Halsbury, as Lord Chancellor, has made the following fantastic statement in *Smith* v. *Cooke*, (1891) AC 297, 299: 'If it is intended to have a resulting trust the ordinary and familiar mode of doing that is by saying so on the face of instrument; and I cannot get out of the language of this instrument, a resulting trust except by putting in words which are not there !'

In English law if the person in whose name the property is transferred is the wife or child of the person who paid the consideration, there is a presumption of advancement, that is, there is a presumption that the husband or the father, as the case may be, intended to confer the beneficial ownership on the wife or the child.

In India[3], such transactions, that is, those in which the property is purchased in the name of another are known as *benami* transactions, the person in whose name the property is taken being known as the

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3. *See* the very interesting; article *Benami* (*Secret Trust*) [*Syndrome* in 19 JILI (1977)] p. 105, by Sri Vasant V. Vaze. Benami transactions are now prohibited by the Benami Transactions (Prohibition) Act, 1988. For past transactions the benamidar in whose name the property is held would be deemed the actual owner.

benamidar. Even when the wife or child is the *benamidar*, unlike English law, there is no presumption of advancement.

(3) Suppose *A* transfers property to *B* upon trust which was to be indicated thereafter, but the purpose is never declared. A trust results, in which *B* holds the property in trust for *A*. (4) Or again *A* transfers property to *B* upon trust for its sale to discharge *A*'s debts. After paying *A*'s creditors, that is, after the trust is completely executed, a surplus remains in *B*'s hands, that is, the trust property is not exhausted. A trust results in this case also, and *B* must hold the surplus in trust for the benefit of *A*.

A constructive trust arises when a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as a trustee. In *Keech* v. *Sanford*[4], it was held that fraud is not necessary. It is sufficient if there is a conflict of his own interests with those of the person he is bound to protect and gains some advantage. Examples are: (1) between executor and the legatees of testator; (2) between an agent and his principal; (3) between a partner and his partners; (4) between the director of a company and its shareholders; (5) between a co-owner and the other co-owners; and (6) between a mortgagor and a mortgagee.

Statutory trust arises in English law.

Another method of classifying trusts is into (1) Simple trusts, (2) Special trusts, (3) Executed trusts and (4) Executory trusts.

In the case of a simple trust property is vested in the trustee upon trust for the beneficiary, but the trustee has no active duties to perform. In the case of a special trust, the trustee is appointed for the purpose of carrying out specified objects. These are not dealt with in the Indian Trusts Act, because the differences are not material and the rights and liabilities of the trustee and beneficiary are the same in every kind of trust in Indian law.

The test for distinguishing between executed and executory trusts is: Has the testator left it to the court to make out from general expressions what his intention is, or, has he clearly defined his intention. If it is the former, it is an executory trust and if it is the latter it is an executed trust.

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4. 25 ER 223.

A third method of classifying trusts is into public ard private trusts, that is, those created for the benefit of the public and those created for the benefit of an individual or a definite and ascertainable number of them.

A *trustee-de-son-tort* or a trustee by his own wrong assumes the position of a trustee. He then becomes accountable to the beneficiary just like an express trustee.

One other kind of transfer of property is known as the Settlement. There are no statutory rules in Indian law dealing with them, but the term is defined in Section 2(*b*) of the Specific Relief Act, 1963, and in the Stamp Act, 1899. These definitions show that a settlement is different from testamentary deeds and also different from the conveyances dealt with in the Transfer of Property Act, namely, sale, gift or exchange.

Settlements came into existence in English law in order to either preserve an estate intact or to provide for the equitable distribution of one's properties among one's children. These considerations do not arise in Hindu Law, because that system of law itself provides for those matters; but, since the Hindu Law, *was* defective in relation to female heirs settlements were resorted to even by Hindus in the past.
