



# **KLE LAW ACADEMY BELAGAVI**

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

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## **STUDY MATERIAL**

*for*

## **PROPERTY LAW**

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## **Property Law**

### **Objectives**

The student shall be able to understand the different types of transfer recognized by law. They shall have a clear idea about the various types of transfer like sale, mortgage, lease, exchange gift & actionable claim. They shall also become familiar to the various requirements of a valid transfer. They shall also understand in detail the effect of various elements like conditions, election, and apportionment on the transfer. They shall also understand the status of a transfer when made by certain other persons.

### **UNIT-I**

Section 1 of the act is called as the transfer of Property Act, 1882. Section 1 gives the title of the act. It is helpful in some instances as an internal aid for the interpretation of any provision in the Act. The title gives the idea about the object of the Act, policy & purpose of the Act.

**Application of the Act:** the T.P Act applies to transfers by acts of parties. & not by the operation of law

The act deals with transfer of property between two living persons. The majority of the act deals with transfers relating to immovable property. This act does not apply to transfer of property governed by personal law, for ex, Mohammedan Law.

### **Section 3 defines Immovable Property**

We know that property is the total wealth of a person. It may include land, buildings, mortgage rights, debts owed to him, insurance money due, cheque received, cash, etc. The Transfer of Property Act, 1882, defines immovable property as that which does not include standing timber, growing crops and grass. This is a very vast definition though, so we must look at the definition furnished by the General Clauses Act, 1897, wherein it is mentioned that immovable property includes – a) land, b) benefits arising out of land, c) things attached to the earth, or d) permanently fastened to anything attached to the earth. Also, the Registration Act defines immovable

property as land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefits arising out of land and things attached to the earth, but not standing timber, growing crops or grass. Actionable claim is dealt with in the Transfer of Property Act.

### **Attestation:**

Section 3 of the T.P. Act defines attestation. Attesting of an instrument means that the documents must be attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the document. Further each of them must have signed the instrument in the presence of the executant. The attester's must have intention of attesting. It is not necessary that more than one should be present at the same time. Law also does not prescribe any particular form of attestation. The usual procedure is that the attester's must sign with address and date.

The Privy Council in *Shamu v. Abdul Khandir*, resolved the controversy whether the attester's should have actually seen the execution or not, of the document. It held that the attester's who sign the document must have actually seen the document executed.

Attester's should be a *Sui juris* i.e. person legally capable signature includes even the thumb impression.

Attestation does not mean that the attester's have the idea of the content of the instrument. It means that they see the executor of the document putting his signature. Therefore it confirms the fact of execution.

### **Constructive Notice**

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

- i) Knowledge is presumed when the party wilfully abstains from making enquiry.
- ii) Gross negligence of the party.
- iii) Registration:

Registration of a transfer amounts to notice, from the date of registration.

### **Possession as notice**

If a person is actually in possession of a property, then the acquirer of the property is deemed to have notice of the title, if any, of the person in possession of the property. v) Notice to agent is treated as notice to the principal. The agent must have notice during the course of his business. If an agent fraudulently conceals the fact, then there is notice to the principal. The principal should not be a privy to the fraud.

### **Section 5: defines the phrase Transfer of Property**

It is an act by which a living person conveys property in present or future or to himself & one or more living persons.

The word property used in the definition means- Tangible material things e.g. land and houses. Rights which are exercised over any material things, e.g right to enjoy a property. Rights regarding repayment of debt, etc.

The word transfer means a transfer of all the rights & interest in the property or transfer of one or more rights relating to the property.

Therefore the phrase transfer of property means

- 1) Transfer of things
- 2) Transfer of one or more rights regarding a thing
- 3) Transfer of the debt.

The effect of the transfer may take place in present or in future. The property to be transferred must be in existence at the time of a transfer. The transfer of property must be from one living person to another living person. However there are exceptions to this general rule as given under section 13 & 14. The transfer of property recognizes such transfers which create a new right or title or interest in favour of the transferee.

The following transfer is not governed by the T.P act: as they do not create any title in favour of the transfer.

- 1) Partition
- 2) A charge
- 3) A relinquishment or surrender
- 4) A family settlement
- 5) Partition by family settlement.

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

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

a) **Spes Successions:** means 'chance of succession' such an interest cannot be transferred .The chance of a relation obtaining a legacy (by a non-testamentary instrument i.e. a Will)

b) **Right of Re-entry:** This right pertains to the owner of the property who has transferred limited interest in the property to another. e.g. A house given on lease.

When the lease is subject to a condition that the owner shall have a right of re-entry to the property in case of breach of a condition committed by the tenant. The re-entry cannot be called as a transfer within the meaning of section 5 of the T.P Act as the possession of the property reverts back to the original owner.

c) **Right of easement:** The easementary right is a dominant right of a person on the property of another which is called the servient property, such a right cannot be sold exclusively apart from the property as this right runs with servient land.

d) Religious Office cannot be transferred: A right regarding a religious office cannot be transferred .As the right is restricted in enjoyment to the holder himself; therefore he cannot transfer it to another.

e.g: office of a *Mutawalli* of a *Wakf* , *Mahant* of a *Math*.

e) **Right to future maintenance:** in whatsoever manner arising, secured or determined, cannot be transferred. A, the wife of B was receiving a

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

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

f) **Public office:** A public office is held for quality personal to the holder himself, as such a transfer of such public office cannot be allowed by alienation.

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

h) **Illegal Transfers:** No transfer can be made if it is

- i) having unlawful object or consideration,
- ii) opposed to the nature of interest effected,
- iii) to a legally disqualified transferee.

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

**Transferable Interest:** Some interest in leasehold is inalienable. E.g. a tenant having an untransferable interest of occupancy cannot alienate or assign his interest in the occupancy.

### **Competency under the T.P Act:**

Both the parties to the transfer must be competent to enter into a contract. They must have the competency as required under S.10 of the Indian Contract Act. They must be major, of sound mind and must not be disqualified by any law in force.

Apart from the above the person who intends to transfer must have the title to the property or the authority to transfer it.

Such property must be in existence at the time of transfer, irrespective whether the transfer creates a right immediately or in future.

**Rule against Inalienability. S. 10. :** Absolute restraint

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

S. 10 states that when a property is transferred subject to a condition absolutely restraining the transferee (or any claimant through him) from parting with or disposing of his interest in the property, the condition or limitation is void. This applies to sale, gift, exchange etc. The rule is based on Justice, equity and good conscience, and includes other transfers not covered by the Transfer of Property Act e.g. will, partition, settlement etc.

**Section 13 Transfer for benefit of unborn person:**

This section is an exception to the general rule regarding transfer between two living persons. In this section a transfer can be made in favour of an unborn person. Such a benefit to an unborn person is valid subject to certain rules under the section. The transfer made for the benefit of the unborn person shall be valid if the following rules are complied with

- 1) No direct transfer
- 2) Making a prior interest
- 3) Making an absolute transfer of interest

**1) No direct transfer:**

Under this section transfers to an unborn person cannot be made directly. As such a direct transfer suspends the ownership in the property till the unborn person comes into existence. This is contrary to the fact that 'the property cannot be without an owner' at any given point of time.

**2) Making a prior interest**

A transfer to an unborn person can be made in an indirect manner. It means that a prior interest in favour of a living person must be created; it is called as a life interest. Such living person shall hold the property till the unborn person comes into existence. There is no limit to the number of

successive life interest created in favour of living persons. However the unborn person must come into existence before the death of the living person holding the life interest.

### **3) Making a absolute transfer of interest**

The transfer made in favour of an unborn person must be absolute. A life interest cannot be made in favour of a unborn person. Such limited interest is void e.g - A property is transferred to 'A' for life, then to his first son 'B' for life & then absolutely to the unborn son of 'B'. This is a valid transfer.

A property is transferred to 'A' for life, then to his first son (unborn) for life & then to 'A's second son X absolutely. This transfer is invalid as there is a life interest created in favour of the first unborn son. The subsequent transfer also fails due to the failure of the prior transfer.

### **Section 14- Rule against perpetuity**

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

Property may be tied up or made inalienable in two ways

- a) By imposing a condition by absolutely restraining the transferee from disposing his interest in the property.
- b) By creating a succession of partial future interest in favor of unborn persons so  
as to postpone the time when the property will vest in person absolutely.

The transfer of property is void if it creates an interest which is to take effect after the life time of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created, is to belong. The leading case is *Cadell v. Palmer* A trust was created for a term of 120 years, if 28 named persons or any of them should so long live and from the determination of that term for a further period of 21 years, and after the end of both terms, for the benefit of persons to be

then ascertained. The House of Lords held that the transfer was valid in respect of the persons in being and 21 years thereafter.

### **Indian Law**

a) It is life or lives in existence number of lives in existence on the date of transfer plus the plus 21 years thereafter period of minority.

b) The period is the minority of gross without reference to the person to whom if he attains the infancy of any person. Full age the interest created is to belong.

c) the period of gestation cannot be added at the end of the perpetuity period

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

### **Exception to rule against Perpetuity**

The rule against perpetuity does not apply to transfer of property for the benefit of the public or for the advancement of religion or knowledge. \

### **Direction for accumulation**

Under section 17 of the T.P act a direction of accumulation for income is one of the ways of restraining the enjoyment of property. Such accumulation is void according to Section 11. However the present section is an exception to the rule under Section 11. It allows accumulation of income by the following ways.

a) The life of the transferor: the accumulation of the income can be made till the life of transferor. If the life of the transferor exceeds 18 years, from the date of transfer then the accumulation is allowed, till such date but if the transferor dies before completion of 18 years, then the accumulation for such period shall be valid.

b) a period of 18 years from the date of transfer [ whichever is longer]

**Exceptions:**

1. Payment of debt: A direction for accumulation for the purpose of payment of the debt of either of the transferor or the transferee is valid.

For e.g. X makes a gift of a house to Z. The income arising from the house is 2000/ per month. X gives a direction that the rent should be applied in the payment of debts of X, amounting to 50,00/-. The direction is valid.

2. Accumulation of raising portions: It is a direction for accumulation of income for the purpose of providing portions for children or remoter issues of the transferor or any other person taking any interest under the transfer.

Case law: Edward v. Tuck.

3. Accumulation for the preservation of property: Where the direction is for the purpose of the preservation or maintenance of the property transferred.

**Vested and Contingent Interest:**

Vested interest is defined under section 19 of the Transfer of Property Act. Interest becomes vested when the property is totally of the transferee and it can be validly transferred by him even before he had obtained possession. If the transferee dies, then his interest devolves on the legal heirs.

An interest created on transfer of property in favor of a person is said to be vested where

i) No time is specified for it to take effect.

ii) It is expressed to take effect forthwith.

iii) It is to take effect on the happening of an event which must happen.

E.g. X makes a gift of 5 lakh rupees to Y, to be paid to 'Y' on the death of 'Z'. Here the interest of 'Y' is vested as the event i.e. death of 'Z' is certain to happen.

If 'Y' dies before 'Z' then the right to claim the gift transfers to the legal representatives of 'Y'.

But if 'Z' dies in the life time of 'Y', then 'Y' is entitled to the gift of 5 lakhs as his interest is vested.

## **Contingent Interest**

Section 21 of the T.P Act defines Contingent interest. An interest is said to be contingent when it is expressed to take effect;

- 1) On the happening of a specified uncertain event
- 2) If a specified uncertain event shall not happen

The contingent interest is an interest which is merely conditional i.e Dependent upon something which is uncertain .there is no present fixed right.

For e.g: An estate is transferred to 'P', if he shall pay Rs.6000 to 'Q'. P's interest is contingent until he has paid Rs. 6000 to 'Q'.

A house is transferred to 'X' until he shall marry and after that event to 'Y'. 'Y' interest is contingent until the condition is fulfilled by 'X' ( i.e the act of marriage ).

## **Void Transfers**

A property can be transferred subject to a condition such transfers are valid. Such conditions may be precedent or subsequent. Section 25 of the T.P Act explains such conditional transfers,

Which is precedent in nature? Precedent condition means that it has to be performed for the transfer to take effect or the property to be vested.

a) Condition must not be impossible to perform: the condition precedent must not be impossible to perform, if so the transfer shall become void for impossibility of performance.

For e.g 'R' transfers his house to 'U' provided he touches the sky with his little finger. The condition is void as it is impossible to perform.

b) The condition precedent must not be forbidden by law: if the nature of the condition is something which the law does not permit then such condition is void.

c) The condition precedent is of such that if permitted, it would defeat the provisions of any law.

d) The condition precedent should not be fraudulent.

e) The condition precedent should not involve or imply injury to the person or property of another.

f) Condition precedent should be immoral or opposed to public policy.

### **Extent of fulfillment of condition precedent: Section 26**

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

#### **Illustrations**

- (i) A transfer Rs.1'0,000/- to B on a condition that B should marry with the consent of C, D & E. E dies. Subsequently B marries with the consent of C and D. Under the doctrine of cypress (substantial compliance) the property comes to B.
- (ii) If in the above case C, D & E are all living and B marries without their consent, but subsequently gets ratified by C, D and E, the condition is not fulfilled.

### **Fulfillment of Condition Subsequent: S.29**

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

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

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

### **Doctrine of Acceleration: Section 27**

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

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

1) In *Lull v. Jones*, A made an inquest to B for life and then to his children. The gift failed as B was one of the attester's. Held, according to acceleration, the gift to B failed but, took effect in favour of the children.

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

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

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

## **Unit- II**

### **Doctrine of Election**

Section 35 of the Transfer of Property Act, 1882 incorporates the Doctrine of election alongside Section 180-190 of the Indian Succession Act 1925.

Election simply means choosing between two alternative rights or inconsistent rights. Under any instrument if two rights are conferred on a person in such a manner that one right is in lieu of the other, he is bound to elect (choose) only one of them. One cannot take under and against the same instrument.

### **Principle Underlying the Doctrine of Election**

*Allegans contraria non est audiendus*: he is not to be heard who alleges things contradictory to each other.

In *Cooper v. Cooper* Lord Hather explained the principle underlying the doctrine of election in the following words,

“...there is an obligation on him who takes benefit under a will or other instrument to give full effect to the instrument under which he takes benefit ; and if it is found out that instrument purports to deal with something which it was beyond the power of the donor to dispose of , but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect .”

### **Applicability**

#### **Hindu Law**

The doctrine was directly applied in the case of *Mangaldas v. Runchhoddas*.

#### **Mahomedan Law**

The doctrine was applied by the Privy Council in the case of *Sadik Hussain v. Hashim Ali*.

#### **English Law**

In this respect the English law is different because there the donee electing against the instrument does not incur a forfeiture of the benefit conferred on him by it, but is merely bound to make compensation out of it to the person disappointed by his election.

**Section 35** of Transfer of Property Act, 1882 reads:

Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless, where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him. The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own. A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect. A person who in his own capacity takes a benefit under the transaction may in another dissent there from.

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

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

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

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

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

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

### **Analysis of the Section**

#### **Essential Conditions**

*Mst. Dhanpati v. Devi Prasad and others:* Before there can be election there must be:

1. transfer of a property by a person who has no right to transfer;
2. as part of the same transaction, he must confer some benefit on the owner of the property; and
3. such owner must elect either to confirm the transfer or to dissent from it.

#### **Effect of election against the transfer**

Where the owner dissents from the transfer of his property –

1. He must relinquish the benefit;
2. The benefit intended for him would then revert to the transferor.

Exception

**General Rule:** If a person elects against the instrument, he will forfeit the whole of the benefit received under it.

**Exception:** If a person elects against the instrument, he will not forfeit the whole benefit but only the benefit attached in lieu of the property. (Election limited to part of benefit)

**Mode of election**

- a. Implied – by conduct
- b. Express – election when made in express words, it is final and conclusive.

**NOTE:** If a person acts through ignorance or mistake, the doctrine gives way.

**Two years' enjoyment**

The presumption may be rebutted. A widow who enjoyed a provision made for her under a will in ignorance of her right of dower was held entitled to elect after a lapse of 16 years.

**Knowledge**

The section permits an interference of knowledge which may be rebutted by circumstances.

**Time limit for election**

Upon the expiration of one year from the transfer, if an election has not taken place, the transferor may compel him to make his election.

If he fails to comply with this requisition within a reasonable time, he shall be deemed to have elected to confirm the transaction.

**Suspension of election**

Where the donee suffers from some disability by reason of insanity, lunacy and so forth, the election shall be postponed until the disability ceases or until the election is made by some competent authority, e.g. a guardian of a minor.

**Illustrations**

1. Illustration A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.
2. Aman is the owner of the property worth Rs.10 lakh, Bhanu is the transferor who has no rights over the property, Chandan is the

transferee. Bhanu offers to Aman that if he willing to sell his property to Chandan, he will give him Rs. 15 lakh. Now Aman (real owner) can either accept the offer or receive the benefit thereof, or to reject the whole offer.

3. A property worth Rs.7 lakh belongs to Ishaan. Anirudh by an instrument of gift professes to transfer it to Ria, giving by the same instrument Rs. 10 lakh to Ishaan. Ishaan elects to retain the farm. He forfeits the gift of Rs. 10 Lakhs.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority. When question of election arises a case of election arises only when the transferee takes a benefit directly under a transaction. When the transferee derives any benefit indirectly, no question of election arises, as he, in that case, cannot be said to take under the deed; *Valliammai v. Nagappa*, AIR 1967 SC 1153.

### **Transfer by Ostensible Owner**

#### **Section 41**

Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it:

PROVIDED that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

Ostensible owner is not the real owner but one who can represent himself as the real owner to the third parties for such dealings. He has acquired that right by the willful neglect or acquiescence by the real owner of the property thereby conferring on him the status of ostensible owner. For instance, when the property is in wife's name however the husband taking care of it and entering into transactions on her behalf is the ostensible owner and has the authority to dispose it off.

The phenomenon of appointing an ostensible owner is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted would have led to discovery of it.

The provision for its application lays down certain requirements to avail the benefit of this section. They are:

- The primary condition is that the person who is transferring the property should be ostensible owner ( as explained above)
- There should be either implied or express consent from the owner of the property.
- The transfer should be for some consideration in return.
- Reasonable care has to be taken by the transferee regarding the authority of the transferor to effectuate the transaction and also of the fact that he has acted in good faith.
- The doctrine of transfer by ostensible owner is based on the doctrine of estoppel that when real owner of property makes some one apparent to be the owner to third parties and they act upon it, he cannot go back his representation.
- These rules and the section are available only to immovable property and not on the movables.

**For determining whether a person is ostensible owner or not some practical tests could be done-**

*Firstly*, the documents concerned with the property have to be checked whether they contain the name of transferor as owner or not.

*Secondly*, whether the person having his name in the documents of the property in question has any intention to purchase the same or not.

*Thirdly*, it is the most important test for determining whether a person is ostensible owner is that who is in the possession of the property and who is enjoying it. If the person who is the owner as per the records and the documents of the property in the matter at hand the chances of being it a property of an ostensible owner or he being an ostensible owner is quite less.

However if the person whose name is there in the property documents is not similar then it enhances the chances of it being a property of ostensible owner who is full filing the wishes of the real owner.

However enjoying the property here does not only mean the mere enjoyment of the property being in the possession of the property but includes the selling rights, right to lease out the said property and get the consideration from the same, to enjoy the benefits out of the said property etc. Enjoyment has been given a broader aspect in this aspect and particular case.

*Fourthly*, the reason behind it being given the aspect of ostensible ownership, *i.e.* the reason why the real owner has not purchased same in his own name.

#### **Authority of ostensible owner and not the title is necessary**

Looking at examples of such transactions, a *Benami* transaction is one where one buys property in the name of another or in the disguise of a beneficiary transfer, without indicating an intention to benefit the other. The *benamidar* though has a property in his name, has no beneficial interest existing in the same. He represents in fact the real owner and as far as their relative legal position is concerned, he is a mere trustee for him. Benami transaction results in creation of a trust. The general rule and principle of the Indian law as to resulting trusts differs a little from the general rule of English law upon the same subject. In India, a *benamidar* is an ostensible owner and if a person purchases from a *benamidar*, the real owner cannot recover unless he shows that the purchaser had actual or constructive notice of the real title. But from this it does not follow that the benamidar has real title to the property, he is merely an ostensible owner thereof.

**Consent of owner and authority of ostensible owner is material:**

Actions of owner also establish whether he has authorized an individual as ostensible owner or not. Consent of owner over this authority is the prerequisite of this provision to apply.

If an owner with his free consent gives apparent authority to some - one to enter into transactions on his behalf, then that apparent authority is deemed to be real authority. In the case *Ananthula Sudhakar v.P.Bucha Reddy*, the defendant Damodar Rao negotiated with plaintiffs, for sale of the two sites, on behalf of his sister Rukmanibai, representing that his sister was the owner thereof. He attested the sale deeds in the favor of plaintiffs as witness and by making his sister as vendor executant. Those acts of Damodar Rao supported the claim of Rukmanibai that there was an oral gift. However even there has not been an oral gift in favor of Rukmanibai and Damodar Rao still remains the owner; the aforesaid acts of Damodar Rao showed that he has given implied consent for her representation as ostensible owner of the suit property and to transfer the same to plaintiffs for consideration.

This attracted the provision of Section 41 of Transfer of Property Act, 1882 and therefore the transfers in favor of plaintiffs was not voidable at the instance of Damodar Rao or his successor alleging that Rukmanibai was not the owner of the property. For being an ostensible owner, not the title but the authority arising from either express or implied consent of owner is needed.

In the landmark case *Shafiquallah v. Samiulah*, after the death of owner, the property was in possession of his illegitimate sons who were legally ineligible to hold the property. The real heir filled a suit claiming his rights of inheritance. However the possessors retained the possession and sold it to a third party, claiming them to be ostensible owners. However present legal position cannot attract Section 41 as the possession was not neither with express nor implied consent of the legitimate owner. Additionally consent must not be understood to be including an intention to deceive the transferee on the part of the real owner nor is the need to prove it.

**Transfer does not include an involuntary transfer:**

This section only applies to voluntary transfers not to involuntary or legally mandated transfers like ones by the order of the court such as an auction sale.

**Transfer includes a partial transfer:**

For the provision to apply there is no necessary sale or exchange to take place. It just denotes to a transfer of interest which could be mortgage, lease etc. and hence an ostensible mortgagee could be held as an ostensible mortgagee.

**The transfer has to be against some consideration**

The transaction entered by ostensible owner has to be for consideration. There has to be an element of quid pro quo. This section does not contemplate gratuitous transfers.

**Extent of rights of transferee**

Also the rights of the transferees making a purchase from ostensible owner depend upon the extent to which the ostensible owner has rights in the said property.

In the case *State of Punjab v. Surjit Kaur*, owner's widow had an authority over his estate as an ostensible owner, however it being limited only to life interest. Hence the rights of the transferee purchasing the property from her would be co-extensive with her and hence will cease to exist with her life time.

**Duties of Transferee during transaction:**

Section 41 along with mentioning nature of authority of an ostensible owner also lays emphasis on intention of transferee and the duty of care he has to oblige to during the transaction. It provides that a transfer by an ostensible owner cannot be avoided on the ground that the transferor was not authorized therefore, subject to the condition that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer and to act in good faith before a benefit thereof is claimed by him.

**Burden of proof:**

The burden of proof is on the transferee to prove that the person making the transfer was in fact the ostensible owner and had the requisite authority for such transactions. He should at least prove that it is a *Benami* transaction. Also he must prove that he took reasonable care to protect his interest. And hence also must make relevant inquiries.

**The Transfer is not voidable at the option of owner:**

When a transfer is made by ostensible owner this section provides that the transfer shall not be voidable on the ground that the transferor was not authorized to make it ; provided the transferee has taken due care and must have acted in good faith. The principle applies when the whole transaction is not voidable.

**Transfer by co-owners**

When a property is owned by more than one person, such owners are called as co-owners. When one or more parties have ownership rights in a property, they are termed as co-owners. Co-owners possess all the rights of ownership in a property in proportion to their share. The co-owners have the right to use, right to dispose and right to possess the property. When a partition of a property takes place, the owners resulting from such partition are termed as co-owners. The term co-ownership includes joint tenancy, tenancy in common and tenancy by the entirety.

**Types of co-owners****Joint Tenancy-**

Joint tenancy is a type of co-ownership where there are two or more owners of a property having an equal share in the property. On the death of one of the joint owners his or her interest automatically passes on to the remaining joint tenants who are alive as on that day.

**Tenancy in common-**

When two or more people jointly own a property but their share in the property is not defined, such individuals are said to be tenants in common.

All the co-owners will have equal ownership rights in the property. However, on death of one of the owners, his share will pass to his legal heir

or any individual as stated in his will and such an individual will then be the tenant in common with the surviving co-owners.

### **Tenancy by entirety-**

This kind of co-ownership is exclusively for husband and wife. The owners of the property should be married for co-owning a property in entirety. A spouse cannot transfer his or her interest to a third party. He or she can transfer the interest only in favour of the other spouse. This kind of co-ownership will be put to an end if either party dies or on divorce or by mutual agreement between the two.

### **Transfer by Co-owners under Transfer of Property Act 1882**

Section 44 of the Act lays down that if one co-owner of the immovable property transfers his share in the property, the transferee of such share acquires the rights of the transferor. That implies the transferee will be clothed with all the rights of the transferor. Such rights include the right to joint possession and the right to partition to the extent enjoyed by the transferor.

The right of transfer will apply to all transferees including mortgagee, lessee etc. However in case of a dwelling house belonging to an undivided family transferred by the transferee who is not a member of the family in that case he is not entitled to joint possession or other common or part enjoyment of the house.

In the case of *Durga v. Debidas*, the family members were separated and living in different places. They stayed in that house for specific purposes. The Court held that using a property for a short period and for a specific purpose will not make it a dwelling house. Dwelling house is one where there is ancestral dwelling in existence and the family members should have not abandoned the house.

### **Principle involved**

This section is based on the principle of subrogation and substitution where the transferee will be bestowed with all the rights of the transferor on the transfer of the immovable property. For example A, B and C mortgage their field to X. C subsequently transfers his share in the field to D. Under this circumstance, D will have the right to joint possession with A and B and

also the right to claim partition however the share acquired by D will still be subject to the mortgage.

### **Transfer by co-owners of share in the common property**

Section 47 states that when several co-owners of immovable property transfer a share in the immovable property without specifying the exact share or shares of the transferors, the transfer among such transferors take effect on such shares equally when the shares are equal. However, if the share in the property is unequal the transfer will take effect proportionately to the extent of the share.

### **Illustration**

A the owner of 80 units, B and C the owner of 40 units each in a property, transfer 20 units of share to D, without specifying from which of their shares the transfer is made. To that effect the transfer of a share shall be in proportion to their holding that is 10 units from the share of A and half a unit from the share of B and C each.

In the case of **Baldev Singh v. Darshani Dev**, the Court held that the co-owner should be in actual physical possession of the immovable property to transfer a valid legal title of that property. If the co-owner is not in actual possession of the land then the transferee will be entitled to a share in the property or get a decree for joint possession or he can claim compensation from the co-owner.

### **When is a co-owner legally competent to make a transfer?**

Section 7 of the Transfer of Property Act, 1882 provides that every person competent to contract i.e. a major and of sound mind or is not disqualified by law for contracting. Therefore even the interest of a co-owner or co-sharer can be sold, mortgaged, leased to another co-sharer or to a stranger. The fact that the partition has not taken place by metes and bounds does not stand in the way of the interest of a co-owner.

According to the law prevailing in some areas, a coparcener of a Hindu Joint Family can alienate his share in the Joint Family Property for consideration. Such a coparcener is a legally competent person. But in some cases of Mitakshara coparcenaries, the consent of other coparceners is required before any such transfer.

## **Principle of Apportionment**

**Section 36 & 37** of the Transfer of Property Act lay down the rules regarding the principle of apportionment.

**Section 36** states- "In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and transferee, to accrue due from day to day and apportionable accordingly but to be payable on the days appointed for the payment thereof".

Although this principle does not usually apply to transactions of transfer of property which take place through 'operation of law' but there are exceptions in cases where the rule has been applied on grounds of equity.

The expression 'apportionment' means division of a common fund between several claimants. It is classified into two types- 'Apportionment by time' and 'Apportionment by estate'

### **Apportionment by time-**

When a property yields income which is periodical in nature, the question of apportionment of this periodical income between the transferor and transferee is bound to arise. The general rule of transfer of interest along with the property between the transferor and the transferee as laid down by section 8 of the Act is inapplicable in cases of apportionment of the periodical income. The section clearly lays down that all periodical income shall be accrued and apportioned on a day to day basis.

**Liability of the tenant**– Unlike Section 8, Section 6 is applicable in terms of a transaction between the transferor and the transferee and does not hold the tenant liable as the section makes the principle of apportionment applicable only between the transferor and the transferee.

**Concept of Transfer**– The basic concept of Transfer of Property Act, 1882 says that when a property is lent to several owners, any one of the several

cannot ask for his specific share of rent or for eviction on the ground that he being the co-owner has the right to ask for rent and evict in cases of non-payment of the same.

Further, these sections like all others are read in light of section 8 under the transfer of property act. The act lays down that all interest including the rents and profits are to be transferred from the transferor to the transferee. In cases where the income accrues from day to day basis, the transferee would then from the date of transfer receive the income on a daily basis. Where however the income does not accrue on a daily basis and is in the form of periodical payments, the amount shall be apportioned between the transferor and the transferee.

### **Apportionment by estate-**

**Section 37** deals with this kind of apportionment stating that “ When, in consequence of a transfer, property is being divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract, to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

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

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

In other words, when the whole of a property is transferred to more than one person, any benefit arising out of obligation to the property is

transferred to the several owners. Therefore in such a case, the obligation attached to the property must then be performed in favour of each of the several owners in proportion to their respective share in the property. The rule is applicable only after fulfillment of the below conditions:

1. The person who is obligated with the duty to fulfill the burden under this section must have notice of the same.
2. The obligation should be of a character which can be severed.
3. The severance of the obligation should not end up increasing the burden of the obligation.

Thus apportionment by estate simply means division and further transfer of a property in the hands of a few owners who are thereby liable to fulfill the obligations attached to the share of property.

The difference between this section and the previous one is that each section deals with one of the two kinds of apportionment. While sec. 36 deals with the apportionment of time, sec. 37 deals with that of the estate.

**Section 37** i.e. apportionment by estate contemplates a scenario where each share whether in terms of income or rent of the various owners is apportioned according to their particular share in the property. In cases of tenancy, the tenant is to be informed if he has to pay each owner separately but in cases where the apportionment isn't done or the tenant isn't informed, the tenant will be liable only singly.

This clearly explains that even if the estate is in the state of tenancy, it can still be apportioned.

### **Illustrations**

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

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

## **Doctrine of Priority /Priority of Rights**

### **Section 48**

The determination of the relative rights and priorities of successive assignees of the same or overlapping rights has been a serious problem for the Courts. When there are two or more competing equitable interests, the equitable maxim *qui prior est tempore potior est jure* (he who is earlier in time is stronger in law) applies. This means that the first in time prevails over the others. Section 48 of the Transfer of Property Act embodies this principle in legislation.

The Section is founded upon the important principle that no man can convey a title than what he has.

### **Basis of the Principle**

It is a principle of natural justice that if rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law. This rule, however, applies only to cases where the conflicting equities are otherwise equal.

Section 48 of the Transfer of Property Act 1882 is founded upon the important principle that no man can convey a title than what he has. If a person has already effected a transfer, he cannot derogate from his grant and deal with the property free from the rights created under the earlier transaction. Section 48 is an absolute in its terms and does not contain any protection or reservation in favour of a subsequent transferee who has no knowledge of the prior transfer.

Madras High Court in *Duraiswami Reddi v. Angappa Reddi* held that the prior transferee would be entitled to enforce his rights though his

document is registered later and even if the subsequent transferee entered into transactions bona fide without knowledge of the first transaction. It was held that this result was implicit and was a direct consequence of the combined operation of Section 47 of the Registration Act and Section 48 of the Transfer of Property Act. It is also observed that the right of priority of the first transferee would be postponed only if the later transferee establishes any informative circumstances like fraud, estoppels or gross negligence.

Reference may be made to the following observations at page. 426. "Such a plea, if allowed would lead to much fraud. If a later document registered earlier is to prevail over an earlier document registered later it would always be easy for the vendor and the later purchaser to enter into a transaction within the time given for registration of the earlier document and get the new deed registered immediately and thus defeat the purchaser under the earlier deed." This decision was followed in a later decision of the Madras High Court in *Ramaswami Pillai v. Ramaswami Naicker*, as well as in the Bench decision of the Andhra Pradesh High Court in *Jagannatha Rao v. Raghavarao*.

In *K.H. Nathan v. Maruthi Rao*, it was held by the Supreme Court that the mortgage-deed became effective and operative from the 5<sup>th</sup> July, 1947, when the mortgage was registered and would prevail over a transfer which took place between the date of the execution and registration of the earlier transaction.

If there are successive transfers of the same property, the later transfer is subject to the prior transfer.

### **Applicability of the Rule**

Where the competition is between a mortgagee by deposit of title-deeds and a subsequent purchaser, the principle embodied in Section 48 is applicable.

Section 48 of the Transfer of Property Act does not admit of any exception.

In *Sitaram v. Rajnarain*, Rachpal Singh, J., and Smith, J., have held that the question of priority between a mortgagee and a subsequent purchaser is governed by Section 48 and is not protected by the provisions of Sec.41 there is no proof of negligence not the part of the mortgagee.

The right of priority will have to be determined by the combined operation of Section 48 of the Transfer of Property Act and Sections 47 and 49 of the Registration Act. Any undue emphasis upon Section 49 of the Registration Act in isolation would render nugatory and useless the equally important provisions in Section 47 of the Registration Act and Section 48 of the Transfer of Property Act. Once the document is registered, Section 49 of the Registration Act has no relevance and the document takes effect from the date of its execution by reason of Section 47 of the Registration Act will necessarily have to be determined in accordance with the rule embodied in Section 48 of the Transfer of Property Act.

The charge which the Plaintiff has under the indemnity clause in the partition deed is not entitled to priority or even equality with the charge which Defendant 1 has for the money due to him for he is entitled to priority over the charge in Plaintiff's favour. Subsequent lease cannot operate to the prejudice of the old tenant.

### **Equality of Partition**

While effecting a partition of the property belonging to the joint family, it would not be possible to divide the properties by metes and bounds there being necessity of an allocation of properties of unequal volumes amongst the members of the joint family. Properties of larger value might go one member and properties of a smaller value of another and therefore there would have to be an adjustment of the values: by providing for the payment by the former of the latter by way of equalization of their shares. This position has been recognized in law and a provision for such payment is termed "a provision for owelty or equality of partition."

This provision for owelty is construed as a lien which the co-sharer who is awarded owelty is deemed to acquire on an excessive allotment of property to the other co-sharer.

It follows that when an owelty is awarded to a member on partition for equalization of the shares on an excessive allotment of immovable properties to another member of the joint family; such a provision of owelty ordinarily creates a lien or a charge on the land taken under the partition. A lien or a charge may be created in express terms by the provisions of the provisions of the partition decree itself. There would thus be the creation of a legal charge in favour of a member to whom such owelty is awarded. If, however, no such charge is created in express terms, even so the lien may even so the lien may exist because it is implied by the very terms of the partition in the absence of an express provision in that behalf. The member to whom excessive allotment of property has been made on such partition cannot claim to acquire properties falling to his share irrespective of or discharged from the obligation to pay owelty to the other members.

The principle of the section cannot apply where the two interests do not conflict. Thus in a case where the property is mortgaged to one and subsequently sold to another, this section will not apply, for the purchaser has obtained only the equity of redemption. So there is no conflict between a completed sale and contract for sale, as the latter confers no right on the property.

An unregistered sale-deed, where registration is compulsory, would confer also no rights upon the vendee, and he cannot, therefore, claim as against the registered transferee. But it is otherwise if the latter had notice of the former.

If A mortgages or sells to B and afterwards C purchases at a Court-sale the then existing right, title, and interest of A, C buys in the first case the equity of redemption and in the second nothing at all. In such a case registration cannot help, for on the very face of his certificate of sale, the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.

In *Chouth Mal v. Hira Lal*, an agreement to sell land in favour of one defendant was executed on 17th January, 1932. The sale-deed was executed in defendant's favour on 5th May, 1932. But in the meanwhile owners executed a Usufructory mortgage of the same land in the plaintiff's favour

on 20th February, 1932. It was held that the mortgage must have its due effect as against the subsequent sale.

Once it is accepted that the parties really intended to convey the suit properties and possession of the said properties was in fact delivered to the conveyed in pursuance of the said conveyance, the mere omission of the plot numbers in the sale-deed is not of any consequence.

According to Section 48 to the Transfer of Property Act, if the same property has been transferred at different times the subsequent transfer shall not confer any right, title or interest on the basis of the subsequent transfer vis-à-vis the first transfer.

### **Exceptions to the Rule**

#### **(1) Salvage Charges**

An exception to the rule *qui prior est tempore* is to be found in the salvage charges created on account of advances made to save the encumbered property from loss or destruction. Such advances are payable in priority to all other charges of earlier date, and amongst themselves have precedence in the inverse order of their respective dates. On the same principle, where the court authorizes the Receiver to borrow money on a mortgage directing that it should constitute a first charge on the property, it will take priority over any other mortgage though of an earlier date. But in order to confer such priority the loan must have been raised for the purpose of preserving the property. If in such a case the Court even improperly confers priority, of which the mortgagees affected thereby have notice, the order may hold well against them unless it is set aside.

#### **(2) Estoppel**

The rule also yields to the equitable principle of estoppel. This, in a case where the first mortgagee was a witness to the second mortgagee, though there was no actual proof of his knowing the contents thereof, yet, since the presumption is that he might have known the same, he was postponed to the second encumbrance. So also, where the registered purchaser was present when possession was made over to the unregistered purchaser, the former was on that account postponed to the latter. A party

paying off a prior mortgage is not stopped but has a right to use that mortgage as a shield against a subsequent mortgage if his intention was to keep the prior mortgage alive. No subsequent mortgage is bound in law to give notice of his encumbrance to the prior encumbrances. In any case nothing short of estoppels would postpone him to the subsequent transferee. The rule is same in England, and no rule of Hindu law requires such a notice. Mere absence of activity on the part of equitable encumbrances cannot postpone his encumbrance.

### **(3) By the Registration**

An instrument operates from the date of its execution, and it is immaterial that it is compulsorily registrable, for in that case too, it will operate from the same date. Where two or more deeds are executed on the same day and the order of their execution cannot be ascertained, all the deeds will take effect at once, and *pari passu*. Such a case is analogous to that of a devise to A, and then devise of the same estate to B in a subsequent part of the will, which will give the estate to A and B either jointly or as tenants in common.

Where two deeds bearing different dates are registered on different days, priority as between them is ascertained with reference to the dates of the deeds and not with reference to the date on which they were respectively registered; and this priority is not influenced by the fact that the party having the later deed is in possession of the property. Where after execution, but before registration, the deed is lost and another had to be executed in its place, the vendor having between the two dates re-sold the property by a registered deed to another with notice of the prior sale, it has been held that the first purchaser was entitled to a decree on his sale-deed.

### **(4) By notice**

Section 78 enunciates the cases in which the rule of this section would be departed from. Thus, it has been held that Section 50 of the Registration Act, 1877, did not avoid to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed not being compulsorily registrable, if in fact, the holder of the registered deed had, at the time of its execution, notice of the earlier

unregistered deed. So where a bona fide contract, whether oral or written, is made for the sale of property, and a third party, afterwards buys the property with notice of the prior contract, the title of party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under this purchase.

If a person who is about to take a mortgage which must be made by registered deed, finds some person other than the intending mortgager in possession, the fact of such possession is sufficient to put the would be mortgagee on enquiry as to the title of such person, and if such person's title is that of a prior mortgagee under a document not compulsorily registrable, the second mortgagee cannot, by getting his mortgage registered, obtain priority over the first mortgagee.

Possession in certain cases is notice of the title of the person in possession and a party intending to deal with the property is bound to inquire into the nature of the possession. If he assumes that the occupant is a tenant and it appears that he had since purchased the land, the subsequent transferee would be affected with notice of the purchase.

#### **(5) By decree or order**

A decree or order passed in respect of a property does not by itself acquire any priority over registered deeds. A decree or order obtained upon an unregistered prior deed against the mortgagor alone, subsequently to a registered transfer of the mortgaged property, does not obtain preference in competition with the latter.

#### **Rent bona fide paid to holder under defective title**

##### **Section 50**

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

### ***Illustration***

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

### **Improvements made by bona fide title holders under defective titles**

The transfer of Property Act, 1882 collaborates all the possible transactions between a transferor and a transferee. Similarly, Section 51 of the Transfer of Property Act, lays down, when the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted the reform, he is entitled to such crops and to free ingress and egress to gather and carry them”.

Thus, the transferee who if unaware of the rights, in good faith makes any kinds of improvements ought to be compensated with. For instance X is the owner of an immovable property. He rents it to Y who continues to pay him rent unaware that X has now mortgaged his house to Z and upon the mortgage, Z being the mortgagee is now entitled to the rent. Y will not be charged again. Therefore, a tenant paying rent in advance in good faith to a person who is no longer entitled to receive will not be chargeable with the rent again, whereas any advance paid as a loan amount will not be protected like the loan amount.

### **Essential Requisites**

- The subject of transaction between the transferor and the transferee must be immovable property.
- The transfer of property must be in absolute favour of the transferee.
- The transferee in good faith must consider him competent enough to make the improvements.
- The transferee has sown plants, crops or made any other additions to the land.
- The transferee is evicted by someone who holds a better title.
- The right of transferee to be compensated for the improvements by seeking the amount spent or the interest in the property.

### **Notice and Application**

- This section can be applied only in cases where the transferee is unaware of the defective title, and in good faith transfers to the person who is not competent to accept it. Otherwise the transaction turns out to be mala fide and will not be protected. *Das Bansilal Rathod v Sumberlal Surajmal Gandhi* [(1973) 75 Bom LR 678]. Hence, notice of any fact to the transferee or the tenant will make him liable to pay the rent again, the notice being actual or constructive.
- In case of any improvements made by the transferee on defective title, the transferee is given two options by law, he can either secure the amount spent by him on the property to make the required improvements or can alternatively acquire that particular interest in the property from the original owner at market value. Further, if the transferee has sown any kind of crops on the property from which he is being evicted, he has the right to carry them anytime.
- This section's application is based on the maxim 'he who seeks equity must do equity' which imposes a legal obligation on the evictor to not appropriate any benefits arising from the improvements on the property and compensate the person who in

good faith has made the improvements. The application further applies only in cases where the person who makes the improvements believes himself to own the title and be competent enough to make the changes.

- In *Harilal Ranchhod v Gordhan Keshav* [(1927) 29 BOMLR 1414], the property belonging to the minor was sold by his guardian to Ram without seeking the permission of the court. Ram paid the consideration and in good faith renovated the house, considering himself as the owner of the property. The minor, on attaining majority evicted Ram. The court favoured the minor but at the same time also instructed the minor to compensate Ram.
- This doctrine is applicable only in cases where there is a belief of absolute entitlement between the parties, and not merely an apprehension of the same. If the transferee with knowledge that the property does not belong to him or is pending litigation or with notice of a prior sale still continues to make improvements, he will not be compensated for the same.
- Further, this rule is applicable only in cases of transfer between the parties and not a court sale. In other words if a person purchases rights in a property through a court auction and is later evicted, law demands that he be compensated whether or not he was apprehensive of his absolute rights in the property.

### **Transferee**

A transferee is a person who believes him to be the owner of the subject (immovable property) of a lawful transaction and believes him to be competent to make the improvements on the property.

An allottee of a plot by the government who erroneously enters and improves another land, or a person who does improve the land himself but purchases the property from the improver, cannot avail either the benefits of improvement or the protection under this doctrine as he does not qualify as a transferee. Similarly, any person who is in unlawful possession of the property is a trespasser and not a transferee and cannot claim any protection under this section.

In *Ganga Din v Jagat* [AIR 1914 All 90] it was held that “No one can by merely trespassing upon the land of another and constructing costly buildings on it claim a right to retain its possession.” Whereas a grantee of a land in truthful possession of the land will also fall under the category of a transferee. As has been thoroughly explained above, a person who claims protection under this section must be a lawful transferee fulfilling all the essential requisites of this doctrine.

Further, a transfer will qualify under this doctrine only in cases of absolute transfers and not in transactions where an interest is transferred in favour of the transferee and not the entire property. In other words, a transferee can only claim protection under this section if he is a holder of all the rights in the subject of property and not merely an interest in the property.

### **Joint Hindu Family**

A Hindu Joint family recognizes itself as a legal entity along with Karta being the manager of the day to day affairs of the family. The Karta is authorized to alienate the property under specified circumstances only, as any other can be challenged by the coparceners. In *Lachmiprasad v Lachminarayan* [AIR 1928 All 41] it was held that “An alienee from the father and Manager/*Karta* of a joint Hindu family is entitled to the value of improvements made by him, if the transfer is avoided later by the son”. Similarly in cases where the legal guardian alienates the minor’s property and the minor later on demands eviction, the law protects the alienee and expects the minor to either compensate the alienee for the improvements or sell the property to him at an appropriate market value.

### **Improvements**

Improvements by defective title holders do not mean ordinary changes to an old property or other operational changes. Improvements mean changes that enhance the value of the property and add to its value as a marketable subject. Thus, improvements are not ascertained merely on the basis of the money spent by the person making the improvements to the property.

The value of the improvements made by the person has to be ascertained at the time of eviction, though the amount spent on the improvements is not decisive of the market value of the property at which it is to be sold.

### **Illustrations**

1. X is the legal guardian of Y, a minor. X alienated Y's property in favour of Z and Z considering himself the absolute owner made improvements to the property. Y on attaining majority demanded Z's eviction. Z can avail the protection under this doctrine and can demand either compensation from the real owner or an interest in the property.
2. A bought a house on a court auction and renovated the entire house, adding on to its market value. He was later given an eviction notice and denied compensation on the ground that he knew the possibilities. A in this situation cannot be denied compensation.
3. A land had been empty and barren since 10 years, X without any authorization built a colony over it. The government demanded eviction on the ground that X had trespassed. X cannot avail the benefit of this doctrine under such circumstances.
4. X rented his property to Y for a subsequent amount per month. He later on mortgaged it to Z, Y not knowing the same continued to pay the rent to X. X cannot be asked to pay the rent again to Z as he acted in good faith and is protected under this doctrine.

### **Doctrine of *Lis Pendens***

The law incorporated in **Section 52** of Transfer of Property Act, 1882 is based on the doctrine of *lis pendens*.

### **Meaning of Doctrine of *Lis Pendens***

1. '*Lis*' means 'litigation' and '*pendens*' meaning 'pending'.
2. So, *lis pendens* would mean 'pending litigation'.
3. The doctrine of *lis pendens* is expressed in the well-known maxim: *pendente lite nihil innovator*, which means 'during pendency of litigation, nothing new should be introduced'.

4. Under this doctrine, the principle is that during pendency of any suit regarding title of a property, any new interest in respect of that property should not be created.
5. Therefore, in essence, the doctrine of *lis pendent* prohibits the transfer of property pending litigation.
6. It is a very old doctrine and has been operating in the English Common Law.
7. Under this doctrine the judgments in the immovable properties were regarded as overriding any alienation made by the parties during pendency of litigation.

### **Basis**

1. The basis of *lis pendent* is 'necessary' rather than actual or constructive notice.
2. It may be said that this doctrine is based on notice because a pending suit is regarded as constructive notice of the fact of disputed title of the property under litigation.
3. Therefore, any person dealing with that property, pending litigation, must be bound by the decision of the Court.
4. But, the correct view is that *lis pendent* is founded on 'necessity'.
5. For administration of justice it is necessary that while any suit is still pending in a Court of law regarding title of a property, the litigants should not be allowed to take decision and transfer the disputed property.
6. *Lis pendent* is, therefore, based on 'necessity' and as a matter of public policy it prevents the parties from disposing of a disputed property in such manner as to interfere with Court's proceedings.

The basis of the doctrine is explained in *Bellamy v. Sabine* Turner, LJ: "It is, as I think, a doctrine common to the Courts both of law and Equity and rests as I apprehend, on the foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendent lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants

alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceedings.”

### **Principle**

1. Section 52 embodies the doctrine of *lis pendens* (pending litigation) as expressed in the maxim *Ut lite pendente nihil innovetur* which means nothing new should be introduced in pending litigation.
2. As a principle of equity, justice and good conscience, this rule applies even where the Act does not apply.

### **Applicability**

1. Section 52 of the Transfer of Property Act is an expression of the principle ‘pending litigation nothing new should be introduced’.

2. It provides that *lis pendens*; neither party to the litigation in which any right to immovable property is in question can alienate or otherwise deal with such property so as to affect his appointment.

3. Originally, the land in dispute was recorded in the name of petitioner’s husband and after his death his brother ‘G’ knowing it well that his brother’s wife was alive and being sole legal heir, without impleading her, filed a suit seeking declaration of *Khatedari* rights, and thereafter she has been litigating being sole legal heir of the recorded *Khatedar*. Despite the pendency of the suit and suit property is being prohibited” from being alienation or transfer during pendency of suit, yet the respondent brother went on transferring the land and thereafter subsequent purchasers went on transferring land. Such transfer would be hit by doctrine of *lis pendens*.

4. Section 52 would apply in a case where the sales are made by way of private negotiations and during the pendency of suit.

### **Ingredients**

Following are essential ingredients for the application of the doctrine of *lis pendens* as provided in Section 52:

1. There is a pendency of a suit or proceeding.
2. The suit or proceeding must be pending in a Court of competent jurisdiction.
3. A right to immovable property is directly and specifically involved in the suit.

4. The suit or proceeding must not be collusive.
5. The property in dispute must be transferred or otherwise dealt with by any party to suit.
6. The transfer must affect the rights of the other party to litigation.

#### **Effect of the doctrine**

1. A transfer or dealing by a party to a suit during the pendency of the suit/ proceeding is not *ispo facto* void.
2. It only cannot affect the rights of any other party to the suit under any decree or order that may be made in the suit or proceedings.
3. Section 52 create only a right to be enforced to avoid a transfer made pendent lite, because such transfers are not void but voidable and that too at the option of the affected party to the proceeding, pending which the transfer is effected.
4. Thus the effect of the rule of *lis pendent* is not to invalidate or avoid the transfer, but to make it subject to the result of the litigation.

#### **Lis pendent and Doctrine of Notice**

1. The rule contained in Section 52 of the Transfer of Property Act is, however, not based on the doctrine of notice, but on expediency.
2. The lis pendent rule does not annul the transfer but renders it subservient to the rights of the parties to the litigation.
3. According to this rule, therefore, whosoever purchases a property during the pendency of a suit is bound by the judgment that may be made against the person from whom he derived title, even though such a purchaser was not a party to the action or had no notice of the pending litigation.

#### **Illustrations**

1. A, B, C are brothers; C is residing in a distant town while A and B are residing together. A file a suit for partition and does not implead C or his father X Though X and C are not parties to the suit, yet the subject-matter of suit is the same, and neither X nor C can legally and validly transfer or alienate his share to a third party. In such cases the ultimate decree is likely to affect the shares of X and C too. Thus, there may be cases where a party

may not be locked in a civil suit or proceeding, yet such a party may be affected by the judgment/decreed in such a suit.

2. A sues B in respect of a house in B's possession. During the pendency of the suit B sells the house to C. A's suit is dismissed. The transfer to C holds good. Thus, here, the purchaser (C) is bound by the result of the litigation.

3. A sues B in respect of a house in B's possession. During the pendency of the suit B sells it to C. A's suit is decreed. The transfer to C is voidable and A's right to take the house is not affected.

### **Fraudulent Transfer**

The object of the fraudulent transfer is to protect the creditor and subsequent transferee. Fraudulent transfer is voidable at the option of creditor and transferee. S. 53 consist of two parts. The first part is in respect of transfer of immovable property made with intent to defeat or delay the creditors of the transferor and second part is in respect of transfer with intent to defraud a subsequent transferee.

### **Fraudulent Transfer S. 53**

Every transfer of immoveable property made with intent to defeat or delay creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed, and every transfer of immovable property made without consideration, with intend to defraud a subsequent transferee, is voidable at the option of such transferee.

Thus, Section .53 deals with two types of fraudulent transfers. As for the first rule is concerned, when the consideration for transfer and good faith on the part of transferee are present, the intention of the transferor to defeat or delay his creditor is immaterial. Thus, Section 53 has a limited scope restricted to immoveable property and not to movable property. Moreover the benefit of this section is not restricted to existing creditors alone, but it extends to subsequent creditors also. This section does not make the translation *void-ab-initio* but only voidable and that to only at the option of any person defeated delayed or defrauded.

Under the transfer of property Act a transfer of immovable property by a debtor may be set aside by his creditor:

- A) if the transferee is not a transferee in good faith for the transferor's creditor, and
- B) if the transferee is not a transferee in good faith for Consideration.

**Exception:**

A transferee from such debtor will be protected

A) if he acquires property for value in good faith without the knowledge of transferor's intention.

B) if he himself is a creditor and the transfer is made in satisfaction of his pre-existing debt.

If the creditor established that transfer was made with the object of defeating him, the shifts on the transferee to prove:-

- 1) that he had paid a fair price, and
- 2) that he was not a party to the fraud.

**Doctrine of Part Performance**

Doctrine of Part Performance is an equitable doctrine and it is incorporated to prevent fraud and from taking illegal advantage on account of non-registration of the document. This Doctrine is based on the maxim, Equity look at as it is done which ought to have been done.

Basically the doctrine says that the transferor or any person claiming under him shall be debarred from enforcing against the transferee and the person claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the term of the contract.

**Definition**

The doctrine of part performance is enshrined in the provisions of The Transfer of Property Act, 1882.

**Section 53-A** of the Act, deals with definition of the doctrine and it says:

When any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with

reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

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

### **Illustration**

A contract to transfer his immovable property to B by way of sale and put B in possession of the property before a regular Sale-Deed is executed. The contract is said to be partly performed and if later on A refuses to execute regular document of sale and files a suit for eviction against B treating B as trespasser. Then B can resist A's claim on the ground that the contract of transfer in his favour has partly been performed and that A should not be allowed to go back upon his own word.

### **Ingredients of Section 53-A**

Bombay High Court in *Kamalabai Laxman Pathak v. Onkar Parsharam Patil* has given emphasis on the ingredients of the Section 53-A which are as follows:

### **Contract for Transfer of immovable property:**

For the application of this section, the first condition is that there must be a contract and the contract must be transfer of immovable property for value.

**a) Written contract:**

The contract must be written. Section 53 "A is not applicable if the contract for transfer is oral. In *V.R. Sudhakara Rao v. T.V. Kameswari*, it was held that the benefit of section 53-A is not available to a person who is in possession of property based on oral agreement of sale. Writing alone is not sufficient. The contract must also be duly executed. That is to say, it should be signed by the transferor or by any other person on his behalf.

**b) Valid Contract**

It may be noted that Section 53-A is applicable only where contract for the transfer is valid in all respects. It must be an agreement enforceable by law under the Indian Contract Act, 1872.

**c) Immovable property**

This section is applicable only in case of transfer of immovable property. It does not apply to an agreement for the transfer of movable property even though supported with consideration. The defense of Part Performance is not available in respect of possession of movables (*Hameed v. Jayabharat Credit & Investment Co. Ltd and Ors.*)

**Transfer for consideration**

The written contract must be for the transfer of an immovable property for consideration. The written contract on the basis of which the property has been possessed, must clearly suggest the transfer of property. If the document is ambiguous or confusing, this section cannot be made applicable. It is one of the necessary ingredients of section 53-A that the terms of written contract must be ascertainable with reasonable certainty (*Hamida v. Humer and Ors.*)

### **Possession in furtherance of Contract**

The Transferee has taken possession or continues possession in part performance of the contract or, has done some act in furtherance of the contract (*A.M.A Sultan (deceased by LRs) and Ors. v. Seydu Zohra Beevi*).

### **Some Act in furtherance of the contract**

Taking possession is not only the method of part performance of contract. If the transferee is already in possession of the property then, after the contract of transfer, he has to do some further act in part performance of the contract (*Nathulal v. Phoolchand.*)

### **Transferee is willing to perform his part of contract**

Section 53-A is based on the principle of Equity. Equity says that one who seeks equity must do equity. Therefore, where a person claims protection of his possession over a land under section 53-A, his own conduct must be equitable and just. It is an essential condition for the applicability of this section that the transferee must be willing to perform his part of contract (*Sardar Govindrao Mahadik and Anr. vs. Devi Sahai and Ors Govind*)

### **Scope of Doctrine of Part Performance**

The Doctrine of Part Performance is applicable to only written and valid contract. It is not applicable to oral or void agreement. The contract must be in writing and signed by the transferor. The transferee has taken possession of the property as a part performance of a contract and transferee must be ready and willing to perform his part of promise. This section is applicable not only to the contract of sale but it is applicable to all such contracts of transfer for consideration. It has been held in (*Jacobs Private Limited vs. Thomas Jacob*) that the doctrine is intended to be used as a shield, not a sword.

### **Legal Effect of the Amending Act (48 of 2001) in Section 53-A**

In para fourth of Section 53-A of T.P. Act, the words the contract, though required to be registered, has not been registered has now been omitted. This may mean to suggest that non-registration of any contract to transfer for consideration is not any relevant factor (i.e. not necessary) for the application of part performance under this section; and, the defense of part performance is available also on the basis of an unregistered document.

But this is not the case. The same Amending Act (48 of 2001) has simultaneously amended section 17 and Section 49 of Registration Act. Therefore, the amendment in section 53-A should be read with amendments in section 17 and section 49 of Registration Act.

In nutshell, the amendments of section 17 and section 49 of Registration Act has now incorporated the law which fulfills the real purpose of amending Section 53-A of the T.P. Act. The object or the real purpose of these amendments (Amending Act 48 of 2001) is that there should not be any perpetual possession of an immovable evading the law of registration. Accordingly, section 53-A of the T.P. Act now insists upon proof of some acts having being done in furtherance of contract.

### **UNIT-III**

### **MORTGAGE**

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

The transfer is called mortgagor, the person to who advances the loan is called as the mortgagee. The property which the mortgagor gives as a security is called as the mortgage property.

#### **Essentials for mortgage: Section 58**

For a transfer to be called as a mortgage the following essentials must be fulfilled:

- 1) There must be a transfer of an interest.
- 2) There must be specific immovable property intended to be mortgaged.
- 3) There transfer must be made to secure the payment of a loan or to secure the performance of a contract.

#### **1) There must be a transfer of an interest:**

The transfer of interest means an accessory right which is intended merely to secure the due payment of the debt to in the property. it is not a transfer the ownership rights in the property. The ownership is still retained by the mortgagor. The mortgage creates a *right in rem*; this right is available in against all the subsequent transferees.

#### **2) There must be specific immovable property intended to be mortgaged:**

For a mortgage the property which is given a security must be distinctly specified. It must be easy to identify the property, so the description of the property must be by metes & bounds.

#### **3) There transfer must be made to secure the payment of a loan or to secure the performance of a contract:**

The consideration of a mortgage may be either money advance or to be advance by the loan a present debt or a future debt or a performance of an engagement giving rights to pecuniary liability .future debt means a loan

which may be incurred after the mortgage. The word 'engagement' means a contract. The word 'Pecuniary liability' means a legal duty to pay damages. For ex: 'A' is in urgent need of money to conduct marriage of his daughter. He approaches 'B' for some loan. 'B' agrees to give him the loan, provided a provides security for the loan. 'A' hands over the documents relating to his house to 'B' as a security. This is an example for a mortgage.

**Types of Mortgage:**

- 1) Simple Mortgage
- 2) Mortgage by conditional
- 3) Usufructory Mortgage
- 4) English Mortgage
- 5) Mortgage by deposit of title deeds;
- 6) Anomalous Mortgage.

**1) Simple Mortgage:**

**Personal undertaking:**

A personal undertaking to pay is an essential element of a simple mortgage. The covenant to pay may be express or implied from the terms of a particular transaction. The promise to pay is implicit in the borrowing transaction, as, for example, in the case of Usufructory mortgage.

**Right to have the mortgaged property sold:**

To constitute a simple mortgage it is that possession that the mortgage must be given the right to cause the property to be sold for the purpose of realizing the mortgage-debt. The words 'cause the property to be sold' indicate that the power of sale is not be exercised without intervention of the court.

**No delivery of possession:**

The outstanding feature of a simple mortgage is that possession is not delivered to the mortgage, but remains with the mortgager. Since the mortgagee is not to out into possession of the property, he has no rights to satisfy of mortgaged property by foreclosure.

It will be seen that the mortgage, has, on default of the mortgagor, a twofold course of action – one arising out of the breach of the covenant to repay & the other arising out of the mortgage. The mortgagee

may, therefore, sue him for the mortgage money or may proceed against the property or may combine both these remedies in one suit. If he sues on personal undertaking only, he obtains a money decree but if he sues on the mortgage, he obtains an order for the sale of the property. (Sec 68 infra ).

## **2) Mortgage by conditional sale:**

### **Essentials of a Mortgage by conditional sale:**

i) **The mortgagor must ostensibly sell the immovable property:** in this mortgage the owner of the property must ostensibly sell the property. The word ostensible means that it has an appearance of a sale but it is in reality not a sale. Therefore the owner needs not handover the property to the mortgagee. This ostensible sale by the mortgagor is accompanied by a condition that the sale shall become absolute, if the mortgagor defaults in the payment of the loan.

### ii) **There must be a condition that either:**

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

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

### iii) **The condition must be embodied in the document which effects or purports to effect the sale:**

The condition attached to this mortgage must be included in the instrument of the mortgage itself.

In *Chunchun jha v Ebadat Ali & another*, the SC held that explained how a document must be construed. The intension must be gathered from document itself provided the words are express & clear. The real question in such case is not what the parties intend, what the legal effect of the words used in the document.

In *Bhaskar Waman Joshi & others v Srinarayan Rambilas Agarwal & others*, the SC has explained the circumstance that the condition incorporated in the sale deed must undoubtedly be taken into account. But the importance attached to such a sale deed will vary according to the formality attached upon the transaction.

In *Umabai & another vs. Nilakanth Dhondiba Chavan by LRs. & another* the SC held that the true nature of transaction must be determined having regard of the intension of the parties as well as the circumstance attributing thereto as also the wordings used in the document in question.

### **3) Usufructory mortgage:**

The essentials of usufructuary mortgage are:

- i) possession of the property is delivered to the mortgagee.
- ii) the mortgagee is not get rents & profits in lieu of interest or principal or both;
- iii) no personal liability is incurred by the mortgagor; and
- iv) the mortgagee cannot foreclose or sue for sale.

#### **i) Possession of the property is delivered to the mortgagee:**

The highlight of this mortgage is the delivery of the possession of the property to be mortgaged by the mortgagor. In *Pratap Bahadur vs. Gajadhar*, the Allahabad HC upheld the above contention. In this case the mortgagor had agreed to handover the possession of the mortgage property at a later date. So it is not necessary that the possession of the mortgaged property must pass on the date of the mortgage itself.

#### **ii) The mortgagee is not get profits rents & in lieu of interest or principal or both;**

##### **a) In lieu of interest:**

In this case, the mortgagor recovers possession when he pays the principle.

##### **b) In lieu of principle or:**

In this case the mortgagor continues to pay interest & is entitled to recover possession when he rents & profits profit received by the mortgaged equal amount of the principle.

##### **c) In lieu of principle & interest:**

In this case the mortgagor is not to recover possession until the principal & interest are paid out of the rents & profits.

#### **iii) No personal liability is incurred by the mortgagor; and:**

In this mortgage, the mortgagor cannot be sued personally for the debt. The mortgagee is only entitled to remain in possession of the mortgaged property till the principal & interest are paid by the mortgagor according to the terms of the agreement.

**iv) The mortgagee cannot foreclose or sue for sale:**

In case of Usufructory mortgage, the mortgagee cannot sue for foreclosing the mortgage or for the sale of the mortgage of the property. he can retain the possession of the mortgage property so given at the time of the mortgage till he recovers the loan given.

**4) English mortgage:**

**The essentials of English mortgage are:**

- i) that the mortgagor should bind himself to repay the mortgage money on a certain day.
- ii) that the mortgaged property should be transferred absolutely to the mortgagee; and
- iii) that such absolute transfer should be made subject to a condition that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage money on the appointed day.

**i) That the mortgagor should bind himself to repay the mortgage money on a certain day:**

In English mortgage the mortgagor undertakes personally to repay the mortgage money on a certain date fixed by both parties.

**ii) That the mortgaged property should be transferred absolutely to the mortgagee; and:**

In this mortgage, the mortgagor shall transfer the absolute interest or ownership of mortgaged property in favour of the mortgagee. The question that arises is, whether by absolute transfer of ownership, the mortgagor loses all interest in the property? According to Indian courts the mortgagor has a right before & after the date of payment of loan. The mortgagor has an interest in the property during the subsistence of the mortgage because of the legal contractual rights to reconvey the property.

The mortgagor has an interest in the property even after the time to pay has elapsed due to the legal right of redemption given by sec 60 of T.P. act. The subsistence of the mortgage because of the contractual rights to reconvey the property.

**iii) That such absolute transfer should be made subject to a condition that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage money on the appointed day:**

In English mortgage the mortgagor transfers the property subject to a condition that it shall be retransferred to him on payment of the mortgage loan on the specified day.

#### **5) Mortgage by deposit of title deeds:**

Essentials of mortgage of title deeds are:

- i) a debt
- ii) deposit of the title deeds;
- iii) an intension that the deeds shall be security for the debt.

This type of mortgage is also called equitable mortgage. Here the mortgage loan is given by the mortgagee upon the deposit of title deeds of the property by the mortgagor.

#### **6) Anomalous mortgage:**

An anomalous mortgage includes:

- i) a simple mortgage usufructuary
- ii) a mortgage usufructuary by condition sale, which are described below.

Anomalous mortgage is mortgage which is a mixture of any of the above types of mortgage. A mortgage usufructuary by conditional sale, which are described below. A simple mortgage usufructuary is a combination of a simple mortgage & usufructuary mortgage. In this transaction the mortgagee is in possession & pays himself the debt out of the rents & profits & there is also personal undertaking as well as a right to cause a property to be sold on the expiry of the date fixed for payment.

**Mode of transfer in mortgage:**

- 1) Registered instrument
- 2) Delivery of possession
- 3) Deposit of title deeds

**Doctrine of Marshaling and Contribution.**

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

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

***Aldrich v Cooper:*** In this case:

The first creditor C had a right against the property of the debtor D. The second creditor, S, had certain rights against the property of the debtor. In these circumstances if the first creditor C is allowed to proceed against the property the rights of 2nd creditor S would be affected. The principle is that one creditor shall not disappoint another creditor. Hence, if one creditor has a security in respect of two properties of the mortgagor and another creditor has a security in one of the properties only, then the two properties shall be marshaled i.e., ranged so as to throw the burden as far as possible on the property not included in the second security.

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

**Contribution:** The converse of marshaling is contribution. This occurs when the mortgaged property belongs to two or more persons, having distinct and

separate rights of ownership. In such a case if there is a mortgage debt both or all should contribute ratably. The value as on date of mortgage shall be taken to calculate the contributions.

E.g. Property X is mortgaged to A for Rs.200/- and sold to C. Properties X & Y are mortgaged to B for Rs.400/- & sold to D. The value of X & Y is Rs.500/- each. The contributions of C & D are Rs.150/- and 250/- respectively

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

### **Subrogation Section 91**

Subrogation means 'Substitution'. This enables a person to pay off a creditor and get into his shoes and exercise the rights of the creditor. Any person redeeming a mortgaged property has the same rights (of redemption, foreclosure or sale), as the mortgagee may have against the mortgagor or any other mortgagee.

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

A mortgages his property to B. A makes second mortgage to C. A makes third mortgage to D. Here, D may redeem B in which case D becomes subrogated to B. He has the same rights as B has. Persons who may claim subrogation.

- i) Any person having interest in or charge on the mortgaged property.
- ii) Any surety.
- iii) Any creditor of mortgagor.

### **Exception: Subrogation does not apply to a mortgagor.**

Cases of legal subrogation are:

- a) A puisne mortgagee redeeming a prior mortgagee.
- b) A co-mortgagor redeeming the mortgagee.
- c) A mortgagor's surety redeeming the mortgagee.
- d) A purchaser of equity of redemption redeeming a mortgage. These people may claim the right of subrogation.

**Tacking: Means to shift one's position.**

The rule relating to prohibition of Tacking is in Section .93 of Transfer of Property Act

**The rule is:** No mortgagee paying off a prior mortgage-(with or without notice of any intermediate mortgage) shall acquire any priority in respect of his Original security.

E.g. three mortgages are made by B: First mortgage to X, second mortgage to Y, third mortgage to Z. Z may pay off X and get into the shoes of X. With this he gets priority over 'Y' in respect of mortgage X only and not in respect of his own mortgage Z. This shifting is the doctrine of tacking, but, such a shifting is prohibited by T.P.Act.

**Redeem up, foreclose down**

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

E.g. A mortgages his property to B C D

Here, D may redeem B or C by paying off the mortgage debt. But, B can foreclose 'A' [fulfilling the conditions]. B can foreclose C and D or both who are subsequent to him. This rule protects the interest of the mortgagees [creditors]

**Rights & liabilities of mortgage & mortgagor:****Once a mortgage always a mortgage**

The mortgagor is having a right to redeem the mortgage. It is called as equity of redemption. It is given under section 60 of the under T.P act after the principal money has become due; the mortgagor has a right on the payment on the mortgage money to get the property reconveyed by the mortgagee. Any condition against this right to redeem is called a 'clog on the equity of redemption'. The right of redemption of the mortgagor cannot be curtailed by a contract.

*Sher Khan v. Swami Dayal.*

Instances which would amount to clog on the right of redemption.

1) **Condition of sale in default**- the court will set aside any contract which deprives the mortgagor of his right to redeem. If the contract of mortgage mentions a specified date to redeem, such a condition would amount to clog.

2) **Long term for redemption**- If the contract of the mortgage mentions a long term for redemption, such term if found to be oppressive the court shall set aside the same as a clog & allow the mortgagor to redeem the mortgage. *Fateh Mohammad VS. Ram Dayal*

3) **Stipulation barring mortgagor's right of redemption after certain period**- If there is a stipulation which bars the mortgagor's right of redemption after certain period then the stipulation is treated as a clog on the right of redemption. *Muralilal v Deo Karan.*

4) **Condition postponing redemption in case of default**- where there is a condition in the mortgage deed which postpones the right to redeem beyond a certain period, then it would amount to clog on redemption. *Sher Khan V. Swami Dayal*

5) **Restraint on alienation**- A stipulation that the mortgagor shall not alienate the mortgaged property is a clog on the mortgage.

6) **Redemption restricted to the Mortgagor**: Any clause in the mortgage deed that restricts the right to redeem to the mortgagor only during his life time and such right does not pass to his legal heirs . Such a clause amounts to clog on redemption.

7. **Penalty in case of default: Any stipulation** that charges an enhanced rate of interest from the date of mortgage in case of default in payment is a clog on the redemption right of mortgagor. *Gulab chand v Saraswati devi.*

#### **Collateral benefit to the mortgage:**

An agreement which confers some collateral advantage upon the mortgagee may be valid or invalid depending upon the circumstances & terms in each case.

Case law- *The Biggs Case*

*The Noakes case*

*The Bradely's Case*

## **Rights and Liabilities of Mortgagee**

Section 67 gives the mortgagee a right of foreclosure or sale in default of redemption by the mortgagor. This right can be curtailed by an agreement of the parties. A simple mortgage, usufructuary mortgage cannot be foreclosed. In an English mortgage & mortgage by deposit of title deeds, the mortgagee can bring a suit for sale of the mortgaged property.

A) Rights of the mortgagee in possession:

i) The mortgagee may spend any necessary amount for

a) The preservation of the mortgaged property from destruction, forfeiture or sale.

b) for supporting mortgagors title.

c) to make his title good against the mortgagor (defending suits against mortgagor). ii) Where the mortgaged property is sold under Revenue sales or acquired by Govt., the mortgagee is entitled to claim his money the surplus of proceeds of such sale or acquisition.

d)for premium paid for insurance: the mortgagee has the right to add the premium amount paid to the mortgage debt.

B) Liabilities of the mortgagee [Section 76]:

i) Mortgagee should prudently manage the property.

ii) He must make endeavors to collect the rents & profits.

iii) He must pay all Govt. revenues & Public charges and all rents due. [This is subject to agreement]

iv) Necessary repairs to property are to be made from collection of rent etc.

v) He should not do anything to destroy or damage the property.

vi) He must maintain clear, full and accurate accounts.

vii) When the mortgagor tenders or deposits any money, the mortgagee should account for the same. The mortgagee becomes liable, for loss incurred by the mortgagor due to violation of these provisions.

**UNIT- IV**  
**SALE OF IMMOVABLE PROPERTY**

**Definition:** sale is transfer of ownership in specific immovable property for price paid or promised or part-paid and part promised.

**Section 54 Transfer of Property Act**, defines the sale. In sale there is absolute transfer of ownership in property.

The seller shall have no rights regarding the property after completion of sale.

The consideration for sale is called the price.

The transferor is called the seller or vendor & the person in who purchases the property is called as the buyer or vendee.

**The essential elements of sale are:**

- 1) The parties
- 2) The subject matter
- 3) The price of consideration
- 4) The transfer or conveyance

**1) Parties to sale:**

There are two parties to a transaction of sale. They are the seller & buyer. Seller must be competent to contract & have the right to transfer the property. The buyer must be a person who is not disqualified to be a transferee. Both the buyer & the seller must be major & of sound mind. However the transfer to a minor is valid.

**2) Subject matter of Sale:**

The subject matter of sale is immovable property which may be tangible (visible to the eyes) for ex land house or things attached to the land. The subject matter of sale can also be intangible property (invisible to the eyes) for ex right of ferry or right of fishery, right to mortgage debt; however the property to be transfer by sale must be in existence at the date of transfer. Such property must be qualified as per section 6 to be transferable.

**3) The Price or Consideration:**

In A Transfer of property by sale the consideration is called price which means money only.

The word price has the same meaning, which is the money consideration as defined under section 4 of the sale of the good act 1930. Payment of the price is not necessary a sine qua non for completion for sale. The price for the sale may be paid fully or partly at the time of sale. In case the buyer fails to pay the remaining amount due on the sale then it shall not repudiate the sale. The seller may have a remedy by filing a suit for specific performance. Such unpaid seller has a charge over the property of sale.

#### **4) Transfer or Conveyance:**

Conveyance means to transfer all rights regarding property by the seller in favour of the buyer. Such transfer can be by two means

- a) by a registered instrument if the value of the property is above 100.
- b) by a registered instrument or delivery of property if the value of property is less than 100.

In *Sibendrapada v Secretary of State*, the Calcutta High Court held that the sale can be affected only by registered instrument.

Registration under section 17 of Indian registration act, 1908 is compulsory for a sale to be valid. In case the sale deed is not registered then it cannot pass a legal title to the seller, inspite of the honest intention of the parties to the sale.

If the sale consideration is not paid by the buyer however the instrument of sale has been registered, the sale is still valid.

#### **Liabilities & Rights of the Seller:**

Section 55 of the T.P Act gives the rights & liabilities of the seller & buyer respectively.

#### **Liabilities of the seller before completion of the sale:**

The seller has having the following duties before the completion of the sale.

- a) To disclose material defects in the property or in the sellers title thereto [ Section 55(1) (a)]
- b) To produce title deeds [section 55 (1) (b)]
- c) To answer questions as to title [section 55 (1) (b)]
- d) To execute conveyance [section 55 (1) (d)]
- e) To take care of the property [section 55 (1) (e)] and

f) To pay outgoings [section 55 (1) (g)]

a) To disclose material defects in the property or in the seller's title thereto [Section 55(1) (a)]

The seller is under duty to disclose any material defect in the property. A prudent buyer may not be able to see the defects. The defect may be relating to the property or the seller's title to the property or restrictions attached to the land e.g. easementary right.

If the buyer discovers the material defect, before completion of sale, he may rescind the contract.

If the buyer discovers the material defect, after completion of sale, he may claim damages & sue for setting aside the sale.

b) Completion of sale, he may rescind the contract:

it is the seller's duty to produce the title deeds relating to the sale property for the inspection of the buyer. The buyer shall satisfy himself regarding the title to the sale property.

c) To answer questions as to title [section 55 (1) (b)]:

The seller is under an obligation to answer all questions posed by the buyer regarding the sale property. This right of inquiry may be waived by the buyer.

d) To execute conveyance [section 55 (1) (d)]

It is the duty of the seller to execute an instrument of transfer regarding the property in favour of the buyer. Such instrument of transfer of property by sale is called a sale deed. The seller shall execute the sale deed after he has received the price fixed by the buyer.

e) To take care of the property [section 55 (1) (e)] and

The seller is duty bound to take care of the property between the period, from contract & delivery of the property to the buyer. In this period he acts as a trustee of the property for the buyer.

f) To pay outgoings [section 55 (1) (g)]

The seller is bound to transfer the property free from any charges. Before delivery of the property to the buyer the seller must pay all the public charges & rent if any regarding the property.

### **Liabilities of seller after completion**

a) To give possession [section 55 (2) (f)]

The seller shall handover the possession of the property on the successful completion on the sale. But in case the remaining consideration of the sale is not paid by the buyer then, such unpaid seller shall withhold the transfer of possession. If the possession has passed to the buyer, then such unpaid seller shall sue for the price money.

b) To covenant for title impliedly [section 55(2)]

The sale deed or instrument of sale is conclusive proof that the seller is the owner of the property & he has the power to transfer the same. The covenant runs with the land. It is, therefore, enforceable by subsequent purchasers of the land.

Where there is a breach of warranty of title which affects the peaceful possession of the buyer, he shall file a suit for defending his title.

c) To deliver title deeds on receipt of price [section 55 (30)]

The seller is duty bound to pass on the title deeds relating to the property which is the subject matter of sale. He shall also surrender any documents which are in his possession relating to the property.

### **Rights of seller before completion of sale:**

The seller is the owner of the property sold by sale until ownership is passed to the buyer. The seller has the right to claim the rents & the profits regarding such property. Mere contract of sale does not create any interest of the buyer in the property.

### **Rights of the seller after completion:**

Section 55 (4) lays down a very important rule, namely, that if the sale is completed by conveyance but the price or any part of it is unpaid, the seller acquires a charge on the property for the unpaid price. This charge is called as seller's lien. If the seller has already delivered possession of the property to the buyer before the payment of the price, he is entitled to recover possession on the ground of non-payment of the price. His only remedy is to enforce his charge against the property. This statutory charge has been described as non-possessory for the reason that it arises when the vendor has parted with the possession of the property. This charge may be

excluded by express contract or waived by an express contract to the contrary or by an implied contract. The charge can be enforced under section 100 of the T.P. act by the sale of the property. It is duty of seller to discharge all encumbrances existing on the property on date of the sale. If a property is sold by the seller, subject to encumbrance then his liabilities is limited till the date of sale. After sale, the buyer is responsible to discharge the encumbrance.

**Buyer's liabilities before completion of sale:**

a) To disclose facts materially increasing the value of the property [section 55 (a)]

b) To pay the price [sec 55 (5) (b)].

**a) To disclose facts materially increasing the value of the property [section 55 (a)]**

Buyer is bound to disclose to seller any fact has to the nature or extent of sellers interest in the property. The buyer's duty arises only

i) If the buyer knows or has reason to believe that the seller does not know the nature and extent of his interest.

ii) If the fact materially increases the value of the property. In case, *Summers v. Griffith*, an old women of eighty eight, being in distress and without legal assistance, was induced to sell her property at one fourth of its face value under the impression that she could not make out a good title whereas the buyer knew that she could & concealed this fact from her. The court held that such concealment does not amount to suppressing a material fact which is one of the elements to constitute fraud. It is held that the buyer is under no duty to disclose a latent advantage of the property, of which the seller is unaware.

**b) To pay the price [sec 55 (5) (b)]**

Generally the duty to pay the price of the buyer and the duty execute the conveyance of the seller are to be performed concurrently. However there is an exception in favour of buyer who has bought property as free from encumbrances and finds that an encumbrance has not been paid off. He may retain out of the purchase money a sum sufficient to pay off the encumbrance. In case he has to pay a large amount that the price, he may

recover the difference by a separate suit against the seller. This has been reaffirmed in *Mehtab Singh v. Collector of Saharanpur*.

In case *K.S. Vidyanandan v. Vairavan*, the SC held that 'Even where time is not the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time should be determined by looking at all surrounding circumstances including the express terms of the contract & nature of the property.'

In constitution bench of SC in *Chnad Rani v. Kamal Rani*, held as under; In case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even it is not essence of the contract; the court may infer that is to be performed in a reasonable time if the conditions are:

- i) from the express terms of the contract,
- ii) from the nature of the property, and
- iii) from surrounding circumstances.

**Buyer's liabilities after completion:**

- a) To bear loss to the property,
- b) To pay the outings [sec 55 (1) (g)]

**a) To bear loss to the property:**

On completion of sale generally the ownership passes to the buyer. If any loss occurs to the property after such completion of the sale by way of accidental destruction or deterioration the loss is borne by the buyer.

**b) To pay the outings [sec 55 (1) (g)]**

After the sale it is the duty of buyer to pay such charges & taxes which accrue regarding the property as the seller's right to pay is limited up to the date of the sale.

**Rights of the Buyer Before & after completion of Sale:**

Buyer's rights before completion of sale:

**a) Buyers lien:**

The buyer has a charge on the amount paid by him in advance on account of the purchase money if the seller fails to complete the sale. The question on the buyer's lien on the property depends on whether the default is with the seller or the buyer himself. The buyer's lien entitles him to a

charge on the prepaid money & interest thereon. This charge is lost by the buyer if he has improperly declined to take delivery on the property.

If due to the default of the buyer the contract is called off then, the advance money paid to the seller is forfeited. But if the contract is called off due to the default by the seller, then the buyer is entitled to claim a refund of the advance given.

**Buyer’s rights after completion of sale:**

a) Improvements & profits:

After completion of the sale the buyer is entitled to make any improvements in the property. if after such improvements there is an increase in the value of the property, then the buyer has the right to enjoy the benefits that accrue. In the form of rents & profits.

**Difference between Sale & Contract for Sale:**

<b>Sale</b>	<b>Contract for Sale</b>
<ul style="list-style-type: none"> <li>➤ Sale is transfer of ownership in property for price paid.</li> <li>➤ The sale is absolute in nature</li> <li>➤ A sale is executed contract</li> <li>➤ In sale the transfer of ownership in property passes immediately.</li> <li>➤ A sale creates interest in the property in favour of the buyer.</li> <li>➤ In sale the buyer has right to file a suit for specific performance or damages for a breach by the seller.</li> <li>➤ In sale, the unpaid seller has a charge on the property</li> </ul>	<ul style="list-style-type: none"> <li>➤ Contract to sale is an agreement to sell a property at futures specifies date.</li> <li>➤ The contract for sale is conditional nature</li> <li>➤ The contract for sale is a executor</li> <li>➤ In contract of sale transfer of ownership does not pass immediately</li> <li>➤ The contract of the sale does not create any interest of the buyer in the property.</li> <li>➤ The buyer has only a right to damages for a breach by the seller.</li> <li>➤ In contract of sale the seller is entitled to damages.</li> </ul>

## **LEASE OF IMMOVABLE PROPERTY**

Section 105 of the Transfer of Property Act defines a lease. A lease of immovable property is defined as the transfer of the right to enjoy such property made for a certain time, in consideration of a price paid or promised. The consideration may be a fixed amount or a share of crops or serving of any other thing to be rendered periodically or otherwise. Lease may be oral or in writing.

If the lease is for one year or above then it must be in writing and must be registered. Leases for lesser period may be oral or in writing. Registration is optional. Delivery of possession is necessary, in both the circumstances.

### **Distinction between Lease and Licence:**

#### **Lease**

- a) A lease creates an interest in the property.
- b) Lessee gets exclusive possession of immovable property.
- c) A lease is assignable
- d) A lease is not revocable
- e) A lessee can bring an action for trespass.
- f) According to T.P. Act, lease is to be registered if it is for one year or above.

#### **Licence**

But a licence does not create any interest in the property.

- a) It is a permission to do an unlawful act on the immovable property i.e, would have been unlawful had there been no licence.
- b) A licensee does not get such a right.
- c) A licence is not transfer -able.
- d) A licence is revocable.
- e) A licence cannot sue in his own name.
- f) Registration is not necessary

### **Rights and Duties of the Lessor and Lessee**

The Transfer of Property Act under section 108 provides for the rights and liabilities of the lessor and lessee:

- i) The rights and liabilities of the lessor.

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

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

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

ii) Rights and liabilities of the lessee.

a) **Lessee's right to accretions** if there is any accretion to the benefit of the property. The lessee is entitled to such accretions. This is of course subject to the law relating to alluvion. Hence adjoining waste land brought under cultivation is not accretion.

b) **Voidable lease:** If the material part of the leased property is destroyed (partially or completely) by fire, tempest or floods or violence or by the enemy, the lease is voidable at the option of the lessee. Of course, the lessee should not be the cause for the destruction of the property. Ex.: A, was a lessee running a shop. But due to mob violence the building was set on fire. The owner claims the value of the building from A. Held: Owner not entitled. A may avoid the lease if he so prefers.

c) **Right to Sub-lease:**

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

d) **Right to fixtures:** Anything affixed to the land becomes part of the land. The lessee is entitled to such fixtures.

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

f) **Payment on behalf of lessor:**

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

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

h) **Duty to restore possession:**

The lessee is bound to restore the property to the lessor in good condition i.e., as the property was at the time of the lease (subject to the normal wear and tear).

However if the defect is caused by the lessee he should not use the property for a purpose different from a purpose agreed upon. He should not fell timber, pull down or damage buildings or commit any other destructive or injurious acts thereto.

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

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

Cases law: i) *Spenser's Case*. ii) *Katyayini devi v. Udaya Kumar*.

### **Termination of lease:**

#### **A lease is terminated**

a) by efflux of time: If the lease is for a fixed period e.g. for 2 years, the lease terminates on the expiry of 2 years.

b) On the happening of an event, e.g. the lease is for 20 years or ends on the death of the lessee whichever happens first. Here the lease terminates on the expiry of 20 years or on the death of the Lessee.

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

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

e) Implied Surrender: This happens when the lessor accepts a new lease, with different terms and conditions, during the continuance of the existing lease. Here, there is the implied surrender of the original lease.

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

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

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

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

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

g) Notice to quit: Notice to quit or to terminate the lease should be given by the lessor to the lessee. If after giving notice the lessor accepts rents, it amounts to waiver of notice to quit. A, the lessor gives B, the lessee to quit. The period of notice expires. A accepts rents from B. The notice is waived

### **Exchange:**

#### **Section 111**

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

Any such transfer can be made in the same manner as is done in respect of sale. A partition of H.U.F. is not an Exchange.

The parties to Exchange are subject to the same rights & liabilities of the Vendor and the Vendee. Any defect in the title of the property exchanged, is to be set right by that party whose property had the defective title.

For e.g. A transfer his house to B and B transfers his wet land and pays cash of Rs.5, 000/- to A as consideration. This is an Exchange. If B had given money only, then it is not an Exchange.

### **Actionable Claim:**

Actionable claims include claims recognized by the courts to grant relief either

a) as to unsecured debts or

b) as to beneficial interest in movable property not in possession (actual or constructive), whether present or future, conditional or contingent. This definition has solved many difficulties that had arisen earlier to 1900.

*Colonial Bank v. Whinney and Muchiram v. Ishan Chandar.*

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

E.g. (a) A is the debtor and B is the creditor. B transfers the debt to C. B then demand from A to pay; A pays without notice of the transfer. The payment is valid. C cannot sue A for the debt. The debt is an actionable claim and may be transferred by B to C. But, C as. Transferee has those rights and remedies as B. Hence, C cannot sue 'A' for the debt. b) A has a life insurance policy. He assigns it to a Bank B for securing a loan. A dies. B is entitled to receive the amount of the policy. B can sue without the consent of A's executors.

The following are actionable claims:

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

## **The Gift**

### **Meaning**

According to **Section 122** of Transfer of Property Act, 1882 'Gift' is defined as the transfer of certain existing moveable and 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.

Gift, as defined in this section, is gratuitous transfer of ownership in some existing property made voluntarily. The definition includes gift of both movable as well as immovable property. The transferor is called donor and the transferee is called donee.

There are certain essentials of a gift like a must transfer of ownership, the ownership must relate to a property in existence, the transfer must be without consideration, it must have been made voluntarily, the donor must be a competent person and lastly the transferee must accept the gift.

A gift is a transfer of property without any monetary consideration by one person in favour of another and accepted by him or by a person on his behalf. Transfer without consideration is called a gratuitous transfer.

A gratuitous transfer may take place between two living persons or, it may take place only after the death of the transferor. Gift may, therefore, be either *inter vivos* or, testamentary. Gift *inter vivos* is gratuitous transfer of ownership between two living persons and a transfer of property within the meaning of Section 5 of Transfer of Property Act, 1882. Gift testamentary is called a will which is transfer by operation of law and outside the scope of this Act. A gift made during apprehension of death is called a gift *mortis causa*. A gift, where both the parties are Muslims, governed by the provisions of *Quranic* Law and not by transfer of Property Act as it is inconsistent with the provisions of this act.

### **Essentials of a Gift**

The essentials of a valid gift are given below

#### **1. There must be transfer of ownership**

As in case of a sale, there must be a transfer of all the rights in the property by the donor to the donee. It may, however, be noted that

it is permissible to make conditional gifts. The only restriction is that the condition must not be repugnant to any of the provisions of Section 10 to 34 of the Transfer of Property Act, 1882.

## **2. The ownership must relate to a property in existence**

Gift must be made of existing movable or immovable property capable of being transferred. Future property cannot be transferred. The share obtained after partition of the joint family property can be gifted. Even a gift of property that obtained after a preliminary decree of partition is passed by the court is valid.

## **3. The transfer must be without consideration**

The word “consideration” refers to monetary consideration and does not include natural love and affection. If the consideration is a nominal amount of money or the property is grossly undervalued yet the transfer would not be a gift but a sale. In fact, the passing of money as a consideration, howsoever small it may be, would destroy the nature of transfer as a gift. Gifts in lieu of expectation of spiritual and moral benefit or a promise to look after the donor in her old age or through our life are transactions without any consideration. A transfer executed for consideration of a donee undertaking the liability of the donor is not gratuitous, and not a gift.

## **4. It must have been made voluntarily**

The offer to make the gift must be voluntary. A gift therefore should be executed with free consent of the donor. This consent should be untainted by force, fraud or undue influence. Mere relationship between the donor and donee is not a conclusive fact of the exercise of undue influence and it must be proved that the transaction is unconscionable.

## **5. The donor must be a competent person**

Donor is the person who makes the gift. In a transaction by way of gift the transferor is called a donor and he divests his ownership in the property so as to vest it in the transferee, the donee. The donor must be a *sui juris*. He must have therefore attained the age of majority, possess a sound mind and should not be otherwise disqualified. Section 7 of this Act provides that only such persons can effect a transfer of property who

is competent to contract. The result is, therefore, that a minor cannot make a gift of his properties. According to Halsbury's Laws of England, persons in fiduciary positions, e.g., trustees cannot make gifts of the property vested in them on behalf of others unless they are authorized to do so.

#### **6. The transferee must accept the gift**

The gift must be accepted by the donee himself. Acceptance can be validly given by a minor donee himself or by his mother or guardian or by an agent in case of a deity. If the guardian gives the acceptance on behalf of the minor the minor on attaining majority can either accept it or reject it. If a gift is made to two or more persons, one of whom is capable of taking and the other is not, it has been held that the former will take the whole of the property. (*Nandi Singh v Sita Ram*, (89) 16 Cal. 677.) Acceptance must be made during the lifetime of the donor and while he is capable of giving. According to Section 122 if the donee dies before the acceptance of gift the gift is void.

#### **Registration of Gift deed**

According to **Section 123**, a gift of immovable property must be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.

Where a gift in favour of someone is registered but it is not accepted by the donee, the gift is incomplete. Suppose, a document is executed by the donor making a gift of immovable property and the deeds are delivered to the donee, and the donee accepts the gift but the document is not registered? The Courts held the **gift as valid** in the eyes of law.

While registration is a necessary formality for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. The donee in such a case can ask the donor to complete the gift by registration. Thus, the most essential thing for the validity of a gift is its acceptance. If the gift is accepted but not registered it is a valid gift.

The Privy Council in *Kalyan Sundram v Kumarappa*, A.I.R. 1925 P.C. 42, decided that after acceptance of the deed of gift and before registration,

the donor cannot revoke the gift. The gift which is accepted by the donee, will take effect from the date of the execution of the document by the donor, even though it is registered at a later date.

### **Suspension or Revocation of Gift**

**Section 126** of Transfer of Property Act, 1882 deals with when gift may be suspended or revoked. According to it, 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 in which if it were a contract it might be rescinded. Such as aforesaid a gift cannot be revoked. Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Gift is transfer of ownership without consideration. Like other transfers, gift too can be made subject to certain conditions. Donor may make a gift subject to condition of it being suspended or revoked. But, such gifts would then be governed by those provisions of this Act which regulate conditional transfers. Accordingly, if a gift is made subject to condition of it being revoked in future the condition must be valid and enforceable under those provisions. **Section 126** lays down two modes of revocation of gift:

1. Revocation by mutual agreement of donor and donee.
2. Revocation by rescission as in the case of contracts.

### **Revocation by Mutual Agreement**

Donor and donee may agree that the gift shall be suspended or revoked upon happening of an event not dependent on the will of the donor. The condition revoking the gift must be express; it should not be merely in the form of a wish or desire. In other words, the condition on the non-fulfillment of which the donor may revoke the gift must be expressly laid down in the gift. A gift of certain properties was executed in lieu of the past and future services rendered by donee to donor. But failure of donee to render services to

donor or to maintain donor in future, was not specified to be a condition for revocation of the gift deed. The Himachal Pradesh High Court in *Mool Raj v. Jamma Devi*, AIR 1995 HP 117 held that since the condition for revocation of gift upon donee's failure to render services to the donor was not laid down in the deed, it was unconditional gift and, therefore, cannot be revoked by the donor.

However, even though a condition is not laid down in the gift deed itself, and has been provided under a mutual agreement separately but forms part of the transaction of gift, the condition would be valid and enforceable. *Thakur Raghunathjee Maharaj v Ramesh Chandra*, AIR 2001 SC 2340

The condition upon which a gift is to be revoked must not depend solely on the will of the donor. A gift revocable at the pleasure of donor is no gift at all. The condition or stipulation providing for revocation must have been mutually agreed upon at the time of the gift. If such agreement is made after completion of gift, since the gift has already become absolute, it cannot be revoked. However, it's not necessary that stipulation for revocation is given in the deed of gift itself. What is necessary is that stipulation and gift both are made at the same time. They might be in two separate documents but must form part of the same transaction. That is to say, the stipulation must relate to the same gift which is to be revoked.

The condition for revocation of gift is a condition subsequent. It must be valid under the provisions of law given for conditional transfers. The condition totally prohibiting the alienation of property is void under Section 10 of this Act. Therefore, if the gift is made revocable with such condition, the condition itself being void, the gift is not revoked. *Jagdeo Singh v. Nandan Mahto*, AIR 1982 Pat. 22.

It is also necessary that the condition upon which the gift is agreed to be revoked must be a condition subsequent the fulfillment of which is not dependent on the will or desire of donor. The condition subsequent must be in the nature of future event beyond the control of donor. For example, A makes a gift of his 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. Here the condition upon which the field given in gift is to be revoked is a condition depending on uncertain future event not depending on the will of A. Therefore, if B dies without descendants in A's life time, the gift is revoked and A may take back the field.

Where the stipulation provide for revocation of gift at the will or pleasure of donor the stipulation is void and gift is not revoked although such stipulation is merely agreed upon by donor and donee. Gift revocable at the will of donor is void. For example, A makes a gift of one lakh rupees to B reserving to himself with B's assent the right to take back at his (A's) pleasure Rs. 10,000/- out of this amount. The gift as to Rs. 90,000/- is valid but as regards Rs. 10,000/- the gift is void, i.e., it shall continue to belong to A. Law shall consider that no transfer of Rs. 10,000/- was made at all.

### **Revocation by Rescission as Contracts:**

Gift is a gratuitous transfer of ownership made voluntarily. If it could be proved that the gift was not made voluntarily, i.e., the consent of the donor was not free, the gift must be revoked. Gift is always preceded by an express or implied contract; offer by donor and acceptance by donee. If the preceding contract itself is rescinded or revoked there is no question of taking place of transfer (gift) made under it. Accordingly, under Section 126 a gift is revoked also on any of the grounds on which it might be rescinded has it been a contract. Section 19 of the Indian Contract Act provides that "Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained". Thus, where the gift is not made voluntarily because of any of the factors mentioned above, the gift may be revoked by the donor. It is to be noted that this section deals with revocation which means rescission or repudiation of gift; it does not deal with cases where the gift is void, e.g., for want of donor's title. So, where the donor's consent has been obtained by coercion, undue influence, fraud or misrepresentation the donor has option to repudiate or revoke the gift. If

he does not exercise this option, the gift is not revoked. Gift may be revoked on the above mentioned grounds only by the donor, he cannot assign this right to any other person. However, after donor's death, his legal heirs may sue for the revocation of gift on any one of these grounds.

The period of limitation for the revocation of gifts on the ground of fraud, coercion, misrepresentation or undue influence is three years from the date on which such facts are known to the plaintiff (donor). The right to revoke the gift on the above mentioned grounds is lost when the donor ratifies the gift either expressly or by his conduct.

### **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 goods as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

### **No Revocation on any other ground**

Except on the ground of (a) condition subsequent not depending on the pleasure of the donor and (b) on the grounds justifying of a contract, a gift cannot be revoked on any other ground. A gift deed was validly executed in favour of the donee. It was held that a simultaneous claim by the donor that the gift deed was revoked unilaterally by him and lodged for registration was not valid as there was no participation by the donee. *Sheel Arora v. Madan Mohan Bajaj*, AIR 2009 NOC 333 (Bom).

### **Subsequent conduct of donee after acceptance – Irrelevant**

A father executed a registered deed of gift in favour of his son. He had done it because of love and affection for the son and also to enable him to live a peaceful life. There was no proof of undue influence. The donee remained out of India for a long time. In the meantime the gift deed

remained with the donor and he also kept paying taxes. There was no mutation for that period in the revenue records. The Supreme Court held that these circumstances were not sufficient in themselves to show that the execution of the gift deed was not voluntary. The deed could not be rescinded on the premise that it was an onerous gift and that the donee had failed to fulfill the condition for the gift of contributing towards the marriage of the donee's sister the specified sum. Once a gift is complete, it cannot be rescinded for any reason whatsoever. The subsequent conduct of the donee is not a ground for rescission of a valid gift. *Asokan v. Lakshmikutty*, (2007) 13 SCC 210.

### **Transferee for Consideration without Notice**

The last paragraph of Section 126 of the Act protects the interest of a bonafide transferee for consideration without notice of donor's right of revocation.

For example, A makes a gift of his house to B with a condition that he shall revoke the gift if B's son does not take up the studies of law after graduation. B sells the house to C. C has no notice of any such condition. After graduation B's son does not join the law course. A cannot revoke the gift because C's interest shall be affected. If C has notice of such condition or that C was a gratuitous transferee, A could have revoked the gift.

### **Suspension or Revocation of Gift under Mohammedan Law**

A gift, where both the parties are Muslims, is governed by the provisions of Quranic Law, also known as the Mohammedan Law, and not by the transfer of Property Act as it is inconsistent with the provisions of this act. A Mohammedan, as opposed to others, can revoke a gift even after delivery of possession except in the following cases-

1. When the gift is made by a husband to his wife or by a wife to her husband;
2. when the donee is related to the donor within the prohibited degrees;
3. when the gift is Sadaka (i.e. made to a charity or for any religious purpose).
4. when the donee is dead;

5. when the thing given has passed out of the donee's possession by sale, gift or otherwise;
6. when the thing given is lost or destroyed;
7. when the thing given has increased in value, whatever be the cause of the increase;
8. when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding; and
9. when the donor has received something in exchange for the gift

Except in those cases, a gift may be revoked at the mere will of the donor, whether he has or has not reserved to himself the power to revoke it, but the revocation must be by a decree of court.

### **Types of Gifts**

The following are included under the category of void gifts, if –

#### **1. Lifetime Gifts:**

When the donor has intention to deliver any gift to the donee during lifetime period of the donor then that gift shall be considered as Lifetime Gifts. Lifetime Gifts are mainly given to the donee by the donor on the basis of some occasions like Birthday Party, Wedding Ceremony etc.

#### **2. Deathbed Gifts:**

Deathbed gifts are future gifts which shall be expected to deliver to the donee after the death of the donor on the basis of intention made by the donor. These gifts are also considered as donations made by donor to the donee. So, any deathbed gift shall not be effective until the death of the donor.

#### **Onerous Gift:**

Any gift which is made with a burden or obligation imposed on the donee by the donor on any immovable property is called onerous gift. This gift also called the exchange of debt of an object from the donor to the donee. This gift is generally illegal but if the donee has no obligation to carry the burden of the gifted object then that gift may become valid on the basis of Section 127 of Transfer of Property Act, 1882.

Example: Mr. Q wants to give his one of the building of Gulshan as a gift to Mr .E which has been mortgaged to N bank for Tk.2 Crore. If Mr. E wants to take burden of the mortgaged loan of that house by acceptance then this gift may be valid or otherwise it is illegal.

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

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

### **Effect of Onerous gift**

The donee is liable to the extent of the total gifted property in his hands.

1. **Onerous gift to disqualified person:** *If an onerous gift is made to a disqualified person, e.g., a minor, and that person accepts it, he is not bound by his acceptance but can make his choice upon attaining majority either to accept the gift burdened with an obligation or to return it. It may be noted that so far as the donor is concerned, the gift is complete against him and he can't claim back the property unless the donee chooses to return it after attaining majority. The gift is complete as soon as it has been accepted and won't be in abeyance until the donee attains the age of majority. Thus, the completeness of the gift is not affected if the donee after accepting gift, dies before attaining the age of majority.*

### **Universal Donee**

Sec. 128 is about universal donee. Here a gift of the entire property of the donor is made to a donee. The donee is liable for all the debts, dues and liabilities of the donor at the time of the gift. This liability extends to the

extent of the property in the hands of the donee. Such a person who takes the entire rights and liabilities is called a universal donee. Property means here movable and immovable. If A makes a gift of his immovable only and not movables to B, B is not a universal donee. The universal donee is liable only to the extent of the immovable and movable property comprised in the gift. The liability is with reference to the time of gift by the donor that is universal donee is not liable for debts & liabilities incurred by the donor after the universal gift is made.

### **Meaning of Universal Donee**

The universal Donee is one to whom the donors whole property is given and who consequently become liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of property comprised in the gift.

### **Section 128 of Transfer of Property 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.

### **Essential**

All the properties of Donor should have been transferred to the donee. In order that a person maybe Universal Donee, all the properties both movable and immovable of the donor must be given to him. Universal Donee is personally liable for all the debts and liabilities of the donor at the time of the gift to the extent of the property comprised therein. The object of section 123 is to protect the interest of the creditor, similar like section 53. For example fraudulent transfer.

In Universal Donee under section 128 all the properties of the donor should have been transferred to the donee. It has been held that even if the life interest in the part of the property is retained by the donor, the donee is Universal donee. However if only all the immovable properties are transferred the donor continue to hold movable, the donee cannot be called as universal Donee. But if only the doner retain a small insignificant part of the property, the donee will be treated as a universal Donee.

## **Indian Trust Act, 1882**

### **History of Trust:**

The modern trust is developed from the ancient one the term is derived from the Latin word *OPUS* which means "on his behalf". This was coined because of in the ancient period on person held large land holdings on behalf of other .This type of use became popular and came to be known as trust. Thus we may say that a Trust is Fiduciary relationship between as regards the person on whom it the property or power is entrusted for the benefit of another. It may be said to be a relationship with the where one of them is duty bound to exercise his rights and powers in good faith for the benefit of another.

The Indian trust act 1882 covers private trust created in favour of a single person or a class of persons

This act is not applicable to private of public religious or charitable endowment, *Waqf* under Mohammedan law the relation of member's Hindu undivided family as per their customs

Definition of Trust : It is an obligation annexed to the Property ownership of property arising out of the confidence reposed in an owner accepted by the owner or declared and accepted by him, for the benefit of another, or another and the owner.

The three things pointed out in the definition

1. the person who makes the trust
2. the person who accepts and
3. the person whose benefit the trust has been made

**1. Settlor/Maker of Trust:** the person who makes the trust is called the creator of the trust or the author of the trust. He is person who declares the trust. The author of the trust earmarks some property for the trust. This property is called trust property or in other words the subject Matter of trust. The property maybe immovable property or money.

2. **Trustee:** The person in whom the maker of the trust as repose confidence is called as Trustee of the trust. The settlor of the trust can name any person as the trustee in the trust deed. However the Trustee has to accept the trust. The trustee in the nominal owner of the property

3. **Beneficiary:** the person for whose benefit the trust is made is called as the beneficiary of the trust. The beneficiary is also called as the “*cestui que trust*”. He is beneficial owner of the property

The document by which the trust is made is called as the instrument of trust.

### **Some definition of the trust:**

Prof Keeton: A Trust is a Relationship which A person is called the trustee is compelled in equity to hold property whether real or personal and whether by legal or equitable title for the benefit of some persons of whom he may be one and who are termed beneficiary or for some object permitted by law in such a way the real the real benefit of a property not to the Trustee but to the beneficiaries and other objects of the trust

Definition by Story: Trust is an equitable right, title or interest in property real or personal distance from the legal ownership thereof ‘

Trust is different from other Type of relationship like agency mortgage contract bailment etc.

### **Trust and Agency:**

In Trust, there is some property called as the Trust Property and the Trustee is the owner of the property. The Trustee is personally liable for the contract entered on behalf of the Trust the Trustee is not under the control of the creator of the trust, it does not terminate on the death of the maker of the trust.

In contract of agency there is an implied or express contract to act for the other; the agent is not the owner of the property, the personal liability if the agent does not arise. Under the control of the principal and the contract shall cease to exist on the death of the either parties or at the will of the parties.

## **Trust and Mortgage**

In a mortgage the mortgagee is not owner of the property. The mortgagee has a legal interest in the property, whereas, the Trustee has beneficial interest in the property. The Trustee is the owner of the property. The Trustee has beneficial interest in.

## **Trust and Contract:**

a contract is an agreement made by the free consent of parties competent to contract lawful consideration and with lawful object. The obligation under contract is legal. It creates a right *in personam*. It can be enforced by the parties to the contract. There consideration in contract is complete by the act of both the parties Agreement do it.

Interest obligations of trustee are equitable, voluntary trust does not require consideration and is possible. A trust letter unilateral act, creates a right in rem. there exist a fiduciary relationship between Trustee and beneficiary.

## **Trust and Bailment**

Bailment is the delivery of a thing by a party called the bailor to a person called the bailee. After the thing has been used for the purpose, and then it is returned to the bailor. The bailee has a legal right over the goods as he has a special ownership in property. He cannot deal with the property as it will have a defective title. The duties of a bailee can be enforced by bailor.

Where as in trust the obligation attached to the property and arises out of a confidence reposed in the Trustee. The trustee is the owner of the property and can therefore pass on a better title to the other. The right of a trustee is equitable. The duties under a trust can be enforced by any person who is the beneficiary under the trust.

## **Trust and Ownership:**

The right of ownership to a property gives the owner the exclusive right to deal with the property in any way he wishes. However this right of enjoyment is restricted so as not to cause Any harm two other.

In trust on the other hand,the trustee is bound to use is rights in a certain way for the benefit of another or for the accomplishment of a certain purpose .

## **KINDS OF TRUST:**

I. Based on the purpose of trust, it is classified into private trust, public or charitable trust

a) **Private trust:** The beneficiary under this trust is either one person or a class of definite persons`

b) **Public Trust:** The beneficiary is the whole society at large or the members of an uncertain and changing body. E.g. trust for the advancement of education irrespective of caste or creed.

## **II. Classification according to mode of creation of trust:**

a) **Express Trust:** An express trust is created by the settlor of the trust by words or will or by a Deed of trust.

a) **Executed Trust:** A trust is executed when no further instrument is necessary and the trust

Is finally declared. This trust cannot be revoked

b) **Executory Trust:** Here there is a requirement of a further instrument or additional instrument to carry into effect the general instruction of the first instrument of trust .This Trust can be revoked.

c) **Constructive trust:** arise in case of persons under producing relationship that is Trustee and beneficiary Guardian and ward. it arises when the person becomes possessed of property through such can abuse of confidence reposed in himself as will induce the court to hold that in

conscience he is bound to hold it for the benefit of the person injured by the breach of trust .

E.g : Vendor's Lien for unpaid purchase money .

d) **Implied Trust:** Implied or presumed trust arises out of a presumed intention of the parties gathered from the intention. The circumstances are such that one can presume that the person intended to make a trust.

### III. **Classification based on the nature of the duties of the trustee;**

a) **A simple trust:** if the trustee has no active duties to perform under the trust and the trustee simply holds it for the beneficiary. Such a trust is called as a simple trust.

b) **A special Trust:** in which trust the Trustee has to exercise his free will or discretion in carrying out the trust.

### IV. **Classification based consideration for creation of the trust:**

a) **Trust for value:** A Trust for consideration or value is created when consideration moves from the beneficiary .the relation between the settlor of the trust and beneficiary is contractual for example a trust t created in favour of A if he marries Z.

b) **Voluntary trust:** voluntary trust is created when no consideration proceeds from the beneficiary.

V. **Completely and Incompletely constituted trust:** the trust which do not fall under the above 4 categories are classed as in this section .

a) **Illusory trust:** This is not a real trust as the form of the instrument only shows that some persons are apparently beneficiaries but the object of the settlor as we gather from the instrument shows an intention to create a trust.

b) **Trust of Imperfect Obligation:** Trust incapable of being enforced by the trustee and yet the court will give liberty to the trustees to carry out the trust if they want to do so.

c) **Trust in favour of creditors:** trust created by a letter for payment of creditors however becomes irrevocable; if it create the relationship of trustee and beneficiary .it is not necessary that the settlor of the trust or debtor should communicate the creation of the trust to the creditors.

d) Discretionary trust :It is a trust which does not afford to a beneficiary the right to any part of the income of the trust property but gives the trustees a discretionary power to pay him such part of the income as they think fit. The beneficiary only has a hope that the discretion shall be exercise in his favour.

### **CREATION OF TRUST**

Section 4 to Section10 of the Indian Trust Act, 1882

1. Creation of trust by an express way
2. Creation of trust arising by operation of law.
  - a) Implied trust.
  - b) Resulting trust.
  - c) Constructive trust
  - d) Trustee de son tort

(Points 3 to 5 are common to both types of trust under 1 &2)
3. Competency or Eligibility of Parties intending to create a trust.
  - a) creator of trust
    - i)Competency
    - b) Trustee.
      - i) Competency
      - c) Beneficiary
4. Essentials of trust according to s.6 of the Indian Trust Act.
  - a) Certainty of Intention.
  - b) Certainty of object of trust
  - c) The beneficiaries.
  - d) Certainty of the trust property
  - e) Transfer of such property
  - f) Lawful purpose
5. Trust of Immovable property /Movable property

1. **In Express trust**, the general intention to create a trust must be clear. There is no prescribed way of expression to make it a valid trust. The words used must convey the intention clearly in all certainty the intention of the maker or settlor of trust, if they fail, then no trust can be constituted. The property to be marked as trust property and the object of the trust must be certain, otherwise the trust would be void and the beneficial interest shall revert to the settlor respectively.

2. **In Trust created by operation of law**: The trust in this category are of 4 types

In certain circumstances, the court shall declare the existence of a trust, so it by created by the operation of the law.

a) **Implied Trust**: Where the words of the maker /settlor are not clear, the court shall presume that a trust was intended to be created, by the circumstances of the case, conduct of the parties, words in the instrument (Interpretation)

For e.g purchase A purchases land and conveys it to B instead. Looking at it we can say that B holds the land for A .Thus B is the trustee for A. (until there is a contrary reason to hold otherwise)

b) **Resulting trust** : A resulting trust is a trust implied in favour of the maker/settlor himself or his legal representatives . It is one of the species of implied trust The beneficial interest comes back to the settlor who had transferred it to the trustee. We can say that if there is a surplus of the trust money after the trust has been performed, there is a resulting trust of that surplus for the benefit of the settlor. In other where there is unexhausted residue of the trust money, it cannot be taken by the trustee as he cannot be the beneficiary but it is reconveyed to the settlor.

c) **Constructive trust** :

According to Snell ,”A constructive trust arises when the a person becomes possessed of property through such an abuse of confidence reposed in himself

so as to induce the court to hold that in conscience he is bound to hold it for the benefit of the person injured by the breach of confidence”

A constructive trust may arise in the following ways:

1) **Vendor’s lien:** Where there is sale of property, the purchaser or buyer has yet to pay part of the price money. The transaction passes the beneficial ownership in the property; however the buyer becomes a constructive trustee for the vendor as regards the unpaid price money.

2) **Person in fiduciary position gaining personal advantage:** Section 88 of the trust act provides that If the person in fiduciary relationship like a partner, trustee, agent, director of company who is bound to protect the interest of the other. If such a person makes personal gain in that capacity, then s.88 says that he holds the gain for the benefit of the other.

3) **Receipt of trust property by stranger:**

If a stranger acquires a trust property even for value having notice of the trust. He knows that this action shall lead to the breach of trust. Then in such case there is a constructive trust where such stranger becomes the constructive trustee.

4) **Other instances:** The instance where constructive trust is created is in case of a mortgagee exercising the power of sale etc.

d. **Trustee de son tort:** The stranger to a trust who assumes the character of a trustee by mistake or intentionally is liable for the breach of the trust. If he acquires the property of the trust in such capacity then he is accountable for his actions as regards the trust property .He is called as the Trustee de son tort

**3. Parties to a trust** Section 7 of Indian trust act, a trust may be created by every person competent to contract with the permission of the Principal Civil Court of original jurisdiction by or on behalf of a minor but subject in such case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust made dispose of the trust property

**a) Creator of the trust :**

The creator of the trust must possess the competency as mentioned in s.11 of Indian Contract Act. Thus he must be a major (i.e.18 years) and of sound mind, should not be disqualified by any law for the time being in force.

If in case of a minor whose guardian has been appointed by the court and in case of a minor whose property is under the superintendence of the Court of Wards shall be considered a major on the attainment of 21 years.

**1. Sound mind:** A person is said to be of sound mind if he is capable of understanding the nature of the transaction and the effect it has on his interests. He should be capable of forming a rational judgment.

**2. Trustee:** Any person can be appointed trustee, if he is capable of holding property but if the trust involves the exercise of discretion which he cannot execute unless he is competent to contract according to Section 10.

The above eligibility for the settlor also applies to the trustee. The capacity to hold property is co-extensive to be a trustee.

**3. Beneficiary:** Under Section 9 of Indian Trust Act, every person capable of holding property may be a beneficiary.

#### **4. Essentials of trust according to s.6 of the Indian Trust Act.**

a) **Certainty as to Intention:** The creator of the trust must express his intention to create the trust clearly. There is no special form of words to be used for creating the trust. The intention to create a trust may be construed from the expressions which the settlor has used. Such intention may be indicated by words or acts with reasonable certainty.

if the settlor of the trust does not communicate his intention who are the Trustee for the beneficiaries of the trust, it shall not effect the trust .

b) **Certainty as to the purpose or object of the trust:** it is the rule of law that in order to make a trust valid the object of the trust must be so identified that the court may be in a position to administer the trust .If the object of the trust is not ascertained then the trust is void.

c) **The Beneficiaries:** The person/s who is the beneficiaries under a trust must be indicated with reasonable certainty. Further, the interest they take must be certain.

d) **Certainty about trust property:** for a trust to be valid there must be reasonable certainty about the subject matter of the trust. There cannot be a trust if the property is not specifically identified in respect of which the trust.

In *Ram Ran Vijay Prasad Singh v. Province of Bihar*, it has been held in the given case that a mere wish or direction given to the executor who may be in the enjoyment of any property either as a legatee to preserve and maintain such institutions in the manner of the settlor had been doing does not amount to valid trust for the trust property is not indicated with reasonable certainty.

e) **Transfer of Property:** For a trust to be valid the trust property must be transferred to the trustee by the settlor of the trust. According to s.6 of the Indian Trust Act, 1882 the property must be transferred in favor of the trustee.

In *Ganesh Lal Sharma v. Snehalata Dassi*, the court held that the word "Arpan" used in the deed to give the property indicates fairly transfer in favor of the trustee as per S.6 of the Indian Trust Act, 1882.

f) **Lawful Purpose:** Section 4 of the Indian trust act that the trust must be created for a lawful purpose. The purpose of the trust is lawful unless it is forbidden by law or is of such nature that if permitted it would defeat the provisions of any law; the court regards it as immoral or opposed to public policy.

Where trust is created for two purposes of which one is lawful and the other unlawful and the both cannot be separated then the whole Trust is void. But if the unlawful part can be separated from the lawful part of the purpose, then the trust is valid as regards the lawful portion and the unlawful part is rejected.

5) **Trust of Immovable property & Movable Property:** Section 5 of the act Lays down that a valid trust of immovable property can be created only if it is declared by a non-testamentary instrument in writing, signed by the author of the trust or the Trustee and registered.

Trust may also be created by a testamentary document i.e. will. It shall be written and signed by the testator (Author of the trust), along with two attesting witnesses. A will need not be registered. This is according to s.63 of the Indian Succession Act, 1925.

A valid trust may be created by a will under Mohammedan law .It may be oral or written and may be or may not be signed by the testator and not attested.

Trust of movable property: A valid trust of movable property can be created either as in the case of immovable property or by transferring the ownership of the trust property to the trustee.

### **Appointment of Trustees**

Section 73 &74 of Indian Trust Act1882

#### **A Trust cannot fail for the want of a Trustee:**

According to Section 10 Indian trust act, a person may be appointed as a Trustee If is capable of holding property.

Thus the Trustee has an important responsibility of managing the property of the trust. The Trustee may be appointed by the settlor of the trust or the court. The Trustee must accept the position voluntary, once he has accepted; the Trustee cannot resign without the consent of all the beneficiaries or the court.

If the settler of the trust fails to appoint a trustee then , the trust shall not fail for the want of a trustee. Mere omission to appoint a trustee will not invalidate the trust. The Principle is that Equity never wants a trustee. In such cases it is upon the person holding the property to execute the trust.

In instances where the Trustee who is named under the trust refuses to perform the duties, it shall not affect the trust.

If the Trustee is unable through death to perform the trust or is unfit to act then in such cases the trust will not be affected but the property shall

revert to the settlor if alive or his legal representatives, who will hold the property upon trust till new trustees are appointed (S.73)

If a Trustee leaves India for the purpose of residing abroad or is absent from India for a continuous period of 6 months, a new Trustee may be appointed in his place. (S.73)

The trustee may be a corporation or a bank or a married or unmarried lady.

A minor can be appointed the trustee in case of a passive trust. However an insolvent cannot be appointed as a trustee.

The power to appoint a new trustee vests in

- i) the person nominated for that purpose by the deed of trust
- ii) the author of the trust if he is alive and competent to contract
- iii) all the surviving or continuing trustee or legal representative of the last surviving trustee
- iv) with the consent of the court if all the trustees are retiring simultaneously.

**Appointment of Trustees by court:**

Section 74 of the Indian trust act provides for the appointment of a new trustee by the court.

Whenever there is vacancy of the position of the trustee death or disqualification then the beneficiary make a petition with Principal Civil Code of original jurisdiction for the appointment of a trustee.

The court shall follow these principles while appointing the trustee

- 1 The wishes of the author of the trust as expressed in or inferred from the instrument of the trust.
2. The wishes of the person if any empowered to appoint new trustees.
3. The court shall have regard to the question whether the appointment will promote or impede the execution of the trust.
4. The court shall have regard to the interest of all beneficiaries where there are more than one. The above principle was laid down by Justice Turner.L in *Re Tempest*.

## **Duties and Liabilities of Trustees**

Section 11 to 22 of the Indian trust act 1882 gives the duties and liabilities of a trustee.

The duties of a trustees are

1. To execute the trust
2. To inform himself of state of Trust property
3. To protect title to trust property
4. Not to set up title adverse to beneficiary
5. To exercise reasonable care
6. To convert perishable property
7. To be impartial
8. To prevent waste
9. To keep accurate accounts
10. To invest trust funds

### **1. To execute the trust:**

It is the most important duty of a trustee. he is bound to fulfill the purpose of the trust and follow the directions given by the author of the trust and use his discretion if given ,in a fair manner.

Directions for the trust may be modified with the consent of all the beneficiaries. But if the beneficiary is a minor, his consent may be given by a principal Civil Court of original jurisdiction.

For e.g: A trustee is simply authorized to sell certain Land by public auction then he cannot sell the land by private contract. The trusting has to comply with the directions given in the deed of the trust, however he may use his discretion if the directions are impracticable illegal or injurious to the beneficiaries.

### **2. To inform himself of state of Trust property: Section .12**

It is the duty of the trustee to acquaint himself regarding the status of the trust property and to obtain a firsthand report of the trust property. He must assure himself that the trust property is in a proper state of investment. Himachal not invest the trust money insufficient or hazardous security

**3. To protect title to trust property:** the Trustee shall defend all suits against the trust property. He shall preserve the trust property and protect the title to the property.s.13

**4. Not to set up title adverse to beneficial:** this is a negative duty of the Trustee where he has to abstain from setting up any title which is adverse to the interest of the beneficiary as regards the trust property .s.14

**5.To exercise reasonable care:** the Trustee shall exercise the same care and caution which he has towards his property, in handling the trust property .Mast deal with trust property as carefully as a man of ordinary prudence wood deal with such property as if it were his own. However the Trustee is not liable for any loss, if he has acted in good faith and due caution.s.15

E.g.1. Ram,a trustee for Shyam in the execution of trust sells the trust property and fails to receive the remaining part of the purchase money from the buyer.Here Ram has to make good the loss so caused to the beneficiary Shyam.

2. Where Som and Shaan are the co-trustees to a trust of which Mahesh is the beneficiary. If Som allows the trust to be executed singly by Shaan, who misuses the property to make some personal gains. Then Som is personally liable to Mahesh, the beneficiary.

**6. To Convert perishable property:** If the property of the trust is of a wasting nature perishable or a reversionary interest then the trustee must convert the trust property into a permanent and profitable character. Provided the trust has been created for the benefit of several persons in succession.s.16. This principle was laid down in *Hinves v. Hinves*.

**7. To be impartial:** where the beneficiaries under the trust are more than one, the trustee shall not execute the trust for the advantage of any one of the beneficiary at the expense of the other.s.17

**8. To prevent waste:** If the trust property is in the hands of one among several beneficiaries , who threatens to or acts to commit waste of the

property, which may cause injury to the interest of other beneficiaries and then the trustee must prevent the waste of such property.s.18

**9. To keep accurate accounts:** a Trustee is duty bound to maintain the accounts of the trust property in a clear and proper manner at all times. He shall furnish the same to the beneficiary if a request is made.s.19

**10. To invest trust funds:** Where the property of trust is money .In the absence of any direction regarding the trust money, the trustee shall invest such money in the following securities; Government notes or stocks, Government Bonds and debentures, stocks of PSU or in any central or state government securities.

Section 21- The provisions of section 20 shall not apply to investments made prior to this act

Section22- where the trustee is directed to sell the trust property within a specified time and the trustee fails to do so and extends the time, he shall be accountable for furnishing reasons for his acts unless he has been authorized by the Principal Civil Judge of original jurisdiction.

### **Liabilities of a Trustee:**

The liabilities of trustee are dealt in s.23 to 30 of the Indian Trust Act.

1. Liability for Breach s.23
2. No set off allowed to trustee s.24
3. No Liability for the acts of his predecessor s.25
4. Liability for wrongful acts s.26
5. Several liability of co-trustees s.27
6. Non-liability of trustee paying without notice of transfer by beneficiary s.28
7. Liability where the beneficiary's interest is forfeited s.29
8. Indemnity of the trustees s.30

**1. Liability for Breach: Section 3** of the act says a breach of any duty imposed on a trustee is called a breach of trust and the Trustee is absolutely liable for such breach.

The trustee is liable to make good the loss to the beneficiary, caused due to the breach of trust.s.23

He is liable to pay interest in the following cases

- a. Where he has actually received interest
- b. where the trustee ought to have received interest but has not done so.
- c. Trustee commits unreasonable delay in paying money to the beneficiary.
- d. the Trustee fails to invest trust money and to accumulate interest or dividend thereof.
- e. the trustee employs the trust property or money in trade or business and fails to give accounts of interest earned from the business. s.23

2. **No set off allowed to trustee:** A trustee cannot set off a loss caused due to breach to a part of the trust property against profit earned by another part of the trust property, It is a breach committed by him for which he is personally liable so he should reimburse from his own funds and not otherwise.s.24

3. **Liability for wrongful act:** Trustee is liable for the act of the co-trustee .if the co-trustee does not apply the property properly or he receives trust property without making any enquiry as to his dealings with it or where co-trustee commits a breach of Trust. The trustee is liable for all such acts of co-trustee. S26

4. **Several liability of co -trustees:** where co-trustees jointly commit breach of trust or where one of them by his negligence enables the other to commit a breach of trust each of them is liable to the beneficiary for the whole of the loss so caused by the breach. as between the trustees themselves the principle of contribution is applicable if all the trustees are equally liable .s.27

5. **Liability of trustee where beneficiary's interest is forfeited** :where the trust property Is forfeited to the government due to a Court judgement , the Trustee is bound to hold that trust property to the extent of such interest for the benefit of such person as the government may direct .s,29

6. **No liability for the acts office predecessor:** where the Trustee success another then he shall not be liable for the acts of his predecessor. S.25

**7. Non-liability of trustee paying without notice of transfer by beneficiary:**

when the beneficiary's interest becomes vested in another person and the trustee having no notice of the vesting, delivers trust property to the beneficiary or such person entitled in the absence of the vesting then he is not liable for the property so paid or delivered.

**8. Indemnity of trustees:** the Trustee indemnified against any loss caused by any banker, broker, or such person in whose hands the trust property was placed. He shall not be liable for the involuntary losses s.30.

**Rights and Powers of Trustee.**

The Rights of the Trustee are contained in the section 31 to 45 of the Indian Trust Act, 1882.

They are

1. Right to Tittle deed
2. Right to reimbursement of expenses
3. Reimbursement of fees to counsel
4. Right to indemnity from gainer by breach of trust.
5. Right to apply to court for opinion in management of trust property.
6. Right to settlement of Accounts.

**1. Right to tittle deeds:**

A trustee is entitled to have in his position the instrument of trust and all the documents of tittle relating to the trust property.s.31

**2. Right to reimbursement of expenses:**

The Trustee is entitled to reimburse himself all the expenses incurred personally out of the trust property. The Trustee is entitled to be reimbursed for the expenses towards i) execution of the trust ii) the realization reservation or benefit of the trust property iii) the protection or support of the beneficiary.

If the trust help incurred expenses with the sanction of the Principal Civil Court of original jurisdiction, a charge is created on the trust property which has to be discharged first before disposition of

the property. If the trust property fails to reimburse the expenses incurred by the trustee, is entitled to recover from the beneficiary personally. Where the trustee has by mistake made an over payment to the beneficiary he may reimburse the trust property out of the beneficiary's interest or personally from the beneficiary. S.32

**3. Reimbursement of fees to counsel:**

The Trustee is entitled to claim the expenses paid as fees to advocate in a suit regarding the trust property, travelling expenses, expenses for management of the trust property.

**4. Right to indemnity from gainer by breach of trust :**

A person other than a Trustee who has gained an advantage from breach of trust must indemnify the Trustee to the extent of the amount actually received by such person under the breach and where he is a beneficiary the Trustee has a charge on his interest for such amount. This indemnity is lost if the Trustee is guilty of fraud.s.33

**5. Right to apply to court for opinion in management of trust**

**property:** A Trustee can seek the opinion of a court of original jurisdiction by filing a petition regarding a present question to managing the trust property. Such opinion of the court shall be in the form of guidance. In *Official Trustee, W.Bengal & others v. Sachindra Nath Chatterjee & other*, the court had held that the s.34 of the Indian Trust Act give a limited jurisdiction to the Court. Thus the court can give opinion relating to a present question of trust property and not on any matter arising out a trust -deed.

**6. Right to settlement of Accounts :**

When the duties of the trustee are completed, he is entitled to have the accounts of his administration of the trust property examined and settled and if there is nothing due to the beneficiary under the trust then an acknowledgement in writing to that effect shall be issued s.35.

## **Powers of Trustees**

The Trustee is divided into 2 classes' i.e General power of a trustee and Statutory power of a trustee.

### **General power of a Trustee:**

A Trustee may do all acts which are reasonable and proper for the realization protection or benefit of the trust property. You have the power to lease the trust property for a period not exceeding 21 years. However for a period exceeding 21 years he shall seek the permission of a principal Civil Court of original jurisdiction. The Trustee has the power to spend money for necessary repairs in improving the trust estate.s.36

### **Statutory power of a Trustee:**

#### **1. Power to sell :**

the Trustee is empowered to sell any trust property either together or in lots or by public auction or private contract at one time or at intervals unless the instrument of the trust otherwise directs s.37

- a. Power to sell under special conditions
- b. Power to buy-in and re-sell
- c. Direction to sell within the time specified s.38
- d. power to convey the trust property .s.39

#### **2. Power to vary investment :**

A trustee has the power to recall any investment of the trust property in securities and reinvest the same in any other securities which is secure and profitable .s.40

#### **3. Power to apply property of minors for their maintenance :**

Where the beneficiary is a minor the trustee shall use the funds for buying the necessities or maintenance of the minor and the advancement of the education or advancement of life or reasonable expenses of his religious worship, marriage or funeral. He shall apply the property and invest the income in

such securities for the benefit of the minor .Where the income of the trust property is insufficient for the expenses then the trustee shall with the permission of the Principal Court apply the corpus of the trust property .s.41

**4. Power to give receipt for trust property:**

The trustee has the power give receipt in writing for any money, securities or other movable property payable, transferable or deliverable to him in the exercise of any trust or power and in the absence of fraud .s.42

**5. Power to compound :**

Trustee acting together have the power

- a. to accept any composition or any security for any debt
- b. To allow time for the payment of any debt
- c. to compromise, compound or submit any claim to arbitration or settle any debt account or claim relating to the trust
- d.the trustee shall enter in such agreements or execute any instrument which he thinks to be beneficial .if the trustee has acted in good faith ,he is absolved from liability for any loss S.43

**6. Vesting of power :**

Where there are several trustees and the power to deal is given to all. If any one of such trustees dies, the power may be exercised by the remaining trustees unless the terms of the trust deed say otherwise .s.44

The powers of trustee are suspended, where a decree is obtained in a suit for the execution of the trust.s.45

Disabilities of a Trustee

The disabilities of the trustee are contained in section 45 to 54 of the Indian Trust Act, 1882.

**1. Trustee cannot renounce after acceptance :**

A trustee cannot renounce the trust after acceptance except

- a. With the permission of the court
- b. With the consent of the beneficiary ,if he is competent to contract
- c. With a special power given under the instrument of trust.

**2. A trustee cannot delegate :**

A trustee cannot delegate his duties either to a stranger or to a co-trustee. However if the instrument of the trust provides for such delegation in the regular course of business or where the delegation is necessary. The beneficiary is competent to contract gives his consent to the delegation. A trustee may employ workmen, values, auctioneers agents if there is necessity.

**3. A co-trustee cannot act singly :**

Where there are several trustees, then all shall join in the execution of the trust except if the instrument of the trust provides otherwise. The joint execution by all in general is necessary to bind the trust estate. They are one in the eyes of law.

In *Janakirama Iyer's case* the SC held that all the acts which the trustees intend to take for executing the trust must be taken by all of them acting together as given by s.48

4. **Trustees cannot act arbitrarily:** Where under a special trust, the trustee is having the discretionary power relating to the trust property. He has to exercise his powers in good faith and reasonably. The power of the trustee is not absolute. The court has a power to interfere if they exercise their power arbitrarily mischievously and in way to endanger the interest of the beneficiaries.s.49

**5. Trustee may not charge for services:**

The office of a trustee is a honorary one, unless there is a provision made for in the instrument of the trust . The trustee is not entitled to any charges for the services rendered in the execution of the trust. The trouble skill and loss of time in executing the trust.

The provisions of this section 50 do not apply to any official Trustee, Administrator -General, Public Curator or person holding a certificate of administration. The above mentioned persons are not in the purview of the act, as was declared in *Robinson v. Pett* .

This general rule was stated in Lord Herschell in *Bray v. Ford* as “It is an inflexible rule of a court of enquiry that a person in a fiduciary position is not unless otherwise, expressly provided, entitled to make a profit ,he is not allowed to put himself in a position where his interest and duty conflict.”

Therefore the courts have strong reason to allow anything beyond the trust because it gives the trustee an undue advantage to put the beneficiary into distress.S.50

**6. Trustee mean of Trust property for his own profit:** the relationship between Trustee and beneficiary are fiduciary in character. A element of trust is reposed in the trustee, therefore he cannot make a personal gain for himself in any matter arising out of the trust .The trustee shall not take any part of the profits for his own use. it is the duty of the trustee to exhibit the same care and caution towards the trust property, as he may towards his own . The trustee holds the property in trust for the beneficiary. He has to use his skills for the benefit for another. However crafty is entitled to reimburse himself all expenses properly incurred in or for the execution of the trust or realization, preservation or benefit of the trust property or for the protection of the beneficiary .s.51.

**7. Trustee for sale may not buy:** The trustee or his agent may not buy the trust property or any interest in the trust property, Section 52. It was held in *Peari Mohan Mukerji v. Manohar Mukerji* that a trustee for sale cannot purchase because the same person cannot be both vendor and purchaser.

The exception to the rule is that a trustee can purchase trust property in the following circumstances:

- a) When the parties are at arm's length
- b) If he has given fancy price for it
- c) If the sale is by public auction and the permission of the court has been obtained.
- d) If he is a bare or nominal trustee without any duties to perform or where he has disclaimed the trust.

**8. Trustee may not buy beneficiary's interest without permission:**

If any trustee of a trust property has recently ceased to be a trustee, may with the permission of the Principal Civil Court of original jurisdiction buy or become a mortgagee or lease of the trust property. Such permission shall be granted by the court if the sale is for the benefit of the property.

**9. Co-Trustees not to lend to one of them:**

A trustee or co-trustee is under a duty not to invest the trust money on mortgage by or on the personal security of him or any one of the co-trustees. S.54.

**Rights and Liabilities of the Beneficiary**

The beneficiary under a trust is entitled to certain rights and owes liabilities under the Indian Trust Act, 1882.

**1. Right to rents and profits**

The beneficiary has a right to the rents and profits of the trust property subject to the provisions of the instrument of the trust s.55`

**2. Right to specific execution:**

The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of his interest. S56.

**3. Right to transfer of possession:**

Where there is one or more beneficiaries who is/are competent to contract and where all of one mind, then he/they may ask the trustee to transfer the trust property to him/them. This right accrues to a beneficiary on the attainment of majority. S56

**4. Right to inspect and take copies of instrument of trust and accounts :**

Beneficiary has a right against the trustees to inspect and take copies of the instrument of trust or of the Documents of Title relating to the trust property. This right is also available against persons claiming under the trustee with notice of trust .S.57

**5. Right to transfer beneficial interest:** if the beneficiary is competent to contract, he can transfer his interest subject to the law for the time being in force to another. S.58.

**6. Right to sue for execution of trust**

The beneficiary has the right to sue for the execution of the trust where no trustees are appointed or if all of them have died or have been discharged or the execution of the trust becomes impracticable. The beneficiary shall file a suit for execution of trust and the trust shall be executed by the court until the appointment of a trustee. S59

**7. Right to proper trustees:**

The beneficiary has a right that the trust property shall be properly protected and held and administered by proper persons. S.60

The following are not the proper persons to administer a trust;

A person domiciled abroad, an alien enemy, a person who is insolvent and unless the personal law of the beneficiary allows otherwise, married woman and a minor. Where the administration of the trust involves the receipt and custody of money, the minimum number of the trustees must be two.

## **8. Right to compel the trustee to any act of duty.**

The beneficiary has a right to compel the trustee to perform any particular act which is his duty. The beneficiary can also restrain the trustee from any act which may cause a breach of trust .S61

## **9. Wrongful purchase by trustee:**

Where the Trustee has wrongfully bought trust property the beneficiary has a right to have the property declared subject to the trust and have it Re transferred by the trustee. On reconveyance of the property the beneficiary is bound to repay the purchase money with interest and other expenses properly incurred in the preservation of the property.S.62

## **10. Following trust property into the hands of third person:**

Where the trust property comes into the hands of a third person inconsistent with the trust the beneficiary may require him to admit formally, or may file a suit for declaration that the property is comprised in a trust. The Trustee who has received the money after the sale of the trust property is bound to repay the money to the beneficiary.

The beneficial has a right to follow trust property into the hands of third persons or into the hands of another beneficial or into which it has been converted.

If the trustee converts the trust property by breach of trust the beneficiary has a right to recover the proceeds of the disposition of Trust property.

If the Trustee mingles the trust property with his own, the beneficial with is entitled to a charge on the whole fund for the amount due to him.S66

The beneficiary has a right to follow the trust estate into the hands of a person without notice of the trust and claim it ` Similarly

he may follow the trust property in the hands of a purchaser for valuable consideration with notice of the trust .S63

Exception to the above rule of following the trust property does not apply to a transferee in good faith for consideration without having notice of the trust and also a transferee for consideration from such transferee with notice of the trust.

Where there is a breach of trust on the part of the trustee, the beneficiary has two types of remedy.

- a) Against the trustee personally. If there is more than one trustee each is jointly and severally liable.
- b) Against the trust property into which it has been converted

**10. Acquisition by trustee of trust property wrongfully converted:**

Where a trustee wrongfully sells or transfers trust property and later himself becomes the owner of the property, the property becomes the subject of the trust again irrespective of the fact of a notice on the part of the intervening transferee in good faith for consideration. **S.65**

**11. Wrongful employment by partner-trust of property for partnership Purposes:**

If a Trustee is a partner in a partnership firm and employs the trust property for furthering the business of the partnership firm, then the trustee is liable for breach of trust and no other partners of the firm are liable personally for the breach .However the other partners can be liable jointly and severally for the breach if they had notice that the property was trust property .S.67

## **When the office of the trustee becomes Vacant**

**Section 70** The office of the trustee is vacant by his death or by his discharge from his office .Discharge of trustee: The trustee may be discharged from his duties as under:

- a. By the extinction of the trust
- b. By the completion of his duties under the trust
- c. By such means as prescribed by the instrument of the trust
- d. By appointment of a new trustee in his place
- e. By consent of him and the beneficiary/ies as the case may be where they are competent to contract.
- f. By the court to which a petition for his discharge has been presented under the act.

The trustee may apply by a petition to Principal Civil Court of Original Jurisdiction to be discharged from his office and if the court is satisfied by the reason furnished, then it may discharge such trustee.S.72.But in the absence of any genuine reasons the court may reject the petition for discharge.

## **Extinction of a Trust**

### **A trust is extinguished**

- a. When the purpose is fulfilled
- b. When its purpose becomes unlawful
- c. When the fulfillment of the trust becomes impossible by destruction of the trust property or otherwise.
- d. When the trust being revocable is expressly revoked`

#### **a) When the purpose is fulfilled:**

A trust is extinguished when the purpose of the trust is accomplished. for e.g If a trust was created and the property was given to the trustee for the education of the children of 'Z'and to distribute the property on their attaining majority. The trust is extinguished as soon as the education of the

children is finished and the property is distributed on their attaining majority.

**b) When its purpose becomes unlawful**

A trust is extinguished if the purpose becomes unlawful .According to Section 4 of the Act; the following purpose renders the trust unlawful

- i) such purpose is forbidden by law
- ii) purpose is of such nature that, if permitted, it defeats the provisions of law
- iii) Purpose is to commit Fraud
- iv) purpose involves injury to the person or property of another .
- v) the purpose is opposed to public policy .

**c) Purpose becomes Impossible to perform:**

Where the trust was a valid trust, however due to loss or destruction of the trust property it becomes impossible to perform the trust .In such instances the trust is extinguished for impossibility to perform

**d) Revocation of the Trust:**

Once a valid trust is created it cannot be revoked except in the following ways

- i)) A trust created by will may be revoked at the pleasure of the testator (in his life time)
- ii)) where all the beneficiaries are competent to contract, by their consent.
- iii)) where the trust is declared by a non-testamentary document or by word of mouth, in the exercise of the power of revocation expressly reserved to the settlor.

iv) where the trust is created for the payment of the debts of the settlor & has not been communicated to the creditors then it may be revoked at the pleasure of the settlor. Where Revocation is to defeat the acts of the trustees; S.79 where the trustees have duly acted to execute the trust

and the trust is revoked. The past acts remain unaffected by such revocation, as it cannot have a retrospective effect.