

AL- AMEEN COLLEGE OF LAW

MODEL ANSWERS

PROPERTY LAW (80 marks)

VI SEMESTER 5 YEARS BA LL. B

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UNIT I

1. Define transfer of property. What are the essentials of a valid transfer (10)

Transfer of Property: Meaning and Essentials

Introduction

Transfer of property refers to the conveyance of an interest in property by one living person to another, as defined under Section 5 of the **Transfer of Property Act, 1882**. The Act regulates various modes of transfer such as sale, mortgage, lease, exchange, gift and actionable claim. For a transfer to be legally valid, certain essential conditions must be satisfied, including the competency of the transferor, existence of transferable property, presence of a definite transferee, compliance with legal formalities, and a lawful object. These requirements ensure that property transactions are carried out fairly, legally, and effectively, thereby protecting the rights of all parties and maintaining certainty in property dealings.

Meaning of transfer of property

The **Transfer of Property Act, 1882** is a central law in India that regulates transfer of property by act of parties. Section 5 of the Act defines transfer of property as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons.

The definition shows that transfer means a conscious and voluntary act of conveying an interest in property from one person to another, and not a transfer by operation of law such as inheritance or succession.

The expression “living person” is given a broad meaning. It includes not only natural persons but also companies, associations, or bodies of individuals, whether incorporated or not. The transfer may relate to present property or future property, but the transfer must be of an interest that the law recognizes as transferable. In this sense, the Act controls who may transfer, what may be transferred, and in what manner a transfer becomes legally valid.

Essentials of a Valid Transfer

For a transfer of property to be valid, certain legal requirements must be satisfied. These essentials ensure that the transfer is lawful, effective, and capable of recognition by law.

1. Transfer must relate to transferable property

The first essential is that the subject matter must be property which the law permits to be transferred. Section 6 of the Act lays down that property of every kind may be transferred, except such property or interests as are specifically excluded by law. For example, a mere chance of succeeding to an estate, a mere right to sue, or certain personal interests cannot be transferred. Therefore, the property must be existing and legally transferable. In *Gulamhusain*

v. Abdul, courts have treated a transfer of a mere chance or expectancy as invalid because such an interest is not transferable under Section 6.

2. Transfer must be by a living person

A transfer under Section 5 must be made by a living person. The term includes natural persons as well as artificial persons like companies and associations. A transfer cannot be made by a dead person, because after death the transfer takes place through succession, testamentary disposition, or operation of law rather than by act of transfer. This requirement distinguishes transfer inter vivos from transfers by inheritance. In *Ram Baran Prasad v. Ram Mohit Hazra*, the Supreme Court explained that a transfer under the Act is a transaction between living persons and is distinct from devolution by succession or inheritance.

3. Transferor must be competent (S.7)

The transferor must be competent to transfer the property. Competency generally means that the person must be competent to contract, which requires majority, soundness of mind, and no legal disqualification. In addition to general competence, the transferor must also have title or authority to transfer the interest. A person cannot ordinarily convey a better title than he himself possesses. Thus, ownership or lawful authority is essential. In *Smt. Shanti Devi v. State of Rajasthan*, the principle was reiterated that a person cannot transfer a better title than he possesses unless authorized by law.

4. Transferor must have the right to transfer

It is not enough that the transferor is competent; he must also have the legal right to transfer the property. For instance, a trustee may transfer only within the powers given by law or trust instrument, and a limited owner cannot transfer beyond his interest unless authorized. The transfer must therefore be within the transferor's legal capacity and power.

5. Transferee must be capable of taking the property

The transferee must be legally capable of receiving the property. Generally, any living person may be a transferee. Even a minor may hold property, though he cannot contract personally in the same way as an adult. In some cases, a transfer may also be made for the benefit of an unborn child, provided the law's requirements are satisfied. If the transferee is not identifiable or capable in the eyes of law, the transfer may fail. In *Nand Lal v. Radha*, the court recognized that the capacity of the transferee is essential and that the transfer will not fail merely because the transferee is a minor, so long as the law permits the property to vest in him.

6. Transfer must be lawful and not prohibited by law

A transfer is valid only if it is not forbidden by the Transfer of Property Act or any other law in force. Section 6 lists several kinds of interests that cannot be transferred, such as a mere chance, a mere right to sue, and public offices or salaries protected by law. Likewise, a transfer made for an unlawful object or consideration is invalid. This means legality is an essential part of every valid transfer. In *Ruttonji v. Dinshaw*, the court held that where the object of transfer is unlawful or against public policy, the transfer cannot be enforced.

7. Transfer must comply with prescribed legal formalities

In many cases, the law requires a particular mode or form for transfer. For example, a sale of immovable property value above 100/- rupees must be made by a registered instrument, and gifts of certain immovable property also require registration. If the statute prescribes writing, attestation, or registration, those formalities must be complied with. Even when the Act allows oral transfers in some situations, the transfer must still satisfy the applicable legal rules.

Illustration

A sells his house to B by a properly executed and registered sale deed, and both are competent persons with lawful title, the transfer is valid. But if A tries to transfer a mere possibility of inheritance from a living relative, that transfer is invalid because a mere chance is not transferable

8. Conclusion

Thus, transfer of property under Section 5 of the Transfer of Property Act, 1882 means the conveyance of property by a living person to another living person or persons, either in the present or in the future. The essentials of a valid transfer are that the property must be transferable, the transfer must be by a living person, the transferor must be competent and authorized, the transferee must be capable of taking, the transfer must be lawful, and the required formalities must be followed. These requirements together ensure that the transfer is legally effective and enforceable.

2. Write a note on notice (6)

Notice under Property Law

Introduction

Notice is a fundamental doctrine in property law, especially under Section 3 of the Transfer of Property Act, 1882. It means knowledge of a fact affecting property rights, either by actual awareness or by legal presumption, and it prevents a transferee from claiming ignorance where reasonable inquiry would have revealed the truth.

The doctrine matters because property transactions often involve competing claims, prior interests, and hidden defects in title. A purchaser who takes property with notice of an earlier right is generally bound by that right, so the rule promotes fairness and diligence in transactions.

Meaning of notice

Under Section 3, a person is said to have notice of a fact when he actually knows it, or when, but for wilful abstention from inquiry or gross negligence, he would have known it. This means notice is not limited to direct knowledge; the law may impute knowledge when a person ignores obvious circumstances or fails to make proper enquiries.

Notice is therefore broader than mere personal awareness. It includes situations where the law deems a person to know something because the surrounding facts were sufficient to put him on inquiry.

Types of notice

There are three important forms of notice in property law.

First, **actual notice**, where the person really knows the fact.

Second, **constructive notice**, where the law treats a person as having notice because he ought to have discovered the fact by reasonable care.

Third, **imputed notice**, where notice received by an agent within the scope of authority is treated as notice to the principal.

Constructive notice is especially important in immovable property transactions. A buyer who ignores suspicious circumstances, title documents, or possession by another person may be fixed with notice even if he denies actual knowledge.

Statutory explanations

Section 3 contains important explanations that expand the idea of notice. Registration of a document, where registration is required by law, operates as notice of the contents of that document. A person who acquires immovable property is also deemed to have notice of the rights of the person in actual possession of the property. In addition, if an agent has notice, the principal is generally treated as having notice as well.

These rules place a duty on purchasers to investigate title carefully. The law expects a prudent transferee to inspect records, check possession, and inquire into circumstances that suggest prior interests.

Case laws

In *Ramcoomar Koondoo v. John and Maria McQueen* (1872), the court treated constructive notice as binding where a purchaser could have discovered the prior claim through reasonable inquiry. The case is commonly cited for the principle that a buyer cannot avoid an earlier interest by simply remaining ignorant when the facts were available on proper investigation.

In *Sarla Sood v. Surjeet Singh* (1991), the Delhi High Court held that failure to make reasonable enquiries can amount to constructive notice of existing rights over the property. The case supports the view that gross negligence in investigating title may have the same effect as actual knowledge.

The doctrine is also reflected in the broader judicial approach that registration and possession are serious signals to a transferee. Courts have consistently protected prior rights when the later transferee had knowledge, or should reasonably have had knowledge, of those rights.

Importance of notice

Notice serves several purposes in property law. It protects prior owners and interest holders from being defeated by careless purchasers. It also discourages fraud, encourages proper title search, and promotes certainty in land transactions.

if a person actually knows a prior right, or would have known it by proper inquiry, the law may bind him as if he knew it. That is the core of the doctrine of notice under property law.

Conclusion

Thus, notice under property law means legal awareness of facts affecting property rights, whether actual or imputed by law. Section 3 of the Transfer of Property Act, 1882 gives the doctrine practical force by linking notice with registration, possession, and agency.

2. Write a note on immovable property (6)

Immovable property

Introduction

Property is broadly classified into movable and immovable property. The distinction between these two categories is of great legal significance because different rules govern their transfer, ownership, registration, taxation, and inheritance. Among them, immovable property occupies a central place in property law due to its permanent nature and economic importance.

The concept of immovable property is fundamental to the study of the **Transfer of Property Act, 1882**, as most of its provisions deal with the transfer of interests in land and things attached to it. Since land is a valuable and limited resource, the law provides special protection and

regulations concerning its ownership and transfer. A proper understanding of what constitutes immovable property is therefore essential for understanding the rights and obligations arising from property transactions.

Meaning of immovable property

Immovable property is a core concept in property law and broadly refers to property that is permanent in nature and cannot be moved from one place to another without causing substantial damage. Although the **Transfer of Property Act, 1882** does not provide a comprehensive definition, **Section 3** explains that immovable property includes land, benefits arising out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Land covers not only the surface of the earth but also things beneath and above it, such as minerals, buildings, and standing crops attached to the soil. The permanence and fixed character of immovable property distinguish it from movable property. Due to its enduring nature, the law imposes strict formalities for its transfer, making immovable property a vital subject of regulation under Indian property law.

Statutory Interpretation and Judicial View

The meaning of immovable property is further clarified by statutory provisions and judicial interpretations. In addition to **Section 3 of the Transfer of Property Act, 1882**, **Section 2(6) of the Registration Act, 1908** defines immovable property to include land, buildings, hereditary allowances, rights to ways, lights, ferries, and fisheries. Courts have consistently adopted a broad interpretation to ensure that all permanent interests connected to land are protected under law. In *Anand Behera v. State of Orissa*, the Supreme Court held that benefits arising out of land, such as rights to collect produce, are immovable property. The judiciary focuses on the nature of attachment and intention behind fixing an object to the earth to determine whether property is immovable.

Legal Characteristics and Importance

Immovable property is characterized by its permanency, stability, and the legal safeguards governing its transfer and ownership. Transactions involving immovable property generally require compulsory registration under **Section 17 of the Registration Act, 1908**, ensuring transparency and preventing fraudulent claims. Rights in immovable property are enforceable against the world at large, subject to lawful restrictions. Such property forms the backbone of economic security, inheritance, and development activities.

Real-Time Example

A common real-time example of immovable property is the purchase of a residential house or flat. When a person buys a house, the land, building structure, and permanent fixtures like walls and ceilings are treated as immovable property. The ownership is transferred through a registered sale deed, as required by law. The house cannot be shifted from its location without destroying its structure, which highlights its immovable nature. Rights attached to the property, such as access roads, water supply, and drainage systems, are also considered part of the immovable property. This example clearly demonstrates how immovable property operates in everyday legal and commercial transactions.

Conclusion

Immovable property is a broad concept that includes land, benefits arising out of land, and things attached to the earth. Although the Transfer of Property Act does not define it exhaustively, Section 3 and the General Clauses Act provide sufficient guidance regarding its scope. The distinction between movable and immovable property is of immense practical importance because it affects ownership, transfer, registration, mortgage, succession, and legal remedies. Therefore, understanding the concept of immovable property is essential for the proper application of property law and the regulation of property transactions.

3. Transfer for the benefit of unborn person

Introduction

The general rule of law is that property can be transferred only to a person who is in existence at the date of the transfer. Since an unborn person does not have a legal existence, property cannot be transferred directly to him or her. However, recognizing the need to make provisions for future generations, the law permits a transfer for the benefit of an unborn person subject to certain conditions.

Section 13 of the **Transfer of Property Act, 1882** lays down the rules governing transfers for the benefit of unborn persons. The provision seeks to balance the interests of the transferor with the policy against keeping property inalienable for an indefinite period.

Meaning of an Unborn Person

An unborn person is a person who is not in existence at the time of the transfer but is expected to come into existence in the future.

Example: A transfers property to B for life and thereafter to B's first child, who is not yet born. The transfer is intended for the benefit of an unborn person.

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

- I. No direct transfer
- II. Making a prior interest
- III. Making an absolute transfer of interest
 1. No direct transfer:

Under this section it 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 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 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 an 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 an 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.

Rule Against Perpetuity (Section 14)

Section 13 is closely connected with Section 14 of the Transfer of Property Act, which embodies the rule against perpetuity.

The law does not permit property to remain tied up indefinitely beyond:

- The lifetime of one or more living persons, and
- The minority of the unborn person who ultimately takes the property.

This ensures the free circulation of property.

Judicial Decision

Girish Dutt v. Data Din The Privy Council held that where only a limited interest is given to an unborn person and not the entire remaining interest, the transfer is void under Section 13.

The case established that an unborn person must receive the whole remaining interest of the transferor.

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

There is a transfer of property creating an interest for the benefit of a person not living by then; Such unborn person acquires a vested interest upon his birth, unless a contrary intention appears from the terms of transfer and although he may not be entitled to the enjoyment thereof immediately on his birth. An unborn person gets a vested interest as soon as he is born, even if he can't enjoy the property immediately.

Eg: A transfers property to B for life and after 'B's death, to 'B' first son.

At the time of transfer son is not yet born. When the son is born, he gets a vested interest immediately. He will get possession only after 'B's death, but his right is already fixed.

Conclusion

Section 13 of the Transfer of Property Act permits a transfer for the benefit of an unborn person through the medium of a prior life interest. Such a transfer is valid only when the unborn person receives the entire remaining interest of the transferor and is born before the prior interest comes to an end. The provision protects future generations while preventing property from being tied up indefinitely and ensuring its free transferability.

4. Define vested and contingent interest and distinguish between vested and contingent interest.

VESTED AND CONTINGENT INTEREST

Introduction

The concepts of **vested interest** and **contingent interest** are important under the **Transfer of Property Act, 1882**. These concepts determine when a person's right in property becomes effective and whether that right depends upon the occurrence of any future uncertain event. Sections 19 and 21 of the Act deal with vested and contingent interests respectively. The distinction between the two is significant because it affects the transferability, inheritance, and enjoyment of property rights.

Vested interest

Vested interest is defined under section 19 of the Transfer of Property Act: when a property interest is created in favor of a person **without specifying the time it is to take effect**, or specifying that it will take effect **forthwith or upon the happening of a certain event that must happen**, such interest is considered **vested**, unless the transfer explicitly indicates otherwise

Characteristics of Vested Interest

- Creates an immediate right.
- Not defeated by the death of the transferee.
- Descends to heirs.
- Generally transferable.
- Favors certainty of ownership.

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.

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.
- IV. If the above 3 conditions are fulfilled, such interest becomes vested interest unless a contrary intention appears from the terms of the transfer.
- V. A vested interest is not defeated by the death of the transferee before the transferee obtains possession.

Here,

- The enjoyment of it is postponed; or
- A prior interest in the same property is given, or reserved to some other person; or
- The income arising from the property is directed to be accumulated until the time of enjoyment arrives. Or
- Merely based on a provision that if a particular event shall happen the interest shall pass to another person.

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.

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

There is a transfer of property creating an interest for the benefit of a person not living by then; Such unborn person acquires a vested interest upon his birth, unless a contrary intention appears from the terms of transfer and although he may not be entitled to the enjoyment thereof immediately on his birth. An unborn person gets a vested interest as soon as he is born, even if he can't enjoy the property immediately.

Eg: A transfers property to B for life and after 'B's death, to 'B' first son.

At the time of transfer son is not yet born. When the son is born, he gets a vested interest immediately. He will get possession only after 'B's death, but his right is already fixed.

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, or
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. Only a chance or probability of acquiring ownership.

Conditions

- Where, on a transfer of property, an interest therein is created in favour of a person to take effect,
- Only on the happening of a specified uncertain event, or if a specified uncertain shall not happen. (uncertain event means an event the happening of which is not certain, or when the non-happening of it is not certain)
- Such person thereby acquires a contingent interest in the property.
- Such interest becomes a vested interest, in the former case, on the happening of the event.
- In the later case, when the happening of the event becomes impossible.

Key features:

- The rights arises only when a specific uncertain event happen or non-happening.
- The person does not have a present ownership right,
- If the condition is not fulfilled, the interest fails completely,
- If the person dies before the condition is fulfilled the interest usually does not pass to heirs.

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).

Exception

- When an interest right looks contingent but is actually treated as vested. This happens when a person is set to receive the property upon reaching a 'particular age' and the transferor also

The person gets the income from that property immediately, even before reaching that age. Income is directed to be used for the person's benefit until they reach that age.

Case Law: *Lachman vs. Baldeo (1919) 21 OC 312* In this legal case, a deed of gift was transferred by one individual in favor of another person. However, the transferor included an instruction that the transferee should not take possession of the property until the transferor's own demise. Despite the postponement of the right to enjoy the property, the transferee was deemed to have a vested interest in the property.

In the case of *Leake vs. Robinson (1817) 2 Mer 363* , the court established a significant legal principle. It was ruled that whenever a condition is attached to a legacy, specifying that it is to be given 'at a particular age,' 'upon attaining a particular age,' or 'a specific age,' it can be inferred that the transfer involves a contingent interest

Sections 22, 23, and 24 of the Transfer of Property Act, 1882 are specific applications of contingent interest. Under Section 22, where an interest is created in favour of members of a class who attain a specified age, only those who attain that age acquire the interest, making it contingent upon attaining the prescribed age. Section 23 provides that where an interest is to accrue on the happening of a specified uncertain event and no time is fixed for its occurrence, the interest fails if the event does not happen before or at the time the prior interest comes to an end. Section 24 deals with transfers in favour of such persons as survive at an unspecified future period; in such cases, the interest vests only in those who are alive when the preceding interest terminates. Thus, these sections illustrate different forms of contingent interests where vesting depends on the fulfilment of a condition such as attaining a particular age, the occurrence of an uncertain event, or survival until a specified time.

Difference between vested interest and contingent interest

Vested interest	Contingent interest
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<ul style="list-style-type: none"> • Vested interest is not conditional and creates an immediate right though the enjoyment is postponed to a future date. 	<ul style="list-style-type: none"> • Completely depend on the fulfillment of certain specified condition, if the condition is not fulfilled, then the interest fails.
<ul style="list-style-type: none"> • Is not defaulted by the death of the transferee before obtains possession 	<ul style="list-style-type: none"> • defaulted by the death of the transferee.
<ul style="list-style-type: none"> • Both transferable and heritable. Therefore, if the transferee dies before the actual possession or enjoyment it passes to his heirs. 	<ul style="list-style-type: none"> • A contingent interest cannot be inherited if the transferee dies before the interest vests. • Though transferable, the transferee acquires an imperfect title.
<ul style="list-style-type: none"> • This is present immediate right even when its enjoyment is postponed. 	<ul style="list-style-type: none"> • there is no present right of enjoyment, there is mere promise of giving of such a right.
<ul style="list-style-type: none"> • Can be attached in execution of a decree and sold by a court 	<ul style="list-style-type: none"> • can't be attached in execution of a decree.

Conclusion

Vested interest and contingent interest are two important forms of proprietary interests recognized under the Transfer of Property Act, 1882. A vested interest creates an immediate and definite right in property, even though enjoyment may be postponed, whereas a contingent interest depends upon the occurrence of an uncertain future event. The distinction between the two ensures certainty in property transactions and helps determine the rights and liabilities of parties involved in the transfer of property.

5. Rule against alienation

Section 10 – Rule Against Inalienability (Absolute Restraint)

Introduction

One of the fundamental principles of the Transfer of Property Act, 1882 is that the right to transfer property is an essential incident of ownership. A person who acquires property should ordinarily be free to enjoy and dispose of it according to his wishes. Therefore, the law

discourages restrictions that prevent the free transfer of property. Section 10 embodies this principle by declaring void any condition that absolutely restrains alienation.

Meaning

The Rule Against Inalienability means that a transferee cannot be absolutely restrained from transferring or disposing of the property transferred to him. Any condition that completely prohibits the transferee from selling, gifting, mortgaging, exchanging, leasing, or otherwise alienating the property is void.

The principle is based on **justice, equity, and good conscience** and is derived from the English law rule against restraints on alienation.

Statutory Provision

Section 10 of the Transfer of Property Act, 1882 provides that where property is transferred subject to a condition absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, such condition or limitation is void.

The transfer itself remains valid, but the restraining condition becomes ineffective.

The rule applies not only to transfers such as sale, gift, and exchange but also to transfers outside the Act, such as wills, settlements, and partitions.

Object of the Rule

The objectives of Section 10 are:

1. To ensure the free circulation of property.
2. To prevent property from being tied up indefinitely.
3. To promote economic and commercial utility of property.
4. To protect the rights of owners to deal freely with their property.
5. To prevent unreasonable restrictions on ownership.

Principle

The right of alienation is inseparable from ownership. Once ownership is transferred, the transferee should be free to transfer the property further. Therefore, any condition that completely destroys this right is considered void.

The law favors free transferability of property and discourages restrictions that hamper its marketability.

Absolute Restraint

An absolute restraint is a condition that completely prohibits the transferee from transferring the property.

Illustration

A transfers a house to B on the condition that B shall never sell, gift, mortgage, lease, or otherwise transfer the property.

The condition is void because it imposes an absolute restraint on alienation. B becomes the owner with full power to transfer the property.

Partial Restraint

A partial restraint may be valid if it is reasonable and does not completely prohibit transfer.

Illustration

A lease deed provides that the lessee shall not sublet the premises without the lessor's consent.

Such a restriction is valid because it is not an absolute restraint and is intended to protect the interests of the lessor.

Thus, while partial restraints may sometimes be valid, absolute restraints are always void.

Condition Precedent and Condition Subsequent

Condition Precedent

A condition precedent is a condition that must be fulfilled before the transfer takes effect.

Example:

A transfers property to B on the condition that B completes a law degree.

Such a condition may be valid if it is lawful and not opposed to public policy.

Condition Subsequent

A condition subsequent seeks to restrict the transferee's rights after the transfer has taken effect.

Example:

A transfers property to B absolutely but directs that B shall never transfer it to anyone.

Such a condition is void under Section 10 because it imposes an absolute restraint on alienation.

Exception

Section 10 expressly recognizes an exception in the case of leases. A condition restricting the lessee from assigning, transferring, or subletting the leased property is valid if it is imposed for the benefit of the lessor.

Conclusion

Section 10 of the Transfer of Property Act, 1882 embodies the **Rule Against Inalienability**, which declares void any condition that absolutely restrains a transferee from transferring his interest in the property. The provision is based on the principle that the right to alienate property is an essential incident of ownership. While reasonable and partial restraints may be valid in certain circumstances, an absolute restraint on alienation is always void. The rule promotes free transferability, economic utility, and effective circulation of property in society.

6. Discuss rule against perpetuity and state the exceptions to this rule (10)

Section 14- Rule against perpetuity

Introduction

Perpetuity means indefinite period or time and this rule is essentially against a transfer that bestows the right of making a property inalienable for an indefinite period.

The rule against perpetuity ensures that property is not tied up indefinitely. It stipulates that no property can be transferred in such a manner that the interest created takes effect beyond the lifetime of one or more living persons plus a minority period.

Statutory Provision (Section 14)

Section 14 provides:

"No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period."

Thus, an interest must vest, if at all, within:

1. The lifetime of one or more living persons (lives in being), and
2. The minority (below 18 years) of a person in existence at the expiry of those lives.

Any transfer violating this rule is void.

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 18 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

Essential Elements of the Rule Against Perpetuity

The application of the Rule Against Perpetuity depends upon certain essential legal conditions. These elements ensure that property is not tied up indefinitely and that the transfer remains valid under the Transfer of Property Act, 1882.

Transfer of Property

At the outset, there must be a valid transfer of property as recognised under the Act. The rule applies only where an interest in property is created. Mere agreements or arrangements that do not create proprietary rights fall outside its scope. The transfer must therefore involve a real disposition of interest in property.

Ultimate Benefit to an Unborn Person

In most cases, the rule becomes relevant where the transfer is intended to benefit an unborn person. Since such a person is not in existence at the time of transfer, the law imposes safeguards to ensure that the interest is not created in a manner that delays vesting indefinitely.

Existence of Prior Interest

To overcome the limitation that transfer can only take place between living persons, a prior interest is created in favour of a person who is alive at the date of transfer. This prior interest is generally a life interest, allowing the person to enjoy the property without having absolute ownership. It acts as an intermediate arrangement until the ultimate beneficiary comes into existence.

Vesting Within Permissible Period

A crucial requirement is that the interest must vest within the legally permissible period, i.e., the lifetime of living persons at the date of transfer plus the minority of the ultimate beneficiary. Any attempt to postpone vesting beyond this period renders the transfer void.

Absolute Interest to Beneficiary

The ultimate beneficiary must receive the entire remaining interest in the property. This includes full ownership rights along with the power of alienation. If only a limited interest is transferred, the arrangement may fail for non-compliance with statutory requirements.

Minority and Its Role

The concept of minority plays a crucial role in determining the permissible period of postponement.

Under **Section 3 of the Majority Act, 1875**, a person domiciled in India attains majority at the age of 18 years. Accordingly, vesting can be postponed up to this age, but not beyond.

For example, if property is transferred to an unborn person upon attaining the age of 27 years, the transfer becomes void as it exceeds the permissible period.

Period of Gestation

The law recognises the rights of a child in the mother's womb. Such a child is treated as a person in existence, provided the child is subsequently born alive.

The gestation period, generally considered to be around nine months, is allowed as an extension to the perpetuity period. However, it is not counted within the minority period.

Interplay with Section 13 of TPA

Section 13 deals with transfers for the benefit of an unborn person. It imposes important conditions:

- A prior interest must be created in favour of a living person
- The unborn person must receive the whole remaining interest

This ensures that property ultimately vests absolutely in the beneficiary and is not fragmented or restricted.

A key principle is that the transferor cannot restrict the property across multiple generations indefinitely.

Interplay with Section 16 of TPA

Section 16 addresses the consequences of failure of prior interest.

Where an interest created for a person or class of persons fails due to violation of Sections 13 or 14, any subsequent interest intended to take effect after such failure also becomes void.

This provision prevents indirect attempts to bypass the rule against perpetuity by creating alternative interests.

Landmark Judgements Rule Against Perpetuity

Soundara Rajan v. C.M. Natarajan (1925)

The Privy Council in Soundara Rajan v. C.M. Natarajan clarified that where uncertainty exists regarding minority, the normal period of 18 years must be applied. The rule ensures certainty and uniformity in determining the perpetuity period.

Rambaran v. Ram Mohit (1966)

The Supreme Court in Rambaran v. Ram Mohit held that the rule against perpetuity does not apply to personal agreements that do not create any interest in property. This distinction is important, as the rule is limited to proprietary interests.

Exceptions to the 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.

Objective of rule against perpetuity: there were people who had vested interest in keeping their property in their family, from generation to generations, but this would be a great loss to the society. This ensures free and frequent circulation of all property.

18. Transfer in perpetuity for benefit of public.

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

Relationship with Indian Succession Act

The principles underlying the rule against perpetuity are also reflected in the **Indian Succession Act, 1925**, particularly in Sections 113 to 116.

These provisions govern testamentary transfers and ensure that similar restrictions apply when property is transferred through wills.

Conclusion

The Rule Against Perpetuity under Section 14 of the Transfer of Property Act, 1882 prohibits the creation of interests that may vest beyond the lifetime of living persons and the minority of a person in existence at the expiry of those lives. The rule is founded on public policy and ensures that property remains freely transferable and economically useful. However, transfers for public, religious, charitable, and other beneficial purposes are exempt from its operation. Thus, the rule strikes a balance between an owner's freedom to dispose of property and society's interest in preventing property from being tied up indefinitely.

7. Define transfer of property and state the properties which cannot be transferred

Introduction

The law relating to transfer of property in India is primarily governed by the Transfer of Property Act, 1882. The Act was enacted to regulate the transfer of property between living persons and to provide certainty and uniformity in property transactions. Transferability of property is considered one of the essential incidents of ownership. However, in order to protect public policy, personal rights, and social interests, the law imposes certain restrictions on the transfer of specific rights and interests.

Section 5 of the Transfer of Property Act defines the expression "transfer of property," while Section 6 lays down the general rule that property of any kind may be transferred except those specifically prohibited by law. Thus, Section 6 contains a list of properties and interests that cannot be transferred.

Transfer of property

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

It is an act by which a living person conveys property in present or future or to himself & one or more living persons. Living person includes: individual, companies, associations

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

Essentials of Transfer of Property:

1. Transfer Involves Living Persons: Property transfers, referred to as "inter vivos," can only occur between living individuals. Transfers to persons who do not exist are not valid. The category of "living person" includes companies, associations, or bodies of individuals, whether incorporated or not.
2. Property Must Be Transferable: Generally, property of any kind can be transferred. However, there are exceptions outlined in Section 6 of the Act, which lists properties that cannot be transferred. For instance, public offices, pensions, and certain rights are among the items that cannot be transferred.
3. Transfer Must Not Violate the Law: Transfers that oppose the nature of interest affected, are for unlawful purposes or considerations, involve persons legally disqualified from being transferees, or go against the principles of public policy are prohibited.
4. Persons Competent to Transfer: Individuals who are competent to enter into contracts, as defined in Section 11 of the Indian Contract Act, may transfer property. This typically includes those who have attained the age of majority, are of sound mind, and are not disqualified from entering into contracts by any other applicable law

General principles of Transfer of Property by act of parties *inter- vivos*

The Transfer of Property Act, 1882, is a cornerstone of Indian property law, providing a legal framework for the transfer of property between living individuals. The general principles laid out in the Act ensure **clarity, fairness and transparency in property transactions**.

The Act outlines the general principles that must be adhered to while transferring property, ensuring that the process is conducted fairly and transparently. It establishes the legal foundation for the transferability of property, restrictions on alienation and the rights and obligations of parties involved in property transfers.

These principles are crucial for maintaining order and predictability in property transactions. They protect the interests of both the transferor and transferee, ensuring that property rights are respected and upheld. The Act's provisions on matters such as the rule against perpetuity, conditional transfers and the doctrine of Lis pendens help prevent disputes and legal complications that may arise from property transactions.

Moreover, the Transfer of Property Act, 1882, plays a vital role in the economic development of India by facilitating the smooth transfer of property, which is essential for investment and growth in the real estate sector. The Act's principles provide a secure legal environment for

property transactions, encouraging investment and contributing to the overall stability and prosperity of the country's property market.

Types of transfer

Under the TPA, 1882, there are 6 types of specific transfers are dealing. Such as

1. Sale: (S.54 – S.57) A sale represents an absolute transfer of property ownership.
2. Mortgage & Charge (S.58- S.104): A mortgage involves a transfer of a limited interest in the property, often as security for a debt.
3. Lease (S.105 – S.117): In a lease, the transfer involves the right to enjoy immovable property for a specified period or perpetuity.
4. Exchange (S.118 – S.121): Exchange is similar to a sale, but the consideration may be something other than money.
5. Gift (S.122 – S.129): A gift involves the voluntary transfer of property without any consideration
6. Actionable claims (S.130 – S.137).

Section 6: What may be transferred

According to Section 6, property of any kind may be transferred, unless there is a specific legal prohibition. This principle establishes the basic premise that property can be freely transferred between parties, provided there are no legal restrictions

General rule is that property of any kind may be transferred

➤ The following certain things cannot be transferred

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)

Eg: A expects to inherit property from his father. He cannot transfer this expectation.

Illustration

A says “After my father dies, I will get land, I sell it now to B”. Invalid transfer (because it is only a chance, not actual property”.

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 easement 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 run with servient land.

Rights like right to way cannot be transferred alone.

Illustration: A has a right of way over B's land. A can't sell only right without selling the main property.

d) **Interest restricted to personal enjoyment.** If a right is meant only for a person, it can't be transferred.

A is given a house to live in personally A can't transfer that right to B.

dd) **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.

e) **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.

Can't transfer a right to file a case

A has right to sue B for damages, A can't transfer this right to someone.

f) **Public office and salaries:** 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. Public posts and their salaries can't be transferred

Illustration

A government officer can't transfer his job or salary to another person.

g) **Pensions, stipends, public office etc.** cannot be transferred, These are given for personal benefits

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

i) **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.

In **Amirtham Kudumbah v. Sarnam Kudumban**, the Supreme Court considered whether a person who purchased property from a minor after she attained majority could challenge an earlier sale made by the minor's guardian during her minority. The Court held that a guardian's unauthorized transfer of a minor's property is **voidable**, not void, and the minor retains a right to set aside such transfer and recover possession. This right is an **interest in property** and is transferable. Therefore, when the minor, after attaining majority, sold the property to the plaintiff, the plaintiff acquired not only the property but also the right to challenge the earlier alienation. Interpreting Section 8(3) of the Hindu Minority and Guardianship Act harmoniously with Section 6 of the Transfer of Property Act, the Court

held that the expression "**any person claiming under him**" includes a purchaser from the ex-minor. Consequently, the transferee was entitled to sue for setting aside the guardian's transfer and recover the property.

Conclusion

Section 6 of the Transfer of Property Act embodies the principle that transferability is the rule and non-transferability is the exception. While property of any kind may generally be transferred, the law prohibits the transfer of certain rights and interests that are personal, speculative, uncertain, or contrary to public policy. These restrictions ensure fairness, protect individual rights, and promote the proper administration of justice. Thus, the Act strikes a balance between the owner's freedom to transfer property and the need to safeguard societal and legal interests.

8. Oral transfer (6)

Introduction

Section 9 of the Transfer of Property Act, 1882 deals with the *mode* of transfer and recognises that property can be transferred orally. It provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law, thereby making oral transfer the general rule and written transfer the exception created by specific provisions.

Meaning and Nature of Oral Transfer

An oral transfer is a transfer of property without a written instrument, usually through spoken words and accompanying conduct such as delivery of possession. Section 9 does not create a new kind of interest; it only relaxes the formal requirement of writing where the statute is silent, allowing ordinary principles of contract and intention to govern the transaction.

The section is enabling in nature: it says that wherever the law does not *insist* on writing, parties are free to transfer orally. Courts and commentators often describe Section 9 as a residuary rule for mode of transfer.

Scope of Section 9

Section 9 applies to all transfers covered by the TPA—sale, mortgage, lease, exchange, gift, etc.—*only to the extent* that their governing provisions do not require a written, and sometimes registered, instrument.

Eg: transfers of movable property and certain low-value or short-term interests in immovable property, where the Act expressly permits transfer without a written document.

Exceptions: Cases Where Oral Transfer Is Not Permitted

Section 9 is expressly subject to other provisions of law that require writing and registration. In such cases, oral transfer is invalid. Important TPA provisions that exclude Section 9 are:

- Sale of immovable property of value of rupees one hundred or upwards must be by a registered instrument under Section 54; an oral sale is ineffective.
- Simple mortgage and certain other mortgages must be by a registered instrument under Section 59, so they cannot be created orally.
- Leases from year to year, for a term exceeding one year, or reserving yearly rent require a written, registered instrument under Section 107.
- Gift of immovable property must be by a written, signed, and registered instrument under Section 123, and an oral gift of immovable property is void.
- Transfer of actionable claims must be by an instrument in writing under Section 130.

This are the “special provisions” which prescribe a particular mode of transfer, so those provisions are treated as exceptions to the general permission for oral transfer.

Legal Effect and Evidentiary Issues

If a transfer falls within the scope of Section 9 and is otherwise valid, an oral transfer has the same legal effect as a written transfer of that class of interest. However, the main practical problem is proof: without a written instrument, parties must rely on oral evidence and surrounding circumstances to prove the fact and terms of the transfer, which courts treat with caution.

Critical analyses emphasise risks of fraud, uncertainty, and difficulty in proving title in disputes over oral transfers, especially of immovable property. Modern practice therefore prefers written and registered instruments, and courts often give greater weight to registered documents when competing claims arise.

In *Narsinghdas v. Radhakisan*, the court indicated that the test for whether a transaction can be made without writing is to see whether the relevant law expressly requires it to be in writing. This supports the interpretation that Section 9 acts only where the governing provision is silent.

Policy Rationale

Section 9 reflects a compromise between flexibility and formalism: it allows informal dealings where law does not demand a written instrument, thus accommodating small or routine transactions, local practices, and party convenience. At the same time, the legislature has carved out important categories—high-value sales, major mortgages, long-term leases, gifts of immovable property, actionable claims—where formal documentation is compulsory to ensure certainty, publicity, and prevention of fraud.

conclusion

Section 9 lays down the general rule that transfer of property need not be in writing unless required by law, but in practice its operation is significantly narrowed by specific provisions of the TPA, the Registration Act, and judicial emphasis on written instruments, especially for immovable property.

9. Conditional transfer

10. Explain the rules relating to condition precedent and condition subsequent

Introduction

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 must not be void. Precedent condition means that it has to be performed for the transfer to take effect or the property to be vested.

Conditional transfer is the transfer of properties where a condition makes the existence of a right dependent on the happening or not happening of a thing. The legal effect of the transfer may vary based on the nature of the condition attached to it. There are three types of conditions: Condition Precedent, Condition Subsequent and Collateral Condition. All these conditions must satisfy the requirements of Section 25 of the Transfer of Property Act, 1882.

Section 25 of the Transfer of Property Act, 1882, states that any transfer that occurs upon the fulfillment of a condition imposed on the other party is a conditional transfer. For instance, A agrees to transfer his property to B if B gets selected for a job. The condition imposed by A for B to get a job is an example of a condition.

For a conditional transfer to be valid, the imposed condition should not be:

- 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 not be immoral or opposed to public policy.

Types of Conditional Transfer in Property Law

Condition Precedent, Condition Subsequent and Condition Collateral are two types of conditions under the Transfer of Property Act, 1882, that govern the timing of fulfilling certain conditions in a property transfer.

Condition Precedent

Section 26 of the Transfer of Property Act, 1882, defines a Condition Precedent as a condition that must be fulfilled before the transfer of property can take place. Unlike Condition Subsequent, this condition does not require strict compliance and can be considered fulfilled if there is substantial compliance.

For example, if A agrees to transfer his property to B on the condition that B obtains the consent of X, Y and Z before getting married and Z dies before giving consent, substantial compliance

may be considered if B obtains the consent of X and Y. However, if the condition is against public policy, such as in the case of **Wilkinson v. Wilkinson**, where one party was required to desert her husband for the transfer to go through, the condition would be deemed invalid.

Condition Subsequent

Section 29 of the Transfer of Property Act, 1882, defines a Condition Subsequent as a condition that must be fulfilled after the transfer of property has taken place. This condition requires strict compliance and the transfer will only happen if the condition is fulfilled.

For example, if A transfers property 'X' to B on the condition that B must score above 75 percent in his university exams, the transfer will only be finalised if B achieves the required marks. If B fails to meet this condition, the transfer will break down and the property will revert back to A.

It's important to note that for a condition to be valid, it must be lawful. If the condition is unlawful, such as in the case where A transfers property to B on the condition that B murders C, the condition will be considered void and the transfer will go through, with the property being retained by B.

Condition Collateral

Condition Collateral refers to a condition that must be fulfilled simultaneously after the transfer of property. This condition must be strictly followed for the transfer to be valid. For example, if A transfers property 'X' to B on the condition that B must maintain A's wife C for a period of 10 years, B must comply with this condition to validate the transfer. Failure to comply will result in the breakdown of the transfer and the property will not be transferred to B.

In a recent case in 2018, the Supreme Court clarified the concept of a conditional gift. If a gift is conditional and there is no acceptance or proof of acceptance and the possession of the gift remains with the donor for their lifetime without completion of the condition, the donor has the right to cancel the gift deed. This cancellation does not violate the principles of a valid property transfer.

Other Types of Conditions

Doctrine of Acceleration: (Section 27 Conditional transfer to one person coupled with transfer to another on failure of prior disposition)

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.

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.

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.

The Doctrine of Acceleration, illustrated in **Ajudhia v. Rakhman Kaur**, states that if the first condition fails, the property should pass to another person as if it was never vested in the first person. This doctrine does not apply to gift transfers unless the first transfer fails in a specified manner.

Section 28 addresses subsequent transfers that occur based on the non-occurrence of a specified event. This involves Conditional Limitation, where a condition affects any ulterior disposition of the property. If a vested property involves a condition that does not happen, the property is transferred to the ulterior disposition, which is the ultimate beneficiary.

Section 30 clarifies that the invalidity of an ulterior disposition does not affect the validity of the initial transfer. For example, if X transfers land to Y and then, after his marriage, life interest to his male offspring (which is invalid), the transfer to Y remains valid.

Section 31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen. states that a transfer where a condition of happening or non-happening of an event is applied will cease to have effect if the condition is not met. This condition is given in a negative sense, where the transferor prescribes when the transfer shall cease to have effect. The case of *Ambika Charan v. Sasitara* confirms that even collateral conditions are valid under this section.

Section 32 specifies that the conditions in Section 31 should not be invalid or prohibited by law. If a condition in an ulterior disposition is invalid, it will not affect any prior transfers, as long as the conditions in Section 25 are met.

Section 33 deals with transfers where no time is specified for the happening or non-happening of an act. The transfer ceases to have effect only when the act becomes permanently impossible.

Section 34 addresses transfers where a time is specified for the happening or non-happening of an act. If the condition is fulfilled within the prescribed time, the transfer continues to have effect; otherwise, it ceases to have effect. If the delay is caused by a person interested in the non-fulfilment of the condition, the delay is excused, as seen in the example of X transferring property to Y with a condition regarding going to the U.S. within 2 years. If Z, by playing a fraud, prevents Y from fulfilling the condition, the delay is excused.

Conclusion

Conditional transfer in property law is a fundamental concept as it allows parties to tailor property transactions to meet their specific needs and circumstances. Understanding the different types of conditions and their legal implications is essential for ensuring the validity and enforceability of property transfers. By adhering to the principles outlined in the Transfer

of Property Act, parties can navigate the complexities of conditional transfers and safeguard their property interests.

11. Write a note on rule of acceleration (6)

Rule of Acceleration under Property Law

Introduction

The **Rule of Acceleration** is an important principle under the Transfer of Property Act, 1882. It applies when a prior interest created in favour of one person fails or comes to an end, causing a subsequent interest to take effect earlier than originally intended. In simple words, when an earlier transfer becomes ineffective, the interest of the next beneficiary is "accelerated" and vests immediately.

The rule is embodied in **Section 27 of the Transfer of Property Act, 1882**.

Meaning of Acceleration

Acceleration means the **hastening of the enjoyment of a vested interest**. When a transferor creates successive interests in property and the first interest fails, the subsequent interest takes effect immediately instead of waiting for the expiry of the prior interest.

Example

A transfers property to B for life, and after B's death, to C absolutely. If B dies before A or renounces his interest before taking possession, B's life interest fails. Consequently, C's interest takes effect immediately. C need not wait until the period originally contemplated. This earlier commencement of C's interest is known as **acceleration**.

Statutory Provision – Section 27 TPA

Section 27 provides that where an interest is created in favour of one person and, by the same transaction, a subsequent interest is created in favour of another person, the subsequent interest takes effect upon the failure of the prior interest in the manner prescribed by law.

The section is based on the principle that the transferor intended the property ultimately to go to the subsequent transferee, and therefore the law gives effect to that intention as early as possible when the prior interest fails.

Essentials of the Rule of Acceleration

For the rule to apply, the following conditions must be satisfied:

1. Successive Interests Must Be Created

There must be a transfer creating:

- A prior interest in one person, and
- A subsequent interest in another person.

2. Both Interests Must Arise from the Same Transaction

The prior and subsequent interests must be created by the same transfer deed, settlement, gift, or will.

3. Failure of Prior Interest

The first interest must fail due to:

- Disclaimer or renunciation,
- Death before vesting,
- Invalidity of transfer,
- Any other legal reason.

4. No Contrary Intention

The transferor should not have expressed an intention that the subsequent interest should arise only after a specified event regardless of the failure of the prior interest.

Circumstances in Which Acceleration Occurs

(a) Disclaimer of Interest

When the first transferee refuses to accept the transfer, the subsequent interest accelerates.

Example: A transfers property to B for life and thereafter to C. B refuses the transfer. C immediately becomes entitled to the property.

(b) Death Before Vesting

If the prior beneficiary dies before the interest vests, the subsequent beneficiary obtains the property immediately.

(c) Invalid Prior Transfer

If the first transfer is void or legally ineffective, the later interest may take effect at once.

Exceptions to the Rule

The rule does not apply:

1. When Transferor Shows Contrary Intention

If the transferor clearly indicates that the subsequent interest should arise only upon the occurrence of a specified event, acceleration will not take place.

2. When the Subsequent Interest is Contingent

If the later interest depends on the fulfilment of a condition, it cannot accelerate until that condition is satisfied.

3. Where Law Expressly Prevents Acceleration

Certain statutory restrictions may prevent the application of the rule.

Importance of the Rule

1. Gives effect to the transferor's intention.
2. Prevents property from remaining without an owner or beneficiary.
3. Ensures smooth transfer of interests.
4. Avoids unnecessary delays in enjoyment of property.
5. Protects the rights of subsequent transferees.

Conclusion

The **Rule of Acceleration under Section 27 of the Transfer of Property Act, 1882** ensures that when a prior interest fails, the succeeding interest takes effect immediately unless a contrary intention appears. The doctrine promotes certainty in property transactions and gives effect to the transferor's ultimate intention regarding the disposition of property. It is therefore an important principle governing successive transfers of property in India.

12. **Write a note on “direction for accumulation” (6)**

Rule Against Accumulation

Introduction

Doctrine of accumulation is a way to restrain the enjoyment of property. Put differently, it would imply restricting the favorable use and pleasure derived from the property. The provision for Direction for accumulation is provided under **Section 17 of the Transfer of Property Act, 1882 (TPA)**.

Section 17 - Direction for Accumulation

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

- (a) the life of the transferor, or
- (b) a period of eighteen years from the date of the transfer,
- Such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

- (i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or
- (ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or
- (iii) the preservation or maintenance of the property transferred; and such direction may be made accordingly.

For Example: A transfers his property in favour of B for life with the condition/direction that the income of the said properties shall be accumulated during A's life and shall be given to C is a valid direction of accumulation.

Rule Against Accumulation

- As per **Section 11** of TPA, any condition which is repugnant to the interest created or which restrains the enjoyment of property which was transferred absolutely is void and inoperative.
- The direction of accumulation of income is a kind of condition which is contrary to the interest created or limiting the right to enjoyment in favour of the transferee to whom the property is transferred absolutely.
- **Section 17 of TPA is an exception to Section 11** as it permits a direction of accumulation of income to operate in certain cases. But Section 17 and 11 are different in terms as Section 11 is only applicable in cases of transfer of absolute interest whereas section 17 is applicable to all kinds of transfer.
- Direction of accumulation of incomes and profits of property transferred as per the terms of TPA as a separate fund means postponing the transferee's right of beneficial enjoyment of the property transferred.
- Like the postponement of vesting of interest is discouraged under Section 14 (rule against perpetuity) the postponement of transferee's right of beneficial enjoyment of property is also discouraged under **Section 17** (direction against accumulation) of the Act.
- **Section 14** fixes the maximum permissible limit for postponing the vesting of interest and **Section 17** prescribes the maximum permissible period up to which income and profits of the property transferred can be accumulated. Section 17 allows accumulation of income during either of the two following periods:
 - The life of the transferor
 - Period of 18 years from the date of transfer (whichever is longer one).
- Therefore, any direction or condition which makes accumulation of income is beyond the prescribed period shall be held void. The result will be that at the end of the last-mentioned period (permissible postponement) the property together with the incidental benefits shall go to the transferee.

Exceptions

- **Payment of Debts**
 - If the purpose of the accumulation is payment of debt incurred by the transferor or anyone having interest in property, then Section 17 shall not be applicable in that case.
- **Raising Portions**

- Raising portion means providing for a portion of income for maintenance. If the purpose of the direction of accumulation of income on the property transferred is providing maintenance to the children or remoter issue of the transferor or any other person interested in transfer.
- **Preservation of Property**
- In case the income of property was directed to be accumulated for the purpose of preservation and maintenance of the property so transferred then also section 17 will not have application.

Concept under English Law

According to the English Law of Property Act, 1925, the income may be accumulated during any of the following periods: -

- The life or lives of the transferor or transferors.
- 21 years from the death of the transferor.
- During the minority of any person living at the death of the transferor.
- During the minority of any person, who would be entitled to the property, if he was of full age.

Conclusion

The rule on direction for accumulation prevents property owners from tying up income for excessively long periods, which would deprive beneficiaries of timely enjoyment and create “dead capital”. The law strikes a balance: It permits reasonable, time-bound accumulation (life of transferor or 18 years, whichever is longer). It recognises necessary and socially useful purposes (debt payment, family provisions, and preservation of property) as valid grounds for extended accumulation. Any direction that attempts to accumulate income beyond the permissible period and outside the recognised exceptions is void only for the excess; the beneficiary then becomes entitled to the income.

UNIT II

1. Discuss the principles relating to doctrine of part performance

Doctrine of Part Performance

Introduction

The Doctrine of Part Performance is an equitable principle designed to prevent fraud and unlawful exploitation resulting from the non-registration of a document. This doctrine operates under the maxim that equity regards an action as if it has been done, which should have been done.

Essentially, the doctrine states that the transferor or any party claiming through them is barred from enforcing any rights against the transferee and those claiming under them, regarding the property that the transferee has taken possession of or continued to possess, except for rights explicitly provided for in the contract terms.

Doctrine of Part Performance

The Doctrine of Part Performance is a legal principle recognised in property law. It is a doctrine that allows for the enforcement of an oral or incomplete written contract to transfer immovable property if certain conditions are satisfied. It is based on the principle of equity and aims to prevent injustice and fraud resulting from non-compliance with formal requirements such as registration.

Under the Doctrine of Part Performance, if a person has taken possession of a property and has performed acts in furtherance of a contract for the transfer of that property, they may be protected and allowed to enforce their rights to the property. This is applicable even if the contract is not in compliance with the formal requirements of the law. This doctrine serves as an exception to the general rule that contracts for the transfer of immovable property must be in writing and registered.

Part Performance under Section 53A of TPA, 1882

The definition of the doctrine of part performance is incorporated in Section 53-A of The Transfer of Property Act, 1882.

Ingredients of Section 53-A for Doctrine of Part Performance

In the case of **Kamalabai Laxman Pathak v. Onkar Parsharam Patil**, the Bombay High Court has emphasised the requirements outlined in Section 53-A for the application of the Doctrine of Part Performance. These requirements are as follows:

Contract for Transfer of Immovable Property

The first condition for the application of the Doctrine of Part Performance is the existence of a contract for the transfer of immovable property in exchange for value.

Written Contract

The contract must be in writing. If the contract for transfer is oral, Section 53-A does not apply. In the case of **V.R. Sudhakara Rao v. T.V. Kameswari**, it was ruled that the benefits of Section 53-A cannot be claimed by a person who possesses property based on an oral agreement of sale. It is not sufficient for the contract to be in writing; it must also be duly executed, meaning it should be signed by the transferor or someone on their behalf.

Valid Contract

Section 53-A only applies to contracts that are valid in all respects. The agreement must be enforceable by law under the Indian Contract Act, 1872.

Immovable Property

This section applies solely to the transfer of immovable property. It does not extend to agreements for the transfer of movable property, even if supported by consideration. The defence of Part Performance is not available in relation to the possession of movable property (**Hameed v. Jayabharat Credit & Investment Co. Ltd and Ors.**).

Transfer for Consideration

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.”

The requirement for the application of Section 53-A is a written contract that involves the transfer of immovable property in exchange for consideration. The written contract, which serves as the basis for the possession of the property, must clearly indicate the intention to transfer the property. If the document is vague or unclear, Section 53-A cannot be applied. It is crucial that the terms of the written contract can be determined with reasonable certainty (**Hamida v. Humer and Ors.**).

Possession in Furtherance of Contract

In order to invoke Section 53-A, the transferee must have taken possession of the property or continued to possess it as part performance of the contract. Alternatively, the transferee must have undertaken some action that advances the execution 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 alone is not the only method of part performance. If the transferee is already in possession of the property, they must perform some additional act in furtherance of the contract after its execution (**Nathulal v. Phoolchand**).

Illustration:

Consider a scenario where A enters into a contract with B to sell his immovable property and allows B to take possession of the property even before the formal sale deed is executed. This contract is considered partially performed.

However, if A later refuses to fulfil his obligation of executing the proper sale document and instead files a lawsuit against B, treating B as a trespasser and seeking eviction, B can oppose A's claim. B can argue that the contract of transfer in his favour has already been partially performed and A should not be allowed to backtrack on his own agreement.

The Willingness of Transferee to Perform their Part of the Contract

Section 53-A is rooted in the principle of equity, which states that one who seeks equity must do equity. Therefore, for a person to claim the protection of their possession under Section 53-A, their own conduct must be fair and just. It is an essential requirement for the applicability of this section that the transferee demonstrates a willingness to fulfil their obligations under the contract (*Sardar Govindrao Mahadik and Anr. vs. Devi Sahai and Ors Govind*).

Scope of Doctrine of Part Performance

The Doctrine of Part Performance applies solely to written and valid contracts. It does not extend to oral or void agreements. The contract must be in writing and signed by the transferor. The transferee must have taken possession of the property as part performance of the contract and they must be prepared and willing to fulfill their obligations.

This section is applicable not only to contracts of sale but also to any contracts involving the transfer of property for consideration. It has been established in the case of *Jacobs Private Limited vs. Thomas Jacob* that the doctrine is intended to be used as a defensive measure rather than an offensive one.

The Exception to Doctrine of Part Performance

The proviso to Section 53-A of Transfer of Property Act includes an exception in favour of a transferee for consideration who has no knowledge of the contract or its part performance. This implies that a transferee who acquires the property for consideration without any knowledge of the contract or its execution is not affected by this rule.

Any rights the transferee may have against the transferor under this section would not be enforceable against a bona fide transferee for value who has no knowledge of the previous transaction.

In the case of *Hemraj v. Rustomji*, the Supreme Court held that the proviso to the section protects the rights of a transferee for consideration. In other words, any rights that the transferee may have based on the unregistered document and the part performance of the contract would not be enforceable against a bona fide transferee for value who had no knowledge of the prior transaction. The burden of proof lies on the person claiming the benefits of part performance to demonstrate that the subsequent transferee had knowledge of the previous transaction.

The Supreme Court has ruled that the right under Section 53-A is not defeated by the fact that the time for filing a suit for specific performance of the agreement of sale has expired or that the claim of acquiring title through adverse possession has been rejected, which renders the possession illegal.

The principle established in *Walsh v. Lonsdale* states that Section 53-A incorporates three principles of equity:

- (i) One who seeks equity must act equitably.
- (ii) Equity considers the intention rather than the form.
- (iii) Equity treats as completed what should have been completed.

Conclusion

The Doctrine of Part Performance, as enshrined in Section 53A of TPA plays an important role in property law in India. It provides protection to transferees who have partially performed agreements for the transfer of property, even if the agreements do not comply with formal legal requirements.

2. Explain the provisions relating to Doctrine of election

DOCTRINE OF ELECTION

Introduction

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 .”

Doctrine of Election

When a person transfers property that does not belong to him and, in the same transaction, gives some benefit to the true owner, the owner must choose (**elect**) either:

1. **To confirm the transfer**, allowing the transferee to keep the property; or
2. **To reject the transfer**, in which case the owner must give up the benefit received.

If the owner rejects the transfer, the benefit returns to the transferor or his representatives. In certain cases, the benefit may be used to compensate the disappointed transferee.

The rule applies whether the transferor honestly believed the property was his own or knew that it belonged to someone else.

A person who receives only an **indirect benefit** under the transaction is not required to make an election.

Further, a person may accept a benefit in one capacity (e.g., personally) and reject the transaction in another capacity (e.g., as a trustee).

In short: A person cannot both keep the property and retain the benefit given in exchange for that property; they must choose one or the other.

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.

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.

Conclusion

The Doctrine of Election under Section 35 requires a person to choose between two inconsistent rights arising from the same transaction. A person cannot both retain the property and enjoy the benefit granted in substitution for that property. This doctrine promotes equity, justice, and consistency in property transactions.

3. Writ a note on apportionment

Introduction

The term "**Apportionment**" means the division or allocation of a common benefit, income, burden, or liability among several persons according to their respective rights and interests. Under property law, when ownership or interest in a property changes during a period for which income or obligations arise, the law provides a mechanism for a fair distribution of such income or liabilities.

The doctrine of apportionment is contained in **Sections 36 and 37 of the Transfer of Property Act, 1882**. These provisions ensure that benefits and burdens attached to property are distributed equitably among the persons entitled to them.

Kinds of Apportionment

Apportionment is of two kinds:

- Apportionment **by time** (Section 36)
- Apportionment **by estate** (Section 37)

Apportionment by Time

- Section 36 deals with the **apportionment of periodical payments on determination of interest of person** entitled it states that—

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

- The section clearly lays down that all periodical income shall be accrued and **apportioned on a day-to-day basis**.
- This section is applicable to **inter vivos transfers** (transfer between living persons) and **does not apply** to transfers by operation of law.
- This rule can be **excluded by a local usage or a contract to the contrary**.

▪ **Illustration -**

Consider 'A' lets his property to 'C' for Rs.1000/- per month. 'C' pays the rent amount at the end of each month. 'A' sold his property to 'B' on 15th January. On 31st January C will pay Rs. 500/- to 'A' and Rs. 500/- to 'B'.

Such apportionment is **only done in the absence of any contract to the contrary**.

Object of Section 36

The purpose of this section is:

- To ensure fairness between transferor and transferee.
- To prevent unjust enrichment of either party.
- To distribute income proportionately according to ownership.
- To recognize that income accrues continuously and not merely on the due date.

Apportionment by Estate

- Section 37 deals with the apportionment of benefit of obligation on severance. It states that

When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to

several owners of the property, the corresponding duty shall, in the absence of a contract, to the contrary amongst the owners, be performed in favor of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose.

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

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

▪ **Illustration -**

- A sell 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.
- In the same case, each house in the village being bound to provide ten days' labor each year on a duke 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.

Object of Section 37

The objectives are:

- To ensure equitable distribution of liabilities.
- To prevent one owner from bearing the entire burden.
- To ensure that benefits and obligations attached to property are shared fairly.
- To protect the interests of all parties involved.

Conclusion

The doctrine of apportionment under Sections 36 and 37 of the Transfer of Property Act, 1882 ensures fairness in property transactions. Section 36 provides for apportionment by time, where recurring income is divided according to the period of ownership, while Section 37 provides for apportionment by estate, where benefits and burdens attached to property are distributed among different owners according to the value of their respective interests. Together, these provisions prevent injustice and promote equitable distribution of rights and liabilities connected with property.

4. Write a note on transfer by co-owner

Introduction

Co-ownership, also known as joint ownership or co-tenancy, refers to the ownership of a property by two or more individuals. **Section 44** of the Transfer of Property Act, 1882 (TPA), deals with **transfers by co-owners**. There are three types of co-ownership, namely, joint tenancy, tenancy-in-common and coparcenary. The co-owners have the right to use, dispose of, and possess the property.

Kinds of Co- ownership

Tenancy-in-common

- Tenants in common are those who occupy a property jointly with another person but do not specify how much of the property they own.
- Every tenant in common has a separate interest in a particular property and each may possess and use the entire property.
- In tenancy in common, co-owners can have unequal shares, and there is no right of survivorship i.e., each co-owner's share can be transferred to heirs or others.

Joint Tenancy

- Joint tenancy is a type of co-ownership in which two or more individuals own the property in equal shares at the same time.
- In joint tenancy, co-owners have equal shares and there is a right of survivorship i.e., upon the death of one co-owner, the property passes to the surviving co-owners.

Tenancy by the Entirety

- Tenancy by the entirety is a form of joint property ownership that is available only to married couples.
- In tenancy by the entirety, neither husband nor wife can transfer his or her interest in the property to a third person.

Transfer by one Co- owner: Section 44

- Section 44 of TPA states that if one of the co-owners transfers his share in the property, the transferee steps into the shoes of the transferor and becomes a co-owner with the remaining co-owners.
- The transferee will get all the rights and liabilities of the transferor, including the right to partition the property.

Rights of the Transferee

Right to Joint Possession

- Proprietary rights extend to all co-owners of a property.
- When the transferee steps into the shoes of the transferor, he acquires the right to joint possession of the property along with the other co-owners.
- The transferee can use and enjoy the property in the same manner as the transferor.

Right to Enforce Partition

- The transferee has the right to demand partition of the property.
- Partition involves dividing the property into distinct portions so that each co-owner gets a specific share.
- If the property cannot be practically divided, it might be sold, and the proceeds distributed among the co-owners.

Right to Peaceful Possession

- Each co-owner has the right to peaceful possession of property.
- Once a co-owner transfers ownership of a piece of property to the transferee, other co-owners are not allowed to interfere with the transfer until the final partition is enforced.

Right to Make Improvements

- Each co-owner is free to build on any area of his land where he is permitted to do so. However, he cannot build on any other portion of the joint property or to the detriment of the other co-owners.

Liabilities of the Transferee

▪ Subject to Existing Conditions and Liabilities

The transferee's rights are subject to the same conditions and liabilities affecting the share at the time of the transfer.

▪ Contribution to Expenses

The transferee must contribute to the expenses of maintaining and preserving the property, including taxes, repairs, and other costs, in proportion to their share.

Special Provision for Dwelling Houses

- The provision for a dwelling house falls under the exception to Section 44 of TPA.
- It states if the transferee is not a member of the undivided family and the property in question is a dwelling-house belonging to an undivided family, the transferee does not have the right to joint possession or common enjoyment of the house.
- This provision protects the privacy and exclusivity of family dwelling houses.

Case laws

- **Dorab Cawasji Warden v. Coomi Sarob Warden (1990)**, The Supreme Court restrained a suit for partition filed by the buyer of an undivided share because the circumstances showed that irreparable damage would have been caused to the family if an outsider found entry into the house.
- **Sri Ram v. Ram Kishan (2010)**, The Court held that, when any member of a joint family sells his portion of the family property which has not been marked out by partition or otherwise, the purchaser can file a suit for partition and delivery of possession of the portion to which the selling member is entitled.

Conclusion

The TPA, provides a comprehensive framework for the transfer of property by co-owners. Understanding the rights and liabilities is essential for co-owners and transferees alike. Proper legal guidance and adherence to the provisions of the TPA can help ensure that transfers are conducted smoothly, and rights are adequately protected.

5. Explain the circumstances under which creditors can set aside a transfer as fraudulent.

Fraudulent Transfer under Section 53 of the Transfer of Property Act, 1882

Introduction

The law relating to transfer of property recognises that ownership rights cannot be exercised in a manner that defeats lawful claims of others. One of the most important safeguards in this regard is contained in the Transfer of Property Act, 1882, particularly under Section 53, which deals with fraudulent transfers.

Section 53 embodies the principle of equity that a person should not be allowed to use property transactions as a means to avoid legal obligations. It addresses situations where a transferor attempts to place property beyond the reach of creditors or to deceive subsequent transferees. The provision ensures that such transfers do not operate to the disadvantage of those who have legitimate claims.

The doctrine of fraudulent transfer is therefore essential to maintain fairness, prevent abuse of legal rights, and uphold the integrity of property transactions.

Meaning and Nature of Fraudulent Transfer

A fraudulent transfer refers to a transfer of immovable property made with the intention to defeat, delay, or prejudice the rights of creditors or to deceive subsequent transferees. The essence of such a transfer lies not merely in the act of transfer but in the intention behind it.

The law does not declare such transfers void from the beginning. Instead, they are treated as **voidable**, meaning that the transfer remains valid unless it is challenged and set aside by the affected party.

Fraudulent transfers give rise to a civil cause of action. A creditor or a subsequent transferee, depending on the circumstances, may approach the court seeking to avoid the transfer. This reflects a balance between protecting innocent parties and preventing misuse of property rights.

Structure of Section 53 of Transfer of Property Act, 1882

Section 53 is divided into two distinct parts:

- Section 53(1) deals with transfers made with intent to defeat or delay creditors
- Section 53(2) deals with gratuitous transfers made to defraud subsequent transferees

Each sub-section operates in a different context but is guided by the same principle of preventing fraud.

Fraudulent Transfers to Defeat Creditors: Section 53(1) of Transfer of Property Act, 1882

Section 53(1) provides that any transfer of immovable property made with intent to defeat or delay creditors shall be voidable at the option of such creditors.

Essential Elements

For the application of Section 53(1), the following elements must be present:

- There must be a transfer of immovable property
- The transfer must be otherwise valid under law
- There must be an intention to defeat or delay creditors

The intention of the transferor is the most crucial factor. Mere transfer of property does not amount to fraud unless it is accompanied by a dishonest purpose.

Nature of the Right of Creditors

The right conferred on creditors is not automatic. The transfer is not void but voidable, which means:

- The creditor must challenge the transfer
- The court must examine the intention behind the transaction
- The transfer continues to operate unless set aside

This ensures that only genuinely fraudulent transactions are invalidated.

Transfer in Favour of a Creditor

A transfer made to one creditor in preference to others does not necessarily amount to fraud. This principle was recognised in *Mushur Sahu v. Hakimlal*, where it was held that preference to one creditor is not fraudulent unless it is shown that the transfer was intended to defeat other creditors.

This reflects the principle that a debtor may choose to pay one creditor over another, provided there is no dishonest intention.

Protection of Bona Fide Transferee

Section 53(1) protects a transferee who: acts in good faith, provides valuable consideration and has no knowledge of fraudulent intent

Such a transferee acquires valid rights in the property, and the transfer cannot be set aside against them.

Good faith implies honesty and absence of knowledge of any fraudulent purpose. Consideration must be real and lawful. This protection ensures that innocent purchasers are not penalised for the wrongful acts of the transferor.

Scope and Limitations of Section 53(1)

Section 53(1) applies only to valid transfers. It does not cover:

- fictitious transactions
- benami transactions
- transfers that are void in law

Additionally, the transfer must fall within the definition of transfer of property under Section 5 of the Act.

Family arrangements and certain informal transfers may also fall outside its scope if they do not constitute legal transfers under the Act.

Gratuitous Transfers and Subsequent Transferees: Section 53(2) of Transfer of Property Act, 1882

Section 53(2) addresses a different situation, where a transfer is made without consideration with intent to defraud a subsequent transferee.

Nature of Gratuitous Transfers

A gratuitous transfer is one where no consideration is given. Such transfers are inherently more susceptible to fraud because there is no exchange of value.

If such a transfer is made with fraudulent intent, it becomes voidable at the option of the subsequent transferee.

Exception to Priority Rule

Ordinarily, under Section 48 of the Act, priority is given to the first transferee. However, Section 53(2) creates an exception:

- If the earlier transfer is gratuitous and fraudulent
- The subsequent transferee is given priority

This protects persons who later acquire rights in the property without knowledge of the earlier fraudulent transfer.

Exclusion of Court Sale Purchasers

The term “subsequent transferee” does not include purchasers at court sales. Therefore, such purchasers cannot invoke protection under Section 53(2).

Consideration and Validity of Transfer

The concept of consideration plays a crucial role in determining the validity of transfers under Section 53.

Valid consideration includes monetary payment or legal obligations. For example, a transfer made in satisfaction of a dower debt is recognised as valid.

On the other hand, natural love and affection do not constitute valid consideration in this context. Therefore, transfers based solely on such motives may fall within the scope of fraudulent transfers.

The presence or absence of consideration often determines whether a transfer will be protected or challenged.

Exceptions to Fraudulent Transfers

Good Faith

A transfer will not be set aside if the transferee proves:

- honest intention
- absence of knowledge of fraud
- genuine purchase for value
- Good faith acts as a complete defence.

Solvency of Transferor

If the transferor remains solvent after the transfer and the transaction is supported by adequate consideration, it may not be treated as fraudulent.

The law recognises that not every transfer affecting creditors is fraudulent. The intention and financial position of the transferor are relevant factors.

Suit under Section 53 of Transfer of Property Act, 1882

Only creditors can institute a suit under Section 53. The doctrine of privity of contract applies, which restricts the right to sue to parties involved in the transaction.

The suit is generally filed in a representative capacity for the benefit of all creditors. This avoids multiple suits and ensures uniform adjudication.

A decision in such a suit is binding on all creditors, promoting judicial efficiency and consistency.

The burden of proof plays a crucial role in cases of fraudulent transfer.

The burden initially lies on the creditor to establish: the existence of a transfer and fraudulent intention behind the transfer. Once the creditor proves fraud, the burden shifts to the transferee. The transferee must then prove: good faith, purchase for value and absence of involvement in fraud

Nature of Section 53

Section 53 operates in a dual manner:

- As a sword for creditors to challenge fraudulent transfers
- As a shield for transferees to defend bona fide transactions

Landmark Cases on Fraudulent Transfer under Section 53 of the Transfer of Property Act, 1882

Karim Dad v. Assistant Commissioner, It was held that where a transaction is based on fraud and misrepresentation, no valid title can pass. A forged or fabricated document cannot confer ownership rights. This case emphasises that fraud vitiates all transactions.

Musahar Sahu v. Lala Hakim Lal, The court clarified that paying one creditor in preference to others does not amount to fraud, provided the debtor does not retain any benefit. This reinforces the principle that intention is the key determinant in identifying fraud.

Validity of Fraudulent Transfers

Fraudulent transfers are not void ab initio. Their validity depends on whether they are challenged.

- They remain valid until set aside by a court
- They are voidable at the option of affected parties
- Their validity depends on intention, consideration, and good faith

This approach balances the need to prevent fraud with the need to protect legitimate transactions.

Conclusion

Section 53 of the Transfer of Property Act, 1882 plays a crucial role in preventing abuse of property rights. It ensures that transfers made with dishonest intent do not defeat the legitimate claims of creditors or subsequent transferees.

The provision reflects a careful balance between competing interests. It protects creditors from fraudulent conduct, safeguards bona fide transferees, and maintains the integrity of property transactions. At the same time, it recognises that not every transfer affecting creditors is fraudulent.

6. Improvements made by Bonafide holder

Improvements made by bona fide holders under defective titles

Introduction

The transfer of Property Act, 1882 collaborates all the possible transactions between a transferor and a transferee. Similarly, section 51 of the 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 therefrom, 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 himself 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.

Transferee

A transferee is a person who believes himself to be the owner of the subject (immovable property) of a lawful transaction and believes himself 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.

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.

Improvements

Improvements by defective title holders does 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.

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 BansilalRathod v SumberlalSurajmal 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.

Conclusion

The improvements made by bona fide title holders in a defective title is an essential remedy available to the transferee who in good faith has made improvements to the property. Law in order to provide justice to the grieved title holder provides protection under this doctrine as

already explained above. Thus, section 51 is yet another equitable doctrine under the Transfer of Property Act, 1882.

7. Who is ostensible owner? When is transferee from an ostensible owner protected against the real owner (10)

Introduction

Section 41 of the Transfer of Property Act is a crucial provision that addresses the rights and protections of innocent third-party buyers who acquire property from ostensible owners. It introduces the concept of estoppel, which restricts the real owner from challenging the validity of a transfer if certain conditions are met. The provision emphasizes the importance of good faith and reasonable precautions taken by the transferee to ensure the transferor's authority

Ostensible Transfer

Section 41 of the Transfer of Property Act, 1882 deals with the transfer of property to someone who appears to be the owner. It states that when a person acts with the permission, whether expressed or implied, of someone who appears to be the owner of a particular immovable property, that person is considered the 'ostensible owner' of that property.

Essentials of Section 41

To apply Section 41, certain conditions must be met. Here are the necessary prerequisites:

- The person transferring the property must be the ostensible owner.
- The actual owner's consent, either expressed or implied, is required.
- The ostensible owner must receive some form of compensation in exchange for the property.
- The transferee must exercise reasonable caution regarding the transferor's authority over the property and act in good faith.
- It's important to note that this section applies only to the transfer of immovable property and not movable property.

An Exception to the 'Nemo Dat Quod Non Habet' Rule

Section 41 introduces an exception to the general principle of 'Nemo Dat Quod Non Habet,' which means that a person cannot transfer a better title to property than what they possess. Section 41 is a widely accepted exception to this principle.

For instance, if the real owner entrusts the title documents of the property to a specific person in a reasonable manner and makes that person an ostensible owner, then a third party who deals with the ostensible owner in good faith and after conducting proper investigation may acquire a valid title to the property, even against the real owner.

Transfer by an Ostensible Owner under Section 41

The term 'ostensible' refers to something that appears to be real or true. In the context of property ownership, an ostensible owner is someone who presents themselves as the legitimate owner of a property to third parties, even though they are not the actual owner.

The ostensible owner gains all the rights to the property with the explicit or implied consent of the real owner. It's important to note that the real owner is the qualified owner of the property, while the ostensible owner is the full owner without the proper qualifications.

Examples of Non-Ostensible Owners

There are certain individuals who are not considered ostensible owners. They include:

- Self-proclaimed managers or agents who claim to have authority over the property.
- Mortgagors who have a minor interest in the property and act as servants.
- Co-sharers who occupy jointly shared family property.
- Trustees or managers of idols, as idols themselves cannot provide consent.

Rights and Limitations of the Ostensible Owner

An ostensible owner, although not the real owner, may act as if they are the true owner during transactions. This right is acquired due to the real owner's intentional neglect or acquiescence, allowing the ostensible owner to exist. The concept of assigning an ostensible owner is based on a universally applicable rule of natural equity.

Protection for Third-Party Purchasers

According to this rule, if one person allows another to hold themselves out as the owner of a property and a third party purchases the property in good faith from the ostensible owner, believing them to be the real owner, the person who allowed the ostensible owner to act as such cannot later claim their secret title.

However, this rule can be overturned if the person who allowed the ostensible ownership can prove that the third party had direct notice or constructive notice of the genuine title, or if there were circumstances that should have prompted the third party to investigate and discover the true ownership.

Benami Transactions

The Benami Transaction (Prohibition) Act of 1988 addresses situations where property is transferred in someone else's name, known as a benami transaction. According to this Act, the person holding the property becomes the real owner, while the benamidar (the person in whose name the property is held) acts as a representative or trustee for the real owner.

If a property is acquired through a benami transaction and the indicia of ownership are entrusted to the benamidar, the real owner can only challenge the transfer by proving that it was done without their consent and that the buyer was aware of this fact.

Restrictions on Litigation and Claims

Under the Act, no legal suits, actions, or claims can be made to enforce any rights related to the property held benami against the benamidar or any other person claiming to be the real owner. Once the Act is implemented, the real owner cannot reclaim the property through legal means, and the argument of being the true owner is not sustainable.

Exemptions to Section 41 of the Act

However, there are exemptions where the provisions of Section 41 do not apply:

- When the person in whose name the property is held is a coparcener in a Hindu Undivided Family, and the property is held for the benefit of all coparceners.
- When the person in whose name the property is held is a trustee or holds a fiduciary position, and the property is held for the benefit of another person for whom they act as a trustee or in a similar capacity.

In these cases, the ostensible owner or benamidar does not become the real owner. Therefore, except for instances where the benamidar is a coparcener or a trustee in a fiduciary position, the provision established by Section 41 of the Act can be modified.

Factors for Determining Ostensible Ownership

The Supreme Court, in the case of **Jayadayal Poddar v. Bibi Hazara** (1974), stated that determining whether a person is an ostensible owner depends on specific facts and circumstances. The following factors should be considered:

- Who paid the price or purchasing money for the property?
- Who held possession of the property after the purchase?
- The motive behind acquiring the property in a benami manner.
- The relationship between the real and ostensible owners.
- The conduct of the parties in managing the property.
- Who had custody of the title deeds?

Requirements of Transfer by An Ostensible Owner under Section 41

To ensure a lawful transfer by an ostensible owner under Section 41, the following requirements must be met:

- The individual must be the ostensible owner of the property.
- The ostensible owner must hold the property with the express or implied consent of the real owner.
- The transferee must acquire the property from the ostensible owner in exchange for consideration.
- The transferee should exercise reasonable caution to ensure that the transferor has the authority to make the transfer, acting in good faith.

If any of these requirements are not fulfilled, the transferee will not be entitled to the benefits provided by this Section. However, if all the requirements are met, the real owner's claim to the property will be overridden.

The Transferor Must be an Ostensible Owner

Once it is established that the transfer was made with the permission of the real owner, the real owner will be prevented from making a claim on the property. This applies even if the transferee did not conduct any investigations to verify the transferor's authority, which is otherwise

necessary for this provision to apply. The key factor is that the transferor is the ostensible owner with the approval of the real owner at the time of the transfer.

Consent of the Real Owner is Essential for Ostensible Ownership

For the real owner to be barred from claiming ownership under this provision, the ostensible ownership of the transferor must have been formed, allowed, or acquiesced in by the real owner. This can be established through:

Express Consent: When the owner clearly states, either verbally or in writing, that they have no interest in the property or that another person has an interest in the property. It can also be shown through acts such as attesting a deed stating the lack of interest or getting the property registered in another person's name while disclaiming ownership. Mere inaction or silence is generally not considered consent unless there is a duty to speak or the silence is equivalent to speaking.

Implied Consent: Consent can be inferred from the actions or behaviour of the real owner. If the real owner is aware that someone else is dealing with their property and does not object, their silence or inaction may imply consent. However, it must be established that the owner was aware of their right, interest, or title to the property and provided consent despite this knowledge. If the owner was unaware of their right at the time, they are not precluded from pursuing their claim against the transferee.

The Transfer Must Involve Consideration

To benefit from Section 41 of the Act, the transferee must show that they received the property in exchange for something. There must be a quid pro quo, or something of value, involved in the transaction.

The Transferee Must Take Reasonable Precautions

According to the clause, a transfer made by an ostensible owner is not voidable if the transferee took reasonable precautions to ensure that the transferor had the necessary authority and acted with bona fide intention. The transferee may be protected under this clause if they lacked constructive knowledge of the real owner's title and had no means to investigate the true owner of the property.

Degree of Care

To determine whether the transferee had the authority to make the transfer, certain requirements to ensure a certain degree of care must be met.

Ordinary Prudence and Reasonability

The evaluation of whether the transferee took reasonable care to confirm the transferor's authority depends on the specific circumstances of each case. The test is whether the transferee acted like a reasonable person and with ordinary prudence.

Standard of Diligence

The conventional standard of diligence for determining the transferee's authority to make the transfer is by requesting and examining the title under which the transferee claims ownership. If the title document itself raises any suspicions or indicates improper ownership, further investigation is necessary.

Obvious Title

If the title is obvious, no further inquiry may be necessary. When a person appears to be in possession of the property, is documented as the owner, holds the property's title deeds, and openly discusses it with third parties, there is no reason to suspect that the third party acted with malicious intentions in dealing with them.

Impact of Lack of Reasonable Care

If the transferee lacks due care in determining the true facts, they cannot enjoy the benefits of this section.

The Transferee Must Act in Good Faith

It is crucial for the transferee to act with bona fide intent. The provision requires honesty and good faith. Merely being unaware of the actual owner's title is not enough for the transferee to claim protection under this clause. They must not turn a blind eye and hastily purchase from an ostensible owner without verifying the transferor's authority.

Registering the buyer's name in revenue papers alone does not establish them as genuine buyer. The transferee must conduct a reasonable investigation into both the transferor's title and their authority to sell the property.

Rule of Estoppel under Section 41 of the Transfer of Property Act

The rule of estoppel under Section 41 of the Transfer of Property Act establishes that when the real owner represents someone else as the owner of the property to third parties, and those parties act based on that representation, the real owner is estopped from rescinding or denying that representation.

This provision creates an estoppel rule against the real owner. Section 41 of the Act is derived from Section 115 of the Indian Evidence Act, 1872, which defines the law of estoppel. The concept was articulated by the House of Lords in **Cairncross v Lorimer (1860)** as follows: when one party represents, by words or conduct, that they will perform or abstain from a certain act, and the other party acts based on that representation, the party making the representation is bound by it.

Burden of Proof

In cases where a transferee seeks immunity under Section 41, the burden of proof rests on the transferee to demonstrate that they were dealing with an ostensible owner. They must establish that the transferor was holding themselves out as the owner of the property or that the transaction was a Benami transaction.

Furthermore, the transferee must show that they took reasonable precautions to safeguard their interests. If the other party claims to have evidence that would lead to the disclosure of the truth, the burden of proof may shift to that party if they provide a starting point for inquiry. If a person claims ownership of property that has been transferred to someone else, they must prove their claim.

The essential legal principle is that unless the true owner has done something to deceive innocent purchasers or pledgees into believing that the immediate possessor is the actual owner, the true owner's rights should be protected prima facie. The true owner would need to demonstrate that the real owner has forfeited their right to reclaim possession through their actions or omissions.

Non-applicability of Section 41

If it is not pleaded or mentioned during the proceedings that the transferor was an ostensible owner with the voluntary consent of the real owner, the plaintiff's claim for title to the property based on a transfer of land by someone other than the owner would be dismissed.

Subsequent purchasers may appeal the cancellation order on its merits, but their purchase is not protected under Section 41 of the Act. The subsequent purchaser can only seek compensation or a refund from their seller. Section 41 cannot be used to create a bona fide transferee without notice (transferee pendente lite).

Landmark Case Laws Concerning Section 41 of the Transfer of Property Act

Md. Shafiqullah Khan v. Md. Samiullah Khan (1929)

In the case of *Md. Shafiqullah Khan v. Md. Samiullah Khan (1929)*, the issue revolved around the possession and transfer of land by illegitimate sons who pretended to be the legitimate owners. The genuine heir, Shafiqullah Khan, filed a lawsuit to assert his inheritance rights, while the possessors sold the land to a third party, Samiullah Khan. The main question was whether the illegitimate sons could be considered ostensible owners under Section 41 of the Transfer of Property Act.

The lower court ruled in favour of Samiullah Khan, the third-party purchaser, stating that he had acted in good faith and was protected under Section 41. The court found that Samiullah had no knowledge of Shafiqullah's suit and believed the illegitimate sons had the title to the land, as Shafiqullah had allowed their names to remain in the revenue papers. Consequently, the court held that Shafiqullah was barred from establishing his own title.

However, the Allahabad High Court disagreed with the lower court's interpretation. They stated that the situation did not fulfill the requirements of Section 41 because ownership was not obtained with the consent, either express or implied, of the lawful owner. Therefore, the illegitimate sons were not considered ostensible owners under the provision.

Conclusion

Section 41 of the Transfer of Property Act provides protection to innocent third-party buyers who acquire property from an ostensible owner. It establishes the principle of estoppel, where

the real owner is barred from challenging the transfer if the transferee acted in good faith and took reasonable precautions to verify the transferor's authority.

The burden of proof lies on the transferee to establish their status as an ostensible owner. This provision aims to protect the interests of bona fide purchasers and ensure stability in property transactions. It serves as a safeguard against the claims of the real owner and promotes certainty in property rights.

8. Write a note on Lis pendens (6)

Doctrine of Lis Pendens and Section 52 of Transfer of Property Act

Introduction

“Lis Pendens,” when translated, means “pending suit or cause.” In this context, “Lis” signifies an action or lawsuit, while “Pendens” indicates that the matter is still awaiting resolution. This concept finds its roots in the Latin proverb “Ut pendent nihil innovetur,” which emphasizes that nothing should undergo changes or alterations while a legal case is ongoing. Section 52 of the Transfer of Property Act deals with doctrine of lis pendens.

Doctrine of Lis Pendens

The Doctrine of Lis Pendens, derived from Latin, translates to “pending litigation.” It is a legal principle that pertains to immovable property and is dealt with in Section 52 of the Transfer of Property Act, 1882, in India. This doctrine serves to protect the rights and interests of parties involved in a pending lawsuit concerning a specific property.

The doctrine of lis pendens can be defined as the legal authority, control, or jurisdiction that a court holds over the property in question during the entire duration of a lawsuit, extending until a final judgment is reached. It encompasses the set of laws, norms, and principles that govern and restrict the application of the common law maxim, which stipulates that no modifications regarding the subject of a lawsuit can be made while it remains unresolved.

The underlying rationale behind doctrine of lis pendens is to prevent the subject matter of a lawsuit from being transferred to a third party while the case is still pending. In situations involving immovable property, any transfer of ownership must comply with the court's decision, and the transferee is bound by the court's judgment.

Section 52 of Transfer of Property Act

One of the most fundamental rights of a property owner is the freedom to transfer or dispose of their property as they see fit. However, certain circumstances, such as when a legal dispute or action involving the property is ongoing, may restrict or prohibit the owner from selling or otherwise disposing of the property for a specified period.

The legal framework governing such situations is encapsulated in Section 52 of the Transfer of Property Act of 1882.

Section 52 of Transfer of Property Act of 1882 delineates conditions under which property transfers are permissible. These conditions may include instances where the court grants explicit permission or when the lawsuit itself has an element of collusion. Exceptions to the

doctrine encompass lawsuits primarily seeking monetary compensation for debts or damages, as well as those aimed at the recovery of personal property.

The Purpose of the Doctrine of Lis Pendens

The doctrine of lis pendens is essential as it prevents Transfer of the title of any disputed property without the Court's consent, there can be endless litigation, and it will become impossible to bring a lawsuit to a successful termination if alienations are permitted to prevail, and covenants are not imposed.

The 'Transferee pendente lite' is bound by the verdict just as if he were a party to the suit and the transfer shall be subservient to the result of the pending lawsuit.

Essential Conditions for Doctrine of Lis Pendens under Section 52 of Transfer of Property Act, 1882

Section 52 serves the purpose of preventing the parties involved in a lawsuit from being deprived of their interests by the opposing party while the case is still unresolved, and it is rooted in principles of equity and fairness. However, it's important to note that merely mentioning an immovable property in the lawsuit is insufficient to trigger the application of this section. What activates Section 52 is the explicit and immediate involvement of property rights in the dispute. As a result, the transfer of an immovable property is restricted only when the rights related to the property are directly and substantially contested during the ongoing lawsuit.

Furthermore, for the doctrine of Lis Pendens to apply, the lawsuit must be pursued in good faith, devoid of collusion or malicious intent. If the lawsuit is found to be tainted by collusion or ill-intent, the doctrine will not be applicable. Additionally, the lawsuit must be filed in a court with the requisite jurisdiction, whether it pertains to pecuniary or territorial jurisdiction. If the lawsuit is initiated in a court lacking the necessary jurisdiction, the principles of Lis Pendens would not come into play.

The application of the doctrine of Lis Pendens is not automatic when a lawsuit involving immovable property is initiated. Certain specific requirements must be met for this doctrine to take effect. These conditions were elucidated by the Hon'ble Justice A.N. Sen in the case of **Dev Raj Dogra v. Gyan Chand Jain**, and they consist of the following key elements:

A lawsuit or legal proceeding concerning a right to immovable property must be actively pending.

The lawsuit or proceeding should not be the result of collusion between the involved parties.

During the pendency of such a suit or proceeding, no party to the case can transfer or deal with the property in question in a way that would affect the rights of any other party involved, except with the authorization of the court. In essence, any transfer or action related to the property during the lawsuit's pendency requires court approval if it has the potential to impact the rights established by any decree or order that may be issued as part of the lawsuit.

From these guidelines and the language of the section 52 itself, it can be inferred that the necessary conditions for the application of the doctrine of lis pendens are as follows:

- There must be a pending suit or proceeding.
- The suit or proceeding must be within the jurisdiction of a competent court.
- The suit must directly and explicitly involve a right to immovable property.
- The suit or proceeding must not be collusive.
- Any transfer or action related to the property in dispute must involve a party to the suit.
- Such a transfer or action must impact the rights of the other party involved in the litigation.

In the case of **Balwant Singh v. Buta Ram**, the court held that when a situation meets all of the aforementioned requirements, the doctrine comes into effect. During a legitimate lawsuit in a court with appropriate jurisdiction, where ownership of immovable property is directly and substantially contested, the property cannot be transferred without the court's permission. If such a transfer occurs, the buyer of the immovable property will be bound by the court's ruling.

In summary, the rule of Lis Pendens under Section 52 of Transfer of Property Act applies to property transfers that pertain to a pending suit or proceeding. This includes transfers made after the initiation of the suit or proceeding and before its resolution by a party to the case as well as to third parties. If these essential conditions are not met, the rule of Lis Pendens does not apply.

Exceptions to Doctrine of Lis Pendens under Section 52 of Transfer of Property Act

While the specified conditions must generally be met for the doctrine of Lis Pendens to be applicable, there are exceptions, one of which is when a transfer is made with the court's consent. Section 52 of Transfer of Property Act, 1882, explicitly states, "except under the authority of the Court and on such terms as it may impose."

Consequently, in a lawsuit directly and explicitly involving issues related to the rights of immovable property, the court has the discretion to permit any party to dispose of the property while the case is ongoing, subject to any conditions imposed by the court. This aspect sets apart the Lis Pendens principle.

In certain situations, the court meticulously examines the facts and circumstances of each case to ensure that the rights of any parties involved are not jeopardized by such an authorized transfer. For instance, in the case of **Vinod Seth v. Devinder Bajaj**, the court, after a thorough examination of the case's facts and circumstances, determined that it was appropriate to exempt the case from the Lis Pendens doctrine, provided that security was provided. In this specific instance, upon providing a security deposit of Rs. 3,000,000, the court allowed the defendants to sell the property even while the case was still pending.

Effect of Doctrine of Lis Pendens

A transfer or action taken by a party to a lawsuit during the pendency of the suit or proceeding is not automatically void. Instead, it is only considered voidable if it has the potential to impact the rights of any other party to the suit under any decree or order that may be issued as part of the lawsuit. Section 52 of Transfer of Property Act creates a right that can be enforced to set

aside a transfer made during the pendency of the suit, as these transfers are not inherently void but rather voidable. Importantly, this voidability depends on the choice of the party affected by the ongoing proceeding, during which the transfer occurred.

In essence, the rule of *lis pendens* does not aim to invalidate or automatically void the transfer but rather places it under the purview of the litigation's outcome. According to this rule, anyone who acquires a property during the pendency of a lawsuit is bound by the judgment that may be rendered against the person from whom they acquired the title, even if such a purchaser was not a party to the lawsuit or had no prior notice of the ongoing litigation.

Conclusion

The Doctrine of *Lis Pendens* is a legal safeguard to prevent parties from disposing of property in a manner that might undermine the outcome of a pending lawsuit. It is designed to maintain the status quo of the property until the legal dispute is resolved, thereby ensuring fairness and protecting the rights of all parties involved in the litigation.

9. Write a note on priority of securities

Introduction

The concept of the doctrine of priority is regulated by the Transfer of Property Act, 1882 (TPA) under Section 48. This doctrine helps the court in determining the correct party to whom the rights are to be given priority over the other in a case where the court has conflicting interests. The need for this doctrine arises in a situation where the transferor of the property deals with the same property with two different people subsequently. Hence, this resolves the problem of the courts to a large extent.

This article explains how the conflicting interest created over a particular immovable property can be settled through the rule of priority and its applicability and exceptions under Indian laws.

Doctrine of priority

This doctrine is based on the Principles of Natural Justice which states that if the rights are made in favor of two different people at different times, then the one who has the advantage in time will also get the advantage in law. However, this principle applies only in the cases where the conflicting equities of the parties are involved are otherwise equal. The doctrine of priority under Section 48 is inspired from the legal maxim, *qui prior est tempore potior est jure* which ultimately means one who is first in time is better in law.

This Section lays down an important principle that states, no man can convey a title other than what he has. This means when a transferor transfers the same property in favor of more than one transferee, then each transferee will enjoy the property along with its right as the former transferee. Under this doctrine, if a person has already created a transfer of the property in motion, then he cannot ignore his grant and deal with the property free from the rights that were created in an earlier transaction. This Section is absolute in nature and does protect or reserve in favor of the transferee, who may not even know about the prior transfer. The

principle of the doctrine of priority explained under Section 48 is applicable where there is competition among the mortgagee by retaining title deeds and a subsequent transferee.

Essentials of the doctrine of priority

1. There ought to be one owner or transferor of the property and more than one transferee.
2. It is only applicable only to immovable property.
3. The transfer should be created at different times and at these different times there ought to be created rights to the transferee.
4. This right cannot be exercised to the fullest at the same time.

Illustration

A is the owner of the immovable property. He mortgaged that property to B in the month of August. Later, in July A transferred the same property to C. Here in this case all the essentials are satisfied and as per the rule of priority, B will get all the rights of the property prior to C. In case of default on the payment of the loan, the mortgagee can sell the property as the latter transfer is in accordance with the earlier transfer.

Effect of the document registered under doctrine of priority

Under the rule of priority, registration of the document does not affect the rights of the prior transferee. That means if the document of the prior transferee is unregistered whereas the document of the subsequent transfer is registered, still the rule of priority would be applicable to the prior transferee and not the subsequent transferee unless and until the subsequent transaction is made with bonafide intention and without the knowledge of the prior transaction. Registration does not create any right in the property. It is merely proof of intention to transfer the title of the property.

Illustration

A mortgaged property to B where the deed is unregistered and will be registered at a later point in time. Later A transfers the same property to C where the deed is registered and was made with bonafide intention without the knowledge of the previous transfer. Here B's right will have priority over C's right as the registration of the document does not affect the rule of priority.

In the case of *Duraiswami Reddi v. Angappa Reddi (1945)*, it was observed that the prior transferee would be entitled to enforce his rights though his documents were registered later. And even if the subsequent transferee's documents were registered earlier and he entered into a transaction with bonafide intention and without the knowledge of the previous transaction, still he is not entitled to the prior rights. It was also held that the result of the above case was implied and was a direct impact of the fused operation of Section 47 of the Registration Act and Section 48 of the Transfer of Property Act. It was concluded that the right of priority of

the earlier transferee would be adjourned only if the latter transferee established any detailed incidents such as fraud, esstoples, or gross negligence.

The Court was also of the opinion that if a document earlier registered should be considered and prevailed over the document registered later then it would be an advantage for the vendors and the subsequent transferee to enter into a transaction within the prescribed time for registration of the earlier document and get the new deed registered immediately and thus defeat the first transferee under the earlier deed.

Exceptions to the doctrine of priority

Postponement of prior mortgagee (Section 78)

Section 78 of the Transfer of Property Act is an exception to the doctrine of priority. According to this Section, if the prior mortgagee creates some fraud, gross negligence, or misrepresentation and induces any person to give security money for the same property, then the prior mortgagee is postponed to the subsequent mortgagees. Hence, the subsequent mortgagee will have priority in the rights of the property over the prior mortgagee.

For example, A mortgages a property to B, subsequently, A also mortgages the same property to C. C unaware of the previous transaction inquires about any debts (if any) in the property with B. B fraudulently conceals his mortgage due to which B advances money for the same to A. Here, though B is the prior mortgagee since B has committed fraud, his prior rights are postponed.

Non-compliance with the procedure of law in prior transfer

If the prior transfer is created non-complaining to the procedure laid down by the law, then such subsequent transfer would be given all the rights prior to the previous transfer. For example, A executed a lease deed of immovable property in favor of B for 5 years but did not get it registered which was mandatory. Later, A sold the same property to C. Here the rights of C would be given preference over B.

Estoppel

In this case, if the first transferee knew about the subsequent transfer, then the subsequent transferee will get the priority. This is an exception to the rule of priority. In this exception, it is not necessary that the first transferee should know the exact contents of the transfer.

By registration

Every instrument starts its operation from the date of its execution. In cases where subsequent deeds are carried out on the same date and the order of execution is unknown, then all the deeds will be carried out at the same time. And in cases where two deeds consist of different dates

and are registered on different days, then the priority, in this case, will depend upon the dates on the deeds and not on their respective registered dates.

By notice

The presence of notice means being familiar with the facts. Therefore, when a *bona fide* contract, whether oral or written, is created for the sale of property, and further the third party buys the property concerning the notice of the earlier transfer, the title of the party claiming under the previous transfer would get the priority over the subsequent purchaser. But the transfer that has been created in time must be *bona fide*.

Section 50 of the Registration Act also provides various classifications of the registered document which is related to the immovable property to draw effect against the unregistered document. Hence, in cases where the holder of the registered deed had notice of the earlier unregistered deed, at the time of execution, it gives the registered deed of the subsequent holder a priority because of his deed over the previous holder of an unregistered deed for not being ought to be registered.

By court

When the court orders or passes a decree to take the subsequent transfer or the second transfer, then such transfer would prevail over the prior transfer and the rights of the subsequent transfer would be given preference. Thus, the rule of priority will not be applicable in such cases.

Case laws on the doctrine of priority

In the case of *ICICI Bank v. SIDCO Leather (2006)*, the Apex Court has discussed in detail, the *inter se* priority amongst the secured creditors of a company in case of liquidation. The Court held that the Parliament is deemed to consider the terms of Section 48 of TPA. According to the said provision, the claim of the first charge holder shall be given priority over the claim of the second charge holder, to be realized from the property that belongs to the mortgagor, the first charge holder will be repaid first. The Court also opined that the specific provision provided under the general statute shall prevail in all the cases, where the special statute does not include any particular provision for the contractual and other statutory rights among different kinds of the secured creditors

SFL Industries Ltd. v. Reliance Capital Ltd. (2015)

In this [case](#), the court ordered the petitioner company to wind up on the recommendation of the Board of Industrial and Financial Reconstruction (BIFR). The question that arose, in this case, was whether the provision of the Companies Act shall have the effect of the doctrine of priority which includes whether the claim of the first charge holder would prevail over the claim of the second charge holder. The court held that there is no specific provision for the right of priority in the Companies Act. In such cases, the rule of priority under Section 48 of the Transfer of

Property Act can be made applicable. Hence, in the present case, the court ordered that the claim of the first charge holder would prevail over the claim of the second charge holder.

Conclusion

Section 48 determines the priority when there is more than one transferee. It safeguards the rights of the first transferee in absence of a special contract or reservation. It describes the essential principle that no person can carry their rights and titles better than himself. Thus, the transferor cannot harm the rights of the transferee by making any further transactions with the property. It cannot ignore the rights created by the earlier transfer. Also, the rule of priority has expanded its scope of relevance to the Registration Act and Insolvency and Bankruptcy Code.

UNIT III

1. Define mortgage and explain its various kinds (10)

Introduction

The Transfer of Property Act encompasses a comprehensive framework for mortgages, which play a crucial role in real estate transactions. A mortgage allows individuals to secure loans by offering their immovable property as collateral. However, not all mortgages are the same, as they can vary regarding rights, obligations, and legal implications. There are different types of mortgages defined under the Transfer of Property Act.

Mortgage Under Transfer of Property Act

A mortgage is a legal transaction that involves transferring an interest in a specific immovable property to secure the repayment of a loan, whether it is an existing debt or one that may arise in the future. The party who transfers the property is the mortgagor, while the recipient of the property and lender of the loan is called the mortgagee.

The amount of money borrowed, including any accrued interest, is called the mortgage money. Property transfer is typically formalized through a document called a mortgage deed. In summary, a mortgage is a means for individuals to obtain a loan using their property as collateral, with defined roles and terms for the parties involved.

Types of Mortgage Under the Transfer of Property Act

1. Simple Mortgage [Section 58(b)]

Section 58(b) describes a type of mortgage called a simple mortgage. In a simple mortgage, the mortgagor promises to personally repay the loan without giving possession of the property to the mortgagee.

The mortgagor also agrees that if they fail to repay, the mortgagee has the right to sell the property and use the proceeds to pay off the loan.

The key elements of a simple mortgage are:

1. The mortgagor agrees to personally repay the loan.
2. The property is not given to the mortgagee.
3. The mortgagor transfers the right to sell the property if they fail to repay it as security for the loan.

A critical aspect of a simple mortgage is the mortgagor's personal obligation to repay the loan. This obligation can be explicit or implied from the terms of the transaction when the loan is accepted. However, in certain cases, like a usufructuary mortgage, the terms of the mortgage transaction may change this obligation.

In a simple mortgage, the mortgagor retains possession of the property. The mortgagee's security is solely based on the property itself, not on any income or profits it generates. If a simple mortgagee seeks to enforce their security, they cannot obtain a possession decree according to Section 68. Instead, it would convert the simple mortgagee into a mortgagee with possession.

The mortgagee has the right to sell the property if the mortgagor fails to repay the loan. However, this power of sale requires court intervention. This means that the mortgagee must obtain a court decree to execute the sale. Once the property is sold through the court, the mortgagee receives the advanced money with interest, and the remaining proceeds go to the mortgagor.

To create a simple mortgage, a registered document is necessary. Even if the loan amount is less than 100 rupees, Section 59 states that a registered instrument is required for a simple mortgage.

In case the mortgagor fails to repay the loan on time, the mortgagee has two remedies available:

1. The mortgagee can sue the mortgagor personally to recover the money owed. This results in a simple money decree.
2. The mortgagee can also seek a court order to sell the mortgaged property and recover the money. This leads to a decree for the sale of the property.

However, the mortgagee can combine both actions in a single lawsuit. They can sue the mortgagor personally and request a court decree for the sale of the property. It's important to file the lawsuit within 12 years from the due date of the loan or mortgage money.

In the case of **Mathai Mathai v Joseph Mary**, a specific property was used as collateral security for stridhan, with the mortgagor being responsible for paying interest towards the loan repayment. However, the mortgage deed did not include any provision regarding the delivery of possession. As a result, the court determined that this particular deed should be classified as a simple mortgage.

2. Mortgage by Conditional Sale [Section 58(c)]

Section 58(c) explains the concept of a mortgage by conditional sale. In this type of mortgage, the mortgagor appears to sell the property to the mortgagee, but there is a condition attached to the sale. If the mortgage money is not repaid by a certain date, the sale becomes absolute, or if the payment is made, the sale becomes void, or the buyer transfers the property back to the seller. This condition must be stated in the same document that affects the sale.

The basic elements of a mortgage by conditional sale are:

- The mortgagor ostensibly sells the property to the mortgagee.
- There is a condition attached to the sale, specifying the consequences based on repayment or default.
- The condition must be included in the same document.

It's important to note that a transaction will not be considered a mortgage if the condition is not mentioned in the document affecting the sale.

The inclusion of the proviso under clause (c) of Section 58 brought about a significant change. It stated that a transaction would be deemed a mortgage by conditional sale only if the condition is embodied in the document that affects or purports to affect the sale. This amendment emphasized that the provision of repurchase must be included in the original sale deed itself rather than having separate documents for the sale and conditions of reconveyance.

The parties' intention is crucial in determining the nature of the transaction. If the written words of the deed contradict one's claim, evidence needs to be produced before the court to establish the intention of the parties.

In a mortgage by conditional sale, the mortgagor has no personal liability to repay the debt, and the mortgagee cannot include the mortgagor's other properties in this transaction. This type of mortgage is an exception to the general rule of "No Debt, No Mortgage."

Upon breach of the condition, the sale deed itself is executed, and the transaction becomes an absolute sale without further accountability between the parties. The mortgagee does not possess the property but has qualified ownership that may become absolute in case of default.

The remedy available to the mortgagee is foreclosure, which can only be obtained through a court decree. The mortgagee can file a decree for foreclosure when the mortgagor fails to repay the amount on time, and the sale becomes absolute.

In the case of **Tamboli Ramanlal Moti Lal v Gharchi Chimanlal Keshavlal**, the court emphasized that for a mortgage to be classified as a mortgage by conditional sale, the existence of the debt must be inferred from the conditions explicitly mentioned in the mortgage deed. The conditions should clearly indicate an absolute ostensible sale in the event of default in payment, as well as the return of the property upon payment prior to or on the prescribed date. If the mortgage deed does not reflect a debtor-creditor relationship or lacks these essential conditions, it cannot be considered a mortgage by conditional sale.

3. Usufructuary Mortgage [Section 58(d)]

Section 58(d) explains the concept of a usufructuary mortgage. In a usufructuary mortgage, the mortgagor either delivers possession of the property to the mortgagee or binds themselves to deliver possession.

The mortgagee is authorized to retain possession until the mortgage money is paid and to receive the rent and profits from the property. The mortgagee can use these rents and profits in place of interest or payment of the mortgage money, either fully or partially.

The basic elements of a usufructuary mortgage are:

- The mortgagor delivers possession of the property to the mortgagee or binds themselves to do so.
- The mortgagee is authorized to retain possession and receive the rent and profits from the property.
- The mortgagee can use the rent and profits as a substitute for interest or payment of the mortgage money, either fully or partially.

Delivery of Possession

The mortgagor provides possession of the property to the mortgagee as security for the mortgage money. The mortgagee retains ownership of the property until the debt is paid. The actual delivery of possession may not occur at the time of executing the mortgage deed but can be agreed upon through an express or implied undertaking by the mortgagor.

Rent and Profits

The mortgagee is entitled to receive the rents and profits generated by the mortgaged property until the mortgage money is repaid. The manner in which the rents and profits are appropriated depends on the terms of the mortgage deed. The mortgagee can use the rents and profits in lieu of interest, principal, or both. The specific terms dictate when the mortgagor can regain possession.

No Personal Liability of the Mortgagor

In a usufructuary mortgage, the mortgagor is not personally responsible for repaying the mortgage money. The mortgagee must utilize the rents and profits from the property to satisfy the mortgage money. The duration of the mortgage is not limited since it is difficult to predict when the debt will be fully repaid.

Mortgagee's Remedies

If the mortgagor fails to deliver possession of the property, the mortgagee can sue for possession or to recover the advanced money. However, if the mortgagee has already been given possession, their only remedy is to retain the property until the debts are satisfied. The usufructuary mortgagee does not have the right of foreclosure or sale. The mortgagee has the advantage of repaying themselves using the rents and profits.

Rights of Usufructuary Mortgagor

Under Section 62, a usufructuary mortgagor has the right to recover possession of the property from the mortgagee in certain cases. These cases include when the mortgagee was authorized to pay themselves the mortgage money from the rents and profits, and the mortgage money is paid, or when the terms for payment of the mortgage money have expired. The mortgagor pays the money to the mortgagee or deposits it in court.

In the case of **Prabhakaran v M Azhagiri Pillai**, the mortgagor transferred the interest in his property to the mortgagee, granting the mortgagee the authority to retain possession and enjoy the rents and profits until the debt is fully realized. The court ruled that in a usufructuary mortgage, the mortgagor bears no personal liability beyond this arrangement.

4. English Mortgage [Section 58(e)]

Clause (e) of Section 58 describes an English mortgage. In an English mortgage, the mortgagor agrees to repay the mortgage money on a specific date and transfers the property to the mortgagee. However, there is a provision that the mortgagee will re-transfer the property to the mortgagor upon full payment of the mortgage money as agreed.

The basic elements of an English mortgage are:

- The mortgagor commits to repaying the mortgage money on a certain date.
- There is an absolute transfer of the property to the mortgagee.
- The transfer is subject to the condition that the mortgagee will re-transfer the property to the mortgagor upon full payment of the mortgage money on the agreed date.

In an English mortgage, the mortgagor transfers full ownership of the property to the mortgagee as security. The mortgagee will return or re-transfer the property to the mortgagor once the agreed-upon mortgage money is fully repaid.

Personal Liability

In an English mortgage, the mortgagor is personally liable to repay the mortgage debt by the agreed-upon date. The agreement to repay is a crucial aspect of this type of mortgage.

Remedy Available

If the mortgagor defaults on payment, the mortgagee can sell the mortgaged property to recover the debt. Often, borrowers engage a finance broker to navigate the mortgage market and secure the most favourable terms.

No Absolute Interest

While the property is transferred absolutely to the mortgagee, it is subject to the provision of re-transfer if the mortgagor repays the mortgage money. Therefore, the mortgagee has an interest in the property but with the right of redemption.

In an English mortgage, when the mortgagor transfers the property to the mortgagee, two circumstances may arise:

Mortgagor repays the amount: If the mortgagor repays the agreed-upon amount to the mortgagee on the specified date, the property that was transferred absolutely will be reconveyed to the mortgagor.

Mortgagor defaults on payment: If the mortgagor fails to repay the amount on the specified date, the mortgagee has the right to sell the property and recover the debt. However, the mortgagor is personally liable for repaying the debt.

Rights of the Mortgagee

In an English mortgage, the mortgagee has the right to possession, even if the right of entry is not explicitly stated. The mortgagee can retain possession until the full amount is repaid. If the mortgagee is in possession and receiving profits from the property, those profits will be used to reduce the mortgagee's dues.

For example, if B, the mortgagor, sells the property to A through a sale deed, and B defaults on payment, A only needs to register the sale deed as they have been given absolute rights over the property.

5. Mortgage by deposit of title deeds (Equitable Mortgage) [Section 58(f)]

Section 58(f) describes a mortgage by the deposit of title deeds. In this type of mortgage, a person in specific towns, such as Calcutta, Madras, and Bombay, or in any other town specified by the State Government, delivers documents of title to immovable property to a creditor or their agent with the intention of creating a security on the property.

In English Law, this type of mortgage is referred to as an "equitable mortgage" as it involves the deposit of title deeds without additional formalities or a written document.

This type of mortgage provides flexibility to the business community when there is an urgent need to raise funds before the opportunity to prepare a mortgage deed arises. This mortgage does not require a written document and is not affected by registration laws since it is an oral transaction.

The basic elements of a mortgage by the deposit of title deeds are:

- Existence of a debt.
- Deposit or delivery of the title deeds.
- The intention that the deeds will serve as security for the debt.

Territorial Restrictions

It's important to note that this type of mortgage can only be made in specific areas designated by the State Government and not everywhere in India. The restriction applies to the location where the deeds are delivered, not the situation of the property being mortgaged. Depositing the deeds beyond the specified area will not create a mortgage or a valid security.

Existence of Debt

The debt can be an existing one or a future obligation. The transfer of an interest in any property to secure the payment of money, either advanced or to be advanced, or to fulfil an existing or future debt, or to perform any obligation resulting in a pecuniary obligation is considered a mortgage. Clause (f) provides one way of creating a mortgage, which is the equitable mortgage by the deposit of title deeds.

Deposit of Title-Deeds

Physical delivery of the documents is not necessary; constructive delivery is sufficient. A valid equitable mortgage does not require all the title documents to be deposited, but the deposited deeds should be genuine, relevant to the property, and serve as material evidence of title. Suppose a title deed is not included in the deposited documents and there are other documents that establish the person's title to the property, but they are not deposited. In that case, an equitable mortgage is not created.

Intention to Create Security

The essence of the transaction lies in the intention that the title deeds will serve as security for the borrowed money (debt). Simply handing over the title deeds from one person to another does not create a mortgage. The delivery of the deeds must fulfil the agreement that they will serve as security for the debt.

The intention to create security is factual, determined on a case-by-case basis through presumptions and evidence, whether oral, documentary, or circumstantial. It is a question of fact, not a question of law.

In the case of **United Bank Of India v Messra Lekharam Sonam and Co**, the court established that the submission of the title deed relating to the property is the essential requirement for it to be considered as security. No further requirements or formalities are necessary to create a valid mortgage. This ruling emphasizes the importance of the title deed as the primary element in establishing the security for a mortgage.

6. Anomalous Mortgage [Section 58(g)]

Clause (g) of Section 58 defines an anomalous mortgage as a mortgage that does not fall into the categories of a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds.

The purpose of including clause (g) was to recognize and protect various customary mortgages that exist in different regions of the country. An anomalous mortgage is essentially a combination of two or more types of mortgages.

The rights and liabilities of the parties involved in an anomalous mortgage are determined by their contractual agreement as stated in the mortgage deed. Additionally, local usage and customs may also influence the rights and liabilities to the extent that the contract does not cover them.

An anomalous mortgage is created through an agreement between the mortgagor and the mortgagee based on their terms and conditions. It is termed "anomalous" because it does not

fit into the established categories such as simple, usufructuary, mortgage by conditional sale, and so on.

For example, an anomalous mortgage could involve a combination of a usufructuary mortgage and a mortgage by conditional sale. In this case, the mortgagee is given possession of the property for a specific period with a condition that if the debt is not repaid, the mortgage will be treated as a mortgage by conditional sale. This creates a situation where the mortgage is both usufructuary and by conditional sale, making it an anomalous mortgage.

The remedy available in an anomalous mortgage depends on the terms of the mortgage agreement. If the agreement allows for it, the mortgagee has the right of both “foreclosure” and “sale.” If the debt is not repaid, the mortgagee can become the property owner through foreclosure or sale, as specified in the agreement.

In the case of **Hathika v Puthiya Purayil Padmanathan**, the mortgagor borrowed a specific amount from the mortgagee and also handed over the property as security. According to the terms of the agreement, the mortgage amount was supposed to be repaid within a period of 6 months. In the event of non-payment, the mortgagee had the right to sell the property and recover the amount. Although the document described it as a usufructuary mortgage, the court classified it as anomalous. The court reasoned that the mortgage exhibited characteristics of both a simple mortgage and a usufructuary mortgage.

Conclusion

Understanding the various aspects of mortgages is essential for both borrowers and lenders. The different types of mortgages are simple mortgages, mortgages by conditional sale, usufructuary mortgages, English mortgages, mortgages by deposit of title deeds, and anomalous mortgages. They offer different rights and obligations to the parties involved. The right of redemption is a key aspect of mortgages, allowing the mortgagor to reclaim the property upon repayment of the mortgage money.

7. Write a note on subrogation (6)

DOCTRINE OF SUBROGATION

introduction

The term “Subrogation” means substitution. Any individual other than mortgagor or co-mortgagor, who having interest in the mortgaged property and who redeems the mortgage, is entitled to be substituted in place of mortgagee. In other words, the person who pays off the debt amount of mortgage, steps into the shoes of mortgagee(creditor) This is called subrogation or substitution of that person in place of mortgagee for purpose of redemption, foreclosure or sale.

By the Amendment Act of 1929, doctrine of subrogation under Section 92 had been included in the Transfer of Property Act. Before this amendment, only the principles of equitable doctrine of subrogation existed and were applied in India. In **Bisseswar Prasad v. Lala Sarnam Singh (1910) 6 Cal. LJ 134**, the nature and scope of the doctrine of subrogation was explained by the Calcutta High Court in the following words :

“The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend upon the privity of contract, express or implied, except in so far as equity may be supposed to be imported into transaction and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice,”

Kinds of Subrogation:

Section 92 of the Transfer of Property Act, 1882, provides for two kinds of subrogation : (i) Legal Subrogation and (ii) Conventional Subrogation.

Legal Subrogation:

Paragraph 1 of Section 92 deals with legal subrogation. Any person (apart from the mortgagor) who has an interest in the mortgaged property or in the equity of redemption, is entitled to be subrogated in place of mortgagee. Such kind of people have legal or statutory right of being substituted in place of mortgagee for purposes of redemption, foreclosure or sale. Legal right of subrogation arises by operation of law.

Under Section 92 legal subrogation may be claimed by following persons :

- (a) Puisne mortgagee
- (b) Co-mortgagor
- (c) Surety
- (d) Purchaser of equity of redemption

(a) Puisne mortgagee:

Where the same property is mortgaged successively in favour of several persons, all such persons are entitled to redeem their respective prior mortgage. A puisne or subsequent mortgagee is entitled to redeem his prior mortgage by making payments. When he does so he takes the place of that prior mortgagee. In other words, in between the mortgagees of the same property, every subsequent mortgagee has right to be substituted in place of prior mortgagee by discharging the debt due to such prior mortgagee.

Illustrations

- (i) A mortgaged X to B in 1990.
- (ii) A mortgaged X to C in 1991.
- (iii) A mortgaged X to D in 1992.

Here, the last mortgagee D can redeem the (i) mortgage executed in 1990 by making payments to B. Where D discharges the debt due to B he (D) is entitled to be substituted in place of B for all purposes of redemption, foreclosure or sale, Further, it may be noted that D can redeem the first mortgage without redeeming mortgage (ii) which is immediately prior to him. Accordingly, when D redeems mortgage (iii) he has all the rights not only against mortgagor (A) but also C who is mortgagee in 1991, prior to him.

(i) A mortgages X to B for Rs. 5000.

(ii) A mortgages X to C for Rs. 3000.

(iii) A mortgages X to D for Rs. 2000.

In this illustration B is first mortgagee and C and D are the subsequent mortgagees. For C, B is prior mortgagee. For D, B and C both are prior mortgagee. Under Section 92, D who is third mortgagee, can redeem mortgage (i) by making payment of Rs. 5000 to B. When D pays Rs. 5000 to B he (D) shall be subrogated for all purposes of redemption, foreclosure or sale in place of B. In other words, D shall step into the shoes of B, i.e., become first mortgagee instead of the third mortgagee. There are two effects of such subrogation. First, as against mortgagor (A), D shall be treated as first mortgagee and A would enforce redemption against D. Secondly, as against C, D shall get priority over C. Accordingly, if C wants to enforce his mortgage he (C) must pay Rs. 5000 to D.

Subrogation is the right of every subsequent mortgagee. Therefore, subrogation may be claimed not only by any one mortgagee. Other subsequent mortgagee has equal right of being subrogated.

(b) Co-mortgagor:

Co-mortgagor is co-debtor. In the debt secured by a mortgage, he is a sharer of the debt and his property is a part of the whole mortgaged property. Hence, he would only be liable to the extent of his own share of debt. But, if apart from redeeming his own share, he pays off also the share of other mortgagor, he would be entitled to be subrogated in place of such mortgagor.

(c) Surety:

In a mortgage, there may be an individual who stands as surety for repayment of loan in case mortgagor defaults to do so. Such surety would be liable to redeem the mortgage under Section 91. Under Section 92, when the surety of mortgagor redeems the mortgage, he is substituted to the rights of the creditor, That is to say, where surety pays off the debt to the creditor (mortgagee) the surety stands in the shoes of that creditor.

(d) Purchaser of Equity of Redemption

The purchaser of equity of redemption is also entitled to be legally substituted or subrogated. But, this subrogation may give rise to some confusion. It is important to note that equity of redemption has been regarded as 'property' of mortgagor which he may assign or sell. The purchaser of such equity of redemption becomes 'owner' of this property in place of seller (mortgagor). But, in the transaction of mortgage, can he be treated as mortgagor? If yes, he shall become mortgagor who under Section 92 has no right of subrogation. If the answer is no, then how can he get back the money which he spent in purchasing the equity of redemption? This confusion was removed by the Courts by introducing the principle of intention. It has been laid down by the Courts that in such cases the intention of the purchaser of equity of redemption is simply to keep the mortgage alive. Such purchaser neither intends to become owner of the mortgaged property not even a mortgagor.

Conventional Subrogation:

Paragraph 3 of Section 92 deals with conventional subrogation. Conventional subrogation comes into the play when any person who is stranger to mortgage, advances money to the mortgagor under an agreement that he would be substituted to the rights of mortgagee if mortgagor pays off the mortgage from such money. The person who advances money to the mortgagor for redemption need not be interested in the mortgage; he may be stranger to the transaction. But, he must provide money to the mortgagor only for redemption and for no other purpose and for this, there will be an agreement in writing and registered between him and the mortgagor that when the debt is paid off from that money, such stranger would be stepped into the shoes of mortgagee. In the absence of any such agreement there cannot be subrogation of a person merely because mortgage was redeemed from the money advanced by him.

Conclusion

Subrogation is an equitable doctrine embodied in Section 92 of the Transfer of Property Act, 1882. It prevents unjust enrichment and protects persons who discharge mortgage debts by allowing them to enjoy the rights and remedies of the mortgagee whose debt has been paid.

8. Clog on the right of redemption (10)

9. Discuss the mortgagors right of redemption

10. Once a mortgage is always a mortgage (6)

Redemption of Mortgage and Clog on Redemption

Introduction

The law relating to mortgage under the Transfer of Property Act, 1882 recognises that a mortgage is not an absolute transfer of ownership. It is only a transfer of a limited interest in immovable property as security for a debt. The ownership substantially remains with the mortgagor, subject to the rights of the mortgagee.

One of the most important features of a mortgage is the right of redemption. This right ensures that the mortgagor can recover the property after repayment of the loan. Closely connected with this is the doctrine of clog on redemption, which prevents any restriction that defeats or unreasonably limits this right.

These two concepts form the foundation of mortgage law and ensure fairness between the mortgagor and the mortgagee.

Meaning of Mortgage

Section 58 of the Transfer of Property Act, 1882 defines a mortgage as the transfer of an interest in specific immovable property for securing the payment of a loan, existing or future debt, or performance of an obligation giving rise to pecuniary liability.

- The **mortgagor** is the person who transfers the interest and takes the loan.
- The **mortgagee** is the person who advances the loan and receives the interest in the property as security.

The amount secured, including principal and interest, is called **mortgage money**, and the instrument effecting the transfer is known as the **mortgage deed**.

Rights of the Mortgagor

The Transfer of Property Act provides several rights to the mortgagor under Sections 60 to 66. These rights are essential to maintain balance between the parties.

Some important rights include:

- Right to redeem the mortgaged property (Section 60)
- Right to transfer interest to a third party (Section 60A)
- Right to inspect title documents (Section 60B)
- Right to redeem separately or simultaneously (Section 61)
- Right to recover possession in usufructuary mortgages (Section 62)
- Rights relating to accession and improvements (Sections 63 and 63A)
- Power to lease (Section 65A)

These rights ensure that the mortgagor retains control and interest in the property despite the mortgage.

Right of Redemption

The right of redemption is the right of the mortgagor to get back the mortgaged property upon repayment of the mortgage money. It is both a **statutory right** and an **equitable right**.

This right arises from the principle that a mortgage is only a security and not a transfer of ownership. Therefore, once the debt is repaid, the mortgagor must regain full ownership of the property.

Statutory Basis of Right of Redemption: Section 60 of the Transfer of Property Act

Section 60 provides that at any time after the principal money becomes due, the mortgagor has the right, upon payment or tender of the mortgage money at a proper time and place, to require the mortgagee to:

Deliver Documents

- Return the mortgage deed
- Hand over all documents relating to the mortgaged property

Deliver Possession

- If the mortgagee is in possession, restore possession of the property

Re-transfer Property

- Re-transfer the property to the mortgagor or a third person as directed
- Execute and register an acknowledgement extinguishing the mortgagee's rights

This right continues unless it is extinguished by:

- Act of the parties, or
- Decree of a competent court

A suit filed to enforce this right is known as a **suit for redemption**.

When Does the Right of Redemption Arise

The right of redemption arises:

- After the **principal money becomes due**
- Upon fulfilment of conditions in the mortgage deed
- Even after default, subject to legal limitations

In *Sampuran Singh v. Niranjana Kaur (1999)*, the Supreme Court held that where no restriction exists in the mortgage deed, the right to redeem arises from the very date of the mortgage.

Equity of Redemption

The concept of **equity of redemption** is an important extension of the right of redemption. It means that even if the mortgagor fails to repay on the exact due date, the right to redeem continues.

Key features include:

- The right survives **default in payment**
- It cannot be taken away by **contractual terms**
- It ensures fairness and prevents unjust enrichment

This principle protects the mortgagor against harsh or oppressive conditions.

Partial Redemption

As a general rule, partial redemption is not allowed. A person having interest in only a part of the mortgaged property cannot redeem that part alone by paying a proportionate amount.

However, an exception exists where the mortgagee has acquired the share of a mortgagor. In such cases, redemption of that portion may be permitted.

Redemption Clause in Mortgage Deed

A redemption clause specifies the manner and time within which redemption can be exercised.

Typical clauses may include:

- Period for which possession is given to the mortgagee
- Obligation to repay after expiry of a fixed term
- Requirement to execute a release deed upon repayment

However, such clauses must not restrict or defeat the right of redemption. If they do, they may be treated as invalid.

Doctrine of Clog on Redemption

A clog on redemption refers to any condition or provision in a mortgage which prevents, restricts, or makes it difficult for the mortgagor to exercise the right of redemption.

Such conditions are considered **void** because they are contrary to the fundamental principle of mortgage law.

Principle: “Once a Mortgage, Always a Mortgage”

The maxim ‘once a mortgage, always a mortgage’ sets out a legal principle applicable to all mortgage transactions. This maxim denotes that a mortgage cannot be made irredeemable and any provision inserted to make it so irredeemable shall be void to that extent and will operate bad in law. The mutual rights of mortgagor and the mortgagee provide for a peculiar position of the parties to the transaction. The Right to Redemption which is available to the mortgagor, provides a right to claim back his property. It is basic right of mortgagor under the mortgage transaction. The mortgage transaction is a secondary transaction to facilitate the principal transaction. It is never intended to transfer the property. The maxim states that the original nature of mortgage transaction never changes. It continues to be a mortgage. Once a mortgage transaction is created then it continues to be a mortgage transaction. The right of redemption is available to him in future. His right of redemption is not defeated for technical reasons. Hence it is regulated by the maxim ‘once a mortgage, always a mortgage’. Thus, stating that the true nature of mortgage never changes.

A mortgage is always redeemable. And a mortgagor’s right to redeem shall neither be taken away nor be limited by any contract between the parties. The phrase also means that a mortgage would remain a mortgage and it cannot by the unilateral act of mortgagee be converted into a sale. For instance, if no period was fixed for redemption of a usufructuary mortgage when it was created, mortgagee would not become owner simply for efflux of time due to non-redemption and mortgagor’s suit for redemption would be proper.

There are four basic principles to which the law of mortgage is subject to in India which are as follows:

A mortgage in essence is a borrowing transaction, and has to be viewed as such unless contrary is proved. A mortgagor is a person who is in need of money, while the mortgagee is a party who has the money and it is presumed that the conditions that prevent the mortgagor to redeem his property or penalise him are inserted in the contract at the behest of the mortgagee.

Any condition that penalise the mortgagor in the event of non-payment of loan would be termed as a clog on his right of redemption and would be void. Such condition can validly be ignored by the mortgagor and would not be enforced by any court. And a condition that the property would be forfeited in the event of default in payment of money is a penalty.

The Supreme Court has observed in various instances that the doctrine of clog on the equity of redemption is a rule of justice, equity and good conscience. It is a right of the mortgagor to get back the subject of the mortgage and to hold and enjoy the same as he was entitled so to do before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that, and has always been termed as a clog. Such a clog is inequitable. Under

Section-60 of the TP Act, it is provided that, at any time after the principal money has become payable, the mortgagor has a right to redeem. Whether a particular condition operates as a clog or not depends upon the facts and circumstances of the case. For example, A condition imposed in the mortgage deed that if the mortgagor is not able to repay the loan by 10 years from the date of execution of the mortgage deed, he would not be entitled to redeem the same and would have to sell the land to the mortgagee, would be a clog on his right of redemption and hence void.

In *Santley v. Wilde (1899)*, it was observed that any provision inserted to prevent redemption upon repayment of the debt is a clog on the equity of redemption and is therefore void.

This principle was reaffirmed in *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit (1989)*.

Rationale Behind the Doctrine

The doctrine is based on considerations of:

- Justice and fairness
- Protection against exploitation
- Unequal bargaining power

The mortgagee often occupies a stronger financial position, and the mortgagor may be in urgent need of funds. Courts intervene to ensure that the mortgagor is not unfairly deprived of property.

In *U. Nilan v. Kannayyan*, it was held that hardship of one party cannot be used as an opportunity for exploitation by the other.

Situations Constituting Clog on Redemption

Condition Converting Mortgage into Sale

A clause stating that on default the property shall become the absolute property of the mortgagee is a clog.

In *Ganga Dhar v. Shankar Lal (1958)*, such a condition was held invalid as it deprived the mortgagor of the right to redeem.

Similarly, in *Meherban Khan v. Mekhna*, a condition converting mortgage into sale upon default was held to be a clog.

Long-Term Redemption Restrictions

A long-term mortgage is not automatically a clog. However, if the period is excessive and coupled with oppressive conditions, it may amount to a clog.

In *Vadilal Chhaganlal v. Gokaldas Mansukh*, a 99-year mortgage with additional burdens was held to be a clog.

In *Ramkhillawan Ashwasi v. Mullo*, an unusual condition fixing repayment after 80 years was treated as a clog.

Renewal Clauses and Postponement

A clause requiring renewal of the mortgage or postponing redemption unreasonably is a clog.

In *Sheo Shankar v. Parma*, a subsequent agreement preventing redemption until repayment of another loan was held invalid.

Unreasonable Penalties

Penalty clauses become a clog when they are excessive or oppressive.

Examples include:

- Charging compound interest unfairly
- Charging interest from an earlier date than default

However, a high rate of interest alone does not amount to a clog unless it is coupled with unfair advantage.

Collateral Benefits Extending Beyond Mortgage

A mortgagee may enjoy certain benefits during the subsistence of the mortgage. However, such benefits cannot extend beyond redemption.

In *Noakes & Co. v. Rice*, a condition requiring exclusive sale of products to the mortgagee was held valid only during the mortgage period.

In *Bhimrao Nagojirao Patankar v. Sakharam Sabajikathak*, a condition allowing permanent possession to the mortgagee was held to be a clog.

Restrictions on Mode of Redemption

Conditions restricting how redemption may be carried out may also be invalid.

In *Kuddi Lal v. Aisha Begam*, requiring redemption through transfer rather than payment was considered a clog.

Limitation Period for Redemption

The limitation period for filing a suit for redemption is governed by the Limitation Act, 1963.

In *Bandhrau Ram v. Sukh Ram (2000)*, it was held that where no time is fixed for repayment, the limitation period for redemption of immovable property is **30 years** under Article 61.

Extinguishment of Right of Redemption

The right of redemption can be extinguished only in the following ways:

- By act of parties (for example, valid sale after redemption period)
- By decree of a competent court

Until such extinguishment, the right continues to exist and remains enforceable.

Conclusion

The right of redemption is an inseparable and fundamental feature of a mortgage. It ensures that the mortgagor retains the ability to reclaim the property upon repayment of the debt. This right is protected both by statute and by equitable principles.

The doctrine of clog on redemption acts as a safeguard against any attempt to defeat this right. Courts consistently strike down conditions that restrict or take away the right to redeem, thereby upholding the principle that a mortgage is only a security.

11. Write a note on charges (6)

Charge under Section 100 of the Transfer of Property Act, 1882

Introduction

Charge is a concept which is defined under Section 100 of Transfer of Property Act, 1882 .A charge is an interest or a right which is created over an asset or a property. It can be either on immovable property like land or building or on movable property like a car, gold etc.

“Charge” as defined in TPA, 1882

Section 100 of the TPA, 1882 defines charge as, “Where immovable property of one person is by an act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

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

Essentials Of a Valid Charge

There are certain essentials which need to be fulfilled to create a valid charge.

Immovable property

- The charge must be created against an immovable property which can be a current or future property belonging to the borrower.

It is nothing but a device to create security which can be enforceable in court. To create charge against immovable property, it is necessary that it should be in written form. The most essential thing to be kept in mind is that there must be a **clear intention to** use the property as a security for the payment of the money.

- A charge cannot be created if the immovable property is not owned by the person from whom the payment is due.

For example- A wife sought for the creation of a charge on house property in a maintenance suit. The court held that since the property was neither constructed nor owned by the husband, no charge can be created against such property.

Does not amount to a Mortgage

- A charge is not a mortgage as there is no transfer of property nor any right is transferred but a personal obligation is created or a right to payment out of a specified property is generated.
- It has been specifically mentioned in section 100 that a charge doesn't amount to mortgage, although all the provisions which apply to a simple mortgage shall also be applicable to charge. In simple mortgage, the mortgagor is not required to give the possession of his property to the mortgagee. Under a mutual agreement, it is decided that if the mortgagee fails to pay the money within the prescribed time period, then the property can be sold as per the law. There is a transfer of an interest in the property in a simple mortgage, but there is no such transfer in a charge. Despite this difference, the section says that "The provision hereinbefore contained which apply to a simple mortgage shall, so far may be, apply to charge."
- A charge is a wider term as it also includes a mortgage i.e. every mortgage is a charge but not every charge is a mortgage.

The Calcutta High Court held that:

"If an instrument is expressly stated to be a mortgage and gives the power of realization of the mortgage money by the sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge."

The charge created by an act of parties

- The parties themselves create a charge by entering into an agreement. No particular form of words or language is required to create a charge.

It will be sufficient to create a charge if it can be seen from the document that there is a clear intention to use the property as a security for the payment of the money, without transferring any interest or right in the property.

The remedy of the holder of the charge is against the property charged only.

For example- A inherited a property from his grandmother. He receives a certain amount of rent from that property. Now on his own volition, he executed an agreement to pay a certain portion of the rent to B. B will have a charge over the said property.

In the said transaction A doesn't owe any money to B nor does B have any right over the rent accruing from that property. But by entering into an agreement for payment of some amount to B, A by his own act has created a charge over the property which can be duly enforceable by B if A fails on his part.

Charges arising by operation of law

- A charge can also be created by the operation of law. It means the charge is created without the will or intention of the parties, but the law enforces them to comply with certain obligations.

For example- B made full payment of purchase money to A in advance. But A is neither transferring the property nor registering it in the name of B. A charge will be created by the operation of law over the said property in favour of B.

Exception

Section 100 provides two exceptions under which no charge can be created. They are as follows:

1. The charge which is created on an immovable property which is also a trust property in favour of a trustee for incurring expenses in the execution of his trust i.e. maintaining the trust property.

For example- A and B entered into an agreement for the transfer of a property with a condition that B will maintain A's grandson C, from the rent occurring out of the said property until C turns 18. The expenses incurred by B will be a charge upon the trust property, but this charge cannot be enforced by selling the said property as it would lead to the destruction of the trust which is prohibited under Section 32 of Trust Act.

B can only be reimbursed from the income coming out of such property and can stop any further disposition of the property until his expenses are paid.

2) A property upon which a charge had been created is brought by a person in consideration without having any notice of the said charge, then such charge cannot be enforced against him.

Types of Charge

Fixed Charge

- The charge is created over ascertainable assets i.e. land, building, machinery, goodwill, copyright etc.
- At the time of the creation of the charge, there is a clearly specified and defined property, the identity of which doesn't change during the period of the loan.
- In such an arrangement, the borrower is only left with the possession of the asset and the lender has full control over the asset.
- The borrower doesn't have the right to sell, transfer or dispose of and prior permission is required.
- There is an obligation to pay off the due amount first.

Floating Charge

- The charge is created over unascertainable assets i.e. assets, vehicles, debtors, etc.
- It is dynamic in nature i.e. the value and quantity fluctuate periodically.
- The borrower has the right to sell, transfer or dispose of and no prior permission is required.
- No obligation to pay off the due amount first.

Crystallization is a process in which the floating charge is converted into a fixed charge. It generally occurs when:

- The borrower defaults on payment and the lender takes action to recover the debt.
- At the time of winding up of the company.
- The company ceases to exist or carry on the business.
- Appointment of a receiver by court.

Registration of Charges

Difference between Mortgage and Charges

A mortgage is a legal process whereby a person borrows money from another person and secures the repayment of the borrowed money and also the payment of interest at the agreed rate, by creating a right or charge in favour of the lender on his movable and/or immovable property.

According to Section 58 of the Transfer of Property Act, “*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 future debt, or the performance of an engagement which may give rise to a pecuniary liability.*”

NO.	CHARGE	MORTGAGE
1.	Defined in section 100 of the Act.	Defined under section 58 of the Act.
2.	Interest is created in the property for the payment of the debt and there is no transfer of any interest.	It involves the transfer of ownership interest in an immovable property.
3.	It is created either by an act of parties or operation of law.	It can be created by an act of parties.
4.	Registration is compulsory only when it is created by the act of the parties.	Registration must be under the Transfer of Property Act. It is compulsory.
5.	Time is infinite and can continue forever.	Time is fixed in a Mortgage.
6.	Personal liability is created only when a charge is created by an agreement.	There is a creation of personal liability unless excluded by an express contract.
7.	Right in personam i.e. enforceable against a person.	Right in rem i.e. enforceable against the world.
8.	It can be in oral and written form.	It must be in writing.

Conclusion

Hence, every mortgage is a charge but not every charge is a mortgage. A charge is an interest created over an immovable property for securing payment of the amount which is due to the party. The property is not transferred to the lender and only interest is created. It is neither a lien nor a mortgage but some properties of both are present in a charge.

12. Mortgagees' rights of foreclosure (6)

INTRODUCTION:

A mortgage is not just a financial relationship but also a legal relationship between the mortgagor and mortgagee under the governance of the Transfer of Property Act, 1882, Section 58. When a person buys a property like a house using a loan and keeps the property itself as collateral to secure the loan is known as a mortgage.

Mortgages are not mere technicalities. In India, they touch everyday lives. A farmer may mortgage his fields to secure a loan for seeds. A middle-class family may pledge their flat to a bank to buy a new home. Even large corporations mortgage land to raise money for business expansion. In each case, the property is not just a piece of land or a building—it is often someone's livelihood.

The mortgagor is the borrower who keeps their property as collateral as security for the loan and the mortgagee is the lender of the loan who provides the funds and keeps a legal interest in the property until the loan is fully repaid, the mortgagor retains possession and the use of the property, while the mortgagee has the right to foreclose and sell the property to recover their money if the mortgagor fails to make payments; a legal process that ends the borrower's rights to reclaim their property.

FORECLOSURE OF MORTGAGES

Imagine you kept your house for a loan. If you repay on time, the house is yours. But if you default on paying and the court passes a foreclosure decree, the lender becomes the outright owner, and you lose the last thread of ownership. This power is given to the mortgagee under Section 67, Transfer of Property Act, 1882. In *Narandas Karsondas vs S.A. Kamtam & Anr*, (1976) SCR (2) 341, the Supreme Court emphasised that the mortgagor's rights to redeem do not end until the judge specifically states it as extinguished. The rights of redemption are not lost just because the repayment period has expired.

Foreclosure is not allowed in all mortgage types; it depends on the specific mortgage and its terms, as well as the jurisdiction's laws. In the Transfer of Property Act, foreclosure is generally only permitted for certain types, like mortgage by conditional sale or an anomalous mortgage, while it is not available for simple mortgage, usufructuary mortgages, or English mortgages, where the remedy is typically a suit for sale instead.

Mortgage types where foreclosure may be allowed:

1. Mortgage by Conditional Sale: In this type of Mortgage, if the mortgagor defaults, the sale becomes absolute. The remedy in this case is foreclosure, which ends the mortgagor's right to redeem the property.

2. Anomalous Mortgage: An anomalous mortgage is a mortgage that is not a simple mortgage or a mortgage by conditional sale. The right to foreclosure may be available in such a mortgage if the terms of the agreement and the nature of the property permit it.

Mortgage types where foreclosure is not allowed:

1. Simple Mortgage: In a simple mortgage, the mortgagee does not take possession of the property. The remedy available is not foreclosure but to sue for the sale of the mortgaged property or to proceed against the mortgagor personally.
2. Usufructuary Mortgage: In this case, the mortgagee is entitled to take possession and enjoy the usufruct (profits) of the property until the debt is satisfied. Neither foreclosure nor sale is permitted.
3. English Mortgage: In an English mortgage, the mortgagee's primary right is the right of sale of the property, not foreclosure.

RIGHTS OF THE MORTGAGEE UNDER THE TRANSFER OF PROPERTY ACT, 1882

The Transfer of Property Act, 1882 (TPA) lays down a structured scheme of rights available to a mortgagee in Sections 67, 68, 69, 70, 72, and 73

- Section 67 – Right to Foreclosure or Sale: The most significant right of the mortgagee is the right to foreclose or to sell the mortgaged property. Foreclosure means the mortgagee can seek a decree in court that permanently bars the mortgagor from redeeming the property. This is most relevant in cases of mortgage by conditional sale or in anomalous mortgages where foreclosure is expressly provided.

Sale, on the other hand, allows the mortgagee to have the property sold through the court and recover the loan amount from the proceeds. This is more common in mortgages like English mortgages. However, there are restrictions. For instance, in a usufructuary mortgage (where the mortgagee enjoys the rents and profits), the mortgagee cannot foreclose or sell because repayment comes from the enjoyment of the property.

In *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit* (1989) 1 SCC 458, the Supreme Court warned that foreclosure is a “drastic” remedy and courts must not allow it to be used oppressively.

- Section 68 – Right to Sue for Mortgage Money
Normally, the mortgagee looks to the mortgaged property as security. But sometimes the mortgagee may sue the mortgagor personally for the loan amount. Section 68 provides this right in four specific scenarios:
 - When the mortgagor has expressly bound himself personally to repay the money.
 - When the mortgagee is deprived of his security due to the mortgagor's wrongful act.
 - When the mortgagee is entitled to possession but the mortgagor fails to deliver it.
 - When the mortgaged property is destroyed or the security rendered insufficient by the wrongful act or default of the mortgagor.

This section recognises that security alone may not always be sufficient.

In *Narandas Karsondas v. S.A. Kamtam* (1976) 2 SCR 341, the court underlined that the right to sue for money is separate from foreclosure or sale, although both remedies cannot be exercised at the same time.

- Section 69 – Right of Sale without Court Intervention

This provision is somewhat exceptional. Generally, the mortgagee needs to approach the court for foreclosure or sale. Section 69, however, allows sale without court intervention in limited circumstances:

- In case of an English mortgage, provided the mortgagor is not a Hindu, Muslim, or Buddhist.
- Where the mortgagee is the Government and the mortgage deed provides for such power.
- Where the property is situated in Bombay, Calcutta, or Madras, and the deed expressly confers the power.

This right is exercised only if there is a clear default in repayment; even then, it requires strict compliance with statutory safeguards.

In *Narandas Karsondas v. S.A. Kamtam* (1976) 2 SCR 341, the Supreme Court held that the mortgagor's right of redemption continues until the actual completion of sale by a registered deed, underscoring the primacy of the right to redeem.

- Section 70 – Right to Accession

If the mortgaged property gains an accession—meaning an addition, natural increase, or improvement—during the subsistence of the mortgage, the mortgagee is entitled to it as part of the security. The logic is simple: the mortgagee should be able to rely not just on the original property but also on any future accretions which enhance the value of the security.

- Section 72 – Right to Spend Money on Mortgaged Property and to Add to Security

A mortgagee is not merely a passive recipient of security. Section 72 empowers him to take active steps to preserve and protect the mortgaged property.

- Payment of government revenue, taxes, or public charges.
- Repairs and preservation of the property.
- Supporting the mortgagor's title if it is under challenge.
- Preventing the property from being destroyed, forfeited, or sold.

Any amount spent becomes a charge on the mortgaged property, carrying interest at the same rate as the mortgage money.

In *Tarak Chandra v. Anukul Chandra* (AIR 1946 Cal 118), it was held that such sums spent by the mortgagee form part of the mortgage money and are recoverable.

- Section 73 – Right to Proceeds of Revenue Sale or Compensation.

Sometimes the mortgaged property may be acquired compulsorily under land acquisition laws, or it may be sold in recovery of arrears of revenue. In such cases, Section 73 ensures that the mortgagee's interest is protected by giving him a right to the compensation or surplus proceeds in place of the property.

In ^[9]*Prithi Nath Singh v. Suraj Ahir* (AIR 1963 SC 1041), the Supreme Court upheld that mortgagees are entitled to compensation when mortgaged land is compulsorily acquired.

CONCLUSION

Foreclosure is not just about legal power; it is about responsibility and rights mentioned under the law. It reminds us that property law weighs both creditors' security and the debtor's humanity. As India's economy grows and reliance on credit deepens, this balance will remain vital. It is crucial to protect such lenders from loss while ensuring borrowers are not crushed under the weight of default.

13. Explain the doctrine of marshalling and contribution in mortgage (10)

Doctrine of Marshalling and Contribution

Introduction

The Transfer of Property Act, 1882 lays down important principles governing transactions relating to immovable property. Among these, the doctrines of **Marshalling and Contribution**, embodied under Sections 56, 81 and 82, play a crucial role in regulating rights and liabilities in mortgage transactions.

These doctrines are based on equitable principles. They aim to ensure fairness between different parties such as mortgagors, mortgagees, subsequent mortgagees and purchasers. In transactions involving multiple properties and multiple claims, these doctrines help prevent unjust enrichment and ensure that no party is unfairly burdened.

While both doctrines deal with mortgage debts, they operate differently. Marshalling focuses on protecting subsequent mortgagees or purchasers, whereas contribution deals with equitable sharing of liability among mortgagors. Importantly, in cases where both doctrines come into conflict, the law gives precedence to marshalling.

Concept of Mortgage

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of a loan or the performance of an obligation. The person who transfers the interest is known as the **mortgagor**, and the person in whose favour the transfer is made is called the **mortgagee**.

Mortgage transactions often involve more than one property or more than one party. In such situations, conflicts may arise regarding which property should be used to satisfy the debt or how the burden of repayment should be distributed. The doctrines of marshalling and contribution address these issues.

Doctrine of Marshalling

The term “marshalling” means arranging or regulating. In the context of mortgage law, it refers to arranging securities in such a way that the rights of different parties are protected.

The doctrine of marshalling is based on the principle that if a creditor has access to multiple funds or properties for the recovery of debt, the creditor should not exercise this right in a manner that prejudices another person who has access to only one of those funds.

This doctrine is recognised under:

- **Section 56** – Marshalling by subsequent purchaser
- **Section 81** – Marshalling by subsequent mortgagee

Marshalling under Section 56

Section 56 deals with marshalling in favour of a subsequent purchaser.

It applies when:

- An owner mortgages two or more properties to a creditor, and
- Subsequently sells one or more of those properties to another person.

In such a situation, the purchaser is entitled to require that the mortgage debt be satisfied out of the properties that have not been sold to him. This right is subject to any contract to the contrary.

However, this right cannot be exercised in a way that prejudices the rights of the mortgagee or any other person who has acquired an interest in the property for consideration.

Illustration

If a person mortgages properties X and Y and later sells property X to a purchaser, the purchaser can insist that the mortgage debt be satisfied from property Y first.

Marshalling under Section 81

Section 81 deals with marshalling in favour of subsequent mortgagees.

It applies when:

- A mortgagor mortgages two or more properties to one mortgagee, and
- Subsequently mortgages one or more of those properties to another mortgagee.

In such a case, the subsequent mortgagee has the right to require that the prior mortgage debt be satisfied out of the properties not mortgaged to him.

This right is also subject to a contract to the contrary and cannot be exercised to the prejudice of prior interests.

Illustration

If properties X, Y and Z are mortgaged to A, and later property X is mortgaged to B, B can require that A recover the debt from Y and Z first. Property X will be used only if the other properties are insufficient.

Judicial Explanation of Marshalling

The doctrine of marshalling has been explained in important cases.

In **Aldrich v. Cooper (1803)**, Lord Eldon stated that where one creditor has access to two funds and another creditor has access to only one, the court will arrange the securities in such a manner that the latter is not prejudiced.

In **Barnes v. Rector**, a mortgagor mortgaged properties A and B to one creditor and later mortgaged A to one person and B to another. The court held that the earlier mortgage would be apportioned between both properties, and the surplus would go to the respective subsequent mortgagees.

These cases highlight that marshalling is based on fairness and aims to protect parties with limited security.

Essential Elements of Marshalling

The doctrine of marshalling operates only when certain conditions are satisfied:

- There must be a **common mortgagor**
- There must be **two or more properties**
- There must be **two or more claimants**, such as mortgagees or purchasers
- The right must not prejudice the rights of **prior mortgagees or third parties**
- The doctrine is **subject to a contract to the contrary**

These conditions ensure that the doctrine is applied equitably and does not interfere with existing legal rights.

Doctrine of Contribution

The doctrine of contribution is embodied in **Section 82** of the Transfer of Property Act, 1882.

It provides that when multiple properties are mortgaged to secure a single debt, each property must contribute towards the repayment of that debt in proportion to its value.

This doctrine is based on principles of equity, justice and good conscience. It ensures that the burden of repayment is shared fairly among all parties involved.

Contribution in Case of Multiple Owners

When properties belonging to two or more persons are mortgaged for a common debt:

- The mortgagee has the right to recover the entire debt from any one property,
- However, the person whose property is used to discharge the debt can claim contribution from other co-mortgagors.

Illustration

If X, Y and Z mortgage their properties for a loan, and the creditor recovers the entire amount from X's property, X can require Y and Z to contribute their respective shares.

In **Kampta Singh v. Chaturbhuji**, it was held that a person who pays off a common mortgage debt is entitled to call upon others to bear their proportionate burden.

Contribution in Sequential Mortgages

Contribution also applies in situations involving multiple mortgages over time.

Where:

- One property is mortgaged first for a debt, and
- Later, that property along with another property is mortgaged for another debt, both properties are liable to contribute to the second debt, after adjusting for the earlier mortgage.

Case Law

In **Bohra Thakur Das v. Collector of Aligarh**, the Privy Council held that even if one property is exhausted in satisfying the first mortgage, the burden of the second mortgage must still be shared proportionately.

However, in **Sesha Iyer v. Krishna Iyenger**, the court denied contribution because the party seeking it failed to take necessary steps to protect the property. As a result, no right to contribution arose.

Rules Governing Contribution

The doctrine of contribution is governed by certain principles:

- The mortgaged properties must belong to **two or more persons**
- The mortgage must secure a **common debt**
- Each property is liable to contribute **in proportion to its value**
- The doctrine applies **in absence of a contract to the contrary**

These rules ensure equitable distribution of liability.

Difference Between Marshalling and Contribution

The doctrines of marshalling and contribution differ in their nature and application.

- **Nature of Right:** Marshalling is a right available to subsequent mortgagees or purchasers, whereas contribution relates to the liability of mortgagors.
- **Purpose:** Marshalling aims to protect parties with limited security, while contribution ensures equitable sharing of debt.
- **Application:** Marshalling applies where a creditor has access to multiple funds, whereas contribution applies where multiple properties secure one debt.
- **Beneficiaries:** Marshalling benefits subsequent claimants, whereas contribution benefits co-mortgagors.

Which Doctrine Prevails?

A significant issue arises when both doctrines apply simultaneously.

The **proviso to Section 82** clearly provides that the right of marshalling prevails over the right of contribution. Courts have also recognised that the right of contribution is controlled by the right of marshalling.

Reason for Supremacy of Marshalling

The reason for giving precedence to marshalling lies in equity.

Marshalling protects a party who has limited security and prevents unfair loss. It allows such a party to require that debts be satisfied from other available properties first.

Only after the right of marshalling has been exercised does the doctrine of contribution come into operation.

Illustration

If a mortgagor mortgages properties X and Y to one creditor and later mortgages only X to another creditor, the second creditor can require the first creditor to proceed against Y first. If the debt remains unpaid, contribution principles may then apply.

Conclusion

The doctrines of marshalling and contribution are essential components of mortgage law under the Transfer of Property Act, 1882. Both doctrines are based on equitable principles and aim to ensure fairness in transactions involving multiple properties and parties.

Marshalling protects subsequent mortgagees and purchasers by regulating the order in which properties are used to satisfy debts. Contribution ensures that the burden of repayment is shared proportionately among mortgagors.

In cases of conflict, the law gives priority to marshalling, recognising the need to protect parties with limited security before enforcing equitable sharing of liability.

14. Distinguish mortgage by conditional sale and sale with a condition to repurchase (6)

Difference Between 'Mortgage By Conditional Sale' & 'Sale With Condition Of Retransfer'

Introduction

Mortgage by conditional sale occupies a unique position in Indian property law. Although the term “mortgage” is widely understood in everyday parlance as the securing of a loan against an immovable property, the legal framework reveals a much more nuanced picture. Among the six types of mortgages recognised under Section 58 of the Transfer of Property Act, 1882, mortgage by conditional sale is particularly interesting due to its ostensible appearance as a sale, while fundamentally serving as a mechanism to secure a debt.

Legal Framework under Section 58 of the Transfer of Property Act

Section 58 of the Transfer of Property Act (TPA) provides the statutory definition and classification of mortgages in India. This section delineates six distinct types of mortgages:

1. Simple mortgage,
2. Mortgage by conditional sale,
3. Usufructuary mortgage,
4. English mortgage,
5. Mortgage by deposit of title deeds, and
6. Anomalous mortgage.

The focus of this discussion is on mortgage by conditional sale, which is specifically defined under sub-section (c) of Section 58. The sub-section provides that the mortgagor ostensibly sells the mortgaged property on certain conditions which relate to the repayment of the mortgage money. The conditions outlined are as follows:

- On default of payment of the mortgage money by a specified date, the sale becomes absolute.
- On the contrary, if payment is made as agreed, the sale becomes void.

- Alternatively, the condition may require that, on making the payment, the buyer (mortgagee) shall transfer the property back to the seller (mortgagor).

Furthermore, a critical proviso states that the transaction shall not be deemed a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. This requirement is essential in distinguishing mortgage by conditional sale from an outright sale or a sale with a condition to repurchase.

Mortgage by Conditional Sale

Mortgage by conditional sale is an intriguing legal construct. At first glance, the transaction appears to be a sale of immovable property. However, a closer inspection reveals that the underlying intention is to secure a loan. In other words, while the document may carry the form of a sale deed, it is executed with the precondition that the transaction's effect is contingent upon the repayment of the mortgage money.

The transaction operates on one of the following conditions:

- **Default Condition:** If the mortgagor fails to pay the agreed mortgage money by a predetermined date, the sale automatically becomes absolute, and the property is transferred in full to the mortgagee.
- **Repayment Condition:** Should the mortgagor repay the mortgage money as agreed, the sale is rendered void, thereby allowing the property to revert to the original owner.
- **Transfer Back Condition:** In some arrangements, even if the payment is made, the buyer is contractually obligated to transfer the property back to the mortgagor.

This mechanism ensures that the mortgagee's right over the property is not immediately absolute; it is subject to the fulfillment of a condition that protects the mortgagor's interests should the loan be repaid in time.

The Concept of Ostensible Sale

The term "ostensible sale" is key to understanding mortgage by conditional sale. Ostensible, or apparent, sale implies that while the transaction is executed as a sale, its true nature is different. Both parties enter the transaction with the full knowledge that the primary purpose is to secure a debt rather than to facilitate an outright transfer of property.

In such transactions, the sale deed is structured in a manner that mimics a conventional sale, complete with details of consideration and transfer of possession. However, the embedded conditions, which stipulate that the transaction will either revert or become absolute depending on the repayment of the debt, are what demarcate it as a mortgage by conditional sale. The ostensible sale is thus a façade that conceals its real purpose—a legal device to secure a creditor's interest in the property without immediately transferring complete ownership.

Essential Elements of Mortgage by Conditional Sale

For a transaction to qualify as a mortgage by conditional sale under Section 58(c) of the TPA, several essential elements must be satisfied:

Ostensible Sale of Immovable Property

The transaction must present itself as a sale. This appearance is deliberate and is used to facilitate the security of the loan.

Conditional Clause

The sale is subject to one or more conditions that determine whether the transaction will become absolute or void. These conditions typically revolve around the repayment of the mortgage money within a specified period.

Embodiment in a Single Document

The condition or conditions must be incorporated in the same document that effects or purports to effect the sale. This is a critical requirement, as separate documentation for the reconveyance or repurchase cannot convert the transaction into a mortgage by conditional sale.

Existence of a Debt Relationship

The underlying fact that a debt exists between the parties is implicit in the transaction. The primary purpose of the transaction is to secure this debt, not to effectuate a permanent transfer of property.

Limitation of Liability

Importantly, the liability under such a mortgage is limited to the property itself, rather than extending as a personal liability against the mortgagor. This aspect ensures that the security is confined to the property and does not expose the mortgagor to additional risks beyond the loss of the property.

In Vithal Tukaram Kadam v. Vamanrao Sawalaram Bhosale, The court ruled that the transaction was essentially a conditional sale, as the buyer was aware of the obligation to reconvey the property upon repayment of the loan.

In Rajamma (Smt.) v. B. Renuka Murthy, This case involved a family property sold for the settlement of a prolonged debt. The possession was transferred along with an undertaking to execute a sale deed upon full repayment. The Supreme Court affirmed that the transaction was not an outright sale but a mortgage by conditional sale with an option to repurchase.

Conditions and Documentation

The efficacy of mortgage by conditional sale rests on the precise drafting of the sale deed. The condition – whether it is to render the sale absolute on default or void on repayment – must be clearly and unambiguously stated in the document. The importance of embedding this condition in the same document cannot be overstated.

The amending act of 1929 introduced the proviso that mandates the inclusion of the conditional clause in the document purporting to effect the sale. This requirement prevents any ambiguity regarding the nature of the transaction. In cases where the condition is included in a separate document, courts have been inclined to view the transaction as an outright sale or a sale with a condition to repurchase rather than a mortgage by conditional sale.

For instance, in *Sunil v. Aghor*, the existence of separate documents – a sale deed and a reconveyance deed – led the court to conclude that the overall transaction did not qualify as a mortgage by conditional sale. The clear takeaway from such cases is that the holistic nature of the transaction is determined by the singularity of the document and the clarity with which the conditions are set out.

Comparison with Sale with Condition to Repurchase

A significant area of legal debate in this field revolves around the distinction between mortgage by conditional sale and sale with condition to repurchase. While both transactions involve a condition related to the retransfer of property, the fundamental nature of the two is different.

- **Mortgage by Conditional Sale:** In this arrangement, the transaction is underpinned by a debtor-creditor relationship. The mortgagor transfers an interest in the property as security for a loan. The transaction is contingent upon the repayment of the debt, and the transfer of property is merely an incidental effect of the security arrangement. The liability is confined to the property itself, and the condition embedded in the sale deed governs whether the transaction will result in an absolute sale.
- **Sale with Condition to Repurchase:** Here, the transaction involves the complete transfer of property rights, except for a personal right to repurchase that exists as a contractual option. Unlike a mortgage by conditional sale, there is no underlying secured debt relationship between the parties. The sale is final, subject only to the repurchase clause which does not create any security interest over the property.

The courts have been consistent in emphasising that the existence of a debt and the intention to secure it are the hallmarks of a mortgage by conditional sale. The repurchase option in a sale with condition to repurchase does not serve the same function and, therefore, the two must be distinctly treated in legal analyses.

Conclusion

Mortgage by conditional sale is a sophisticated legal instrument that straddles the line between a sale and a mortgage. Its ostensible sale structure, coupled with conditions that reflect the secured nature of the transaction, distinguishes it from an outright sale or a sale with a condition to repurchase. The inclusion of conditional clauses in the same document is a critical requirement that ensures the true nature of the transaction is maintained, thereby protecting both the interests of the lender and the rights of the borrower.

UNIT IV

1. Define sale and rights and liabilities of seller and buyer (10)

Introduction

The concept of sale of immovable property forms one of the most important modes of transfer under the Transfer of Property Act, 1882. It governs transactions where ownership in immovable property is transferred from one person to another for monetary consideration. The provisions relating to sale are contained in chapter III Sections 54 to 57 of the Act.

The law relating to sale under the Transfer of Property Act applies only to transfers made by the act of parties, that is, voluntary transfers between living persons. Transfers arising by operation of law, such as succession, insolvency or execution, fall outside its scope. Therefore, a sale under the Act is essentially a transaction between living persons involving immovable property.

The statutory framework not only defines the concept of sale but also lays down the method of transfer, rights and liabilities of parties, and remedies available in case of disputes. These provisions aim to ensure certainty, fairness, and protection of interests of both buyer and seller.

DEFINITION

A sale under the Transfer of Property Act is defined in Section 54 of the Act. It states that "sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

Here, "ownership" refers to the bundle of rights that the owner of the property holds, including the right to possess, use, and transfer the property.

The transferor is called the seller, and the transferee is called the buyer.

Essentials of Sale under Section 54 of TPA

- 1) Transfer of ownership: The essence of a sale is the transfer of ownership from the seller to the buyer.
- 2) Consideration: The transfer must be for a price paid, promised, or partly paid and partly promised.
- 3) Immovable property: The subject matter of the sale must be immovable property, which includes land, buildings, and any rights attached to the land.

Right and Liabilities of Buyer and Seller (Section 55)

- Section 55 of the Transfer of Property Act 1882 confers certain rights and liabilities on the Seller and the Buyer.
- The rights and liabilities of seller and buyer, are divided into two categories

The rights and liabilities before the Sale.

The rights and liabilities after the Sale.

Seller's Liabilities Before Completion of Sale

Before the Sale is completed, the seller's liabilities are as under:

- a) To disclose material defects in the property or title, if any, [Section 55(1) (a)] Before completion of sale, the seller is bound to disclose to the buyer and latent material defect in the property or any defect in his own title (ownership rights).
- b) To produce the title-deeds for inspection [Section 55(1)(b)] If the buyer requests the seller for the title-deeds for the inspection, the seller has a duty to produce not only those documents

which are in his possession but also to make arrangements for the inspection of those documents which are within his power.

c) To answer relevant questions as to title [Section 55(1) (c)] The Seller's duty is to answer all questions put by the buyer which are relevant for passing of the title.

d) Duty to execute Conveyance [Section 55(1) (d)] The seller's duty is to execute the conveyance. That is to say, he must effect the transfer of ownership. This is done by signing or affixing thumb-impression on the sale-deed by the seller.

e) Care of title deed and Property [Section 55(1) (e)] After execution of the conveyance, the next duty of the seller is to take care of the property and the documents of title. They are to be handed over to the buyer after the sale.

f) to give possession of the property to the buyer

g) Payment of the out goings [Section 55(1) (g)] Before completion of the sale, the seller continues to be the owner of the property. Therefore, the government dues etc. are to be paid by him. The seller's last duty before completion of the sale is to pay all the outgoing.

Seller's Right Before Completion of Sale [Section 55(4) (a)]

Before completion of Sale, the seller is entitled to all the rents, profits, or other beneficial interests of the property.

- Until ownership is transferred, the seller continues to be owner and as such he has every right to enjoy the profits of the property.

- The contract of sale does not create any proprietary interest in favor of the buyer. Seller's Right After Completion of Sale [Section 55(4)(b)]

After the completion of sale, if the price or any part of it remains unpaid, the seller acquires a lien or charges on the property. The completion of sale of an immovable property does not depend on the payment of price, the price or part of it may also be paid after the sale.

Therefore, under Section 55(4) (b) the seller is given a right to recover the unpaid purchase-money from out of the property. This is called as a statutory charge of the seller for unpaid price.

Buyer's Liabilities Before Completion of Sale Before completion of sale, the duties (liabilities) of the buyer are as under:

- To disclose facts which materially increases the value of property [Section 55(5) (a)] The buyer is liable to disclose to the seller the facts (Kind of Property, its location etc.) which materially increases the value of property. This liability is limited to disclosure of only those facts which relate to title or interest of the buyer.

- Payment of price [Section 55(5) (b)] The completion of sale in favor of buyer, the seller has the duty of execution of deed and buyer has corresponding duty of payment of price. But the buyer is not bound to pay the full amount before transfer of ownership.

Buyer's Liabilities After Completion of Sale

After completion of sale, the buyer has following two liabilities:

1. To bear the loss to property, if any, [Section 55(5) (c)] If there is any loss to property subsequent to sale, it is the buyer who shall suffer that loss as owner of property. He cannot hold the seller to bear the loss unless it is proved that loss was caused by seller himself.
2. To pay the out goings [Section 55(5) (d)] After completion of Sale, since the buyer becomes owner of the property, he is liable to pay the outgoings e.g., Government dues, rents, revenue or taxes.

Buyer's Rights Buyer's Right Before Completion of Sale [Sec. 55(6)]

This right occurs when the seller refuses to sell, and the buyer already paid some amount in advance. This situation creates buyers' charges, and the buyer is entitled to get his money back with interest on it, and interest will be paid from the date of transfer of money from the date of delivery of possession.

But if due to the fault of the buyer, the sale doesn't execute, then the buyer doesn't have a charge on it and can't claim his money back.

Buyer's Right After Completion of Sale [Section 55 (6) (a)]

According to Section 55 (6) (a) of the Act, the buyer is entitled to get all the rights over the property inclusive of all rents, profits, and also any other benefits over the property. The buyer becomes the property owner after completion of the sale or, in other words, after the transfer of ownership, and he/she is entitled to all the benefits from the date of transfer of ownership.

Conclusion

A contract of sale creates reciprocal rights and obligations between the seller and the buyer. The seller is bound to deliver goods and transfer ownership, while the buyer must accept the goods and pay the price. The Sale of Goods Act, 1930 ensures a fair balance between their respective rights and liabilities.

2. What is gift? When it can be revoked?

Introduction

Section 122 to Section 129 contained in Chapter VII of Transfer of Property Act, 1882 deals with gifts. A gift is considered a gratuitous transfer as an existing property is transferred in favour of another person without consideration. A gift between living persons is *inter vivos* (between the living) gift and it is a transfer of property within the meaning of Section 5 of this Act.

Section 122 of the Transfer of Property Act, 1882

A gift is defined in Section 122 of the Act, which reads as follows:

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

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

The following gifts do not come within the purview of this Act:

- Testamentary gift that is a gift by operation of law.
- A gift made in apprehension of death.

Essential Elements of a Valid Gift

1. Transfer of Ownership

- A gift involves transfer of ownership as in this the whole interest of the person in the property is transferred in favour of another person.
- The person transferring the interest is known as the ‘donor’ and the person to whom the interest is transferred is known as the ‘donee’.
- The donor must be competent to contract; he must be major as well as of sound mind.
- The donee does not need to be competent to contract; a minor or a person of unsound mind though disqualified from entering into a contract is capable of receiving the property.

2. Existing Property

- As per Section 124 of this Act, the gifted property must be in existence at the time of making the gift, although its conveyance may take place either in future or in present.
- Both immovable and movable property may be gifted.
- A gift of a future property is Also, a gift comprising of both the existing and future property is void as to the future property.
- An actionable claim is an existing property, and it can be gifted.

3. Transfer Without Consideration

- An essential feature of a gift is that it must be gratuitous.
- Ownership must be transferred without any consideration.
- The word ‘consideration’ has been defined in Section 2(d) of the Indian Contract Act, 1872 (ICA) and is used in the same sense under the Transfer of Property Act, 1882.
- As per Section 2(d) of ICA, when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

4. Voluntary Transfer with Free Consent

- The gift must be made by the donor voluntarily, that is with his free will and consent.
- When the consent of the donor is not free that is the consent has been given due to coercion or undue influence, then the gift will not be a valid gift.
- Section 15 and 16 of the Indian Contract Act, 1872 defines coercion and undue influence respectively.

5. Acceptance of Gift

- Acceptance of the gift by the donee is necessary and the acceptance may be expressed or implied.
- When the donee is a minor or of unsound mind, then the gift must be accepted on his behalf by a competent person.

Mode of Transfer

- **Section 123** lays down two modes for effecting a gift depending on the nature of property.

Gift to Several Persons of Whom One does not Accept

- Gifts may be made to two or more persons
- For the validity of the gift, it is necessary that it must be accepted by all the donees.
- Section 125 provides that a gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Suspension or Revocation of Gifts

- As per Section 126 of this Act, a gift which under an agreement between the parties is revocable wholly or partially at the mere will of the donor is void wholly or partially as the case may be. It lays down two modes of revocation of gift which are as follows:

Revocation by Mutual Agreement:

If the donor and the donee have agreed that on the happening of a specified event (not depending upon the will of the donor), the gift should be revoked or suspended.

Revocation by Rescission as in the Case of Contractors:

A gift will be revoked if it was not made with the free consent of the donor.

A gift may also be revoked in any of the cases in which if it were a contract, it might be rescinded. As per Section 19 of Indian Contract Act, 1872, a contract may be rescinded in case of coercion, undue influence, fraud and misrepresentation.

Provisions of Section 126 do not apply to an incomplete gift, such a gift can be revoked at any time.

Kinds of Gifts

Void gifts may be divided into two types:

- Void Gifts
- Onerous Gifts

Void Gift

The following gifts are included in the category of void gifts:

- Gifts depending on unlawful purposes.
- Gifts made upon a condition, the fulfillment of which is impossible or forbidden by law.

- Gifts by a person incompetent to contract.
- Where the donee of the gift dies before acceptance.
- A gift comprising of both the existing and future property is void as to the future property.

Onerous Gifts

- A gift is said to be onerous when it is accompanied by a burden or obligation.

This section is based on the maxim '**qui sentit commodum sentire debet onus**' which means that he who receives advantage must also bear the burden.

- Section 127 of this Act deals with the concept of Onerous Gifts. It states that:

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

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

Onerous Gift to Disqualified Person - A donee not competent to contract and accept a property which, burdened by any obligation, is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Universal Donee

- **Section 128** deals with the concept of universal donee. It states that:
- 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 and liabilities of the donor at the time of the gift to the extent of the property comprised therein.
- Universal Donee is the person who gets the whole property (both movable and immovable) of the donor under a gift.

Mortis Causa

- Section 129 deals with the Gifts which are made in contemplation of death and known as **donatis mortis causa**. Such gifts are exempted from the operation of chapter VII by virtue of Section 129.
- Another exemption is made in favour of gifts which are governed by Muslim personal law.

Conclusion

A gift is a gratuitous transfer of existing property made voluntarily and accepted by the donee. Registration and acceptance are essential requirements for a valid gift of immovable property, and the Transfer of Property Act provides rules regarding its creation, revocation, and legal effects.

3. Write a note on exchange (6)

Introduction

Sections 118 to 121 of the Transfer of Property Act, 1882 (TPA) deals with the concept of Exchange. It is the same as sale but differs in consideration. Here the consideration is another thing, not money.

Exchange

Section 118 of TPA defines Exchange.

This Section states that when two persons mutually transfer the ownership of one thing for the ownership of another neither thing or both things being money only, the transaction is called an exchange.

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

The definition does not exclude the payment of money altogether. If one of the two properties which are to be exchanged exceeds the other in value, the transfer would nonetheless be an exchange, even if some money is paid by the owner of the property in addition in order to equalize the value of both properties.

Illustrations:

Exchange of X's pen for Y's book.

A's house worth Rs. 2000 is to be exchanged for B's field worth Rs. 1200 and in pursuance of this bargain, B agrees to pay A Rs. 800 in case. Such a transaction is an exchange.

Essentials of Exchange

- There must be a minimum of two parties and two properties, one of each belonging to each one of them.
- No other form of consideration should be involved besides the properties.
- There must be a transfer of a thing for another thing and both or either of these things may be movable or immovable.
- The object of exchange must not be unlawful.

Right of Party Deprived of Thing Received in Exchange

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

Rights and Liabilities of Parties

- Section 120 of TPA deals with the rights and liabilities of parties.
- It states that save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and the rights and is subject to the liabilities of a buyer as to that which he takes.
- In exchange each party is subject to the rights of the buyer and seller in relation to the property that he receives and gives respectively.

Exchange of Money

- **Section 121 of TPA** deals with the Exchange of money.
- It states that on an exchange of money, each party thereby warrants the genuineness of the money given by him.

Conclusion

Exchange is a transfer of ownership where one property is given in return for another property. It differs from a sale because the consideration is property and not money. The Transfer of Property Act regulates the mode, rights, and liabilities relating to exchange transactions.

4. Onerous gift

INTRODUCTION

The concept of gifting is often perceived as straightforward – a transfer of ownership without consideration. However, the legal landscape surrounding gifts becomes more intricate when the gift is burdened by obligations, leading to what is known as onerous gifts.

An onerous gift involves the transfer of property with attached responsibilities or burdens, posing unique challenges and considerations for both donors and recipients.

In this article, we will explore onerous gifts, highlighting their importance in property law and the implications they carry for donors and recipients.

Onerous Gifts

Onerous gifts refer to situations where a gift comprises multiple items, with some burdened by obligations and others not. According to legal principles, if a [gift](#) involves a single transfer of several items to the same recipient and some items are burdened while others are not, the recipient cannot selectively accept only the unburdened items. They must either accept all items fully or reject the entire gift.

However, if the gift consists of separate and independent transfers of several items to the same recipient, the recipient has the freedom to accept one item and refuse the others, even if the accepted item is beneficial and the others are burdened. This principle ensures that the recipient is not compelled to accept gifts that come with obligations they are unwilling or unable to fulfil.

It is important to note that if a person who is not legally competent to contract accepts a gift burdened by obligations, they are not initially bound by their acceptance. However, once they become competent and are aware of the obligations, retaining the property signifies their acceptance of the obligations associated with it.

This legal concept is based on the maxim “Quis titi commodum sentire debet et onus,” which translates to “one who receives benefit must bear the burden also.” It underscores the principle that gifts should be accepted or rejected in their entirety based on their overall terms and conditions.

Onerous Gifts under Section 127 of the Transfer of Property Act

Section 127 of the Transfer of Property Act reads as:

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

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

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

Illustrations

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

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

Section 127, Para 1

The concept of onerous gifts revolves around the idea that if a gift involves a single transfer of several items to the same recipient and some items are burdened by obligations while others are not, the recipient must either accept all items fully or reject the entire gift.

Illustration (a) provided in the section exemplifies this principle. If, for instance, Raman is gifted shares in two joint-stock companies through the same transaction, he must either accept both sets of shares or reject them entirely. He cannot choose to accept the shares of one company while rejecting the shares of the other.

For this rule to apply, certain conditions must be met:

- The gift must be a single transfer.
- It must be made to the same person.

- It must involve several properties.
- One of the properties should be subject to a burden or obligation.

If these conditions are present, the recipient must accept the burden if they wish to accept the benefit. They cannot cherry-pick the beneficial items while rejecting the burdened ones. This ensures that the donor's intent is honoured and the recipient cannot selectively accept the advantageous parts of the gift while avoiding the burdensome aspects.

If a recipient accepts an onerous gift, they are considered to have accepted the associated obligations, such as debts or liabilities attached to the properties. The recipient is then liable to fulfil these obligations to the extent of the gifted property in their possession.

Section 127 of the Transfer of Property Act, 1882, is similar to the doctrine of election under Section 35. It states that if an instrument provides some benefit while simultaneously divesting the beneficiary of other property, the beneficiary must surrender the latter to receive the benefit. The donee must choose to either accept the entire gift or reject it entirely; they cannot accept the beneficial part while rejecting the burdened part.

In conclusion, Section 127 governs onerous gifts, ensuring that recipients cannot selectively accept the benefits of a gift while rejecting its burdens and they must either accept or reject the entire gift as a whole.

Section 127, Para 2

This section addresses the scenario where a gift may consist of one or more properties transferred to the same person either at once or independently. In either case, some of the properties may be burdened by obligations.

The key question here is whether the recipient can accept the gift partially, accepting the unburdened items while rejecting the burdened ones. The answer hinges on whether the gift of multiple items is done through a single transfer or through separate transfers.

If the gift is made through a single transfer, the recipient must accept the entire gift as per the first paragraph. They cannot selectively accept only the unburdened items; it's an all-or-nothing scenario. However, if the gift is made through separate and independent transfers, the recipient is free to accept the unburdened items and reject the burdened ones.

In cases where burdened and unburdened properties are transferred through separate and independent transfers, the principle that the entire intention of the donor should be given effect does not apply. This is clarified in the second paragraph of the section.

Illustration (b) provided in the section illustrates this concept well. If, for example, gifts are given independently of each other and do not form part of the same transaction, the recipient is not obligated to accept both gifts. They have the liberty to accept the unburdened gift and reject the burdened one, as they are independent transfers.

Onerous Gift to Disqualified Persons

The third paragraph addresses the scenario where an onerous gift is made to a person who is not legally competent to contract, such as a minor. Despite their lack of legal capacity, the gift of a burdened property to such a person is not postponed. The property vests in the minor immediately upon the gift, but their acceptance is not final. The minor has the right to repudiate the gift upon reaching the age of majority.

Upon attaining majority, the minor has the option to either accept or refuse the gift. The gift does not become binding on the minor unless they ratify the acceptance upon reaching the majority. If, upon reaching the majority, the minor retains the property with the knowledge of the burden, it is considered an implied acceptance of the gift and they become bound by the burden.

It is important to note that once the gift is accepted by the minor, it is complete against the donor and the donor cannot revoke the gift during the minority of the minor. The donor can only regain the property if the minor, upon reaching majority, chooses to reject the gift.

If the minor dies during their minority, the property passes to their legal heirs. The donor cannot revoke the gift on the grounds of incompleteness, as the gift is considered complete as soon as it is accepted and does not remain in abeyance until the minor reaches the age of majority.

Case Laws on Onerous Gift

In the case of **Subramania Ayyar vs. Sitha Lakahmi**, the court upheld the completeness of a gift made to a minor, even though the minor had passed away before reaching the age of majority. The court found that the gift was delivered to and accepted by the minor and while the deed of gift imposed an obligation on the minor, the law granted the minor the right to repudiate the gift upon attaining a majority. Since the minor had passed away before reaching the majority, the right to repudiate was no longer possible and thus, the gift was considered complete and binding.

Can Minors Accept Onerous Gifts?

Regarding whether minors can accept onerous gifts, Section 127 of the Transfer of Property Act specifies that a person not competent to enter a contract, such as a minor, is not bound by any obligations attached to a gift they accept. However, if the minor retains the property after becoming competent and aware of the obligations, they become bound by those obligations.

This means that while a minor can accept an onerous gift, they are not legally obligated to fulfil any obligations attached to the gift until they reach the age of majority and choose to retain the property.

Conclusion

Onerous gifts are transfers of property that come with attached obligations or burdens. Unlike regular gifts, which are freely given without conditions, onerous gifts require the recipient to fulfil certain responsibilities. This concept is governed by legal principles that determine the rights and obligations of both the donor and the recipient in such transactions.

5. Discuss the essentials of lease and state how the leases are made (10)

INTRODUCTION

The concept of lease plays a crucial role in the law relating to immovable property in India. While ownership of property is often transferred through sale, not every individual is in a position to purchase property. The law, therefore, recognises alternative modes through which a person can enjoy property without owning it. One such important mode is a lease.

A lease enables a person to use and enjoy immovable property for a specific period without acquiring ownership. It creates a legal relationship between the owner and the person in possession, balancing rights and obligations on both sides. The provisions governing leases are contained in Sections 105 to 117 of the Transfer of Property Act, 1882.

Understanding the legal framework of lease is essential not only for law students but also for individuals engaged in everyday transactions such as renting residential or commercial premises.

Meaning and Definition of Lease

Section 105 of the Transfer of Property Act, 1882 defines a lease as a transfer of a right to enjoy immovable property for a certain time, express or implied, or in perpetuity. This transfer is made in consideration of a price paid or promised, or of money, share of crops, service, or any other thing of value to be rendered periodically or on specified occasions.

In a lease:

- The transferor is called the **lessor**
- The transferee is called the **lessee**
- The price paid is known as the **premium**
- The recurring payment is known as **rent**

The essential feature of a lease is that it transfers only the **right to enjoy the property**, and not the ownership. The lessee obtains possession and limited rights over the property, while the ownership remains with the lessor.

Nature of Lease

A lease creates an interest in immovable property, which distinguishes it from a mere licence. The lessee acquires a legal right enforceable against the world, subject to the terms of the lease. The following characteristics define the nature of a lease:

- It involves a **transfer of right to enjoy property**, not ownership
- It may be for a **fixed period**, implied duration, or even in perpetuity
- It creates a **proprietary interest**, not merely a personal arrangement
- The interest of the lessee is **transferable and heritable**, unless restricted by contract
- The relationship created is between the **lessee and the property**, not merely between two individuals

Thus, a lease is both a transfer of property and a contractual arrangement.

Essential Elements of a Lease

The validity of a lease depends upon certain essential elements. These elements define the basic structure of a lease:

- There must be a **transfer of a right to enjoy immovable property**, meaning possession is given without transferring ownership
 - The lease must be for a **certain period**, which may be fixed, implied, or perpetual
 - There must be a **consideration**, which may take the form of rent, premium, or other valuable return
 - The consideration may be **periodic or occasional**, depending on the terms agreed
 - The lessee must **accept the terms** of the lease
- These elements ensure that the lease operates as a legally recognised transfer of interest.

Essential Requisites of a Valid Lease

Apart from the basic elements, certain legal requisites must also be fulfilled:

- The **lessor must be** competent to contract and must have authority or title over the property
 - The **lessee must also be competent** to enter into a contract
 - The subject matter must be **immovable property**
 - There must be a **clear transfer of the right to enjoy the property**
 - The lease must be for a **certain duration**, either expressly stated or implied
 - There must be lawful consideration, which may include rent or premium
 - The **lessee must accept the lease**
 - The interest created should be **transferable and heritable**, unless restricted
- These requisites ensure the legal enforceability of a lease and distinguish it from informal arrangements.

Mode of Creation of Lease

Section 107 of the Act lays down the manner in which a lease is created. The mode of creation depends upon the duration of the lease:

- A lease of immovable property for a term **exceeding one year** can be made only by a **registered instrument**
- All other leases may be made either:
 - By a **registered instrument**, or
 - By an **oral agreement accompanied by delivery of possession**

Where a lease is created through an oral agreement, the provisions relating to duration under Section 106 become applicable. This position was recognised in *Punjab National Bank v. Ganga Narain Kapur*, where the Court held that oral leases attract the application of statutory rules regarding duration.

Thus, registration becomes crucial in long-term leases, while short-term arrangements allow flexibility.

Duration of Lease

Section 106 provides rules regarding the duration of lease in the absence of a written contract or local usage.

The law distinguishes between two categories:

Purpose of Lease	Nature of Lease	Notice Required
Agricultural or manufacturing	Year to year	6 months' notice

Any other purpose	Month to month	15 days' notice
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This provision ensures certainty in situations where the lease agreement does not specify duration.

A notice to quit must be:

- In writing
- Properly communicated to the concerned party
- If communication is not possible, affixed at a conspicuous place on the property

These rules provide a structured mechanism for termination of uncertain leases.

Rights and Liabilities of the Lessor

Rights of the Lessor

The lessor retains ownership and is entitled to certain rights:

- The right to **receive rent or premium** as agreed
- The right to **recover possession** in case of breach of conditions
- The right to **claim damages** for injury to the property
- The right to **take back possession** upon expiry of the lease term

These rights ensure that the lessor's ownership is protected during the lease period.

Liabilities of the Lessor

The lessor is also subject to certain obligations:

- The duty to **disclose material defects** in the property which are not discoverable by ordinary care
- The obligation to **give possession** of the property to the lessee
- The duty to ensure **peaceful enjoyment** of the property by the lessee during the lease period

These liabilities reflect the principle of fairness and protect the interests of the lessee.

Rights and Liabilities of the Lessee

Rights of the Lessee

The lessee enjoys several rights during the subsistence of the lease:

- The right to **enjoy the property** without interference
- The right to **terminate the lease** if the property becomes unfit due to events like fire, flood, war, or similar causes
- The right to **deduct repair expenses** from rent if the lessor fails to carry out necessary repairs
- The right to **recover payments** made on behalf of the lessor
- The right to **remove fixtures** attached during the lease, subject to restoring the property
- The right to **harvest crops** and enjoy benefits even after termination in certain cases
- The right to **transfer interest** through sub-lease or mortgage, subject to the contract

These rights ensure that the lessee can effectively use the property during the lease period.

Liabilities of the Lessee

The lessee must fulfil several obligations:

- The duty to **disclose material facts** affecting the value of the property
- The obligation to **pay rent or premium** on time
- The duty to **maintain the property** in good condition
- The obligation to **notify the lessor** of any encroachment or interference
- The duty to **use the property prudently** and prevent misuse

- The restriction against **erecting permanent structures** without consent, except for agricultural purposes
- The obligation to **return possession** upon termination

These duties ensure responsible use of the property and protection of the lessor's interest.

Determination of Lease

Section 111 of the Act lays down various modes through which a lease may be terminated:

- **Lapse of time:** When the fixed term expires
- **Happening of specified event:** When the lease depends on an event
- **Termination of lessor's interest:** When the lessor's title ceases
- **Merger:** When the interests of lessor and lessee vest in the same person
- **Express surrender:** Mutual agreement to end the lease
- **Implied surrender:** Creation of a new lease inconsistent with the existing one
- **Forfeiture:**
 - Breach of express condition
 - Denial of lessor's title
 - Insolvency of lessee (if provided)
- **Notice to quit:** Expiry of valid notice

These modes provide a comprehensive framework for termination.

Notice to Quit and Waiver

A notice to quit is a formal written communication by which one party expresses the intention to terminate the lease. It becomes effective after the expiry of the prescribed period.

However, the law also recognises situations where such notice may be waived.

- Under Section 112, if the lessor accepts rent after issuing notice to quit, the termination is considered **waived**
- Section 113 recognises:
 - **Express waiver:** Direct acceptance of rent
 - **Implied waiver:** Conduct indicating continuation of lease

Waiver reflects the intention of the parties to continue the lease despite earlier termination steps.

Effect of Holding Over

Section 116 deals with the concept of **holding over**. It refers to a situation where the lessee continues in possession even after the expiry of the lease term.

- If the lessor **accepts such possession**, the lease is deemed to be **renewed**
- If the lessor **does not consent**, the lessee becomes a **tenant at sufferance**, and legal action may be initiated

Holding over does not automatically create a new lease but depends upon the conduct of the lessor.

Conclusion

The law relating to lease under the Transfer of Property Act, 1882 provides a structured and balanced framework governing temporary transfer of rights in immovable property. It recognises the practical need for individuals to enjoy property without owning it, while ensuring that the interests of both lessor and lessee are protected.

The statutory provisions, ranging from definition to termination, clearly define the rights, duties, and remedies available to both parties. Concepts such as notice to quit, waiver, and holding over further add flexibility to the legal framework.

6. Write a note on actionable claim (6)

Introduction

Actionable claim means a debt or a claim on which action can be started in a Court of law for comfort or relief. The civil Courts recognized as giving the grounds for relief whether such claims are conditional, accruing and other. The actionable claim is defined under section 3 of the Transfer of Property Act, 1882. In general terms, an actionable claim is a debt or claim for which the person can take an action and also approach the Court for recovery his debt or claim.

MEANING OF ACTIONABLE CLAIM

Actionable claim means a debt or a claim on which action can be started in a Court of law for comfort or relief. The actionable claim is defined under section 3 of the Transfer of Property Act, 1882.

Tangible or touchable movables such as chairs or bikes and many have physical existence and can be possessed. Some movable property is an actionable claim. It is also a claim for unsecured debt and any beneficial interest in the moveable property and the property is not in any kind of possession.

Like example- X is a person who needs a loan or money from Y. Then X takes loan 50,000/- from Y. And Y does not take any security. It means X takes loan 50,000/- from Y without any security. So the debt or claim given by Y is an actionable claim. And if the X failure on his part or not repay the money then Y can approach the Court.

Definition

According to section 3 of the Transfer of Property Act, the actionable claim is a claim to any debt which is not secured by a mortgage, pledge, and hypothecation. The mortgage of immovable property does not come under section 3 of Transfer of Property Act and also the pledge OR hypothecation of moveable property is not an actionable claim. An actionable claim is transferable under the Transfer of Property Act. The transfer of actionable claim is given under chapter eight of the Transfer of Property Act. Chapter eight of the Transfer of Property Act is the last chapter of the Transfer of Property Act and it covers section 130 to 137.

Important Provisions dealing with Actionable Claim under Transfer of Property Act

Under **Section 130 of the Transfer of Property Act**, the mode of transfer of actionable claim is described. According to Section 130,

- The transfer can be done by only a written instrument;
- And signed by the transferor or his legal agent; and
- The transfer will be complete.

Exceptions of the Sec 130-Sec 130 does not apply on the transfer of marine and insurance of fire policy.

In the case of *Simon Thomas vs. State Bank of Travancore*, in this case, there should be an intention to transfer the debt represented by the written receipts.

Under **Section 132 of the Transfer of Property Act**, defines the liability of the transferee of actionable claim. The liabilities and equities of the transferor are transferred to the transferee.

Some examples of actionable claim, these following claims are the actionable claim-:

1. Claim for arrear rent.
2. Claim for rent to fall due in future.
3. A choice offered to repurchase the property once again.
4. Book debts or claims
5. The right to claims maintenance.
6. Claim the benefit of the contract.
7. Deposit receipt.

The following claims are not the actionable claim-:

1. A claim which is decreed.
2. "Right to sue", it is a right but it is not an actionable claim.
3. The claim for the main profits.

In the case of the *Jugalkishore Saraf Vs Raw Cotton Co. Ltd.*, the Supreme Court held that a judgment debt or decree is not an actionable claim for action is necessary.

In the leading case *Lachmi Koeri Vs the State of Bihar*, the Court has been pointed out the transfer of arrears of rent is a type of a transfer of actionable claim. And the transfer of arrears of rent could be transferred in accordance with the provisions of the Transfer of Property Act.

In the case of *Rekhath Koeri*, where the Court said that the transfer of arrears of rent is really a transfer of actionable claim and it could be transferred in accordance with the rules and regulations of Transfer of Property Act.

Section 133 of the Transfer of Property Act described the warranty of solvency of the debtor. In this section when a claim is transferred the transferee may run the chance or risk of losing the debt, in this case, the debtor is insolvent. So as a precautionary measure, the transferee should be assured that the debtor is solvent.

Section 134 of the Transfer of Property Act is deals with the mortgaged debt. And **section 135** of the Transfer of Property Act deals with the assignment of rights under the policy of insurance against fire. **Section 136** deals with the incapacity of officers connected with the Court of justice. The person who includes in section 136 are:-

- Legal practitioner;
- Judges of the Court; and
- The legal or officer who concerned with the justice of the Court.

And the last **Section 137** describes the saving of negotiable instruments and etc.

In the case, State of Kerala and Ors. Vs. Mini Shamsudin and Ors., the Court said that actionable claims are 'goods' and movable property but it is not for the purpose of the sales tax acts.

CONCLUSION

The term 'Actionable Claim' is that every type of debt in a movable property which would be enforced by the Court. Under this meaning any kind claim of money whether the amount was fixed or the amount was also uncertain, it's an actionable claim. Sometimes, these were made confusions and there also used to be conflict decisions; and the law was not uniform or not clear. In the Transfer of Property Act, the law should be amended to provide the rights and liabilities of both the parties in transactions.

7. Distinguish sale from contract of sale (6)

INTRODUCTION

The concept of sale of immovable property forms one of the most important modes of transfer under the Transfer of Property Act, 1882. It governs transactions where ownership in immovable property is transferred from one person to another for monetary consideration. The provisions relating to sale are contained in Sections 54 to 57 of the Act.

The law relating to sale under the Transfer of Property Act applies only to transfers made by the act of parties, that is, voluntary transfers between living persons. Transfers arising by operation of law, such as succession, insolvency or execution, fall outside its scope. Therefore, a sale under the Act is essentially a transaction between living persons involving immovable property.

The statutory framework not only defines the concept of sale but also lays down the method of transfer, rights and liabilities of parties, and remedies available in case of disputes. These provisions aim to ensure certainty, fairness, and protection of interests of both buyer and seller.

DEFINITION

A sale under the Transfer of Property Act is defined in Section 54 of the Act. It states that "sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

Here, "ownership" refers to the bundle of rights that the owner of the property holds, including the right to possess, use, and transfer the property.

The transferor is called the seller, and the transferee is called the buyer.

Essentials of Sale under Section 54 of TPA

- 1) Transfer of ownership: The essence of a sale is the transfer of ownership from the seller to the buyer.
- 2) Consideration: The transfer must be for a price paid, promised, or partly paid and partly promised.
- 3) Immovable property: The subject matter of the sale must be immovable property, which includes land, buildings, and any rights attached to the land.

Modes of Transfer of Sale

Section 54 provides two modes for effecting a valid sale of immovable property:

Registered Instrument

A sale can be made only by a registered instrument in the following cases:

- Tangible immovable property of value ₹100 or more
- Transfer of reversion
- Transfer of intangible immovable property

Registration ensures legal validity and provides public notice of the transaction.

Delivery of Possession In the case of tangible immovable property valued at less than ₹100, a sale may be effected either:

- by a registered instrument, or
- by delivery of possession.

Delivery is complete when the seller places the buyer, or a person authorised by the buyer, in possession of the property. However, judicial interpretation has emphasised the importance of registration. In *Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana (2011)*, the Supreme Court held that immovable property can be transferred only through a registered sale deed, and an agreement to sell does not create any interest in property.

Process of a sale in transfer of property act

- 1) Agreement to sell: The first step is the execution of an agreement to sell, which outlines the terms and conditions of the sale. This agreement is crucial as it ensures that both parties are aware of their obligations and rights.
- 2) Due diligence: Before the final sale, due diligence is conducted to ensure that the property is free from any legal encumbrances. This includes verifying the title, checking for any unpaid dues, and ensuring that the property complies with local laws and regulations.
- 3) Payment of consideration: The buyer pays the agreed upon price to the seller. This payment can be made in full or in parts, as agreed in the contract.
- 4) Execution of sale deed: The sale deed is the document that legally transfers ownership of the property from the seller to the buyer. It must be executed on non judicial stamp paper of appropriate value and signed by both parties.

5) Registration: According to Section 17 of the Registration Act, 1908, the sale deed must be registered with the Sub Registrar's office. Registration is essential to give legal validity to the sale and to provide public notice of the transaction.

6) Possession: Once the sale deed is registered, the possession of the property is handed over to the buyer.

Contract for Sale

Section 54 also recognises the concept of a contract for sale. It is an agreement between parties that a sale will take place in the future on agreed terms.

A contract for sale:

- does not transfer ownership,
- does not create any interest or charge in the property,
- creates only a personal obligation.

In *Dave Ramshankar Jivatram v. Bai Kailasgauri* (1972), it was observed that a contract for sale does not require registration and does not itself transfer any title.

However, courts have recognised equitable principles. In *Kodapalli Satyanarayan v. Kondapalli Mavullu* (1998), it was held that if a subsequent transferee has notice of a prior agreement, he may hold the property in trust for the earlier agreement holder.

Similarly, in *Ramesh Chand Ardawatiya v. Anil Panjwani* (2003), it was held that a person in possession under a contract for sale can protect such possession against third parties.

Distinction between Sale and Contract for Sale

The distinction between sale and contract for sale is fundamental:

- A sale results in immediate transfer of ownership, whereas a contract for sale is only an agreement to transfer ownership in the future.
- A sale creates a right in rem, enforceable against the world, whereas a contract for sale creates a right in personam, enforceable only between parties.
- A sale requires registration, while a contract for sale does not.
- A sale transfers interest in property, whereas a contract for sale does not.

This distinction is crucial in determining rights, remedies, and enforceability.

Distinction Between Sale and Agreement to Sell

Understanding the differences between sale and agreement to sell is crucial as they have different legal consequences.

Distinction between Sale and Contract for Sale

1. A 'sale' of immovable property is a transfer of ownership. A sale passes an absolute interest in the property to the purchaser i.e. it conveys a legal title to the purchaser. A 'contract for the sale

of immovable property' is a mere agreement that a sale of property is to take place in the future on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Even after the contract for sale, the ownership remains in the vendor. All that a person gets is a right of litigation on this basis.

2. A 'sale' creates a right in rem. A sale must be evidenced by a registered instrument in case of (i) tangible immovable property of the value of Rs. 100 or more; or a reversion or other intangible thing of any value. A 'contract for sale' does not convey any tide to the purchaser. A contract for sale creates a right in personam i.e. only the promisee can compel the promisor (as well as a subsequent purchaser with notice) to execute the promised conveyance. A contract for sale need not be registered at all.

Difference between Sale and Contract for Sale

Basis	Sale	Contract for Sale
Meaning	Actual transfer of ownership from seller to buyer.	Agreement to transfer ownership in the future.
Nature	Executed transaction.	Executory agreement.
Transfer of Ownership	Ownership passes immediately to the buyer.	Ownership does not pass; it remains with the seller until the sale is completed.
Creation of Rights	Creates proprietary rights (rights in rem) in favour of the buyer.	Creates only personal rights (rights in personam) against the seller.
Possession	Possession may or may not be transferred, but ownership is transferred.	Possession may be given, but ownership is not transferred.
Risk of Loss	Risk generally passes with ownership to the buyer.	Risk generally remains with the seller until the sale is completed.
Remedy	Buyer can assert ownership rights against the whole world.	Buyer can sue for specific performance or damages if the seller breaches the agreement.
Registration	Sale of tangible immovable property worth ₹100 or more must be by a registered instrument.	A contract for sale itself does not require registration merely because it is an agreement to sell.
Effect on Property	Creates an immediate interest in the property.	Does not create any interest or charge on the property.

Conclusion

A **sale** results in the immediate transfer of ownership and creates rights in the property itself, while a **contract for sale** is merely an agreement to transfer ownership in the future and creates only contractual rights between the parties. This distinction is crucial in determining the rights and liabilities of the parties under property law.

8. Write a note on universal donee (6)

Universal Donee

Section 128 deals with the concept of a Universal Donee, a recipient who acquires the entire property of the donor through a gift, encompassing both movable and immovable assets. This concept is unique to Indian law, as it is not recognized in English law.

Under Section 128, the Universal Donee assumes personal liability for all the debts and obligations of the donor existing at the time of the gift, up to the extent of the property received. This provision reflects the equitable principle that one who receives benefits from a transaction must also bear its burdens.

The primary objective of this section is to safeguard the interests of the donor's creditors. While similar in intent to Section 53, which pertains solely to immovable properties, Section 128 applies to both movable and immovable assets. Section 53 addresses fraudulent transfers, but Section 128 does not.

A crucial requirement of Section 128 is that the donor must transfer all of their properties to the donee. Even if the donor retains a life interest in a portion of the property, the donee is still considered a Universal Donee. Even a minor retention of property by the donor qualifies the recipient as a Universal Donee.

However, if the donor does not include the equity of redemption in a mortgaged property, the donee cannot be categorized as a Universal Donee.

UNIT V

- **Define trust, essentials, explain the procedure for creation of trust**
- **Write a note on creation of trust (6)**

How to Create a Trust in India, Under the Indian Trusts Act, 1882

Introduction

A trust is a legal arrangement whereby one person transfers property to another person, who holds it for the benefit of a third person. The law relating to private trusts in India is governed by the Indian Trusts Act, 1882.

According to Section 3, a trust is:

"An obligation annexed to the ownership of property, arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner."

Meaning of trust

In simple terms, a trust is a legal arrangement where the author/settlor transfers property to a trustee, who manages it for the benefit of specified beneficiaries or the public. The Act mainly governs private trusts (for individuals), while public/charitable trusts are regulated by state laws and other statutes. A valid trust requires: a competent settlor, trustees, beneficiaries, trust property, a lawful object, and clear intention.

Types of Trusts

Private Trusts: A private trust is for a closed group. In other words, the beneficiaries can be identified. Eg: A trust created for the relatives and friends of the author.

Public Trusts: A public trust is created for a large group, i.e. the public in large. Eg: Non-Profit NGO's Charitable Institutions for the general public.

Essentials for the Creation of a Trust

The process of creating a valid trust under the Indian Trusts Act, 1882, requires the following key elements:

Author of the Trust: The trustor must be competent to create a trust. According to **Section 7 of the Act**, any person who is competent to contract under Indian law can create a trust. This means that the individual must be of sound mind, not a minor, and not disqualified by law. Additionally, companies and other legal entities can also create trusts, provided they comply with the law governing their establishment and operation.

Intention to Create a Trust: The trustor must express a clear intention to create the trust. This intention can be indicated through a written document (trust deed) or by actions that demonstrate a commitment to establishing a trust. The intention to create a trust must be unambiguous, leaving no room for doubt.

Lawful Purpose: The trust must be created for a lawful purpose, as specified under **Section 4 of the Act**. A trust is considered unlawful if its purpose is:

- Prohibited by law
- Defeats the purpose of any law
- Fraudulent
- Causes harm to individuals or their property
- Is immoral or contrary to public policy

If any part of the trust is unlawful, the entire trust may be deemed void unless the unlawful purpose can be separated from the lawful one.

Trust Property: The subject matter of the trust, known as the trust property, must be clearly defined. The property can be either movable or immovable, but it must be transferable under law. A trust cannot be created for an interest that is not legally transferable. According to Section 8 of the Act, the trust property must be sufficiently identifiable and described to allow its proper management by the trustee.

Beneficiaries: The beneficiaries of the trust must be clearly identified or identifiable. Any person capable of holding property can be a beneficiary. Beneficiaries can include minors, companies, or even unborn persons (as long as the rule against perpetuity, under Section 14 of the Transfer of Property Act, 1882, is not violated). Beneficiaries have the right to enforce the terms of the trust and can renounce their interest if they choose.

Transfer of Trust Property: For a trust to be valid, the trust property must be transferred to the trustee. The trustor must relinquish ownership or control over the property and transfer it to the trustee, who then holds it for the benefit of the beneficiaries. The transfer can be done through a non-testamentary instrument (a document that is not a will) for immovable property or through actual transfer for movable property.

Trust Deed: A trust deed is the legal document that establishes the trust. While it is not mandatory to create a trust in writing (except for trusts related to immovable property), a trust deed helps ensure that the terms and conditions of the trust are clear and legally enforceable. It is essential that the deed contains details about the trustor, trustee, beneficiaries, trust property, and purpose of the trust.

Process of Creating a Trust

The creation of a trust in India is governed mainly by the Indian Trusts Act, 1882 (for private trusts) and relevant state laws (for public/charitable trusts). The process involves the following steps:

- **Define the Purpose** – Clearly decide whether the trust will be private, public, charitable, or religious. The objective must be lawful and achievable.
- **Select the Name of the Trust** – Choose a unique name that does not conflict with existing institutions or violate laws.
- **Draft the Trust Deed** – A legal document specifying the name, objectives, settlor, trustees, beneficiaries, powers/duties of trustees, and management rules. This forms the foundation of the trust.
- **Appointment of Trustees** – Minimum two trustees are usually required; they are responsible for managing the trust property and fulfilling its objectives.
- **Stamp Duty & Registration** – Execute the deed on non-judicial stamp paper (value depends on the state) and register it with the local Sub-Registrar/Registrar. Registration makes the trust a legal entity.
- **PAN and Bank Account** – Apply for a Permanent Account Number (PAN) in the trust's name and open a bank account to manage its funds.
- **Tax Exemptions (if applicable)** – Public charitable trusts can apply for 12A and 80G registration under the Income Tax Act to avail tax benefits.

Who Can Create a Trust

A trust can be created by any person who is competent to contract, i.e., an adult of sound mind and not disqualified by law. The creator of a trust is called the author or settlor. Minors cannot create a trust but can be beneficiaries. Individuals, companies, associations, and bodies corporate can also create trusts if authorized by their constitutions or governing laws. The settlor must have the ownership or control of the property being settled and must intentionally declare or transfer it to the trustee for the benefit of the beneficiaries. The author's capacity, intention, and authority are essential for a valid trust.

Landmark Judgment –

Bai Dosabai vs. Mathurdas Govinddas (1980)

In this case, the Supreme Court of India held that an obligation annexed to the ownership of property does not amount to an interest in the property but is an obligation that can be enforced against a transferee with notice or a gratuitous transferee. This judgment provided clarity on the nature of obligations imposed on trustees.

Conclusion

A trust is a legal arrangement that ensures the management and protection of property for the benefit of specified beneficiaries or for a lawful purpose. Under the Indian Trusts Act, 1882, the creation of a valid trust requires a competent settlor, clear intention, lawful purpose, identifiable property, designated beneficiaries, and proper transfer of property to trustees. Trusts can be private or public, and may be created through written deeds, wills, or implied conduct. The settlor's capacity, authority, and intention are crucial, while trustees have a fiduciary duty to manage the property responsibly. By providing a structured framework, the Act promotes transparency, accountability, and enforceability, ensuring

- **Discuss the rights and liabilities of trustee**

Rights, Duties and Liabilities of Trustees

Introduction

When an individual or institution is entrusted with the responsibility of managing assets or property on behalf of another party, they are designated as a trustee. This role carries significant legal obligations and potential liabilities, as trustees are bound by a fiduciary duty to act in the best interests of the beneficiaries they serve.

Trustee

A trustee is an individual or a legal entity, such as a company, appointed to manage and administer property held in a trust. Trustees are legally obligated to act in the best interests of the beneficiaries, according to the terms specified in the trust agreement.

They must be capable of holding property and competent to contract. Trustees have the choice to accept or disclaim their role, which can be expressed explicitly or implied through their

actions. It is common for a trust to have multiple trustees, allowing shared responsibilities and diversified management of the trust's assets.

Rights of a Trustee

The Indian Trusts Act, 1882, grants trustees a variety of rights and powers essential for the administration and preservation of trust property, as well as for fulfilling the purposes of the trust. These rights not only empower trustees to effectively manage the trust, but also ensure that they can undertake their responsibilities while safeguarding their own interests and those of the beneficiaries. Below, we detail these rights and powers conferred upon trustees.

1. Right to Title Deed

Trustees are entitled to possess the title deeds and other documents related to the trust's creation and the trust property. This is crucial for maintaining clear records of the trust's assets and ensuring their proper management.

2. Right to Reimburse Expenses

Trustees have the right to be reimbursed for all expenses incurred in the execution, preservation and protection of the trust property, as well as in the support of the beneficiaries. This ensures that trustees are not financially disadvantaged while performing their duties.

3. Right to Recollect Overpayment

If a trustee overpays a beneficiary by mistake, they have the right to reclaim the excess amount. This can be collected directly from the beneficiary's interest in the trust property or, if necessary, from the beneficiary personally.

4. Right to Indemnity from Breach of Trust by a Gainer

If a breach of trust results in gain for an individual, the trustee has the right to indemnify themselves against this gain, unless the trustee is also complicit in the breach. This right protects the trust from losses due to unauthorised actions that benefit others.

5. Right to Seek Court's Opinion

Trustees can petition the court for opinions, advice or directions concerning the management of the trust property. This is a valuable right that allows trustees to act in complex situations under judicial guidance, ensuring legality and propriety in their actions.

6. Right to Settle Accounts

Upon completion of their duties, trustees are entitled to have the trust accounts audited and settled. They can also receive an acknowledgement that no further benefits are due to beneficiaries, thus formally concluding their responsibilities.

7. Right to Sell Trust Property

Trustees have the power to sell trust property according to the terms of the trust deed or through suitable means such as public auction or private contract. This power is vital for the proper management and financial health of the trust.

8. Right to Vary or Rescind Sale

Trustees can alter the terms of a sale or cancel it and they can resell the property if necessary. This flexibility is important for adapting to changes in market conditions or correcting any issues in the initial sale.

9. Power to Manage Investments

Trustees can manage the investments of the trust, including selling current investments and reinvesting in more suitable avenues. However, if a beneficiary is competent to contract, this power can only be exercised with their written consent.

10. Power to Apply Trust Property for Minor Beneficiaries

Trustees can use trust income for the maintenance of minor beneficiaries, covering expenses like education, healthcare and other essential needs. This power ensures that the trustee can provide for minors' welfare until they come of age.

11. Power to Compound

Trustees can resolve disputes related to the trust property through compromise, abandonment or arbitration. This power allows them to handle conflicts in a manner they deem fit, potentially avoiding costly and prolonged legal battles.

12. Trustees to Continue with Trust if One of Several Trustees Dies or Disclaims

If one of multiple trustees dies or disclaims the trust, the remaining trustees can continue to manage the trust property. This ensures continuity in the administration of the trust, although this power is subject to any specific conditions set forth in the trust deed regarding the number of trustees required.

Duties/Liabilities of a Trustee

The duties and liabilities of a trustee as stipulated under the Indian Trusts Act, 1882, encompass a broad range of responsibilities designed to ensure the faithful execution of trusts in accordance with the intents of their creators and the interests of the beneficiaries. The duties of trustees are critical as they define the legal and moral framework within which trustees must operate.

1. Execution of Trust

Trustees are legally bound to execute the trust as per the terms specified in the trust deed. This includes adhering to the directions given by the author of the trust at its inception. The trustees must carry out these instructions faithfully unless they are impractical or illegal. This duty ensures that the trust operates strictly within its intended purpose and legal boundaries.

2. Acquaintance with Trust Property

Trustees must have a thorough understanding of the trust property, including its nature, location and condition. They are also expected to take all necessary steps to secure the property. This duty is crucial for the proper management and preservation of the trust's assets.

3. Protection of Title to Trust Property

It is the responsibility of trustees to defend any challenges to the title of the trust property. This involves taking appropriate legal actions to affirm and protect the property's title, thereby safeguarding the assets against claims or disputes that could undermine the trust's holdings.

4. Prohibition against Setting Up Adverse Titles

Trustees must not establish any title in the trust property that is adverse to the interest of the beneficiaries. For instance, a trustee should not sell trust property to themselves, their relatives or associates as it conflicts with the beneficiaries' interests and undermines the foundational trust principle.

5. Maintenance of Trust Property

Trustees are required to care for the trust property with the same diligence an ordinary prudent person would use for their own property. The law shields trustees from liability for any loss that might occur provided they have exercised such due diligence.

6. Conversion of Perishable Property

If the trust property includes assets that are likely to deteriorate or depreciate over time, trustees have the duty to convert these into more stable forms, typically cash, to prevent loss of value. This is especially important when the trust benefits multiple successive beneficiaries.

7. Impartiality among Beneficiaries

In cases where a trust is set up for multiple beneficiaries, trustees must distribute the benefits derived from the trust property equitably, without showing favouritism. This duty is essential for maintaining fairness and equity among the beneficiaries.

8. Protection from Adverse Beneficiaries

Trustees must take steps to protect the trust property from any beneficiary who threatens or commits actions detrimental to the trust or other beneficiaries. This includes preventing any harm that could potentially affect the interests of the trust or its equitable administration.

9. Maintenance of Books and Accounts

Trustees are required to maintain accurate and detailed records of all transactions related to the trust property. These records should be available to beneficiaries upon request, ensuring transparency and accountability in the administration of the trust.

10. Investment of Trust Money

If the trust property includes cash that is not needed immediately, trustees must invest this money in secure and specified financial instruments. The Indian Trusts Act, 1882, lists acceptable investment vehicles such as government securities, railway stocks, government company debentures and units from the Unit Trust of India.

Conclusion

The duties and liabilities of trustees form the foundation of trust law. They ensure that trusts are managed with integrity, with the beneficiaries' best interests at heart. For a trustee, understanding these responsibilities is crucial for the successful administration of a trust. Given their complex nature, trustees often seek professional advice to navigate the legal landscape, mitigate risks and avoid the potential pitfalls of their role.

The responsibilities of a trustee are both broad and deeply rooted in legal precedents and statutes, most notably the Indian Trusts Act, 1882. The Act clearly outlines the expectations and requirements of trustees, serving as a guiding framework for their conduct and accountability. Through their actions, trustees embody the principles of fiduciary duty, stewardship and ethical management, which are essential for maintaining the sanctity of the trust mechanism.

- **Appointment of trustee (6)**

Appointment of trustees under the Indian Trust Act

Introduction

In England, trustees are in the first instance almost invariably appointed by the settlor under the instrument constituting the trust, but, where necessary, they may be appointed by the Court. Such trustees are called '**Original Trustees**'.

The settlor has the freedom to select eligible persons to be the first trustees. He may appoint the trustees *inter vivos* or *by his will*. In the case of an inter vivos trust the settlor is required to transfer the property to the trustees for failure to achieve this result will make the trust imperfect.

The appointment of a new trustee under the provisions of **Section 73 of Indian Trusts Act**, need not be by a registered document. When none of the other provisions for retirement is capable of compliance, it is open to the trustee to be absolved from his office by application to Court.

Appointment Of Trustees

Section 73 of the Indian Trusts Act, 1882 deals with appointment of new trustees under certain circumstances, which are as under:-

- if any person appointed as a trustee disclaims;
- if any trustee, either original or substituted:-
 - dies; or
 - is absent from India for a continuous period of six months; or
 - leaves India for the purpose of residing abroad; or
 - he is declared an insolvent; or
 - desires to be discharged from the trust; or

- refuses to act, or becomes, in the opinion of the Court, unfit or personally incapable to act in the trust; of
- accepts an inconsistent trust.

In cases where there is no trustee then the Court provides a trustee for such trusts and executes it. In such cases, the Court acts on the principle “**Equity never allows a trust to fail for want of a trustee**”. In other words, if a settlor or testator has manifested a clear intention to create a trust but has omitted to appoint a trustee, or if the sole trustee nominated by him has declined to act, equity will not allow the trust to fail on that account.

In the case of **Mallo vs Welsor**, if the settlement is created inter vivos and the trustee appointed disclaims the trust, then the property will revert to the settlor himself, and if he is dead, to his personal representative, and the settlor, or his personal representatives, must hold the property on the trusts which have been declared with regard to it.

Modes in which trustees appointed

A person is legally appointed trustee who:

- Is originally designated as a trustee by the instrument creating the trust.
- Or he is duly appointed as a trustee under a power for the purpose contained in the instrument.
- Accepts the trust either expressly or by acting in the execution of it.

Who can appoint Trustee

A new trustee may be appointed by-

1. The person who has been nominated for the purpose of appointment and such power is granted by the instrument of trust, if any, or
2. If there be no such person, or no such person is able and willing to act, the author of the trust if he be alive and competent to contract; or
3. The surviving or continuing trustees or legal representative of the last surviving or continuing trustee, or
4. With the consent of the Court, by the retiring trustees, if they all retire simultaneously.
5. With the consent of the court, by the last retiring trustee

Appointment Of Trustees By Court

Section 74 lays down that whenever any such vacancy or disqualification occurs and it is found impracticable to appoint new trustee under Section 73, the beneficiary may without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee and *the court may appoint a trustee or a new trustee accordingly.*

Every appointment of a new trustee shall be made by writing under the hand of the person making it on appointment of a new trustee the number of trustees may be increased. If there is any objection from the side of the surviving or continuing trustee, the court should not make it

a sole ground of refusal of appointment of a new trustee. It must fully ascertain that the objection is well-founded.

Rule for selecting new trustee

Section 74 of the Indian Trust Act expressly provides that appointing new trustees, the court shall have regard to following:

- The wishes of the author of the trust as expressed in, or to be inferred from the instrument of trust;
- To the wishes of the person (if any) empowered to appoint new trustees;
- The question whether the appointment will promote or impede the execution of the trust;
- To the interest of all the beneficiaries where there are more than one beneficiary.

Application of these rules and principles also has been in vogue as they apply in English cases, as has been made clear by *Turner L.J.* in the case of **Re Tempest**.

In **Janta Bibi vs Wali Ullah**, it was held,

“Section 73 does not entitle a beneficiary to ask for the verdict of the court as to the unfitness of the sitting trustee. It is only when he makes petition under Section 74 that the court gets an opportunity to express its opinion as to the fitness or unfitness of the trustee.”

Jurisdiction Of The Court

The jurisdiction under this section would be exercised only where other avenues of appointment have failed or have become impracticable. Where it is a matter of doubt whether the statutory power or the express power under the instrument would be applicable, the court would step in to make the appointment.

In the case of **Smt. Shanti Devi v. State Of Delhi (1982)**, it was held that *Section 73 does not apply to charitable trusts. If the settlor did not appoint a trustee, the court can appoint and enforce it as trust never fails for the want of the trustee.*

Effect Of The Appointment Of Trustees

According to **Section 75**, When a trustee is discharged from office and any new trustee is appointed, all the trust property for the time being vested in the surviving or continuing trustee or trustees, or in the legal representative of any trustees, shall become vested in such a new trustee, either solely or jointly with the surviving or continuing trustees, or trustee as the case may require.

Similarly, every new trustee so appointed and every trustee appointed by a court, either before or after passing of this act, shall in all respects have the same powers, authorities and discretions, and shall in all respects act, as if he had originally nominated a trustee by the author of the trust.

However, if the number required by the trust deed is not complete the remaining trustee cannot exercise the right of the execution of the aim of the trust.

Conclusion

The law of appointment of trustees is enshrined under the Indian Trust Act, 1882. Appointment of a new trustee plays a vital role in the management of trust deed and trust property. It is the duty of the settlor and the court to appoint eligible trustees capable of performing their duties following the principles laid down within the code.

• Write a note on public trust (6)

Public Trusts and Indian Trusts Act

Introduction

A trust in India is a legal arrangement where one party, known as the settlor, transfers property to another party, known as the trustee, for the benefit of a third party or for a broader charitable purpose. The Indian Trusts Act, 1882 governs the establishment, management, and responsibilities of a trust in this context.

Trusts are created for the purposes of accomplishing charitable, religious, or private activity while taking care of the assets. Generally, in India trusts fall into two categories: Public Trust (which benefit the general public for activities like education and healthcare) and Private Trust (which benefit specific individuals or families) Trusts.

In this blog we will cover the major differences, structuring and purposes of a Public Trust and a Private Trust so that you may see which would work best for you.

Public Trust

Public trusts are created as nonprofit legal entities for the benefit of the general public or a broad group of people in society. In India, these trusts are governed by the Indian Trusts Act of 1882 and, sometimes, state-level Public Trust Acts. Additionally, they are often subject to greater scrutiny and regulation than other trusts.

Key Features of Public Trusts

Typically, public trusts work to serve society's needs.

- Charitable or Religious Purpose – Dedicated to public benefit by facilitating education, health care, poverty relief, or a religious organisation
- Open Beneficiaries – Benefits flow to an undefined class of people (e.g., “all slum children”)
- Regulatory Oversight – Organisations must register with state charity commissions, receive audited and asset transaction approvals, and may be subject to the doctrine of cypres
- Irrevocability – A trust deed is typically irrevocable, and trustees may not amend the purposes without a court or regulatory approval.

Examples of Public Trusts

These trusts are responsible for large-scale social and religious institutions in India:

- Akshaya Patra Foundation – Incorporated under the Indian Trusts Act, it provides mid-day meals to more than two million school children
- Tirumala Tirupati Devasthanam (TTD) – A trust managed by the government that manages the Tirumala Temple and social activities
- Sevalaya – A charitable trust located in Chennai that operates free schools, hospitals and shelters in multiple states
- Sri Sathya Sai Central Trust Implements a range of large-scale public welfare projects, like drinking-water projects in multiple states.

Feature	Public Trust	Private Trust
Beneficiaries	Unspecified public / large group	Named individuals or family
Purpose	Charitable or religious	Personal, estate planning
Regulation	Charity Commissioner, audits required	Fewer compliance obligations
Asset Flow	Open to public benefit	Limited to specified beneficiaries
Beneficiaries	Unspecified, broad group (e.g., community, underprivileged)	Clearly defined individuals or families
Purpose	Charitable or religious public welfare	Private asset management, inheritance, tax planning
Tax Treatment	Often exempt from income tax; eligible for public donations	Usually taxed like individuals or AOP; limited exemptions
Legal Framework & Registration	State-level Public Trust Acts; mandatory immovable property registration	Governed by Indian Trusts Act; registration optional unless immovable property involved
Transparency	Highly accountable—open to public scrutiny, audits, regulatory oversight	Low transparency; private deed, limited disclosure
Management & Compliance	Managed by a board; strong regulatory oversight, report filing	Few trustees; minimal ongoing compliance
Duration	Perpetual or long-term with no set end	Often set for specific period or until condition fulfilled

Legal Framework and Compliance Requirements for Private and Public Trusts

In India, the formation of a private trust or a public trust has to comply with different legal frameworks based on the type of trust. Private trusts are regulated by the Indian Trusts Act, 1882. Public trusts, for example, charitable or religious trusts, are governed by state laws like the Bombay Public Trusts Act, 1950 or the Tamil Nadu Societies Registration Act of 1975.

Trust Registration and Authority

Trusts are registered with the Sub-Registrar as per the registration laws of the respective state. To complete this process, the following documents are required:

- Trust deed, which specifies the purpose of the trust, the trustees, beneficiaries, and administrative arrangements
- Identity and address proof of the trustees and settlor
- Photographs & PAN card

Trust Deed Drafting

The trust deed must be properly drafted if it is to be enforced by law. It is necessary to have an accurate description of the objects of the trust, the trust's rules, its duration (if any), and the powers and duties of the trustees. For a public trust, it will be important to contain clauses related to charitable purposes and the use of income for tax exemptions.

Compliance Rules

After a trust is registered, it must continue to follow the legal obligations, such as:

- Annual filings with the regulator (Charity Commissioner or Registrar)
- Accounting and audit obligations
- Income tax compliance following Sections 12A and 80G (for public charitable trusts).

In general, private trusts will be governed by central legislation, while public trusts come under state specific laws, so it is important to confirm the laws that apply according to where the trust is located.

Common Use Cases

Trusts serve different purposes depending on their type. Choosing the right kind ensures your goals are met efficiently and legally.

- Charity and philanthropic activities → **Public Trust**
- Religious institutions or temple management → **Public Trust**
- Family inheritance and succession planning → **Private Trust**
- Protecting assets from creditors or legal disputes → **Private Trust**
- The right structure ensures compliance and smooth operation of your trust's objectives.

Conclusion

A private trust differs from a public trust in that private trusts are for personal and family needs, such as inheritance and financial assurance for specific beneficiaries, whereas public trusts are for charitable, religious, and social purposes and may be broader in scope. You must establish your intent, beneficiaries, and goals for the future to determine the right solution. Even though both types of trusts may be beneficial, compliance and good structures are essential to the success of either.

- **Write a note on successions (6)**

Successions under the Indian Trusts Act, 1882

Introduction

Under the **Indian Trusts Act, 1882**, succession in the context of trusts refers to the transfer of rights, duties, and interests from one trustee or beneficiary to another, in accordance with the trust deed and the provisions of the Act. While the Act primarily governs **private trusts**, it lays down clear rules for how such succession is handled.

1. Creation of a Trust and Beneficiary Rights

- As per **Section 6**, a trust is created by a *settlor* transferring property to *trustees* for the benefit of *beneficiaries*.
- The rights of beneficiaries are defined in the trust deed, and these rights can pass on to their legal heirs unless expressly restricted.

2. Succession of Trusteeship

- If a trustee dies, resigns, or is removed, the succession of trustees is governed by the trust deed.
- In the absence of such provisions, the author of the trust or the remaining trustees may appoint a new trustee, or the court may intervene under Sections 73–74.

3. Succession of Beneficial Interest

- Unless the trust deed specifies otherwise, a beneficiary's interest is heritable and transferable.
- If a beneficiary dies, their legal heirs inherit the beneficial interest, subject to the trust's terms.

4. Role of the Trust Deed in Succession

- The trust deed is the primary document that dictates succession rules.
- It may provide for automatic succession, nomination, or court appointment in case of vacancies.

5. Key Legal Safeguards

- Trustees must act in good faith and in the best interest of beneficiaries.
- Succession must not defeat the trust's purpose or violate any statutory provisions.

Conclusion

In essence, succession under the Indian Trusts Act ensures continuity of trust administration and protection of beneficiaries' rights, with the trust deed playing a central role in determining how transitions occur.

• Distinguish between trust with bailment and Agency (10)

Distinguishing Between the Trust Concept and Other Legal Concepts

Introduction

Trust, bailment, and agency are distinct legal relationships recognized under Indian law. A **trust** is governed by the Indian Trusts Act, 1882, **bailment** is governed by the Indian Contract Act, 1872 (Sections 148–171), and **agency** is governed by the same Act (Sections 182–238). Though all three involve one person dealing with property or acting for another, they differ significantly in their nature, purpose, and legal consequences.

1. Trust

Definition:

According to Section 3 of the **Indian Trusts Act, 1882**, a trust is:

"An obligation annexed to the ownership of property, arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner."

Example: A transfers property to B to hold and manage for the benefit of C. Here, B is the trustee and C is the beneficiary.

2. Bailment

Definition:

According to Section 148 of the **Indian Contract Act, 1872**, bailment is:

"The delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them."

The person delivering the goods is called the **Bailor**, and the person receiving them is called the **Bailee**.

Example: A gives his watch to B for repair. A is the bailor and B is the bailee.

3. Agency

Definition:

According to Section 182 of the **Indian Contract Act, 1872**:

"An agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done or who is so represented is called the principal."

Example: A appoints B to sell his house on his behalf. B acts as A's agent and A is the principal.

Distinction between Trust, Bailment and Agency

Basis	Trust	Bailment	Agency
Meaning	An obligation annexed to ownership of property for the benefit of another.	Delivery of goods by one person to another for a specific purpose upon a contract that the goods shall be returned or otherwise dealt with according to directions.	A relationship where one person is authorized to act on behalf of another in dealings with third parties.
Parties	Author/Settlor, Trustee, Beneficiary.	Bailor and Bailee.	Principal and Agent.
Subject Matter	Property (movable or immovable).	Only movable goods.	Any lawful act, transaction, or business.

Basis	Trust	Bailment	Agency
Ownership	Legal ownership vests in the trustee.	Ownership remains with the bailor.	Ownership remains with the principal.
Purpose	Benefit of beneficiaries.	Safe custody, repair, transport, or other specified purpose.	Representation of the principal in legal or commercial transactions.
Creation	By declaration, transfer, or will.	By delivery of goods and acceptance.	By agreement, ratification, necessity, or operation of law.
Power over Property	Trustee has legal control subject to trust obligations.	Bailee has possession only.	Agent may deal with property as authorized by the principal.
Right against Third Parties	Trustee can sue third parties regarding trust property.	Bailee may sue for interference with possession.	Agent generally acts in the name of the principal.
Beneficiary	Essential element.	No beneficiary.	No beneficiary; acts for principal.
Termination	According to the trust purpose or provisions of law.	On completion of the purpose or return of goods.	By revocation, completion of business, death, insanity, or insolvency of the principal/agent (subject to exceptions).

Conclusion

A **trust** involves the transfer of ownership to a trustee for the benefit of beneficiaries; **bailment** involves only the transfer of possession of goods for a specific purpose, while **agency** is a representative relationship in which an agent acts on behalf of the principal. The key distinction lies in the transfer of ownership in trust, transfer of possession in bailment, and authority to act in agency. These differences determine the rights, duties, and liabilities of the parties involved.

- **Disabilities of trustee (6)**

Introduction:

A trustee is expected to protect trust property, act loyally, and administer the trust according to the settlor's intention. But the law also places strict limits on what a trustee cannot do. These

restrictions are called the disabilities of trustees. They are not punishments in the ordinary sense; they are safeguards designed to prevent conflict of interest, self-dealing, careless delegation, and misuse of trust property. Chapter V of the Indian Trusts Act, 1882 sets out these disabilities in sections 46 to 54. Together, they preserve the purity of the fiduciary role and ensure that trustees remain accountable to beneficiaries and to the court.

The legal setting of trustee disabilities:

The Indian Trusts Act, 1882 was enacted to define and amend the law relating to private trusts and trustees. After Chapter IV deals with the rights and powers of trustees, Chapter V immediately follows with the disabilities of trustees. That structure is deliberate: the Act first gives trustees the tools to administer the trust, and then restricts them from using those tools for personal gain or unsafe conduct. The relevant disability provisions are sections 46 to 54. They cover renunciation after acceptance, delegation, acting by co-trustees, control of discretionary power, remuneration, personal profit, purchase of trust property, purchase of beneficiary's interest, and self-lending by co-trustees.

These rules reflect the basic equitable idea that a trustee must not place personal interest above duty. Even where a trustee is honest, the law still avoids situations where temptation could arise. That is why the Act uses firm prohibitions instead of relying only on subjective good faith. The beneficiary is protected not merely from fraud, but also from structural risks that can weaken trust administration.

3. Trustee cannot renounce after acceptance — section 46:

Section 46 states that once a trustee has accepted the trust, he cannot later renounce it except in three situations: with the permission of the principal Civil Court of original jurisdiction, with the consent of a beneficiary who is competent to contract, or under a special power contained in the instrument of trust. The rule makes acceptance binding. A person cannot accept a fiduciary office and then walk away whenever it becomes inconvenient.

The policy behind this section is stability. Beneficiaries, donors, and third parties must know that the trustee will continue unless the law or the trust deed provides otherwise. Otherwise, trust administration would become uncertain and fragile. The section balances rigidity with fairness by allowing court permission and beneficiary consent where appropriate.

Trustee cannot delegate — section 47:

Section 47 lays down the non-delegation rule. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger unless the instrument of trust permits it, the delegation is in the regular course of business, the delegation is necessary, or the beneficiary competent to contract consents. The explanation clarifies that appointing an attorney or proxy for a merely ministerial act involving no independent discretion is not a prohibited delegation. The reason is simple: trustees are chosen for personal confidence and judgment. A settlor selects a trustee because the settlor trusts that person's discretion. If the trustee could freely hand over the office or core duties, the foundation of the trust would be weakened. Yet the law does not require the trustee to do every mechanical task personally. Routine work may be done through proper agents when the Act allows it.

Co-trustees cannot act singly — section 48:

Section 48 says that when there are more trustees than one, all must join in the execution of the trust unless the instrument of trust provides otherwise. This rule prevents one trustee from

acting alone and binding the trust without the participation of the others. It is a collective-control mechanism.

The purpose is to create internal checks and balance. Co-trustees are expected to supervise one another and prevent unilateral misuse. If one trustee could act alone in every matter, the very reason for appointing multiple trustees would be defeated. The trust deed may, however, authorize a different arrangement. The Act respects such contrary intention.

Control of discretionary power — section 49:

Section 49 provides that where a discretionary power given to a trustee is not exercised reasonably and in good faith, the principal Civil Court of original jurisdiction may control that power. The section does not eliminate discretion; it supervises it. A trustee may decide among options, but the decision must be honest, reasonable, and faithful to the trust's purpose.

This is important because some trust deeds give trustees broad latitude. The law does not leave that latitude unchecked. A trustee cannot hide behind the word "discretion" if the choice is irrational, oppressive, or dishonest. The court can intervene where the discretion is abused.

Trustee may not charge for services — section 50:

Section 50 states that, unless the trust instrument, a contract with the beneficiary, or the court at the time of accepting the trust provides otherwise, a trustee has no right to remuneration for trouble, skill, or loss of time in executing the trust. In general, trustees serve gratuitously. The Act makes remuneration an exception, not the rule.

The policy is that trusteeship is a fiduciary obligation based on confidence, not a commercial job by default. If trustees were entitled to charge freely, beneficiaries might be burdened with unexpected costs, and the fiduciary character of the office could be diluted. At the same time, the Act allows compensation where the instrument or court expressly permits it. Some office-holders, such as Official Trustees and certain public fiduciaries, are excluded from this restriction.

Trustee may not use trust-property for his own profit — section 51:

Section 51 is a direct anti-self-dealing rule. It provides that a trustee may not use or deal with the trust-property for his own profit or for any purpose unconnected with the trust. This is one of the strongest disabilities in the Act because it protects the core duty of loyalty.

The rule is absolute in spirit. Even if the trustee believes the trust is not harmed, personal use of the property creates conflict and undermines confidence. Trust property is not a trustee's private resource. It belongs to the trust and must be applied only for trust purposes.

Trustee for sale or his agent may not buy — section 52:

Section 52 prohibits a trustee whose duty it is to sell trust-property, and any agent employed by that trustee for the sale, from buying the property or any interest in it directly or indirectly, whether on his own account or as agent for another person. This is a classic conflict-of-interest rule. The person in charge of selling cannot also be the buyer.

The purpose is obvious. A seller can influence price, timing, and disclosure. If the same person is allowed to buy, there is a serious risk that the property will be sold below fair value. The Act therefore treats such purchases as forbidden. This is one of the most important anti-fraud safeguards in trust law.

Trustee may not buy beneficiary's interest without permission — sec 53:

Section 53 states that no trustee, and no person who has recently ceased to be a trustee, may without the permission of the principal Civil Court of original jurisdiction buy or become

mortgagee or lessee of the trust-property or any part of it. The court may grant permission only if the proposed transaction is manifestly for the beneficiary's advantage. The section further provides that a trustee whose duty is to buy or obtain a mortgage or lease of particular property for the beneficiary cannot buy or take that property for himself.

This section deals with the danger that a trustee may exploit privileged information or influence to benefit personally from the trust relationship. Even after resignation, a trustee may still know inside details about value, timing, or beneficiary pressure. The law therefore keeps a careful restriction on these transactions.

Co-trustees may not lend to one of themselves — section 54:

Section 54 provides that a trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees. The rule blocks self-lending and intra-trustee favoritism. A trustee must not place trust money in a position where the borrower is himself or his colleague.

The concern is obvious: trustees should not become both lender and borrower in relation to trust funds. Such a loan would tempt misuse and weaken objective judgment. Even co-trustees are treated cautiously because their close relationship may create pressure or collusion. The section therefore draws a bright line.

Why these disabilities matter:

The disabilities in Chapter V form the ethical spine of the Indian Trusts Act. The Act does not assume that trustees are dishonest. Instead, it recognises that fiduciary office must be protected from temptation, conflict, and informal abuse. That is why the law prevents renunciation at will, forbids delegation of core responsibility, requires collective action by co-trustees, reviews discretionary power, denies automatic remuneration, and bans self-profit, self-purchase, and self-lending. Together, these rules keep the trustee focused on the beneficiary's interest.

For exam purposes, it helps to remember the logic of the provisions in a sequence. First, the trustee cannot escape the office easily. Second, the trustee cannot hand the office or core duties to someone else. Third, the trustee cannot act alone when co-trustees are required. Fourth, the trustee cannot use discretion arbitrarily. Fifth, the trustee cannot make the trust a source of personal gain. Sixth, the trustee cannot buy, borrow, or profit from the trust relationship. That is the trust law policy in its simplest form.

Conclusion:

The disabilities of trustees under the Indian Trusts Act, 1882 are not merely technical restrictions. They are the legal machinery that keeps trustees faithful, cautious, and accountable. Sections 46 to 54 ensure that a trustee cannot renounce casually, delegate unlawfully, act without fellow trustees where required, abuse discretion, charge unless allowed, use trust property for personal profit, buy trust assets, acquire the beneficiary's interest unfairly, or lend trust money to himself or a co-trustee. These rules make trust administration trustworthy in the true sense of the word. For a law student, they are among the clearest expressions of the fiduciary principle in Indian private law.

- **Charitable trust**

Charitable Trust Under the Indian Trusts Act, 1882

Introduction

A charitable trust is a **public trust** created for the benefit of the public at large or a considerable portion of it, with objectives centered on poverty relief, education, medical relief, religious practices, and other objects of general public utility. While the **Indian Trusts Act, 1882** is the foundational legislation governing trusts in India, it is crucial to understand that **the Act primarily governs private trusts**, not public charitable trusts.

Key Legal Position: Applicability of the Indian Trusts Act, 1882

Section 1 Savings Clause

The Act explicitly **excludes** public religious or charitable endowments from its scope:

"Nothing herein contained... applies to public or private religious or charitable endowments"

This means:

- The Indian Trusts Act, 1882 **does not specifically apply** to public charitable trusts
- In states **without** a specific Public Trusts Act, the **general principles** of the Indian Trusts Act, 1882 are applied
- States like **Maharashtra** (Bombay Public Trusts Act, 1950), **Gujarat, Rajasthan** (1959), and **Madhya Pradesh** (1951) have their own governing legislation

Essential Elements of a Charitable Trust

Author/Settlor: Person who creates the trust and must be competent to contract

Trustee(s): Person(s) accepting confidence, responsible for trust property; minimum 2 trustees required

Beneficiary: Public at large or considerable portion (not definite individuals)

Trust Property: Definite property transferred to trustee; must be transferable

Charitable Purpose: Clear objective for public benefit

Three Bare Minimum Requirements (per Hanumantram Ramnath case):

1. **Declaration of trust** – binding on settlor
2. **Setting apart definite property** – settlor deprives themselves of ownership
3. **Beneficiary** – for whom property is held

Creation of Charitable Trust

Section 6 Requirements

The author must indicate with **reasonable certainty**:

- Intention to create a trust
- Purpose of the trust

- Beneficiary (public at large)
- Trust property
- Transfer of property to trustee

Formal Requirements:

Immovable: Written, registered trust deed essential (Section 5)

Movable: Simple delivery of possession with direction sufficient; no document required

Important: For charitable/religious trusts, **formal deed or writing is NOT necessary**, unlike private trusts. However, a **trust deed is desirable** for registration and legal evidence.

Definition of "Charitable Purpose"

Under Section 2(15) of Income Tax Act, 1961:

Charitable purposes include:

1. **Relief of the poor**
2. **Education**
3. **Medical relief**
4. **Advancement of any other object of general public utility**

Additionally, Finance (No.2) Act, 2009 added:

- Preservation of **environment** (watersheds, forests, wildlife)
- Preservation of **monuments** or places of artistic/historic interest

Under Bombay Public Trusts Act, 1950 (Section 9(1)):

1. Education
 2. Relief of poverty or distress
 3. Medical relief
 4. Recreation/leisure facilities (for public benefit/social welfare)
 5. Any other object of general public utility
- **Excludes:** purposes relating exclusively to religious teaching or worship

Types of Charitable Trusts

- **Charitable Lead Trust:** Proceeds distributed to charity first; remainder goes to donor's chosen beneficiaries
- **Charitable Remainder Trust:** Donor receives income from assets; after specified period/death, charity gets complete control

Duties and Powers of Trustees

Though the Act primarily governs private trusts, these principles apply by analogy:

Key Duties:

- **Section 11:** Execute trust and fulfill purpose
- **Section 12:** Inform himself of state of trust-property
- **Section 13:** Protect title to trust-property
- **Section 15:** Deal with property as **man of ordinary prudence** would with own property
- **Section 17:** Be **impartial** among beneficiaries
- **Section 19:** Keep clear accounts and furnish information

Key Rights:

- **Section 31:** Right to title-deeds
- **Section 32:** Right to reimbursement of expenses
- **Section 34:** Right to apply to Court for opinion
- **Section 36:** General authority to do reasonable acts for trust benefit

Disabilities:

- **Section 50:** Cannot charge for services (unless specified)
- **Section 51:** Cannot use trust-property for own profit
- **Section 46:** Cannot renounce after acceptance

Registration Process

Procedure:

1. **Choose appropriate name** (not under Emblem and Name Act, 1950)
2. **Prepare trust deed** on stamp paper with objectives, rules, trustee details
3. **Submit to Registrar** with settlor, 2 witnesses, identity proofs
4. **Obtain registration certificate** within 7 working days

Documents Required:

- Trust deed
- Self-attested ID proof of settler and trustees
- Address proof of registered office
- PAN Card

- NOC by property owner

Registration: Optional but desirable for public trusts; mandatory for private trusts involving immovable property

Tax Exemptions

Income Tax Act, 1961:

- **Section 11:** Modes of exemption for public charitable trusts
- **Section 12:** Exemptions for contributions/income
- **Section 13:** Forfeiture conditions
- **Section 80G:** Donor deduction privileges

Conditions for 80G certification:

- Trust must be public charitable (not private)
- Registered under state law and Income Tax department
- Income used only for charitable purposes
- Regular account maintenance and audit
- No irregularities in tax return filing

Foreign Contribution Regulation

Trusts receiving foreign donations must obtain **FCRA registration** under Section 6(1) of Foreign Contribution (Regulation) Act, 2010:

Eligibility criteria:

- Trust must exist for **minimum 3 years**
- Spent at least **₹10,00,000** on aims/objectives (excluding admin) in last 3 years
- Audited statements of income & expenditure for 3 years

Important Legal Principles

Secular Nature

India being a secular state does not allow distinction based on color, caste, or creed in charitable organizations. However: Trusts for specific religious communities are not eligible for income tax exemptions. Political activity is not permitted; even "political education" is outside charitable purpose under Bombay Public Trusts Act. Perpetual Existence. Charitable trusts enjoy permanent existence, unlike private trusts.

Conclusion

While the Indian Trusts Act, 1882 provides the foundational framework for trust law in India, it is essential to recognize that public charitable trusts are primarily governed by state-specific

Public Trusts Acts or general principles where no state act exists. The Act's Section 1 expressly saves religious and charitable endowments from its application.

A valid charitable trust requires: (1) a competent settlor, (2) definite property, (3) clear charitable purpose for public benefit, (4) trustees accepting the confidence, and (5) beneficiaries being the public at large. Such trusts enjoy tax exemptions, perpetual existence, and serve public welfare objectives including poverty relief, education, medical care, and general public utility.

The legal framework ensures charitable trusts serve genuine public purposes while preventing misuse for private gain or political activities, maintaining India's commitment to secular charity aligned with public policy

- **Precatory trust**

Precatory trust definition

Introduction

A transfer or bequest of property to another with words of prayer, entreaty, recommendation, expectation or the like which, properly construed, amounts to a trust. Precatory words can be construed as creating a trust. However, precatory words (such a desire, wish, hope or expectation that the donee will use the property in a certain way) can also be construed so that no trust arises unless the court comes to the conclusion that a trust was intended. Where precatory words are used it is ultimately a matter of construction whether a trust can be inferred.

Precatory Trust

Precatory language like "I wish" or "I hope" in a will or trust may or may not be legally binding — here's how courts decide and what it means for your estate plan.

A precatory trust becomes binding only when a court concludes that the person who created the document genuinely intended to impose a legal obligation, not just express a hope. Words like “wish,” “desire,” and “request” raise a red flag for judges because they sound like suggestions rather than commands. Whether those words actually create an enforceable trust depends on the full context of the document, the specificity of the instructions, and the relationship between the parties involved.

Meaning of “Precatory”

Precatory language is any phrasing that recommends or expresses a hope rather than directing someone to act. Common examples include “I wish that my daughter use this property for her education,” “I desire that my spouse distribute the remainder equally,” or “I request that my brother manage these funds for the family.” These phrases come up constantly in wills and trust documents, and they create a problem: did the writer mean to create a binding trust, or were they simply offering guidance the recipient could ignore?

The distinction matters enormously. If the language creates a trust, the recipient becomes a trustee with legal duties to manage and distribute the property according to the instructions.

If the language is merely precatory, the recipient owns the property outright and can do whatever they want with it. The people the writer hoped would benefit have no legal claim.

What Courts Look for When Deciding If a Trust Exists

For any trust to be valid, the person creating it must clearly intend to impose a binding duty on the person receiving the property. Under the framework adopted across most states, a trust requires that the creator had the capacity to establish it, demonstrated an intention to create it, identified definite beneficiaries, and gave the trustee actual duties to perform. The intent requirement is where precatory trusts live or die.

When Precatory Language Does Create a Binding Trust

Courts don't automatically dismiss precatory words. In the right circumstances, a "wish" or "desire" can be read as a command, and the trust will be enforced. This is where the real analysis happens, and several factors push courts toward finding a binding obligation.

The strongest indicator is specificity. When the document names exact beneficiaries, describes particular property, and spells out detailed distribution instructions, courts are far more willing to read precatory words as mandatory. A clause that says "I wish my trustee to distribute \$50,000 to each of my grandchildren when they turn 25" leaves little room for discretion. Compare that to "I hope my wife will take care of my family," which is so vague it barely qualifies as an instruction at all.

Courts also look at who received the property. When precatory language is directed at a disinterested party like an executor or professional trustee, judges are more inclined to treat it as binding than when the same language is directed at someone who personally benefits from the property. A trustee with no stake in the outcome has no reason to hold the property unless a trust was intended. An interested recipient, on the other hand, could simply be receiving a gift with some non-binding moral guidance attached.

Historical judicial trends shifted significantly on this point. During the 19th century, courts routinely found that precatory words created enforceable trusts, sometimes even when it was doubtful the writer intended any such restriction. The modern approach is far stricter: precatory words create a trust only when the overall evidence shows the writer intended to impose an obligation on the recipient to distribute the property in a particular way.

When Courts Refuse to Enforce Precatory Language

The modern default runs against enforcement. When someone challenges a precatory clause, the court reads the entire document to determine the writer's true intent, giving attention to every surrounding fact and circumstance rather than fixating on isolated words. If the language leaves too much discretion to the recipient, lacks specific distribution instructions, or fails to identify clear beneficiaries, the court will almost certainly conclude no trust was created.

Vagueness is the most common reason precatory trusts fail. Language like "I desire that my property be used for the benefit of my family" doesn't tell anyone what property, which family members, in what proportions, or under what conditions. That level of ambiguity defeats the claim that a binding obligation exists. Courts look for the kind of precision you'd expect in a

trust instrument: identified assets, named beneficiaries, and instructions specific enough that a trustee could actually follow them.

The absence of any management or accountability framework also weighs against enforcement. A real trust comes with reporting duties, investment standards, and fiduciary obligations. If the document says nothing about how the property should be managed, that silence suggests the writer didn't intend to create those obligations. The court won't read them in where the writer left them out.

What Happens When a Precatory Trust Fails

When a court decides the precatory language doesn't create a trust, two outcomes are possible, and the distinction between them is important.

The most common result is that the property passes to the recipient as an outright gift. The person owns it completely, with full legal and beneficial title, and faces no legal consequences for ignoring the writer's stated wishes. While they might feel a moral pull to honor those wishes, nobody can sue them for choosing otherwise. The intended beneficiaries of the "wish" have no standing to bring a claim because there's simply no trust to enforce.

The less common but equally important result is a resulting trust. This happens when the court determines the writer didn't intend an outright gift either. If the evidence suggests the writer meant to create a trust but failed because the language was too vague or the beneficiaries too uncertain, the property doesn't stay with the recipient. Instead, it reverts to the writer's estate or passes to the residuary beneficiaries named in the will. As one court put it, even when the trust language is imperfect or fails to identify its objects clearly, the named recipient is excluded and the next of kin take the property instead.

Creditor and Asset Protection Consequences

The failure of precatory language to create a trust has real financial consequences beyond the disappointed beneficiaries. When property passes as an outright gift rather than into a trust, it becomes part of the recipient's personal estate. That means the recipient's creditors can reach those assets, the property counts toward the recipient's taxable estate, and it's subject to the recipient's own debts and legal judgments.

This is a sharp contrast to property held in a properly structured trust, where the assets belong to the trust rather than the individual trustee. If someone intended to protect property from a beneficiary's creditors by creating a trust, precatory language defeats that purpose entirely. The phrase "precatory trust" has even been called a misnomer because if the language is truly precatory, no trust exists at all.

Gift Tax Considerations

When a court treats precatory language as creating an outright gift rather than a trust, the transfer may trigger federal gift tax obligations. For 2026, you can give up to \$19,000 per recipient per year without needing to file a gift tax return.¹ Transfers above that threshold require filing IRS Form 709, though you likely won't owe tax until your cumulative lifetime gifts exceed the estate and gift tax exemption.

The tax treatment differs depending on whether property passes through a trust or as a gift. A properly funded trust gives the trustee control over timing and distribution, which can be structured to minimize gift and estate tax exposure. An outright gift triggered by failed precatory language offers none of that flexibility. If the amounts are significant, the unintended tax consequences can be substantial.

- **Modes of termination of trust (10)**
- **Write a note on extinction of trust (6)**

Extinction of Trust / Termination of trust

Introduction

The extinction of a trust is the termination or complete dissolution of a trust arrangement, effectively ending its existence and operations. This can occur under several circumstances as stipulated by law.

According to Section 77 of the Indian Trusts Act, 1882, a trust can be extinguished when its purpose is fully achieved, if the purpose becomes unlawful, if fulfilling the purpose becomes impossible due to reasons such as the destruction of the trust property or if the trust is explicitly revoked.

Once extinguished, the responsibilities of the trustees end and the trust property may need to be distributed or handled according to the terms of the trust or legal requirements.

Extinction of Trust

The extinction of a trust marks the cessation of its legal existence, typically when its predetermined conditions are met or altered by circumstances outlined in the governing legal framework, such as the Indian Trusts Act, 1882. This discussion explores the four primary circumstances under which a trust can be extinguished according to Section 77 of the Act.

1. Fulfillment of Purpose

The primary and most straightforward circumstance for the extinction of a trust occurs when its defined purpose has been completely fulfilled. This means that the objectives for which the trust was established have been achieved, rendering the trust's continuation unnecessary.

Case Example: In the case of **Amrit Lal Kohli and ors. vs Harbansh Lal Kohli and ors**, the trust was set up in 1966 for the benefit of the settlor's minor sons until they reached maturity and were well-established. The court ruled that the trust's objectives had been met as the beneficiaries had grown up and settled, leading to the trust's lawful termination.

2. Unlawful Purpose

A trust must be extinguished if its purpose becomes unlawful. According to Section 4 of the Indian Trusts Act, the illegality of a trust's purpose can arise under various conditions:

- It is explicitly forbidden by law.
- It would defeat the provisions of any existing law if allowed to continue.

- It involves or implies fraudulent activities.
- It results in injury to the person or property of another.
- It is regarded as immoral or opposed to public policy.

When a trust's purpose is declared illegal, it must be terminated to prevent the continuation of an unlawful activity.

Legal Framework: If a trust has mixed purposes, where some are lawful and others unlawful and these purposes are inseparable, the trust must be terminated entirely. However, if the lawful purposes can be distinctly separated from the unlawful ones, the trust can continue for those lawful purposes.

3. Impossibility of Fulfillment

A trust is also terminated when it becomes impossible to fulfil its purpose, whether due to the destruction of the trust property or other reasons that prevent the continuation of its activities.

Case Example: In **Gela Ram vs District Board Muzaffarnagar (1923)**, a trust was extinguished when the land designated to connect a main road with a public garden was sold and the garden ceased to exist. The purpose of the trust became impossible to fulfil, leading to its lawful termination.

4. Revocation of Trust

Trusts can be revoked in specific situations, leading to their extinction:

- **By Consent:** If all beneficiaries are competent to contract, they can agree to revoke the trust.
- **By Reservation:** Trusts can be revoked if there is an express power of revocation reserved by the author of the trust, which can be exercised under the conditions specified at the creation of the trust.
- **For Payment of Debts:** A trust created for the payment of the author's debts can be revoked at the author's discretion, provided it has not been communicated to the creditors.

Legal Note: The burden of proof to demonstrate the irrevocability of a trust typically falls on the creditors, who must prove their assent and reliance on the trust's provisions.

Extinction of Religious or Charitable Trusts

Religious and charitable trusts, once established, generally hold a permanent and irrevocable status. The creation of such trusts often involves dedicating property for the service and worship of a deity, a family or a public temple, making such dedications steadfast and unalterable.

This immutability is anchored in the principle that once a religious or charitable trust has been effectively set up, it becomes immune to revocation—even if the trustees fail to fulfil the intended objectives of the trust. This ensures that the trust's assets remain perpetually dedicated to the designated religious or charitable purposes.

Moreover, Halsbury's Laws of England notes that although charitable trusts can be declared with express powers of revocation, there is a lack of judicial decisions regarding the validity of such powers, specifically in relation to the rule against perpetuities.

This underscores the complex nature of revoking such trusts, further emphasising their generally permanent character. Consequently, the provisions for the extinction of trusts under Section 77 of the Indian Trusts Act, 1882, do not typically apply to religious or charitable trusts, reinforcing their enduring nature.

The Role of Trustees and Beneficiaries

Upon the extinction of a trust, trustees are required to settle any remaining obligations, distribute the assets according to the terms of the trust or legal directives and ensure a clear and documented end to the trust's operations. Beneficiaries must be informed and involved, as appropriate, especially in cases where their consent is necessary for revocation.

Conclusion

The extinction of a trust under the Indian Trusts Act, 1882, is a process bound by legal stipulations designed to ensure that trusts serve their intended purposes without leading to perpetual obligations.

Each scenario for the extinction of a trust reflects a balance between fulfilling the settlor's intent and adhering to legal and ethical standards. Understanding these conditions is crucial for trustees, beneficiaries and legal professionals involved in trust management and litigation.

- **What are rights and disabilities of a beneficiary (10)**
- **Discuss the rights of beneficiary of trust (10)**

Rights and disabilities of a beneficiary

Introduction

Under the Indian Trust Act, the beneficiary has no estate or interest in the subject matter of the trust. He has only the right to proceed against the trustee. The rights and liabilities of beneficiaries are also more commonly known as powers and remedies of the beneficiaries. These rights and liabilities of beneficiaries are dealt with under **Section 55 to 69** under **Chapter 6** of the Indian Trusts Act, 1882.

Right Of the Beneficiaries

Right To Rent and Profits

The beneficiary has, subject to the provision of the instrument of the trust, a right to rents and profits of trust property. The beneficiary has the right to collect any rents and profits or income of the trust properly, but this right is subject to such limitations as may be imposed by instruments of the trust.

Case law: Baker v/s Archer

In this case lord summer observed “*The trustee has the full legal property in the whole of trust funds and the beneficiary has interest set apart from special provisions in particular. Settlements, which do not affect the general principles are valid. The trustee is not the agent of the beneficiary, who can neither appoint or dismiss him.*”

Right To Specific Execution

Right to specific execution as the right to enforce in equity the specific execution of the intention of the settlor to the extent of the beneficiary’s particular interests. Thus, the beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary’s interest.

Where there are several beneficiaries with regard to whom the settlor or testator has created specific trust, each beneficiary is entitled to have the intention of the settler carried out according to the provision.

Right To Transfer of Possession

When there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all are of one mind, he or they may require the trustee to transfer the trust property.

Example– If A bequeaths a sum of rupees 20 thousand to trustees upon trust to purchase bond for B, B may become competent to contract and claim rupees 20 thousand himself.

Right To Inspect, Accounts And Take Copies Of Instrument Of Trust

The beneficiary has the right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of instruments of trust, the document of title relating solely to the trust property, the accounts of the trust property and the vouchers in any. It is open to the beneficiaries to demand, at all reasonable times, inspection of the documents relating to the trust at their own expense to obtain copies of the same.

Right Transfer Beneficial Interest

The beneficiary if competent to contract, may transfer his interest, but subject to the law for the time being in force, provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

Beneficiaries of a trust property who are ‘*sue juris*’ and whose rights are vested, may deal with and convey their beneficiary interest in the trust property, and the trustee will be required to convey the legal title in accordance therewith if such actions are not contrary with any statutes.

Right To Sue For Execution Of Trust

Where no trustees are appointed or all the trustees die, disclaim or are discharged, or for any other reason the execution of trust by the trustees is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the court until the appointment of new trustee.

Modes Of Execution

The court has to execute the power according to the circumstances. These modes are:

- Where the testator has prescribed the rule, the court shall follow it.
- Where the testator has not given a rule, the court will execute trust by the most reasonable rule according to the circumstances.

Case Law: Thangachi vs Ahmad Hussain

It was held that the beneficiary's right to sue for execution is well recognized and has been applied to public trust as well. The beneficiary has a right to invoke the jurisdiction of the court for the due execution of the trust.

Right To Proper Trustee

The beneficiary has the right to appoint a proper person and number of such persons for the management, protection and administration of a trust property; the principle of right to proper trustees is based on the interests of the beneficiary. A beneficiary interested in the proper administration and preservation of the trust property, hence in the interest of it, is entitled to approach the court for the appointment of a new trustee.

Under the Indian trust act the following are not proper persons to be trustee:

- Domiciled abroad
- An alien enemy
- A person having inconsistent interest with that of the beneficiary
- An insolvent
- A minor
- A person of unsound mind
- A person convicted for a serious criminal
- A person with physical infirmity

Case Law: Teerathadas vs Parameshwaribai

Weston J. observed: *"It may be taken that the list is not exhaustive, and that persons not following directly within one or other of these descriptions may not be proper persons within the meaning of this section"*

Right To Compel The Trustee To Any Act Of Duty

The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing contemplated or probable breach of trust. The beneficiary is entitled to bring an action against his trustee, and to compel him to execution or performance of any particular act or duty.

The beneficiary has not only a right to institute a suit to compel a trustee to do any act, he can file a suit for injunction against the trustee. But he has no right to move the court in a summary manner.

Wrongful Purchase By Beneficiary

Beneficiary has the right to retransfer any property which is wrongfully bought by the trustee which is in his hands and is unsold. Also the beneficiary is required to repay the purchase money paid by the trustee, with interest and any other expenses incurred on the preservation and maintenance of trust property.

However, nothing impairs the rights of the lessee to re-transfer the property if they have contracted in good faith with the trustee or purchaser.

Also, the property can not be re-transferred if the beneficiary has ratified the sale agreement with the testee and has given consent for the purchase of the property without any coercion and undue influence.

Following Trust Property

The beneficiary has the right to take all necessary steps to place trust property in the hands of the rightful owner, which has gone into the hands of a stranger. The rule applies not only to express trustees but also to all persons in a fiduciary capacity including agents.

Thus, where the trustee has disposed of trust property and the money or other property which he has received thereof can be stressed in his hands, or in the hands of his legal representative, the beneficiary has the right as nearly as may be same in respect of the original trust property.

Liabilities Of Beneficiaries

Liable to Compensate

It is the duty of the beneficiary to compensate or reimburse the trustee in case there are any damages caused either to the trustee or to the trust, due to the beneficiary. It is legally mandatory for the beneficiary to compensate if there is any injury or damage caused by himself.

Liability in case of breach of trust

The beneficiary is held liable, if by any chance, in any case, he/she breaches the trust agreement in any way. He is held fully liable for all losses/damages if he commits a breach of trust.

Liability for harming interest of other party

Beneficiary cannot harm another party's interests in any way in the trust, as he will be liable for any harm caused to another party within the trust that is due to him or his behavior/etc.

Liability not to obtain any advantage without the consent of other beneficiaries

It is mandatory for the beneficiary to take consent of all other beneficiaries involved in the trust in case he/she needs to obtain any kind of advantage. If not done, it will be considered as a breach of trust.

Liable to Receive his interest

The beneficiary is entitled to get his/her interest from the trust, but the beneficiary should not claim more than his interest in the trust property.

Liability to take reasonable steps

The beneficiary will be held liable in case he fails to take reasonable steps and actions, as mentioned in the trust deed, within the rights and duties of other beneficiaries. It is mandatory for the beneficiary to only take steps within the limitations and boundaries set of all other beneficiaries.

Conclusion

To conclude, we can say that under the provisions of the trust act, there is an equal ratio of rights as well as the liabilities of the beneficiary. The beneficiary is entitled to many rights and is equally liable for any breaches as well.