

CHAPTER II
TRANSFERS OF PROPERTY BY ACT OF PARTIES
(Ss. 5 – 53-A)

A. Transfer of property whether movable or immovable (Ss. 5-37)

Meaning of transfer of property (S. 5)

Transfer of property means:

- i. an act by which
- ii. a living person
- iii. conveys,
- iv. in present or in future,
- v. property
- vi. to another living persons, or to himself.

“living person” includes a company or association or body of individuals, whether incorporated or not.

Living person – transfer only between living persons (*inter vivos*). Living person includes a juristic person but does not include an idol or a temple. If a person dedicates property to God, this transfer would not be subject to the TP Act, but would be governed by the relevant religious or charitable endowment Acts.

Property – means not only physical objects but also includes rights and interests existing in, or derived out of, the actual physical objects.

Interest in property – an owner has three basic rights in the property:

- (a) right of ownership, of having the title to the property,
- (b) an exclusive right to possess and enjoy the property, and
- (c) an exclusive right to alienate the property in any manner that he likes.

These rights are called interests in the property. Absolute ownership is an aggregate of these component rights.

Transfer – Where all the rights in property are transferred, it would be a transfer of property, but where only some rights are transferred, it would be a transfer of an interest in the property, such as mortgage, lease.

Conveyance of property – involves creation of new title or interest in favour of the transferee.

Partition of joint family property does not amount a transfer within the meaning of S. 5 of TPA. (*V.N. Sarin vs Ajit Kumar Poplai, 1966 SC 432*)

Present or future – the words ‘in present or in future’ qualifies the word ‘conveys’ and not the word ‘property’. It means that a transfer is a conveyance of such property that must be in existence at present, but whose conveyance may take place depending upon the terms of the contract not only at present, but also in the future.

It does not refer to conveyance of future property.

‘to himself’ – Added by the Amendment Act of 1929. It is now possible for a person to transfer property to himself. It is only possible when a person does so in different capacities. Thus, where a person is the settler and makes himself trustee, he transfers the property to himself.

What may be transferred (S. 6)

The general principle is that “property of any kind may be transferred”.

Exception:

(a) Spes Successions –

- (i) The chance of an heir-apparent succeeding to the property,
 - (ii) the chance of a relation obtaining a legacy on the death of a kinsman, or
 - (iii) any other mere possibility of a like nature,
- cannot be transferred.

Heir-apparent – is based on the maxim *nemo est heres viventis* which means that a living person does not have any heir. An heir is a person who succeeds to the property of another on his death, if such person wills the property to him or dies intestate. The expectant heir cannot transfer the property presently in the hope of succeeding to the same on the death of a kinsman.

Similarly, the chance of a relation obtaining a legacy on the death of a kinsman cannot be transferred. The reason is that there is no property with the transferor in such cases. He has merely *spes successionis*, i.e., mere possibility of succession, which is not transferable. Such a transfer is *void ab initio*.

(b) **Right of re-entry** – A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone **except the owner** of the property.

(c) **Easement** – An easement cannot be transferred apart from the dominant heritage.

(d) **Personal right** – An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him, *since it is a personal right created for the benefit of the person.*

E.g. – a transfer by way of a mortgage of a life-interest restricted to the owner personally is inoperative under this clause.

(dd) **Future maintenance** – A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred. *It is a right intended for the personal enjoyment of the grantee. This clause was added by the Amendment Act of 1929.*

N.B. – Arrears of maintenance allowance which have been accrued due may be transferred.

(e) **Mere right to sue** – A mere right to sue cannot be transferred.

- It can be transferred along with the interest with which it relates.
- A mere claim for damages in respect of a breach of contract is a mere right to sue which cannot be transferred.
- This rule has been enacted for the purpose of discouraging champerty and maintenance.
- There is a difference between mere right to sue and actionable claim. The former is not transferable, the latter is.
- As a general rule, where there are unliquidated damages it is merely a right to sue which as such cannot be transferred, but where there is a liquidated debt or beneficial interest in any movable property it is an actionable claim which is assignable in law.
- Dower debt is an actionable claim and not mere right to sue.

(f) **Public office** – A public office cannot be transferred. The salary of a public officer also cannot be transferred, whether before or after it has become payable.

N.B. - The salary can be attached under O.21, R 48 CPC.

(g) **Stipends** – Stipends allowed to military, naval, air-force and civil pensioners of the Government and political pensions cannot be transferred.

(h) **Untransferable interest** – No transfer can be made:

- (1) if it opposed to the nature of the interest affected thereby, or
- (2) if it is for an unlawful object or consideration under section 23 of the Indian Contract Act, 1872, or
- (3) if it is to a person legally disqualified to be transferee.

N.B. - Persons coming under O. 21, R 73 CPC, S. 136 TP Act are legally disqualified.

(i) **Statutory prohibition** – under this clause:

- (a) tenant having an untransferable right of occupancy,
- (b) the farmer of an estate in respect of which default has been made in paying revenue, or
- (c) the lessee of an estate under the management of a Court of Wards, cannot assign his interest as such tenant, farmer or lessee.

Persons competent to transfer (S. 7)

The transferor must be –

- (i) competent to contract (under S. 11 Contract Act) and
- (ii) (a) entitled to, or
 - (b) authorised to dispose of, transferable property.

N.B. - According to S. 11 Contract Act, the following persons are not competent to contract –

- (a) a minor,
- (b) an insane, and
- (c) a person disqualified from contracting by any law.

Pardanasheen lady is competent to contract but any person entering into a contract with her should show that no undue influence was exercised upon her.

Minor – This section imposes a restriction on the competency to transfer, but makes no restriction on any person being a transferee. Thus, a minor cannot be donor, though he can be a donee by accepting the gift. A lease by a minor is void, but a mortgage in favour of a minor is valid.

Restriction on transferee is provided under S. 6(h) (3), which says that no transfer can be made in favour of a person legally disqualified to be transferee.

Operation of transfer (S. 8)

General rule -- a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the **legal incidents** thereof.

Such incidents include –

- (a) where the property is **land** >> the easements annexed, the rents and profits thereof accruing after the transfer, and all things attached to the earth;
- (b) where the property is **machinery attached to the earth** >> the movable parts thereof;
- (c) where the property is a **house** >> the easements annexed, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;
- (d) where the property is a **debt or actionable claim** >> the securities in relation to such debt or claim. But not arrears of interest accrued before the transfer;
- (e) where the property is **money or other property yielding income** >> the interest or income thereof accruing after the transfer takes effect.

Exception – This section does not apply where a “different intention is expressed or necessarily implied”.

N.B. - This section is based on the legal maxim, *res accessoria sequntur rem principalem*, i.e., the accessory follows the principal.

Method of transfer – (Oral transfer, S. 9)

A transfer of property can be made without writing (i.e., orally) in every case where a written document is not expressly required by law.

In the following cases a transfer cannot be orally created and both writing and registration are essential:

- 1) Sale of tangible immovable property of the value of Rs 100 or more (Sec. 54);
- 2) Sale of reversion or other intangible thing of any value (S.54);
- 3) Simple mortgage of any value (S. 59);
- 4) All other mortgages, (except a mortgage by deposit of title deeds,) where the principal money secured is Rs. 100 or more (S. 59);
- 5) A lease from (a) year to year, (b) exceeding one year, or (c) reserving yearly rent (S. 107);

6) A gift of immovable property of any value (S. 123);

- Transfer of actionable claims requires only writing, registration is not compulsory (S. 130).
- A mortgage deed (S. 59) and a gift deed (S. 123) requires attestation also, others do not.
- Where an instrument is not completed in the manner prescribed therefor, it shall not be recognised.

Conditions restraining alienation (S. 10)

Any condition or limitation **absolutely restraining** the transferee from alienation of the property is void, *the transfer is valid*.

Exception

(a) In the case of a lease where the condition is for the benefit of the lessor or those claiming under him, is valid. (Exception)

Thus the condition that the lessee will not sublet or transfer, is valid.

(b) Where the property is transferred for the benefit of a married woman (not being a Hindu, Muhammadan or Buddhist), a condition that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein, is valid. (Proviso)

(c) Partial restrictions – law prohibits only the absolute restrictions on alienation of the property and not the partial restrictions which are valid. It is a question of fact whether the restrictions in each case restricts the power of the transferee absolutely or not; if it does, it is absolute; if it does not, it is partial and hence valid.

Restrictions repugnant to interest created (S. 11)

Where the alienation of the property is **absolute** but the transferor imposes such conditions which **restrict the transferee in the enjoyment of the property**,

- then any such restriction which is repugnant to the interest created is void and the alienation is valid.

- The transferee is entitled to receive and dispose of such interest as if there were no such restriction.
- Thus, where a house is gifted to a pandit with a condition superadded that neither he nor his heirs shall reside therein at any time is void as being

contrary to the interest created and imposes fetter on the mode of enjoyment and the application of the property.

- The section does not apply where the property is not absolutely transferred to the transferee. Therefore, this section does not apply to a lease and a mortgage.

Distinction between section 10 and section 11

(1) While Section 10 deals with restricted transfers, Section 11 applies only where there is absolute transfer.

(2) Under Section 10 the limitation relates to the transfer of an interest, in Section 11 the limitation refers to the application and enjoyment of the interest in the property absolutely transferred.

Exception

where a person contains two pieces of immovable property and he disposes of one, he can impose restrictions on the transferee in respect of such transferred property for the beneficial enjoyment of the property remaining with him. **(proviso to S. 11)**

Tulk vs Moxhay, a condition that the transferee shall not raise the structure on the land to allow light and air in respect of the property remaining with the transferor was held valid as it was for the beneficial enjoyment of that land.

Positive and negative covenants – both Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. Section 11 refers to the rights as between a transferor and a transferee, while Section 40 relates to the rights of the third parties against transferors.

As between the **transferor and transferee all agreements whether affirmative or negative are enforceable**, but against third party **negative agreements are enforceable** when such party is not a *bona fide* purchaser for value without notice. **Affirmative agreements are not enforceable** even where such party has notice.

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

If the transferor includes a condition in the deed that the transfer will cease to have effect if the transferee becomes **insolvent** or he attempts to **alienate**, such condition is void but the transfer is valid.

Exception – This section does not apply to a condition in a lease for the benefit of the lessor or those claiming under him.

- This section applies only when there is an absolute transfer.
- It has been intended for the benefit of the creditors of the transferee.

Transfer for the benefit of unborn person – or *the rule against double possibilities* (S. 13)

Property cannot be transferred directly to an unborn person but property can be transferred for the benefit of an unborn person. S. 13 provides for a specific mechanism for transferring property validly for the benefit of unborn persons subject to the following conditions:

- (i) Transfer for the unborn must be preceded by a life interest in favour of a person in existence at the date of the transfer, and
- (ii) only absolute interest may be transferred in favour of the unborn.

Illustration

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and, after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Legal consequences

- (1) A direct transfer in favour of an unborn child is void as the transferee is non-existent.
- (2) There should be a prior transferee or transferees. The transferor may create successive life interests in favour of several living persons at the same time.
- (3) The unborn child should be born at or before the prior interest finishes.
- (4) If the unborn comes into existence after death of the last living person, the property shall revert back to the transferor or his heirs.
- (5) The unborn child must be given the “*whole of the remaining interest*”, i.e., the absolute ownership, by the transferor. He cannot be given limited estate.
- (6) The unborn child takes the interest in the property immediately on birth. But he will get the possession of the property only on the death of the life holder.
- (7) The transferor, however, can restrict the vesting of the property under S. 14 in such person till his minority.

(8) Any attempt to violate the rule under S. 13 makes the transfer void in favour of unborn person.

Person not in existence – means an unborn person. A child in the mother's womb is a person not in existence since he is still unborn.

Isaac Nissim vs Official Trustee, Bengal, 1957 Cal 118 – The grandchildren did not take “the whole of the remaining interest of the transferor” since the absolute interest was taken by the sons of the transferor. The gift in favour of the grandchildren was, therefore, void.

N.B. The principle of section 13 is based upon the rule in **Whitby vs Mitchell, 1890**, or the rule against double possibility. In this case the Court of Appeal in England held that if property is given to a living person for life and then to his unborn child and then to the child of such unborn child, the last remainder was absolutely void. According to S. 13 also, the creation of double possibilities is forbidden. This section stops the creation of remote possibilities as S. 14 stops the creation of remote interest. The two sections are dissimilar though their effect sometimes overlap.

This section does not apply to Mohammedans (on account of S. 2) though it applies to Hindus.

Rule against perpetuity. (S. 14)

If an unborn person is born at or before the expiration of the prior interests, he takes the property immediately on birth . The vesting of the property in such person can be postponed till eighteen years of his age by a condition and not beyond minority.

- **S. 20** provides that unless a contrary intention appears from the terms of a transfer, an interest created for the benefit of unborn person vests in him immediately on his birth. It means the transferor is competent to specify the time of vesting. However, under S. 14, he cannot extend the time of vesting beyond the minority of the ultimate beneficiary (unborn person).
- S. 14 lays down the principle of *rule against perpetuity*. Truly speaking, this section lays down the *rule against remoteness* for it forbids the vesting of property at such a remote period as after eighteen years of the age of the unborn person who comes into existence on or before the expiration of the prior interest.
- The rule does not prevent the creation of successive life estates provided the beneficiaries are all living persons.

Maximum permissible remoteness of vesting = life of the last preceding interest + gestation period of ultimate beneficiary + minority of the ultimate beneficiary.

Minority under S. 14 is to be understood as only eighteen years and not any other age, i.e., legal minority, where the age of minority is extended to 21 years.

Object of the rule – is to ensure free and active circulation of property both for purposes of trade and commerce as well as for the betterment of the property itself. It is against public policy to prevent the property from being freely dealt with. It is detrimental to the property itself.

Contingent interest – Under S. 14, vesting of interest in favour of ultimate beneficiary may be postponed up to his minority, i.e., the property does not vest in him until he attains the age of majority. Between the period when the last person dies and the majority of the ultimate beneficiary, the ultimate beneficiary has a contingent interest which becomes vested upon his attaining majority.

Rule against perpetuity is applicable to both movable and immovable property.

Exception to the rule

- (1) Gift to charities – under S. 18 religious gifts are exempted from the rule against perpetuity.
- (2) A direction for accumulation under S. 17.
- (3) Personal contracts are not affected by the rule against perpetuities.
- (4) Rule against perpetuity does not apply to a covenant of pre-emption. (**Ram Baran Prasad vs Ram Mohit Hazara, 1967 SC 744**)
- (5) A covenant to renew a lease at the option of the lessee, is a covenant running with the land and is not subject to rule against perpetuity.
- (6) Vested interest are not affected by the rule, for when an interest has once vested, it cannot be bad for remoteness.

N.B. - A similar provision is given under S. 114 Indian Succession Act, 1925.