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# Transfer of Property Act

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***Abstract***

*The Transfer of Property Act is an act consolidating all the laws regulating the transfer of property between parties. It regulates transfer inter vivos; that is, dealing of transfer between living parties in the present or in the future. Living parties include existing corporations, partnership firms, and so on that have not been wound up and/or closed. Act does not include any transfer by the conduct of a court and/or by the operation of law. The act of party also considers will and codicil (succession,) but they are not included in the act. It also does not include transmission, that is, transfer after the death of the party, as it is governed under various personal laws relating to the law of succession. There are six types of transfer of immovable property dealt with under the Act; that is, Sale, Gift, Exchange, Mortgage, and so on. During the British Era, transfer of property was made following the local laws and principle of natural justice. And after that, British Laws were adopted in India to govern the provisions related to transfer of immovable property. However, some of its section deals with the transfer of movable property. The act deals with the immovable property, whereas the movable property is dealt under the Sales of Goods Act. Even though the act is of the Year 1882, various provisions has been amended by the legislature and reviewed by the judiciary. This act covers conveyance of Right, Title, and Interest. The act provides uniformity as it is applicable in equal manner to all the transfer, which has taken place between parties. However, it has a saving clause, in which it is mentioned that if there is a conflict between Special Laws and Transfer of Property Act, then special laws will prevail as Transfer of Property Act is General Law. The act follows the essential requirement of a valid contract as mentioned under Indian Contract Act.*

**Keywords:** Transfer of property, inter vivos, unborn person, vested and contingent interest, perpetuity, conditional transfer, sale, mortgage, actionable claims, charge, lease, gift, doctrine, part performance, acceleration, cypres, apportionment, part performance

## INTRODUCTION

The act is divided in VIII Chapters covering 137 Sections and one schedules namely, Preliminary, Transfer of Property by act of parties, Sales of Immovable Property, Mortgages of Immovable Property & Charges, Leases of Immovable Property, Exchanges, Gifts, Transfer of Actionable Claims and the Schedule.

The act is known as Transfer of Property Act, 1882. The act came introduced on 17th February, 1882 and into force on the 1st July, 1882. It extends to the whole of India except the territories as mentioned in Part B States or the states including Bombay, Punjab and Delhi [1]. However, powers were given in the hands of State Government to apply the act in their territory by giving notification in their official gazette.

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**Section 3 in The Transfer of Property Act, 1882 states as follows [2]**

a. "Immoveable property" does not include standing timber, growing crops or grass;
b. ''Instrument" means a non-testamentary instrument;

 

c. "Attested," in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;
d. "Registered" means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents;
e. "Attached to the earth" means—(i) rooted in the earth, as in the case of trees and shrubs; (ii) imbedded in the earth, as in the case of walls or buildings; or (iii) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;
f. "Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;
g. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

***Explanation I***

Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property, which is being acquired, or of the property wherein a share or interest is being acquired, is situated.

Provided that—(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder, (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

***Explanation II***

Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

***Explanation III***

A person shall be deemed to have had notice of any fact if his agent acquires notice thereof while acting on his behalf in the course of business to which that fact is material: Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud [3].

**DEFINITION OF TRANSFER**

According to Section 5 of the Act "Transfer of property" is defined 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 and one or more other living persons; and "to transfer property" is to perform such act [4]. In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals [5].

There are certain properties which cannot be transferred as per Section 6 of the act as follows:
(a) A mere chance of a Legal Heir
(b) A right of re-entry
(c) An easement
(d) Personal interest of an owner
(e) Right to get maintenance in future
(f) Right to file a suit
(g) Right related to public office and/or its salary
(h) Stipends related to military, naval, air force, & civil and political pension
(i) Transfer opposing nature of Interest
(j) Transfer including unlawful object or consideration
(k) Transfer to a person disqualified by law.

## ACCESSORY FOLLOWS THE PRINCIPAL

Transfer of a property is based on the rule "Accessory follows the principal," it clarifies that the main property must be transferred along with its subordinate or ancillary properties. For example, if property is money than its interest should also be transferred. Similarly, if a property is a house, then, its easement will also be transferred not individually but along with it.

## CONDITIONAL TRANSFER

The act covers conditional transfer, that is, condition subsequent and condition precedents. In case of condition precedent, it means that a transfer shall take place upon completion of a condition. However, in condition subsequent it means a transfer will take place and after the said transfer, condition is required to be fulfilled otherwise, transfer shall be declared as null and void and it will not have any legal binding effect.

For example, if A transfer a land to B imposing a condition upon B to marry C, then B is under an obligation to marry C, otherwise, the transfer between A and B will not be having any binding effect. The provision also states that the condition shall not be impossible, forbidden by law, defeat the provision of law, fraudulent, invalid, involves injury to the person or property, immoral or against public policy.

## OTHER PROVISIONS

This act also deals with a provision related to transfer for the benefit of unborn person. According to [6] Section 13 of the act, an interest may be created for the benefit of a person who is not in existence at the date of the transfer. However, this kind of transfer will only take place with the assistance of a prior interest and it extends to the whole of the remaining interest of the Transferor in the Property. The act restricts transfer in perpetuity but it does not restrict this type of transfer if it is for the welfare or benefit of public.

It states that Transfer of property should be made between competent parties, it clearly shows that both parties must be of sound mind, major and not disqualified by law however, a transferee may be of unsound mind or minor and transfer may take place by the aid of guardian or parents and it is required to be made in prescribed form by applying the provisions of Transfer of Property Act. This Act regulates provisions relating to unborn person, transfer in perpetuity and accumulation of Income.

Transfer of Property act distinguishes two types of interest; that is, vested interest and contingent interest. In case of vested interest, transfer takes place without specifying time period, it is related to present right whereas contingent interest related to future right which is depended upon fulfilment or non-fulfilment of any conditions or events.

The act also regulates transfer wherein election is necessary, as per this provision, one party professes to transfer a property in which he does not have any right, title and interest and it confers advantage upon an owner and owner is required to confirm or reject the transfer, if an owner accept the transfer, then, he is entitled to get the benefit from the said transaction and if an owner rejects the transfer then the interest will go back to the person entitled. The act states that the benefits of a property can be divided and/or apportioned according to the time period and ownership. It clarifies that if a property is transferred between the parties, then, both the parties are required to have their interest in accordance with the provisions of the act.

For example, if A transfer a Property to B on 15th June and property was on monthly rent basis then the amount received from tenant will be divided between A and B, unless expressly clarified by the contract. Similarly, if A transfer Property to X, Y, and Z, then, X, Y, and Z will be entitled to the benefit as a Joint Owner.

Thereafter, the acts deal with the provision in which a property is transferred by a person who is not an owner of the property, but authorized by an Owner or law has imposed right over a person to deal with the property. Transfer by apparent owner is also one of the forms of transfer.

Sometimes, the transferor transfers a property with a view to defeat the claim of its creditors then it shall be treated as a fraudulent transfer.

The Act contains a provision related to sale, it clearly deals with Rights and Liabilities of seller and Buyer and Sale is defined as a transfer of a property from one person to another for a consideration.

It contains specific provisions relating to Mortgages and Charges. Charges means a transfer of immovable property as a security which is not a mortgage.

Transfer of Property Act deals with Lease which means transfer of a right to enjoy the property for a period specified or for longer duration for a consideration. Consideration is classified between Premium and Rent.

This act states that when two parties transfer their property mutually for the ownership of another without any money component then it is termed as exchange. For example, A transfer to B his property situated in Mumbai for the property of B situated in Kolkata, then it is termed as Exchange.

It deals with Gift as it is transfer of a property without any consideration and made out of love and affection voluntarily. Parties involved in Gift is known as Donor and Donee. Acceptance is required in this kind of transaction, if Donee dies without acceptance, then, gift cannot be made enforceable.

It also states the provisions related to actionable claim, it is a transfer of claim for which an action can be taken. For example, if a transaction is entered into A and B, A has taken a loan from B and B does not repay the loan, then, A is entitled to take an action against B. this type of claim is termed as an Actionable Claim. Transfer of property act states that this type of right can be transferred by following the provision of transfer of actionable claim.

## DOCTRINES DEALT UNDER THE ACT

### Doctrine of Priority

Section 48 of the Act is based on a Legal Maxim "qui prior est tempore potior est jure" it means that one who is first in time will have better title, right, share, and interest in law [7]. If a person does not have a title, then, he cannot pass over the same. For example, if a property is transferred to A, then to B and again to C, then, the court would determine that who will be having a better title over the property according to the time and its registration.

 

### Doctrine of Cypres

Cypres means "as near as Possible." It gives power to the Court of Law to interpret the Donor's/Testator's intention and it carry out their wishes. It empowers court to consider the provisions related to Will, Gift, Charitable Trust or Inheritance. For example, if A transfers a property to B on a condition to seek permission from C, D, and E. C died before fulfilment of condition, then, for transfer of the property B is required to seek permission from only D and E. Here, the Doctrine of Cypres will be applicable.

### Doctrine of Apportionment

Apportionment refers to division. For taking benefit of the property, it will be divided according to the Share and Time Period. Sections 36 and 37 is applies this Doctrine.

### Doctrine of Election

The act regulates the provision related to election. It gives an option to an owner either to elect the transfer or to reject it.

### Doctrine of Acceleration

The word Acceleration basically means a shortening of time period until some event takes place. Doctrine of Acceleration talks about conditional transfer to at least one person including transfer to a different person with a condition, as per [8] Sec 27 of Transfer of Property Act, conditional transfer to one person coupled with transfer to another on failure of prior disposition, the ulterior disposition shall become on failure of prior disposition [9].

### Doctrine of Part Performance

Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract [10].

## CONCLUSION

The Transfer of Property clarifies that it is not applicable over movable properties and only some of the provision applies to movable property. It deals with the local laws, British Laws, and Contract Act. In this case, transfer is related with immovable property only and all the essential conditions as mentioned under the contract act is applicable here as well. It regulates the transfer between two or more person (living person); that is, inter vivos.

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