

**Ahmednagar Jilha Maratha Vidya Prasarak Samaj's  
NEW LAW COLLEGE, AHMEDNAGR**

**Property Law and Easement  
(Subject Code - LC 0702)**

**STUDY MATERIAL  
FOR**

**LL.B. – II (Sem. – III), B.A.LL.B. – IV (Sem. – VII) and  
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## **Module 01 Concepts, Meaning and types of Properties:**

### **1. Meaning of property**

In its widest sense, Property includes all the **legal rights** of a Person of whatever description. The property of a man is all that is his in law. In the narrower sense, the property includes the proprietary rights of a person and not his personal rights. Proprietary rights constitute his estate or property and personal rights constitute his Status or personal and condition. In another sense, the term property includes only those rights which are both proprietary and real.

According to Sir John Austin, the term property is sometimes used to denote the greatest right of enjoyment known as to law excluding servitudes. Sometimes, life interests are described as property. Even servitudes are described as property in the sense that there is a legal title to them. Sometimes property means the whole of the assets of a man including both the right in rem and right in personam.

### **Kinds of property -**

Property is essentially of two kinds Corporeal Property and Incorporeal Property. Corporeal Property can be further divided into Movable and Immovable Property and real and personal property. Incorporeal property is of two kinds-*in re propria* and rights *in re aliena* or encumbrances.

### **1) Corporeal and Incorporeal Property -**

#### **(I) Corporeal Property -**

Corporeal property is the right of ownership in material things. Corporeal property is always visible and tangible. Corporeal property can be perceived by senses. It can be seen or touched.

**Examples** -A House, Land, Car, Bike etc

Corporeal property may be divided into two classes-

1. Movable Property (Chattels) and Immovable property. (Land and buildings)

## 2. Real Property and Personal Property

### **(II) Incorporeal Property -**

Incorporeal property also called as intellectual or conventional property. it includes all those valuable interests which are protected by law. Incorporeal property is intangible. It cannot be Perceived by Senses.

**Examples** - Patents, Copyrights, Trademarks etc.

Incorporeal property is divided into two classes-

(a) Jura in re propria Over Material things (for example patents, copyrights, trademarks etc)

(b) Jura in re Aliena encumbrances, whether over material or immaterial things, for example, Lease, **Mortgages** and Servitude etc.

### **2) Movable Property and Immovable Property -**

All Corporeal Property is either movable or immovable. In English law, these are termed as chattels and land respectively.

#### **(I) Movable Property -**

Movable property is one, which can be transferred from one place to another place with the human efforts.

#### **(II) Immovable Property -**

According to the General Clauses Act, 1897 "Immovable property includes land, benefits arising out of land and things attached to the earth or permanently fastened or anything attached to the earth."

According to the Indian Regulation Act, "immovable property includes land, building, hereditary allowance, rights of way, lights, Ferries, Fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the

earth but not standing Timber, growing crops or grass.

Section 3 Para 2 of the Transfer of Property Act 1882 defines immovable property as "immovable property does not include standing Timber, growing crops or grass. Movable property includes corporeal property which is not immovable.

According to Salmond immovable property (i.e., land) has the following elements-

- A) a determinate portion of the surface of the earth.
  
- B) The ground beneath the surface down to the centre of the earth
  
- C) The column of space above the surface ad infinitum
  
- D) All objects which are on or under the surface in its natural state for example-minerals natural  
vegetation, or stones lying loose upon the surface.
  
- E) An object placed by human agency on or under the surface of the land with the intention of permanent annexation, for example, House walls, Doors, Fences, etc.

### **3) Real and Personal Property -**

In English law, the property has been divided into the real and personal property. This division is identical to a great extent with that of immovable or movable. The division into real and personal is not based on any logical principle but is a result of the course of legal development in England.

#### **a) Real property -**

The real property includes all rights over land with such additions and exceptions, as the law has deemed fit.

#### **b) Personal property -**

The law of personal property includes all other proprietary rights whether they are in rem

or in personam.

## **Notice**

When a person actually knows any fact, it is understood as he has notice of that fact.

Section 3 of Transfer of Property Act enumerates three kinds of notices—

(a) Actual or expressed notice: If a person actually knows a particular fact it is considered he has actual notice. The knowledge of fact must be received in the course of negotiations of the property.

(b) Constructive or implied notice: If it can be assumed if a person 'may know a particular fact' due to the circumstances, so it will be presumed that he knows the fact. It is said that the person could have had actual notice if he would have inquired reasonably. In this, the court also presumes that the person shall have knowledge of a fact and it cannot be proved that it was not obtained.

For example, X agrees to sell his property to Y. There are tenants of that property that pay rent to Z. It is presumed that Y will have notice of the fact that the tenants pay the rent to Z and hence he cannot claim that he was devoid of knowledge of this fact.

**Legal presumption of knowledge** is considered when it is prima facie understood that a fact can come to the notice of a prudent person but because of wilful abstention from an inquiry or search, a person does not have the knowledge of that fact.

**Gross negligence** is a concept that is used in the constructive notice. It is different from negligence which means mere carelessness or omission to do an act. The doctrine of constructive notice applies when there has been gross negligence which means a high degree of carelessness or neglect. Mere negligence is not punished as seen in the case of *Hudson v. Vincy*, where the court defined gross negligence as a degree of negligence so gross that a court may presume it to be some kind of fraud. Hence it can be understood, that only gross negligence is punishable.

## **Module 02 Transfer of Property by Act of Parties (Sections 5 to 9):**

### **Meaning of transfer (Whether movable or immovable) - Section 5**

- Transfer of Property means an act by which a living person convey property in present or in future to one or more other living person, to himself, and one or more other living person.
- Living person” includes a company or association or body of individuals whether incorporated or not.

### **Legal rules for a valid transfer**

- Property must be transferable.
- Transferor and transferee must be competent.
- Consideration and object of transfer must be lawful.
- Transfer must take place as per method prescribed under the Act.

Sadiq Ali Khan Vs. Jai kishore, 1928.

Privy Council observed that a deed executed by a minor was nullity. Principle of estoppel cannot be applied to a minor. A minor is not competent to transfer yet a transfer to a minor is valid.

### **Amina Bibi vs Saiyid Yousuf 1922.All. 449.**

A contract made by lunatic is void under section 11 of the Indian Contract Act, and so also, transfer by him of his property is void.

### **K Kamama Vs. Appana**

U/s. 11 of Hindu minority and guardianship Act, 1956 a defacto guardian is merely a manager and cannot dispose off minor's property. In this case a defacto guardian sold property of a minor, the court declared the sale invalid.

### **Who can transfer property – Section 7**

- Every person, competent to contract and having ownership can transfer property
- A minor can be a transferee but a minor is not competent to be a transferor

- Persons who are authorised to transfer property can also transfer property validly

### **Subject matter of transfer – Section 6**

Every kind of property can be transferred. But following properties cannot be transferred:

- Chance of an heir apparent.
- Right of re-entry.

Transfer of easement.

- Restricted interest.
- Right to future maintenance.
- Right to sue.
- Transfer of public office, salary and pension

### **Formalities for transfer – Section 54**

- Movable property Orally (by delivery of possession) Writing (by executing agreement)
- Immovable property Tangible o Value of 100 Rs. or above (Registration mandatory) o Value of less than 100 Rs. (Registration optional) Intangible o Registration compulsory

Property which cannot be transferred – Section 6

**General Rule:** Every kind of property can be transferred.

But following properties cannot be transferred:

#### **Chance of heir apparent (Spes successionis)**

- This means an interest which has not arisen in future. It is in anticipation or hope of succeeding to an estate of a deceased person. Such a chance is not property and as such cannot be transferred, if it is transferred, the transfer is wholly void.

- Example: A is the owner of the property and B is his son. B is the heir of A. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

### **Right of re- entry**

- It means right of lessor to re-claim the leased property from lessee on breach of contract or express condition. It is personal benefit which can't be transferred.

- Example: If A leases his property to B with a condition that if he sublets the leased land, A will have the right to reenter, i.e., the lease will terminate. This right to reenter is personal benefit available to A, which can't be transferred.

### **Transfer of easement**

- An easement means an interest in land owned by another that entitled his holdersto a specific limited use or enjoyment. An easement cannot be transferred.

- Example: If A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if A transfers the house itself to C, the easement is also transferred to C.

### **Restricted interest**

- Certain rights enjoyment of which is reserved for certain person. If it is so, it is known as restricted interest. Restricted interest can't be transferred to another person. It includes 'religious office'.

- Example: The right of PUJARI in a temple to receive offering.

The right of WIDOW under Hindu law to residence.

### **Right to future maintenance**

- Right to future maintenance is personal benefit to whom it is granted. However arrears of past maintenance can be transferred.

- Example: The right of a Hindu widow to maintenance is a personal right which cannot be transferred.

### **Right to sue**

- A mere right to sue cannot be transferred. The right refers to a right to damages arising both out of contracts as well as torts.
- Example: A commits an assault on B. B can file a suit to obtain damages; but he cannot assign the right to C and allow him to obtain damages.

### **Transfer of public office**

- It is against public policy to transfer public offices, salary and pension. Pension and salary are given on personal basis, it can't be transferred.

### **Occupancy Rights**

- Transfer of occupancy rights of a tenant is prohibited.
- Example:- Tenant can't transfer his right of tenancy and farmer can't transfer his right to land if he himself is a lease.

### **Operation of transfer**

Unless a different intention is expressed or necessarily implied, 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, when the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth; and, where the property is machinery attached to the earth, the movable parts thereof; and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith; and, where the property is a debtor other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer; and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

## **Module 03 General Principles Relating to Transfer of Property (Sections 10 to 37):**

### **Restraint on transfer or rule against inalienability**

#### **Restraint on transfer - Section 10**

- If any property is transferred subject to a condition or limitation which absolutely restrains the transferee from parting with or disposing of his interest in the property such condition or limitation and not the transfer itself is void.
- Restraint on alienation of property may be either absolute or partial.
- Absolute restraint is void and transfer is valid, while partial restraint as regard to time, place or person is valid.
- Absolute restraint: If A transfers property to B and his heirs with a condition that if the property is alienated, it should revert back to A. Such a condition, being absolute, is void.
- Partial restraint: A transfer property to B with condition that he should not alienate it in favour of D who is his trade competitor. It contains partial restraint and therefore valid.

#### **Exceptions to rule of restraint on transfer:**

- In case of lease transition, lessor can impose condition that the lessee shall not sub lease it.
- In case of married woman, a condition that she will not have right during her marriage, to transfer the property.

#### **Restraint on enjoyment - Section 11**

- When property is transferred absolutely, transferee has right to enjoy property as he likes,
- When transferor place restriction on the enjoyment of property which is transferred to transferee, restriction is treated as clog on property and such restriction is void.
- Example: A sells his house to B with condition that only B shall reside in the house. The condition is invalid.

### **Exception to Section 11: -**

If a person transfers a property to another keeping some other property for himself, he can impose certain condition which may interfere with the rights of enjoyment of the transferee.

Example: - A person has 2 adjoining houses, one of which is transferred, he may impose a condition not to construct a second floor on a property because transferor will not able to enjoy sunlight. **Condition as to insolvency - Section 12**

- If person transfer property to another person with condition that property will be revert to transferor if transferee becomes insolvent, It is invalid condition.
- Exception: If lessor reserve right to get back leased property on declaration of lessee as insolvent, it is valid condition.

### **Illegal or impractical condition - Section 25**

- Interest created in a property under transfer, which depends on a condition the performance or satisfaction of which is either impracticable or disallowed under law or fraudulent or harmful to the person or property of another, is invalid.

## **DOCTRINE OF ACCUMULATION OF INCOME (SEC 17)**

Section 17 does not allow accumulation of income from the land for an unlimited period without the income-being enjoyed by the owner of the property. The laws allow accumulation of income for certain period only. The period for which such accumulation is valid is: -

The life of the transferor; or period of eighteen years from the date of transfer.

Any direction to accumulate the income beyond the period mentioned above is VOID.

- The payment of the debts of the transferor or any other person taking any interest under the transfer, or
- The provisions of portions for children or any other person taking interest in the property under the same transfer, and
- The preservation or maintenance of the property transferred.

Example: A settles the sum of Rs. 5, 000 for the benefit of B on 1st January, 1979 and directs the trustee to invest the money in units of the Unit trust of India and to deliver the total accumulated income and the units to B on the turn of the century. B would be entitled to the accumulated income and the units before the stipulated period, i.e. on 1st January, 1997 i.e. 18 years after 1st January, 1979. The accumulation of incomes is valid up to 31st December, 1996 and would be void beyond the period.

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

Generally, property can only be transferred to living person, as on date of transfer, i.e. property cannot be directly transferred to unborn person. However, there are certain exception to this rule.

Transfer for benefit of unborn person - Section 13

- No direct transfer can be made to an unborn person
- Interest of the unborn person must be preceded by a prior interest.
- The prior interest must also be created by the same transfer.
- The unborn person must be exclusive owner of whole of property.

**Example:** Where 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.

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

Perpetuity means continuing forever. Rule provides that no transfer of property can operate to create 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 for that period, and to whom, if he attains full age, the interest created is to belong.

Following are elements of rule against perpetuity:

- Property can be transferred to different living persons for their successive lives, before property is transferred to unborn person.
- Unborn person must come in to existence before expiry of existing life of transferor.
- Transfer must be absolute.

Example 1: • A transfers a piece of land to his friend B for life, and

- afterwards to his friend C for life,
- then to his friend D for life, and
- then to the son that may be born to B, for his son's life,
- then to the son that may be born to C for his life, and
- then ultimately to the son that may be born to D forever.

In case of such disposition of the land, B cannot alienate the property, because he has only a life interest therein. For the same reason, neither C nor D, nor the sons of B and C can alienate the property.

When the property finally vests in D's son, only he will be entitled to alienate the property. This would be certainly a restraint on the free alienation of the piece of land for a considerable long period. Section 14 prevents this and lays down that one can tie up property and stop its free alienation only for one generation, because all friends of A, now living must die within that time, as they are all candles lighted together.

Example2: - A child is 10-year-old and he will become owner of property at 18 years of age. So, the perpetuity is 8 years

### **Exception to Rule against perpetuity**

- When land is purchased or property is held by corporation.
- Where property is transferred by way of gift for benefit of public.
- Personal agreement.
- Agreement for perpetual lease.
- Gift to charity

### **Vested interest (Section -19)**

- Word vest has two references here: Vested in possession.

Vested in interest. • Vested in possession means right to present possession of property,

- Vested in interest means present right to future possession of property,
- Vested interest means interest created in favour of person which is not subject to happening of an event or if subject to the happening of an event, then such event is bound to happen.

Example: • Property is given to A for life with a remainder to B, A's right is vested in possession; B's right is vested in interest.

- Vested interest is transferable and heritable.
- If transferee dies before taking possession of property, such property passes to his legal representative.

## **Contingent interest**

- Contingent interest means interest, created in favour of person, which will take effect on happening or non-happening of specified uncertain event
- Example A transfer property to B until B marries, and after marriage of B, to C. C has contingent interest in property.

## **Conditional Transfer**

**Section 25 of the Transfer of Property Act, 1882** provides for Conditional Transfer. It means that any transfer that happens on the fulfilment of a condition that is imposed on the other party for the transfer of property. For example, A agrees to transfer his property to B if he gets selected for a job. The requirement of A for B to get a job is called a condition.

For any kind of a conditional transfer to be valid, the condition that is imposed should not be:

1. Prohibited by law,
2. Should not be an act that involves fraudulent acts,
3. Should not be any act that is impossible,
4. Should not be an act that is termed as violative of public policy,
5. Should not be immoral,
6. Any act that incurs any harm to any person or his property.

For example, X transfers a property 'B' to Y stating that he shall murder Z as a condition for the transfer. Such transfer is void as the condition is prohibited by law.

## **Types of Conditions on Transfer**

There are three specific types of conditions that are imposed in a transfer of property and there are some more types provided. All these conditions should also satisfy all the requirements of a condition as mentioned in Section 25 of the Transfer of Property Act, 1882.

## **Condition Precedent**

It is given in **Section 26 of the Transfer of Property Act, 1882**. Any condition that is required to be fulfilled before the transfer of any property is called a condition precedent. This condition is not to be strictly followed and the transfer can take place even when there has been substantial compliance of the condition. For example, A is ready to transfer his property to B on the condition that he needs to take the consent of X, Y and Z before marrying. Z dies and afterward, B takes the consent of X and Y so the transfer can take place as there has been substantial compliance. These facts were from a case of *Dawson v. Oliver-Massey* (1).

In the landmark case of *Wilkinson v. Wilkinson* (2), the condition where one party was required to desert her husband for the transfer to go through, this was held by the court as invalid as it was against public policy.

## **Condition Subsequent**

It is given in **Section 29 of the Transfer of Property Act, 1882**. Any condition that is required to be fulfilled after the transfer of any property is called condition subsequent. This condition is to be strictly complied with and the transfer will happen only after the completion of such condition. For example, A transfers any property 'X' to B on the condition that he has to score above 75 percent in his university exams. If B fails to achieve 75 percent marks then the transfer will break down and the property will revert back to A.

Although it is an essential requirement that the condition needs to be lawful and if it is not then the condition will be held as void and the transfer will not break down and will be finalized. For example, A transfers the property to B on the condition that he shall murder C. This condition is void and hence transfer will go through and the property will be kept by B.

## **Doctrines of Election**

### **Meaning**

Election means "choice". A person can't accept part of agreement which is beneficial and reject other part which is burdensome. He can either accept agreement entirely or reject entirely. Person taking benefit of instrument must also bear the burden. The doctrine of election is based on the principle of equity. The principle of the doctrine of election was

explained by the House of Lords in the leading case of Cooper vs. Cooper. Election may be express or implied by conduct.

Example: A transfers to you his land, and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the land, you must transfer your house to C, because the transferor is transferring to you his land on the condition that you give your house to C. Here, either you take the land and part with your house or do not take it at all. This is called the doctrine of election.

Question of election does not arise when benefit is given to a person in a different capacity.

## **Module 04 General Principles Relating to Transfer of Immovable Property (Sections 38 to 53A) :**

### **Doctrines of Holding out/Transfer by ostensible owner Section 41**

#### **Meaning:**

Doctrine is an exception to the rule that a person cannot confer a better title than what he has. Where owner of property permits (expressly or impliedly) another person who is not owner of the property to hold himself as owner of property and third-party deal in good faith with person so permitted, such third party acquire good title as against true owner.

#### **Example**

A made a gift of property to B but continued in possession of the gifted property. He purported to exercise a power of revocation and then transferred the property to the C. The gift, however, was not revocable as it was an unconditional gift. B seeks to recover possession from the C. C can get protection under Section 41.

### **Doctrines of feeding grant by estoppels - Section 43**

#### **Meaning:**

Where person who purport to grant interest in property, which he did not at the time possess but subsequently acquires, benefit of subsequent acquisition goes automatically to earlier grantee. It is known as feeds estoppel.

Example A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that he (i.e. A) is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition, but on B's dying, A as heir obtains Z. C not having rescinded the contract of sale, may require A to deliver Z to him.

### **Exceptions to doctrine of feeding grant by espoppel**

If the transfer is invalid for being forbidden by law or contrary to public policy. If the contract comes to an end before acquisition of the property by the transferor. This section

has no application to Court sales. The right is not available against the bona fide purchasers for value without notice.

### **Doctrines of Lis Pendens - Sec-52**

#### **Meaning :**

Lis means ligation and pendens means pending Lis pendens means pending suit or petition before court. During the pendency of suit or petition before any court, property which is subject matter of litigation can't be transferred by any party, except with consent of court. If any party has transferred property under litigation in suit, transferee is bound by judgment of court. Example Specific office building is under litigation. B and C are parties to litigation. B during pendency of suit transfers property to A. The suit ends in favour of C. A is bound by order of court and C can recover property from A.

#### **Exception**

Doctrine of lis pendens is not applicable when the property has been transferred by stranger. (i.e. a person who is not party to litigation)

For Example: - suits is pending two brothers and father has transferred property to another person.

### **Doctrines of Fraudulent transfer section- 53**

#### **Doctrine of fraudulent transfer Meaning**

When debtor transfers immovable property with intent to defeat or delay his creditors, transfer of property shall be voidable at option of any creditor so defeated or delayed. This doctrine discourages fraudulent transfer of property. This doctrine gives right to defraud creditor to challenge transfer of property in court and get order from court that transfer is invalid.

#### **Example**

A takes a loan from the C and fails to pay the loan. C sues him in a Court to get back his debt. A knows that his property will be applied by court for repayment of his loan. Meantime, he

transfers his property to a friend who simply holds the property on behalf of the transferor. Here, property is transferred to his friend with fraudulent intention.

### **Doctrines of Part Performance Section 53 A**

- Transferor cannot take back property only on ground of non – registration of documents, if the transferee has performed his part of contract and has also taken possession of property or part of it.
- Doctrine prohibit transferor from taking back property.

### **Conditions**

- Contract for transfer of property should be for consideration.
- Terms necessary to constitute transfer must be ascertainable with reasonable certainty from contract.
- Transferee should have taken possession of property in part performance of contract.
- Transferee must have already fulfilled or ready to fulfilled his obligation under contract.

### **Doctrine of Priority In Property Law**

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

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

The article looks into the law applicable in case of conflicting rights created over the same property, its basis, exceptions, with judicial interpretations and its application in modern times.

### **BASIS OF THE PRINCIPLE**

It is a principle of natural justice that if rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law. This

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

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## **Essentials of Section 48**

1. The transferor transfers the rights in the same immovable property
2. At different times – one interest created should be prior in time and another should be subsequent.
3. Such rights created cannot coexist or cannot be enjoyed in full extent together
4. Then, each later right created is subject to the previously created rights.

Provided that there is no contract to the contrary or reservation binding the earlier transferee.

## **Exceptions to the rule of Priority**

### **1. Where in prior transfer, the procedure laid out by the law which is compulsory is not followed**

Hence, where the prior transfer is incomplete in the eyes of the law, there doesn't arise any question of conflict of rights or interest in the property. Example: A executed a lease deed of immovable property in favor of B for 5 but didn't get it registered. Registration of lease deed which is for one or more than one year is compulsory.

A subsequently sold the same property to C. Here C can have the immediate possession of the property if he wishes so. The rights of C would be given preference over the rights of B. And the rule of Priority would not be attracted here. When the conflict is between two registered documents, the earlier document but registered later would be preferred over the later document but registered earlier.[2]

### **2. Where the subsequent transfer or the second transfer takes place by the virtue of the court**

If the court has ordered for the subsequent transfer, then the subsequent transfer would be preferred over the prior transfer and the rights of the subsequent transferee would be given preference over the prior transferee. Hence, in this case, the Doctrine of priority will not apply.

### **3. Estoppel**

Here, if the prior transferee is aware of the subsequent transfer taking place, i.e. the subsequent transfer is taking place and the same is within the knowledge of the prior transferee, the subsequent transferee would be given preference. And the rule of priority

would not be attracted. It is not needed for the prior transferee to be familiar with the exact details of the transfer.

#### **4. Salvage charges**

The salvage charges are the amount paid to protect the encumbered property from the loss or destruction. Such amounts are recoverable/payable in priority to all other charges.

#### **5. Notice / Section 78**

Because of the fraud, misrepresentation or negligence of the prior mortgagee, a person gets induced and advances money on the security of the mortgaged property, then that person (the subsequent mortgagee) would be given the priority over the prior mortgagee.

## **Module 05 Sales and Exchanges (Sections 54 to 57 and 118 to 121) :**

### **Provisions relating to sale of immovable property Section 54**

#### **Meaning:**

Sale means transfer of ownership in consideration of price. Price is paid or promised to be paid.

#### **Essential of sale of immovable property**

- Subject matter is transferable property.
- There must be two parties (i.e. seller and buyer).
- Parties must have capacity to enter into contract.
- There must be consideration. I Property must be transferred absolutely.
- Stamp duty and other formalities should be complied with.

### **Provisions relating to exchange of immovable property Section 118**

#### **Meaning :**

“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.” Example: - Exchange of a car for two scooters or exchange of a house for 10 hectares of land.

#### **Essentials of exchange**

- Both parties must be competent to contract.
- Exchange should be with mutual consent of parties.
- There must be mutual transfer of property.
- Neither party has paid any money .

#### **Parties to Sale**

The parties to a sale are—the transferor who is called a seller, and the transferee known as the buyer. A contract of sale must be based on a mutual agreement between the seller and the buyer.

The transferor or the seller must be a person who is competent to enter into a contract i.e., he must be a major and of sound mind and should not be legally disqualified to transfer the property.

A minor or a person of unsound mind is incompetent to transfer his own property despite being its owner. Statutory incompetency refers to an, incompetency imposed under law or a statute. When a person is declared as an insolvent, his property vests in the official receiver and he is incompetent to transfer the same. Similarly, a judgment debtor is not capable sell his property that is to be sold in execution under the order of the court. The property cannot be sold when it is under the management of the Court of Wards.

**Distinction between Sale and contract for sale**

<b>Sale</b>	<b>Contract for sale</b>
There is a transfer of ownership	There is merely an agreement for the sale of property in terms agreed between parties.
Conveys a legal title to the buyer.	Does not create any interest in the property.
Creates a right <i>in rem</i>	Creates a right <i>in persona</i>
Mandates registration where sale is of immovable property of Rs. 100 or more.	Does not require registration.

**Rights and liabilities of buyer and seller**

In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:

**(1) The seller is bound**

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

PROVIDED that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. (3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

PROVIDED that,(a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyers of the lot of greatest value is entitled to such documents.

But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled

(a)to the rents and profits of the property till the ownership thereof passes to the buyer;

(b)where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest; (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs:

PROVIDED that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(a)where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(b)where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the

property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a) and paragraph (5), clause (a), is fraudulent.

## **Module 06 Mortgages (Sections 58 to 98):**

### **Provisions relating to mortgages - Section 58**

#### **Meaning**

Mortgage means transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan or performance of an engagement which may give rise to pecuniary liability

#### **Essentials of mortgages**

- There must be transfer of an interest in immovable property.
- Property must be specific
- Transfer is for securing payment of loan or debt

#### **Types of Mortgage**

##### **Simple Mortgage Section 58 (b)**

#### **Meaning**

Mortgagor gives personal undertaking to the mortgagee to repay amount due under the mortgage, without delivering possession of mortgaged property, then it is called as simple mortgage.

#### **Essential elements**

- There should be a personal obligation on the part of the mortgagor to pay the debt.
- An express or implied power is given to the mortgagee to cause the Property to be sold through the intervention of the Court.
- There is no transfer of ownership.

### **Mortgage by conditional sale Section 58 (c)**

#### **Meaning**

Where the mortgagor apparently sells the mortgaged property on any of the following conditions:

- If loan is repaid, sale becomes void.
- If loan is not repaid at specific time, sale will become absolute and binding.
- If loan or debt is paid off within specific time, mortgaged property is re-transferred to the mortgagor.

### **Usufructuary mortgage Section 58 (d)**

Meaning It is also known as mortgage with possession. Where mortgagor deliver possession of property to mortgagee and authorised him:

- To retain possession of property until payment of money or debt and
- To receive the rents and profits accruing from property in payment of mortgage money.

### **English mortgage Section 58 (e)**

#### **Meaning**

When the mortgagor binds himself to repay mortgage money on certain date, and transfer the mortgage property absolutely to mortgagee but subject to condition that he will re-transfer it to mortgagor upon payment of mortgage money as agreed, mortgage is known as English mortgage. **Essential elements**

- English mortgage is followed by delivery of possession.
- There is a personal covenant to pay the amount.
- It is effected by an absolute transfer of property, with a provision for retransfer in case of repayment of the amount due.
- Power of sale out of Court is given on certain persons under certain circumstances.

## **Mortgage by deposit of title deed Section 58 (f)**

### **Meaning**

It is also known as equitable mortgage. Where mortgagor delivers to mortgagee documents of title of property with intent to create security thereon, the transaction is known as mortgage by deposit of title deed.

### **Essential elements**

- It is created in specific towns by deposit of title-deeds, even though the property is situated outside those towns.
- It is effected by deposit of material title-deeds. It is not necessary that all the deeds should be deposited. It is sufficient if material documents are deposited.
- Delivery of possession of property does not take place.
- This mortgage is made to secure a debt or advances made, or to cover future advances.
- This mortgage prevails against a subsequent transferee who takes under a registered instrument. • This mortgage prevails against all who are not bonafide purchasers for value without notice.

## **Anomalous mortgage Section 58(g)**

### **Meaning**

A mortgage which does not belong to any of above categories is known as anomalous mortgage. It is combination of two or more mortgages. Possession may or may not be delivered in anomalous mortgage.

### **Right related to mortgaged property**

#### **Right of redemption Section 60**

- Mortgagor has right to redeem property provided as security.

- Redemption means to take back the mortgaged property by paying the mortgage money at any time after stipulated date for repayment.
- Mortgagor can exercise this right:
- Before right is extinguished by the act of parties or by decree of court, or I Before it is barred by Limitation Act.
- As per Limitation Act, mortgagor can redeem the property within 60 years after the money has become due.
- This right to redeem the property even after the time of payment has elapsed is called the Right or Equity of Redemption. But the mortgagor is not entitled to redeem before the mortgaged money becomes due on the date fixed for repayment of loan. His right to redeem arise only when mortgaged money becomes due and not before.
- Example: A borrows money on a mortgage and agree to pay it back after 10 years. A has obtained gift of money from his relative at end of 5th year from date on which he borrowed money. Now, A wants to pay the loan and redeem his property. He can't do so, because the right to redeem arises only when the money has become due at the end of 10 years.

### **Doctrine on clog of equity redemption**

- Mortgagor has right of redemption by virtue of mortgage deed.
- This right is considered to be inalienable, and cannot be taken away from a mortgagor by means of any contract to the contrary. • Redemption means the act of the vendor of property in buying it back again from the purchaser at the same or an enhanced price.
- Section 60 of the Transfer of Property Act, 1882 authorise mortgagor to get his property back from the mortgagee on paying the amount borrowed from him.
- Clog on a right means the insertion of any clause or any provision under the mortgaged deed which would alienate mortgagor of his property under certain circumstances.
- As per Act, such provisions would not be able to alienate a mortgagor of his "Right of Redemption", and such provisions would be void-ab initio.
- Right of redemption shall remain effective unless the property has been sold off or under any statutory provision.

- Even if mortgagee has went to the court for the foreclosure of the property mortgaged, mortgagor can redeem his property by paying off the full amount in the court.

### **Doctrine of marshalling - Section 81**

If the owner of two or more properties mortgaged them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of the contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee. This is known as the Doctrine of Marshalling.

### **Provisions relating to charge - Section 100**

#### **Meaning**

- Where immovable property of one person is by act of parties or by operation of law made security for repayment of money of other and transaction is not mortgage it is called charge.
- All provision which are applicable to simple mortgage are applicable to such charge.

Charge can be either fixed or floating charge

#### **Fixed Charge**

- When charge is created on Specific property, it is known as fixed charge.
- Example: Charge created on office building situated in particular locality.
- Fixed charge can't be converted into floating charge.

#### **Floating Charge**

- When charge is created not on specific property but class of property, it is known as floating charge.
- Floating charge is charge on class of assets both present and future. In ordinary course of business, it is changing from time to time.
  - In case of floating charge, person can deal with property in ordinary course of business. Here, deal with property means, person may use its assets charged.

- Floating charge can be converted into fixed charge.
- Example: Charge created on plant and machinery of factory.

A floating charge was created by a mortgage of book and other debts which shall become due during the continuance of this security

### **Crystallisation of floating Charge.**

A floating charge become fixed or crystallizes in the following cases:-

- (a) When the money become payable under a condition in the debenture and the debenture holder take some steps to enforce the security.
- (b) When the company ceases to carry on business.
- (c) When the company is being wound-up.

## **Rights and Liabilities of Mortgagor and Mortgagee**

### **. Mortgager**

#### **A. Rights**

A mortgagor has the following six rights –

#### **1. Right of redemption**

at any time after the principal money has become due, the mortgagor has a right on payment of the mortgage money at a proper place and time, to require the mortgagee –

1. To deliver to the mortgagor the mortgage-deed and all documents relating to mortgaged property in possession or power of the mortgagee,
2. To deliver possession of the property to the mortgagor where the mortgagee is in possession of it,
3. To re-transfer the property to the mortgagor or any third person directed by him (at the cost of the mortgagor) it to register an acknowledgement in writing on the extinction of the mortgagee's right.

These rights cannot be exercised if they have been extinguished by the act of the parties or by a decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

This section does not render invalid any provision to the effect that –

1. If the time fixed for payment of the principal money has been allowed to pass, or
2. No such time has been fixed,

The mortgagee shall be entitled to reasonable notice before payment to tender of such money.

### **Modes of Exercise of Right of Redemption (S. 60, 83 and 84)**

The right of redemption can be exercised in three ways –

1. By paying or tendering the mortgage-money to the mortgagee outside court. The mortgage-money may be paid directly to the mortgagee or his agent. Tendering is the unconditional offer for the payment of debt in such manner that the mortgagee gets the money.[ii]
2. By depositing the mortgage-money in court.
3. By filing a suit for redemption. The suit can be filed only after the principal money has become due. It must be filed during the subsistence of mortgagor's right of redemption.[iii]

### **Extinguishment of Right of redemption (S. 60)**

The right of redemption is extinguished –

1. By the act of parties as when the mortgagor sells his equity of redemption and thereby extinguishes his right,[iv]
2. By an order of the court. Where a decree is passed in a foreclosure suit, or when a mortgaged property is sold by an order of the court, the mortgagor's right is lost.[v]

### **Effect of redemption**

The effects of redemption in short are as follows –

1. Return of documents and return of possession of the mortgaged property (S. 60 and 62)

2. The mortgagor may require that instead of re-transferring the mortgaged-property to the mortgagee, the mortgagee shall assign the mortgage-debt to a third person named by him. (S. 60A)
3. The mortgagor becomes entitled to –
  - i. Accessions to the mortgaged property (S. 63)
  - ii. Improvements made thereon (S. 63A)
  - iii. The renewed mortgage lease (S. 64)

### **2. Right to Transfer to the third party. (S. 60A)**

According to this section, the mortgagor may require the mortgagee to assign the mortgage-debt and transfer the mortgaged property to a third person directed by him, instead of re-transferring the property to him. This section was intended to enable the mortgagor to pay off the debt of the mortgagee by taking loan from another person on the security of the same property

### **3. Right to inspection and production of documents (S.60B)**

According to this section, the mortgagor, who has handed over the title-deeds or other documents relating to the mortgaged property to the mortgagee, is entitled to inspect those documents. He may require the mortgagee to produce those documents in his possession at a reasonable time and at the cost of mortgagor himself. The mortgagor may make copies or abstracts of or extracts from those documents.

### **4. Right to redeem separately or simultaneously**

This section says that a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall be entitled to redeem anyone such mortgage separately or any two or more of such mortgages together. However, this is subject to contrary contract, i.e. the mortgagor and mortgagee may exclude this provision from their mortgage. It is possible only when the principal money of any two or more of the mortgages has become due.

### **5. Right to accession (S. 63)**

According to section 63 –

1. Where mortgaged property in possession of the mortgagee has,

2. During the continuance of the mortgage,
3. Received any accession,
4. The mortgagor shall upon redemption, be entitled to such accession as against mortgagee,
5. This is so in the absence of a contract to the contrary.

**Types of accessions –**

- **Natural accessions** – Section 70 gives the general rule that if after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee shall for the purposes of the security be entitled to such accession in the absence to the contract to the contrary.

Section 63 provides that as a general rule, natural accessions which arise during the continuance of mortgage can be redeemed by the mortgagor together with the mortgaged property. The mortgagee has no right to retain or claim such accessions when mortgagor redeems the mortgage.

- **Acquired accessions** – there are of two types – separable acquired accessions and inseparable acquired accessions.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it.

Where separate possession or enjoyment of property is not possible, the accession must be delivered with such property. When the accessions are inseparable, the mortgagor has no option but to take them on redemption.

**Usufructuary mortgage –**

Where the mortgage is usufructuary, and the accession has been acquired at the expense of the mortgage, then the profits arising from the accession shall be set off against interest payable on the money so expended. However, this is in the absence of the contract to the contrary.

**6. Right to grant a lease (S.65A)**

A mortgagor, who is in lawful possession of the mortgaged property, shall have the power to make the lease the property which shall be binding on the mortgagee. However, this right is subject to the provisions of sub-section (2). The conditions given under sub-section (2) are –

1. Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,
2. Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance,
3. No such lease shall contain a covenant for renewal,
4. Every such lease shall take effect from a date not later than six months from the date on which it is made,
5. In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid with a time therein specified.

#### **7. Right in case of waste (S.66)**

According to this section, a mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate but he must not do any act which is destructive or permanently injurious to the property, if the security is insufficient or will be rendered insufficient by such act.

The mortgagor's duty is not to waste the mortgaged property deliberately. Some of the acts given below are regarded as active waste by the mortgagor –

1. Removal of valuable fixtures from the property.
2. Pulling down the mortgaged house and selling materials.

#### **B. Liabilities**

##### **1. Covenant for the title (S. 65)**

The mortgagor is deemed to contract with the mortgagee that the interest which the mortgagor professes to transfer to the mortgagee subsists and that the mortgagor has the

power to transfer to the same. There is implied warranty of title by the mortgagor in the property mortgaged to him.

If the title of the mortgagor turns out to be defective the mortgagee can sue for the principal money as well as for damages even before the stipulated period.

### **2. Covenant for the defence of title (S. 65(b))**

The mortgagor is deemed to contract with the mortgagee that he will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto. The mortgagee has a right to protect the title of the mortgagor because he is entitled to the full benefit of the security.

### **3. Covenant for payment of public charges (S. 65(c))**

The mortgagor is deemed to contract with the mortgagee that the mortgagor will so, long as the mortgagee is not in possession of the mortgaged property, pay all the public charges accruing due in respect of the property.

If the mortgagor fails to pay and the property is sold for arrears and revenue, and he again purchases that property, the property will remain under the mortgage, for he cannot take advantage of his own wrong in order to better his position.

### **4. Covenant for payment of rents (S. 65(d)) –**

Where the mortgaged property is a lease, the mortgagor is deemed to contract with the mortgagee that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lease, have been paid, performed and observed, down to the commencement of the mortgage; and will pay the rent reserved by the lease and perform the conditions contained therein, and observe the contracts binding on the lease, and indemnifying the mortgagee against all claims, sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts.

### **5. Covenant for the discharge of prior mortgage (S. 65(e)) –**

Where the mortgage is a second or subsequent encumbrance on the property, the mortgagor is deemed to have contract that the mortgagor will pay the interest from time to time accruing due on each prior encumbrances as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrances.

## **II. Mortgagee**

### **A. Rights**

#### **1. Right to foreclosure of sale (S. 67)**

According to this section, at any time after the mortgage money has become due and before a decree has been made for the redemption of mortgaged-property or the mortgage money has been paid or deposited, the mortgagee has a right to redeem the property or a decree that the property be sold.

An order permitting foreclosure can only be passed upon ascertaining the nature of the mortgage and the parties right under it.

The right of foreclosure implies that when the time fixed for the repayment of mortgage-money has expired and the mortgagor's right to redeem the mortgage-money has become complete but he has failed to avail that right, the mortgagee gets a right to institute a suit of decree that mortgagor should be absolutely debarred of his right to redeem the property.

The right to redeem and right foreclosure are co-extensive. In the absence of any stipulation (express or implied) to the contrary, the two-rights are co-extensive.

#### **2. Right to sue for mortgage-money (S. 68)**

In the following four cases the mortgagee has a right to sue for the mortgage-money –

1. Where the mortgagor binds himself to repay the same,
2. Where the mortgaged property is destroyed, wholly or partially without the fault of any party.
3. Where the mortgagee is deprived of the whole or part of his security by wrongful act or default of the mortgagor.
4. Where the mortgagee being entitled to possession, the mortgagor fails to deliver the same.

The court may, at its discretion, stay all the suit and proceedings therein, notwithstanding the contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property, unless the mortgagee abandons his security, and wherever necessary, re-transfers the property mortgaged.

### **3. Right to sell (S. 69)**

This section gives the mortgagee a right to sell without the intervention of the court. When the mortgage-money is not repaid by the mortgagor, he becomes entitled to sell the property to recover his debt.

Section 67 and 68 provide for the recovery of debt by the sale of the mortgaged property by intervention of court. But in this section, a mortgagee (or any other person acting on his behalf) has a power to sell or concur in selling the mortgaged property default of the payment of the mortgaged-money without the intervention of the court in the following cases only –

1. Where the mortgage is an English mortgage and neither the mortgagor nor the mortgagee is a – Hindu, Muhammadan, Buddhist, or A member of any other race, sect, tribe or class from time to time specified in this behalf by the state government in the official gazette.
2. Where the power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage deed and the mortgagee is the government.
3. Where the power of sale without the intervention of the court is expressly conferred on the mortgagee and the mortgaged property is situated within specified towns.  
These towns included Calcutta, Madras and Bombay originally.

A power sale without the intervention of the court does not affect the ordinary right of realization of suit of the mortgagee. The right provided by this section is independent of the right to have a receiver appointed under section 69A and may even be exercised after a receiver has been appointed under section 69A.[ix]

### **4. Right to appoint Receiver**

A mortgagee having the right to exercise a power of sale under section 69 is entitled to appoint, in writing, a receiver of the income of the mortgaged property.

Any person who has been named in the mortgage-deed and is willing and is able to act as a receiver may be appointed by the mortgagee. In case no person has been so named, or all the named persons are dead or unable or unwilling to act, the mortgagee may appoint any person with the consent of the mortgagor.

However, if the mortgagor does not give his consent to the appointment, he is entitled apply to court for the appointment of a receiver.

## **5. Right to accession (S. 70)**

Accession are addition to the property. Section 70 says that if after the date of the mortgage any accession is made to the mortgaged property, the mortgagee shall be entitled to such accession for the purposes of security of his mortgage-debt. This section is a converse of section 63 which provides for the mortgagor's rights of accessions. The mortgagee is entitled to treat the acquired accession as part of his security and to enforce his lien upon them.

However, this right is available only in the absence of a contract to the contrary i.e, the parties to the mortgage may also otherwise contract.

## **6. Right of renewal of mortgaged lease (S. 71)**

According to this section, when the mortgaged property is a lease and the mortgagor obtains a renewal of the lease, the mortgagee shall be entitled to the new lease for the purpose of security in the absence of the contract to the contrary.

## **7. Right of mortgagee to spend money**

Section 72 dealing with the right of mortgagee in possession provides for the circumstances under which the mortgagee may spend money.

A mortgagee may spend such money as is necessary in the absence of the contract to the contrary-

- i. For the preservation of the mortgaged property from destruction, forfeiture or sale.
- ii. For supporting the mortgagor's title to the property.
- iii. For making his own title thereto good against the mortgagor i.e, for defending his own title against the mortgagor.
- iv. When the mortgaged property is a renewable lease-hold, for the renewal of the lease.
- v. Insuring the property where it is of insurable nature.

## **8. Right to proceeds of revenue sale or compensation on acquisition (S. 73)**

According to this section, where the mortgaged property or any interest in it is sold, owing to failure to pay –

1. Arrears of revenue, or

2. Other charges of a public nature, or
3. Rent due in respect of such property.

Such a failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage money, out of any surplus on sale-proceeds remaining after the payment of –

1. The arrears, and
2. All charges and deductions directed by law.

## **B. Liabilities**

### **1. Mortgagee bound to bring one suit on several mortgages (S. 67A) –**

Section 67A provides that if a mortgagee holds two or more mortgages of the same property or of different properties from the same mortgagor, he must enforce all or more, in the absence of a contract to the contrary. It provides that –

- i. A mortgagee who holds 2 or more mortgages executed by the same mortgagor, and
- ii. In respect of each mortgagee he has a right to obtain the same kind of decree under section 67, and
- iii. He sues to obtain such decree on anyone of the mortgages,
- iv. He shall be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

However, this liability is subject to a contract to the contrary that may be made between the mortgagor and the mortgagee.

### **2. Liabilities of mortgagee in possession (S. 76)**

The mortgagee is the person who gives a loan to the mortgagor on the security of some property. This section says that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property he is bound by the following duties –

- i. Duty to manage the property as a person of ordinary prudence.
- ii. Duty to collect rents and profits of the property to this best endeavour.
- iii. Duty to pay government dues unless there is a contract to the contrary.

- iv. Duty to make necessary repairs of the mortgaged property unless there is a contract to the contrary.
- v. Duty not to commit any act which may destroy or injure the property permanently.
- vi. Duty to apply insurance money in reinstating the property or in reduction of the mortgage-money if he receives such money in respect of the mortgaged-property.
- vii. Duty to keep proper accounts of all sums received and spent by him as a mortgagee.
- viii. Duty to apply rents and profits in discharge of interest of making certain deductions.
- ix. Duty to account for gross receipts.

## **Module 07 Leases (Sections 105 to 117):**

### **Lease :**

• It is transaction whereby one person transfers the right to enjoy in an immovable property to another person for specific time or perpetuity for consideration. • The person who transfer right in property is known as lessor. The person in whose favour right in property is transferred is known as lessee.

### **Essentials of lease:**

- Transfer of a right to enjoy immovable property.
- Transfer is for specific time or for perpetuity.
- There must be consideration which is paid or promised to be paid. Here premium or rent is known as consideration.
- Transfer must be accepted by transferee.

### **Meaning of licence**

Licence means right granted in respect of immovable property to enjoy certain benefits on land in some way or other while it remains in the possession and control of owner.

### **Difference Between Lease and Licence**

1 A lease is a transfer of interest in land

A licence is merely a personal right and does not amount to any interest in immovable property.

2 A lease involves a transfer of interest followed by possession of the property in question

A licence does not transfer any interest in the property and the licence has no right of possession.

3 Exclusive possession of the property in question is given to the transferee.

No such exclusive possession is given to the transferee.

4 A lessee has to be served with notice to quit before eviction.

A licensee is not entitled to any such notice.

5 A lease is generally transferable A licence is not transferable.

6 A lease is generally not revocable A licence is always revocable

7 A lease is unaffected if the lessor transfers the property.

A licence is determined on account of the transfer of the property in question.

8 A lease does not get terminated on account of the death of the lessor.

A licence gets terminated on account of the death of the grantor.

9 The document-creating lease generally requires registration.

The document granting licence, does not requires any registration.

10 There can be sub-lease after assigning the rights in favour of third party unless refrained in this regard.

There is no such eventuality

### **Rights and Liabilities of a Lessor**

We already know who is a lessor, so legally a lessor is granted certain rights and certain liabilities. Section 108A talks about the rights and liabilities of a lessor, so let's further analyse the rights and liabilities of a lessor.

#### Rights of a lessor

1. Right to accretions- If during the tenancy period or during the duration of the tenancy any further accretion, accumulation or addition is made in the property then the lessor is entitled to such property. Such addition can be natural or by the expense of the lessee but after the termination of the tenancy period, the lessee must deliver the title to the lessor.
2. Right to collect rent- The lessor has the right to collect rent or any form of consideration as mentioned in the terms and conditions of the contract from the tenant without any form of interruptions.

## **Liabilities of a lessor**

1. Duty of disclosure- The lessor is bound to disclose any form of a material defect in the property. There are two kinds of defects:
  - Latent defect- Latent defect cannot be discovered rationally or through inspection by the lessor.
  - Apparent defect- Apparent defect can be easily discovered through some inspection.

So basically, a lessor shall disclose any apparent defect to the lessee and it is vital to disclose such defects as they interfere with the enjoyment of the property by the lessee.

2. To give possession- The lessor must give possession of the property to the lessee on lessee's request. However, this liability only arises when there is a request on behalf of the lessee.
3. Covenant for quiet enjoyment- The lessee has all the rights to enjoy the property. It is the duty of the lessor to not cause any form of interruptions during the tenancy period. The Madhya Pradesh HC stated that actions such as physical interference or direct interference in the premises lead to a breach of enjoyment and interruptions.

## **Rights and liabilities of a lessee**

Just like a lessor, a lessee has also some rights and liabilities which are granted to him by the Transfer of Property Act. So now we will analyse the rights and liabilities of a lessee.

### **Rights of a lessee**

#### **To charge for repair-**

If the lessor fails to make any repairs in the property which the lessor is bound to do in that case the lessee can make such repairs by his personal expenses. If a lessee makes such repairs by his personal expenses then, in that case, it is the right of the lessee to deduct the cost of such repairs from the rent or the lessee may simply charge the lessor for such repair.

#### **Right to remove fixtures-**

The lessee has the right to remove any fixture in the property during the time period of the lease, however, after the termination of the lease deed the lessee must leave the property in

the condition in which he received it. In case the lessee fails to do so, the lessor can sue the lessee.

#### **Right to assign his interest-**

The lessee can sub-lease the property or the lessee can absolutely transfer his interests. However, if the lease deed restricts a lessee to assign his interest then the lessee is prohibited to do so and even after the transfer of his rights, the lessee is still subject to all the liabilities related to the lease deed.

#### **Right to have benefits of crops-**

When the lease is of uncertain duration then, in that case, the lessee or his/her legal representative has been given the right to gain benefits from all the crops grown by them.

#### **Liabilities of a lessee**

##### **Duty to disclose material facts-**

The lessee is bound to inform the lessor of any material fact which the lessee is aware of and the lessor is not. In case the lessee does not disclose such fact and the lessor suffers any loss then the lessee is bound to compensate the lessor.

##### **Duty to pay rent-**

The lessee is bound to pay the rent or the premium to the lessor or his agent in the proper time and proper place as decided by the lease deed. In case the lessee fails to pay his/her rent then, in that case, the lessor can eject the lessee on the ground of non-payment of rent or file a suit for arrears of rent.

##### **Duty to maintain the property-**

The lessee is bound to maintain the property in a good condition as it was when he was given the possession of the property. The lessor or his agent are allowed to inspect the property at the reasonable ground. Only the changes caused by irresistible forces can act as an exception for this liability.

##### **Duty to give notice-**

If the lessee becomes aware that any person has tried or is trying to damage the rights of the lessor or the title of the lessor is endangered then, in that case, the lessee must give notice to the lessor.

**Duty to use the property in a reasonable manner-**

The lessee must use the property in a manner as if it was his/her own property.

**Duty not to erect any permanent structure-**

A lessee cannot erect any permanent structures except in the case of agriculture without the consent of the lessor.

**Duty to restore possession-**

After the determination of the lease, the lessee must restore the possession of the property to the lessor. If the lessee does not vacate the premises even after the expiry of the notice, the lessee is then bound to pay the damages.

**Termination of a lease**

A lease is terminated in eight different ways that are discussed below:

A lease is terminated after the expiry of the specified time period.

If the length of the lease is until the happening of some event and when that event happens the lease is terminated.

If the lessor's interest in the property is to terminate the lease on the happening of some event and when the event happens the lease is terminated.

When the lessee surrenders by implying.

When both the lessor and lessee mutually agree to end the contract.

On the expiry of a notice which expressly conveys the intention to terminate the vacancy and such notice must be unconditional.

Through forfeiture which legally allows a lessor to re-enter and reclaim his property.

If the interest of both the lessor and the lessee in the whole property becomes vested at the same time in one person in the same right, then by the operation of law merger takes place.

**Determination of lease. — (111)**

A lease of immoveable property determines—

(a) by efflux of the time limited thereby:

- (b) where such time is limited conditionally on the happening of some event—by the happening of such event:
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:
- (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:
- (f) by implied surrender:
- (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee 2[gives notice in writing to the lessee of his intention to determine the lease:
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f)

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

**Waiver of forfeiture.(Sec 112.)—**

A forfeiture under section 111, clause (g) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture; such acceptance is not a waiver.

**Waiver of notice to quit.(Sec113)—**

A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. Illustrations

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A give to B as lessee a second notice to quit. The first notice is waived.

**Relief against forfeiture for non-payment of rent(Sec114).—**

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

**Relief against forfeiture in certain other case(114A).—**

Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, underletting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.]

**Effect of surrender and forfeiture on under-leases(115.).—**

The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

**Exemption of leases for agricultural purposes.**(Sec117)—

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

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

## **Module 08 Gift and Transfers of Actionable Claims (Sections 122 to 129 and 3, 130 to 137):**

### **Provision Relating to gift Section 122-129**

#### **Meaning**

- Gift means transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person to another.
- Person who transfer property is known as donor. Person in whose favour property is transferred is known as donee.

#### **Essentials of gift:**

- Transfer of ownership from donor to donee.
- Transfer must be made voluntarily and without consideration.
- Transfer must be accepted by donee. Acceptance by donee should be during his lifetime.
- Subject matter should be existing property. It may be movable or immovable property.

#### **Procedure**

- A gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor,
- And attested by at least two witnesses.

#### **Revocation of gift::**

##### **(I) Conditional gifts:**

The fundamental rule is that 'A resumable gift is not a gift at all.' A gift once given cannot be revoked at the mere will of the donor; such a gift if made, is void ab initio. But a conditional gift is void. Conditional gift which attaches a condition subsequent is valid if the condition is not vague or illegal or immoral or opposed to public policy or impossible of performance.

Hence conditional gifts may be made.

Under Mohammedan law, to be a valid gift, three essentials are required to exist:

- (a) declaration of gift by the donor
- (b) an acceptance of the gift, express or implied, by or on behalf of the donee, and
- (c) delivery of possession of the subject of gift.

Courts have consistently held that when there is no compliance of any of the above three essential conditions the gift renders itself as invalid. Another characteristic of Mohammedan law is that writing is not essential to the validity of a gift either of movable or immovable property.

In another case the Patna High Court held that under the Mohammedan Law for validity of the deed of gift four elements are necessary

- ∅ declaration of gift by the donor
- ∅ relinquishment by donor of ownership and dominion
- ∅ acceptance of the gift by donee, and
- ∅ delivery of possession of the property by donor.

Under the Mohammedan Law it is essential as regards gift that the donor should divest himself completely of all the ownership and dominion over the subject of the gift. It is essential to the validity of the gift that there should be delivery of such possession as the subject of the gift is susceptible of. According to Muslim law it is not necessary that there should be deed of gift in order to make it a valid gift, but of course, if there is a deed it should be registered.

Acceptance- Acceptance may be made expressly or impliedly by conduct, but acceptance would be unnecessary in a case where the gift is made by a guardian to his ward.

Mohammedan law does not dispense with the necessity for acceptance of the gift even in cases where the donees are minors. If the donees are minors it may be that the evidence of acceptance will have to be approached with reference to that fact, but that does not mean that no proof of evidence of acceptance is necessary in the case of a gift in favour of minor.' A minor who has attained discretion may accept the gift even after it has been rejected. He may also refuse to accept the gift.

### **Actionable claim Section 3 Meaning**

- Actionable claim means a claim to unsecured debt. Here debt is not secured by the mortgage of immovable property or by pledge of movable property.
- The debt may be existing, accruing, conditional or contingent.

What is actionable claim What is not actionable claim Arrears of rent. Secured debenture. Money due under insurance policy. A claim which is decreed. Claim for rent to fall due in future. Relinquishment of interest of a member retiring from joint Hindu Family business Benefit of a contract giving option to purchase the land. Right to Sue

Example A borrows Rs 5000/- from B at 12% per annum interest on 1st April ,2016 and promise to pay back the amount with interest on 1st july 2016. Till Ist july 2006 the debt is an accruing debt and is an actionable claims.

The partner's right to sue for accounts of dissolved partnership is an actionable claims being a beneficial interest in movable property not in possession. (Thakardas Vs Vishindas)

## **Module 09 Law of Easements (Sections 1 to 51 of the Easement Act, 1882) :**

### **Meaning and nature of Easements**

The concept of easement has been defined under *Section 4* of The Indian Easements Act, 1882. According to the provisions of *Section 4*, an easementary right is a right possessed by the owner or occupier of the land on some other land, not his own, the purpose of which is to provide the beneficial enjoyment of the land. This right is granted because without the existence of this right an occupier or owner cannot fully enjoy his own property.

It includes the right to do or continue to do something or to prevent or to continue to prevent something in connection with or in respect of some other land, which is not his own, for the enjoyment of his own land.

The word 'land' refers to everything permanently attached to the earth and the words 'beneficial enjoyment' denotes convenience, advantage or any amenity or any necessity. The owner or occupier referred to in the provision is known as the Dominant Owner and the land for the benefit of which the easementary right exists is called Dominant Heritage. Whereas the owner upon whose land the liability is imposed is known as the Servient Owner and the land on which such a liability is imposed to do or prevent something, is known as the Servient Heritage.

#### **Illustrations-**

1. 'P' being the owner of certain land or house has a right of way over Q's house, adjacent to his house, to move out of the street. This is known as right of easement.
2. A voluntary dedication of right by 'X' to the public for passing or re-passing over a surface of certain land is not a right of easement.
3. X's right to go on his neighbour Y's household for fetching water from the well for the purpose of his own household is a right of easement. Here, the way to the well is through Y's land only. Hence, X has an easementary right to pass through Y's household.

In the words of great jurist *Salmond*, **easement is that legal servient which can be exercised on some other piece of land specifically for the beneficial enjoyment of one's own land.** Right of easement is basically a form of **privilege**, the integral part of which is to do an act or prevent certain acts on some other land for enjoyment of one's own land.

Other examples of right of easement includes-

- Right of way
- Right to discharge rainwater
- Right to sunlight etc

## **Essentials of Easements**

### **1. Dominant and Servient Heritage**

For the enjoyment of right of easement, necessary existence of two properties i.e. **dominant and servient heritage** is a must. This is because as per the definition, it is the right exercised by the owner or occupier of one land for enjoying the benefit of his/her land, over the land of some other person. Dominant and servient heritage cannot be one. Thus, the existence of two properties and that to be separate from each other is essential.

### **2. Separate owners**

For exercising the right of easements, owners of the two properties shall be different and not a single person.

### **3. Beneficial Enjoyment**

The object of easements is that the dominant owner enjoys it in a way which includes express and implied benefits.

### **4. Positive or Negative**

Easements can be both positive or negative. Former refers to a right through which the dominant owner does some act to exercise the right over the land of the servient owner. Whereas, the latter denotes an act of prevention. In a negative easement the dominant owner prevents or restricts the servient owner from doing certain act or acts.

In a right of easement an owner of dominant heritage can do an act or prevent the servient owner from doing something but he cannot bind the servient owner to do something for him.

The easementary right exists only when two heritages are adjacent to each other. It is a right in *rem*, which means a right available against the whole world. Easement as a right is always **annexed to the dominant tenement**. It is a right of **re-aliena** which means a **right over a servient tenement** and no on one's own land.

## **Classification of Easements**

*Section 5* of the **The Indian Easements Act, 1882** classifies the easements as follows–

### **Continuous or Discontinuous**

Continuous easements are the one whose enjoyment may be continued without the intervention of any human conduct or act of a man. There is no interference by a man and it adds special quality to the property. While, on the other hand, right of easement for the enjoyment which an interference of a man is required is known as discontinuous. In this kind of easement, it is necessary that a human act is done on the servient heritage.

### **Apparent or Non- Apparent**

An apparent easement is one the existence of which can be seen through a permanent sign. It can be visible by a careful examination and on reasonable foresightedness. It is also known as **express easement**. An inspection is required to check the existence of a right. For example- There is a drain from A's land to B's land and from there it led to an open yard. This can be visible through a clear inspection and is an apparent easement.

Whereas, a non-apparent easement is just opposite of what apparent easement is. This kind of easement is not visible through an inspection. There is no permanent sign as such. The right is in use but is not visible and thus, is known as an invisible easement. For example, A's right annexed to A's land to prevent B from building on his own house.

Another example to explain non-apparent easement is that the right to stop construction over a certain height.

### **Limitations or Conditions of Easements**

An easementary right may be permanent or for a period of years or for a limited term. It can also be subjected to periodical interruption or may be exercisable at a particular place, between certain hours and for a certain or particular purpose. This right can also be granted on a condition that such a right shall become void or voidable on happening of some event or non performing of some act. These limitations or conditions which regard to the right of easement has been specified under **Section 6** of the Act.

### **Restrictive Easements**

**Section 7** specifies that the easements are restrictive of certain rights which are as follows-

- Exclusive right to enjoy
- Right to advantages arising out of the situation

### **Profit a Prendre**

According to **The Indian Easements Act, 1882**, profit a prendre is a part of the definition of easements. An instance to explain the concept is, a right to take earth from the land of the other person for making an earthenware is a profit a prendre. This is basically a profit made out of the land of the other person. Other examples of profit a prendre-

- Right of fishery
- Right to take fruits of trees in the season

This is the right which is exercised on the land appurtenant to the dominant heritage. Hence, there shall be the existence of two heritages i.e. dominant and servient. The owner of the dominant heritage exercises this right on the property of the servient owner. Profit a prendre is a right to do something on the land of servient tenement for more beneficial enjoyment of the dominant heritage.

### **Modes of Acquisition of Easements**

#### **Express Grant**

The easement can be acquired through express grant made by inserting the clause of granting such a right in the deed of sale, mortgage or through any other form of transfer. This involves expressing by the grantor of his clear intention. If the value of the immovable property is Rs.100 or above then it compulsory for it to be in writing and duly registered.

#### **Implied Circumstances**

Easementary right can be acquired in implied circumstances in the following ways-

- **Easement of Necessity**

*Section 13* of the act deals with this. This consists of the circumstances where the owner or occupier cannot use his property without exercising the right of easement over the servient heritage. Thus, absolute necessity is the test and the convenience.

**For example**– X sells his land to Y for agricultural purpose. Here, Y cannot access his land without passing through Z’s land (his neighbour). Thus, this is an easement of necessity.

When a joint property is partitioned amongst various coparceners and if right of easement over one share of the property is essential for the enjoyment of the share of the other coparcener then latter shall be entitled to easement.

- **Quasi Easements**

In the case of a person transferring his property to another person then-

- If an easement is continuous, apparent and necessary to enjoy, then in such a case the transferee shall be entitled to it,
- If such an easement is continuous, apparent and necessary to enjoy the said property, the transferor has a right to such easement over property transferred by him
- In case of partition of the property of the joint family, if an easement is continuous, apparent and necessary to enjoy the share of one coparcener over the other coparcener, then he is entitled to such a right of easement.

Easements are quasi as those are arising out of circumstances. When common properties are converted into tenements by way of sale, mortgage, partition or through any other form of transfer. In such a case, there is an implied grant of right of easement.

**For example**– P’s right attached to Q’s house to receive air and light through a window without any obstruction by his neighbour. This is a continuous.

- **Prescriptive Easements**

*Section 15* provides for this type. Following are the requisites-

- Right must be definite and certain,
- Right must have been independently enjoyed without any agreement with the servient owner,
- Must be enjoyed openly, peacefully and as of a right without any interruption for a continuous period of 20 years and in respect of any government land the period of non-interruption shall be 30 years.

- **Customary Easements**

An easement right can be acquired by virtue of a local custom. This is known as customary easements. **Section 18** of the Act provides for it. For example- people living in a particular city or town having a right to bury the dead in a particular area or riparian right to use water.

### **Extinction of Easements**

Section 37 to 47 of the **The Indian Easements Act, 1882**, provides for the mode of extinction of easements.

- **Dissolution of Servient Owner's right**

In the situation where the grantor ceases to have any right in the servient tenement because of some reason, then the right of easements ceases to exist as well. This has been specified under Section 37 of the Act. For e.g.- X grants a piece of land to Y for a period of 20 years in the year 1970. In the year 1971, Y imposed an easement in favour of Z. In 1990 Y's interest came to an end. Thus, easementary right granted to Z ceases to end as well.

- **Expiry of time or happening of an event**

When an easement is acquired on certain conditions or for certain purpose or for certain period of time. On the fulfilment of such condition or purpose or expiry of the time, the right of easement extinguishes as well as in accordance with Section 6 of the Act.

- **Extinction by release**

Where in a situation the owner of the dominant heritage releases the right of easement to the servient owner, the right ceases to exist. Such a release can be both expressly or impliedly made. For eg- P has a right to discharge water through the eaves to Q's yard. P authorized Q to construct a building to such a height as not be able to discharge water. Q builds it and P's right comes to an end.

- **Termination of necessity**

When necessity terminates the easement of necessity terminates as well. For example- A grants a piece of land to B on which easement of necessity for B is the right of his way over A's land. Later on, B purchases a part of the A's land over which he may pass to reach his own land. Here, the necessity has ended and so does the easement.

- **Useless Easements**

When easement is of such a nature that is not useful or becomes incapable of being beneficial at any time or under any circumstances, then the right of easement ends.

- **Permanent change in the Dominant Heritage**

When the nature of the dominant heritage changes permanently with increase in burden on tenement, then the right of easement ceases to exist as the purpose of it was the beneficial enjoyment of the dominant heritage. For example- A's house is located such that he has a right of way by passing through B's house. Later, due to earthquake, B's house got cut off and thus, right of easement ends.

- **Extinction by destruction of either of heritages**

When either of heritages gets destroyed, the easement ends as it is essential for two properties to exist for exercising the right.

- **Unity by ownership**

By unity of ownership it is indicated that when one person becomes the owner of both the dominant and servient heritage then the right of easement terminates. For instance, A has right of easement over B's property. Later on, A purchases B's property and becomes the owner of B's property. In such a case, easement extinguishes.

Another example which can be stated here to explain the concept is that A has a right of easement over B's land. In future A takes B's land on rent, here A becomes the occupier of B's land. Thus, easement terminates.

## **Suspension of Easements**

**Section 49** of the Act provides that easement can be suspended under the following circumstances-

1. An easement is or can be suspended when the dominant owner becomes entitled to the possession of servient heritage for a limited interest. An example which can be stated here to explain the concept is that A has a right of easement over B's land. In future A takes B's land on rent, here A becomes the occupier of B's land. Thus, easement suspends.
2. When the servient owner becomes entitled to the possession of dominant heritage for a limited interest, the easement is suspended.

Thus, where both the dominant and servient owner becomes one, easement is suspended.

#### Revival of Easements

**Section 51** of the Act provides for the situations wherein easement suspended or extinguished can be revived, which are as follows-

1. When an easement is extinguished by destruction of either of the heritages then it can be revived-
  - If the heritage is restored in 20 years.
  - If the heritage is rebuilt in 20 years
2. In case of unity of ownership, if the unity breaks due to some reason, then easementary right can be revived and also through an order of a competent court.

## **Module 10 Law of Licenses (Sections 52 to 64 of the Easement Act, 1882):**

### **Licenses**

*Section 52* of the Act deals with the concept of licenses. Where one person grants to another person a right to do or continue to do something in or upon the immovable property of the grantor, something which if he does will be unlawful without the prior permission or the availability of the grant. Such a right shall not amount to an easmentary right or creation of interest in the property.

### **Essentials of licenses**

1. It is a permission granted, i.e. a right arising out of permission.
2. Legalises an act.
3. Is revocable on the act of the grantor.
4. It is always in respect of immovable property.
5. It is a right in personam.

### **Revocation of licenses**

License can be revoked in following ways-

1. If from the cause of preceding the grant, the grantor himself ceases to have any interest in the property, the license gets revoked. Grantor's interest comes to an end.
2. By express and implied release of the license by licensee.
3. There are certain cases wherein a license is issued under certain conditions or limitations. This includes a license issued on a condition that if a certain act is done or is not performed then the license may become void. In such a situation wherein these acts are performed then license can be revoked. Also, licenses are granted for the fulfillment of certain acts and once it is fulfilled license can be revoked.
4. Where a property in relation to which a license was granted gets destroyed due to any reason, then a license can be revoked.
5. Where, a licensee himself becomes the owner of the property for which license was granted, then the purpose for which license was granted ceases to exist and thus, the license also ceases to exist and gets terminated.

6. When licensee does not use it for a period of 20 years then the license gets revoked.

### **Transferable Licenses**

According to *Section 56* of the Act, a license can be transferable under the following conditions-

1. A license to attend a place of public entertainment may be transferred by the licensee. This may be gathered from the grant or contract, or from surrounding circumstances or local usage. For instance, P grants Q, a right to walk over P's field whenever he pleases. The right is not annexed to any immovable property of Q. The right cannot be transferred.
2. Transfer by licensee- The general rule is that the licensee cannot transfer his license. If he transfers then the transferee becomes a trespasser and can be or may be ejected.

### **Irrevocable Licenses**

*Section 60* provides that license can also be irrevocable. If the license is coupled with a transfer of property and the transfer is in force, it cannot be revoked. This is subject to the agreement. Hence, the power can be reserved. The rule is that a bare license may be revoked but if coupled with a transfer of the property, then it is irrevocable.

A license coupled with an interest in a land is binding. A license coupled with profit a prendre is irrevocable, for example, Right to excavate earth and carry it to make earthen wares, right to cut and carry timber on payment of royalty.

If the licensee, has executed some work which is permanent in nature and has incurred expenses, the licence cannot be revoked and hence, is irrevocable. For example, there are two companies, namely X and Y having lands adjoining to each other. The agents were common who managed to put up the building and tank on X's land for use by Y. License is irrevocable as the rule applied as was held in *Ramson V dyson*.

Tabular difference between Licenses and Easements

Under the Indian Law, a license is governed by the Indian Easement Act, 1882. Section 52 of the Act defines license as a permission by one person to the other or a group of people to

carry out any activity on the property of the grantor, which without such permission from the grantor would be considered unlawful.

Interpreting section 52, it can be said that when a person is given the right to use a particular property for certain use, while the possession and control of the property are with the owner, the person will be considered as the licensee. A license can be granted to only a definite number of people, as a license is a personal right given to the licensee. Section 56 of the Easement Act also states that a license cannot be transferred by a licensee or the right under the license be exercised by his servants or agents. In the judicial pronouncement of *Associated Hotels of India Ltd. v RN Kapoor*, the Apex Court gave a definition of a license. Court stated that when a document only gives the right to use a certain property in a certain way, it'll be considered as a license. The licensee is entitled to use the premises only in a specific manner. Without the permission, his activities would be considered unlawful. The essential features of a license can be thus summarized as-

- A license does not create an interest in the property. It acts only as permission which created a personal right with regards to the property.
- A license authorizes certain acts on the property which would be otherwise unlawful.
- A license cannot be assigned or transferred to some third party.

### **Types of License**

License are generally of two types-

- Bare license
- License coupled with a grant.

#### **Bare License**

A bare license can be defined as a personal consent which is granted without any consideration. A bare license can be revoked at any time. A bare license acts as a defense to the act of trespass. If a person is allowed to enter a property for some particular purpose, but on entering the property does something else, it'll be considered as an act of trespass. When one party grants another party to carry on some activities on the land without changing the nature of the land, it is a bare license.

### **License coupled with grants**

A license coupled with grant or interest means that the permission is given to carry on activities in the property or premises of the other for the purpose of earning some profit and exploit the interest given in the land. For instance, the government gives license to contractors to enter a forested area to collect timber. A license coupled with a grant is assignable, and it also cannot be revoked at any time. The parties must give each other some reasonable time before the permission is revoked.

### **Granting of license and Implied & Express license**

Under the Indian law, the provisions governing the granting of a license are section 53 and section 54 of the Easement Act. Section 53 talks about the question of who may grant a license. Section 54 states that a license may be granted in an express or implied manner.

Section 53 of the Act states that any person can grant a license who in a particular situation can transfer his interest in the property which is affected by the license. In simpler words a person cannot grant license rights if he does not have sufficient legal interest in the property.

The power to grant a license co-exists with the power of transferring of interest. Section 53 also states that a person can grant a license to the extent he can transfer his interest in the property. Interpreting this part, it can be said that if a person is not the owner of property, but he has some interest in that property, even he can grant a license to the extent of his interest. Therefore, even a co-tenant or a mortgagee can grant a license to a third party. A tenant can also grant a license, but this right is limited only to the extent of his interest in the property, i.e. the tenancy rights. A tenant cannot transfer the interest which goes beyond the term of the lease.

Section 54 of the Indian Easement Act states that a grant of license may be express or implied. It depends on the conduct of the grantor. Many times it so happens that the owner of a property creates an agreement for easement, but it may turn out to be an implied license. Thus, the owner of a property should take proper care to differentiate between the permission he is giving, because due to his behavior the opposite party may get a license even though a formal agreement was never created. But in such a case, the co-tenant or mortgagee should be in the sole possession and enjoyment of the property.

## **Implied License**

A license may be an implied license due to the conduct of the owner of property, who may allow some other person to carry on activities on his property. For instance, a shopkeeper allows a customer to enter the shop and enter into a transaction with him. An implied license may also arise due to the reasonable belief of the licensee that the licensor has consented to certain acts on his property.

## **Express License**

In the case of express license, some direct authorization is given to the licensee to carry on activities on the property. Express license are more specific than implied license, as in the case of express license specific terms and conditions are mentioned.

The concept of lease is governed by the Transfer of Property Act, 1882.[5] Section 105 of the Act defines what is meant by a lease. According to the provision lease means a transfer of the right to enjoy the property, for a fixed time and in lieu of some consideration or price. The person who transfers the rights is known as the lessor and the person to whom the rights are transferred is known as the lessee. The question which arises here is that what the difference between a lease and a license is? In simple words, it can be said that the difference lies in the intention of the parties, and the fact that whether any exclusive possession has been given or not. In the case of Section 52 of the Easement Act, no exclusive possession is given to the opposite party. Therefore, if exclusive possession is missing, it cannot be a lease and will be considered as a license. The difference between the two can be summarized in the following points-

- In the case of a lease, the right to enjoyment is transferred, i.e. exclusive possessory rights. In the case of a license, a mere permission is granted without any transfer in interest or rights.
- A lease can be both heritable and transferable. But on the other hand, a license is neither heritable nor transferable.
- In the case of a lease, the parties are entitled to any accession or improvement made to the property. In the case of a license, no such entitlement is there.

- In the case of a contract of lease, the lessee has the right to protect the possession in his own name. In the case of a license, the licensee does not have the right to defend the possession in his own name as no proprietary rights are transferred.

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