LAW COMMISSION OF INDIA

# SEVENTIETH REPORT

ON

## The Transfer of Property Act, 1882

AUGUST, 1977

P. B. GAJENDRAGADKAR

CHAIRMAN
LAW COMMISSION.
Government of India.

12, TUGHLAK ROAD,
NEW DELHI—11
*August* 25, 1977

My dear Law Minister,

I have great pleasure in forwarding herewith the Seventieth Report of the Commission on the Transfer of Property Act, 1882.

Revision of the Act was taken by the Commission on its own, having regard to the fact that the Act is a Central Act of general application and importance which has not been the subject-matter of review for about half a century.

Since this is the last Report of the present Commission, I would like to describe briefly the procedure followed by the Commission in making all its Report after I became its Chairman in October, 1971.

The study of different Acts for revision was undertaken by the Commission either at the request of the Government or *suo motu*. When the Act was thus taken up for study and report, each one of us examined the different provisions of the Act individually and consulted relevant legal literature. This preliminary study enables us to formulate provisionally our views as to the points on which the Act in question needed to be amended.

Meanwhile, Mr. P. M. Bakshi, Member-Secretary, also studied the Act and examined critically the relevant legal literature bearing on the points which needed consideration. This literature consisted of the standard text-books on the subject and judicial decisions of the Indian High Courts and the Supreme Court of India as well as the material English, American and even Australian decisions. As a result of this preliminary comprehensive study, Mr. Bakshi prepared a draft for the consideration of the Commission and the same was circulated.

This draft was read at the meetings of the Commission and was examined carefully paragraph by paragraph. Naturally, during the course of discussion, different points emerged on several issues and as a result of the detailed and careful examination of most of the points, the Commission was able to reach unanimity. When, however, difference of opinion was of a radical nature and it was not found possible to evolve unanimity, minutes of dissent were written by those Members who differed from the majority view. But such occasions fortunately were not many.

The detailed discussion of the Report disclosed that some changes may have to be made in the draft Report and they were accordingly made by the Member-Secretary, Mr. Bakshi. Thereafter, a Questionnaire containing the broad issues involved in the study of the Report was framed whenever necessary and was circulated to the persons, bodies and institutions interested in the study of the subject.

After replies were received to the Questionnaire, they were analysed by Mr. Bakshi and in the light of the replies received and their analysis made by Mr. Bakshi, if the Commission felt that some changes were required to be made, they were made and as a result of this process, the draft was finalised.

Since this is the last Report of the Commission, I wish to put on record that during the entire period of my Chairmanship, all my colleagues have given me their fullest cooperation. It is true that in our discussion, several points of view were expressed with emphasis by different Members, but the atmosphere of the discussion was always cordial and conformed to the best traditions of academic debates. I wish to express my grateful appreciation for the cooperation which my colleagues have consistently given me in the work of the Commission.

As would be evident, in the method adopted by the Commission in making its recommendations, Mr. Bakshi has played a pivotal role in making the initial draft, and in all further discussions. He has shown remarkable legal acuemen and a profound knowledge, of the principles of law which were relevant to the debate. His industry, his devotion to his work and his intensive study of all problems have helped the Commission to a very large extent. I would like to place on record the Commission's sincere appreciation of the assistance which it received from Mr. Bakshi throughout this period.

The same procedure has been followed in making this Report. All relevant questions have been exhaustively considered and some significant recommendations have been made. In consequence, the Report has been an exhaustive document and it spreads over more than 1800 pages.

In this connection, I may be permitted to point out that during October 1971 to August, 1977, the Commission has forwarded to the Government twenty-six Reports including the present one. All the Reports have not yet been printed; but such of them as have been printed extend to 1609 printed pages and those not yet printed, including the present one, cover 5830 typed pages.

It is a matter of regret that the Reports forwarded by the Commission to the Union Government have not been implemented as the Commission hoped they would be. I ought to add that, in my covering letters to the Law Minister, I, several times, recommended that the Reports, after they were forwarded to the Government, should be immediately published and opinions of different Bar Associations of the country, including the Bar Council of India and the State Bar Councils should be called for to enable the Government to decide which of the recommendations should be accepted. It would also have been worthwhile to hold some All-India Seminars to consider recommendations of the Commission and that would have involved a real dialogue between the academics of the country. I trust the present Government will consider this aspect of the matter.

In our Report on the Civil Procedure Code, we have deliberately added the last Chapter and have observed that the discussion in that Chapter was strictly outside the terms of reference, because we thought that the discussion in the Chapter and the recommendations made in it would contribute to improve the quality of the subordinate Judiciary in the country; but, unfortunately, that part of our Report does not appear to have received due consideration from the Government. If the present Government feels that the recommendations made by the Commission in that part of the Report should be considered on the merits, I would suggest that the Government should do so an early date.

In conclusion, the Commission wishes to say in all humility that it tried its best to discharge the onerous responsibilities

placed on its shoulders during the time that it has functioned under my Chairmanship.

With warm personal regards,

Yours sincerely,
Sd/-
(P. B. Gajendragadkar)

Hon'ble Shri Shanti Bhushan,
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## CHAPTER 1

### *INTRODUCTORY*

1.1 *Reasons for taking up*—The Transfer of Property Act, 1882, with which this Report is concerned, has been taken up by the Law Commission on its own, having regard to the fact that the Act is a Central Act of general application and importance which has not been the subject-matter of revision for about half a century.

1.2 *Importance*—Although, as will be seen later, the Act does not purport to codify the whole law of property or of transfer of property, and although its application in regard to territories, persons and subjects has certain limitations, yet the fact that a law dealing with the transfer of property affects almost every citizen, renders it desirable that legislation on the subject should be reviewed from time to time. It is not only men of property who are governed by the Act or by rules of law analogous to its provisions. The provisions of the Act, or analogous rules, are of importance for almost every citizen. Every individual may not, during his life-span, have occasion to buy or sell or mortgage land or other immovable property, but almost everyone who has a shelter on his head, is either a landlord or a tenant, or a person who may become a tenant by succession. Again, while every one may not have occasion to be a transferor of immovable property almost every one is affected by the law relating to what property can or cannot be transferred. For example, the proposition that future maintenance cannot be transferred is one which has been enacted[1] by legislation or judicially recognised for the protection of those who are entitled to maintenance because, without the right to maintenance, life itself would be impossible.

1.3 *Social Aim*—A prohibition against the transfer of his right, and many other similar prohibitions, have a wider social aim to achieve; and their importance is not confined to the rich. Though they speak the language of the law and may have a flavour of the court room, their roots lie much deeper.

That, indeed, was the rationale of the legislation passed in several countries recognising a compulsory share out of the estates of decendents for those who were, in fact, economically dependent on them[2]—a movement[3] in which New Zealand seems to have been a pioneer in the Commonwealth.[4]

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1 Section 6(dd).

2 Note, "Decendents" Family Maintenance Legislation" (1955) 69 Harvard Law Rev. 277.

3 N. Z. Family Protection Act, 1908 (Part II), re-enacting the Testators Family Maintenance Act, 1908. See *Allardice* v. *Allardice*, (1911) A.C. 730.

4 Now the (New Zealand) Family Protection Act, 1955.

1.4. *Case of gifts*—Again, take a transaction that almost every one enters into—a[1] gift. How a gift can be made is laid down in the Act in a specific provision[1] which applies not only to immovable property, but to movables as well. That a gift can be made by delivery in the case of tangible movable property—we are not referring to gifts of debts etc.—is an assumption on which every citizen acts; but if a legal basis for it is to be sought, it could be sought only in the Transfer of Property Act—at least, in regard to territories, persons or matters not excluded from the operation of the Act. It is well established that if a gift is, for any reason, imperfect, the court will not approve it by construing it as a trust,—which shows the importance of the relevant provision in the Act.

1.5. In this connection, it will be of interest to refer to a Bombay case[2] in which judgment was delivered by Mulla J. It was held that the gratuity payable to retired servants of a Railway Company being in the nature of a gift, it must be completed either by a registered document or by actual payment as required by section 123 of the Transfer of Property Act. The delivery of the cheque by the Railway Company to the Mercantile Bank, though coupled with the request to send the amount to their London Office to be paid to the defendants, was not equivalent to delivery to the defendant and section 123 which requires delivery was not satisfied.

A transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee of the property for the intended donee. In other words, an imperfect gift will not be construed as a declaration of trust.

1.6 *Law of Property a pre-requisite of social order*—Transfer of a right, of course, pre-supposes the existence of that right. Any society must, as a pre-requisite of social order, allocate rights of control over the land and goods existing in its territory. The pattern of allocation may vary, but there must be some allocation of its resources. Once "proprietorship"—ownership of the resources—is recognised, there must also be a provision for recognising subsequent dispositions of the rights as recognised in their origin. This shows the significance of a law relating to the transfer of property.

The rights may be allocated according to the norms of the particular society, but there must be some form of allocation. The transition from the natural state to civil society, according to Rousseau[3], "changes usurpation into a true right and enjoyment into proprietorship". Civilised society thus postulates the transformation of *de facto* acts into legal doctrines in the field of property. Once the rights are recognised by society—setting its seal of approval—their transfer must also be provided for. The provisions for transfer could also vary according to the norms of the particular society, but the provisions must be there.

1.7. *Transferability not an essential feature*—Of course, transferability or assignability cannot be considered to be a *Sine qua Non* or a necessary and indispensable incident of every kind of property. For example, it has

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1 Section 123.

2 *Natha Gulab & Co.* v. *W. C. Shaller,* A.I.R. 1924 Bom. 88.

3 Rousseau, Social Contract.

4 *Mrs. S. G. P. Athaide* v. *The Charity Commissioner,* (1974) 77 Bom. L.R. 486 (Vaidya J.).

been held[4] that the word "property" used in section 55(1) and 56 of the Bombay Public Trusts Act, 1950, is wide enough to include a *statutory* tenancy created under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, even though such a tenancy is not transferable.

**Property—Range of**

1.7A The term "property" covers a very wide range of rights. Professor Tawney[1] has pointed out that property is the most ambiguous category. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the State. Apart from these formal characteristics, he says, those multitude of rights operate indefinitely in economic character, in social effect and in moral justification. They may be conditional, like the grant of patent rights, or absolute like the ownership of ground rent. They may be permanent like a freehold land—to borrow an expression used in English law previously—or they may be terminable like copyright. They may be intimate and personal, as the ownership of clothes and books, or intangible, as shares in a gold mine.

1.8. *Concepts of property changing from time to time*—Legal concepts of what is property differ from time to time and place to place. What is property in one legal system may not be so according to another legal system. inasmuch as the law may fail to provide that the particular assertion deserves to be recognised or protected by law. This is partly due to the differences in the social order in which a legal system operates, and partly due to the state of juristic thinking in the particular country.

1.9. *Species of property*—Legal literature as well as actual instances would show that concepts of property and ownership have come up for consideration in situations that are sometimes unusal. For example, the question whether bees settling on another's land became his property has been the subject-matter of debate[2], and actually arose in England.

*In Kearry* v. *Pattinson*[3], title in bees settling on another's land was directly in issue. Some of the plaintiff's bees swarmed in the garden of the defendant, a neighbour, who refused the plaintiff permission to enter. When the defendant subsequently gave permission, the bees had gone. The plaintiff appealed from an adverse judgment in action for conversion based on the defendant's refusal to allow him to enter. It was held that the title in the bees persisted only so long as the plaintiff was able to pursue them without trespassing, at which time they reverted to *ferae naturae*.

The basis of this decision is that bees are *ferae naturae*, (so that only a qualified title can be obtained in them). In contrast, it may be noted that the civil law[4] provides that an owner's title is not lost[5] because his bees settle on another's land.

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1 R. H. Tawney, The Acquisitive Society (1921) Chapter 5.

2 Note "Bees settling on another's land", 52 Harvard Law Review 335.

3 *Kearry* v. *Pattinson*, (1939) 1 All Eng. Rep. 65, 834.

4 Note, 52 Harvard Law Rev. 834.

5 France : "Law of April 4, 1889; 1889 Bulletin des Lois Pt. I. 554; Cf. Code Napoleon (1804) s. 564; La. Civ. Code Ann. (Dart, 1932) art. 519.

1.10. *Wild Animals*—Incidentally, it may be stated that the mode of acquisition of ownership over wild animals in the Western legal system, alluded to above, is analogous to the ancient juristic principle of *parigraha*. That word literally means appropriation, and is explained in the Virmitrodaya[1] as signifying the appropriation of previously unappropriated property, such as, straw, water, logs of wood etc. from a forest which is open to the public as not being under the ownership of any particular individual.

In the famous text of Manu[2] dealing with the acquisition of fields, the case of wild animals is specifically mentioned.

1.11. *Change in modes of transfer*—Modes of transfer permitted by law also change from time to time. English legislation favouring case of disposition furnishes an example of the effect of changing conditions of time and place[3]. At the same time, changing social conditions may render necessary new restrictions on the freedom of disposition[4], not previously known.

English law of the medieval period was dominated by the law of feudal tenures. With the grow.h of equitable interests in land, the property aspect and aspect of rendering aid to the government declined. The emergence of importance of the family and the "family settlement" gave rise to the elaborate apparatus of life interest, legal and equitable interests and rules of remoteness and limitations. New claims arising from the changing economic process, and new forms of incorporeal interests seeking recognition create problems, for solving which the law must step in at some stage or another.

1.12. *Effect of practical development*—That the emergence of new commercial practices in real life may necessitate certain minor re-adjustments is strikingly illustrated by what took place in England in relation to negotiable instruments. In the Eastern world, the same process is illustrated by an interesting institution of Japanese commercial law—*Jato Tampo* (security by assignments), which was developed by the courts without any clear statutory basis[5]. This transaction permits a debtor to take possession of goods while vesting the title in the creditor, and has been described as the Japanese equivalent of "chattel mortage", conditional sale and similar security devices. There is no general provision for public registration even though registration is separately provided for many particular types of security transactions. The device referred to above permits fiexibility and, to a certain extent, secrecy. Of course, it seems to postulate that the debtor will not be able to deal with the assets to the prejudice of third parties.

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1 P. N. Sen, Hindu Jurisprudence (1918), page 55.

2 Manu, I. 44.

पृथोरयामां पृथिवीं भार्यां पूर्वे विदो विदु : ।
स्थाणुच्छेदस्य केदारमाहु : शल्यवतो मृगम ॥

3 Dicey, Law and Public Opinion in the 19th Century, pages 202, 203.

4 Simpson Stone, Law and Society, Vol. 1, pages 606-620.

5 Von Mehren, Japanese Legal Order (1963) 76 Harvard Law Review 1170. 1202, 1203.

1.13. *Personal property as security*—Since we propose to discuss, at some length, the question of transfer of future property under the appropriate sections, we may quote certain observations of a leading authority on the subject of personal property security. He has pointed out[1] that we have passed from the whole-hearted acceptance of the self-evident proposition that a man cannot transfer property which he does not own, "to a somewhat grudging acceptance of the much less evident proposition that a business enterprise should be allowed to make an irrevocable commitment, to pass the benefit to its present creditors of all its future property." He was writing of the impact of article 9 of the Uniform Commercial code, but the ovservation is, in substance, true of the device known as the floating charge. It has been observed[2-3] with reference to floating charges that although the floating charge appears in many ways to be a second-rate security, its wide use would indicate that creditors find it a useful device despite its risks.

1.14 *Instance of ownership Flats*—The emergence of what are popularly known as "ownership flats" in multi-storeyed apartments offers another interesting example of the adjustment of the law to new developments,—this time in private housing. The traditional legal concepts which assume that land is in its ownership divided only on the surface, would not obviously be appropriate for resolving legal issues arising from such flats. Such co-operative apartments involve many legal problems, foreign to the day-to-day practice of the law and necessitate changing attitudes towards ownership of property. The owner of the flat is not the owner of the land below in an undiluted form. His control over his own apartment is also restricted,—in so far as he lacks the freedom of the ordinary home-owner in deciding what services could be had in the building, what expenses can be undertaken and so on. The title to the entire land might vest in the co-operative society or company which has organised the flats, or as may be provided in the relative documents; the point to be made is that growing urbanisation renders necessary a modification of traditional legal concepts[4]. These flats also necessitate[5] the imposition of restrictions on alienation, not met with in ordinary conveyances. This is not to say that restrictions are not otherwise known. The point is that social and economic forces may give a fresh direction to the law of property.

1.15 *Law and social notions*—Of course, these forces take time to put their imprint on the law. It is obvious that in a developed society, the details of law are brought out by the lawyers and while legal details come

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1 Grant Gilmore, "The Purchase Money Priority" (1962) 76 Harvard Law Review 1333, 1334.

2 Coogan and Bark, "The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture" (1959) 69 Yale Law Journal 203, 251.

3 See also Pennington, "The Genesis of the Floating Charge" (1956) 23 Modern Law Review, 630.

4 Leiyser, "The Ownership of Flats—a Comparative Study" (1958) 7 I.C.L.Q. 31, 37.

5 Manning, "The Development of Restraints on Alienation since Grey" (1935) 48 Harvard Law Review 373.

from the common consciousness of the people in their essence, the details themselves would be worked out by the law. The law might, in this process, become complex and artificial, since it becomes a special science in the hands of the jurist. Nevertheless, the rights which it recognises and the modes of transfer to which it lends its sanction, would, speaking broadly and in the ultimate analysis, correspond with the generally accepted social notions. If they do not so correspond, it is the business of law reform to consider how far such harmony should be brought about.

1.16. *Borrowing from other system*—Since it is the common consciousness that supplies the ultimate nourishment to legal developments in this field, another interesting feature exhibits itself. When alien juristic notions are borrowed by one country from another country, they do not necessarily operate in their full force or in an unmodified form in the borrowing country. To a certain extent, an alien principle can be successfully integrated into a different system—this is what happened in India where the notion of trust, borrowed from English law, has been adopted. But this very instance shows how, in the process of borrowing, a modification was considered necessary, and the fragmentation of ownership which was an essential aspect of the English doctrine of trust, was not adopted in India. The theory of dual ownership in its full technical minutae would not have thrived in the Indian soil.

Those rules of Hindu law which are still in force—for example, that property can be dedicated to an idol without the formalities required for a transfer of property to a living person—also furnish an example of the survival of our own institutions along with legal provisions borrowed from elsewhere.

1.17. *Roman law of slaves as modified in Egypt*—Another illustration of this process is furnished by the Roman law as it travelled into Egypt. While Roman law as Administered in Italy—its home—did not allow slaves to hold property, Roman slaves living in Egypt were treated as capable of owning property[1].

Again, the standard Roman contract of sale—*emptio venditio*—was consensual, and transfer of ownership under it was separate and required physical delivery—*traditio*. But, in Egypt, the Romans accepted a different mode which was both a formal written contract (drawn up by a public official) and a conveyance[2].

1.18 *Property and recognition in society—Hindu juristic thinking*—That property and its recognition depend on social recognition was an aspect well-known to Hindu jurist. According to some Hindu jurists, the idea of property is exclusively indicated by the Sastras and onwership can be acquired only in the modes recognised[3] by them. This view is favoured by *Dhareswara, Jimutayahana* and their followers. On the other hand, *Vijnaneswara* and his followers maintain that the idea of property has its *basis on popular recognition* without any dependence on Sastras, the modes of acquisition of

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1 Alan Watson, Legal Transplants (1973), page 32.
2 Alan Watson, Legal Transplants (1973), page 33.
3. P. N. Sen, Hindu Jurisprudence (1918), page 42.

ownership being to collect and prescribe those means of acquisition recognised by popular usage that are regarded as commendable and as such worthy of being pursued. This latter view represents *the doctrine that property has its basis in popular recognition*[1].

We are not concerned with the merits of the controversy. In its essence, this controversy resolves itself into this : there are certain modes of acquiring onwership recognised by the people on all-hands; they are also the modes laid down in the Sastras as leading to the acquisition of ownership; now, the question is, which is prior ?[2] So far as the merits are concerned, one would say that public opinion and law act and react. The Sastras do not merely summarise the modes of acquisition of ownership which they find already recognised in popular usage. Nor does the popular usage merely follow and give effect to the Sastric rules laying down the conditions for the acquisition of ownership[3].

A lawyer would always feel inclined to give preference to the former view as more consonant with reason and common sense, but that is not the point sought to be made. The point is that the controversy amongst Hindu juristic presents the question in a form surprisingly modern.

1 .19. *Meaning of property under the Act*—Reverting to the Act, it is to be noted that Transfer of Property, Act does not profess to give any comprehensive idea of the concept of "property". Although the Law Commissioners of 1879 were in favour of adding definitions of "ownership" and "property"[4], those definitions[5] were never added. Section 5 of the Act, which defines what is meant by "transfer", but does not define what is meant by "property". It is clear from the sections relating to the sale of property—section 54 in particular —that the word "property" in the Act is not confined to tangible property.

It would appear that the term "property" is, in the Act, used in its most generic sense[6]. It means not only the actual physical object, but also all interest comprised therein which may be the subject of ownership. When, for example, the Act speaks of property which "can be transferred", (section 6), it does not confine itself to tangible property. The exceptions enumerated in section 6 make this amply clear. On the other hand, when we speak of general property and special property, we refer not to the subject matter of ownership but to the interest recognised by law therein.

According to Lord Langdale[7], "property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest, which the party can have." The "common of turbary", or the right of cutting turf in another person's land and "common of pasture", or the right of depasturing cattle on the land of another, are appendant incorporeal hereditaments, which are regarded in England as

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1 P. N. Sen, Hindu Jurisprudence (1918), page 42.
2 P. N. Sen, Hindu Jurisprudence (1918), Page 42.
3 P. N. Sen, Hindu Jurisprudence (1918), Page 42.
4 Gour, Transfer of Property Act, Topical Introduction to Chapter II.
5 Para. 1.20 *infra*.
6 Gour (1948), page 53, para. 68.
7 *Jones* v. *Skinner*, (1835) 5 L.J. Ch. 90.

falling into the category of real property'. They would be recognised in this country as rights.

1.20. *Definition in draft Bill*—In the draft Transfer of Property Bill, the following definition was proposed in regard to "ownership" and "property".

> "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. Such ownership is either absolute or qualified. The thing of which there may be ownership is called 'property'.[2]"

In an Allahabad case[3], Mahmood J. stated that section 6, in making exceptions to transferrability, must be understood to use the term "property" in its widest and most generic legal sense, for otherwise the exceptions would be wholly unnecessary.

The definition given in the then edition of Wharton's Law Lexicon—"The highest right a man can have to anything, being used for that right—as to lands or tenements, goods or chattels, which does not depend on another's courtesy", was quoted with approval by Mahmood J. in the Allahabad case[4].

1.21. *Bentham's view*—The idea of property, Bentham observed, consists in an established expectation, in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case[5]. Now, this expectation, this persuasion, added Bentham, can only be the work of law. "I cannot count upon the enjoyment of that which I regard It is this law alone which permits me to forget my natural weakness. It is as mine, except through the promise of the law which guarantees it to me. only through the protection of law that I am able to enclose a field and to give myself up to its cultivation with the sure though distant hope of harvest."

1.22. *Kinds of transfer regulated by the Act*—The Act does not now define "property" nor does it lay down any criteria for the purpose. It pre-supposes the existence of property recognised by law. It is to be noted that the Act does not profess to deal exhaustively with all kinds of transfers. Certain provisions of the Act apply to all kinds of transfers between living persons (in particular, the earlier half of Chapter 2). Some of its provisions are meant only for transfers of immovable property (Chapter 2, latter half). In so far as the Act deals with the modes of transfer, it mainly deals with—

(a) sale (of immovable property);
(b) lease and mortgage (of immovable property);
(c) exchange (of both kinds of property);
(d) gift (of immovable as well as movable property); and
(e) transfer of actionable claims—in this case, however, every mode of transfer is regulated if it is by act of parties.

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1 Will Laws, R.P. (18th Ed.) 395.
2 Clause 3 of the Bill of 1879 (following New York Code, para. 159).
3 *Mohiyuddin* v. *Kazim Hussain*, I.L.R. 13 All. 432 (F.B.)
4 *Mohiyuddin* v. *Kazim Hussain*, I.L.R. 13 All. 432.
5 Bentham Theory of Legislation (Hilderath Ed.). Chapter 8, page 111.

1.23. The Act does not specifically deal with settlements, partitions or trusts as modes of creation of interests in property. Settlements and partitions were proposed to be included in the draft Bill of 1877, clauses 49 to 53 and clause 93 to clause 98 respectively, but were later omitted as unsuitable. This does not, of course, mean that the Transfer of Property Act is entirely irrelevant to the creation of a trust, because, under the Trusts Act, the creation of a trust itself requires the transfer of property[1], unless the author is his own trustee[2]. Where there is no transfer and the author is not the trustee, a trust cannot arise. This is precisely the reason why special statutory provisions, such as section 6 of the Married Women's Property Act, 1882, were needed to deal with the situation where, though there was no transfer within the framework of the law and no trust in accordance with the statutory provisions, the legislature desired, as a matter of policy, to confer on certain persons—the wife and children of the insured—beneficial rights in regard to moneys payable under the life insurance policy[3].

1.23A. *Matters outside the Act*—There is yet another aspect which shows that the Act is not exhaustive even in regard to transfers by act of parties. Since the Act in most of its provisions is confined to transfers between living persons, it does not affect dispositions of property which do not partake of that character. In particular, it does not govern transfers to an idol otherwise than by the medium of a trust in favour of a living person. This is for the reason that section 5 of the Act, which defines—so far as is material—a transfer of property as an act by which a living person conveys property to another living person, is not attracted, since a gift to an idol is not a gift to a living person. "A juristic person is not necessarily a living person, and the fact that for some purposes the law by a fiction invests the non-animate bodies with the rights of persons would not make juristic persons living persons for all purposes"[4]. Similarly, a declaration of trust in relation to immovable property for a public religious purpose, not being governed by the Trusts Act, is also not governed by the Transfer of Property Act in regard to its provisions as to the formalities[5]. Section 123 of the Act (Gifts) has also no application to dedication of land to the public, since the section applies only where the donee is an ascertainable person by whom or on whose behalf a gift can be accepted or refused[5].

1.24. *Lines of revision*—So much by way of introduction. We need not, at this stage, anticipate all that we are going to recommend in this Report. In the American case of *Arndt* v. *Grigg*[6], the following observations were made with regard to the law of property which lucidly bring out the importance of the law of property :—

> "The well-being of every community requires that the title of real estate therein be secure, and that there be convenient and certain

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1 Section 6, Indian Trusts Act, 1882.
2 *Bai Mahakore* v. *Bai Mangla*, I.L.R. 35 Bom. 403, 407.
3 *Cleaver* v. *Middle Reserve Fund Life Association*, (1892) 1 Q.B. 147.
4 *Narsimaswamy* v. *Venkatalingam*, (1927), 53 Madras Law Journal 203, 208 (F.B.).
5 *Palliayya* v. *Ramavadhanulu*, (1903) 13 Madras Law Journal 364.
6 *Arndt* v. *Griff*, (1890) 134 U.S. 316, 321.

> methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in nature.... and is this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution or against natural justice."

This basic principle will apply whether the property is private or public. If the property belongs to the State or public authority, the title of the State or public authority has also to be made secure.

Our approach, therefore, will be to bear the importance of the law of property in mind in making our recommendations. At the present stage it will be sufficient to state that the present Act has worked with remarkable smoothness, and the careful and competent revision undertaken in 1929 solved many of the problems that had arisen up to that period. However, as our further discussion will show, some problems still remain. Some of the provisions of the Act have created difficult problems in interpretation—for example, section 5. Some of them have been found to be obscure—e.g. section 6. Some have revealed lacuna or incompleteness—e.g. section 10. Some, while appearing to be clear in themselves are found, when read with others, to disclose internal inconsistency in the Act which requires attention—e.g. sections 5, 6 and 43, when read together. The sociological or commercial importance of some of the provisions—e.g. section 120 to 123 and the last Chapter—is now far greater than in 1882. It will therefore, be our concern to remove defects in all these provisions.

## CHAPTER 2

### *HISTORY*

2.1. *Policy of codification.*—The Transfer of Property Act was prepared in pursuance of the policy of the Government to prepare a self-contained Civil Code for India. The Commission appointed for the purpose prepared the draft of the Succession Act, which according to their recommendation was to be enacted as the first chapter of the Civil Code. When the draft was submitted for the approval of the Secretary of State, it was returned with instructions that that Act should be enacted without reference to the projected Civil Code. It was so enacted and became Act 5 of 1865. The draft of the Transfer of Property Act which the Third Law Commission prepared was submitted with the following note : "It is probable that several of these rules will eventually find a different place whenever a final distribution and rearrangement of the whole law shall have been effected; but some blending of subjects is unavoidable in a work which the Government has, for sufficient reasons, instructed us to submit to it in portions, as each portion is completed.'" The Government had agreed to scientifically arrange at a later stage the various chapters of the Civil Code thus produced. But as this was never done, the Select Committee had to make the present Act, as far as possible, self-contained. Hence the reference in section 4 to the Contract and the Registration Acts. Referring to that section, the Law Commissioners wrote : "We would declare that all chapters and sections of the Bill which relate to contracts should be taken as part of the Contract Act, 1872."

2.2. *Previous law.*—Prior to the passing of the Act, the state of law relating to transfers was in a chaotic state.[2] One of the earliest Madras cases illustrates this chaos.[3] The law on the subject was, for the most part, fragmentary, The enactments mentioned in the Schedule to the Act, now superseded and repealed,[4] covered only a part of the field.

2.3. *Situation in* 1850.—The background in which the Act was enacted could be best illustrated by taking up first the question of applicability of English law. The situation which presented itself during the fifties of the nineteenth century as regards the law applicable to those parts of the country which were under British rule was not a very happy one. On the one hand, it was not clear how far the English law applied, even in the Presidency Towns. In the celebrated case of *Mayor of Lyons* v. *East India*[5] Company, Lord Brougham expressed the opinion that the Indian inhabitants were governed by their own laws and that English law applied only to British subjects and other foreigners who sought the protection of the factories, but even in their case good many parts of English law which from the nature were unsuited to the conditions of the colonies could not be taken to have been so introduced. It was on this reasoning that he held that the Mortmain Act and the statutes which incapacitated aliens from holding land, did not apply to Calcutta.

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1 3rd Law Commission (1879) 6th Report.
2 Gour, Comment on Section 1.
3 *Thumuswamy* v. *Hossain Rowthen*, I.L.R. 1 Mad. 1 (P.C.) See para. 2.3 infra
4 Section 2.
5 *Mayor of Lyons* v. *East India Company* (1837) 1 Moore Indian Appeals 135.

2.4. So far as the mofussil courts were concerned, Bengal Regulation III of 1793—subsequently re-enacted in the Bengal Civil Courts Act, 1887, Bombay Regulation IV of 1827, section 26, and similar provisions in Civil courts Acts directed, in substance, that where no specific rule existed, the court shall decide according to justice, equity and good conscience. Although this direction was generally construed as authorising the courts to apply rules of English law, that position was subject to the important qualification that the rules of English law must be found appropriate to Indian circumstances.[1] This qualification became of importance in the field of law of property. How far the English law would apply became a subject of debate in almost every instance. In a case of 1874, for example,[2] the question whether the rule against perpetuities applied to charitable trusts was considered at length by the Privy Council. The appeal was from the Settlement of Penang, but the observations made by Sir Montague Smith apply also to the territories in India then under the British rule. The observations were as follows :—

> "Whilst English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of colony, the rule against perpetuities was to be considered to be part of it. This rule which certainly has been recognised as existing in the law of England independently of any Statute, is founded upon considerations of public policy, which seem to be applicable to the conditions of such a place as Penang as to England, viz. to prevent the mischief of making property inalienable unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if convenient for the purposes of trade or for the enlargement of town or a port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of England has, however, made an exception also on grounds of public policy in favour of gifts for purposes useful and beneficial to the public and which in a wide sense of the term are called charitable uses and this exception may properly be assumed to have passed with the rule into the law of the colony."

2.5 In a case decided in 1879—this time on appeal from Calcutta[3]—the Privy Council made these general observation which are relevant to the subject—"If the principle invoked depends on any technical rule of English law, it would, of course, be inapplicable to a case determinable like this on broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although these decisions are undoubtedly valuable in so far as they recognize the general equity of the principle and show how it has been applied by the courts of this country". Thus, in each case it became obligatory to consider how far the English rule was appropriate for the physical, social and historical conditions in India.

2.6 *Necessity for codified law.*—It was in this background that it was considered necessary to have a codified law on the subject. The

1 *Warden Seth Sam* v. *Luckpathy Royjee Lallah*, (1862) 9 Moors Indian Appeals 303.

2 *Prap Chash Neo* v. *Ong Cheng Neo* (1874) Law Reports 6 P.C. 381, 394.

3 *Raja Kishendatta Ram* v. *Raja Mumtaz Ali Khan* (1879) I.L.R. 5 Cal. 198, 210.

Act was first drafted as far back as 1868-1870. Macaulay had, in 1833, written "that no country ever stood so much in need of a Code of law as India, and I believe also that never was a country in which the want might be so easily supplied." The British Parliament accepted this view and at one time intended to draft an Indian Code, for which several efforts were made, but ultimately given up. The Transfer of Property Act itself passed through numerous hands, and was revised by several Commissions, with the result that its final draft remained in suspense for twelve years from 1870.

2.7 The Act was passed in 1882. In the same period were enacted the Negotiable Instruments Act (in 1881), and the Acts on Trusts and Basements (in 1882). History of the drafting of the Act is represented by the following stages—

(a) *The Third Law Commission.*—This Commission drafted the First Bill on the subject.

(b) *Despatch of* 1877.—A body of substantive civil law had long been in course of formation for India. In 1877, whitely Stokes, who had for long been the Legislative Secretary, became the Law Member in succession to Lord Hobhouse. The Government's despatch of 1877 contained Whitely Stockes's programme of work and plan of operations.[1] It laid stress on reduction to a clear, compact and scientific form, of the uncodified branches of the substantive law. This, it was said, was preferable to ascertaining the law "only from English text-books written solely with reference to the system of English law, and from a crowd of decisions, often obscure and sometimes contradictory, to be found in the English and Indian law reports." The Government, therefore, proposed the codification, besides others, of the following branches of substantive law—Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments, and Transfer of Immovable Property, in the order mentioned. This despatch was the genesis of further work on the subject.

(c) *Work subsequent to the despatch.*—The Secretary of State accepted these proposals of the Government of India. Dr. Whitley Stokes was appointed to remodel the Bills relating to the Transfer of Property and Negotiable Instruments and to prepare Bills on other subjects. The work took about two years.[2]

(d) *Fourth Law Commission.*—On the 11th February, 1879, through a notification issued by the Governor-General-in-Council a Commission was appointed to enquire into and consider the provisions of the draft Bills mentioned above and to report thereon, and to make such suggestions as to the codification of the substantive law of British India as might seem desirable. The members of the Commission which came to be known as the Fourth law Commission—were :

Whitley Stokes, Sir Charles Turner, Chief Justice of the Madras High Court, and Raymond West, a Judge of the Bombay High Court. For our purposes it is enough to state that the Fourth Law Commission

1 Ilbert, Government of India, page 357.
2 Stokes, The Anglo-Indian Codes, Vol. I. para. xix.

recommended that the law relating to the subject dealt with by the Transfer of Property Bill should be codified, and the Bill already drawn for the purpose by the Commission should be passed into law.

2.8 *Objective of Civil Code.*—The intention was that when the body of substantive civil law enaced for India is re-arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the Legislature, the chapters on sale, Mortgage, Lease and Exchange (contained in the present Act), will probably be placed in close connection with the rules contained in the Contract Act. But, till then, they may fitly be left in a law containing what the contract Act does not contain, namely, general rules regulating the transmission of property between living persons.

2.9 *Amendments.*—It may be convenient to mention briefly the important amendments that have taken place since the Act was enacted. The first important amending Act was Act 6 of 1904, which amended sections 1, 59, 69, 107 and 117. The Code of Civil Procedure, 1908 (5 of 1908) repealed sections 85 to 90, 92, to 94, 96 and 97 and amended section 100. The amendments were mainly consequential on the inclusion, in the Code, of certain provisions as to mortgages. Act 11 of 1915 amended sections 59 and 69. In 1920, 1925, 1926 and 1927, the Act was amended in certain points of detail.

The most important amendment was, however, made by Act 20 of 1929, which was passed to implement the recommendations made by a special Committee. The special Committee consisted of distinguished lawyers and forwarded its report in 1927.

The Act of 1929 made extensive amendments. It amended sections 1, 2, 3, 4, 5, 6, 11, 15, 39, 40, 43, 52, 55, 59, 60, 62, 63, 64, 67, 69, 71, 72, 76, 82, 83, 84, 98, 100, 102, 103, 106, 107, 108, 111, 128, 129 and 130. It revised sections 16, 17, 18, 53, 56, 61, 68, 73, 81, 91, 95, 96, 101 and 119.

It also inserted new section—53-A( 59-A, 60-A, 60-B, 63-A, 65-A, 67-A, 69-A, 92, 93, 94 and 114-A. It also omitted sections 74, 75 and 80.

2.10 Principally, the Amendment Act was concerned with the doctrine, of notice, the doctrine of part-performance, sale of immovable property, the law relating to mortgages and actionable claims. If it is not pedantic to say so, one would like to state that many of the amendments effected in 1929 brought the statute law nearer to some of the important doctrines of equity. The fusion of law and equity that took place in England in the latter half of the nineteenth century has a striking parallel in the amendment Act of 1929. The device adopted was different; the very doctrines were being given legislative recognition. But the result was to bring the statutory law in harmony with the dictates of equity. We shall later deal in detail with the amendments effected by this Act.

Act 4 of 1938 and Act 6 of 1944 effected certain amendments concerning policies of insurance—an instance of the impact of increasing commercialisation. The other amendments as well as the adaptations made by various Adaptation Orders need not be mentioned in the present rapid survey.

2.11 *Equity*.—Incidentally, the above resume of the important amendments would show how intimate is the connection between the law of property and equity jurisprudence. Hardly any important section of the Act can be understood in its true sense without a background of the relevant principle of equity.

Another feature that stands out on a study of the amendents is the over-whelmingly large number of amendments that touched the provisions relating to mortgages in the amending Acts of 1904, 1908, 1915 and 1929. This is understandable, because about one-third of the sections in the Act are concerned with mortgages. Apart from this purely numerical aspect, it should be mentioned that vital amendments were made in the fasciculus of sections which constitute the basic provisions on mortgages sections 59 to 63.

2.12 *Gist of amendments made in* 1929.—It is desirable now to give in detail the gist of important amendments made in 1929. The Act made important amendments in the doctrine of notice. In particular, it extended the category of constructive notice. It also removed the exception regarding Hindus, in section 2, Taking note of the revision of the law of registration that had taken place, it provided that the registration of documents by which a transaction relating to immovable property is effected, is deemed to be notice.

As regards the property that can be transferred, the amendment inserted a prohibition against the transfer of the right to maintenance, in whatsoever manner arising or secured or determined. This amendment was rendered necessary by the pre existing conflict of decisions on the subject. In regard to gifts to a class (sections 13 and 14), a welcome change was made by abolition of the English Common law rule in *Leake* v. *Robinson*[1], and by adopting a suggestion made by Wilson J. in an earlier Calcutta case. In substance, the new provision enacted that where a gift to a class fails, the failure is not to be in respect of the whole class, but only so far as the gift relates to those persons who fall within sections 13 and 14, i.e., those members who in regard to whom the gift becomes invalid.

2.13 The law regarding the validity of clauses directing accumulation was also sought to be modified. The doctrine of it *lis pendes* (section 52) was the subject matter of an amendment which removed certain difficulties arising from the case law[2]. The law relating to fraudulent transfers (section 53) was modified by revising the section on the lines of sections 172 and 173 of the Law of Property Act, 1925. A certain amount of neatness was introduced by splitting up the section so as to deal separately with transfers with and without consideration.

2.14 One of the most important amendments made by the Act was by way of statutory recognition of the well-known doctrine of part-performance. There had been an acute conflict of decisions on the subject.

2.14A Sale of immovable property or of any interest in it was now to be made only by a registered instrument, irrespective of the value of the property. This amendment represents a movement in the direction

1 *Leake* v. *Robinson* (1817) 35 English Report 2979.
2 *Ram Lal* v. *Kanya Lal*, (1886) I.L.R. 12 Cal. 663.

of formalisation of the procedure for transfer—a contrast with the amendment pertaining to the doctrine of part performance (section 53A) which was, in substance, aimed at reducing the importance of formalities.

2.15 A pretty large number of amendments made in 1929 related to the law of mortgages. The class of mortgage known as mortgage by conditional sale had been a source of trouble to the courts, as it was often very difficult to decide whether the transaction was a sale (with condition of repurchase) or merely a mortgage by conditional sale. It was provided that no transaction can be a mortgage by conditional sale unless the whole arrangement (sale and the usual conditions) was embodied in one single document. The governing test was still the intention of the parties, since the new statutory proviso was of a negative character. It did not provide that wherever there is only one document evidencing the sale and the condition, the transaction is to be deemed only a mortgage by conditional sale irrespective of the intention of the parties. We are mentioning this since there arose a controversy on the subject even after the amendment. The definition of usufructuary mortgage was amended in order to get over a Madras ruling dealing with the case[1] where possession has not actually been given. The principal remedy of the mortgagee in such a case would be to demand possession, failing which he could demand the mortgage money—this was separately provided by amending section 68.

2.16 A new definition of "anomalous mortgage" was also added in section 58(g). Rights of mortgagees under such mortgages were to be governed by revised section 98—principally by the contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage.

2.17 The policy of compulsory registration was sought to be implemented by providing, in section 59, second paragraph, that even where the principal money secured is less than one hundred rupees, the mortgage must be effected by a registered and attested instrument or (except in the case of a simple mortgage) by delivery of the property. The question whether attestation should continue to be insisted upon in the case of mortgages does not seem to have been discussed.

2.18 The prohibition of consolidation of mortgages—section 61—underwent a far-reaching change. The right to redeem separately or simultaneously two or more mortgages executed by a mortgagor in favour of the same mortgagee (in the absence of a contract to the contrary) was strengthened. Consolidation at the instance of the mortgagee was not to be allowed, even when the same property was mortgaged more than once.

A new section—Section 63-A—was inserted to deal with improvements to a mortgaged property. Curiously, the case where an improvement is effected by the mortgagee *with the consent of the mortgagor*—express or implied—is not expressly covered in section 63A(2). This could have been achieved by adding, after the words "public authority", the words "or with the consent express or implied of the mortgagor".

2.19 A new section—Section 65A—permitted the mortgagor, while in possession to grant a lease which would be binding on the mortgagee. Certain conditions were imposed as to the kind of leases which the mortgagor can grant. The condition in section 65A (2)(e) as to the duration of the lease (maximum three years) may not be practicable, though

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[1] *Subammah* v. *Narayya* (1917) LL.R. 41 Mad. 259.

of course, these conditions can be varied under section 65A(3). But, then a specific provision in the mortgage deed and careful conveyancing would be required.

By amending section 67 (right to foreclosure and sale), certain restrictions were imposed as to the right of fore-closure in certain kinds of mortgages.

2.20 A new Section—Section 67A—was added to compel a mortgagee who holds more than one mortgage executed by the same mortgagor to bring a suit on all his mortgages in certain cases. The object was to prevent a sale of mortgaged property in execution of a decree for sale in respect of one mortgage, reserving the rights of the same person as mortgagee under other mortgages in his favour, whether prior or subsequent.

As regards the right of the mortgagee to bring a suit for the mortgage money under section 68, certain changes were made, of which the most important was the addition of sub section (2), to compel the mortgagee to exhaust all his available remedies against the mortgaged property before obtaining a money decree unless he abandoned the security.

The mortgagee's power of sale without intervention of the court was also clarified. The amendment allowed the same powers of private sale in the case of English mortgages, whether the mortgage deed conferred a power or not. An amendment was also made to allow the appointment of a receiver in cases where the right to exercise the power of private sale had arisen. This was on the analogy of the English law. These matters were dealt with in sections 69 and 69-A.

2.21 Certain amendments were made concerning marshalling and subrogation. The main rules of the law of subrogation were recognised in the new section.[1]

2.22 As regards charges governed by section 100, it was made clear that the charge-holder has the same rights, as far as the case may be, as a simple mortgage. It was also provided that the charge as such cannot be enforced against property in the hands of a transferee for consideration without notice. Incidentally, the last mentioned amendment is an instance of the influence of equitable doctrines.

2.23 In regard to leases, service of notice to quit by post was provided for, (Section 106). Registration of all leases, from year to year or for any term exceeding one year or reserving a yearly rent was made compulsory. The instrument of lease must be executed by both the parties. In so far as registration was made compulsory of a lease for a term exceeding on year say, even two years—certain practical difficulties may arise. Also, the amendment requiring *both the parties* to sign the lease seems to be contrary to the then existing usage,[2] perhaps even to the current practice is to the contrary.

These, in brief, are the important amendment of 1929.

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1 Sections 91-92.

2 For the old law, see *Syed Alam Sahib* v. *Ananthnayam* (1910) I.L.R. 35 Mad. 95.

## CHAPTER 3

### *SOURCES AND SCHEME OF PROVISIONS*

3.1 *Introductory*—Before proceeding to consider the Act section by section, it will be useful to deal briefly with the sources of its provisions and with its general scheme.

3.2 *Previous statute law*—There was not much of statute law in India on the subject of transfer of property, and, in drafting the present Act, the framers do not seem to have drawn much on the pre-existing Central Acts. The Act cannot, therefore, be described as a mere re-enactment of pre-existing statutory provisions. It drew upon English rules. While English terminology and conveyancing practice have left their mark on many of the general provisions—particularly, Chapter 2—and on the specific provisions relating, for example, to mortgages, it is not to be overlooked that the Act has, in the content of many of its provisions, deliberately departed from the English law.

For example, in England, at the time when the Act was drafted. loss arising from destruction by fire of leased immovable property was to be borne by the lessee, while in India, under section 108, it is not so. Similarly, in England, at the time when the Act was enacted, an alien could not hold immovable property except in certain cases. This was also the position in ancient Rome[1]. But it was not the law in India even before the Act[2], and is not the law under section 7. That section, so far as is material, provides that every person competent to contract and entitled to transferable property is competent to transfer such property. It may be stated that an adult alient is competent to contract.

3.2A *English law followed only to a limited extent*—It is apparent from the above that it is only to a limited extent that the Act is based upon the English law of real property[3]. It would, therefore, be correct to say that the general scheme adopted in the Act in regard to the pre-existing law is to lay down settled rules where there was a conflict, to add certain rules where there was obscurity, and to abrogate rules which were found to be unjust or inappropriate, and to regulate the transfer of property in its general principles and, to a limited extent, in its modes of transfer.

3.3 *Equity*—It would be of interest to note that equity supplied the source of material for some of the rules, and was also the guiding spirit in many others. This has both a positive and a negative aspect. It would not be improper to mention that when certain provisions of the Act based on corresponding rules of equity recognise the overriding rights of a bone fide purchaser for value without notice, the ultimate rationale is that an equitable right cannot be a *jus in rem* in an undiluted sense[4]. It

1 Hunter, Introduction to Roman Law, Chapter on Law of Property.
2 *Mayor of Lyons* v. *East India Company*, 1 Moores' Indian Appeals 175.
3 *Taijo Bibi* v. *Bhagwan Prasad*, I.L.R. 16 All. 295.
4 Maitland, quoted by H. G. Hanbury, "Field of Modern Equity" (April 1929) Law Quarterly Review.

is the very key-note of equitable jurisdiction that equity acts *in personam*. Hence, equity will not act against a person who is innocent and has given value.

3.4 It was pointed out by Matland[1] that equity has added to our legal system, together with a number of detached doctrines, "one novel and fertile institution, namely, the trust, and three novel and fertile institutions, namely, specific performance, injunction and judicial administration of estates". Indian statute law has made full use of all these creations of equity. The topics just now mentioned did not find a place in the Act (as originally enacted), but it may be noted that part-performance is a part of its provisions after the amendment of 1929.

3.5 *Sale of wife*—That there were certain antiquated practices which were, fortunately, not given legislative sanction in express terms is worth illustrating. In England, as late as the 18th century, the wife was treated as a chattel. The following extract from a short article[2] by Mr. Courtney Kenny published in the Law Quarterly Review makes interesting reading. After recording some early instances including an aristocratic instance as old as the reign of Edward I, of the transfer of a wife, the writer tells us—

"The great majority of those who took part in wife-selling seem to have had no doubt that what they did was lawful, and even conferred legal rights and exemptions. They were far from realising that their transaction was an utter nullity; still less that it was an actual crime and made them indictable for a conspiracy to bring about an adultery.

> "Lord Mansfield could recall (3 Burross 1438) 'a cause in the Court of Chancery wherein it appeared that a man had formerly' (formally) 'assigned his wife over to another man. And Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners.
>
> "From the beginning of the last quarter of the eighteenth century until nearly the end of the nineteenth one, journalists frequently recorded instances of wife-selling. The last that I have noticed was in 1887 at Sheffield. That town and also Manchester and the metropolitan market of Smithfield and a market of the same name at Birmingham—appear to have been conspicuous for the practice. Had it not penetrated into Wessex too, Hardy would scarcely have ventured to make it the starting point of his 'Mayor of Casterbridge'.
>
> "In no instance of which I have read does the wife appear to have exhibited any reluctance to be alienated. Nor is this surprising; for she might well think that by any average Englishman she would likely to be better treated than by a husband who had so conspicuously shown his disregard for her.
>
> "The prices paid differed very markedly from a pint of beer to a handful of guineas. For there would be corresponding differences in the attractiveness of the ladies themselves; and also in the zeal of their purchasers, for the buyer might be merely a casual stranger or, on the other hand, an attached paramour.

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1 Maitland, quoted by H. G. Hanbury, "Field of Modern Equity" (April 1929) Law Quarterly Review.

2 Kenny "Wife Selling in England" (October 1929) L.Q.R. 57 M.L.J. 182, 183.

"Customary solemnity required that the husband should lead the wife into the market by a halter—usually of rope but sometimes of ribbon—and that the purchaser should take his halter and lead her away by it.—Cf. The Times of March 30, 1796, and July 18, 1797.

"But the strongest proof of the high current estimate of the efficacy of these transactions is the trouble sometimes taken to create formal evidence of them. A striking instance of this is preserved in the British Museum (Additional Mas. 32,084). It is *a bill of sale of a wife, couched* in such full technical form as to suggest that it may have followed some accustomed precedent."

3.6 The Act, though the first of its kind introduced in India, does not entirely create new rights, or impose new obligations. It does not professedly do more than "define and amend" the law relating to the transfer of property by act of the parties. It is not, therefore, exhaustive. However, it is self-contaied,[1—3] in so far as it goes. The Act relates to the transfer of property *inter vivos*, as the Indian Succession Act relates to the devolution of property after death. In the words of the framers, "read with the Contract Act, this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos* of interests in property, and for the convenience of the practitioner it could hardly be enacted in a more accessible form".[4]

3.7 *Scheme*—This, then, is a general description of the sources of the provisions of the Act. The scheme of the Act may be briefly described at this stage. After certain preliminary matters dealt with in the first few sections, the Act proceeds to indicate a few general principles relating to the transfer of property by act of parties. These are first dealt with in relation to transfers of all property, whether movable or immovable, and the sections concerned contain important provisions, enacted as matters of legal policy, in regard to what property may be transferred, who are the persons competent to transfer, the mode of transfer, the operation of a transfer and similar matters (sections 5 to 9). The actual content of the transfer is sought to be governed by detailed provision in sections 10 to 34; these principally deal with the conditions on which interests of various classes may be created.

It is in this context that the difficult but unavoidable subject of contingent and vested interests comes up for consideration. While simple and absolute transfers do not create many legal problems, conditional transfer raises the question how far the condition is valid, what happens if the condition is fulfilled and what happens if the condition is not fulfilled. A discussion of the nature and effect of the conditions is a necessary concomitant of the two kinds of interests—vested and contingent—contemplated by the Act, to which reference has been already made above. Since the draftsmen of conveyances are not always precise or exhaustive in their description or anticipation of the possible events, it is desirable that the legislature should give a clear indication as to what happens when a transfer is conditional on the performance of an act but the time for perfor-

1 *Choteshav. Mt. Maklum bi.* A.I.R. 1928 Nag. 223.
2 *Ghasi Ram* v. *Kundan Bai,* A.I.R. 1940 Nag. 163.
3 *Corporation of Cal.* v. *Arun Chandra,* A.I.R. 1934 Cal. 862.
4 Report '1879'.

mance is not specified, or the time is specified but the performance is prevented by fraud. All these matters take up sections 10 to 34. The influence of English legal concepts is clearly seen in the structure and terminology of these sections. Many of the illustrations are drawn from reported English cases. Some of them echo arguments addressed at the bar in Chancery.

3.8 These sections have their counterparts in the Succession Act. Occasionally, implementation of the terms of a transfer creates difficulties where a person professes to transfer property which he has no right to transfer and, at the same time, confers a benefit on the owner of the property. This situation is dealt with in the interesting doctrine of "election" (section 35), which concerns the obligation imposed upon a party—originally by the courts of equity—to choose between two inconsistant or alternative rights[1]. After this provision of considerable theoretical interest involving ethical issues, the Act goes on to enact two sections of a more prosaic character, dealing with apportionment of periodical payments and apportionment of the benefit of an obligation on severance—sections 36 and 37.

3.9 These general principles are intended to apply to all kinds of transfers between living persons by act of parties. In regard to transfers of immovable property, certain principles required to be dealt with in detail. These provisions, contained in section 38 to 53A, and confined to transfers of immovable property, do not, of course, indicate that if a similar problem arose in regard to a transfer of movable property, the legislative approach would have been necessarily different. The need for making detailed provisions as to transfers of immovable property arose not because of any radically different approach as a matter of policy, but because certain kinds of problems either arise more frequently from transfers of immovable property or assume greater practical importance because of the value which immovable property generally possesses. It may also be observed that while the general principles as to transfer of property apply whether the land is agricultural or not, and while the Act (in sections 106 and 107) expressly or impliedly recognises the special position of agricultural tenancies, yet sections 38 to 53A were enacted as part of a scheme that was intended to apply, in general, to agricultural land as well as to other immovable property. Having regard to the tremendous importance of agricultural land in the economy of the country, detailed and elaborate provisions to deal with situations frequently recurring or possessing practical importance seem to have been considered necessary. Perhaps, the sections may not retain their present importance in the coming century.

3.10 After enunciating general principles governing transfer of property, the Act (in sections 54 to 57) deals more particularly with sales of immovable property; in sections 58 to 104 with mortgages of immovable property and charge; and in sections 105 to 117 with leases of immovable property. Sections 118 to 121, not confined to immovable property, deal with exchange. The logic of dealing first with sales needs to comment. Sale represents a transfer of all the rights absolutely. A mortgage, even where expressed in the form of a transfer of ownership, operates only as a security. A lease does not transfer all the interest of the transferor.

1 *Bapathamma* v. *Shankaranarayan*, A.I.R. 1965 S.C. 241.

Next are dealt with transfers without consideration made voluntarily, that is to say, gifts,—in sections 122 to 129. A peculiar species of non-tangible property, which is described in the Act by the name of actionable claims, comes up for consideration in sections 130 to 137.

3.11 *Differentia*—At this stage it may be useful to mention some of the important concepts which form the basis of distinction in the scheme of the Act. These differentia could be usefully emphasised, since on them depends the answer to the question whether a particular provision applies to a particular transfer or not.

First, we may take up the kind of transfer. In general—the only exception seems to be the case of a charge—the Act is not concerned with the transfer by operation of law or with a transfer operative on death. It is confined to transfer by acts of parties between living persons, as distinct from transfer by operation of law and transfers operative on death.

3.12 *Transfers with or without consideration*—Assuming that the transfer is by an act of parties between living persons, then, for the purposes of certain sections, it still remains important to consider whether the transfer is without consideration or whether it is with consideration. This is particularly so in the case of the transfers mentioned in the sections contained in the latter-half of Chapter 2, dealing with certain general principles applicable to transfers of immovable property. Either the rights of the transferee or the rights of third persons or the rights of a subsequent transferee are, in many cases, made to depend on the presence or absence of consideration.

In this category, for example,[1] fall section 35 (election), section 38 (Transfer by persons authorised only under certain circumstances to transfer), section 39 (Transfer where a third person is entitled to maintenance), section 40 (Burden of obligation imposing restriction on use of land or of obligation annexed to ownership but not amounting to interest or easement), section 41 (Transfer by ostensible owner), section 42 (Transfer by person having authority to revoke former transfer), section 43 (Transfer by unauthorised person who subsequently acquires interest in property transferred), section 45 (Joint transfer for consideration), section 46 (Transfer for consideration by persons having distinct interest), section 49 (Transferee's right under policy), section 53 (Fraudulent transfer) and section 53A (Part-performance). And, of course, the absence of consideration is one of the essential ingredients of gift as defined in section 122.

3.13 *Meaning of expressions "consideration" and "price"*—Since the expression "consideration" is not defined in the Act, though used in several sections, one may presume that it will have the same meaning as in the Indian Contract Act, 1872. Section 4 of the Transfer of Property Act, 1882 in fact, provides that the chapters and sections of the Act "which relate to contracts" shall be taken as part of the Indian Contract Act, 1872. If not on a literal interpretation of this section, at least by analogy, one can refer to the definition in the Indian Contract Act.

The expression "price" used in the definition of sale in section 54—a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised—is also not defined in the Act, and here again

1 The list is not exhaustive.

we may presume that the meaning given to that expression in the Sale of Goods Act can be drawn upon. It may incidentally be noted that section 4 of the Transfer of Property Act, under which the Indian Contract Act, 1872 is attracted, was enacted at a time when the topic of sale of goods also formed a part of the Indian Contract Act.

3.14 *Tangible and intangible—Immovable and movable*—Apart from the distinction[1] based on consideration, in the scheme of the Act, the distinction between tangible and other property is important with reference to sale under section 54. The distinction between immovable and movable property is important for the purposes of several sections of the Act, including the latter half of Chapter 2, which is confined to immovable property, and including the sections dealing with specific modes of transfer such as sale, lease, gift and exchange, where the fact that property is movable property either renders the relevant provision inapplicable, or leads to the application of a rule different from that applicable to immovable property.

3.15 *Hindu and Mohamedan rule*—The expression "tangible" reminds one of certain texts of Hindu law. A mortgage of future property is, perhaps, strictly speaking, contrary to Hindu law[2], as being a mortgage of that which was not "visible" or in existence[3], and it was so thrown out by Westropp, J., in a Bombay case.[4]

According to Colebrooke, in 2 Strange's Hindu Law, 467, 469, a mortgage (bandhaka) is defined to be "or real, substantial, visible (drisha) property, under which the mortgagor remains in possession till the stipulated time arives[4]".

It will be noted that the Act does not maintain the distinction between real and personal property on the technical lines of English law. As to the distinction between tangible and intangible property, it may be that this distinction was suggested by the Roman law classification between *Res Corporales* and *Res incorporales*. In Roman law, the former category comprises lands, clothes, money and all things which can be touched. The latter category included servitudes, contractual rights and things which cannot be touched and exist only as legal conceptions[5].

3.16 *Immovable and movable property*—As to the distinction between immovable property and movable property, it is to be noted that in England this distinction has not much importance so far as the law of property is concerned. The distinction was, however of considerable significance, in Roman law. In that legal system, things were classified as immovables and movables (*res immobiles* and *mobiles*). A similar division exists in modern times in most continental systems of law[6], though there is no uniformity. Immovables in Roman law comprise land and things attached to the land, while movables comprise all other forms of property which do not have essentially a permanent location. Immovable property could not, in Roman

1 Para 3.13.

2 Drishtadi, Drishtabandhak, Wilson's Glossary, 148; cited in *Kedari* v. *Atmaram*, 3 B.H.C.R. (A.C.) 11, 17.

3 *Kedari* v. *Atmaram*, 9 B.H.C.R. (A.C.) 11, 17.

4 *Venkatav* v. *Parvati*, 1 M.H.C.R. 460 (464 note).

5 Vaines, Personal Property, page 14.

6 Clarence Smith, "Classification by site" (1963) 26 Modern Law Review 16.

Law, be stolen—a distinction which had great practical importance. In Indian law also, under section 378 of the Indian Penal Code, theft can be committed only in respect of movable property. Again, in Roman law, special rules apply as to the period of acquisition of title by long possession in the case of immovable property.

The distinction has considerable importance in the field of conflict of laws, even as administered in England. We shall revert to this aspect later.

# CHAPTER 4

## *PRELIMINARY MATTERS : SCOPE AND APPLICATION*

### SECTION 1

4.1. The short title of the Act, as given in section 1, is the Transfer of Property Act. It will be seen from the various sections that the Act does not deal with all property, or, indeed, with any but the topics comprised therein. Nor does it deal with all kinds of transfer, limited as it is only to transfers *inter vivos*, nor in dealing with such transfers does it more than "amend certain parts of the law". In short, the Act merely professes to crystallize some leading principles of the law of Transfer. These are to be supplemented by other laws and by final recourse to the principle of "justice, equity and good conscience[1]".

4.2. The Act, for example, is not exhaustive even on the law of mortgages[2]. Thus, an award can create a mortgage. In a case not covered by the Act, the Court is entitled to apply rules of equity, justice and good conscience which are not inconsistent with the Act. Thus, the holder of a statutory charge is entitled to a decree for sale, even though the charge arises by an act of the legislature and not by "transfer" as defined in section 5. This was the position even when section 100 did not cover statutory charges.

4.3. The preamble to the Act makes it clear that the law codified is by no means exhaustive, and that the Act does not purport to consolidate, but only defines and amends certain parts of the law[3] relating to transfers by act of parties. The expression "by act of parties" is used to distinguish transfer by operation of law, e.g., in case of insolvency, forfeiture or sale in execution of a decree[4]. Even as to transfers by act of parties, it does not profess to be exhaustive[5].

For instance, it does not deal with pledges of tangible movable property and transfer of Government promissory notes[6]. In such cases, the matter is governed partly by statutory law and partly by the rules of justice, equity and good conscience. The Courts will have to act upon the principle of justice, equity and good conscience, in enforcing the contracts in accordance with their tenor[7] where there is no statutory provision.

4.4. *Extent*—Section 1 provides that the Act extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States or in the States of Bombay, Punjab and Delhi. Thus, the initial extent of the Act was very limited.

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1 Gour.

2 *Hotchand* v. *Krishanchand*, A.I.R. 1924 Sind 23, 24.

3 *Jotindra* v. *Rangpoor Tobacco Co.*, A.I.R. 1974 Cal. 990.

4 *Golak Nath* v. *Mathura Nath*, I.L.R. 20 Cal. 273, 278; *Krishnan* v. *Perachan*, I.L.R 15 Mad 383.

5 *Kalyan Das* v. *Jan Bibi*, A.I.R. 1929 All. 12.

6 *Subbaraya* v. *Kuppuswamy*, (1909) 1 I.C. 535, 538; *Kishori Lal* v. *Krishna Kamini*, (1910) 5 I.C. 500, 502; *Bunsee Dass* v. *Gena Lal*, 14 C.L.J. 530, 536.

7 *Subbaraya* v. *Kuppuswamy*, (1909)1 I.C. 535, 538.

But the same section enacts that this Act or any part thereof may, by notification in the Official Gazette, be extended to the whole or any part of the said territories by the State Government concerned. Notifications have been issued from time to time in exercise of this power by several State Governments. We need not go into details of such notifications, it being unnecessary for the present purpose.

4.5. *Exemption*—Section 1 further provides that any State Government may, from time to time, by notification in the Official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such State Government from all or any of the following provisions, namely :

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

The sections listed relate to the formalities requisite for effecting a sale, mortgage, lease and gifts respectively.

4.6. *Territories excluded from Registration Act*—Finally, the last paragraph of section 1 provides that notwithstanding anything in the foregoing part of this section, section 54, paragraphs 2 and 3 and sections 59, 107 and 123 shall not extend or be extended to district or tract of country for the time being excluded from the operation of the Indian Registration Act (1908), under the power conferred by the first section of that Act or otherwise.

4.7. *Other sections relating to exemption*—There are other sections in the Act which have the effect of exempting or extending the operation of certain provisions. For example, section 69 empowers the State Government to specify the classes of persons whose participation in an English mortgage excludes the operation of certain provisions mentioned therein. Section 57(e) further empowers the State Government to extend the jurisdiction of courts for the purposes of that section. Section 104 empowers the High Court to make rules to carry out the provisions of this Act relating to mortgages or charges on immovable property. That the legislature can empower State Governments to remove a district from the jurisdiction of the High Court or extend the operation of the law to any district is now authoritatively ruled by the Privy Council[1]. Section 2(d) also enacts that "nothing in the second chapter of this Act shall be deemed to affect any rule of Muhammadan Law".

In relation to gifts governed by Muhammadan law, a similar provision is contained in the Chapter on gifts—section 129.

4.8. *Power to extend*—Regarding the power of the State Government to extend the provisions of certain sections to any area within their jurisdiction, it has been held that this power does not entail the abrogation of the general scheme of the Act, to which they might be subject. For instance, under the general provisions of section 129 all rules of Muhammadan Law relating to gifts remain unaffected by any of the provisions of Chapter 7,—which includes section 123. Consequently, when the Government of Burma extended the provisions of that section to the district of Pegu, it could not, by such extension, rescind the general exception in favour of

1. *Emperor* v. *Burah*, L.L.R. 4 Cal. 180 (P.C.).

Muhammadan gifts which would still be complete if accompanied by mere delivery without being compulsorily registrable under that section[1].

4.9. We shall deal later with the position regarding Government Grants and Rent Acts[2].

1 *Mami* v. *Kallander*, I.L.R. 5 Rang. 5 (P.C.).
2 Chapter 4, *infra*.

## CHAPTER 5

### *SCOPE AND APPLICATION AND RULE OF DAMDUPAT*

#### SECTION 2 AND PROPOSED SECTION 2A

5.1. *Section* 2(*a*)—The first part of section 2 deals with enactments mentioned in the schedule which are repealed. It does not have much practical importance. In the second part of the section, there is a saving not only in respect of certain enactments, but also in respect of certain incidents, rights and liabilities. Under clause (a), the provisions of any enactment not hereby expressly repealed are saved.

5.2. *Section* 2(*b*)—Under clause (b), the section saves any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act and are allowed by the law for the time being in force. In practice, this clause assumes the greatest importance. In the very nature of things, its scope cannot be exhaustively indicated. However, by way of illustration, it may be stated that the right to partition of property is definitely saved by this clause. In addition, terms which can be imposed by a partition, being the terms of a "constitution of property", would also be saved by this clause.

In its comment on this clause, the Select Committee observed[1] :—

> "We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option which the Bill, as introduced, expressly preserved, there must be many other incidents of native contracts with which it is desirable not to interfere."

5.3. *Section* 2(*c*)—Clause (c) of section 2 saves rights and liabilities arising out of legal relations constituted before the Act came into force and reliefs in respect of any such rights or liabilities. This may have been considered necessary either because section 6 of the General Clauses Act, 1868, which was in force at the relevant time, was not considered comprehensive enough, or because the Transfer of Property Act was taken as affecting or abrogating not merely statutory rights but also others, for which the General Clauses Act could not have proved sufficient, the case not being one of "repeal" in regard to the sources of such rights.

5.4. *Rights under rules of Hindu Law*—In this connection, it may be of interest to note that the Hindu and Muslim law had a fairly well developed system of rules regulating the creation of mortgages, liens and pledges. Any rights which would have been created under such mortgages and pledges that were executed prior to the Act were not intended to be affected. Since there were certain points of difference between the present Act and Hindu and Muslim law as it was administered prior to the Act, such a saving was obviously necessary. In Hindu law, for example, a mortgagor who had once mortgaged the property could not mortgage it to another, since such a conduct was regarded as criminal and worthy of punishment. Muslim law did not so penalise the mortgagor, but the purchaser after the mortgage could be compelled to redeem the property.

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1 Report of the Select Committee (1878), paragraph 3.

5.5. Prior to the Regulations of 1798, in Bengal and the United Provinces, and for a long time subsequently in the other provinces, the law administered was according to the personal laws of the Hindus and Muslims. These laws recognised no distinction between mortgages of land and pledges of movable property[1]. In both, the pledge might be for a period specified or not, and either usufructuary or simple possession was considered essential to its validity[2], but it was by no means the invariable rule. When no date was fixed by the parties for redemption, the mortgagor could redeem it at any distance of time from the mortgagee, who acquired no title as against him by prescription or possession, however long. Under the Muslim law, taking of interest was forbidden, but the property pledged was always presumed to be, in value, equivalent to the debt due[3].

5.6. *Features of Hindu & Muslim mortgages*—The salient features of the Hindu and Mohamedan mortgages have been thus described[4] by Turner C.J. :—

> "The form of Hindu mortgage under the names of Katkabala, Muddatakriyam, and Gahanlahan obtains commonly throughout British India, though its incidents may vary. It is generally, though not universally, accompanied by the delivery of possession to the mortgagee with permission to enjoy the usufruct either in lieu or part-payment of the interest. Although there is no precise form of words necessary to constitute such a mortgage, it ordinarily differs from the bye-ul-wufa of the Mahomedans in this, that, in the Hindu form there is a preliminary mortgage with a condition for future sale, while in the Mahomedan form there is at once no absolute sale with a counter-agreement for re-sale which may be contained in the original sale-deed, or in a separate contemporaneous instrument. The origin and nature of this form of mortgage among "the Mohamedans is explained in Baillie's Mahomedan Law of Sale[5].
>
> "It was introduced or adopted in order to defeat the precept of the Mahomedan Law prohibiting usury. The lender, by stipulating for the usufruct, or for the payment of a price on the re-sale higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the law."

The abrogation of all these rules by the Act was not a case of repeal of an "enactment". Hence the need for a widely-worded savings.

5.7. *Section 2(d)*—This takes us to section 2, clause (d), which saves transfers by operation of law or transfers by or in execution of a decree or order of a court of competent jurisdiction,—except as provided by section 57 and chapter 4. Section 57 relates to sale by a Court. Chapter 4 relates to mortgages and charges. The intention is that mortgages and charges, even if created by operation of law, would be governed by the Act.

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1 Cole, Dig., Vol. I, Ch. 3 Tit. 'Pledge';
Manu. Ch. VII, SS. 143-145;
Macnaghten's Mohamedan Law, page 74, all cited by Gour.

2 *See Lakshmandes* v. *Dasrat*, I.L.R. 6 Bom. 168 (F.B.) *Sobhagchand* v. *Bhaichand*, I.L.R. 6 Bom. 490 (F.B.) reviewing and commenting on all the previous cases.

3 Macnagthen's Mahomedan Law, page 74.

4 *Ramasami* v. *Samiyappanayakan*, I.L.R. 4 Mad. 179, 183.

5 Baillie's Mahomedan Law of Sale, page 303.

5.8. *Section 2, last paragraph*—The last paragraph of section 2 provides that nothing in the second chapter of the Act shall be deemed to affect any rule of Mohamedan Law. There was also a saving for Hindus and Budhists, which has not been repealed. The saving regarding Hindus, it is stated, was inserted at the instance of Maharaja Jyotiandra Mohan Tagore[1].

5.9. *Governments grants*—This disposes of the savings expressly provided for. Let us now turn to a few other matters. It is to be noted that though there is no express savings in the Act as regards grants made by the Government, such grants are subject to a special law, namely, the Government Grants Act, 1895, which—to state the position in broad terms empowers the Government to make grants of property and to impose conditions which may not be otherwise valid under the Transfer of Property Act. In other words, in making such a grant, the Government has a wider discretion than an ordinary citizen and can burden the grant with conditions on the non-fulfilment of which the grant may be forfeited.

5.10. *Gist of section* 3, *Act of* 1895—By the Government Grants Act, 1895, section 3, grants and gifts by or on behalf of the Government are subject to special rules. The Bill was originally framed as an amendment of the Transfer of Property Act. But since its object was to also over-ride limitations supposed to be imposed otherwise than by that Act, it was considered desirable to introduce it as a separate self-contained Bill. Section 3, in particular, provides that all provisions, restrictions, conditions and limitations whatever contained in any such grant or transfer (grants and gifts made by or on behalf of the Government), shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the legislature to the contrary notwithstanding. The Act was expressly made retrospective.

The effect of the Act—to give a few important illustrations—is to empower the Government to create estates unknown to the Hindu law[2] or the Muslim law[3].

5.10A. *Construction of* 1895 *Act*—General rules of construction will, of course, apply. Thus, the question whether a grant is permanent or personal must, in a great measure, depend upon its terms. But it would appear that in the construction of terms of a Government grant, recourse can be had to the surrounding circumstances and the object for which the grant was made[4].

5.11. A restriction or limitation, if clearly intended to be for a special purpose, would nevertheless be enforceable by the Government, though it could not be availed of by a third party.

5.12. So, where the grant was resumable if required for government purposes, and the Government had reserved ownership therein, the Court held[5] that the propriety of resumption could not be questioned, as it fell within the terms of the grant. By a sanad of 1862, the Government granted to one A in consideration of his personal military services, a village revenue—free "to remain in the family of the grantee—on his demise subject to assessment,"

1 Gour, Commentary on section 2.
2 *Sheo Singh* v. *Raghubansh Kunwar*, I.L.R. 23 All. 634, 653.
3 *Hapi Mohd.* v. *Egambara*, (1907) 2 Mad. Law Times 55.
4 *Krishna Rao* v. *Rangarao*, 4 Bom. H. C. Reports App. Cases 1, 24.
5 *Sapurlo* v. *Secretary of State*, I.L.R. 36 Bom. 438.

and the question turned upon what was intended to be conveyed by term "family", and the Court held that it must be taken to be employed in its restricted sense, as meaning "the wife and children" of the grantee, and not in the more extended sense of a household comprising all the blood relations of the man[1].

5.13. It would appear that in England Crown[2] grants must be in writing. There is no such restriction in India, since no form is prescribed by the Government Grants Act, 1895. The Transfer of Property Act, does not apply to Government grants—which is the reason why in a Calcutta case[3] it was held that a grant can be made even by a letter from the Agent to the Governor General to the grantee.

5.14. So, again, in the absence of any procedure prescribed by law for the resumption of government grants, it is manifestly proper and convenient that a notice should be given, even though it be not strictly necessary[4].

5.15. *Equitable principles and Government Grants.*—This does not mean that equitable principles generally governing the transfer of property—even those codified in the Transfer of Property Act—would not apply to such grants. When there is nothing in the Government Grants Act or in the grant made thereunder to the contrary, such principles can appropriately be applied. Thus, where a man spends money on the improvement of land granted by the Government under an expectation of an interest therein created or encouraged by the grantors, he would be no worse off than if his grantors had not been the Government. Moreover, as regards situations governed by statute, sometimes particular Act itself may provide that it applies to the Government[5].

5.16. *Rent Acts*—Another important modification of the rights which would otherwise flow under the Act should be noticed at this stage. With the emergency of the problem of scarcity of accommodation, it became necessary after the first world war to pass legislation for the control of rents and eviction of tenants. While such legislation does not, in terms, repeal the Transfer of Property Act, the effect of the material provisions is to impose restrictions on the right of the landlord in respect of a tenancy governed by the Act, both as regards the quantum of the rent and as regards eviction of the tenant. Consequently, the legislature also considered it necessary to make detailed provisions as to the enforcement of the statutory rights so created in favour of the tenant and other matters.

5.17. The direct impact of such legislation is to modify the provisions of the Transfer of Property Act relating to leases. But, since what has come to be known as a "statutory tenancy" comes into being under the Act for the control of rents and eviction, the question how far such statutory tenancy is itself property would naturally arise[6]. In this sense, the juristic importance of such legislation transcends the narrow sphere of leases and could embrace the whole of the law of property.

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1 *Jaimal Singh* v. *Gurmukh Singh*, (1910) P.R. No. 20.

2 Coke, 3 Inst. 71, cited by Gour.

3 *Hassan Ali* v. *Chutterput*, (1892) I.L.R. 23 Cal. 742.

4 *Thomas* v. *Sherwood*, L.R. 9 P.C. 142, 148.

5 *Municipal Corporation* v. *Secretary of State*, I.L.R. 29 Bom. 588. *Secretary of State* v. *Dattatraya*, I.L.R. 26 Bom. 271.

6 See Chapter 1, *supra*.

While the Transfer of Property Act is the general law, the Rent Control Act is a special and local enactment overriding the provisions of the general law so far as it is in conflict therewith. A lease may be terminated under section 106 read with section 111 of the Transfer of Property Act, but the lessee is still not liable to ejectment unless the conditions laid down in the Rent Control Act are satisfied.

5.17A. *Damdupat*—There remains to be discussed yet another matter pertaining to the scope of the Act. It relates to a matter arising out of Hindu law. It is not very clear whether the rule of Hindu law prohibiting a creditor from recovering, at one and the same time, as interest, an amount more than the principal—the rule popularly known as Damdupat—is still operative in respect of mortgages. The matter is not governed by the Civil Procedure Code in a direct manner, since that Code does not deal with the substantive law of interest for the period prior to the institution of the suit. The Interest Act, 1839 also gives no specific guidance on the subject. It is, therefore, a matter of investigation whether any such rule exists.

5.18. Section 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Indian Contract Act. From this section, it would appear that the rule would not apply to mortgages. In its essence, a mortgage debt, or for that matter, any debt, is a pecuniary obligation arising under a contract, express or implied,—leaving aside debts arising by operation of law. Under the Hindu law of contract, the rule did apply to debts under mortgages and pledges and other loans.

5.19. *Damdupat—Rationale*—In a Bombay case[1], West J. had occasion to consider the rationale of the rule. The precise question related to its applicability to proceedings in execution. West J. held that there is no authority for limiting the amount recoverable in execution of a decree by any such rule. The following observations explain the rationale of the rule :—

> "As regards purely private transactions, the law for the protection of the weaker party controls his freedom of contract in the way to which we have referred, or, at least, refuses to enforce the debtor's engagement by means of a duty imposed on the Courts of exercising their powers of coercion to give effect to what it presumes to be an extortionate or unduly rigorous bargain. But the same reason, it is obvious, does not *apply to the execution of a decree of a Civil Court.* In making such a decree the Judge is not liable, as the debtor is supposed to be, to undue pressure on the part of the creditor."

5.20. On the question with which we are immediately concerned, the High Court of Bombay has taken the view that the rule applies as much to secured debts as to non-secured debts. Thus, in a Bombay case[2], while holding that the rule applies in all cases as between the Hindu debtors and creditors in respect of simple debts as also *in respect of mortgage debts,* it was also held that it does not apply where the mortgagee has been placed in possession and is accountable for profits received by him as against the interest due. But, where those profits are, by the terms of the mortgage, received for *only a portion of the mortgage debt,* the general rule of damdupat will govern the mortgage accounts.

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1 *Balkrishna* v. *Gopal,* (1875) I.L.R. 1 Bom. 72, 73.

2 *Sundarabai* v. *Jayavant Bhikaji Nadgowda,* (1899) I.L.R. 24 Bom. 114, 119 (Parsons & Ranade, JJ.).

5.21. In a Calcutta case[1], it was held that the rule applies until the matter travels from the region of contract to that of decree. On this point, an earlier judgment of Woodroffe J.[2] was followed.

In Madras[3], it has been held that the rule does not apply to mortgages governed by the Transfer of Property Act. The judgment does not discuss the position taken in Bombay. There seems to be some disparity between the Bombay view and the Madras view.

5.22. *Recommendation to abrogate the rule of Damdupat in relation to mortgages governed by the Act*—Having regard to the fact that the true position is not evident from the Transfer of Property Act, it is, in our view, desirable to make a specific provision. It could be to the effect that the Act shall not affect the operation of the rule of Hindu law known as Damdupat in regard to areas and persons to which or to whom that rule applies.

Or, in the alternative, the reverse provision should be made, namely, *the rule of Hindu law known as the rule of Damdupat shall not apply to mortgages to which the Act applies.* We prefer the latter alternative, for the sake of uniformity, and also having regard to the fact that cases where, as a matter of policy, interest should be restricted are, in modern times, amply taken care of by legislation for the relief of indebtedness or the Usurious Loans Act or the Money-lenders Act. We recommend that a suitable amendment implementing this approach should be incorporated as section 2A, somewhat on the following lines :—

"2A. The rule of Hindu law known as the rule of Damdupat shall not apply to mortgages of immovable property to which this Act applies."

As to money-lenders, we give below an illustrative list :—

| | Act or Regulation No. | Year |
|---|---|---|
| 1. Money Lenders Act (Assam) | 4 | 1934 |
| 2. Money-Lenders Act (Bihar) | 3 | 1938 |
| 3. Money-Lenders Act (Bombay) | 31 | 1947 |
| 4. Money Lenders Act (Kerala) | 35 | 1958 |
| 5. Money Lenders Act (Madhya Pradesh) | 13 | 1934 |
| 6. Money Lenders Act (Madras) | 26 | 1957 |
| 7. Mones Lenders Act (Mysore) | 12 | 1939 |
| 8. Money Lenders Act (Orissa) | 3 | 1939 |

1 *Nanda Lal Roy* v. *Dhirendra Nath*, (1913) I.L.R. 40 Cal. 710, I.L.R. 24 Bom. 114, 119 (Parsons & Ranade, JJ.).

2 *In the matter of Hari Lal Mullick* (1906) I.L.R. 33 Calcutta 1269, 1276.

3 *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu*, (1903) I.L.R. 26 Mad. 662.

## CHAPTER 6

## *DEFINITION OF IMMOVABLE PROPERTY*

### SECTION 3

6.1. *Introductory*—Section 3 contains a definition of the terms "immovable property", "instrument", "attested", "registered", "attached to the earth", "actionable claim" and "notice". The definitions should have been arranged in alphabetical order, which is not the case at present.

6.2. *Immovable property*—Section 3 begins with the meaning of "immovable property". It does not define "immovable property", but only interprets and limits it by excluding from the definition occurring in the General Clauses Act, certain things, namely, "standing timber, growing crops or grass" which would otherwise be included in the category[1].

6.3. *Real property*—The term "immovable property" does not occur in English internal law, where the distinction is between real property and personal property. This distinction is not synonymous with immovable and movable property. It is based upon no juristic conception of property, but is associated with an early form of action called *actio realis*[1]. The terms "real" and "personal" were originally applied to actions in which a decree for restitution might or might not issue against the thing in suit (*in rem*).

A successful party in a real action obtained the King's writ commanding the Sheriff to put him in possession of the identical holding in respect of which the action had been brought, whilst personal actions were brought to enforce an obligation imposed on a man personally to *make* satisfaction for a breach of contract or a wrong, in short, to pay damages[2]. And, since specific recovery could only be obtained in respect of immovable property, the other suits being only relieved in damages, the distinction between real property and personal property began to be made according to the appropriate reliefs granted in each case. Now, as freeholds were the only things specifically recoverable at common law, the term "realty" came to be used as denoting the freehold.

Thus, a lease for years, however long, was not regarded as real property at all; and even now it is classed as a chattel real. But in India, a reversioner who has a lease in a property, for however long a period it may be, has an interest which arises out of land and so it is immovable property[3].

6.3A. *Scientific position*—The law, unlike engineering, deals with rights, and not with things[4]. In making a classification of property into movable and immovable, the legal system really classifies *rights* for the particular purpose in hand. It may be noted that the law of one of the early European principalities—the Custom of Artois—considered even houses to be movable, on the ground that an enemy might pull them down[5]. It is also to be noted

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1. Gour.
2 Williams, Real Property (18th Ed.), pages 24, 25.
3 *Matilal Raga* v. *Ishwar Radha Damodar*, A.I.R. 1936 Cal. 727, 736.
4 Cook, Logical and Legal basis of Conflict of Laws, page 301.
5 Clarence Smith, "Classification by Site on Conflict of Laws" (1963) 26 Modern Law Review, pages 16, 22.

that even now, on another man's land, the house is regarded as moveable property[1].

6.4. *Subject-matter of ownership classified as movable or immovable not as realty or personalty*—The categories of movable and immovable property could, thus, possibly differ from country to country. Thus, a semi-permanent pavillion is classified as movable property in several American States[2].

As a matter of internal law, even common law jurisdictions cannot agree whether some kinds of property are movable or immovable[3]. For example, take the case of the right of a mortgagee. England[4] and *Ontaio*[5] consider it to be immovable. New Zealand[6] and Australia[7] regard it as movable.

It will be of interest to note that even as late as 1834, the question arose whether an equitable mortgage of land in Antiqua included the slaves on the land as "affixed to the free-hold" by a local Act of 1692 or whether slaves were personalty within the reputed ownership of the mortgagor and were available to the unsecured creditor[8]. Again, it seems obvious at first sight that a building erected for the purposes of an exhibition, which cannot be removed without losing its identity, must be in the same category as normal buildings, yet in some of the American State[9] and in Germany[10] its owner is deemed to hold an interest in a movable.

6.5. Tangible physical objects may be classified[11] as either 'land' or 'chattels', and as such, 'immovable' or 'movable'. Like all classificatory terms, these develop ambiguities in use, and whether some physical object is to be regarded as part of the 'land' or as a 'chattel' must always be decided in the light of the purpose of the classification. The problem is not merely one of physics : the classification is being made by lawyers for legal purposes,—that is, in order to reach useful decisions in particular types of cases. One type of case is concerned with the law of 'fixtures' (between land and chattels).

The decision involves[12] in doubtful cases a problem somewhat like that of deciding whether when one sells an automobile, the tyres which, of course are easily detachable, are a 'part' of the automobile. Much depends upon the customary use of terms : in the 1500's it seems that window glass in a house was regarded as not part of the house, and so not part of the 'land'.

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1 Clarence Smith. "Classification by Site on Conflict of Laws" (1963) 26 Modern Law Rev. 16, 22.

2 Cook, Logical & Legal Basis of Conflict of Laws, page 306.

3 Cheshire, Private International Law (1970) page 269.

4 *Re Hoyles* (1911) 1 Ch. 179.

5 *Re Ritchie*, (1942) 3 D.L.R. 330 (Ontario).

6 *Re O'Neill* (1922) N.Z.L.R. 468.

7 *Haque* v. *Haque* (No. 2) (1965), 114 C.L.R.

8 *Ex pare Rucker*, (1834) 1 Mont & Ayr 480 referred to by Clarance Smith, "Classified by site in the conflict of laws' (1963) 26 (Modern law review 16, footnote 2.

9 Cook, Logical basis of Conflict of Laws, page 306 at seq.

10 Wolff, Private International Law, p. 502.

11 Cook "Immovable Property and the Law of Situs", 52 Harvard Law Rev. 1246, 1251.

12 Bingham, "Some Suggestions Concerning the Law of Fixtures" (1907) 7 Col. L. Rev. 1.

Later, as the use of window glasses in houses became customary, the meaning of the word 'house' came to include the glass in the windows. No one of course doubts that when bricks, shingles, and nails for example, have been used in building an ordinary dwelling house, they have become part of the 'land', even though they may easily be physically detached. At the other extreme, we all recognise that cattle horses, threshing machines, etc., are 'chattels' or 'movables' and are not to be regarded as 'improvements' to the 'land'. Between these two classes lies a third which includes objects which are not so easily classified. That is to say, the members of this class are not, according to prevailing usage, always regarded as part of the 'land', and yet may be, and often are, thought of as so used in connection with the 'land' that they are treated as part of it for many purposes. In spite of this, they are, to quote Professor Bingham[1], "not actually merged into the land or some 'improvement' on it in such a way as to prohibit regarding them as separate objects of property." Under this group Bingham puts the key to a house.

6.6. *Definition in General Clauses Act and other Acts*—So much by way of introduction. Let us now compare a few Indian precedents. "Immovable property" is thus defined in the General Clauses Act—

> "Immoveable property shall include land, benefits to arise out of land, and things attached to the earth[2]."

This applies to the Transfer of Property Act also. The expression has been, however, used in varying senses in the different Acts of the Legislature. In the Indian Trustees Act[3], for example, it was defined thus : "Immovable property shall extend to and include messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein." In the Registration Act[4], "Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise "out of land and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass." Similar definitions occur in other Acts, where, however, the term has been given more or less different meanings. Thus, within the meaning of the Limitation Act[5], standing crops are immovable property; growing crops and trees are held not to be moveable property[6] within the meaning also of the Small Causes Courts Act[7], and they are likewise treated as immovable property within the meaning of the Civil Procedure Code and the Provincial Small Causes Courts Act, 1887[8]. All these are, however, expressly declared to be moveable property by this clause[9].

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1 Bingham, "Some suggestions concerning the law of fixtures" (1907) 7 Columbia Law Rev. 1.

2 S. 3(25), General clauses Act, 1897. The same definitino occurs in section 2, Act I of 1868.

2a Section 3(26) and section 4, General Clauses Act, 1897.

3 Section 2, Act 28 of 1866, Trustees Act, 1866 (28 of 1866) Repeal.

4 Act 16 of 1908, section 2(6).

5 *Pandah Gazi* v. *Jennuddi*, I.L.R. 4 Cal. 665;
*Nattu Miah* v. *Nandrani*, 8 B.L.R. 509;
*Tafail Ahmad* v. *Banee Madhub Mukerjee*, 24 W.R. 394.

6 *Gopal Chandra* v. *Ramjan*, 5 B.L.R. 194;
*In re Hormasji Irani*, I.L.R. 13 Bom. 87.

7 Act 11 of 1865.

8 *Madaya* v. *Venkata*, I.L.R. 11 Mad. 193;
*Cheda Lal* v. *Mulchand*, I.L.R. 14 All. 30.

9 *Raj Chandra Bose* v. *Dharmo Chandra Bose*, 8 B.L.R. 510.

6.7. *Calcutta case—Letters Patent*—In a calcutta case[1], the combined effect of the two Acts was considered for the purpose of the Letters Patent. According to the General Clauses Act, "immovable property" includes lands, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth, and "movable property" means property of every description except immovable property.

As land or immovable property has not been defined in the Letters Patent, one has, in order to find out whether there has been a transfer of an interest in immovable property, to refer to the Transfer of Property Act. If the definition of "immovable property" in the Transfer of Property Act had been self-sufficient, no other piece of legislation need have been examined. Looking at section 4 of the General Clauses Act, one finds that the definition of "immovable property" in section 3 of that Act will apply to the Transfer of Property Act, which is a Central Act made after 3-1-1868, unless there is anything repugnant in the subject or context.

The following observations then follow in the judgment :—

> "*The effect therefore is that by virtue of the combined operation of section* 2 *of the Transfer of Property Act and sections* 3 *and* 4 *of the General Clauses Act,* 2 *"immovable property" includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth, but does not include standing timber, growing crops or grass*[2]. So far as the expression "attached to the earth" is concerned, it occurs only in two sections of the Transfer of Property Act, namely, sections 8 and 108, clause (h). But as a result of the above amalgamation the meaning of the expression "attached to the earth" given in section 3 of the Transfer of Property Act is attracted to all immovable property referred to in the said Act. "Immovable property", therefore, for the purpose of the Transfer of Property Act includes things attached to the earth or things permanently fastened to anything attached to the earth within the meaning of the expression "attached to the earth" given in the Transfer of Property Act. "So interpreted, the definition of immovable property for the purpose of the Transfer of Property Act becomes almost the same as that given in the Registration Act except that the incidents such as "hereditary allowances, rights to ways, lights, ferries, fisheries" expressly mentioned in the Registration Act are absent in the Transfer of Property Act. But these incidents are probably also brought in by virtue of section 8 of the Transfer of Property Act."

6.8. *Incorporeal rights*—"Immovable property" as defined is not confined to tangible property. It may be generally premised that the term includes all that would be real property according to English Law, and possibly more[3]; toda giras hak[4], being a right to receive an annual payment which attaches to the inamdar into whose hands the village may pass, is an "interest

1 *Jnan Chand v. Jugal Kishore,* A.I.R. 1960 Cal. 331, 334, 335 (G.K. Mitter J.).

2 The portion relating to combined effect is underlined for emphasis.

3 *Futtehsangji* v. *Desai,* 13 B.L.R. 254 (P.C.); *overruling Fattehsangji* v. *Desai,* 4 B.H.C.R. 189.

4 "A right of levying a cash composition in lieu of other claims, or of plunder, "*The Collector* v. *Pestonjee,* (1855) B.S.D.A. 291; *Sumbhoolall* v. The Collector, 8 M.I.A. 1, cited in Gour.

inimmovable property", and would fall into that category. Similarly, haq-i-chaharum or liability to pay customary dues is an incident attaching to land and may be enforced against the vendee, unless it is limited to a right available only as against the vendor[2]. Varshasans or annual allowances, charged on immovable property, are also included within the definition of immovable property[3].

6.9. *Hindu law*—Certain rights are classified as immovable property in Hindu law. A right to officiate as priest at the funeral ceremonies of Hindus is in the nature of immovable property[4-5]. But an allowance, payable periodically, which is not incidental to a hereditary office, is not, unless it is a charge on such property. A hereditary office is regarded as by itself immovable property[6-7], and so is a right to worship an idol[8]. A claim to maintenance is a familiar example of this species of property[9]. A nibanoha or corody involves generally the idea of a connection with immovable property and ranks with it[10]. The chance of acquiring a right to light and air is both incapable of valuation and is wholly outside the term[11].

6.9A. *Share*—A share in a registered company is by law declared to be moveable property[12]. And so, under the Hindu law, Government Promissory Notes are classed as movable property[13].

6.10. *Standing timber*—The Act excludes standing timber from immovable property. The definition is professedly not one of general application, but is limited only to this Act, from which it follows that the term "standing timber" is not to be classed as movable property for all purposes. It is so regarded under the Provincial Small Causes Courts Act[14-15] and the Indian Registration Act[16], but it is treated as immovable property for the pur-

1 *Dhandai Bibi* v. *Abdur Rehman*, I.L.R. 23 All. 20 210; following *Heera Ram* v. *Raja Narain Singh* Agra, (F.B.) 63.

2 *Futtehsangji* v. *Desai*, 13 B.L.R. 254 (P.C.); overruling *Fatteshangji* v. *Desai*, 4 B.H.C.R. 189.

3 *Keshav* v. *Vinayak*, I.L.R. 23 Bom. 25.

4-5 *Krishnabhat* v. *Napabhat*, 6 B.H.C.R. 137 *Balvantrav* v. *Pushotam*, 9 B.H.C.R. 99; *The Collector of Thana* v. *Krishnanath*, 5 B. 322; *Appanna* v. *Nagia*, I.L.R. 6 Bom. 542; *Futteshsangji*, v. *Desai*, 13 B.L.R. 254, (P.C.) *Raghoo* v. *Kassy*, I.L.R. 10 Cal. 73; *Sukhlal* v. *Bishambhar*, I.L.R. 39 All. 196.

6 *The Government of Bombay* v. *Goswami*, 9 B.H.C.R. 222, 225; following *Bharatsangji* v. *Navanidharaya*, 1 B.H.C.R. 186; *Fattesangji* v. *Desai*, 4 B.H.C.R. 189; *Raiji* v. *Desai*, 4 B.H.C.R. 56.

7 *Government of Bombay* x. *Desai*, 9 B.H.C.R. 228; (P.C.); *Vishnu* v. *Yeshwantrao* (1895) B.P.J. 453.

8 *Eshan Chander* v. *Manmohini* I.L.R. 4 Cal. 683; following in *Jetikar* v. *Mukunda Bastia*, I.L.R. 39 Cal. 227, 230.

9 *Vishnu Ganesh Joshi* v. *Yeshvantrao*, I.L.R. 21, Bom. 387.

10 *Government of Bombay* v. *Gosvami*, 9 B.H.C.R. 222, 226; *Krishnaji* v. *Gajanan*, 11 Bom. L.R. 352; *The Government of Bombay* v. *Kalianrai*, 14 M.I.A. 551.

11 *Sultan Nawaz Jung* v. *Rustamji*, I.L.R. 20 Bom. 704; *Munappa* v. *Subramania*, I.L.R. 18 Mad. 437.

12 Companies Act.

13 *Doorga* v. *Pooreen*, 5 W.R. 141.

14 Gour.

15 *Umed Ram* v. *Daulat Ram*, I.L.R. 5 All. 564, 566 (F.B.).

16 *Ram Ghulam* v. *Manohar Das*, (1887) A.W.N. 50, *Mangal Sen* v. *Naoli*, O.I.C 478.

pose of the Limitation Act[1] and the Code of Civil Procedure, and would be so regarded under the General Clauses Act[2-3].

6.11. *Growing crops*—Under the English law, where the owner of the soil sells what is growing on land, whether natural produce or fructus industriales, (the fruit of human industry), on the terms that he is to sever them from the land and deliver them to the purchaser, the latter acquires no interest in the soil[4]. The section in our Act would yield the same result.

But the Indian law makes no distinction between what are known as "emblements" in English law, i.e., crops which are the annual results of agricultural labour, and other crops, i.e., grass and clover which do not repay within the year the labour by which they are produced[5]. Consequently, "growing crops" would, in India, include not only the seeds or products of the harvest in corn, but also all vegetable growths, whether in the form of fruit, leaf, bark or roots, which have no existence apart from their produce, as distinguished from trees and shrubs which have a recognised existence apart from any produce which they may bear. As such, pan creepers would be included in the term, though the creepers are uprooted not annually but at the end of the third year[6].

6.12. *Fixtures*—Since the expression "attached to the earth" is an important element of the concept of immovable property, it may be considered in some detail. The position as to fixtures has been discussed at some length in a Madras case[7]. It was pointed out that 'immovable property is defined at least in three Indian enactments,—the General Clauses Act, the Registration Act and the Transfer of Property Act. The first two are not of much assistance, for they merely say that 'immovable property includes things attached to the earth or permanently fastened to anything attached to earth. They give no guidance as to what is meant by 'attached' or 'permanently fastened'. The Transfer of Property Act, by section 3, describes what is meant by 'attached to the earth', namely, (a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Broadly speaking, the degree, manner, extent and strength of attachment of the chattel to the earth or building, are the main features to be regarded. The attachment should be such as to partake of the character of the attachment of the trees or shrubs rooted to the earth, or walls or buildings inbedded in that sense, the further test is whether, such an attachment is for the permanent beneficial enjoyment of the immovable property to which it is attached. Even here, although there may be an attachment to the earth, as contemplated by the first two aspects in the description of 'attached', still, if the attachment is a necessary requisite and that is the manner by which the movable property is or can be enjoyed or worked, it may be open to question whether because of its fixture, though

1 (a) *Sakharam* v. *Vishram*, I.L.R. 19 Bom. 207; (b) *Madayya* v. *Venkata*, I.L.R. 11 Mad. 198; (c) *Jaimal Singh* v. *Ladha*, (1884) P.R. No. 112.

2 Section 3(25). General Clauses Act, 1897.

3 (a) *Jaimal Singh* v. *Ladha*, (1884) P.R. No. 112; (b) *Abdullah* v. *Ashraf Ali*, 7 C.L.J. 152, 166.

4 *Washbourne* v. *Burrows* (1847) 10 L.J. Ex. 266; 1 Exch. 107, cited in Gour.

5 Gour.

6 *Atmaram* v. *Doma*, 11 C.P.L.R. 87, cited by Gour.

7 *Perumal* v. *Ramaswami*, A.I.R. 1969 Mad. 346.

permanently, in the qualified sense, it can *ipso facto or ipso jure* be regarded as immoveable property[1].

6.13. *Incidental Fixtures*—Besides the erections imbedded in the earth, the clause would not exclude other fixtures such as machinery and the building accessory thereto, being erected to cover and protect it[2]. With regard to buildings and trade-fixtures, the general rule is that in respect of whatever has been annexed to the land, for the purpose of its better enjoyment, the intention must clearly be presumed to be to annex the erection to the property in the land, but the nature of the annexation may be such as to show that the intention was to annex it only temporarily, in which case, it may be detached and removed from the corpus[3]. The question, again, is a question of intention[4], but the degree and nature of the annexation is an important element for consideration; for, where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land. Of course, no such presumption is possible where the value of the fixture is far in excess of the land upon which it was erected, or where by custom or contract a different intention is indicated.

6.13A. *Comparison with English law*—The English law as to fixtures is based on the maxis *quicquid plantatur solo, solo credit*[5-6] as to trees, and *quicquid inaedificatur solo, solo credit*[6] as to buildings, and the application of these maxims is varied by a mass of exceptions in favour of a tenant and in a favour of trade fixtures. The term fixture has no precise meaning in English Law, and is not found in *Termes de la Ley*[7] but it is generally applied to something annexed to the freehold.

The classification in the Act as immoveable property of things attached to the earth bears some analogy to the English Law of fixtures, but the maxims on which the English law is founded do not generally apply in India.

Long before the Transfer of Property Act was enacted Para Manisk's case[8](s) settled that it was the common law of India that buildings and other improvements do not by the mere accident of their attachment to the soil become the property of the owner of the soil. The general rule laid

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1 Gour.

2 See per Lord Fitzgerald in *Wako* v. *Hall*, 8 App. Cas. 195, 216; o.a. from *Wake* v. *Hall*, 7 Q.B.D. 295.

3 *Per Lord Blackburn in Wake* v. *Hall*, 8 App. Cas. 195, 204 o.a. from *Wake* v. *Hall*, 7 Q.B.D. 295.

4 *Lancaster* v. *Eve*, L.R. 3 ex. 257, 260. The intention may be rebutted by circumstances pointing to the contrary—ib., page 260. *Subramaniam Chettiar* v. *Chidambaram Servai*, A.I.R. 1950 Mad. 527.

5 I.e., whatever is planted in the soil falls into, or becomes part of the soil.

6 I.e., whatever is built in the soil falls into, or becomes part of the soil. Another reading substitutes fixtures (is fixed to) for inaedifictor (is built in).

7 Per Campbell, C. J. *Wiltshear* v. *Cottrell*, (1853) 1 El. & Bl. 674, 682.

8 *Thakoor Chunder* v. *Ramdhone* (1866) 6 W. R. 228; Beng. L. R. Supp. Vol. 595; Approved and *followed in Narayan Das Khettry* v. *Jatindranath* (1927) 54 Cal. 669,54 I. A. 218, 102, I. C. 198. A.I.R. 1927 P.C. 135; A.I.R. 1933 Oudh 468; A.I.R. 1967 Kerala—22.

down by a Full Bench of the Calcutta High Court in that case was as follows :—

> "We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials restoring the land to the state in which it was before the improvement was made, or to obtain compensation or the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken done by the builder during the continuance of any state he may possess."

6.13B. The Mohomedan Law is the same,[1]

Our Legislature has departed from the English Law of fixtures in section 2 of the Mesne Profits and Improvements Act 11 of 1855, corresponding to section 51 of this Act[2] and again in section 108(h) of this Act dealing with the lessee's right to remove fixtures.[3] The Act inclines rather to the law recognised by Hindu and Mahomedan Jurisprudence.[4]

6.14. *Considerations applied by English Courts in regard to fixtures*— As is clear from the above, different considerations have been applied by English Courts in deciding whether given things amounted to fixtures, in the sense in which he term is understood in the law relating to real property.[5] Nevertheless, reference may be made to two of the English cases. In *Leigh* v. *Taylor*,[6] the House of Lords held that valuable tapestries affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them, were not fixtures and therefore did not pass with the freehold to the remainder-man. The House of Lords was of the view that the tapestries formed part of the *personal estate* of the tenant for life. The speech of Lord Halsbury shows that questions like this cannot always be answered, in the nature of things with arithmetical accuracy, but certain discernible tests, as aids in deciding the question, are well-established, as, for instance, if something is made part of the house, it must necessarily go to the heir, because the house goes to the heir and it is part of the house. So, where something is attached in some form to the walls of a house, nevertheless, having regard to the nature of the thing itself, and the purpose of its being placed there, it is not intended to form part of the reality, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, Though these observations were in the context of fixtures, and we are conscious that English law relating to fixtures cannot be applied without qualifications and in their entirety to conditions in this country, the observations of Lord Halsbury certainly are of weight and point to the correct approach to questions of this kind.

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1 *Secretary of the State* v. *Charlesworth Pilling & Co.*, (1902) Bom. 1; I. A. 121

2 *Ismail Kani Rowthan* v. *Hazarali Sahib*, (1903) 27 Mad. 211.

3 *Chaturbhuj* v. *Bonnett*, (1905) 29 Bom. 323.
*Beni Ram* v. *Kundal Lal*, (189) 21 All. 496.
*Sitabai* v. *Sambhu*, (1914) 38 Bom. 716; 28 I.C. 796.

4 *Hafiz Shaikh* v. *Rashik Lal Ghose* (1910) 37 Cal. 815; 6 L.C. 796.

5 *Perumal* v. *Ramaswami*, A.I.R. 1969 Mad. 346, 349.

6 *Leigh* v. *Taylor*, (1902) A.C. 187.

The House of Lord, again, had to consider in *Reynolds* v. *Ashby & Son*,[1] whether machinery attached to freehold was a fixture. There the machines affixed to concrete beds in the floor of the factory by bolts and nuts, could have been removed without injury to the building or the beds. In this case too Lord Halsbury was one of the Law Lords who decided it, but with this difference, here the House considered that as the machines were part of a factory, which was the subject-matter of a lease, the attachment of the machines to the earth in that manner should be regarded as a fixture.

6.15. *English conflict of laws and movable property*—We have mentioned above that the distinction between immovable and movable property is not important in England in internal law. But even in England, the distinction becomes material when a question of conflict of laws arises. When English courts have to determine rights between domeciled Englishmen and persons domiciled in other countries which do not adopt the English division into real and personal property, the division into immovable and movable property becomes relevant because, in such case,[2] out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, English courts recognise and act on a division otherwise unknown to English law into movable and immovable property.

It is for this reason that a lease hold interest in English land, though classified as personal property for the purposes of English internal law, is regarded as immovable property for the purposes of private international law in England.[3-4]

6.16. ***Immovables some-times regarded as movables***.—Rights over immovable are determined by the *lex situs*. Rights over movables are not necessarily governed by that law, If, therefore, the subject-matter of ownership is regarded as an immovable by one system of law but as a movable by another, to which law is the decision left ? This question must also arise. The answer given by English law and by most foreign legal systems is the *lex situs*. If the *lex situs* attributes the quality of movability or of immovability to the object in question, the English court which is seised of the matter must also proceed on that basis.[5]

6.17. The first task of the[6] court in conflict of laws case, when required to decide some question of a proprietary or possesory nature, is to decided whether the *res litigiese* is a movable or an immovable. Upon this preliminary decision depends the legal system that will be applicable to the case. Rights over immovables are determined by the *lex situs* : rights over movables are not necessarily governed by that law, as already stated. The classic situation is the transfer of property by succession, land going

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1 *Reynolds* v. *Ashby & Son* (1904) A.C. 466.
2 Re Hoyles (1911) 1 Chancery 179, 185 (Farwell L.J.).
3 *Greke* v. *Lord Carbery* (1873) L. R. 16 Equity 461.
4 *Duncan* v. *Lawson* (1889) 41 Ch. D. 394.
5 *Johnstone* v. *Baker* (1817) 4 Mad. 474, note Re *Hoyles* (1910) 2 Ch. 333, 341, (1911) 1 Cr. 179.
6 Cheshite Private International Law (1970) p. 269.

to the heirs selected by the law of the site while goods go according to the law of the domicile of the deceased[1].

6.18. In one article[2] pertaining to the conflict of laws, it is stated that immovable right means any right of ownership, occupation or drawing profit from any site, the site being taken as one with all things regarded by the law of that site as annexed to it for the purpose in hand, and it has been added that this expression probably means also any right which is creature of positive law and is so classified (classified as an immovable right) by its creator. Movable right could then mean other right.

6.19. *Recommendation*—Reverting to the Act, we may state that the definition of "immovable property" in the Act, merely provides that it does not include standing timber, grown crops or grass. This definition is obviously not self-contained, and must be read with the definition in the General Clauses Act, 1897, which[3], by virtue of section 3(26) of that Act read with section 4, applies to the Transfer of Property Act. In our opinion, it would be convenient if the definition is made self-contained, by combining[4] what is enacted in the General Clauses Act with what is enacted in the Transfer of Property Act—at least to the extent to which the two can stand together.

6.20. *Recommendation*—This does not, of course, mean that such a combination will avoid all disputes for the future. But the citizen will, at least, be able to locate from one place the scope of the expression. It will also lend some utility to the elaborate definition of the expression "attached to the earth" given in the Transfer of Property Act. At present, the importance of the expression "attached to the earth" is not readily perceived, since the fact that the expression occurs in the definition of 'immovable property' in the General Clauses Act—Which also applies to the Transfer of Property Act—does not appear in the forefront. It will, therefore, be an improvement if the definition of 'immovable property' is made self-contained as suggested above. We recommend accordingly.

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1 Clarence Smit, "Classification by Site in Conflict of Laws" (1963) 26 Modern Law Review 16.

2 Clarence Smit, "Classification by Site in Conflict of Laws" (1963) 26 Modern Law Review 16, 23.

3 See para 6.6, *supra*.

4 Compare para 6.7, *supra*.

## CHAPTER 7

## *DEFINITIONS PERTAINING TO INSTRUMENTS*

### SECTION 3

7.1. *Introductory*—Three definitions concerned with instruments may now be dealt with. These definitions are needed because several sections require "instruments" for carrying out certain modes of transfer, and some of them require that the instrument should be attested or registered. Having inserted these requirements, the legislature considered it necessary that the essentials thereof should be indicated.

7.2. *Instrument*—"Instruments is defined as meaning a non-testamentary instrument. It hardly needs any comments or change. It reinforces the position flowing from section 2 to the effect that the Act does not apply to transfers operative on death. The definition may be left as it is.

7.3. *Attested—Analysis*—The definition of "attested" can be broken up into several parts :

(a) There must be attestation—an ingredient whose importance is often not realised;

(b) The attestation must be by two or more "witnesses"—again, an ingredient which seems to have raised problems in regard to seribee, registration officers and the like;

(c) Each of the two witnesses must have seen the executant sign or affix his mark to the instrument or must have seen some other person sign the instrument in the presence and by the direction of the executant or must have received from the executant a personal acknowledgment of his signature or mark or of his signature by such other person;

We shall have a few comments on "personal acknowledgment".

(d) Each of the two or more attesting witnesses must have signed the instrument in the presence of the executant;

(e) It shall not be necessary that more than one of such witnesses shall have been present at the same time;

(f) No particular form of attestation shall be necessary.

7.4. *Complexity*—The definition of "attested" may appear to be a complicated one; but this complexity is primarily due to the fact that a number of situations had to be dealt with, and several points that had arison in the case law prior to the insertion of the definition had to be clarified. The most important clarification is that to the effect that for the purposes of the validity of attestation it is not necessary that both the attesting witnesses must be present at the same time. It is, of course, requisite that each of them must have either witnessed the execution or received an acknowledgment of execution from the executant of the instrument.

It may be noted that the definition of "attested" was added at the instance of Dr. Hari Singh Gour[1]. The specific provision in the definition of "attested", to the effect that the two witnesses need not have simultaneously witnessed the execution, was inserted in view of the fact that the previous position led to a lot of perjury, and was seen to be unrealistic. Moreover, in view of the requirement of registration which is now compulsory for all gifts and most mortgages, the additional precaution that both witnesses must have witnessed the execution simultaneously was considered unnecessary.

7.5. *Common law and history of the definition*—At common law, an attesting witness must be *present at the execution*[2]. In the Indian Succession Act, attestation included an attestation of an admission of execution. Since the Transfer of Property Act contained no such definition, controversy arose on the subject, till that Privy Council gave the expression a restricted meaning[3].

This position was allowed by the Legislature to continue for the future, though a Validating Act was passed in 1917 to validate past instruments which had been attested on admission of execution. In 1926, a specific definition was inserted, overriding the Privy Council ruling. In 1927, it was clarified that the amendment of 1926 was retrospective.

Post—1927 decisions do not reveal any serious controversy that can be appropriately remedied by an amendment. But a look at the important points that have been discussed in the judicial decisions would be worthwhile.

7.6. *Animus to attest*—Although not so expressly stated in the definition, it is an important ingredient of the concept of attestation that there must be an animus to attest[4]. This is implicit in the word "attest". This ingredient is often lost sight of so that unfortunately controversies arise whether a *scribe* can be an attesting witness, or whether the registering officer's signature can be regarded as an attestation, or whether an identifying witness can also be regarded as an attesting witness. In general, the answer would be affirmative only if the animus to attest is proved.

7.7. Since intention to attest is a question of fact, the answer to be given in a particular case as to whether the test mentioned above is or is not satisfied must, in general, depend on the facts of the case. Many of the apparently conflicting decisions on the subject can be reconciled on this ground.

Once the matter is seen in this light, there does not seem to be much scope for improving the form or content of the definition on the question of animus.

7.8. *Personal acknowledgment*—The portion of the definition relating to personal acknowledgment requires some discussion. It should be noted that personal acknowledgment need not be in a particular form.

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1 Legislative Assembly Debates, 3rd February, 1925, pages 716, 717.

2 *Freshfield* v. *Reed*, (1842) 9 M & W 404, followed in *Seal* v. *Claridge*, (1861) 7 Q.B.D. 516, 519.

3 Shamu Potter v. Abdul Kader, (1912) I.L.R. 35 Mad. 697 (P.C.).

4. *Abdul Jabbar* v. *Venkata Sastri*, A.I.R. 1969 S.C. 1147; (1969) 2 S.C.R. 513. affirming *Venkata Sastri*, A.I.R. 1962 Mad. 11.

and it need not be express. An acknowledgment of signature may well be inferred from the conduct of the executant at the time when the deed is attested by the witnesses. In fact, many cases of attestation by admission would be of this nature, since it is hardly likely that the executant of a will, mortgage, gift,—or for that matter, any other document,—would go through the ceremonial or perform the ritual of solemnly announcing to those present as attesting witnesses *in so many words* that he has signed the instrument. Of course, we recommend no amendment on this point.

It may be noted that according to the English rulings, it is not necessary that the acknowledgment should be expressed or should have been made verbally by the executant. In several cases where the executant was present and the attesting witnesses signed the document in his presence on being assured that he had executed the will, it was held that there had been sufficient acknowledgment. In *Inglesant* v. *Inglesant*[1], the deceased had signed her will in the presence of one witness; on the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so and the second witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. The will was lying on the table open and had a heading in large characters that that was the last will and testament, etc. It was held that the deceased "acknowledged" her signature in the presence of two witnesses. So far as the attestation of a will is concerned, it is, in India, governed by the Succession Act, which uses the expression "personal acknowledgment" which occurs in Section 3 of the Transfer of Property Act also. In the English Wills Act (1 Vict. Ch. 26, S. 9), the section is similar, except that the word "personal" does not occur therein.

7.9. As regards the form of attestation, it is now well established that it can be by affixing marks.[2-3]

7.10. The definition of "registered" merely refers to the law for the registration of documents—the Indian Registration Act, 1908. The definition assumes importance not only for the purposes of those sections which require registration for the validity of certain modes of transfer, but also for the section relating to part performance—section 53A—which cures the absence of, or defects in, registration, subject to the conditions mentioned therein.

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1 A.I.R. 1935 Mad. 176 (2).

2 *Bishwanath* v. *Babu Ram* A.I.R. 1957 Patna 485, following *Maikoo Lal v.Santu*, A.I.R. 1936 All. 576 (F.B.3.)

## CHAPTER 8

### *DEFINITION OF "ACTIONABLE CLAIM"*

SECTION 3

8.1. *Analysis*—The definition of "actionable claim" comprises several items which may be broadly enumerated as (i) debt and (ii) a beneficial interest in movable property which is not in the actual or constructive possession of the claimant. Of course, in both the cases, the definition is framed in terms of a "claim" and in both the cases, the claim must be one recognised by the Civil Courts as affording grounds for relief,. There are other requirements which we shall keep aside for the presence.

8.2. In the case of a debt, the further condition is that the debt must not be secured by a mortgage of immovable property or by a hypothecation or pledge of movable property. In both the cases, it is immaterial whether the debt or interest is existent or accruing or conditional or contingent.

8.3. *Essence*—The essence of an actionable claim is the concept of action coupled with the element of incorporeal personal property. Previously the definition was as follows :

> "A claim which the civil courts recognise as affording grounds for relief is actionable, whether a suit for its enforcement is or is not actually pending or likely to become necessary."

This definition led to certain conflicts of decisions and obscurity, chief amongst which were questions pertaining to secured debts, questions relating to mere right to sue and questions relating to cases where the cause of action had accrued before the assignment of the actionable claim. Although it it often assumed that all the difficulties have been removed by the amended definition which was transferred to section 3 and re-modelled in 1900, certain questions do still survive. In particular, the position regarding benefits under contract is not evident from the definition as it now stands. We discuss this aspect in some detail below[2]. Statements[3] that "all claims under contract are excluded except claims to the payment of a liquidated sum of money or debt or price" may require qualification in certain respects.

8.3A. *English concept*—It would be noted that in English law all personal property may be either in possession or in action. The former is called chose in possession, while the latter is called chose in action. Things of which the owner has the present possession and enjoyment and which he can deliver over to another are choses in possession. Things of which he has no actual possession or enjoyment to which he has only a right enforceable by suit are designated choses in action[4]. The latter includes, in England a debt, the benefit of a contract or damages for a wrong.

8.4. About the transferability of damages, the Indian law is different, but it is clear that in England, the benefit of contract is included in a chose

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1 Mulla (1973), pages 804 and 805.

2 See Infra.

3 Mulla (1973), page 805.

4 *Colonial Bank* v. *Whinney*, 30 Chancery Division 261, 285 (cited by Gour).

in action. Whatever be the position as regards shares and patents, copyright and trade marks in England—a matter into which we need not go—it has never been doubted that the phrase "chose in action" includes many things whether a contract or not and contracts of every nature except contract for the sale of goods[1-3].

8.5. *English law*—A brief but helpful statement of the English law is given as follows in a work on Mercantile law[4] :—

> "Rights under a contract are called choses in action which is a legal expression used to denote all personal rights in property which can only be claimed or enforced by an action at law e.g. contract debts, shares in companies and negotiable instruments. They may be contrasted with choses in possession which are things capable of actual physical assignment, e.g. a watch, a piece of furniture and so on.
>
> The common law does not recognise assignments of choses in action, but equity does and so does statute."

8.6. As common law[5] choses in action could only be assigned with the assent of the debtor, or in accordance with the law merchant.[6] So, unless the contract were one of a negotiable character, the rights given by it could not be assigned; to transfer these rights; a new contract of a trilateral nature, "a novation" was required, i.e. the creditor A agreed to release the debtor B from his liability to A in return for B agreeing to pay the debt to C. C could only enforce B's promise if he gave consideration for it.

The common law rule was altered by the Judicature Act, 1873, section 25(6), which was repealed and re-enacted by section 136 of the Law of Property Act, 1925. These Acts provided that a debt or other legal chose in action may be assigned so as to entitle the assignee to sue in his own name without joining the assignor as a party if :

(i) the assignment is absolute, and not by way of charge;

(ii) the assignment is in writing;

(iii) notice in writing of the assignment has been given to the person bound—the notice must actually reach the person bound[7].

8.7. *English law as to benefits of contract*—Thus, in English law, a chose in action includes, inter alia, benefits of contract[8]. Under the Transfer of Property Act, it would appear that the right to claim the benefit of a contract is a beneficial interest in movable property not in possession[9]. That the benefit of a contract is assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under

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1 Slphinston, "Ghose in action", 9 L.Q.R. 311.

2 Sweet, "Ghose in Action" 10 L.Q.R. 303, 317.

3 T. C. Williams, "Ghose in Action". 10 L.Q.R. 143.

4 Smith & Koenan, Mercantile Law (1965), page 57.

5 Stevens, Mercantile Law (1969), page 69.

6 See remarks of Martin, B., in *Liversidge* v. *Brosdbent*, (1859), 4 H & M 603, 610.

7 *Holt* v. *Hoatherfield Trust, Ltd.*, (1942) 2 K.B. I; (1942); 1 All F.R. 404.

8 Mulla (1973), page 804. Also para 8.4 *supra*.

9 *Jaffer Mehar Ali* v. *Budge Budge Jute Mills Co.*, (1906) I.L.R. 33 Cal. 702, affirmed in (1907) I.L.R. 34 Cal. 289.

an agreement between the parties is also now fairly well settled[1]. Of course, this assignment of *rights under a contract* is quite distinct from assignment of a claim for compensation which one party has against the other *for breach of contract*. The latter is a mere claim for damages which cannot be assigned in law; the former is a benefit under an agreement, which is capable of assignment. This much is clear from the discussion in the judgment of the Supreme Court in *Khardah Company Ltd.* v. *Raymon & Co. Ltd.*[2].

8.8. The discussion in the Supreme Court judgment cited above[3] was, in a sense, obiter, because in that case there was a statutory prohibition against assignment of the benefit of the contract. The contract in issue was for the purchase of foreign jute. Since the goods had to be imported under a non-transferrable licence, and since the licence contained an express condition requiring the utilisation of the imported raw material only *by the Bill* in question, an assignment was regarded as prohibited. But the discussion is fairly exhaustive, with respect, illuminating. The assignment of the benefit of a contract was a subject specifically discussed, the court observing that ordinarily, there is nothing personal about a contract for the sale of goods. It even referred to an English case[4] holding that an arbitration clause does not take away the right of a party to assign the benefit if it is otherwise assignable.

8.9. Apart from the cases already cited, it may be mentioned that in a Privy Council case[5], it seems to have been assumed that the benefit of a contract of repurchase or resale of property could be assigned. In the Calcutta case of *Champarun Sugar Co.* v. *Haridas*[6], the question at issue was whether the right to purchase shares or option to do so could be attached, but the discussion is exhaustive and the court specifically held that such a right is a beneficial interest for movable property and is an actionable claim where the movable property is not in possession and that it was assignable and transferable.

In the Bombay case of *Vishweshwar* v. *Durgappa*[7], the question was whether the option to purchase property is assignable. Beaumont C.J. observed :

"There can be no doubt that both under the common law and under section 23(b), Specified Relief Act, an option to repurchase property is prima facie assignable though it may be so worded as to show that it was to be personal to the guarantee and not assignable. Under section 23(b), Specific Relief Act, 1877, it is provided that a specific performance of a contract may be obtained by the representative-in-interest of the principal, or any party thereto; provided that, where the learning, skill, solvency of any personal quality of such party is a material ingredient in the contract, or where the

1 *Khardah Company Ltd.* v. *Raymon & Co. Ltd.*, A.I.R. 1962 S.C. 1810; (1963) 3 S.C.R. 183, 202.

2 *Khardah Company Ltd.* v. *Raymon Co. Ltd.*, A.I.R. 1962 S.C. 1810, 1817, 1819; (1963) 3 S.C.R. 183, 202, covering A.I.R. 1960 Cal. 86.

3 *Khardah Company Ltd.* v. *Raymon & Co. Ltd.*, A.I.R. 1962 S.C. 1810, 1817, para 19; (1963) 3 S.C.R. 183 202.

4 *Shaylor* v. *Woolf*, (1964) 2 All E.R. 54.

5 *Sakaleguna* v. *Munnuswamy*, A.I.R. 1928 P.C. 174, 175, on appeal from A.I.R. 1926 Mad. 699.

6 *Champarun Sugar Co.* v. *Haridas* A.I.R. 1966 Cal. 134, 136, 137 (D. M. Sinha & A. C. Sen JJ.).

7 *Vishweshwar* v. *Durgappa*, A.I.R. 1940 Bom. 339.

contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed."

8.10. *Contract Act*—The Indian Contract Act has no section dealing generally with the assignability of contracts. A contract which, under section 40, is such that the promiser must perform it in person is not assignable by virtue of section 40—the section which deals with the burden of the contract. Judicial decisions have applied the same principle to the benefit of the contract[1]. But there is no specific provision in that regard. Insertion of it would be useful.

The utility of the proposed clarification[2] would be seen when one takes the case of contracts for the return of specific goods. The interest of the buyer of goods in a contract for future delivery, would be property within the meaning of the Transfer of Property Act and an actionable claim. It was so held in a Bombay case[3]. The following observations of Jenkins C.J. are pertinent :

> "What was transferred was, in my opinion, property, and under section 6 of the Transfer of Property Act property of any kind may be transferred except as therein provided. None of the specified exception would have included what Shariffbhoy (buyer) purported to transfer and I further hold that the subject of the transfer was an actionable claim, and so Chapter VIII of the Transfer of Property Act applies. That this view of the Transfer of Property Act does not involve any material change in the law as previously understood in Bombay is apparent from what was said by Westropp C.J. in *Dayabhai Dipchand* v. *Bullabhram Davaram*."

It may be noted that the decision was rendered after the extension of the Transfer of Property Act, to the then existing province of Bombay by a notification of 1st January, 1893.

8.11. *Position under the Contract Act*—We are not, at the moment, concerned with the modes of assignment of the benefit of a contract[4]. But the broad and general proposition that a benefit of a contract is a species of an actionable claim should, in our opinion, find a place in the definition of that expression in the Transfer of Property Act, to make it more expressive and self-contained.

8.12. Such an amendment would not, of course, mean that contractual or statutory restrictions on assignment, or non-assignability arising by reason of the nature of the subject-matter, would thereby be rendered nugatory[5]. What actionable claims can be assigned is a matter which is dealt with not by the definition but mainly by the provisions of section 6 and, though indirectly, by section 130 and succeeding sections. This is true even of those items of property which are undoubtedly actionable claims under the present definition. For example, the salary of an employee[5] and also his pension is an actionable claim. But this proposition is subject to section 6(g) prohibiting the transfer of certain pensions—a prohibition which does not apply

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1 *Toomey* v. *Ramanahi*, (1889) I.L.R., 17 Cal. 115, 121.

2 See para 6.13, *infra*.

3 *Hans Raj* v. *Nathu*, (1907) 9 Bom. Law Reporter 838.

4 *Ibrahim* v. *Union of India*, A.I.R. 1966 Guj. 6, 13, paras 7 and 8.

5 Section 6.

to pensions payable by a foreign State remitted to pensioner in India.[1]. Then, an insurance policy creates an actionable claim, but there are special provisions relating to its assignment—for example, in the Marine Insurance Act[2-3].

8.13. *Recommendation*—On the above reasoning, we recommend that in the definition of "actionable claim", after the words "not in the possession, either actual or constructive, of the claimant", the words "*including the benefit of a contract otherwise than one relating to immovable property*" should be added. After this amendment, the last portion of the definition which reads—"whether such debt or beneficial interest be existent, accruing, conditional or contingent" will still apply to the benefit of a contract; as also the restrictions indicated by the words "which the civil courts recognise as affording grounds for relief".

8.14. *Mere right to sue*—A question often arises whether a particular claim is an actionable claim or a mere right to sue which cannot be transferred by reason of section 6(e). Much depends on the manner in which the instrument of assignment is drafted. In a Nagpur case[4], these were the facts—

On the 25th of March 1920, the defendant Mst. Nakhela executed a document in favour of one Raoji, which had been described as a chitti, in which it was recited that she had borrowed a cart, bullocks, a silk dupata and a sari, the total value of which things was Rs. 200, to use in the marriage of her son. In the chitti, Mst. Makhela promised to return the article when done with, when she would be entitled to get back her chitti. On the 2nd of June, 1921, according to the case of the plaintiffs, Raoji executed in their favour a sale deed by which he transferred to the plaintiffs Kokaya and Durga the chitti with all the rights thereunder. The following are extracts from the deed of sale :

> "You are at liberty to recover the *amount of these articles from* Nakhela, either "privately or through the Civil Court. It also stipulated that if you do not recover this amount from Nakhela, I shall be liable to pay it to you."

It was held that this was a transfer of a mere right to sue—a personal claim which could not be transferred. A claim for damages for breach of Contract, after breach, is not an actionable claim. The actual decision, with respect, is correct on the language of the instruments. But the following discussion of the law, as found in the judgment, seems to be wider than is the correct position :—

> "For the applicant it is contended that all that Raoji could recover *was either the original articles lent or damages* for breach of contract to return them and I have no doubt that this contention is a correct one. *So far as Raoji's right to recover the goods lent is concerned, that is a personal claim and there is ample authority for holding that such a personal claim is a right which cannot be transferred.* It is also clear that, failing the recovery of the original goods, what was recoverable was money in the form of damages "and that this money was not a debt.

1 ***Bishamber Nath*** **v.** ***Imdad Ali,*** **(1891) I.L.R. 18 Cal. 216 (P.C.).**
2 Sections 17, 52, and 79 of the Marine Insurance Act, 1963.
3 *Union of India* v. *Alliance Insurance Company,* A.I.R. 1964, Cal. 31.
4 *Mt. Nakhela* **v.** *Kokava.* A.I.R. 1923 Nag. 67(2).

No doubt, the value of the article was specified in the chitti but the chitti would only be the evidence of the value of the articles and there is no promise in the chitti to pay Rs. 200. It would be open to the defendent to prove that the goods were in reality worth less than Rs. 200. What was transferred therefore by Raoji to the plaintiff was a mere right to sue for damages and there is ample authority for holding that such a transfer is against the provisions of section 6 of the Transfer of Property Act."

8.14A. We may comment that if the right to recover the goods is transferred, it would be transfer of a claim to beneficial interest in movable property not in possesssion, actual or constructive.

8.15. *Debt*—We have discussed at length the latter part of the definition of actionable claim in view of the fact that the statutory provision does not mention it specifically. This does not mean that the earlier half of the defintion relating to "debt" is not important. In practice, questions do arise with reference to this part of the definition also, namely, whether a particular demand is within this part. The answer must depend largely on what may be understood to be comprehended by "debt", since a claim to a debt is an actionable claim. "Debt" in its primary sense, means a liquidated monetary obligation which is usually recoverable by a suit. There is a series of rulings to that effect in India[1-2].

This also seems to be the English law, where the aspect of certainty (liquidated amount), the aspect of money and the aspect of recoverability in law, have been emphasised in the judicial decisions. In English law, it is an essential feature of an action for debt that it should be for a liquidated or certain sum of money. "In general", says Blackstone[3], "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth), a debt is then said to exist between these parties; while, on the other hand, if the demand be of an uncertain amount, as when an action is brought against a bailee for injury done through his negligence to an article committed to his care, it is described not as a debt, but as a claim for damages."

1 *Moti Lal* v. *Radhey Lal*, I.L.R. 55 All. 814.
2 *Ram Charan Das* v. *Naseeran*, A.I.R. 1935 All. 342.
3 Blackstone, cited by Cour.

## CHAPTER 9

### *DEFINITION OF NOTICE*

#### SECTION 3

9.1. *Introductory*—The last of the definitions contained in section 3 is concerned with notice. A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

This is the gist of the main part of the definition. But the Explanations are equally important, or perhaps more important than the main part.

9.2. *Scheme*—In the scheme of the clause, notice falls into three separate sub-divisions—(a) actual notice—this is called, in the English law, express notice; (b) constructive or "implied" notice, when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known; (c) imputed notice, when notice is acquired by an agent. The last mentioned category is sometimes described as a species of constructive notice, but deserves special treatment.

9.3. *Some important sections*—In order that the importance of the definition of 'notice' may be appreciated. It would be useful to refer to a few important sections wherein the expression occurs. Under section 39, where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property and such property is transferred, the right to receive such maintenance or provision may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous. But the right cannot be enforced against a transferee for consideration and without notice of the right, nor against such property in his hands. Again, under section 40, when one person has, for the more beneficial enjoyment of his own immovable property, a right to restrain the enjoyment in a particular manner of the immovable property of another person or where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, such right or obligation may be enforced against a transferee with notice, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands. A familiar example is the case where there is a contract for the sale of immovable property and the prospective vendor, in breach of the contract, sells the property to a third person who has a notice of the contract. The prospective purchaser may enforce the contract against a transferee with notice to the same extent as he could have enforced against the prospective vendor. Then, under section 43, where there is a transfer of immovable property by an unauthorised person who subsequently acquires an interest in the property which he professes to transfer and the transfer is for consideration, such transfer shall, at the option of the transferee, operate on such subsequently acquired interest while the contract of transfer subsists, but this shall not impair the rights of transferees in good faith for consideration without notice of the existence of the said option.

All these provisions illustrate the importance attached to notice or its absence. We need not give an exhaustive list. Many of the provisions, as we have pointed out in the first chapter, are derived from rules of equity.

9.4. *Principle of notice*—The doctrine of notice as affecting priorities is founded upon the rule which discountenances laches and frauds of all kinds.[1] As such, its principle is widely applicable, and stated generally, it is an exception to the general maxim *qui prior est tempore, potior est jure* (He who is first in point of time is more powerful in law). Correctly understood, however, it is rather an explanation than an exception to it, for the true meaning of the maxim is that, as between persons having only equitable interests, if such equities are in all other respects equal, then only would the rule apply.[2]

9.5. *History*—The definition of the word 'notice' in the Act correctly codifies the law which existed prior to the passing of the Act so far as notice *to the principal* is concerned.[3] Thus, it was held in a case decided in 1881[4] that when a person is proved to have had knowledge of certain facts, or to have been in a position, the reasonable consequences of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact.

9.6. It is to be noted that the definition of 'notice' was adopted by the Law Commissioners of 1879[5] from Bill which led to the Indian Trusts Act, 1882, section 3. In the Act as subsequently passed, however, the words "or search" were added after the words "from an enquiry", at the instance of the Select Committee,[6] in order to make the definition[7] apply expressly to a case where a person wilfully abstains from a search in a register, which he ought to have made.

This raised the question whether registration should, of itself, be deemed to be legal notice. On this point, the High Courts of Bombay and Allahabad had been, for some time, at variance with those of Calcutta and Madras, where registration was held to be no notice—a view afterwards confirmed by the Privy Council.[8]

The law was altered in 1929. The Amending Act has not accepted the ruling of the Privy Council, on the ground that it inevitably led to such prejury and litigation. In America[9], registration of conveyance is held to operate as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property.[10] "The reasoning, upon which this doctrine is founded, is the obvious policy of the Registry Acts, the duty

1 Gour

2 *Rice* v. *Rice*, 2 Drew. 73;
*Cordon* v. *James*, 30 Ch. D. 249;
*National Provincial Bank* v. *Jackson*, 33 Ch. D. 1;
*Farrand* v. *The Yorkshire Bank*, 40 Ch. D. 182.

3 *Churaman* v. *Balli*, I.L.R. 9 All. 591.

4. *Doorga Narain* v. *Boney Madhub*, (1881) LL.R. 7 Cal. 199.

5 Report, dated 15th Nov. 1879, section 29.

6 Third Report, dated 11th March, 1881, section 3.

7 Gour.

8 *Tilakdhari* v. *Khedan Lal*, (1921) I.L.R. 48 Cal. 82 (P.C.).

9 Notes on clauses.

10. Gour.

of the party purchasing under such circumstances to search for prior encumbrances, the means of which search are within his power, and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance."[1]

9.7. *First Explanation*—Actual notice does not raise problems. Constructive notice requires to be discussed at length. According to the first Explanation, where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest, in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated.

This Explanation, however, applies only if three conditions mentioned in the Proviso thereto are fulfilled, namely,—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

If these conditions are satisfied, registration is given the effect of notice by a construction of law.

It is aptly described in the text books as constructive notice.

9.8. In England, under section 197 of the Law of Property Act, 1925, registration is notice in the two counties of Middle sex and Yorkshire where the system of local deed Registries prevails, and, under section 198, in the case of instruments which are registered under the Land Charges Act, 1925, it is provided that registration shall be deemed to constitute actual notice of such instrument to all persons and for all purposes connected with the land affected.

9.9. *Second Explanation*—The solemnity of legal transactions has been given recognition in the First Explanation. The reality of *de facto* enjoyment is next dealt with in the Second Explanation which is concerned with actual possession as a source of constructive notice. Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of the person who is for the time being in actual possession thereof.

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1 Story's Equity, section 534, pages 510, 511, cited in Notes on clauses (not traceable in 3rd Eng. Edition).



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9.10. *Third Explanation*—The third Explanation deals with agency as a source of notice. This category of notice is usually described as imputed notice. A person shall be deemed to have had notice of any fact if his agent *acquires notice* thereof whilst acting on his behalf in the course of business to which that fact is material. This is, however, subject to a qualification contained in the proviso. Under the proviso, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to, or otherwise cognizant of, the fraud.

9.11. *Whether constructive notice attributable to principal*—Does the notice of the agent, that could be fictionally attributed to the principal under the third Explanation, have to be actual notice, or it is enough if it is constructive notice? The use of the word "acquires" would, at first sight, seem to support the first view, since "acquisition", in ordinary language, implies something positive and actual, or at least some effort. However, it should be noted that there is at least one judicial decision taking the opposite view.[1] This also seems to be the English concept of notice.[2] It would, thus, appear that when the constructive notice of an agent is imputed to the principal, there is a double fiction.

9.12. In other words, the principal is liable not only on the actual notice received by the agent, but also on the basis of constructive notice received by the agent. Of course, in every case, the important condition must be satisfied, namely, that the agent was acting on behalf of the principal in the course of business to which the fact is material and that there was no fraudulent concealment on the part of the agent.

9.13. *Limits*—The discussion so far has dealt with width of the definition of notice as read with the Explanations. The limits of the definition must also be noted. There may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice, as may property be held to have the consequences of notice actually obtained. But if there is no actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge, of facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied.[3]

9.14. The above discussion calls for no amendment of the definition.

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1 *Renukabai* v. *Bheoson*, A.I.R. 1931 Nag. 132.
2 Snell, Equity (1966), page 60, para 3(a).
3 *Doorga Narain* v. *Baney Madhub* I.L.R. 7 Cal. 199; following *Agra Bank* v. *Barry*, L.R. 7 H.L. 135; and *Ramroomar* v. *McQueen*, 11 B.L.R. 53. See, also *Khushalchand* v. *Trimbak*, 48. Bom. L.R. 586.

## CHAPTER 10

## *RELATIONSHIP WITH CONTRACTS ACT AND REGISTRATION ACT*

### SECTION 4

10.1. We have already stated[1] that the Transfer of Property Bill was originally conceived as a part of a wider project forming part of a draft Civil Code. That plan did not materialise. But the unity of the project finds some reflection in section 4.

Section 4 provides that the Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

Further, it provides that section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

The first part of the section does not merely mean that transfers by act of parties are subject to the general principles of the law of Contracts. That did not require an express provision. Its practical importance could be more concretely indicated by stating that definitions and explanations in the Contract Act can be invoked for construing the Transfer of Property Act.

We have no further comments on section 4.

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1 Chapter 1.

## CHAPTER 11

## *DEFINITION OF TRANSFER OF PROPERTY*

### SECTION 5

11.1. *"Transfer of Property" defined Introductory*—Section 5 defines the expression "transfer of property" as meaning an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons. It also defines the expression "to transfer property" as meaning to perform such act.

The section further clarifies that 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals. This clarification was inserted in 1929.

11.2. *Analysis—Living person*—Let us analyse the section. The first important ingredient is that there must be a living person. This is explained in the second part of the section which expands its scope. But apart from that, it may be noted that the section,—and therefore the Act in general—does not apply to the conveyance of property to an entity which is recognised by law as having a personality in law but which does not have life. It is for this reason that a gift to God Almighty does not fall within the frame-work of the Act.[1]

For the same reason, a transfer of property to an idol is not a transfer[2] within the meaning of section 5. Those judicial decisions,[2-3] therefore, which take the view that a living person includes a juristic person, do not, with respect, appear to be correct. The very fact that in 1929 a paragraph had to be added to define a living person as including a company or association or body of individuals whether incorporated or not, would seem to show that artificial legal persons do not otherwise fall within section 5.

Of course, the position in regard to idols or other juristic persons may be different if the mode of conveyance is so adopted that the transferor executes the instrument in favour of *living persons designated as trustees.*[3] Such a transfer must satisfy the requirements of the Act.

11.3. *Conveyance*—The next important ingredient of section 5 is that indicated by the word "conveys". This expression is not defined in the Act, but it postulates on act by which a change of proprietory right is sought to be effected. Where there is no transmutation of a proprietory interest, but only a re-distribution thereof, there is no act "conveying" property within the meaning of this section. It is fo rthis reason that a family arrangement is not a transfer[4]. Again, it is for the same reason that an arrangement by way of dissolution of partnership is not, speaking

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1 a. A.I.R. 1946 Audh 256.

2 a. A.I.R. 1926 Nag. 469.

3 (1975) 16 Guj. Law Rep. 289.

4 A.I.R. 1966 S.C. 432.

ordinarily, a transfer,[1] though the case could be different where, after the dissolution, *a specific conveyance of property is* the device adopted. For the same reason, the contribution of immovable property by a partner as his share of partnership does not require a written document or registration.[2]

11.4 It has been held[3] that an arrangement by which, on the dissolution of a partnership, certain partners are paid off and, in return, give up or assign their interests in the assets of the partnership by way of debts, which were due to the firm is a "transfer of property" as defined by section 5. This, with respect, must be taken as confined to actionable claims (section 130).

11.5. *Transferee*—The third important ingredient of section 5 is indicated by the words which relate to the transferee. The transferee must be (i) one or more *other* living person, or (ii) the transferor himself, or (iii) the transferor himself and one or more other living persons. In the case (ii) mentioned above, the transferor, when he becomes the transferee, does so as a trustee.

11.6. *Property*—'Property', of course, is a wide term, Thus, it includes an interest of the lessor. The interest of a lessor is a reversion, a future estate capable of being reduced to possession on the termination of the existing lease, and can be validly transferred[4] under section 5, while the lease is subsisting.

11.7. *Property in existence*—The subject matter should be property in existence. Where the section uses the words 'conveys property', in present or in future (to one or more other living persons), one should read the words 'in present or in future' with the word 'convey', and not with the word 'property'. In other words, in the contemplation of the section, the property must exist before the transfer can be effected.[5-6]

11.8. *Effect of transfer of future property*—This does not, of course, mean that it is illegal to transfer property to be acquired in future. Such a transfer is not prohibited by the Act in general terms, and all that can be said with reference to such a transfer is that it does not fall within the terms of this section. It may not be effective as an immediate transfer, but this is quite a different thing from saying that it is totally devoid of any legal effect. Section 5 does not cover it, but such an instrument relating to property to be acquired in future may yet have certain legal consequences. It could, for example, bring into being contractual liabilities or rights similar to those recognised in England as equitable rights—same principles apply to property not in existence. This aspect of the matter

1 *Cf.* A.I.R. 1970 Mad. 111.
2 A.I.R. 1963 Pat. 221;
A.I.R. 1965 Pat. 144.
3 A.I.R. 1939 Sind 288.
4 A.I.R. 1957 Andhra Pradesh 619.
5 *Jugal Kishore Saraf* v. *Raw Cotton Co.*, A.I.R. 1955 S.C. 376 (1955) 1 S.C.R. 1369, 1413.
6 *Chief Controlling Revenue Authority* v. *Sudarsanam Picture* A.I.R. 1968 Mad. 319 (F. B.).
7 *Moti Ram* v. *Khyali Ram, A.I.R.* 1967 All. 484.
8 A.I.R. 1955 Pat. 402.

is often overlooked by reason of the juxtaposition of the words in section 5, but the correct positions seems to as above.

While section 5 cannot be invoked to validate a transfer of future property, such transfer can create certain rights depending on the nature of the property, the relations between the parties and various other circumstances relevant to the application of doctrines originating in equity. For example, the principle of section 43,—if not the literal text thereof,—could be invoked for giving effect to the instrument purporting to incorporate such a transfer.[1]

11.9. In an Allahabad case,[2] section 18 of the Specific Relief Act, 1877—now section 13, 1963 Act— was also discussed. The old section 18 and the new section 13 are based on the well-known rule of estoppel sometimes referred to as feeding the grant by estoppel. The effect of section 13, so far as is material, is to confer on the transferee, from a person having no title, certain rights if the transferor acquires any interest subsequently.

The Calcutta High Court in the case of *Prem Sukh Gulgulia* v. *Habib Ullah*,[3] held that transfers of non-existent or, as it is conveniently called, after-acquired property, provided they are not of the nature contemplated in section 6(a)—transfer of a mere chance—are perfectly valid. The transfer would be regarded in court of justice as a contract to transfer after the vendor had acquired title, and would fasten upon the property as soon as the vendor acquired it. A contract of sale of property which is not of the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law.

11.10. *Sale of Goods Act*—It may also be noted that section 6 of the Sale of Goods Act has a detailed provision[4] as to transfer of goods not in existence—

> "6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned[5] or possessed by the seller, or future goods.
>
> (2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
>
> "(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates an agreement to sell the goods."

11.11. *Recommendations for amendment*—The only amendment that we recommend in section 5 is transportation of the words "in present or in future" after the word "convey"[6] and before the word "property".

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1 A.I.R. 1960 Cal. 609.
2 *Ehsanul Haq.* v. *Mohd. Umar*, A.I.R. 1973 All. 425, 426 (S. Malik, J.).
3 *Prem Sukh Gulgulia* v. *Habib Ullah*, A.I.R. 1945 Cal. 355.
4 Section 6, Sale of Goods Act, 1930.
5 E. G. shares.
6 Para 11.7 *supra*.

## CHAPTER 12

## *PROPERTY WHICH CANNOT BE TRANSFERRED*

### SECTION 6

12.1. *Section* 6—*Introductory*—Several items which cannot be transferred have been enumerated in section 6, after laying down the abstract general proposition that property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force. Transferability is, then, the general rule, and the right to property includes the right to transfer that property to another person.[1-2] We need not concern ourselves with restrictions on the transfer of property which arise by reason of—

(a) Hindu law;
(b) Muslim law;
(c) Special or local laws;
(d) Custom.

12.2. *Rationale*—Concentrating on those prohibitions which are expressly provided in section 6, one may note that these prohibitions owe their rationale either to the nature of the property, or to certain considerations of policy, or to the need for enforcing the provisions of other legislative enactments. Sometimes, more than one of those considerations operate together. The prohibition in clause (d) against the transfer of an interest in property restricted in its enjoyment to the owner personally is based on the nature of the interest. The prohibition in clause (c) relating to the transfer of an easement apart from the dominant heritage, is also similarly explained, namely, by reason of the nature of the right.

The prohibition in clause (f) relating to the transfer of a public office or the salary of a public officer is obviously based on considerations of public policy easily apparent, and the prohibitions in clauses (dd) and (g) are also based on similar considerations. Clause (h), in sub-clause (2) and sub-clause (3), is intended to re-inforce prohibitions flowing from other statutory provisions. Clauses (h) and (i) are based on mixed considerations.

12.3. *Section* 6(*a*)—Under section 6(a), "the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of kinsman or any other mere possibility of a like nature" cannot be transferred.

The words "of a like nature" in this clause should of course, be contrued, as *ejusdem generis* with the two kinds of "chance" mentioned in the clause.[3] However, that does not lead to a very precise position. For example, does it mean that only a possibility *dependent on death* is excluded? Reported[4-5] cases do not take such a very narrow view.

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1-2 Mulla.
2 *Lala Baidnath* v. *Chandrapaul*, A.I.R. 1924 All. 793.
3 A.I.R. 1919 Mad. 718.
4 A.I.R. 1938 Mad. 881.
5 I.L.R. 43 Cal. 28.

12.4. *Meaning of "chance"*—What is meant by these "chances" or "possibilities"? Lord Westbury referred, in *Davis* v. *Angel,*[1] to the distinction between an interest that has arisen and is represented, and an interest that has not arisen and that never may arise, but with regard to which there is a remote possibility that the event which has not occurred and upon which it is made to hand may hereafter occur. The latter is not an interest; it is not a right; it is nothing more than a bare expectation of a future right. The expectation of a future interest, or rather, of a future event which may give an interest, is not a thing which would justify a court of equity in "entertaining a suit at the instance of a party having that and nothing more."

12.5. *Comparison with Code of Civil Procedure*—Thus, a bare expectation of a future right is contrasted with an interest. It would be of interest to compare and contrast the language of the corresponding provision[2] in be Code of Civil Procedure—section (60)m. What is excluded from liability to attachment under the Code is "an expectancy of succession by survivorship or other merely contingent or possible right or interest". The earlier half of this clause in the Code is better expressed than section 6(a) of the Transfer of Property Act. The latter half is wider than section 6(a),—an aspect to which we shall revert later.

12.6. *Muslim law*—There is a corresponding rule in Muslim law. Sir Roland Wilson, in his 'Anglo Mohammadan Law"[3] states the position thus :

> "For the sake of those readers who are familiar with joint ownership of father and son according to the most widely prevalent school of Hindu Law, it is perhaps desirable "to state explicitly that in Muhammaden, as in Roman and English Law. *nemo est heres viventis* a living person has no heir. An heir apparent or presumptive has no such reversionary interest as would enable him to object to any sale or gift made by the owner in possession; see *Abdul Wahid.* (1885) 12 Ind. App. 91 (P.C.) and (1885) I.L.R. 11 Cal. 597 which was followed in Hasan Ali, (1889) I.L.R. 11 All. 456.
>
> "The converse is also true; a renunciation by an expectant heir in the lifetime of his ancestor is not valid, or enforceable against him after the vesting of the inheritance."

There is, however, no prohibition as such in Muslim law against a renunciation for consideration of the claim to succeed. Such renunciation may at least operate as an estoppel.

12.7. *Possibility coupled with interest*—Reverting to section 6(a), we should note that a mere possibility must be distinguished from a *possibility coupled with interest.* A contingent interest[4] can be transferred,[5-6] though

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1 *Davis* v. *Angel,* (1862) 4 De. G.F. & J. 524 8 Jur. (n.s.) 1024; 6 L.T. 880; 10 W.R. 722.

2 Section 60(m), Code of Civil Procedure, 1908.

3 Wilson Anglo Muhammadan Law page 280, para 208, cited in *Gulam Abbas* v. *Hafiz Kayyam Ali,* A.I.R. 1973 S.C. 556, 554 (para 7).

4 Section 19.

5 A.I.R. 1967 Guj. 16 (contingent interest).

6 A.I.R. 1930 P.C. 17 (contingent interest)

it cannot be attached. This position has come to be established after considerable litigation in the Courts. The principal section of the Act relating to contingent interests is section 19. A contingent interest depends on the happening or non-happening of an event which is not certain. The law is that until the event happens, or is rendered impossible, as the case may be, the interest does not vest. But it is still an interest. In this sense, it is not a 'mere' possibility.

12.8. *Need for amendment regarding contingent interest*—In order to maintain the distinction between a bare possibility and a contingent interest, it appears to be desirable to make it clear in section 6(a) that a contingent interest can be transferred. Such an amendment is needed in view of the fact that the present wording might lead to a misconception, and also since the matter seems to have come up before the Courts for determination.[1]

12.9. *Need for clarification regarding "chance"*—Apart from this clarification regarding contingent interests, it is also, as a matter of drafting, desirable to amend section 6(a) in so far as it deals with 'chance'. The present wording in section 6(a) is not very appropriate. The earlier half of section 60(m), Code of Civil Procedure, is better expressed as already stated.[2] The term 'heir apparent"[3]—itself not very happy in the Indian context—is restricted, and gives the wrong impression that an heir presumptive[4] can transfer his *Spes successionis*—which is not the intention.

It is true that the non-transferability of the interest of an heir presumptive is deducible from the general prohibition as to "mere possibility". But that is true of the interest of the heir apparent also. This part of section 6(a) is certainly capable of improvement and advantage can be taken of the more appropriate wording in the earlier part of section 60 (1)(m), Code of Civil Procedure, 1908.

12.10 *Recommendation to revise section* 6(*a*)—We, therefore, recommend that section 6(a) should be revised as under :

> "(a) *an expectancy of succession by survivorship or any other mere possibility of a like nature.*
>
> *Explanation.—A contingent interest in property is not a mere possibility within the meaning of this clause.*"

12.11 *Section* 6(*b*)—This takes us to section 6(b) which provides that a mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby. This clause has in mind right of lessor as against the leassee for breach of an express condition which provides that on its breach the lessor may re-enter. The "condition subsequent" referred to in section 6(b) is defined in section 31 as a condition which divests an estate that has already vested. Where the reversion of the lease is itself assigned, the assignee certainly is entitled to enforcement of the condition; but the mere right of re-entry cannot be assigned. Being an

1 See case-law as to contingent interests, para 12.7, *supra*.
2 Para 12.5, *supra*.
3 The person first in line of succession.
4 The person second in line of succession.

incident of the land, it may not be severed from the land for the benefit of another person unconcerned with the reversion.[1] This is the principle.

12.12 It has been pointed out[2] that the principle is succeptible of extension to other cases. For instance, in a hire-purchase transaction of a movable property, the right to take *possession by force* of the property which is the subject matter of the hire-purchase-for example, a refrigerator or a motor-vehicle or furniture—is analogous to the right of re-entry. Or rather, it is an extra udicial rjemedy which cannot be transferred.

To quote what has usually been stated in regard to easement, the right is a parasitical one.[3-5]

12.13 *No change*—The points discussed above do not call for any amendment of section 6(b).

12.14. *Section* 6(*c*)—Under section 6(c), an easement cannot be transferred apart from the dominant heirtage. The expressions employed in this clause must be understood in the light of the definitions given in the Indian Easements Act. 1882. Since an easement appended to a dominant heritage is, by its very nature, intended for the enjoyment of the dominant heritage, it is exiomatic that it cannot be divorced from the dominant heritage. Conversely, where the dominant heritage is transferred, the easement is, *ipso factor*, transferred without a specific provision for transfer of the easement. This is expressly provided[6] in the Act. Section 6(c) merely expresses the rule that there cannot be an easement in gross.[7-8]

The clause needs no change.

12.15. *Section* 6(*d*)—Then, under section 6(d), an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. The example usually given is that of the right of the head of a Hindu religious institution such as a Math. Offices connected with such institutions are, in general, restricted in their enjoyment to the 'owner' personally—the word 'owner' is used in a wide sense as indicating the person entitled to the interest.

There is also axiomatic. If enjoyment of property is restricted by law to the owner personally, it is obvious that it cannot be parted with. All these exceptions became necessary because section 6 opens with the abstract general rule that property 'of any kind' may be transferred and that general rule had to be qualified.

The precise question that usually falls to be considered under this clause is whether the particular interest in question is restricted personally to a particular person. This question cannot be answered without a study of that field of law which regulates the creation of the interest. It

1 Gour.
2 Gour.
3 *Ammutool* v. *Jamach Singh*, 24 Weekly Reports 345 Calcutta.
4 Gale, Easement, 6th Edition, pages 65 and 492.
5 Also see section 19, Easements Act, 1882.
6 Section 8, second paragraph, Transfer of Property Act.
7 A.I.R. 1919 Nag. 62.
8 A.I.R. 1917 Cal. 681.

has its own reasons of policy for restricting the enjoyment. The considerations that give rise to restrictions on enjoyment automatically justify restrictions on transfer also.

12.16. *Temples*—The manager of a temple is by virtue of his office administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual but which in course of time has become vested by descent in more than one person.[1]

Thus, the shebait performs a dual role, namely, he has duties to discharge in connection with the endowment and at the same time has a beneficial interest in the debutter property. It was so laid down by B. K. Mukerjea, J. while considering the question whether the office of shebiatship was property for the purpose of Hindu Women's Rights to Property Act, 1937.[2]

12.17. In the case of all Hindu endowments, the inalienability is based upon the principle that no stranger shall be permitted to intrude into the management of the endowment. The reason usually given is that if such an alienation were permitted, the purchaser may be a person belonging to another religion who would be unwilling and unable to perform the worship and thus the object of the endowment may be defeated.[3]

In general, as regards the inalienability of religious offices, it is a dominant consideration whether the right is merely of a proprietary nature, or whether it is primarily based on religious sentiments. It was for this reason that the right of administering 'purohitum' to pilgrims resorting to the temple of Rameshwaram was held to be capable of alienation or delegation.[4]

12.18. *No change*—This clause also needs no change.

12.19. *Section 6(dd)*—Section 6(dd) prohibits transfer of a right to future maintenance, in whatsoever manner accruing, arising, secured or determined. The rationale of the prohibition is the principle that the right to maintenance is recognised for the sustenance of the beneficiary. If the beneficiary parts with it, he or she parts with a benefit which the law regards as essential for his or her sustenance. No man or woman is allowed to deal even with his or her affairs and transfer a right in a manner which defeats the basic purpose of the legal rule conferring the right. The very *raison d'etre* of the rule is defeated by such a transfer.

12.20. *Basis*—All this may sound elementary, but seems to be worth emphasising. The philosophical basis on which section 6(dd) rests is to a great extent similar to that on which the law prohibits a person from taking his own life, or at least contained such a prohibition before certain other considerations, regarded as of over-riding importance, modified the criminal law in this regard. Sustenance of human life is the dominant

1 *Ramanathan Chitty* v. *Murruguppa Chitty*, (1905) I.L.R. 28 Mad. 283 (P.C.).
2 *Angoorbala* v. *Debabrata*, A.I.R. 1951 S.C. 293, 296.
3 *Raja Verma* v. *Ravi Verma*, I.L.R. 1 Mad. 235 (P.C.).
4 *Ramaswamy* v. *Venkeita*, 9 Moore Indian Appeals 344.

consideration that overrides the liberty of the individual to arrange his own affairs—including the freedom of disposition of property.[1]

12.21. *Object*—The insertion of clause (dd) by the Amending Act was intended to settle the conflict of views amongst certain previous decisions of the Calcutta,[2] Bombay[3] and Madras[4] High Courts. It is sometimes stated that the amendment is in accordance with the policy which discourages all transfers of an expectancy.[5] This may be so, but there appears to be a broader ground of public policy. A number of considerations support the prohibition against transfer of the right to future maintenance, namely, sustenance of the person entitled, personal nature of the right, and the aspect of future interest. The principal one, however, is the aspect of sustenance.

12.22. *Sum accrued*—The prohibition against the assignment of the right to future maintenance does not seem to disallow the transfer of a sum of money which has accrued due. The sum accrued due is a debt; there is nothing personal about it and the very fact that the amount has been allowed to fall in arrears would seem to indicate that the purpose of sustenance would not be defeated by its assignment.

That arrears of maintenance can be attached or assigned like any other debt, was the position established long before the Act.[6] This position was not intended to be disturbed.

It may be noted that in the Civil Procedure Code, exemption from attachment is conferred in respect of a right to future maintenance by section 60(n). Under that Code, it has been held that it does not apply to arrears of maintenance.[7] It has also been held that a right to future maintenance which is heritable and not personal is not exempt from attachment.[8] Moreover, anything which is in excess of maintenance, pure and simple, is not exempt from attachment.[9] As early as 1900, it was held that arrears of maintenance could be attached.[10]

12.23. It was held in a Madras case of 1919[11] that the right of a member of Malabar Tarwad to maintenance is property, *and can be assigned*. The right to receive future maintenance cannot be alienated—though the position might be different in equity in England. An annuity by way of maintenance is transferable.[12]

12.24. *No change*—No change in clause (dd) is required as a result of the above discussion.

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1 Section 6, opening sentence.

2 *Asad Ali* v. *Hyder Ali*, (1911) I.L.R. 38 Cal. 13, 20.

3 *Diwali* v. *Appaji* I.L.R. 10 Bom. 342, 345. (doubt expressed).

4 *Ranee Annapurna* v. *Swaminath*, I.L.R. 34 Mad. 7, cited in *Raja of Kalhati* v. *Venketappa*, A.I.R. 1928 Mad. 713 (F.B.). (Case before amendment).

5 *Gour*.

6 *Kasheesburee* v. *Greesh Chandra*, (1866) 6 Weekly Reports Miscellaneous 65 (Calcutta), cited in Mulla (1973), page 68. footnote (p).

7 *Palikandi* v. *Krishnan*. I.L.R. 50 Mad. 302.

8 *Ashfac* v. *Nazir*, A.I.R. 1942 Oudh 410.

9 *Chittory* v. *Themana*, A.I.R. 1954 Mad. 946, 947 (Mack J.)

10 *Haridas* v. *Baroda* 1900, 4 Cal. W.N. 87.

11 A.I.R. 1919 Mad. 538.

12 A.I.R. 1917 Mad. 79.

12.25. *Section 6(e)*—Section 6(e) provides that a mere right to sue cannot be transferred. Though this is a rule of substantive law, it has an intimate connection with certain aspects of procedure. Maine, in his Early Law & Custom,[1] wrote as follows :—

> "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms".

The evolution of the law prohibiting the transfer of a mere right to sue is an instance in point.

12.26. *Comparison.*—Under the Code of Civil Procedure, 1908, Section 60, "a mere sight to sue for damages" cannot be attached. In section 6(e) of the Transfer of Property Act, the wording was "a mere right to sue for compensation for a fraud or for harm illegally caused". The amendment of 1900 omitted the restrictive words. The present wording is very brief—a mere right to sue.

12.27. *Simplicity deceptive*—The simplicity of this brief and cryptic provision is deceptive. The word "mere" is crucial in the section. The moment this word is overlooked, difficulty arises. It never was the law, and it is not the law, that the transfer of a right to sue is totally prohibited. What the law desired to discourage was trafficking in litigation. The law of maintenance and champerty are branches of law the discussion of which is now considered of not much importance. But these are the topics which form the basis of the prohibition against transfer of a mere right to sue. If a person indulges in intermeddling with litigation in which he has no legitimate interest, he ought to be discouraged. If a mere right to sue is transferred to such a person, it is not a permissible transfer. It is an abuse of the right of transfer and would lead to an abuse of the right to sue. Common law does not accept in its entirety the doctrine of abuse of rights familiar to continental jurists. But, to the limited extent indicated above, it takes note of the fact that even a legitimate right could be so dealt with as to lead to abuse.

12.28. *Difficulty*—The thesis of the law, taken as an abstract proposition, may be assumed to be productive of no serious difficulty. But difficulty arises when the legislature seeks to give concrete shape to it, and when, after such concrete shape is given to it, courts have to apply the legislative mandate in concrete cases.

At the stage of legislation, the problem is how to distinguish between legitimate and illegitimate dealings with rights. If the transfer of a right of suit is totally disallowed, one would be overhitting the mark, because certain kinds of property are of such a nature that their protection and enjoyment might require action on the part of a third person (other than the transferor and the transferee). A thing *in possession* can, within certain limits, be defended without going to a court of law. Things *not in possession* cannot, however, be so defended. This distinction between two kinds of property, and the special nature of things not in possession, gave rise to the evolution of special rules.

12.29. *Importance*—It is in dealing with the transfer of actionable claims that the question often assumes the greatest prominence. An actionable claim is not a corporeal thing which may change hands by delivery, but represents a right to performance of a duty by another person.

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1 Maine, Early Law and Custom (1901) page 389.

Assignment of a chose in action ready amounts to substituting a new duty to the assignee in place of the duty originally incurred.[1] Originally, choses in action were, in England, not transferable and their assignability became recognised only by slow degrees. Before such recognition, the same result was achieved by novation of the contract by a triangular agreement to which the debtor was a party, or by means of the power of attorney which enabled the assignee to sue in the name of the assignor for his own purpose. These, however, were indirect modes, and were sometimes practically inconvenient, and also involved risk. Direct transfer was recognised by equity in the seventeenth century.[2]

12.30 It is well-knownth at with the growth of commerce, changes in the law regarding property and transfer of property become desirable. The emergence of rules permitting the transfer of actionable claims is really an instance of the response of the law to changing economic conditions. The origin of the prohibition against transfer was directed against the multiplying of contentious suits,—briefly described as maintenance. As commerce increased, the rigour of this original rule had to be modified. Equity first gave its aid, and later, statute law gave effect to the doctrines of equity. It now remains for the courts to apply to the law in its true spirit so as to discourage, on the one hand, gambling in litigation or transactions intended to injure or oppress third persons by encouraging unrighteous suits, at the same time fostering the growith of commerce by recognising those transactions which are entered into in the process of modernisation of commercial activities.

12.31. *Legislative formulation*—The problem, then for the legislature was how to reconcile the desire of the law to discourage trafficking in litigation with its equally keen desire to recognise the existence as well as the transferrability of things not in possession which could be the subject matter of beneficial interest. In India, the legislature has dealt with the matter by—(a) providing for the transfer of things not in possession—which are, really speaking 'claims',—provided the claims are recognised by law—'actionable' according to Indian legislative phraseology, and (b) disallowing the transfer of a "mere" right to sue.

The two have been sought to be harmonised by using the word 'mere'. The use of this word takes note of the fact that in certain circumstances a transfer can be a transfer of a right to sue.

12.32. So much as regards the solution adopted by the legislature, which indicates that the whole matter hinges upon the word 'mere'. The legislature having done its job by using that word, it remains for the courts to apply the criterion in such a manner as to achieve both the objectives to which reference has been made above, namely, prevention of trafficking in litigation and, at the same time, leaving unaffected the right to transfer those claims which are not in the nature of things in possession but are in the nautre of claims enforceable by law. Both the aspects are important.

12.33. *Case law under* s. 6(e)—What has been the attitude of the Courts? Judicial decisions applying this clause fall into three categories—

(a) cases where there could be no doubt that the matter related to actionable claims;

(b) cases where there could be no doubt that the matter related to mere right to sue;

(c) border line cases.

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1 Ames in 3 Harvard Law Review, 337, 339.
2 *Fry* v. *Porter* 1 Mod Report 300.
3 Wilson Anglo Muhammadan Law page 280, para 208, cited in *Gulam Abbas*

12.34. *Madras cases*—Thus,[1] where a sale is set aside, the right of the purchaser to recover the purchase money is an actionable claim, assignable under section 130 and the assignment is not prohibited by section 6(e). It is on this principle, again, that rent which is due is assignable, unlike *mesne profits,* which is a claim in tort.[2]

12.35. *Calcutta cases*—As an example of a case where due attention was paid to the two competing considerations which form the basis of the law, we may refer to a Calcutta case.[3] Certain goods booked by A for carriage and delivered through railways were short delivered and a shortage certificate was issued by the railways to him. The goods had been insured by A, and having regard to the shortage certificate, the insurer paid the value of the goods short delivered. A assigned to the insurer all his rights against the railway company arising by reason of the damage or loss and also granted to the insurer power to take any steps in the insurer's own name and to recover the damage or loss. It was held that such an assignment was not a transfer of mere right to sue for damages. The court construed the assignment as an assignment of the goods short delivered, together with the actionable claims relating thereto.[4]

It may also be noted that the contract of insurance is a contract of indemnity. On payment of the amount of the loss, the assured has an indemnity and the insurer has an equitable right of subrogation to the claims of the assured against the carrier or other person insuring his interest. This equitable doctrine does not, however, give the insurer the right to sue third parties in his own name.[5] In the absence of an assignment, the insurer though subrogated to the rights of the insured can sue only in the name of the insured. But since the legal position is that any damages that might be recovered by the assured would be held by him as a trustee of the insurer to the extent of the payment received by the assured from the insurer, the court would compel the assured to permit the use of his name on the usual terms by the insurer. A subsequent assignment of the right to sue would not, for these reasons, be hit by section 6(e) since it is not a transfer of a 'mere' right to sue. The matter depends primarily on the meaning of the word 'mere' which turns to be crucial in such circumstances.

The assignment enables the assignee to sue in his own name and to enforce the claim which was already held for his benefit by the assignor.[6]

12.36. In a Calcutta case[7] a certified guardian sold some immovable property of the ward to the defendant without the sanction of the District Judge. Subsequently, he sold the same property to the plaintiff with sanction of the District Judge. The plaintiff instituted a suit for recovery of possession on declaration that the previous sale to the defendant was not valid.

It was held that what the plaintiff purchased was not a mere right to sue within section 6, T.P, Act but the entire right of the minor in the property. In a Bombay case,[8] plaintiff sold to defendant three sets of bales

1 *Chinnappa Reddy* v. *Venkateramanappa,* A.I.R. 1942 Madras 209.
2 *Chidambaram* v. *Doraiswamy,* A.I.R. 1916 Madras 974.
3 *Union of India* v. *Alliance Insurance Company,* A.I.R. 1964 Cal. 31 (R. S. Bachawat and A. K. Mukherjea, JJ.).
4 66 Calcutta Weekly Notes 419 approved.
5 *K. M. Prinian Maryam* v. *Benyam & Co.,* A.I.R. 1926 Mad. 544, 550.
6 *King* v. *Victoria Insurance Co.* (1896) A C. 250.
7 A.I.R. 1931 Cal. 131; 34 C.W.N. 948; I.L.R. 58 Cal. 128.
8 32 Bom. L.R. 894; A.I.R. 1930 Bom. 409 (D.B.).

of yarn for three different vayadas at certain rates. Similarly the defendant sold to plaintiff an equal number of bales for the same vayadas. These were cross-transactions between plaintiff and defenant, and no delivery remained to be given and taken, but only adjustments of the rates were to be made. On such adjustments, a certain amount was found due to plaintiff in respect of the three transactions. Plaintiff assigned his right to recover this amount to another person. It was held that the subject of the assignment was a 'debt' and not a mere right to sue within the meaning of section 6(e).

Where a person purchases a tank and brings a suit by virtue of a covenant running with the land, it cannot be said that what was transferred was a mere right to sue.[1]

Where the pre-emptor made a gift of his property, including the right to continue the suit for pre-emption then pending, it was held that the gift, so far as the right of pre-emption was concerned, was not a transfer of a 'mere right to sue.[2]

12.37. *Uncertain amount*—Taking cases at the opposite extreme, the right to recover an uncertain amount cannot be transferred. On this principle, the right to damages accruing after a breach of contract is a mere right to sue for damages.[3] Similarly, a mere right to sue for the remainder of maintenance allowance that may fall due in future is not transferable.[4]

12.38. *Border line cases*—Difficulties, however, could arise in a border-line case. For example, the transfer of a right of action in tort could take place by the effect of a contract of insurance by which the insurer who has paid for the total or partial destruction of the insured goods is subrogated to the rights of the insured. The insurer must sue in the name of the assured, but if the right to sue has been properly assigned to the insurer,[5] the insurer can sue in his own name and it would appear that in such circumstances the right to sue—even the right to sue for damages—has been property assigned to the insurer.

On the other hand, the right to sue for damages on account of fraud cannot be transferred. The right to complain of fraud is not a marketable commodity and if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon the court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savours of it too much for the court to give its aid to the enforcement of the agreement.

12.39. *No change in section* 6(*e*)—The upshot of the above discussion is that the legislative formulation, though not capable of verbal improvement, requires to be applied with some care and after bearing in mind the historical and juristic background in which it was enacted. No changes, are, of course, recommended.

12.39.a. *Res extra commercium*—Before we proceed to the next clause, we may mention that apart from the specific prohibitions contained in the clauses of section 6, there may arise, in effect, a prohibition against transfer because the item sought to be transferred is *res extra commercium*. What can be transferred under the Act must be

1 A.I.R. 1929 Pat. 245.
2 A.I.R. 1922 Oudh 289.
3 A.I.R. 1937 All. 642.
4 A.I.R. 1929 All. 281.
5 *King* v. *Victoria Insurance Company* (1896) A.C. 250. 256.

'property'—section 6, opening sentence goes only to that length. It must be subject matter in regard to which the law recognises proprietary rights. If a right is not recognised by law in its very existence, its transferability is out of question.

12.39.b. *Sacred Bulls.*—Let us draw an example from Hindu law. The ceremony of consecrating a bull (vrishotsarga) forms a part of the sraddha ceremony of the Hindus. This ceremony forms the subject of separate treatises which give the fullest information upon all points. It will be sufficient for our present purposes to state that the ceremony seems to be a survival of the Vedic site of 'gomedha', where the bull is set free instead of being slaughtered.[1] The rationale of this consecration is the use of the animal as a propagator of the breed. *Manu*[2] declared "that no fine shall be paid for (damage done by) a cow within ten days after her calving by bulls (kept for impregnation) and *by cattle sacred to the gods,* whether they are attended by a herdsman or not." The following explanation occurs in Buhler's Notes :—

> "Bulls, "i.e., 'those set at liberty (see VII. LXXXVI) are meant' (Nar., Kull)., which may be met with near many Indian villages and in many towns. 'Cattle sacred to the gods, i.e., either such are set apart for sacrifices," or 'such as are dedicated to temples' (Medh.). The other commentators prefer the second application."

The same text is quoted by Colebrooke,[3] but he gives the further explanation by Kullukabhatta on the words "attended or unattended" of the text of manu :—

> "Since even consecrated bulls are kept by herdsman among cows for the sake of impregnating them, it is possible they may be attended by a keeper."

The marking of the consecrated bulls is an ancient practice, as will be seen from a text of Usanas, quoted by[4] Colebrook : "for elephants and horse, no fine is allowed.....nor for bulls marked with the token of consecration." "Bulls marked" is explained by Ratnakara as "distinguished by the mark of a trident and the like."

12.40. *Rules of Hindu law*—It may be noted that in regard to religious offices and things dedicated to religious purposes, the rules of Hindu Law[5] and Muslim Law[6] agreed with that of the ancient Roman law in rigidly classifying public trusts and property and offices as *extra commorcium*. Such offices were not transferable like other property, and even where a transfer was allowed, that was within certain well defined limitations.

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1 See मधुपर्क Ashwalayana Grihya Sutra, pages 103, 108 and 109; also Colebrooke's Essays, Vol. I. pages 206, 207. Also see अवनतरणी Ashwalayana Grihya Sutra, pages 200, 201 and 209; मूलगं, Ashwalayana Grihya Sutra, page 251, & c.. उत्सर्ग ; in page 260, See वृषोत्सर्ग: Ashwalayana Griha Parisishtafi pages 331 to 333.

2 Manu VIII, 243, See Buhler, page 297 and note.

3 Colebrooke's Digest, Vol. II, page 104.

4 Colebrooke & s. Digest, Vol. II, page 104.

5 *Narayan* v. *Chintamani*, I.L.R. 5 Bom. 393, 396, 397 (Westropp, C.J.).

6 *Shama Charun Roy* v. *Abdul Kabeer*, 3 Calcutta Notes 158.

12.41. *Section 6(f)—To revert to Section* 6, under clause (*f*), a public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable. Public offices are made non-transferable for reasons of public policy. As regards salary of public officers also, the provision is based on obvious considerations of public policy, namely, (i) the salary of public officers is paid in order that they may discharge their public functions efficiently and maintain their dignity, and (ii) public functions, in contrast with private functions, deserve special treatment. Though salary is the property of the person entitled thereto and therefore that person may, in general, have the freedom of disposition thereof, yet, in the case of public servants, other considerations are material.

12.42. *Rationale*—A rule that anyone may renounce and assign his own benefits, applies only to private rights and benefits, and not to a right created on the ground of public policy. An individual cannot waive a matter in which the public have interest.[1] That is the rationale of the prohibition. As the law stands now, this rationale has been considered sufficient to invalidate the transfer of any part of the salary,— and this irrespective of the circumstances which might have impelled the transfer.

12.43. *Limitation*—Though the above discussion shows the width of the prohibition, it should. at the same time, be noted that the clause does not prohibit the incurring of *any monetary obligation* by a public servant. An obligation undertaken by a public servant is not necessarily void merely because it may result in a pecuniary liability. If it is not framed in terms of assignment of salary, it can still be valid.

12.44. *Madras case*—A Madras case[2] must be taken note of at this stage. A was the youngest brother and B the eldest brother. After their father's death, A who was only 10 or 11 years old was educated and brought up by B out of his meagre income. When A had almost completed his college career, he executed an agreement in favour of B. In consideration of the moneys spent by B from B's earnings on account of A and in consideration of the moneys that would be spent by B in future and out of natural love and affection, A relinquished in favour of B, his interest in the joint family properties and further agreed that A would pay B, on account of the maintenance of B himself and the members of his family after A began to earn a salary or income, sums which would represent a *percentage of his monthly income*. When A was appointed to a public office in the Public Works Department, he brought a suit for a declaration that the agreement was void and unenforceable.

It was held (i) that the agreement did not purport to assign the salary of a public officer. It related to the income which *A might earn* after completing his education. The income might be earned either as salary attached to a public office, or as salary in private employment, or as income in independent practice of the profession. The agreement by itself had nothing directly to do with any public office. Further, A was not bound to pay the amount payable under the agreement *out of the salary* or income that he earned every month. He could pay it out of his savings or out of any dowry that he might get or out of gifts of any

1 A.I.R. 1941 Bombay 389.

2 *Ananthayya* v. *Subba Rao*, A.I.R. 1960 Mad. 188. (Subrahmanyan, J.).

other kind. The agreement, therefore, did not of its own force assign, or effect a transfer of any part of A's salary and therefore it was not void under section 6(f), Transfer of Property Act or on any ground of public policy.

(ii) that the payment provided in the agreement was not in the nature of penalty, nor was there anything unconscionable or inequitable in the terms of the agreement so as to grant equitable relief. Nor was it a case for the application of section 74, Contract Act. It appears that at the time when the agreement was made, A was not yet in service.

We need not comment on this decision of the Madras High Court. We may, however observe that the assignment of monthly income may, in certain circumstances, operate practically as an assignment of the salary. On the contrary view, the prohibition incorporated in section 6(f) might, in practice, be defeated in a large number of cases. It is not in every case that a provision for assignment of "income" can be saved. Since the problem is one of correct application of the law and not of any defect in its formulation, we leave the matter at that.

12.45. *Question of maintenance*—The principle underlying section 6(f) is sound, and it is not our intention to recommend any modification of a radical nature. But it is necessary to consider one question which, while preserving the priniciple, suggests itself, having regard to the need to take into account certain realities of life. The precise question to be considered is whether the present prohibition against the transfer of a salary of a public officer should be retained *in toto*, or whether the law should be amended so as to allow the transfer of a part of the salary in certain special situations. The concrete situation which we have in mind is a transfer of salary made by a public officer in favour of his wife or children in order to provide for their maintenance, where the amount or percentage transferred does not exceed the attachable portion of the salary. The attachable portion of the salary is dealt with in section 60(1)(i) of the Civil Procedure Code. Necessity for recognising such a transfer as is posed above might arise where there has been a separation between the spouses, or where there have arisen other special circumstances, necessitating the entering into of an agreement of maintenance. As a part of such an agreement, it might become expedient to make provision for the assignment of a portion of the salary, so as to secure to the transferee payment of the amount promised thereunder.

12.46. At this stage, a question may be raised whether the rules relating to maintenance of spouses have purely legal origin, or whether they have also a sociological importance. In this connection, it is to be pointed out that while, historically speaking, in the common law, these rules might have been the inevitable consequence of the doctrine of unity of legal personality of the spouses,[1] it is not to be forgotten that in modern times their sociological justificaion is the necessity to sustain life, coupled, of course, with the obligation undertaken by the spouses. The obligation to maintain spouses is, so far as England is concerned, now given statutory force.[2] The statutory framework in which that provision is placed—the National Assistance Act—is enough to indicate its sociological importance and we may state that it is for the same sociological consideration that there is

1 Bromley, Family Law (1971), page 401.

2 Section 22(1), National Assistance Act, 1948.

contained in the Code of Criminal Procedure[1] a special procedure regarding proceedings for the maintenance of wife and legitimate and illegitimate children.

12.47. *Need for change*—As the law now stands in India, not only is an agreement for attachment and deduction of the non-attachable portion illegal in case of a public servant, but also an agreement assigning the attachable portion becomes ineffective by virtue of section 6(f). There seems to be some justification for permitting the transfer of so much of the salary of a public officer as is attachable in execution of a decree where the assignment is bona fide for maintenance as stated above of the spouse or child. In such cases, in the first place, there is no serious objection on the ground of public policy—since the proposed amendment would relate only to the attachable portion—and, in the second place, because we should take into account the claims of the spouse as a particular overriding consideration as against the general aspect of public policy, assuming that such aspect can have much importance for the attachable portion.

12.48. *Provision in Civil Procedure Code*—Under the Code of Civil procedure, 1908, section 60(i), as amended, four hundred rupees of the salary of an employee and two-thirds of the remainder is exempt. In addition, there is the following further proviso :—

> "Provided that where any part of such portion of the salary as is liable to attachment has been under attachment whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and, where such attachment has been made in execution of one and the same decree, shall, after the attachment has continued for a total period of twenty-four months, be finally exempt from attachment in execution of that decree."

It is not our intention that the restriction imposed by the Code on the duration of the attachment should be applied to restrict the duration of the assignment. Attachment is an immediate sanction and exerts a certain amount of psychological pressure, which is absent in the case of an assignment. In any case, the proposed provision is intended to benefit the spouse or child, and for that reason, should be unrestricted as regards duration.

12.49. *Recommendation*—Having regard to the considerations mentioned above, we recommend that in section 6(f), an exception should be carved out—say, by adding a proviso[2]—permitting the assignment of the attachable portion of the salary of a public officer for the maintenance of his spouse or children or both.

12.50. *Verbal point*—Finally, a verbal point. The expression "public office" is defined in section 2(17) of the Code of Civil Procedure, 1908, and the expression "public servant" in section 21 of the Indian Penal Code. There is no definition in the Transfer of Property Act of the expression "public office". It may be presumed that for the purposes of the Transfer of Property Act, it is legitimate to apply the definition in the Code of Civil Procedure. This could be usefully provided for.

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1 Section 125, Code of Criminal Procedure, 1973.

2 This is not a draft.

12.51. *Recommendation*—On the above reasoning, we recommend that clause (f) should be followed by a proviso somewhat on the following lines :—

> "Provided that nothing in this clause shall prohibit the transfer of so much of the salary of the public officer as is not exempt from attachment under the Code of Civil Procedure, 1908, where the transfer is intended to provide for the maintenance of the spouse or child of the transferor whom the transferor is bound to maintain by virtue of the provisions of any law for the time being in force or under a decree or order of a court or an agreement."[1]

Further, a suitable definition of "public officer" (applying the definition in the Code of Civil Procedure) be added.[2]

12.52. *Section* 6(g)—Under section 6(g), stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

12.53. *Provision in the Code*—It may be noted that the corresponding provision in the Code of Civil Procedure[3] reads thus :

> "(g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the State Government in this behalf, and political pensions."

It has been held that the gratuity, referred to in this provision of the Code of Civil Procedure, is a bonus allowed by Government to its servants in consideration of past service. It may be allowed to a pensioner in addition to his pension or it may be allowed to a person who is not a pensioner. It is exempt in both cases.[4]

12.54. *Rationale*—In the case of political pensions, two considerations are operative, namely, they were granted in view of considerations of a political nature and those considerations were peculiar to the grantee. In the case of Government servants, the primary consideration of public policy is also two-fold, namely, the pension is granted in order that the pensioner may not have to live in penury or discomfort, and secondly, the ultimate object is that the prestige of the Government should also remain untarnished. Considerations similar to the above have led to the enactment of provisions for exemption from attachment in the Code of Civil Procedure and also appropriate provisions in the Pensions Act. Some points relating thereto will be discussed at the appropriate place.

12.55. *Pensions Act*—The same policy that justifies the prohibition enacted in section 6(g) equally renders invalid any assignment of all pensions—whether political, Civil or military—under the Pensions Act.[5] The policy of prohibiting the transfer of a pension is to insure its enjoyment by the pensioner in comfort. Being an offering made to the recipient in gratitude for his past services, and being almost always less than the salary which the pensioner was accustomed to draw, it is considered right, that its enjoyment shall be assured to the recipient.[6] But, being a limitation on

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1 Para 12.49, *supra*.
2 Para 12.50, *supra*.
3 Section 60(*o*), Code of Civil Procedure, 1908.
4 *Bawan Das* v. *Mul Chand*, (1884) I.L.R. 6 All. 173.
5 Sections 11 and 12, Pensions Act (23 of 1871).
6 Gour.

the rights of the creditor, the term should be construed strictly so as to include only a periodical allowance or stipend granted not in respect of a right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants.[1]

12.56. *Pensions Act*—Sections 11-12 of the Pensions Act, 1871, practically cover the same ground as section 6(g), but there are certain differences. Both deal with pensions of all kinds, but while section 6(g) prohibits their *assignment generally*, section 12 of the Pensions Act prohibits only their assignment before they are "payable"—a term understood[2] to mean "due and demandable by the person entitled".

The leading case is a Madras one,[3] in which the Zamorin of Calicut, who was entitled to a political pension of Rs. 6,000 a month payable quarterly, devised to the plaintiff whatever might be in arrears at the time of his death. The Zamorin died on the 6th August, 1892 before the quarterly instalment became payable. The plaintiff sued for its recovery. It was contended that section 12 was not contravened since the transfer was after accrual of a right to receive payment, though not after the payment was actually due.

The Court overruled the contention and held that the word "payable" referred to the time when the payment was ripe and demandable. It then went on to add that even if section 12 of the Pensions Act did not authorise that construction, section 6(g) of the Transfer of Property Act was in point, as it was more positively worded and prohibited all transfers of political pensions. The Court applied the law in section 6 to the will, since wills amongst Hindus had been treated as developments of gifts.

12.57. *Meaning of pension*—The term "pension" is a relative term and while it is true that the character of non-transferability is not indelibly impressed upon it even after it reaches the hands of the pensioner, still it undoubtedly retains that character so long as it remains unpaid in the hands of the Government, irrespective of whether the intended beneficiary is alive or dead.[4]

12.58. *Recommendation*—It appears to us that the phraseology of section 60(g), Code of Civil Procedure, which is wider, is also more precise and should be adopted. We recommend accordingly[5].

12.59. *Section* 6(h)(1)—Under section 6(h), there is a prohibition against three kinds of transfers, namely, no transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be the transferee.

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1 (a) *Secretary of State* v. *Khemchand*, I.L.R. 4 Bom. 432;
(b) *Lachmi Narain* v. *Mokund Singh*, I.L.R. 26 All. 617.

2 Gour.

3 *Sridevi* v. *Krishnan*, I.L.R. 21 Mad. 105, 108.

4 *Valia Thamburatti* v. *Anjani*, I.L.R. 26 Mad. 67, 91.

5 Para 12.53.

The first sub-clause in clause (h), as is often pointed out, is really an example of circumlocution, because all that it means is that if the nature of the interest sought to be transferred is such that the interest is not transferable, then it may not be transferred. In this sense this clause tells us nothing new. In any case it cannot be applied without an understanding of the nautre of the interest. Recourse, therefore, has necessarily to be had to the nature of the interest, which is determined by the rules of law recognising or creating the particular interest. In illustration of this prohibition, mention is usually made of things which are nobody's property and to the use of which all are equally entitled, such as air, light and water. How far water can be appropriated—for example, water in a pool or tank—is a matter dealt with not in the Transfer of Property Act, but by the relevant rules of other branches of law.[1] In particular, the owner of an artificial watercourse might come to have proprietary rights to the water, and in such a case the water may be the subject matter of private dominion[2].

12.60. *Section* 6(h)(2)—*Unlawful object or consideration*—The second sub-clause of clause (h) deals with an entirely different topic. The prohibition here does not depend on the nature of the interest, but on the unlawfulness of the object or consideration pertaining to the transfer. Whatever be the nature of the interest, this prohibition applies and in this sense this prohibition is *sui generis*, unlike clauses (a) and (g). The expression "object" implies the purpose or intention in an overt act. For example, a person hires a house for a lawful consideration, but with the unlawful object of using it as a gambling house.[3] Here the object is unlawful. Similarly, where money is borrowed for the purpose of marriage of a minor which is prohibited by the Child Marriage Restraint Act, 1929[4] the consideration may not be illegal—the consideration being the loan. But the object is to defeat the provisions of the Child Marriage Restraint Act.

12.61. *Dominant object of legislation to be concerned*—Students of the law of contracts are familiar with difficult questions concerning section 23 of the Contract Act that arise when it becomes necessary to determine whether the object or consideration of an agreement is "unlawful" as defeating the provisions of any law. The dominant purpose of the legislation is to be taken into account in this context. Is the dominant purpose one of imposing a prohibition as a matter of policy, or has the law been passed primarily for facilitation of collection of revenue or for effecting other administrative object? If the conduct, which is now challenged as illegal, was forbidden as a matter of policy, the transaction would be void. If, on the other hand, the legislation infringed was intended merely to prescribe certain terms and conditions for administrative purposes, then a transaction which infringes the law by failing to comply with the statutory requirements may not necessarily be void, although the transgression may be visited with a statutory penalty.

The effect of a transfer in violation of the land ceilings law—a situation more likely to arise in modern times—is discussed in a judgment of the Supreme Court.[5]

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1 *Dorumal* v. *Ramaswami*, I.L.R. 11 Mad. 16.

2 (a) *Inderjit* v. *Lachme*, 14 Weekly Reports 349;
(b) *Debi Prasad* v. *Joynath*, I.L.R. 24 Cal. 865 (P.C.).

3 Gour.

4 *Chandrasrinivas Rao* v. *K. Rajaram Mohan Roy*, A.I.R. Mad. 579.

5 A.I.R. 1968 S.C., 1358; (1969) 1 S.C.J. 279.

12.62. *Effect of illegality on parties*—For the present purpose, it is not necessary to discuss in detail the various situations in which object or consideration becomes unlawful. From the practical point of view, the more important question relates to the effect of the illegality on the rights of the parties to the illegal transfer. The law on the subject is complex and not very satisfactory. When one or other of the parties seeks to enforce or repudiate such a transfer, the question how far that party will succeed depends on several factual elements—which is the reason why the law is complex. These factual elements acquire relevance by reason of certain rules of law—some of them based on equitable doctrines—which we shall discuss in due course.

The effect of the provisions relating to illegality in section 6 is not completely stated in the section. Even though the section provides that the transfer cannot be made, that does not mean that if possession has been delivered, it can be recovered by the transferor.[1] The transferee (except in certain special situations) is allowed to retain the property transferred. This is the effect of another rule of law, namely, that the court will not assist a person taking advantage of his illegality. If possession has been given, the transferor cannot recover back what he has transferred, except in certain special cases which will be dealt with in due course.

12.63. *Malaya case*—Let us illustrate this. The Privy Council, in an appeal from Malaya, held that where two persons agreed together to a conspiracy to achieve a fraudulent or illegal purpose and one of them transfers property to the other in pursuance of the conspiracy, then, so soon as the contract is executed and the illegal purpose is achieved, the property (be in general or special) that has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin.[2] In that case the transfer of a lorry was made in Mallacca (Malaya) in violation of legislation relating to road transport prohibiting the transfer in question, that is to say, the transfer of a registered motor vehicle without a written permit from the Registrar.

Subsequently, the seller of the lorry had taken it back from the purchaser and refused to return it and the action by the purchaser was against the seller in detinue.

Title was held to have passed to the transferee. The reason is that the transferor having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the object with which he did it and the transferee, having got the property, can assert his title against all the world not because he has any merit of his own, but because there is no one who can assert a better title. The court has no power to confiscate the property. To quote Lord Eldon L.C., "Let the estate lie where it falls"[3]

While the matter, no doubt, is governed by statute in India, the principle that the transferor cannot recover in the circumstances mentioned above, would be true of Indian law also.

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1 Mulla (1973), Page 77.

2 *Sajan Singh* v. *Sardara Ali*, (1960) 1 All England Reports 269, 272 (P.C.).

3 *Muckleston* v. *Brown*, (1801) 31 English Report 19, 34.

12.64. *Section* 84, *Trusts Act*—The circumstances in which the transferor can recover are dealt with in the Trusts Act. The general rule under section 84 of the Trusts Act[1] is as follows :—

> "84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

For the present, we shall not enter into the question whether section 84 is exhaustive of all the special situations. But it is fairly well settled that it is not in every case that the transferor who is party to an illegal transfer can sue on the basis of illegality. That there are limitations is not now doubted, even in India.

12.64A. We take up, for the present, the limitations contained in section 84, Trusts Act.

In the first case, there is a *docus poenitentiae* until the fraud is carried out and the transferor may sue to recover his property.[2] The second case is where the transferor is not so guilty as the transferee. In the analogous case of contract, section 27(1)(b) of the Specific Relief Act, 1963, allows a contract to be rescinded if the defendant is more to blame than the plaintiff. As to the third case mentioned in section 84, Trusts Act, its application again depends on the object underlying the legislative prohibition.[3]

12.65. *English law—Reason for bar*—In English law, ordinarily speaking, a person cannot recover back money paid under an illegal contract, or property transferred by him under such a contract. There may be no strong reasons against recovery, but there are no strong reasons justifying it. The principle seems to be that as there is no strong reason to act, inertia prevails.

12.66. *Exceptions*—To this general rule, there are exceptions in special cases. These may be enumerated as—

(a) class-protection "Statutes";

(b) oppression;

(c) fraud;

(d) repudiation of illegal transaction in time by a voluntary act.

(e) cases where the plaintiff does not rely on the illegal transaction as such for recovery, and the cause of action is based on any other ground.

*Examples of this are*[4]—

(i) Expiry of the period of hire in case of goods let out on hire under illegal contract;

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1 Section 84, Indian Trusts Act, 1882.

2 *Kedar Nath Motani* v. *Prahlad Rai*, (1960) 1 S.C.R. 861; A.I.R. 1960 S.C. 213; (1960) S.C.J. 1072.

3 *Qadir Ruksh* v. *Hakim*, A.I.R. 1932 Lah. 503 (F.B.).

4 The categories are based on Troitol, Contracts (1966), pages 342 to 350.

(ii) Money deposited with a stake holder under an illegal wager;

(iii) Expiry of illegal lease;

(iv) Establishment of a title without reference to the contract or its illegality.

12.67. The case where there has been fraud or oppression,[1] on the part of one person, is really an instance of a situation where the guilt is not equal—not a case of *par delictum*. "It can never be predicated as *per delictum* where one holds the rod and the other bows to it."[2]

In particular, this aspect might become important in rent restriction cases where the tenant is made to pay an illegal premium in order to obtain a lease or sub-lease. This is so even where there is no provision in the relevant legislation enabling the premium to be recovered back. Courts have so held,[3] on the ground that the duty of observing the law being placed on the shoulders of the landlord *for the protection of the tenant*, the parties were not *in pari delicto*.

As regards the case of repudiation,[4] the law encourages repentance and therefore, assists a man who has paid money under an illegal contract, provided he repudiates the transaction before the illegal purpose is carried out. Such repentance must be proved, and assistance is not given to a party who is prevented from fulfilling the illegal purpose by the refusal of the other party who refuses to co-operate.[5]

12.68. *Locus Poenitentiae*—In a case in which the transaction is still inchoate, or the grantor still retains a *locus poenitentiae*, the formal act may be relieved against by reference to the real intention of the parties, the reason being that in such cases the violation or infringement of the law had not been completed.[6]

Hence, when an illegal purpose has been effected by a transfer of the property, the transferee is not to be treated as holding it for the benefit of the transferor,[7] and the transferor is ever afterwards precluded from proving the real nature of the transaction.[8]

12.69. Incidentally, this aspect is not clearly brought out in section 84 of the Trusts Act,[9] where that section refers to the fact that such purpose is not carried into execution apparently because the provision in the Trusts Act might have been based on the observations of Mellish, L. J. in a case[9-a] reported in 1876. His observations were as follows :—

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1. Para 12.66 (b) and (c), *supra*.

2 *Smith* v. *Cuff*, (1817) 6 M & S 160, 165 (Lord Ellenborough).

3 *Kiriri Coton Co. Ltd.* v. *Ranchordas Dewani*, (1960) 1 All E.R. 179, 180 (P.C.).

4 Para 12.66 (d), *supra*.

5 *Bigos* v. *Bausted*, (1951) 1 All E.R. 92.

6 *Sham Lall* v. *Amarendro Nath*, I.L.R. 23 Cal. 460; and the cases therein cited.

7 (a) *Chenvirappa* v. *Puttapa*, I.L.R. 11 Bom. 708, 719;
(b) *Tamarasherri* v. *Maranat Vasudevan*, I.L.R. 3 Mad. 21.

8 (a) *Goberdhan* v. *Ritu Roy*, I.L.R. 28 Cal. 962;
(b) *Kali Charan* v. *Basik Lal*, I.L.R. 23 Cal. 962 note.

9 Para 12.64, *supra*.

9a *Taylor* v. *Bowers*, (1876) 1 Q.B.D. 291, 300.

"If money is paid for goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods *may recover them back before the illegal purpose is carried out.*"

These are too wide if divorced from the facts. The transferor in that case took proceedings in time thus showing repentance.

12.70. *Discretion*—It would appear that where a person who has transferred property for an unlawful object or consideration seeks to rescind the transfer the courts have a discretion in the matter. This discretion is not conferred in so many words by statute, but can be inferred from certain statutory provisions and judicial decisions. The statutory provisions of principal relevance are sections 27, 31 and 34 of the Specific Relief Act, 1963 and section 84 of the Indian Trusts Act, 1882[1]. The judicial decisions on the subject emphasise the equitable principle which has been followed in cases where the plaintiff seeks the assistance of the court to regain property after transferring it for purposes of illegal activities.

12.71. Although the provisions in the specific Relief Act, referred to above, do not in so many words apply to transfers and are framed with reference to agreements, courts seems to have applied them to transfer either directly or by analogy.[2]

12.72. *Other limitation—Calcutta case*—We have so far dealt with certain special situations in which courts allow or refuse a transferor to recover property illegally transferred.

Are there any other situations in which the transferor can recover? Where the owner of a house lets out the property to the defendant for the immoral purpose of running a brothel, the executors and trustees of the will of the owner, who were not *in pari delicto* or *in particeps criminis*, it has been held[3] can sue to eject the defendant on the basis that the transfer is void and the court will accord relief to the claimants.

P. B. Mukerji J. held that *Averst* v. *Jinkins*, (1874) 16 Eq. 275 had been misapplied and misunderstood in many cases in India.

It is elementary that property can be transferred only by a person who owns it or who, though not owning it, is authorised to do so. A transfer by any other person has no legal effect—that is, of course, a rule subject to certain qualifications.[4] The general rule is that no man can confer a better title than that which he himself has. However, occasionally, by either accident or design, a testator or transferor gives his own property to a beneficiary and purports to give some of the beneficiary's property to a third party. In this case, the beneficiary becomes subject[5] to a general principle that a person cannot take under a will without conforming to all its provisions.[6] If, therefore, he is to take the testator's or transferor's, it was held that the principle in that case should not be

1 Para 12.64, *supra*.

2 *Kamarbai* v. *Badri Narain*, (1976) 78 Bom. L.R. 579 (Vaidya and Shimpi, JJ.).

3 *Pranballav*, A.I.R. 1958 Cal 713, para 44, 114, 117 (P. B. Mukherji & R. S. Bachawat, JJ.).

4 E.g. see sections 35, 37, 38, 41, 43, Transfer of Property Act, and Certain provisions in the Sale of Goods Act.

5 Mellows, Law of Succession (1973), page 485.

6 Corrington v. Codrington, (1875) L.R. 7 H.L. 854, 861, 862 (Lord Cairns).

understood as laying down an invariable and inflexible rule of disqualification for a plaintiff seeking the aid of court. The principle of that case should be understood with the limitation referred to by Lord Selborne himself in that judgment. The true boundaries of *Averst* v. *Jenkins,* when applied in India were rightly indicated by Sir Subramania Ayyar, J. in I.L.R. 28 Mad. 413 and Lokur, J. in A.I.R. 1947 Bom. 198 Refusal by the courts to grant relief on the basis of such maxims as *ex turpi cause non oritur actio* or *pari delic* to or *particeps criminis* is based on grounds of public policy and therefore if the same or higher public policy demands in a particular context that relief should be given, then such maxims should not be used any more as a bar and the courts should not deny relief. The rule in *Averst* v. *Jenkins* should never be used to (a) defeat statutes like section 6(h)(2) of the Transfer of Property Act, (b) make the plaintiff liable to prosecution, conviction and punishment under such statute as the Bengal Suppression of Immoral Traffic Act. and (c) violate the express prohibition of the Constitution such as Article 23 saying that traffic in human being is prohibited. This rule in any event should not be extended to the class of innocent trustees and executors who are administering the estates under orders of court.

12.73. Bachawat, J. agreed, but his reasoning was slighty different. In English law—(a) A completed transfer of property made under an unlawful agreement or for an unlawful purpose is valid at law. (b) The title so acquired is protected and enforced and may be used by the transferee both as a shield and as a weapon of offence. (c) In the absence of some special ground of interference a Court of Equity will not on the ground of illegality set aside a transfer valid at law and will let the estate lie where it falls. (d) *Averst* v. *Jenkins,* (1874) 16 Eq. 275 laws down the principles upon which a Court of Equity may or may not set aside such a transfer.

The case of *Averst* v. *Jenkins,* (1874) 16 Eq. 275 has no application where the transfer is void.

In Indian law a transfer for an unlawful object or consideration within the meaning of section 23 of the Contract Act is prohibited by section 6(h), clause 2 of the Transfer of Property Act. Such a transfer is void and need not be set aside.

In Indian law the transferee cannot recover the property on the strength of such a transfer.

12.74. In Indian law, according to Bachawat, J., the transferor claiming that the transfer is void may sue to recover the property on the strength of his original title and in general he may be given relief though he is *particeps criminis* in the following cases :

(a) Where his case falls within one of the three exceptions recognised by section 84 of the Indian Trusts Act, or

(b) (i) Where public interest or the interest of third parties requires that the relief should be given, or (ii) where denial of the relief may defeat a legal prohibition, or (iii) where the transaction is such that it ought to be allowed to stand on grounds of public policy.

Relief may be given upon such terms as the justice of the case may require.

It is an open question whether the transferor should be given relief under other circumstances also.

12.75. According to Bachawat, J., further when an instrument is void on account of illegality not appearing on the face of it and the transaction is such that it cannot stand on grounds of public policy, the Court will decree its cancellation at the suit of the *particeps criminis* on equitable terms. The power of the Court to decree cancellation of void instruments of transfer must be exercised in accordance with sections 39 to 41 of the Specific Relief Act. The power of the Court to decree cancellation and rescission of unlawful contracts in writing is regulated by sections 35(b), 38 and 39 to 41 of the Specific Relief Act.

Reasons of public policy allow the defendant to take the plea of *particeps criminis*. Greater reasons of public policy may allow the plaintiff to repel the plea.

12.76. It would appear that the decision in the Calcutta case should be confined to the special facts of the case. There were several extraordinary features. Illegality in this case was represented by conduct which, if not rectified, might have involved innocent parties in a criminal prosecution. There was also the constitutional directive and further the fact that the executors did make their repudiation at the earliest possible opportunity available to them.

12.77. *Section* 24, *Contract Act*—It may be stated that the Transfer of Property Act contains no provision corresponding to section 24 of the Contract Act, and judicial decisions on the subject do not lead to a very definite position,[1] in this regard. Where, therefore, a transaction comprises two transfers for one consideration and the consideration is lawful but the "object" of one of the transfers is void, it does not necessarily follow that the transfers are all void.

In the Allahabad case, Mukherjee, J. has discussed at length the applicability of section 24 of the Contract Act to section 6(h) of the Transfer of Property Act and has taken the view that section 24 does not apply. He has criticised the contrary view taken in an earlier case.[2] In the same case, Suleman, J. agreed with him.

12.78. *No change*—Having considered all aspects of the matter, we have come to the conclusion that the clause does not need any amendment, and it may be expected that the provisions of law—statutory and the non-statutory—which should be read along with the section will be kept in mind by those concerned with illegal transfers.

12.79. *Section* 6(h)(3)—This takes us to section 6(h)(3), under which a person who is disqualified to be a transferee cannot be a transferee—really a self evident proposition which has been enacted only in order to make the section complete as far as possible. The question who can be a transferor is dealt with in section 7. The question who can be a transferee is not dealt with in a general way in the Act, except that certain persons are prohibited from purchasing actionable claims. The answer

1 *Dip Narain* v. *Nageshar*, A.I.R. 1930 All. 1.

2 *Kanhai* v. *Tilak* (1912) 16 Indian Cases 542.

to this question must therefore be sought elsewhere. Even other legislative measures do not comprehensively deal with the subject, though the Code of Civil Procedure has certain provisions restricting purchases in execution of a decree at the instance of specified persons.

Legal disqualifications in regard to being a transferee might be imposed either in order to protect the interest of a transferee who is deemed not to be competent enough to look after his interest, or in order to prevent a conflict of interest with duty, or in order to prevent trafficking in litigation or for certain other reasons of policy.

12.80. *Minors*—The question has often been discussed how far a minor can be a transferee. The correct position seems to be this— that a minor, though he cannot transfer property, can receive benefits under a transfer. Where therefore there is no contractual obligation undertaken by the transferee, a minor can be a transferee. Cases, however, where the transferee undertakes an obligation—e.g., the case of a lease—stand on a different footing. A minor cannot sign such instruments. The position is the same as regards other persons incompetent to contract.

12.81. Some of the statutory provisions prohibiting the purchase of property by specific persons, contained in the Act[1] or in the Code of Civil Procedure,[2] are based on specific reasons.

Chancellor Kent, adopting Blackstone's definition says,[3] that it is a principle common to the laws of well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. It is called "maintenance" because one man gives or delivers to another—plaintiff or defendant in an action—a sum of money or other things to maintain his plea, or takes great pains for him when he has nothing to do therewith.[4]

12.82. *Section* 6(h)(3)—*Disqualified transferees.*—The law against the transferability of property to a person legally disqualified to be a transferee is, in part, a branch of the law against maintenance and champerty. For it is to discourage the malpractices which arose out of the law officers trafficking in questionable claims that the early statutes against champerty were directed.[5] Thus, in England, it was provided by the Statute of Westminster that "no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters; having in the King's Courts, for lands, tenements or other things, for to have part or profit thereof by covenant made between them; and he that shall be punished at the King's pleasure."[6] Another statute passed in the same reign further extended the scope of the prohibition by prescribing that "the Chancellor, treasurer, justices, nor any of the King's Council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the King's house, clerk ne-lay shall not receive any church, nor advowson of a

1 Section 136.

2 Order 21, Rule 78.

3 Kent's Commentaries, Part VI, Lecture 76, quoted in *Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1, 5, 6.

4 Adapted from Terms de La Ley, as quoted in *Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1, 5, 6.

5 Gour.

6 3 Edw. I, c. 25.

church, land, nor tenement in fee, by gift, nor by purchase, nor to far, nor by champerty, nor otherwise so long as the *thing is in plea before us, or before any of our officers;* nor shall take no reward thereof."[1]

12.83. This statute was again extended by another which ordained that "The King wills that no officer, nor any other (for to have part of the thing in plea) shall not take upon him the business that *is in suit;* nor none upon any such convenant shall give up his right to another."[2] The penalty of attainder was provided for disobedience "but it may not be understood hereby that any person shall be prohibited to have counsel of pleaders, or of learned men in the law for his fee, or of his parents, or next friends."

12.84. A similar prohibition is separately and more specifically enacted by the Act[3] and the Code of Civil Procedure,[4] Section 136 of the Act enumerates the class of persons legally disqualified to be transferees under which judges, legal practitioners, mukhtars, clerks, bailiffs and other officers connected with courts of justices are disqualified from buying any actionable claim.

Under Order 21, Rule 73 of the Code of Civil Procedure, 1908, no officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

We have no further comments on section 6(h)(3).

12.85. *Section* 6(i)—Section 6(i) provides that nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

This clause needs no comments.

12.86. *Recommendation to add Explanation to section* 6—In order to avoid any misapprehension that every item enumerated in section 6 is property, we recommend that an Explanation (or other appropriate provision) should be added to section 6 to the effect that nothing in this section shall be construed as implying that every thing mentioned in a clause of the section is property.

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1 13 Edw. I, c. 49.

2 28 Edw. I, c. 11; 1 Rich. II, c. 4, extended the restriction to all persons.

3 Section 136.

4 Order 21, Rule 73, Code of Civil Procedure, 1908.

## CHAPTER 13

## *PERSONS COMPETENT TO TRANSFER*

13.1. *Persons competent to transfer*—The subject of persons competent to transfer is thus dealt with in section 7—

> "7. Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force."

13.2. *Contract Act*—Section 11 of the Indian Contract Act, 1872 defines persons who are competent to enter into contracts. It provides "Every person is competent to contract who if of the age of majority *according to the law to which he is subject,* and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Thus, excepting persons who are of unsound mind, all adults may enter into any lawful contracts, unless they are disqualified from contracting by any law to which the contracting party may be subject. The disqualification need not be explicit, but may be implied from a reasonable construction of the law.[1] One who is usually of unsound mind but occasionally of sound mind, may enter into a contract when he is of sound mind,[2] but not when he is of unsound mind.

13.3. *Majority Act*—Under the Indian Majority Act,[3] which applies to all persons domiciled in India, the period of minority lasts until the completion of the eighteenth year. This holds good for persons of either sex, and supersedes the personal and local laws by which the question was formerly decided.[4]

13.4. *Majority Act*—Under section 3 of the Indian Majority Act, 1875, first paragraph, every person domiciled in India shall be deemed to have attained his majority when he shall have completed the age of eighteen years and not before. We do not quote the second paragraph of the section relating to minors of whose person or property or both a guardian has been appointed by the court or of whose property the superintendence is assumed by a court of wards. So far as the question of capacity is concerned, it seems to be well-established that it is domicile which governs capacity to contract.[5-6]

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1 ***Dhunput*** v. *Shoobhudra*, (1882) I.L.R. 8 Cal. 620.

2 Section 12, Indian Contract Act, 1872.

3 Indian Majority Act, 1975.

4 ***Reede*** v. *Krishna*, I.L.R. 9 Mad. 391;
***Sarat Chandra*** v. *Foreman*, I.L.R. 12 All. 213.

5 ***Kashiba*** v. *Siripat*, (1895) I.L.R. 19 Bom. 697.

6 ***Dhanraj Mull*** v. *Shamji*, A.I.R. 1961 S.C. 1285.

13.5. *Domicile*.—In cases where the matter is governed by private international law, special rules come into existence and domicile becomes important, for the purpose of determining the capacity to contract.

For the present purpose, we shall leave aside contracts of immovable property situated outside India as of no consequence for the purposes of the Transfer of Property Act. In relation to other contracts, domicile may assume great importance. This is by reason of the fact that according to at least one theory,[1] the law of domicile governs the capacity to contract. In fact, it is this view that has been recognised in section 3 of the Indian Majority Act, 1875.

13.6. *Allahabad case*—The importance of domicile is illustrated by an Allahabad case[2] in which a European, not domiciled in India, but only temporarily residing in India, was held not to be governed by the Indian Majority Act.

13.7. *Theories in English law*—In English private international law, the position is not settled beyond doubt, but one view currently accepted is that the law of domicile governs the contractual capacity of a person.[3] In India, this view has been recognised in section 3 of the Majority Act.

According to another theory, the law of the place of contract may govern the contractual capacity. According to yet another theory it is "the proper law" which should be applied. The test of proper law here is an object test and—speaking broadly—means the law of the country with which the contract is most substantially connected. Whichever view is correct, this controversy is not of much importance for the present purpose, because it primarily pertains to the interpretation of the Indian Contract Act, 1872, as read with the Indian Majority Act, 1875. So far as section 7 of the Transfer of Property Act is concerned, the matter is sufficiently stated by the requirement that there must be competence to contract.

13.8. *Importance*—That the age of majority is determined by the law of domicile is an aspect which becomes important where the contract is entered into in India by a person not domiciled in India and the law of the country where that person is domiciled, prescribes an age of majority different from that to which the Indian Majority Act applies.[4] This aspect was of particular importance in relation to Englishmen, since, in England, until the age of majority was lowered,[5] the age was higher than in India--21 years.

13.9. *Artificial persons*—That contractual capacity and the capacity to transfer property is subject to any law for the time being in force is an aspect of particular importance in relation to artificial persons, such as,

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1 Cheshire. Private International Law (1970), page 221.

2 *Rohilkand Bank* v. *Row*, I.L.R. 7 All. 490.

3 Cheshire. Private International Law (1970), page 221.

4 For a comparative survey, see Hartwig in 15 I.C.L.Q. 780.

5 Section 1, Family Law Reform Act, 1969, (Eng.)

corporations, and also as regards the trustees of religious and charitable endowments and, of course, the capacity of a person to transfer property may be limited to certain circumstances in other cases, as, for example, in the case of a Hindu widow under Hindu law as unmodified by statute[1].

13.10. *Trusts Act*—Finally we may note that section 7 of the Transfer of property Act is closely analogous to section 7 of the Indian Trusts Act.[2] The competence to transfer property under section 7 and the competence to create a trust under the Trusts Act are both co-incident with the competence to contract.

13.11. *No change*—The above discussion necessitates no change in section 7.

## CHAPTER 14

### *ACQUISITION OF PROPERTY OF HOMICIDE*
### *SECTION 7A* (PROPOSED)

14.1. *Effect of death on transfer*—One aspect of public policy which is not dealt with expressly in the Act may now be discussed in view of its ethical interest and juristic importance. The precise question for consideration is this—can a person who has been guilty of the culpable homicide—(whether amounting to murder or not) of another person acquire, (otherwise than by succession), an interest in property where the acquisition of such interest is, by the terms of a transfer, conditional on the death of the person who is the victim of the culpable homicide? Acquisition of interest (otherwise than by death) conditional on death could be envisaged in several circumstances even apart from succession. Examples will be given later.[1] For the present, let us consider a few theoretical and general aspects.

14.2. The principle *Nullus commodum capers potest de injuria sus propria* (No man can take advantage of his own wrong[2-3]) is familiar to lawyers.

It is a well-established general principle that a person who kills another is not entitled to enjoy any property which he would otherwise have acquired as a result of that death.[4-5] We are now concerned with the application of that principle to the law of transfer.

14.2A. *Equity*—"Equity does not demand that its suitors shall have led blameless lives."[6] What bars the claim is not a general depravity, but one which has "an immediate and necessary relation to the equity sued for".[7] We are now dealing with the question whether there is justification for applying this principle in the law of transfer.

14.3. This is not a mere question of abuse of existing rights. The question is whether rights should be allowed to be acquired under a transfer where their acquisition offends the deepest moral sentiments of the community. No doubt, it is not possible to give effect in the legal system to every norm of ethics. Law presents itself as an external regulation of human conduct.[8] Ethical theory is concerned with the question of the content of a man's own will, in whose heart there must be no opposition of being and seeming.[9] Law is neither ethics nor religion, it is true. But the law is not safe when it is totally diverced from ethics.[10] Such ethical

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1 Para 14.14, *infra.*

2 Chadwick, "Tostator's Bounty to his slayer" (1914) 30 L.Q.R. 211.

3 Toohey, "Killing the goose that lays the golden eggs" (1958) 23 Australian LJ. 14.

4 T. C. Youdan, "Acquisition of Property by Killing" 89 L.Q.R. 235.

5 *Re Callaway,* (1956) Ch. 559.

6 *Loghran* v. *Loughran,* 292 U.S. 216, 229 (1934), per Brandeis, J.

7 *Dering* v. *Earl of Winchelsea,* (1787) 1 Cox Eq. 318, 319, 320; 2 W. & T.L.C. 488 489, per Byre C. B.; *Moody* v. *Cox,* (1917) 2 Ch. 71, 87; 34 T.L.R.

8 Rudolf Stammler, Justice, page 441.

9 Rudolf Stammler, Justice, page 441.

10 Dr. Nathniel Micklem, Law and the Laws (1952). page 59.

mandates as are universally accepted, and as are immediately relevant to the subject, deserve consideration.

14.4. *Position in law of Succession*—Let us first refer to a few branches of the law where the principle that a man shall not profit by killing has been given concrete legal recognition. In the law of Succession it is well recognised that it is a rule of public policy that a person shall not be allowed to benefit from his crime. If, therefore, A makes a will in favour of B, and B shoots A dead. B is not allowed to claim the property to which he would otherwise be entitled under the will. Likewise, he is not entiled to claim under an intestacy in such circumstances.

In England, before the Forfeiture Act, 1870, the interest of a murderer was forfeited to the Crown, so that where a fellow was a beneficiary under the will, the murderer's interest was forfeited, by reason of this rule. The Forefeiture Act, 1870 abolished the common law as to the property of the felon and since then the basis of the rule has been altered. It was in 1892 and Fry, L.J. formulated the rule thus[1]—

> "It appears to me that no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. In other words, the rule is expressed in terms that the law will not lend its aid to assist a criminal to recover. It left open the question whether the executors could nevertheless pay."

14.5. The Indian Succession Act does not contain any specific provision on the subject. But it should be noted that the Act does not embrace the whole field of intestate succession for persons of all communities. In this sense, it does not deal exhaustively with the law of succession. In any case, such Acts should be read[2] as not intended to affect paramount questions of public policy.

14.6. *Position in Hindu law*—In regard to Hindus, this was the position[3] in respect of Hindus, even before the passing of the Hindu Succession Act.

14.7 It was held by the Privy Council[4] even before the Act that the "High Court has rightly *decided* that the principles of *equity*, *justice* and *good conscience* exclude the murderer." The Privy Council also laid down that "statutes regulating heirship or descent, or giving force to wills should be read as not intended to affect paramount questions of public policy or depart from well settled principles of jurisprudence."

Amongst the persons disqualified to succeed in Hindu law were those criminally responsible for the death of the propositus.[5] This position was not modified by the Hindu Inheritance (Removal of Disabilities) Act, 1928. It was reinterated by the Hindu Succession Act, 1956. Section 25 of that Act expressly disqualifies a murderer.

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1 *Cleaver* v. *Mutual Reserve Fund Life Association*, (1892), 1 Q.B. 147.

2 Para 14.7 *infra*.

3 *Kenchava* v. *Girimallappa*, A.I.R. 1924 P.C. 209.

4 *Kenchaya* v. *Girimallappa*, A.I.R. 1924 P.C. 209, 211.

5 *Chanda* v. *Chameli*, A.I.R. 1962 Punjab 162, commented upon in A.I.R. 1963 Journal 5, 6.

14.8. According to Hindu law, then, even before the passing of the Hindu Succession Act, no heirship to another can be claimed by or through a person who has been a privy to his murder. This rule is one of public policy. It has been given effect to by the Privy Council, relying on ancient texts.[1]

*The Hindu Succession Act*—The Hindu Succession Act now provides as follows [2]:

> "25. Murderer disqualified,—A person who commits murder or abets the commission of murder, shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder."

14.9. The rule amongst Muslims is the same.[3] The rule of law is that he who kills another cannot take a legacy from the deceased. in Hanafi law this provision is applied with great severity, and the manslayer is excluded whether the homicide is intentional or not. In Ithna "Ashari law, the more logical view is taken and only intentional homicide leads to exclusion, but the Fatimids have apparently adopted the Hanafi rule.[4]

*Rule in England*—The general rule[5] in England is that a person may not recover *a benefit resulting from his own crime.*[6]

As early as 1892,[7] it was, in England, laid down that a murdered forfeits all benefits under the will of his victim.[8] In 1914, this principle was extended from murder to man-slaughter.[9] In regard to intestacy, it was decided in 1935 that the same rule of public policy applies.[10]

14.10. *View of Ames*—Ames, in his famous study "Can a Murderer acquires. Title by his Crime and keep it;"[11] said that three results were possible where a person acquires property by killing: (i) the legal title does not pass to the killer; (ii) the legal title passes to the killer, and he may retain it in spite of his crime; or (iii) the legal title passes to the killer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition.

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1 *Narada,* II-13, 31 cited in Mitakshara II.x.3 relied upon in *Kenchava* v. *Girimallappa,* A.I.R. 1924 P.C. 209.

2 Section 25, Hindu Succession Act, 1956.

3 Tyabji, Muslim Law (1968), pages 762—820, 865.

4 Fyzee, Outlines of Muhammadan Law (1974), citing Tyabji, 682; Wilson 478; Fitzgerald 170; Fat. Law 446.

5 Halsbury (3rd Edn.), Vol. 1, page 10, para 15.

6 (a) *Boresford* v. *Royal Insurance Co. Ltd.,* (1936) 2 All. E. R. 1052; recsd. C.A. (1937) 2 All E.R. 243; affd. H.L., (1933) 2 All E.R. 602; (1938) A.C. 586, 107, L.J.K.B. 464; 158 L.T. 459

(b) *Cleaver* v. *Mutual Reserve Fund Life Association,* (1892) 1 Q.B. 147;

(c) *In the Estate of Crippen,* (1911) Probate page 108;

(d) *Dixon* v. *Sutten Heath & Lea Green Colliery Ltd.,* (No. 2) (1930) 23 B.W.C.C. 135 (C.A.); Halsbury, 2nd Ed. Vol. 34, page 865(i).

7 *Cleaver* v. *Mutual Association,* (1892) 1 Q.B. 147.

8 See Ames, Lectures on Legal History, page 310.

9 *Re Hall,* (1914) Probate 1.

10 *Re Sigsworth,* (1935) Ch. 89.

11 Ames, Lectures on Legal History, pages 310-311.

14.11 *No title passes*—English courts[1] have rejected the second possibility and have generally considered that the killer does not gain legal title. However, as to the theoretical basis for a deprivation, there are two methods that have been used to justify this result in Anglo-American law. Both methods are sometimes employed in the same judgment and the difference between them is more superficial than real. The first approach is to say that all laws—whether made by statute or judicial precedent—must conform to a "higher law". The second approach is to interpret the law so as to make it conform to the judge's conception of what it should be. A case which is a good example of the former approach is *Riggs* v. *Palmer*[2] where the New York Court of Appeals held that a legatee did not gain title to property which he would have received as the result of murdering the testator.

Earl J. observed that there are certain principles that "have their foundation in universal law administered in all civilised countries" and that "all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law."

14.12. *Position in Commonwealth*—The same view is accepted in—

(b) Australia,[4]

(b) Australia,[4]

(c) New Zealand.[5]

14.13. *Position in U.S.A.*—In many states in the U.S.A. there is legislation dealing with the question.[6] The restatement of Restitution provides *that a person should not be allowed to acquire property* by murdering another.[7]

In some jurisdictions in the U.S.A. motive is material[8] before the disqualification can attach.

14.13A. *Need for change*—Notwithstanding the absence of a statutory or special provision regulating the consequences of such action on the part of a transferee, it would appear that the established usages of the community should be taken as furnishing a supplemetary criterion for deciding the legal position. A recognition in an undiluted form of the power to dispose of property and the power to take interest in property under a disposition, unrestrained by the considerations of ethics, would be undesirbale in the particular situation which is now under consideration.

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1 T. G. Youdan, "Acquistion of Property by Killing", 89 L.Q.R. 235.

2 *Riggs* v. *Palmer,* (1889) 115 N. Y. 506, 22 N. E. 188, 190 (New York Court of Appeals).

3 (a) *Re Johnson* (1950) 2 D.L.R. 69 (*Manitoba*);
(b) *Re Pupkowaki,* (1957) 6 D.L.R. 2d 519 (B.C.);
(c) *Schobell* v. *Barber,* (1967) 59 D.L.R. 2d 519 (Ont.).

4 (a) *Re Jane Ticker,* (1920) 21 S.R. 176 (N.S.W.);
(b) *Re Sangal,* (1921) V.L.R. 355.

5 *Re Cash,* (1911) 30 N.Z.L.R. 577.

6 See Scott on Trusts (3rd Ed.), Section 492; Wade, "Acquisition of Property by Wrongfully Killing Another—A Statutory Solution".

7 Restatement of Restitution sections 187—189.

8 Case Comment (1914), 28 Harvard Law Rev. 426.

It is to be noted that in the case of a gift, Manu declared that a gift induced by force, possession by force and document obtained by force, in short, everything brought about by force should be regarded as null and void.[1] No doubt, Manu was peaking of the immediate instrument of gift which was obtained by force. But we are concerned, at the moment, with the moral principle underlying this mandate. If force or fraud is regarded as nullifying a transfer when such force or fraud has brought about an immediate transfer, the approach ought not to be different where after the transfer heinous crime is committed with the intention of acquiring, or accelerating the acquisition of, an interest in property. A clear case of acquisition of property dependent on the death of another person is the gift wherein interest is conferred on A provided he survives B. In such circumstances A has certainly a self-interest in the death of B and if that self-interest takes the form of B's murder the law ought not to recognise the acquisition of interest by A.

14.14 *Need for codification of the principle*—So much as regards the principle that can be recognised and the position elsewhere. The principle, it would appear, is worth codification and since it is a universally accepted one, there should be no objection to its incorporation in a suitable form in the Act at all. The exact form in which it could be put in the Act will be indicated later on.[2] But it may be useful to refer to a few typical situations wherein a legislative provision would be useful.

The first situation is where the death converts an interest vested in ownership into one in possession. This may arise where property is given to A for life and after his death to B, *the gift to B not being dependent on his surviving A*. B kills A.

The wrongdoer *increases the value* of property which he owned before killing,—when a person entitled to a remainder interest in property kills a person whose death occasions the end of a prior life interest.[3]

Secondly, where the wrongdoer's remainder interest is contigent on *surviving the prior life tenant* (or is vested subject to divestment if the former should predecease the latter), then[4] as the wrongdoer's interest might, in the ordinary course of events, have never vested in possession, he should be deprived of his whole interest. A similar argument would be relevant where the wrongdoer is himself a life-tenant who kills a prior life-tenant.

These are typical situations, and not of infrequent occurrence. There could be many other permutations and combinations—the illustrations to section 19 to 31 (vested and contingent interests) furnish ample hypothetical material. It appears to be unnecessary multiply examples.

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1 Manu, 8.168; quoted by P. N. Sen, Hindu Jurisprudence (1913), page 89.

2 Para 14.15, *infra*.

3 T. C. Youdan, "Acquisition of Property by Killing" 89 L.Q.R. 235.

4 Scott, Trusts, Vol. 3, section 493.1.

14.15 Having considered the theoretical justification[1] and the practical need[2] for a provision on the subject, we recommend the insertion of a new section on the following lines. It could be conveniently placed as section 7A.

*Recommendation to insert Section 7A.* "7A. A person who commits or abets the commission of culable homicide, whether amounting to murder or not, shall be disqualified from acquiring under a transfer any property, in furtherance of the acquisition of which he committed or abetted the commission of the homicide."

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1 14.13 to 14.14 *supra.*
2 For typical situations, see para 14.14, *supra.*

## CHAPTER 15

## *OPERATION OR TRANSFER*

### SECTION 8

15.1. *Introductory*—Assuming that the property is one which can be transferred and that the transferor and the transferee are competent to make the transfer or take under the transfer respectively, the next question to be considered is on what interest the transfer operates. Of course, since a transfer is the result of a contract, the answer primarily depends on the intention of the parties. But it is well known that the parties do not always express their intention clearly in exhaustive terms, and it is also well known that the words which they employ in effecting the transfer may not be regarded as exhaustive. In aid of the presumed intention of the parties the Act, in section 8, makes a specific provision regarding the operation of the transfer. This provision is mainly intended to do away with clumsy and prolific conveyancing and to guard against the raising of frivolous pleas based on the supposed incompleteness of the formula employed by the transferor.

Three important propositions are laid down in the first paragraph of section 8. Unless a different intention is expressed or necessarily implied, it provides, in the first place, that a transfer of property passes all the interest which the transferor is then capable of passing in the property. In the second place, it provides that such passing of the interest takes place forthwith. In the third place, it provides that the legal incidents of the interest are also transferred forthwith.

15.2. *Legal incidents*—What the expression "legal incidents" comprises is dealt with in the remaining paragraphs, though not in an exhaustive manner. Those paragraphs deal separately with five kinds of property, namely,—(1) land, (2) machinery, (3) house, (4) debt or actionable claim and (5) money or other property yielding income. Legal incidents of each are mentioned by an inclusive formula.

This part of section 8 reads—

> "Such incidents include, where 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 debt or other actionable claim, the securities therefor (except where they are also for other debt 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."

15.3. *Previous law*—The provisions of section 8 closely conform to the corresponding provisions of the English Conveyancing and Law of Property Act, 1881 (section 63)—now the Law of Property Act, 1925 (section 163).

Before the English Conveyancing Act, it was necessary to insert in each deed, under "general words" minute details of the property, easements and incidents intended to be conveyed. The prolix lengths to which deeds in consequence used to run often rendered them as imperspicuous as insensible.[1] In *Wood* v. *Saunders*, Hall. V.C. observed :

> "General words we all know are almost always, if not always, unmeaning; and you can in fact only lay hold of them to sometimes extend the operation of instruments; as, for example, to easements which have become extinguished by unity of seisin of enjoyment, or in some other way. They have no operation, and the only wonder is, that they have been allowed to remain so long in the pigeonholes to be put in every deed, when in truth they have no meaning or effect at all."

Its provisions therefore, had the effect of not only cutting down the length of deeds, but of simplifying them by doing away with the "general words" which have now become a thing of the past. But they are of great assistance in interpreting the corresponding provisions of the Indian law, as, in drafting the Indian Act, the English Statute was before the Legislature and its advisers.[2] The marginal notes[3] appended to the Bill of 1879 show that the principles embodied in the section were recognised in this country from before the Act.[4-5]

15.4. *Privy Council*—Referring to the law in force anterior to the enactment of this section, the Privy Council said :

> "It is not necessary to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that indefinite words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument togather the intention. It is a question to be decided when it arises, whether the framers of the Act have not conciously or otherwise so expressed themselves as to lay down a more positive rule in favour of absolute gifts."[6]

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1 *Wood* v. *Saunders*, 44 L. J. Ch. 514, 520.

2 See Writley Stokes, Introduction to the Act, in his Anglo-Indian Codes and *Wutzler* v. *Sharp*, I.L.R. 5 All. 270, 285.

3 The marginal notes cite the following cases as authorities on the section *Ram Dhone* v. *Ishanee*, 2 W.R. 123 (125); *Kishen Gir* v. *Busgeet Roy*, 14 W. R. 379; *Faqueer* v. *St. Khuderun*, 2 N.W.P.H. C. R. 251 (252); *Mahomed Ali* v. *Bolakee*, 24 W. R. 330 (trees), "everything grown on it", Morley N.S. 259.

4 Cour.

5 So a lease given in 1865 "with all rights" was held to comprise the minerals despite section 108(c) of this Act, which shows that the principle had even a wider application before its enactment here : *Megh Lal* v. *Raj Kuma.*, I L.R. 34 Cal. 358.

6 *Kalidas Mullick* v. *Kanhaya Lal*, I.L.R. 11 Cal. 121, 131, P.C.

15.5. *Principle—First maxim*—The principle embodied in the section is one of universal application and may be found in the ancient legal maxims which have become a part of the common law of England. These maxims are (i) *Eujus est solum, ejus est usque ad coelum ad inferos,*[1] (ii) *Quicquid plantaur solo, solo cedit.*[2]

Under the rule embodied in the first maxim, it has been laid down that, since land in its general signification has an indefinite extent both upwards and downwards, a conveyance of land is sufficient to pass all buildings, growing timber, emblements and water thereon as also mines and minerals thereunder : from which it follows that the owner cannot put erections on his own land so as to project on his neighbour's land, or throw the rain water from his roof on his neighbour's land, or grow trees so that their boughs overhand the adjoining land of another.[3] The right of light and air is similarly traceable to the same rule. The owner of the soil having a right to subterranean springs can maintain a suit for its diversion under circumstances which would have given a right for action if the stream had been above-ground.[4] On the other hand, he cannot dig on his own land, so as to undermine the foundation of his neighbour's building.[5]

15.6. *The second maxim*—The second maxim relates to accessories and things affixed to land. In a mortgage or lease of property, "a different intention" is necessarily implied, inasmuch as the transferor does not obviously intend to pass all his interest in the property, but only creates a limited interest in the transferee, the extent and nature of which forms the subject of two separate chapters of the Act. Where the nature of the interest conveyed is defined by the transferor, the question depends upon the construction to be placed upon the document, the terms of which alone must then afford a basis for decision. But the relationship of the parties may also be material. In the absence of an express agreement to the contrary, the Act further provides rules for the construction of the presumed intention which depends upon the nature of the interest conveyed.[6]

15.7. *Rule of construction*—The section lays down a rule of construction, which must be applied to the case of a transfer which, *ex hypothesia,* does not tell us whether any particular interest, possessed by the transferee, was meant to pass, by the conveyance or not. The object of the section is, therefore, to stabilize title and to remove, from the region of pure speculation, what passed in the mind of the transferor or the transferee at the date of the transfer.[7]

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1 "Whoever has the soil, has it even up to the firmament, and to the middle of the earth."

2 "Whatever is planted on (or fixed to) the soil follows the soil."

3 Gour.

4 Section 17(d), India Easement Act (V of 1882), *Action* v. *Blundell,* 12 M & W, 324; *Chasemore* v. *Richards* 7 H.L.C. 349.

5 *Pindu* v. *Johnai,* I.L.R. 24 Cal 260 Cf. *Balabhai* v. *Balakbidas,* 2 B.L.R. 114; *Waman* v. *Parasharam,* 2 B.L.R. 688; *Deoki* v. *Dhian Singh,* I.L.R. 8, All. 467.

6 Sale section 55, mortgage, section 65; leases, section 108; exchange, section 119.

7 *Fazal Ahmed* v. *Har Prasad,* A.I.R. 1929 All. 465, 474.

15.8. *Effect of transfer of debts on decrees subsequently passed*—An important question with reference to section 8 concerns that part of the section which relates to debts or other actionable claims. The fifth paragraph of the section, so far as is material, provides that the incidents of a property include, "where the property is a debt or other actionable claim, the securities therefor". The main paragraph of the section—first paragraph—so far as is material—provides that a transfer of property passes forthwith to the transferee the interest which the transferor is "then capable" of passing in the property and in the legal incidents thereof. The precise question to be considered is whether the transfer of a debt is to be construed (in the absence of a contrary intention) as also a transfer of a decree to be passed later in proceedings then pending at the instance of the transferor.

15.9. *Supreme Court case*—In Jugal Kishore[1] a firm in the name of M/s. Habib & Sons of Bombay had filed a suit in the year 1948 against Jugal Kishore Saraf for the recovery of Rs. 7113/-. When the suit was still pending, the firm of M/s. Habib & Sons transferred their business to Raw Cotton Co. Ltd. in the year 1949 along with all debts due to the firm. In December 1949, a decree was passed in this suit for a total sum of Rs. 8428/- in favour of M/s Habib & Sons. In April 1951, the Raw Cotton Co. Ltd. applied for the execution of the decree, which was opposed by Jugal Kishore Saraf on various grounds. One of the grounds was that the decree was not transferred to the respondent company (Raw Cotton Co. Ltd.) as the suit was still pending when the business of M/s Habib & Sons was transferred to them and the decree had been passed subsequently. The executing court rejected this plea of the judgement-debtor and his appeal was also dismissed by the High Court. The matter came up before the Supreme Court under Article 133(1) of the Constitution of India.

Das J. held that under section 9 of the Transfer of Property Act, the true position is that at the date of the transfer of the debt to the respondent company, the transferors could not transfer the decree, because the decree did not exist. This section does not operate to pass any future property for the section passes all interest which the transferor can "then" i.e. at the date of transfer pass. He also held that under the Transfer of Property Act, there can be no transfer of property which is not in existence at the date of the transfer. Therefore the purported transfer of the decree that might be passed in future could only operate as a contract to transfer the decree to be performed in future i.e. after passing of the decree.

Bhagwati J., however, took a different view. He observed that section 8 of the Transfer of Property Act provides that 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. These incidents include, where the property is an actionable claim, the "securities ..... but not arrears of interest accrued before

1 *Jugal Kishore Saraf* v. *Raw Cotton Co.*, A.I.R. 1955 S.C. 376 (1955) 1 S.C.R. 1369 (Das, Bhagwati & Imam JJ.).

the transfer". In case of transfer of debts or property coming within the definition of actionable claim, there is, therefore, necessarily involved also a transfer of the transferor's right in a decree which may be passed in his favour in a pending litigation and the moment a decree is passed in his favour by the Court of Law, that decree is also automatically transferred in favour of the transferee by virtue of the written assignment already executed by the transferor.

The debt which is the subject matter of the claim is merged in the decree and the transferee of the actionable claim becomes entitled by virtue of the assignment in writing in his favour, not only to the book dent but also to the decree in which it has merged. The transferee is, without anything more, entitled to the transfer of the decree passed by the Court of Law in favour of the transferee.

15.10. *Judgments summed up*—Das J. took[1] the view that the subsequent decree is not transferred. Bhagwati J., however, took the view that the decree was transferred. He primarily based himself upon two propositions, namely,—first, though there can be no transfer as such of future property, yet the transfer should, on equitable principles, be given effect as contract, and secondly, the decree merely represented the debt.

15.11. *Need for change*—The question to be considered by us is not which of these views is correct, but which view is of practical benefit. To take the narrow and strictly literal view, namely, that because of the word "then" in section 8, first paragraph, the subsequent decree is not transferred, leads to an anomaly. The transferor of the debt, having transferred his rights, would not be interested in executing the decree.

On the narrow view, the transferee of the debt would not get any right to execute the decree as an assignee. The result would be that the transferee of the debt would be required to file a suit for specific performance of the contract to transfer the decree and it is only when he obtains a decree in that suit that he can apply for execution of the money decree as an assignee. If this is the correct position, it should be remedied. The law should aim at shortening rather than lengthening litigation—unless, of course, there are any other considerations of justice to the contrary. In this particular case, there appear to be none. Such procedural formalities, if any, as are required under the Code of Civil Procedure, 1908, should, of course, be complied with by the purchaser of the debt in his capacity as the transferee of the decree even after the proposed amendment. That applies to express transfers also. But the expression "securities" in section 8 should, in this special case, be widened so as to cover, in the situation where a suit has already been instituted, the decree that may be passed in favour of the plaintiff.

15.12. *Order* 21, *Rule* 16—One of the major points of difference between Das & Bhagwati JJ. related to Order 21, Rule 16, of the Civil Procedure Code which is quoted below :

> "16. *Application for execution by transferee of decree.—Where* a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which

[1] For the view of Imam J., see para. 15.15, *infra*.

passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Provided, that, were the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgement-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution;

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others."

15.13. *Propositions underlying each judgment*—It would appear from the judgements of the three Judges—S. R. Das, J., Bhagwati, J., and Iman, J.,—that while they all agreed that the purchaser of the debt could avail itself of the provisions of section 146 of the Civil Procedure Code, there was a sharp cleavage of opinion amongst them as the applicability of Order 21, Rule 16, of the Civil Procedure Code and as to the exact position of the purchaser company. S.R. Das, J. based his decision on the following propositions.

(a) Section 8 does not operate to pass any future property and the transfer of the book debts did not transfer *the decree as a legal incident*.[1-2]

(b) If the document could be construed as a transfer of, or an agreement to transfer, the decree *to be passed in future*, the beneficial interest in the decree would, by operation of equity, have passed to the purchaser and the purchaser company would become within the meaning of Order 21, Rule 16, transferee by operation of law.[3] In this case, however, there was no agreement to transfer the decree.

(c) But, in the eye of the law, the transferor of the debt, vis-a-vis the purchaser of the debt was nothing more than a benamidar for the purchaser and on this basis it was the purchaser who was the real owner of the decree. Since the purchaser was, after the transfer, the owner of the debt and the legal incidents thereof, it was the real owner of the decree.[4] This dictum, with respect, is in apparent conflict with the previous dictum.[5]

(d) Since the purchaser company became the owner of the decree immediately on its passing in the above sense, it could come under section 146.[6]

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1 Para. 15.12, *supra*.
2 Pages 1379, 1380 of the S.C.R.
3 Pages 1401, 1402 of the S.C.R.
4 Pages 1405 of the S.C.R.
5 Pages 1379, 1380 of the S.C.R
6 Pages 1405 of the S.C.R.

15.14. The propositions, —so far as they are material, —enunciated in the judgment of Bhagwati J. can be stated as follows :

(a) In cases of transfer of book debts or property which is actionable claim, there is necessarily involved also a transfer of the transferor's right in a decree which may be passed in his favour in a pending litigation, and the moment a decree is passed in his favour by a court of law, that decree is also automatically transferred in favour of the transferee by virtue of the assignment in writing already executed by the transferor.[1] This is by virtue of section 8.

(b) Of course, this transfer is subject to the provisions of section 132 of the Transfer of Property Act to the effect that the transferee should take the actionable claim subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.[2-2a]

(c) So far as Order 21, Rule 16, C.P.C. is concerned, the transferee in the above-mentioned circumstances is a transferee by "assignment in writing[3]" and not by operation of law.

(d) Of course, there is nothing in Order 21, Rule 16, prohibiting the transferee from availing of section 146 of the Civil Procedure Code.[4]

15.15. The propositions on which the judgment of Imam J. was based may be stated as follows :—

(a) The purchaser should be permitted under section 146 to execute the decree as one claiming under the decree-holder.[5]

(b) While a transfer of, or an agreement to transfer, a decree that may be passed in future may in equity entitle the transferee to claim the beneficial interest of a decree after it is passed, such equitable transfer does not render the transferee a transferee of the decree by assignment in writing within Order 21, Rule 16.[6]

(c) No opinion is expressed as to whether the expression "by operation of law" in Order 21, Rule 16 can be given the interpretation suggested by Das. J.[7]

15.16. *Resultant uncertainty*—It should be pointed out that while, for the particular purpose under consideration before the Supreme Court, the applicability of section 146 enabled the alleged transferee of the debt to execute the decree, the position resulting from the judgment on the more material question, namely, whether there was or was not an assignment and, if so, whether it was by act of parties or by operation of law,

1 Page 1418 of the S.C.R.
2 Page 1418 of the S.C.R.
2a Para 15-12, *supra*.
3 Page 1418 of the S.C.R.
4 Page 1421 of the S.C.R.
5 Page 1425 of the S.C.R.
6 Page 1426 of the S.C.R.
7 Page 1427 of the S.C.R.

was not established with certainty. The applicability or non-applicability of Order 21, Rule 16 of the Civil Procedure Code to the situation under consideration remained indefinite, because while Das, J. excluded its applicability on the ground that there was no agreement to transfer the future decree, Bnagwati J. included it by reason of his construction of section 8 of the Transfer of Property Act, while Imam, J. did not express any opinion as to whether there was an assignment by operation of law. It should also be stated that Order 21, Rule 16, makes a distinction (in the proviso) between cases of assignment by act of parties and assignment by operation of law. In the first case, notice is given to the transferor and the judgment debtor, while, in the second case, notice is not given. Again, the uncertainty in regard to the assignment by act of parties or operation of law leads to uncertainty as to the application of section 132 of the Transfer of Property Act. It is for these reasons that a clarification is necessary.

15.17. It is also legitimate to point out that—High Court decisions (some of them referred to in the Supreme Court judgement) also reveal a difference of views. Bombay cases discussed in the judgment, the Calcutta case in *Purna Chandra Bhomik* v. *Barna Kumari Debi*[1] and the Madras judgement in *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa and another*[2] are illustrations. The Madras judgement observed that if the matter were *res integra*, much might perhaps be said for the contention that the assignee under similar circumstances could excute the decree under Order 21, Rule 16, Code of Civil Procedure, 1908.

15.19. *Need for change*—It is for these reasons that a clarification is necessary. Whatever be the correct position in theory under the present section as it is worded, practical considerations justify an amendment to the effect that in the situation under discussion, the transfer of a debt[3] should operate so as to transfer the decree to be ultimately passed in favour of the transferor subject to the following conditions[4] :

(a) The transfer was made after the institution of proceedings for recovery of the debt.

(b) The provisions of Order 21, Rule 16, C.P.C. should apply as they apply to an express assignment in writing.

(c) The provisions of section 132 of the Transfer of Property Act, 1882 should apply in relation to the assignment—this, in fact, need not be expressly provided.

The merit of the proposed amendment is that :—

(i) it states the position with reasonable certainty;

(ii) it leads to shortening of litigation, since the purchaser of the debt will not be required to institute a suit again calling upon the seller of the debt to transfer the decree;

(iii) it brings into operation the safeguards provided in Order 21, Rule 16, C.P.C. leaving no doubt in the matter;

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1 *Purna Chandra Bhowmik* v. *Barna Kumari Debi*, I.L.R. (1939) 2 Cal. 341.

2 *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa and Another*, A.I.R. 1942 Mad. 21.

3 For brevity "debt" is used. Same position will apply to "actionable claims".

4 This is not a draft.

(iv) it potects the rights of the transferor, the transferee and the judgment debtor by providing for application of Order 21, Rule 16 C.P.C.

(v) last, but not the least, it defines the position *as between the transferor and the transferee* in express terms.

15.19. *Recommendation*—In the light of the above discussion, we recommend that to section 8, a suitable Explanation should be added on the lines indicated above.

8—885 Law/77

## CHAPTER 16

## *ORAL TRANSFERS*

### SECTION 9

16.1. *Oral Transfer*—According to section 9, a transfer of property may be made without writing in every case in which a writing is not expressly required by law.

There are several cases in which the Transfer of Property Act requires a written instrument, namely—[1]

(1) Sale or exchange of immovable property of the value of one hundred rupees and upwards;

(2) Sale of a reversion or other intangible interest in immovable property irrespective of value;

(3) Simple mortgage;

(4) Other mortgages where the principal money is one hundred rupees and upwards—but not including a mortgage by the transfer of title deeds;

(5) Leases from year to year or for any term exceeding one year or reserving a yearly rent;

(6) Gifts—but in certain cases delivery is sufficient;

(7) Assignment of actionable claims.

Besides this, there may be other laws requiring writing.[2]

16.2. *Reasons*—The reasons for requiring a writing in these cases are various, but in the case of most of the transactions, the law not noly reflects a policy of ensuring accurate and permanent record to prevent disputes, but also shows its anxiety that such transactions should not be entered into without some deliberation. In the case of assignments of actionable claims, there is the additional reason that an actionable claim being incorporeal property, it cannot, by its very nature, be transferred by delivery of possession because the transferor has no present possession to deliver. Therefore, it can be transferred only by words. A writing is required in preference to an oral grant, since the interest of third parties may be involved and also because the properties not being visible, it is considered that some particularity describing the nature of the property sought to be transferred may be useful.

16.3. *Objects*—Thus, the objects of requiring a written instrument are manifold. A written instrument affords an indelible record of the transfer—this is the aspect of evidence—but there is a more vital aspect to it, namely, that it secures title by defining the nature of the interest conveyed. In this sense, it is not only an immutable memorial of the transaction, but also a more reliable source of the essence as well as the details of the transaction.

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1 Sections 54, 59, 107, 118, 122, 130, 131.

2 E.g. Section 5, Trusts Act.

The object of the law in requiring writing is one of substance, even though occasionally it may appear that such requirement assumes an over-technical importance in practice. Domat,[1] an eminent French jurist, has described the object of writing in words which cannot be bettered, as follows :

> "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollections of things past and of which they were desirous to establish the remembrance, either as rules for their guidance, or to have therein a lasting proof of the truth of what they write. The agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fix and immutable law for them. So wills are written to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heirs and legatees. In like manner are written sentences, decrees, edicts, ordinances and everything intended to have the effect of title or of law, etc. The writing preserves unchangeably what is entrusted to it, and expresses the intention of the parties by their own testimony."

16.4. Of Course, the fact that a document has been employed to effectuate a transfer does not avoid controversy, but, in contrast with an oral transfer, the controversy, if any, will now be as to the *construction* of the document, and not as to the *contents* of the transfer.

16.5. *Previous position*—It would appear that before the passing of the Act,[2] no writing was necessary for the sale of immovable property. This shows how the Act has altered the previous position.

16.6 *Hindu law*—The marginal note appended to the Bill[3] shows that this section was adopted from the New York Code. By the Hindu law, a verbal grant of immovable property is good, if followed by delivery of possession to the grantee.[4] Indeed, in no case does the Hindu law appear absolutely to require writing[5] though, as evidence, it regards writing as of additional force and value.[6]

16.7 *Transfer at the time of marriage.*—It has been held[7] that section 9 is not applicable to the transfer of immovable property made at the time of marriage by a Hindu. This decision can be explained only on the special facts of the case relating to a family arrangement. In this connection it is to be remembered that the expression "transfer of property" is to be construed with reference to section 5, of which an essential ingredient is the act of "conveying the property". We have already

1 Domat, Civil Law, para. 1.3, Titles 6—Section 2, cited by Cour.
2 A.I.R. 1914 P.C. 27.
3 N. Y. Code, s. 453, 7 Exch. 581; Cour
4 *Doed Seeb Kristo* v. *East India Co.*, 6 M.I.A. 267;
*Hurrish Chunder* v. *Rajender* 18 W. R. 293, Anonymous, 1 I.J. (O.S.) 135.
5 *Mantena* v. *Chekuri*, 1 M.H.C.R. 100; *Palanivappa* v. *Arumugam*, 2 M.H.C.R. 26; *Criniva* v. *Vijayammal*, 2 M.H.C.R. 37; *Krishna* v. *Rayappa*, 4 M.H.C.R. 98; *Hurpurshad* v. *Sheo Dyal*, 26 W.R. 55 (P.C.).
6 Gour.
7 AI.R. 1968 A.P. 291.

explained, while discussing section 5, that where there is no "conveyance" of property, there is no transfer, and the transaction is outside the Transfer of Property Act.

There was, strictly speaking, no need for a provision of the nature contained in section 9, which seems to have been inserted out of abundant caution.

16.8. *Part-performance*—To the rule that where a writing is required by the law there must be a writing, there seems to be no exception —not even the doctrine of part performance,[1] because that doctrine does not apply unless the contract to transfer for consideration any immovable property is in writing, signed by the transferor. An oral agreement will not be sufficient for the purposes of the application of the doctrine of part performance—which seems to be a departure from the English law.[2]

16.9. *Position in England as to Part-performance*—In England, the doctrine of part-performance which was evolved to mitigate the hardship caused by the Statute of Frauds is not confined to written agreements. Under this doctrine, a party who has partly performed the contract can enforce it even though there is no written evidence of the contract. It is certainly a requisite that there must be parol evidence of the contract which is let in by the act of part-performance.[3] But the absence of writing is immaterial.

16.10. *Material alteration*—We have, in the Report[4] on the Stamp Act, discussed the question how far a material alteration in an instrument after its execution affects its validity. The general principles applicable to the question, apart from the position for the purposes of the stamp law, have also been discussed, and we do not consider it necessary to go over the ground again.

16.11. *Other formalities*—Besides writing, there might be other formalities, such as attestation and registration and (under special laws) the affixation of a seal. Confining ourselves to writing, we might state that so far as the general rule is concerned, it is not necessary that the transfer should be contained *in a single document*. The transfer might be made out of several documents, so long as they can be connected together without parol evidence. There are certain requirements of Stamp Law[5] particularly applicable to such a case, but the provisions of that very law indicates that our legal system does not rule out the effectuation of a transfer by more than one document.[6]

16.12. *No Change*—The above discussion discloses no need for amending the section.

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1 Section 53-A.

2 *Bechar Dass* v. *Ahmedabad Municipality*, A.I.R. 1941 Bom. 346.

3 Fry, Specific Performance, 6th Ed., pages 276-277, cited by Treitel, Contracts (1966), pages 119, 121.

4 Report on the Stamp Act.

5 Section 4, Indian Stamp Act, 1899.

6 Compare *Pearce* v. *Gardener*, (1897) 1 Q. B. 688.

# CHAPTER 17

## *CONDITIONS RESTRAINING ALIENATION*

### SECTION 10

17.1. *Introductory*—The Act has so far deat with transferable property, capacity to transfer, operation of the transfer and mode of transfer. What terms can be lawfully inserted in a transfer is dealt with in a group of sections. In general, parties ought to be allowed to transfer property on such terms as may be agreed upon between the parties, or, in the case of a unilateral transaction, as may be decided by the transferor and accepted by the transferee. In this sense, freedom to dispose of property—section 7—may be said to include freedom to choose the conditions upon which the transfer is to be operative (conditions precedent), the conditions upon which it should cease to be operative conditions subsequent), the terms upon which the interest transferred should be enjoyed and the terms upon which that interest should pass from the immediate transferee to his successors. The terms upon which the interest transferred may itself be transferred by the transferee may even be regulated. The imposition of these terms is a part of the power to transfer property under section 7. But that section itself lays down that the power shall be subject to the provisions of any law for the time being in force—this is the gist though not the precise text. Thus, that section itself contemplates that the law may impose restrictions upon the freedom of disposition. The scope and content of those restrictions form the subject matter of the next few sections. On the ground of public policy, and primarily on the ground of the policy of the law favouring the vesting of interests in property, and also on the ground of the policy of favouring the circulation of property rather than its being tied up within a particular group or to a particular person, the law has imposed certain limits as to the terms of a transfer. Whether the breach of a particular term renders the transfer void or whether it keeps the transfer intact and the term becomes invalid is a matter which we need not go into for the present purpose. We are now primarily concerned with what are the permissible and what are the impermissible terms of a transfer.

17.2. *Sections* 10—18 —*Common thread*—The most important sections of immediate interest in this context are sections 10 to 18, which principally, though not exclusively, deal with the invalidity of restraints on alienation, accumulation of income and the rule against perpetuities. Notwithstanding the complexity of these sections, a close analysis will reveal that the golden thread connecting them is one salutary principle that the law favours the freedom of transfer of property—the corpus as well as the income—and property should not be transferred upon terms which destroy or substantially impair this freedom. This is often pithily expressed by saying that the freedom of disposition should not be allowed to be so exercised as to lead to its own destruction. One could more elaborately state the considerations of policy by saying that if a person is free to dispose of his own property, he must so exercise the freedom that those to whom he transfers an interest in property are not deprived of that very freedom. The connection of the rule against perpetuities with this principle may appear to be tenuous, since that rule is often attributed to

another principle—the law favours the vesting of estates within a reasonable time. But even this rule has, as its foundation, the broader principle that the tying of property for an unreasonably long period and the postponement of its vesting defeats the enjoyment thereof by those who derive their rights under a transfer burdened with such conditions. To put the matter in different words, the law requires that a person transferring property should not merely look to his own immediate interests, but should also have regard to the interests of future generations. In this sense, a balance is sought to be achieved between the immediate present and the distant future—which is indeed a function of law as social engineering.

17.3. *Difficulty of formulation*—These principles, sound as they are, do not yield easily to legislative formulation. By reason of the very fact that the immediate past and the distant future have both to be borne in mind and reconciled, the issues that arise present difficult problems of legal policy. So many alternatives present themselves. The choice is not always easy. Opinions could veer from one extreme to another. Personal feelings and sentiments, not lightly to be brushed aside, have to be reconciled with social and economic considerations. For example, a person may very much wish that the property disposed of by him should remain within the family. He may desire that the property should be so enjoyed as to have regard to the welfare of certain other members of the family also, particularly by providing for allocation of a certain part of the income to them. These are personal sentiments. But those who are to live in future generations may not necessarily share the same sentiments, or not to the same degree. Even if they do so, they may have their own social or economic reasons of a compelling nature raising countervailing considerations. It is then the business of law to evolve a set of rules that will reconcile sentiment with reason, the immediate and visible past with the remote and invisible future. The exact content of the set of rules to be so evolved must, in the very nature of things, be a matter of opinion. Orthodoxy and modernism each have their say.

17.4. *Section* 10—With these aspects of policy in the background, let us examine the first section concerned with the permissible terms of a transfer of property. This is the text of section 10, which deals with a condition restraining alienation—

> "10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Mahammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

17.5. *Analysis*—The section thus consists of three parts—the general prohibition, the exception and the proviso. The general prohibition is against an absolute restraint on "parting with or disposing of" the interest. The exception is in regard to a particular mode of transfer—lease—and is confined to a condition for the benefit of the lessor or those claiming under him. The proviso is in regard to a particular class of persons—married women of certain communities. Although worded as a provision

permitting restraint on the rights of women, it originated in a desire to protect the women. The restraint is thus for the benefit of the transferee. We shall advert later to the question how far such a restraint is consistent with modern notions.

17.6. *Absolute restraint—Rationale*—So far as the general prohibition in section 10 is concerned, the most important element, is that indicated by the requirement of absolute restraint. The term in a deed of transfer is void if it absolutely restrains the transferee from transferring his interest. If the transferor in categorical and unqualified terms provides that the transferee shall not transfer his interest at all. there can hardly be any difficulty in the application of the rule. The policy of the law is clear enough. If there is freedom of disposition for the immediate transferor. there ought to be a similar freedom for the transferee as well. If he is absolutely restrained from transferring his interest, his freedom of disposition is totally taken away, so that—if the condition were to be recognised by law—in regard to that particular property. the freedom of disposition would cease to exist at all. The freedom of disposition of the transferor would then be exercised to its own destruction. As observed by us in the introductory discussion in this Chapter[1] this is against the policy of the law. Such an absolute restraint on alienation would hardly be favoured by any legislator, even if he is not a person introduced to the learning of the law. It may be of interest to note that article 19 of the Constitution is based on a similar principle, although, of course, its operation is against the State.

If the section were to be taken as confined to absolute restraints pure and simple,. hardly any problems would have arisen and the section would not require any elaborate discussion. But, in practice, limitations on alienation are not so simple in their language or unqualified in their scope. And the question naturally arises whether restraints not absolute in that sense are within the mischief of the section. Restraints limited to transfers to particular persons, or transfers except to a particular person or limited to transfers with a certain period, have often been held to be void. as will apear from a few cases discussed below. It would thus appear that the word "absolute" is not to be taken in a literal sense. The section has been construed to apply to all transfers repugnant to the nature of the interest.

17.7. *Restraints with reference to duration*—First, as to restraints limiting transfers in point of time. The section has been construed to apply to restraints limited to last for only a limited time.[2] For example, the seller cannot stipulate with the purchaser that the purchaser shall not build a slaughter-house upon his land or that he shall not lease his land, or sell it for the next twenty years. or that he shall put it only to such use as the seller sanctions; the condition is repugnant to the nature of the interest created and is void under sections 10 or 11. As Jessel, M.R., observed[3] :

> "The test is whether the condition takes away the whole power of alienation *substantially;* it is a question of substance and not mere

1 Para. 17.1, *supra.*

2 (a) *Chamaru* v. *Sona Koer,* 14 C.L.J. 303; 11 I.C. 301;
(b) *Nageshar* v. *Muta Prasad* A.I.R. 1922 Oudh 236, 244

3 *In re Mackay,* L.R. 20 Eq. 186.

form. You may restrict alienation in many ways. You may restrict it by prohibiting it to a particular class of individuals or you may restrict alienation by restricting it to a particular time."

So Lard Eldon said :

"It is clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate."[1]

17.8. *Duration*—There is, therefore, nothing in the bare fact that the estate carved out is a life-estate, to bar the application of the rule of repugnancy. Nor is the restraint any less obnoxious to the rule because it provides for alienation to a speecified class of persons.[2] The question whether a condition or a limitation has the effect of absolutely restraining a transfer so as to attract the prohibition in the section is to be answered on a consideration of several factors. In judging of the validity of the restraint, the court not only sees whether it is absolute, but also whether the right to cancel the transfer is based upon some reason or upon a purely capricious exercise of the transferor's will, in the effectuation of which he has no conceivable interest.

17.9. *Restraints as to persons*—Restraints concerned with the persons to whom the interest created may be transferred, may assume one of two alternative forms. There may be a restraint on transfer to a particular person—for example, that the property shall not be transferred to A or B or other specified person. In general such restraints would not be regarded as absolute.

In practice however many cases present a situation of a different Kind. The transferor seeks to prohibit alienation *except to a specified person or group of persons.* The transfer is then allowed to the specified persons or group only and every person is excluded from the range of the permitted transferees, if the terms are to be recognised . It is in this situation that problems arise. In general, the matter is decided after taking into account whether the restraint though not absolute, yet practically operates so as to exclude a very large class of persons and if so, whether in the circumstances of the case there is any justification.

17.9A. *Restrictions as to price*—Besides limitations as to persons and time, there are sometimes to be found restrictions as to the price at which property should be sold by the transferee. Such restrictions are often coupled with restrictions as to the person to whom it can be transferred. Usually, this situation is illustrated by restrictions to the effect that if the property is transferred, it shall be first offered to a particular person who shall have the option to purchase it at a particular price. A right of pre-emption is thus created, but, in addition, considerable advantage is also secured to the beneficiary of the right of pre-emption, since usually the amount of price specified or the method for determining it is advantageous as contracted with the market price that is likely to prevail at the date of the intended sale by the transferee. If, in regard to such clauses contained in

1 *Bradon* v. *Robinson*, 18 Ves. J. 429; 34 E.R. 370.

2 (a) *Teja Singh* v. *Moti Singh*, 80 I.C. 918;

(b) *Asghari Begam* v. *Maula Baksh*, A.I.R. 1929 All. 381.

instruments of transfer—we shall also deal later with instruments of partition—the section is construed literally and the expression "absolutely" taken in its dictionary meaning and given a narrow scope, serious inconvenience would arise in practice.

17.10. Appreciating this reality of life, courts have, in many cases, given a wide meaining to the word "absolutely". They have weighed the advantage conferred on the prospective pre-emptor—which is the obverse of the restriction placed on the immediate transferee—as against the effect thereof upon the freedom of the immediate transferee. They have, in other words, considered the needs of the pre-emptor and the sentiments of the transferor in balance against the interests of the transferee. Any such balancing is bound to involve an assessment of social and economic realties, consciously or unconsciously undertaken by the Court.

17.11. *English case*—In illustration of what is said above, let us refer to the English case of *Rosher* v. *Rosher*.[1]. It was a case of testamentary disposition, but the principles would be the same as regards disposition *inter vivos*. A testator devised an estate to his son in fee, providing that if the son, his heirs or devises should desire to sell the estate during the life-time of the testator's wife, she should have the option to purchase it at a fixed price named, which was one-fifth of the real purchasing value of the estate at the date of the will and at the time of the testator's death. It was held that the prohibiion to sell at a fixed price much below its real value, during a given period, was equivalent to an absolute prohibition, and as such void.[2]

17.12 *Position summed up*—The question really is not how the transfer was designed, but what was really its effect, the true test being whether the condition takes away substantially the whole power of alienation; it is a question of substance and not of mere form.[3] If the condition substantially deprives the transferee of the power of alienation, it is void, but if it only so restrains it that in effect he still has the power in substance, it is valid[4]. So a prohibition on transfer *in the father's life*-time held to be valid in a Lahore case[5].

The salient points could be thus summed up—

(a) A restraint which though apparently not absolute, has substantially that effect, would be regarded as repugnant.

(b) A conditnon in restraint of alienation is none-the-less absolute because its operation is limited to a particular period or to a particular person.

(c) Such a condition may be regarded as an absolute restraint by reason of the price at which the alienation is required to be made.

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1 *Rosher* v. *Rosher*, 26 Ch. D. 801, 811.

2 See also *Doe Singh* v. *Khub Chand*, 19 A.L.J. 848.

3 In *re Mackay*, L.R. 20 Eq. 186, 189, a part of whose jugment was, however, animadverted upon by Pearson, J., in *Rosher* v. *Rosher*, 26 Ch. D. 801, 817, 818.

4 *KcLean* v. *McKay*, L.R. 5 P.C. 327;
*London and S. W. Ry. Co.* v. *Comm*, 20 Ch. D. 562.

5 *Took Chand* v. *Radha Kishan*, A.I.R. 1935 Lahore 503.

17.13. *Valid restrictions*—In contrast, let us see a few cases where the restraints were not regarded as absolute. An agreement to retain a court-yard undivided for the convenience of the adjacent dewellings is valid.[1] Similarly, where a Hindu widow executed an agreement in respect of her husband's property in favour of her husband's cousins, by which she agreed not to lease the property without obtaining their signatures, adding, that if the document be not signed and consented to by both the parties, it shall be null and void, it was held that the agreement was valid.[2] So again, where a house was conveyed to the transferee, subject to a covenant on his part not to use it for any purpose other than a private residence, and the transferee conveyed it to another who converted it into a boarding house, the covenant not to use the house for any other purpose was held not repugnant to the nature of an estate, and might be enforced by an injunction.[3]

17.14. *Personal interest*—Restraints may also be upheld where they merely emphasise the nature of the interest conveyed. The settlement of an annuity with the direction that it should, from time to time, be paid to *himself only*, and that a receipt under his own signature and no other shall be a a sufficient discharge, was construed to point to an intention on the part of the testator that the annuity should cease if it is alienated, and it was held to have ceased on the bankruptcy of annuitant.[4] A similar intention may be gathered from the direction to pay a sum of money to an individual named, *but not to his assigns*, for his natural life with a limitation over if the devisee should alienate.[5]

17.15. A grant of any interest in land, whether limited or unlimited, would be subject to this rule. But it must be the grant of land and not merely of its profits. The adopted son of a Hindu widow granted to her for her maintenance, the usufruct of certain land, she being expressly forbidden by the terms of the grant "to mortgage, make a gift of, sell or assign the land in any way to any person". Her judgment creditor sought to attach the land, but his application was rejected on the ground that what was granted to the widow was the usufruct and no interest in the corpus which, therefore, could not be attached.[6] A will containing clear words of inheritance, but containing a clause forbidding alienation, will take effect as if the clause did not exist.[7]

17.16. Then, it has been held in Allahabad[8] that a gift subject to the power of revocation is not repugnant to this section. In that case, A had sold his village to B, whereupon B granted A some land for his maintenance, stipulating that it would be liable to resumption if A transferred it. A's

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1 (a) *Ramalinga* v. *Virupak*, I.L.R. 7 Bom. 538, 541;
(b) *Western* v. *Macdermott*, L.R. 6 Ch. A. 72;
(c) *Maclean* v. *Mackay*, L. R. 5 P.C. 327.
2 *Kuldip* v. *Khetrani*, I.L.R. 25 Cal. 869.
3 *Hobson* v. *Tulloch*, (1898) 1 Ch. 424.
4 *Dommett* v. *Bedford*, 3 Ves. 149.
5 *Cooper* v. *Wyatt*, I.L.R. 5 Mad. 482.
6 *Diwali* v. *Apaji*, I.L.R. 10 Bom. 342, 345; distinguished in *Golak Nath* v. *Mathura Nath*, I.L.R. 20 Cal. 273.
7 *Kannu Pillay* v. *Challathamal*, 10 M.L.J. 203.
8 *Makund Prasad* v. *Rajrup Singhji* 4 A.L.J. 708.
See contra *Brij Devi* v. *Shiva Nanda*, I.L.R. (1939) All. 298. (Power of revocation reserved for himself and his heirs in case of alienation).

transferee sued for a declaration that he was a tenant of the land, but Banerji, J., held the plaintiff's assignor's gift to be subject to the power of revocation, and, therefore, not necessarily repugnant to the provisions of section 10. Reference was also made to section 126, but reference to section 6(d) would also have been apposite. Such grants are, necessarily, excluded from the rule.

17.17. *Mortgages*—It is customary in Indian conveyancing for the mortgagor to insert a clause in his mortgage-deed to the effect that the mortgagor will not, pending the mortgage, execute another mortgage or otherwise alienate, or charge the property with another incumbrance. Such a convenant, standing by itself, does not amount to a martgage.[1] But what is its effect upon the rights of the parties and of the subsequent alienee? Allahabad cases on the subject are of interest. It has been held that a transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable only in so far as it is in defeasance of the mortgagee's rights. Where in contravention of a condition not to alienate, the morgagor had transferred his proprietary right in the mortgaged proporty to a third person for a term of years, the Allahabad High Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt unless he desired its continuance.[2] But it was again held[3] by the same High Court that a transfer of mortgaged property in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee, and with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee, specially if the transfer was made for the *bona fide* purpose of paying off the mortgage,[4] in which case a condition not to alienate cannot operate to annul it;[5] but the debt must be at once discharged by the transfer.[6] Now, it has been held[7] that a similar convenant on the part of the alienee is absolutely void; then, why should it be otherwise in the case of the transferor? The rule thus laid down by the Allahabad High Court has, in fact, been considerably relaxed by that very High Court.

17.18. *Leases*—Lease deeds often contain conditions against alienation. If they are not absolute or if they fall within the Exception to section 10, they are valid. Assuming now, that the stipulation against alienation is valid, the real question in such a case is, whether by reason of an alienation in breach of such stipulation, the permanent lease is determined, where there is no express condition providing that, on breach of the stipulation against alienation, the lessor may re-inter, or that the lease shall become void. On this point, the authorities are clear that in the *absence of some such express condition,*

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1 *Gunoo* v. *Latafut*, I.L.R. 3 Cal. 336.

2 (a) *Chuni* v. *Thakur Das*, I.L.R. 1 All. 126;
(b) *Mulchand* v. *Galeobind*. I.L.R. 1 All. 610;
(c) *Lachmi* v. *Koteshar*, I.L.R. 2 All 826.

3 *Ali Hasa* nv. *Dhirja*, I.L.R. 4 All. 518.

4 *Ram Saran* v. *Amrita*, I.L.R. 3 All. 369.

5 *Dookhchore* v. *Haiji Hidayatoolah*, (1866-67) N.W.P.H.C.R. (F.B.) page 7.

6 *Mahomad* v. *Banea*, (1869) N.W.P.H.C.R. 135, cited in *Chunni* v. *Thakur Das*, I.L.R. 1 All. 126, 128, footnote.

7 *Mohram* v. *Ajudhia*, I.L.R. 8 All. 452.

there can be *no forfeiture of the lease.*[1] The lessor may enforce the convenant by using for damages for its breach and by obtaining an injunction to restrain the lessee from making an assignment, in breach of the same.[2] The case would, however, be different where non-transferability is shown to be one of the incidents of the lease,[3] in which case ejectment would follow on transfer a clause for re-entry being unnecessary.

17.19. *Recommendation as to the word "absolute".*—It would be apparent from the case law discussed above,[4] that the word "absolute" has been construed by the Courts as including cases where the restraint is not absolute in the literal sense, but is substantially so. It appears that the sense of the section, the intention of the legislature and judicial construction thereof would be better expressed if the word "absolutely" is suitably explained as including cases where the restraint is substantially of an absolute character. We recommend accordingly, so that the section may better reflect its true scope. In such an important provision as section 10, the principle should be more precisely expressed where practicable. Such an amendment will not, we know, avoid the tasks which the Courts have to perform of determining whether, having regard to all the circumstances of the case, the restraint is to be regarded as absolute in substance. But the amendment will have the merit of drawing the attention of the citizens to the wide scope of an important ingredient of the section.

17.20. *Effect of void condition*—Where a restraint on alienation is void by reason of the principles discussed above, it is obvious that an alienation made in violation thereof is as operative as if no such restraint existed The transfer containing the restraint is valid, and is to be read as if no such condition existed. This much is clear so far as the rights of subsequent transferees are concerned. But since the restraints are imposed usually in reciprocal transfers having a contractual element, the question naturally arises whether *as between* the parties, the restraint possesses any validity, so as to confer a cause of action on a party to the transfer against the defaulting party.

17.21. On this point the authorities are not unanimous. It has been held in Calcutta[5] that as between the immediate parties to it, the convenant is binding. But a different note was struck by Phear, J., in a case,[6] since affirmed,[7] in which he observed :

> "It is not competent for the owners of property in this country by any arrangement made in their own discretion to alter the ordinary incidents of the property which they possess, for instance, in this particular

1 (a) *Tamaya* v. *Timapa,* I.L.R. 7 Bom. 262;
(b) *Nilmadhub* v. *Narottam.* I.L.R. 17 Cal. 826;
(c) *Naruvan* v. *Ali Saiba,* I.L.R. 18 Bom. 603;
(d) *Madar Sahib* v. *Nahawa Guiranshah.* I.L.R. 21 Bom. 195;
(e) *Parameshri* v. *Vittappa,* I.L.R 26 Mad. 157;
(f) *Basarat* v. *Vittappa,* I.L.R. 36 Cal. 745.

2 (a) *Mohan* v. *Shekh Sadoodi,* 7 B.H.C.R. (A.C.) 69;
(b) *Tamaya* v. *Timapa,* I.L.R. 7 Bom. 262. 265;
(c) *McEachurn* v. *Cotton,* (1902) A.C. 104;
(d) *Parameshri* v. *Vittappa,* I L.R. 26 Mad. 157.

3 Section 6(i) : *Achuta* v. *Sankaran,* 13 I.C. 1007.

4 Paras 17.10 to 17.18, *supra.*

5 *Ramdhun* v. *Arund.* 2 Hyde 93; *Rajendra* v. *Sham Chund,* I.L.R. 6 Cal. 106; follow in *Muthuraman* v. *Ponnuswamy,* 29 M.L.J. 214.

6 *Radhanath* v. *Tarrucknath.* (1874) 3 Cal. 126, 128.

7 *Krishnendra* v. *Debendra,* (1883) 12 Cal. 793.

case, to say that the joint-property shall remain the joint-property of the joint-family in perpetuity but shall not possess the incidents which the law of the country attaches to property in such condition, namely, that every independent co-parcener is entitled, at any time, to his share dividend of the rest. No doubt, any one member of the family and, therefore, all, might, for sufficient consideration, bind themselves to forego their rights for a specified time and definite purpose, by a contract which could be enforced against them personally."[1]

The Bombay High Court has, similarly, held that an agreement between co-parceners never to divide certain property is invalid as tending to create a perpetuity,[2] and the same view has been taken in Allahabad[3] and Madras[4] where the introduction of a condition against alienation in a great absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is the essence of the grant. So, where parties to a division agree that the property of any one of the parties to the agreement or their heirs dying issueless, should not be sold or transferred as a gift, but should, on his death, be divided by the other shareholders, and where, subsequently, the property was sold in contravention of this agreement and a party to the original agreement sued to recover, it was held that the condition was void.[5] A decision of the Privy Council[6] tends to the same conclusion.

17.22. It seems that such stipulations, since they would, within the meaning of section 23, Contract Act, be agreements whose object or consideration is unlawful, could be regarded as void for that reason. In any case, the matter is one of construction and application of section 23 of the Contract Act, the question being whether the stipulation defeats section 10 of the Transfer of Property Act.

17.23. *Partition and family arrangements*—So far as the main paragraph of the section is concerned, we have dealt with the existing position above at some length, in view of the importance of the section. We have a few points on which an amendment is required in the main paragraph—besides, of course, the amendment regarding the meaning of the word "absolutely" which we have already discussed.[7] The question to be considered is the applicability of the section to partitions and family arrangements. Since the section opens with the words "where property is transferred.....", it may not apply to partitions, if regard be had to the strict meaning of the

1 *Radhanath* v. *Tarrucknath*, (1874) 3 Cal. 126, 128.

2 *Ramalinga* v. *Virupakshi*, I.L.R. 7 Bom. 538; citing.
*Rajendra* v. *Sham Chund*. I.L.R. 6 Cal. 106;
*Ananth* v. *Nagamuthu*, I.L.R. 4 Mad. 200;
*Asutosh* v. *Doorga*, I.L.R. 5 Cal. 438; P.C.;
*Chimonroo* v. *Rambha*, 4 Bom. L.R. 508;
*Chandar Shekhar* v. *Kundan* Lal, I.L.R. 31 All. 3.

3 *Chander Shekhar* v. *Kundan Lal*, I.L.R. 31 All. 3.

4 (a) *Anantha* v. *Nagamuthu*, I.L.R. 4 Mad. 200, 202;
(b) *Venkataramanna* v. *Brammanna*, 4 M.H.C.R. 345;
(c) *Promotho* v. *Radhika*, 14 B.L.R. 175;
(d) *Parameshri* v. *Vittappa*, 12 M.L.J. 189, 193;
(e) *McEacharn* v. *Cotton*, (1902) A.C. 104.

5 *Venkataramanna* v. *Brammanna*, 4 M.H.C.R. 345.

6 *Padmanund* v. *Hayes*, I.L.R. 28 Cal. 720, 733 (P.C.).

7 See recommendation as to "absolutely", *supra*—Para 17.19.

word "transfer".[1] Position in this regard is not, however, free from doubt, as is apparent from the case law to be discussed presently.

17.24. *Partition deed*—It appears from reported decisions that partition deeds have contained conditions which provide that the share of a particular person shall not be sold or that if it is sold, the other co-sharer would have the right of pre-emption, and that too at a fixed price. Judicial decisions also show that such conditions have raised controversy as to whether they are valid, or whether they should be construed as substantially imposing an absolute restraint on alienation. The last mention query, in its turn, involves an examination of the question whether section 10 applies to deeds of partition at all. This query arises because under section 5 a transfer of property is defined as an act by which a property is *conveyed*—and a partition is not, in terms, a transfer.

Recognising the hardships caused by such harsh provisions in partition deeds, courts have, in general, tried to do substantial justice by refusing to recognise them, but the reasons for the conclusions so arrived at have varied. Some High Courts have taken section 10 as applicable. Some High Courts, while not going to that length, have decided the matter on the ground of justice, equity and good conscience. Since the situation is of frequent recurrence, an examination of the case law is useful and this examination ,it is hoped, will show the need for clarification in the matter.

17.25. *Madras view*—One shade of view is that the section applies to a partition.[2] A Madras decision of 1939 illustrates this approach :[3]

In a partition deed between the father and his sons in a Hindu family, it was provided that certain houses (which had been used as the family residence) should be held by the members of the family as tenants in common, that no member should have the right to dispose of his share to a stranger, that if any of the sons chose to live in the houses mentioned, he shall not be at liberty in any manner to let or lease, etc. his undivided share to a stranger to the family but shall do so only to any of his brothers or his heirs for a sum not exceeding Rs. 1,000 and it is found that the price of Rs. 1,000 fixed is far below the real price of the share and that there is no corresponding obligation on the part of the other members to buy the share of the members wishing to sell, the restriction against the alienation is void. The estate created is a tenancy in common, and the restriction against alienation amounts to an absolute restraint on alineation within the meaning of section 10, and, therefore, must be disregarded as void; the sons take the property as tenants-in-common without fetter.

It is not clear whether section 10 was regarded as applicable in terms. Perhaps the principle was applied.

17.26. *Bombay case*—A term restraining alienation during the lifetime of the widow in a partition deed was held by the Bombay High Court[4] to

1 Compare section 5 and para 17.24.

2 A.I.R. 1955 Mad. 350 (reviews case law).

3 *T. V. Sangam* v. *Shanmukha Sundaram*, A.I.R. 1939 Mad. 769, distinguished in A.I.R. 1957 Pat. 571.

4 *Jagannathpuri*, A.I.R. 1968 Bom. 25, 25, para 8 (Deshmukh, J.), (contra *Sanatan*, A.I.R. 1946 Cal. 129—distinguished in A.I.R. 1951 Bom. 94).

be void, and it even held a partition to be a "transfer" for the purposes of section 10, Transfer of Property Act.[1]

17.27. *Family Settlement*—It may be noted that even in a family settlement, an absolute restraint on alienation is void.[2] In contrast, a partial restraint on alienation in family settlement would be valid if otherwise reasonable.[3]

The principle underlying section 10 would be applied to a family settlement if there is an absolute restraint on alienation.[4]

17.28. *Calcutta case*—A Calcutta case,[5] however, leaves the matter somewhat uncertain.

17.29. *Price*—On the question whether a provision compelling transfer to a particular person on an *artificially* narrow price is an absolute restraint or only a partial one, the position seems to be fairly clear.

In this context, it is pertinent to refer to an Allahabad case.[6] In that case, the transfer was from X to Y, on the condition that Y shall have no right to rtansfer the property except to the seller X and his heirs for *a fixed sum of money*. This was held to be an absolute restraint, for all practical purposes,[7-8] and was held to be void.

17.30. *English case*—In the English case of In re Rosher,[9] a testator devised an estate to his son in fee, subject to the proviso that if the son, his heirs or devisee, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof during the lifetime of the testator's wife, she (the testator's wife) should be given the option to purchase the estate at the price of £ 3000 for the whole, and at a proportionate price for any part or parts thereof. *The selling value* of the estate at the date of the will and at the time of the testator's death was £ 15,000.

It was held that the proviso compelling the son to sell at such an *undervalue* amounted to an absolute restraint on alienation during the lifetime of the widow, and was consequently void.

The same principle was applied by Eve, J. in *In re Cockerill.*[10] In that case, a testator by his will devised land subject to the proviso that if within 20 years of his death the devisee should desire to sell the land, he was to give the governors of a certain school the option of purchasing it at the price of £ 300 an acre. The total area was about 22 acres, and

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1 Compare also—
(a) *Waman* v. *Ganpat*, A.I.R. 1946 Bom. 10, 12;
(b) *Rasagoundan*, A.I.R. 1923 Mad. 577; 44 M.L.J. 513.

2 *Nageshar Sahai* v. *Mata Prasad*, A.I.R. 1925 P.C. 272, 280, affirming A.I.R. 1922 Oudh 236, 244 (case of compromise).

3 *Mationed Ruza* v. *Abbas Bandi*, A.I.R. 1932 P.C. 158 affirming A.I.R. 1929 Oudh 193.

4 *Venkatachallum* v. *Kabalamurthi* A.I.R. 1955 Mad. 350, 358.

5 *Sanatan*, A.I.R. 1946 Cal. 129.

6 *Gayasi Ram* v. *Shahabuddin*, A.I.R. 1935 All. 493, 494, 495 (Sulaiman, C.J. and Bennet, J.)

7 To the s ame effect, *Hari* v. *Jehomal*, A.I.R. 1935 Sind 182, 184.

8 See also *Dal Singh* v. *Khub Chand*, A.I.R. 1921 All. 97 (Tudball & Lindsay, JJ.).

9 In *re Rosher*, (1884) 26 Ch. D. 801; 53 L.J. Ch. 722.

10 In *re Cockerill*; *Mackaness* v. *Porchival*, (1929) 2 Ch. D. 131; 98 L.J. Ch. 281

the land was worth £ 670 an acre at the date of death. It was held that the condition amounted to a restraint on alienation and was void for repugnancy.

It may be noted that these English cases were relied on in the Sind case[1] for holding that a condition for pre-emption at an artificially small price is void in a will.

17.31. *Need for amendment*—It appears to us that the matter should be dealt with specifically in section 10 by extending that section to partitions and family arrangements.

In particular, while in a partition deed, it is permissible to create a right of pre-emption it should not be permissible to impose stringent conditions narrowing down the range of the price, and without any corresponding obligation on the other party to sell his or her share within the family. Such restrictions particularly partake of the nature of an absolute restraint on future transfer, and are therefore against justice, equity and good conscience. They are harsh and unconscionable in so far as they place an undue limit on the price. The freedom of transfer is restricted in a manner which practically amounts to an absolute prohibition.

Even if a partition may not technically be called a transfer, the principle underlying section 10 is so vital to the interests of society that by express amendment it will be just and fair to extend it. This is not to say that a partition is to be construed as a transfer under all sections of the Act. The amendment will be framed so as to extend the provisions of section 10 to partitions and family arrangements. So far as other sections of the Act are concerned the need for similar amendment should, wherever necessary, be examined on the merits with reference to the subject matter of each particular section.

17.32. *Position in the Punjab*—In this connection, it should be noted that the principle of section 10 has been applied in the Punjab to transfers, even though the Act has no application in the whole area of the State.[2] This at least shows that the principle is one deserving of adoption even where technically the section does not apply, since the rule enacted in the section is one based on allowing the free circulation and disposition of property. There is, therefore, sufficient justification—at least prima facie—for applying the section to partitions.

17.33. *Family settlements*—As to family settlements,[3] at present the section does not apply, and the reasons for extending the section to such transactions are the same as those in the case of partitions. It may be noted that in Hindu law even in the case of grants for maintenance, a restraint on alienation was not encouraged[4] A family arrangement and a compromise of dispute claims are not "transfers" and the section does not in terms. apply to them.[5] But the principle would be applicable were the condition involves an absolute restraint on alienation.[6]

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1 *Hari* v. *Jathomal*, A.I.R. 1935 Sind 182, 184 (case of Will).
2 A.I.R. 1924 Lak. 674.
3 A.I.R. 1955 Travancore 231.
4 I.L.R. 38 Mad. 867.
5 (a) *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*, 1 Ind. App. 157, 166 (P.C.);
(b) *Khunnilal* v. *Gobinda*, 33 All. 356 (P.C.);
(c) *Kapura* v. *Madsodan Das*, A.I.R. 1943 Lah. 168.
6 *Pritami Chand* v. *Sundar Das*, A.I.R. 1946 Pesh. 12.

17.34. *Compromises*—Where, however, the terms of a compromise were embodied in a decree, the legality of a convenant inserted therein was judged by the test of the rule in section 10. Where, therefore, in a partition-suit the parties entered into a compromise whereby the defendant transferred a house to the plaintiff on the condition that though he should be thenceforward its owner, he could not transfer it to another without the defendant's consent, and the plaintiff afterwards sold the house without his consent, it was held that the clause restraining alienation was repugnant to the grant and was, therefore, void, though its terms had been embodied in a decree.[1]

17.35. *Recommendation as to partitions and family arrangements*—Having regard to the various aspects discussed above, we are of the view that section 10 should, by an express amendment, say, by adding a new sub-section—be extended to partitions and family arrangements.

17.36. *Exception for leases—Extention recommended to movable property*—This disposes of the main paragraph of the section, and the amendments relevant to that paragraph. There is, in the section, an exception for leases, as to which we have no comments, except that we think that the principle of the exception should be the same as regards hire of movable property. We recommend that the exception should be so extended.

17.37. *Position as to married women—Recommendation*—Next, we come to the proviso. We have, in an earlier Report,[2] referred to the proviso to section 10 under which property can be transferred to a married woman who is not a Hindu or a Muslim, with a condition restraining her absolutely from alienating during marriage.[3] We said in that Report that "this proviso is in derogation of the general rule enacted by section 10 in its main paragraph, prohibiting the imposition of an absolute restraint on alienation. In our view, the proviso is not justified, in view of the growing social consciousness in the country. Christians and Parsis—to whom the proviso primarily applies,—are not less educated than others. There is no such restriction for other communities. The proviso is linked up with section 8, Married Women's Property Act. In our new scheme, its deletion is unavoidable."

Our recommendation in that Report may be quoted—

> "Having taken into account the social conditions of the present day and the considerations mentioned above, we are of the view that in section 10 of the Transfer of Property Act, the proviso relating to restraint on alienation should now be removed, and we recommend accordingly."

In conformity with that recommendation, we recommend again that *the proviso in section 10 relating to Married Women should be deleted.*

Another exception in favour of charities appears to have been overlooked in this section, but it is recognised[4] by section 18.

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1 (a) *Khiali Ram* v. *Raghunath*, 3 A.L.J. 621;
(b) *Gayadin* v. *Syed Mumtaz* (1907) 10 O.C. 136.

2 66th Report (Married Women's Property Act), para 15.2.

3 Also see 66th Report, para 5.7.

4 As amended by Act 20 of 1929, formerly section 17 of the Act.

17.36. *Charity—Recommendation*—There appears to be need for expressly mentioning in this section an exception for charities. It is well-recognised that where there is a gift in favour of a charity, a restraint can be imposed upon the alienation of the property gifted. Not only can a charity claim exemption from the rule against perpetuities to the extent allowed by law[1] but also it is permissible to restrain alienation where the object of the restraint is to preserve the property for the charity and thus to advance its charitable objects. Though not stated in so many words in section 18, it is a well-recognised principle of law.[2] In fact, when section 18 exempts charities from the rule against accumulation of income, it gives an indication of the policy of the law in this regard. For these reasons, we recommend that a specific exception should be inserted in section 10, saving the validity of absolute restraints where the beneficiary is a charity.[3]

17.37. That perpetuities and the restraint on alienation are connected with each other in their spirit may be well substantiated by the following extract from Jarman on Wills.[4]

> "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider, for a moment, what would be the state of a community, in which a considerable proportion of the land and capital was locked up. The free and active circulation of property which is one of the springs as well as the consequences of commerce, would be obstructed : the improvement of land checked, its acquisition rendered difficult; the capital of a country withdrawn from trade, and the incentives to exertion in every branch of industry diminished."

17.38. *Points for amendment summed up*—It is now time to sum up the amendments that we have recommended in section 10—

(i) Addition of an Explanation regarding the meaning of "absolutely".

(ii) Extension of the section to partition and family arrangements.

(iii) Extension of the proviso (leases) to hire of goods.

(iv) Addition of an exception for transfers in favour of charities.

(v) Deletion of the proviso relating to married women of certain communities.

17.39. *Revised draft*—In the light of the above discussion, we recommend that section 10 should be revised as follows :—

> "10. (1) Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void except in the case of a lease *of immovable property* or *letting out of goods on hire* where the

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1 Section 18.

2 (a) *Mrs. Goudoin* v. *Venkatesan*, I.L.R. 30 Mad. 378, 379;
(b) *Babulal* v. *Ghansham*, I.L.R. 44 All. 633;
(c) *Nizamuddin*, I.L.R. 19 Bom. 264.

3 This is not a draft.

4 Jarman on Wills, 4th Ed., pp. 250-251, cited by Gour.

condition is for the benefit of the lessor *or the person letting out the goods on hire*, or those claiming under him.....

(Proviso omitted)

*Explanation.*—

*A condition or limitation which in the circumstances of the case operates as a substantially absolute restraint shall, for the purposes of this section, be consrtued as an absolute restraint.*

"(2) *Nothing in this section applies to any condition or limitation in any such transfer of property as is mentioned*[1] *in section* 18.

(3) *The provisions of this section apply as far as may be, to a partition or family arrangement, as they apply to a transfer and the expressions "transferred" and "transferee" shall be construed accordingly.*

1 Section 18 applies to a transfer of property for the benefit of public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

## CHAPTER 18

### SECTION 11

### *RESTRAINT OF ENJOYMENT*

18.1. *Introductory*—We come to another topic dealing with another type of restraint. This time, the law is concerned not with a condition or a limitation imposing a restraint on alienation, but a restraint on enjoyment or application. The matter is dealt with in section 11. The section consists of two paragraphs. The first paragraph contains the main provision, while the second paragraph is really in the nature of an exception, or at least in the nature of a saving.

Under the first paragraph, where, on a transfer of property, an interest therein is created absolutely in favour of any person but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Under the second paragraph, where any such directions has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he (the transferor) may have in respect of a breach thereof. The second paragraph was modified by the amendment of 1929 and is generally regarded as a codification of the equitable doctrine of negative covenants, but it is wider than that.

In the case of a negative covenant,—for example, a covenant not to build so as to obstruct a view or not to use a piece of land otherwise than as a garden,—the court has power to interfere and the covenant is enforceable. Of course, where specific relief is claimed, the grant thereof is subject to the general principles regulating the grant of specific relief.

18.2. *First paragraph*—The first paragraph raises no serious problems. It is enough to point out that it applies only where an interest is created absolutely on a transfer of property. The general rule enacted is that a direction for application or enjoyment is void.

18.3. *Object of the grant*—Where the main object of the grant is clear, conditions clearly inconsistent with that object cannot be held to be valid. In dealing with a question of this kind, there is sometimes a difficulty. If one is to regard it as a question of construction, one asks oneself the question what the parties mean by first saying in the instrument that ownership is to be transferred and then saying that what is transferred is not ownership in the proper sense. In such a case every attempt to reconcile these statements should be made. But if no reconciliation is possible, the courts give effect to the main object of the parties and the provisions inconsistent therewith are treated as void. The court has to see whether the clause so far detracts from the enjoyment conveyed that to uphold it would be contrary to public policy.

18.4. *Need to decide whether absolute interest created*—It is, however, a difficult question to decide whether the transfer in a particular case is absolute and therefore the condition restricting enjoyment is void as repugnant, or whether the transfer, by reason of the condition, is not to be

regarded as an interest "created absolutely" within the meaning of section 11. In the former case, the condition is void under section 11, but not so in the latter case. The difficulty illustrated by two Calcutta cases. In a case decided in 1954,[1] a person conveyed certain property to another person but reserved for himself a subordinate or tenancy right under the transferee. The reservation was held to be valid. The transfer is to be regarded not as a transfer of the entire interest of the owner, but only of a portion—actual possession of the property remaining with the transferor on his undertaking to pay rent to the transferee. Reservation of a subordinate interest is in no way inconsistent with the proprietary interest.

In another Calcutta case,[2] property was transferred absolutely but a clause in the sale-deed—the clause usually described in conveyancing practice as habendum—was so framed that the interest of the immediate transferee was, in substance, restricted to a life interest. The clause was as follows :—

> "To have and to hold the said messuages tenements or dwelling houses lands hereditaments and premises hereby granted or expressed so to be free from all encumbrances unto and to the use of the said purchaser Sreemati Kalidashi Devi to be held by her for the term of her natural life as the estate of a Hindu widow and from and after her death to her three sons Samaresh Chandra Mukherjee, Sikharesh Chandra Mukherjee and Sunilesh Chandra Mukherjee to be held by them as tenants in common during their respective lives without power of anticipation and after their death unto and to the use of their respective heirs absolutely and for ever."

It was held that the transfer was of an absolute interest and no transferor can, when executing an absolute transfer, restrict the nature of the interest passing to the transferee in such a manner.

In the last mentioned case, unfortunately, the conveyancer seems to have used a inconsistent language,—first describing the instrument as a sale-deed and then inserting a restrictive clause in the terms quoted the rule in section 11. This does not, however, mean that in every case such a clause must be regarded as in operative. The first duty of the court, when it is called upon to apply section 11, is to decide whether the transfer creates an absolute interest. It is then only that occasion for applying the operative portion in the section arises.

18.5. *Gifts*—In regard to gifts, a question would arise whether the gift was conditional or absolute with a condition attached. If the gift is conditional, the condition is valid; in the latter case, the condition is void. Restrictions in an absolute grant that the grantee shall live at a particular place or that the property shall not pass to the grantee's daughter, are void.[3] In an earlier case,[4] where, by a trust-deed, it was provided that a dwelling-house dedicated to the worship of the deities should not be alienated for twenty years, the court gave effect to the prohibition.

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1 *Bejoy Krishna* v. *Iswar Damodar*, A.I.R. 1954 Cal. 400, 402 (R. P. Mookerjee Bentusengupta Mukherjee, JJ.).
2 *Manjusha Debi* v. *Sunil Chandra*, A.I.R. 1972 Cal. 310 (Amiya Kumar Mookerji, J.).
3 *Saraju Bala* v. *Jyotirmoyee*, I.L.R. 59 Cal. 142 (P.C.).
4 *Ananth* v. *A. B. Mackintosh*, 8 B.L.R. 60.

This case was referred to and commented upon in another case[1] in which Wilson, J., observed :

> "That case decided, I think, no more than this, that there was a valid trust for the performance of certain worship in the dwelling-house and as incidental to that trust, a restraint upon partition or alienation during the period of the trust, and that a mortgagee with notice was bound by it."

18.6. *Second paragraph*—The second paragraph is primarily, though not exclusively, meant for the convenient enjoyment of adjacent properties. The leading English case of *Tulk* v. *Moxhay*,[2] illustrates the principle. Thus, a covenant between the vendor and the purchaser that the purchaser and his assigns shall abstain from using the land in a particular way would be enforceable in equity, not only against the immediate purchaser but also against subsequent purchasers with notice[3]—and this is independently of the question whether the covenant at law runs with the land so as to bind even purchasers without notice. We are not, at the moment, concerned with the question how far subsequent purchasers should be bound —a matter dealt with, to some extent, in section 40. For the present, it is enough to state that the second paragraph takes out of the operation of the first paragraph the case under consideration. In other words, the provision in the first paragraph that the transferee shall be entitled to receive and dispose of such interest "as if there were no such directions" which, on its text is absolute and unqualified, is modified to the extent mentioned in the second paragraph, so far as the general validity of such a covenant is concerned.

18.7. *First paragraph*—It may be noted that the first paragraph of the section broadly corresponds to section 138 of the Indian Succession Act, 1925, quoted below :—

> "138 Where a fund is bequeathed absolutely to or for the benefit of any person but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction:"[4]

That section has an illustration as follows :

> "A sum of money is bequeathed towards purchasing a country residence for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so."

18.8. *Negative covenants*—The second paragraph of section 11 is an exposition of the equitable doctrine of negative easements: such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct it. Where there is a negative convenant expressed or implied—as, for instance, a covenant not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden,—the court interfers unless its hand is stayed on

1 *Rajender* v. *Sham Chund*, I.L.R. 6 Cal. 106, 116, 117.
2 *Tulk* v. *Moxhay*, (1848) 2 Phill 774.
3. *C.f.* section 40.
4 Section 138, Successoin Act.

the ground of greater inconvenience. Thus, a covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice independently of the question, whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.[1] So, where the owner of a plot of land sold a part of it to another and covenanted that the land "should never be hereafter sold, but let for the common benefit of both parties and their successors," it was held that the agreement to keep the land open was binding between the parties and their representatives, and that, therefore, the person who might hold the vendee's land, had the right to enforce the obligation against the person who might hold the vendor's land."[2]

18.9. Thus, if the plaintiff sells one of his two neighbouring houses; a stipulation in the sale-deed that the vendee should not construct windows or doors to the southern side of the house but that there should be only Zarookas of 1¼' by 1¼' for light is not void and is enforceable.[3]

18.10. *Second paragraph not confined to negative covenants*—Of course, the second paragraph of section 11 is not confined to negative covenants. As between the transferor and the transferee, it would appear that even affirmative covenants, if intended to secure the beneficial enjoyment of a piece of immovable property are, in general, valid. Such covenants are distinguishable from easements which, if otherwise legally created, would bind the whole world irrespective of notice. The point to be made is that as between the transferor and the transferee, even an affirmative covenant would be saved by the section, whatever be the position as regards enforcement by caliming specific relief and whatever be the position as regards enforceability against subsequent transferees. The grant of specific relief would, of course, depend on circumstances—including even changed circumstance.[4]

18.11. *Importance of covenants*—The emergence of multi-storeyed buildings with what are popularly known as ownership flats usually necessitates covenants binding the co-owners *inter se*. These covenants are absolutely necessary for the proper enjoyment of the property by each owner of the flat according to the true purport of the scheme. Sometimes the legislature intervenes by passing legislation relating to "condominium" titles.[5-7]

It has been recognised ever since the time of Coke that a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another[8] But the situation is now of more frequent occurrence, thus increasing the importance of the subject.

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1 *Tulk* v. *Moxhay*, (1848) 2 Phill. 774.

2 *McLean* v. *McKay*, L.R. 5 P.C. 327;
*Dhannu Lal* v. *Bansidhar*, A.I.R. 1929 Pat. 349.

3 1962 Nag. L.J. (Notes) 40 cited in the Yearly Digest.

4 *McLean* v. *McKay*, L.R. 5 P.C. 327, 337.

5 Condominium Act, 1970 (No. 54) (Newfoundlaind).

6 Act of respecting the co-ownership of immovables. Statutes of Quebec (1969).

7 Condominium Ordinance North-West Territories (1969).

8 Code on Littleon, 48b. See further *Sunsill Enterprises Proprietary Ltd.* v. *Berger Bros. Trading Co. Proprietary Ltd.*, (1971) 45 A L.J.R. 203.

18.12. *Common instances*—The most common instance of the rule embodied in the second paragraph is to be found in those cases where a person who owns a house and adjoining land and sells the land, enters into a covenant with the purchaser that the latter shall keep a portion of the land transferred vacant and free buildings, so as not to obstruct the air and light of the vendor's house. Such a covenant, being one intended for the beneficial enjoyment of the vender's house, is enforceable, as against the purchase.[1]

18.13. *Arbitrary condition*—A covenant which is not made for the beneficial enjoyment of the transferor's property, but is merely an arbitrary condition imposed for its own sake, is not enforceable against the transferee, and the latter may ignore it; e.g., a covenant to use the transferred land as a garden, a covenant to build a second story, a covenant to improve the transferred land. There are affirmative covenants which can be rarely enforced against the transferee.

18.14. *English law*—In England, it was considered to be an important contribution of equity that subject to certain conditions the burden of covenants could be assigned. This is, of course, confined to restrictive covenants.

With the growth of population, the law relating to restrictive covenants affecting the user of land has been developed. The cases range themselves conveniently under one or other of two heads, but under which the particular instance is to be classed is a matter of great difficulty, depending as it does upon a consideration of al lthe facts. Land may be sold upon terms which make the restrictive stipulations a bargain between the immediate contracting parties, who are at liberty to vary the terms of the contract between them[2] and this they may do either in express terms or by waiver or acquiscence will generally be limited in effect to the particular breach.[3] And benefit of covenants of this description may be made to run with the land at law and in equity,[4] although the burden can only be made to run with the land sold in equity.[5] On the other hand, there may be what is known as a building scheme which confers a right upon purchasers of lots to sue purchasers of other lots for failure of observe restrictive stipulations relative to the use of land.[6] And in this case the common vendor cannot dispense with the conditions or refuse to observe them.[7]

18.15. *History of the section*—It may be noted that while affirmative covenants, that is to say, covenants to compel the enjoyment in a particular manner, are not, in general, enforceable against subsequent trans-

1 See *Tulk* v. *Moxhay*, (1848) 2 Phill. 774; *Mc-Lean* v. *McKay*, L.R. 5 P.C. 427.
2 *Rupala* v. *Cowlishaw*, 11 Ch. D. 866;
*Osborne* v. *Bradley*, (1903) 2 Ch. 446.
3 *Sayers* v. *Collyer*, 28 Ch. D. 103;
*Knight* v. *Simmonas*, (1896) 2 Ch. 294.
4 *Rogers* v. *Hosegood*, (1900) 2 Ch. 388.
5 *Haywood* v. *Burnswick Permanent Benefit Building Soc.*, 8 Q.B.D., 493.
6 *Rowell* v. *Satchell*, (1903) 2 Ch. 212.
7 *Spicer* v. *Martin*, 14 App. Cas. 12;
*In re Birmingham and District Land Co.* v. *Allday*, (1893) 1 Ch. 342.

ferees, they are still enforceable between the transferee and the transferor. Before 1929, the second paragraph of section 11 read as follows :—

> "Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner."[1]

The amendment of 1929, although it made a verbal change in this paragraph, did not restrict its scope and was not, in fact, intended to restrict its scope. A change of substance was intended only in section 40, that is to say[2] as regards enforceability against subsequent transferees.—

The first paragraph of section 40, before its amendment in 1929, also contained the words "compel its enjoyment"—words which were wide enough to apply to affirmative covenants. After the amendment which omitted these words, an affirmative covenant cannot be enforced against a purchaser from a transferee and only a negative covenant can be enforced, provided that the other conditions in section 40 are satisfied.

18.16. *Allahabad case*—An Allahabad case[3], though decided under the pre-amendment section, supplies factual material which can be used in illustration of the amendment. In that case, the purchaser entered into a covenant to pull down, when required by the vendor, rooms for a passage between the house of the vendor and the house purchased by the purchaser. This covenant was held to be enforceable against the purchaser under section 11, second paragraph, and against the transferee from the purchaser under section 40, as it stood then. After the amendment of 1929, as Mulla has pointed out[4], the covenant can still be enforced against the immediate purchaser—no change is made by the amendment in section 11—but, being an affirmative covenant, it cannot be enforced against a purchaser from the vendee.

18.17. *Exceptions to the rule against restrictive enjoyment*—There are several exceptions to the general rule that conditions restrictive of the enjoyment of the absolute interest are void. Covenants or other obligations annexed to the ownership of property may control the enjoyment of property. They seem to fall under the following principal categories, namely :—

(i) Easements;
(ii) Covenants running with the land;
(iii) Restrictive covenants;
(iv) Personal covenants;
(v) Contractual obligations annexed to the ownership of property.

18.18. *Brief discussion*—A brief discussion of each category follows :

(i) Where property is subject to an easement, the easement is enforceable against the purchaser. Creation of easements and the general subject of easements are outside the province of the Transfer of Property Act.

(ii) Certain covenants run with the land.

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1 Mulla (1973), page 102.
2 Mulla (1973), p. 102.
3 *Nandgopal* v. *Batuck Prasad*, A.I.R. 1932 All. 778.
4 Mulla (1973), page 105.

The definition of this concept in England[1], is as follows :—

> "A covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be."

Although, in India, there is no distinction between law and equity, this provision is helpful as explaining the concept of covenants running with the land. Many covenants of the lessee run with the land. Then there are covenants for title created by statute in the case of sale of land and running with the land in India[2].

(iii) A restrictive covenant restrains the covenantor from putting his property to certain specified use. An affirmative covenant compels him to enjoy the property in a specified manner. A covenant to keep the land uncovered with buildings is an example of the former; a covenant to dig a well on the land for the supply of water to the dwelling house of the covenantee is an example of the latter.

Ordinarily speaking, the burden of an affirmative covenant does not run with the land. In contrast, the burden of a restrictive covenant is transferred to the subsequent transferees, subject to certain requirements. Developments in England in this field are represented by three leading cases, namely :

(a) *Tulk* v. *Moxhay*[3],
(b) *Austerberry* v. *Oldman Corporation*[4];
(c) *'Haywood' case*[5].

The position in equity under the rule in *Tulk* v. *Moxhay*, as modified and interpreted by later decisions, was thus stated by Maitland[6]

> "Any one coming to the land with notice actual or constructive of a covenant entered into by some previous owner of the land restraining the use to be made of the land, will be prohibited from doing anything in breach of that covenant."

It is now well settled that affirmative covenants are not enforceable against the transferees of the land, even where they have notice. But they are binding on the covenators.[7]

(iv) Personal covenants cannot be enforced against transferees. This is so even if they have notice.[8] However, this does not affect their validity as between the immediate parties.

(v) Contractual obligations annexed to ownership are illustrated by an obligation undertaken under a contract of sale.

**18.19.** *Covenants for supply of goods*—Covenants in leases for the sole supply of goods sold on the lease premises have often come up before

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1 Section 80, Law of Property Act, 1925.
2 Section 55(2) of the Act.
3 *Tulk* v. *Moxhay*, (1848) 41 E.R. 1143.
4 *Austerbarry* v. *Oldham Corporation*, (1885) 28 29 Chancery Division 750.
5 *Haywood* v. *Burnswick Permanent Building Society*, (1881) 8 Q.B.D. 403.
6 Maitland, Equity (2nd Ed.), page 163.
7 *Wolverhampton Corp.* v. *Emmons*, (1901) 1 K.B. 151.
8 *London Country Council* v. *Allen*, (1974) 3 K.B. 642.

English courts. In an English case decided in 1969,[1] Lord Denning M. R. discussed the aspect of restraint of trade. If a person out of possession is let into possession by an Oil company on the terms that he has to tie himself to that company—in the sense that he has to take all his supplies from that company—such a tie was described as good by Lord Denning. On the other hand, if an owner in possession ties himself for more than 5 years to take oil supplies from the company, that is an unreasonable restraint of trade and is invalid.

The relationship between the restraint of trade doctrine and the covenant also came up before a court in New South Wales, Australia.[2] An action between covenantee and covenantor involved a covenant executed by a purchaser of land not to use the property for the sale of wine products sold or produced under the name "Dalwood". The covenant was not capable of benefitting the land of the covenantor, though the land was retained by him. It was held that only covenants in leases and covenants which benefited retained land were excluded from the operation of the doctrine of restraint of trade.

18.20. *Incompleteness*—There appears to be a certain amount of incompleteness in the second paragraph of section 11. Before the amendment of 1929, it was clear[3] that both the right to restrain the enjoyment and the right to compel the enjoyment in a particular manner were saved. This does not appear very clearly in the section after its amendment. We have gone through the Statement of Objects and Reasons[4] and the Report of the Select Committee, relating to the amendment of 1929, but, with respect, it does not give any adequate reasons why the benefit of this clarification was sought to be sacrificed.

Whatever difficulties might have been felt in section 10, there was hardly any necessity to dispense with those words in the second paragraph of section 11, which at least made it clear that both affirmative and negative covenants were intended to be covered. Having regard to the fact that conveyancing in India is not in a very advanced stage of perfection and also having regard to the fact that there is a likelihood that a controversy,—if it has not arisen so far,—might arise by reason of the terseness of the language, it appears to be desirable to make it clear that an affirmative covenant is not invalid as between a transferor and transferee under section 11, second paragraph. In fact, this was the object of the Select Committee, namely, to make it clear that "although an affirmative covenant is not, by itself, invalid as between a transferor or a transferee, negative or restrictive covenants only can be specifically enforced against other parties". In so far as section 40 is concerned, the amendment of 1929, no doubt, follows the trend of later English cases.[5] But in so far as the amendment, as a matter of language, makes it less clear than before that section 11, second paragraph, was intended to cover both the types of covenants, it was not, in our opinion, properly executed. It is not without some effort that one is able to spell out from the paragraph, as amended, that both the types of covenants are covered. Readers might not immediately perceive the difference between the phraseology of section 11 and section 40. Even if they

1 *Cleveland Petroleum* v. *Dartatones*, (1969) 1 All. E.R. 211.

2 *McGuigan Investment Proprietary Limited* v. *Dalwood, Wineyard Proprietary Ltd.* (1970) 1 New Southwales Reports 686.

3 See "History of the section", *supra*.

4 Para 18.21, *infra*.

5 *Haywood* v. *Burnswick Building Society*, 8 Q.B.D. 403.

perceive the difference, they might not be readily able to spell out the effort of that difference. In any case, there appears to be hardly any harm if the position is made specific on the point discussed above.

18.21. *Statement of Objects and Reasons*—In the Statement of Objects and Reasons to the Amendment Bill it was stated—

"Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. *Section 11 refers to rights as between a transferor and transferee,* while section 40 relates to the rights of third parties against transferees. The words 'to compel is enjoyment', used in the second paragraph of section 11 and in the first paragraph of section 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. The paragraph seems to have been based on the observations of Lord Cottonham in 2 Ph. 774, a case decided in 1848. But in later English decisions such as 8 Y.B.D. 403, the observations in that case were not approved, and it is now settled that except in certain special cases affirmative covenants cannot be specifically enforced. Thus, in (1885) 29 Ch. D. 750, a covenant to spend money on the land was held as not binding on *the purchaser of the land,* although he had notice of the same. Indian Courts have followed the same principle.[1] We propose that the second paragraph of section 11 and the first paragraph of section 40 could be amended as to make it clear that, although an affirmative covenants is not, by itself, invalid as between a transferor and transferee (section 11), negative or restrictive covenants only can be specifically enforced against a third person (section 40)."[2]

The amendment unfortunately does not improve the second paragraph in point of precision. One cannot help observing that it makes it less precise than before.

18.22. *Need for change*—Having regard to what is stated above, we are of the view that section 11, second paragraph, should be amplified so as to make it clear that it applies to affirmative as well as to negative covenants.

18.23. *Charity*—Further, there should be an exception for charities, as in section 10, as proposed to be amended.[3]

18.24. *Re-draft of section* 11—In the light of the above discussion, we recommend that section 11, should be revised on the following lines :

*Revised section* 11

(1) Where, on a transfer of property, an interest there in is created absolutely in favour of any person but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

(2) Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment

1 27 Bom. L.R. 73; 1925 Bom. 183.
2 Statement of Objects and Reasons.
3 See discussion as to section 10 *supra.*

of another piece of such property, nothing in this section shall be deemed to affect any right which, the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof; *whether such direction restrains the enjoyment of the first mentioned property in a particular manner or compels the enjoyment thereof in a particular manner.*

[Also add Exception for charity,[1] as in amended section 10].

1 Para 17.39, *supra*.

## CHAPTER 19

## *CONDITION MAKING INTERST DETERMINABLE ON INSOLVENCY OR ATTEMPTED ALIENATION*

### SECTION 12

19.1. *Section* 12, *first paragraph*—The power of the transferor to impose conditions while making a transfer of property is restricted by a further provision contained in section 12 which invalidates two kinds of conditions or limitations—(i) a condition or limitation which makes any interest to cease on the person becoming insolvent; (ii) a condition or limitation making any interest to cease on a person endeavouring to transfer or dispose of the same. The reasons for invalidating the condition in each case may be stated. In the first case, the consideration is not a purely legal one, and the aspect of public policy involved is of greater importance than in the second case.

The law does not consider it proper that while a person should, in other respects, enjoy an interest in an unrestricted manner, that interest should cease as soon as he becomes insolvent. Such a provision, if recognised, would practically defeat the law relating to insolvency. If it were to be permitted in an unqualified form, a time would come when no property would ever become available on insolvency to the creditors, because every person would get such a condition inserted in a transfer. It may not help the transferee directly, but at least it would defeat his potential creditors on insolvency.

19.2. *Section* 12, *first paragraph—Interest terminable on alienation*—The second condition sought to be invalidated by section 12, pertains to alienation. An attempt to transfer or dispose of an interest reserved or given to a person should not be made a ground for termination of the interest, the rationale here being that such a condition would be repugnant to the nature of the interest. The law favours the circulation of property and if an interest is once transferred, the transferee should further have power to transfer it. In any case, the transferor is not allowed to create, by private contract, a non-transferable interest and thus add to the list of things which cannot be transferred.[1]

19.3. *Section* 12 *compared with section* 10—Since the subject of restraints on alienation has also figured in section 10, it would be useful to point out that section 12, first paragraph, is in some respects wider than section 10. Section 10 applies only to restraints which are absolute—as the text goes,—or restraints which are substantially absolute—as interpreted by judicial decisions. In section 12, however, a partial restraints also seems to be covered. It may also be stated that section 10 deals with a condition against alienation in the abstract, while section 12 is confined to conditions or limitations which expressly provide for cesser of an interest on an endeavour to transfer or dispose of the same.

19.4. *Section* 12, *first paragraph and English law*—It may be noted that section 12 enunciates an exception to the general rule enacted in sections 31 and 32, which provide that an interest "may be created" with the

1 Section 6.

condition super-added that it shall cease to exist on the happening of an uncertain event. Out of the range of permissible conditions, section 12, first paragraph, takes out two kinds of conditions.

19.5. *English law in regard to insolvency*—It is to be noted that in regard to insolvency, the section departs slightly from the English rule. A provision terminating the interest on bankruptcy is a common forfeiture clause in English conveyances.[1] But a man cannot settle property on himself, determinable on bankruptcy. A settlement so made is void, it being fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors.[2-3].

19.6. *Succession Act*—The law is also different under the Indian Succession Act. Section 120 of that Act recognises the legality of a condition terminating an interest on insolvency. If "an estate is bequeathed to A, until he shall take advantage of the Act for the relief of insolvent debtors, and after that to B, B's interest in the bequest is decluared to be contingent until A takes advantage of such a law". So says one of the illustrations of section 120.[4]

19.7. *Problem arising on second paragraph*—So much as regards the first paragraph of section 11. We shall now deal with an important question that is raised by the second paragraph of the section. Operating as an exception to the first paragraph, the second paragraph saves conditions in a lease which are inserted "for the benefit of the lessor or those claiming under him". It is well-known that conditions are often inserted in leases, prohibiting or restricting the lessee from assigning the lease or subletting the leased premises. While in the absence of such a condition, the assignment or sub-lease would be permissible under the Act[5], that position is expressly made subject to a contrary provision in the lease.[6] Now, when such a condition is expressly inserted in a lease, the question arises whether it is to be construed as one intended for "the benefit of the lessor" within the meaning of the second paragraph of section 12. At first sight, it would appear that[7] the answer should be in the affirmative and that there can hardly be any doubt on the subject.

It would appear, however, that a Calcutta case throws some doubt on the subject.[8] Though the observations in that case were, strictly speaking, obiter, they have, with great respect, created some confusion.

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1 *Brandon* v. *Robinson*, 18 Ves. 429;
*Natton* v. *Mav*, 3 Ch. D. 148, 152;
*In re Machu*, 21 Ch. D. 838;
*In re Bedasons' Trusts*, 28 Ch. D. 523;
*Metcalfe* v. *Metcalfe*, 43 Ch. D. 633, C.A. (1891) 1 Ch. 1, distinguishing *White* v. *Chitty*, L.R. 1 Eq. 372; *Llyod* v. *Llyod*, L.R. 2 Eq. 722.

2 Compare the Presidency Towns Insolvency Act (3 of 1909), section 9, clause (b); Provincial Insolvency Act (5 of 1920), section 6, clause (b).

3 *Hormusji* v. *Dadabhoy* (1895) I.L.R. 20 Bom. 310.
(Case decided on 30th September, 1895, after the act had been extended to the Bombay Presidency on 1st January, 1893).

4 Section 120, Indian Succession Act, 1925, Illustration (vii); Section 107 of the Indian Succession Act (10 of 1865), paragraph III.

5 Section 108(j).

6 Section 108, opening lines.

7 See para 19.29 (*infra*).

8 *Nilmadhab* v. *Naruttam*, I.L.R. 17 Cal. 627 (See *infra*).

19.8. *Effect of covenant on validity of assignment*—Even if the point just now mentioned is kept aside, there yet remains to be considered another point also arising out of the second paragraph on the same subject. If such covenants against assignment of a lease are violated, and an assignment or a sub-lease is made in violation thereof, is the assignment or sub-lease ineffective? In other words, assuming that a condition prohibiting an assignment or sub-lease is one for the benefit of the lessor and therefore not invalidated by section 12, does it so operate as to render the assignment or sub-lease void? One would have thought, that to this question also, the answer should be in the affirmative. But it would appear from the reported decisions, to be discussed presently, that while one view on the subject is that the assignment is void, another view would merely recognise a right to damages in favour of the lessor for breach of the covenant, at the same time treating the assignment as valid notwithstanding that it is in violation of an express covenant.

19.9. *Aspect of power of re-entry*—At this stage, it is also necessary to refer to the law relating to forfeiture of leases. Under the Act,[1] the mere fact that the lessee commits breach of a covenant of the lease does not, in general, suffice to confer a right on the lessor to forfeit the lease. It is further required in general that the covenant should state that the lessor has a power to re-enter the premises for breach. This restriction seems to have been inserted in view of the hardship that may be caused to the lessee by a forfeiture. This general rule applies to covenants against assignments, as well as to other covenants.

The scope of this rule is restricted to cases where the lessor proposes to forfeit the lease. It has, in the scheme of the Act, no express relevance to—(i) the question whether the covenant in valid as between the lessor and the lessee, or (ii) whether the covenant is to be regarded as for the benefit of the lessor, or (iii) whether action taken in breach of the covenant would be legally recognised and what, if any, would be the legal remedies for the breach—leaving aside forfeiture, for which, as already stated, the covenant must contain an express power of re-entry.

Now, what has happened is that the requirement that there should be a power of re-entry, which, according to the scheme of the Act, *is relevant only in the context of a claim to forfeit the lease*[2], has somehow been considered to be relevant also for deciding the other queries listed in the immediately preceding discussion. The view is sometimes taken—expressly or impliedly—*that where there is no power of re-entry*, then an assignment in breach of a covenant to assign is valid, *qua* asignment, though the lessor can sue the lessee for damages. This view has been taken in a later Calcutta case[3], holding that an assignment in breach of such a covenant is nevertheless valid. There is no elaborate discussion of the various aspects.

19.10. *Three shades of view*—Thus, case law reveals three shades of opinion—

(i) the covenant is void;

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1 Section 111 (5). Para 19.13 *infra*.
2 Para 19 9 supra.
3 ***Basarat Ali Khan*** **v.** ***Manirullaa,*** I.L.R. 26 Cal. 745, 746.

(ii) the covenant is valid, but the assignment is also valid even though in breach of the covenant;

(iii) the assignment is void.

19.11. *Later Calcutta case*—The extreme view that *the covenant is void*, which was taken in the earlier Calcutta case,[1] was not approved by the same High Court in a judgment of a Division Bench consisting of Jenkins C.J. and Mokherjee J.[2] That Bench at least held that the covenant was valid, though it did not regard it as nullifying the assignment.

19.12. *Madras view*—In a Madras case,[3] Bhashyam Ayyangar, J., dealing with the question of forfeiture, expressed himself strongly against the Calcutta view in these words—Moore J. concurred with him :

> "The stipulation that the lessee shall have no right to transfer his interest is clearly one intended for the benefit of the lessor and it would [illegible] able to hold, following the dictum in *Nil Madhab Sikdar* v. ***Narattam Sikdar***[4] that the condition against alienation cannot be said to be for the benefit of the lessor and hence it is void under the provisions of section 10 of Act IV of 1882. The stipulation against alienation is not void "but valid (***Vyankatrayya*** **v. *Shivrambhat*)**[5] and if the plaintiffs had sued for an injunction to restrain the defendants' assigner from making the assignment or sued for damages for breach of the stipulation, they would have been entitled to the remedy sought for (*Jivandas Keshavji* v. *Framji Nanabhai*[6], *Tamaya* v. *Timana Ganjaya*,[7] *McEacharan* v. *Colton*,[8] and Foa on 'Landlord and Tenant' 2nd edition, page 211). It may also be that a transfer by the lessee, absolutely or by way of mortgage or sub-lease, in breach of the covenant not to alienate, will be void as against the lessor and he may realise arrears of rent due by the lessee, by attaching and selling his interest in the lease as effectually as *if there had been no transfer by the lessee* and the transfer will also be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract under section 108(c) of the Transfer of Property Act."

19.13. *Other provisions in the Act*—Under section 111(g), so far as is material, a lease of immovable property determines by forfeiture, that is to say, in case the lessee breaks an express condition which provides that on breach thereof a lesser may re-enter and the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

Under section 108(j), so far as is material, in the absence of a contract or local usage to the contrary, the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property

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1 *Nilmadhab* v. *Narattam*, (1890) I.L.R. 17 Cal. 826.

2 *Basarat Ali Khan* v. *Manirulla* (1909) I.L.R. 36 Cal. 745, 746, followed in *S. K. Roy Choudhury* v. *A. L. Khan*, (1960) 65 Cal. W. N 1050, 1052.

3 *Parameshri* v. *Vittappa*, (1903) I.L.R. 26 Mad. 157, 161 (Bhashyam Ayyangar & Moore, JJ.).

4 *Nil Madhav Sikdar* v. *Narattam Sikdar* I.L.R. 17 Cal. 827.

5 *Vyankatraya* v. *Shivrambhat*, I.L.R. 7 Bom. 256.

6 *Jivandas Keshavji* v. *Framji Nanabhai*, 7 Bom. H.C.R. (A.C.T.) 69.

7 *Tamava* v. *Timana Ganjaya* I.L.R. 7 Bom. 262. 265.

8 *McEacharn* v. *Colton*, (1902) A.C. 104 (P.C.).

and any transferee of such interest or part may again transfer it. The lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease.

19.14. *Confusion between right of forfeiture and validity of assignment* —The case law discussed above shows the uncertainty. It would seem that the difficulty has arisen because a confusion has been made between the lessor's *right to forfeit* under section 111(g),—for which the Act requires an express provision for re-entry—and the effect of the breach of the prohibition against assignment on the validity of assignment—a matter on which section 111 has no relevance. The point to be determined is the meaning of the words "for the benefit of the lesser" in sections 10 and 12.

19.15. *Calcutta case*—The earlier Calcutta case[1] is often cited in support of the narrow construction of "for the benefit". But what that case decided was that the *compulsory sale of the lessee's interest* in execution of a decree obtained against the lessee was valid. The observation that since there was no right of re-entry, the condition against alienation was not for "the benefit of the lessor", was obiter. From other points of view also, this observation was obiter, because the lessor did not sue to declare the assignment as void, but sued for a declaration that the lease was forfeited. That relief he obviously could not claim as there was no power of re-entry.

19.16. *Position under case law in India*—The position then seems to be that while (i) the earlier Calcutta view would invalidate the very covenant, (ii) the later Calcutta view would recognise it to the extent of permitting a grant of damages, and (iii) observations in the Madras judgment would not only permit the grant of damages, but also validate the covenant and nullify the assignment—though, of course, forfeiture cannot be ordered in the absence of a provision conferring a right of re-entry.[2]

19.17. *Anomaly caused by Calcutta view*—Apart from the position under case law, the question should be examined on the score of principle. Whatever be the reasons in equity for denying the *right to forfeit* a tenancy in the absence of an express clause conferring a power of re-entry, is there sufficient justification or juristic reason for recognising the assignment as valid, where there is a valid covenant against it? The anomaly of taking such a view could be illustrated by taking a hypothetical case. A lessor who is a vegetarian creates a lease in favour of A, who is also a vegetarian; the lessor inserts a covenant that the lessee shall not assign the lease to a non-vegetarian. There is no express provision for re-entry. The lessee attempts to assign the lease to a non-vegetarian. Is it adequate justice if the lessor is merely given the right to compensation for the loss caused? In its very nature, such a loss cannot be adequately estimated in terms of money. It is true that before the assignment the lessor could have sued for an injunction, but what is to happen if the assignment has already been executed by the lessee? To take the position that such an assignment is valid notwithstanding the covenant and that the lessor can sue only for damages—even if such a position is supported by a few cases—is not really doing substantial justice. Substantial justice, it is urged, would be better achieved if the lessor has a right to get the assignment set aside—without, of course, forfeiting the lease. The assignee will not, under such a provision,

1 *Nil Madhav* v. *Narattam*, (1890) I.L.R. 17 Cal. 827.
2 Section 111 (g).

get the right to occupy the premises. It may be that the lessee is not interested in the lease. If so, the lessee can surrender the premises. The doctrine of equity which gave birth to the provisions against forfeiture, does not necessitate the further position that the assignment must also be recognised.

19.18. *English law*—It is usually stated in the commentarios on the Act that in English law, in the absence of an express covenant providing for re-entry, the assignment is valid. This does not, however, appear to be a totally accurate statement of the position. The case of *Commissioners of Works* v. *Hull*[1] is one of the cases cited in support of the proposition. But actually in that case the clause prohibiting assignment provided for forfeiture and proceedings of the lessor against the assignee for ejectment were successful. The case of *Williams* v. *Erle*[2] was one relating to the question of damages. Other cases also do not directly relate to the *validity of the assignment.*

19.19. The assumption that in English law in the absence of a power of re-entry an assignment is valid seems to be debatable. Of course, a lease may contain an express proviso for re-entry or forfeiture by the landlord on specified events. Such a proviso leaves it optional to the landlord whether he will exercise his right of determining the lease upon a cause of forfeiture arising. The lease is not void but voidable, and only the landlord can avoid it[3].

19.20. *Aspect of condition*—But English law also recognises the rule that the lease may be made determinable *without an express proviso for re-entry,* if the event specified is a "condition" subject to which the term was created[4] and the event happens.

In this context English law makes a distinction of much the same nature found in the law relating to sale of goods between condition and warranty. If the clause which is put forward constitutes only an "agreement" on the part of the lessee to do or not to do a specific act, and if the clause is not tantamount to a "condition", the landlord cannot re-enter for breach of it except under an express proviso for re-entry. It will thus be obvious that even in the absence of a proviso for re-entry under English law, a stipulation in a lease may amount to a condition and in that case the lesser is even allowed to terminate the lease. Now, if the lessor is competent to terminate, then it follows that in the case of a covenant against assignment being broken, the covenant (if construed as a condition) gives the lessor the right to nullify the assignment. If he has got the right to forfeit the lease, it follows that he is competent not to recognise the assignment. In fact, the true position in English law seems to be that since forfeiture is a *matter stricti juris,* an assignment *which is void* does not give cause for forfeiture *ipso facto.*[5] Of course, where a covenant against assignment or underletting with a proviso for re-entry on breach of covenant is broken, the lessor can either re-enter for the forfeiture or sue for damages for the breach. The option is his, subject to the provisions as to relief against forfeiture. It is also true that an assignee

1 *Commissioners of Works* v. *Hull,* (1922) 1 King's Bench 205; (1921) All E.R. reprint 508; 3 Halsbury, 3rd Ed., Vol. 23, page 665.

2 *Williams* v. *Erle,* (1868).

3 Halsbury, 3rd Edition, Vol. 23 pages 665-666, para 1389; *Jardino* v. *Attorney-General for Newfoundland,* (1932) A.C. 275 (P.C.) and other cases.

4 Halsbury, 3rd Edition, Vol. 23, page 666, para 1390.

5 *Doed Llyod* v. *Powell,* (1826) 5 B. & C. 308, 313 Halsbury, 3rd Ed., Vol. 23, page 630, footnote (1).

in possession must comply with the stipulations of the lease notwithstanding the want of the landlord's consent requisition under the clause against assignment.[1]

19.21. *Injunction*—But the very fact that the breach of a covenant against assignment or underletting may be restrained by injunction[2] shows the attitude of the law. It has also been held that the law will restrain the breach of a covenant not to assign without the landlord's consent.[3] This is in contrast with the refusal of the law to grant specific performance in some cases such as breach of a covenant to repair or of a covenant to build, the assumption being that in such cases damages would be, in general, an adequate remedy. In short, the whole trend of the judicial attitude in England would seem to be in the direction that there is no categorical rule that every assignment in breach of a prohibition in nevertheless valid.

19.22. *Equity*—The jurisdiction of equity by way of grant of injunctions, to restrain the alienation of property (in the largest sense of the word) is certainly exercised where the grant of the injunction is indispensable to secure the enjoyment of a specific property or to preserve the title to such property or to prevent frauds and irremediable injustice. It is on the same principle that courts of equility refuse to grant a relief against forfeiture for the breach of a covenant not to assign a lease without the landlord's consent, because from such breaches it is not possible to make a clear estimate of damages.[4]

19.23. *Equity's attitude towards forfeiture*—It is to be noted that the principle which governs the court in granting relief against the forfeiture of lease is that the court will grant relief only where the court can give compensation in lieu of the forfeiture. Therefore, in general, equity granted relief only when the forfeiture clause in substance was merely a security for the payment of a monetary sum. Save in very exceptional circumstances, no relief was granted against forfeiture for breach of a covenant not to underlet without consent.[5]

No doubt, forfeiture in England, as in India, is now governed by statutory provisions,[6] but the point to be made is that equity did take into account the aspect of compensability in exercising jurisdiction concerned with the consequences of an assignment of leases.

19.24. *Story's view*—The following exposition of the position by Story is instructive[7] :

> "1324. Be this as it may, it is clearly established, that courts of equity will not interfere, in cases of forfeiture for the breach of covenants and conditions, where there cannot be any just compensation decreed for the breach. Thus, for example, in the case of a forfeiture for the breach of a covenant, not to assign a lease without

1 *McBacharn* v. *Colton*, (1902) A.C. 104 (P.C.).
2 *McBacharn* v. *Colton*, (1902) A.C. 104 (P.C.).
3 Story, Equity Jurisprudence (1919), page 369, para 305.
4 *Barrow* v. *Isacs & Sons*. (1891) 1 Q.B. 417.
5 *Barrow* v. *Isacs & Sons*. (1891) 1 Q.B. 417.
6 Section 146, Law of Property Act, 1925.
7 Story, Equity Jurisprudence (1919), para 1324, 1324a, 1324b.

licence, or to keep leasehold premises insured, or to renew a lease within a given, time no relief could until lately have been had; for they admit of no just compensation or clear estimate of damages.'

"1324a. The power of courts of equity to relieve lessees from forfeiture for breaches of covenants in leases was enlarged by the 22 & 23 Vict. c.35, s.4, which gives the courts power to relieve against forfeiture for breach of a covenant to insure, where no loss or damage has happened, and the breach has been committed through accident or mistake, and an insurance has been duly effected at the time of application. But this relief can only be given once, nor can it be given at all where a forfeiture shall have been already waived out of court in favour of the person seeking the relief.

"1324b. Further, by the Conveyancing Act, 1881, s. 14, the rights of re-entry or forfeiture for breaches of covenant are limited. For it is provided by that Act that previously to enforcing these rights by action or otherwise, the lessor must serve on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money. If the lessee either remedies the breach, or makes compensation in money, no right of re-entry or forfeiture will arise. Further, if the lesser proceeds to enforce his right of re-entry or forfeiture by action or otherwise, the lessee may apply to the court for relief, which the court may, having regard to all the circumstances, grant or refuse at its discretion. But the Act excludes from its operation : (1) Covenants or conditions against the assigning, underletting, parting with the possession or disposing of the land leased."

19.25. *Judicial attitude under section* 146, *L.P. Act*—Even so far as section 146 of the Law of Property Act is concerned, in England, it has been pointed out[2] by Harman J. that the power to grant relief to an assignee, where an assignee is in breach of a covenant not to assign, "remains a jurisdiction to be exercised sparingly, because it thrust upon the landlord a person whom he has never accepted as tenant".

19.26. *Need for change*—Reverting to the topic of validity in India, we do not see any reason why the assignment should be regarded as valid merely because the conveyancer has not inserted a clause for re-entry. The insistence of the law on such a clause may be understandable where the question is of forfeiture. There is, however, no reason for such an insistence where the question is as to the validity of the assignment in breach of a covenant. Ordinarily, a covenant is intended to have legal effect. In the absence of compelling considerations of policy, the covenant should be given effect to.

*Modern condition*—Indian social conditions also necessiate the approach suggested above.

Instead of insisting on a specific power of re-entry and then bringing into play the provision for forfeiture and then the provision for relief against forfeiture as a matter of discretion, it will be more consonant to Indian social

1 See *Barrow* v. *Isacs & Sons.* (1891) 1 Q.B. 417.

2 *Crocry* v. *Barmersell, etc. Co. Ltd.*, (1949) Chancery 751; Vol. 83, Solicitor Journal, 357.

conditions if the view is adopted that a covenant against assignment must always be regarded as a covenant "for the benefit of the landlord" so as to render the assignment void. We are using the expression "assignment" for brevity in this discussion. It will include cases of sub-letting and the like, also.

19.27. *Mulla's view*—At one place, Mulla[1] states that the words "for the benefit of the lessor" refer to a condition giving the lessor a right of re-entry. For this, he relies on the amendment made in 1929 in section 111(g). In his commentary on section 108(g), however,[2] he has stated that the covenant cannot be invalid, for such a covenant by itself will support a suit for injunction and damages.[3] He adds that the words of section 10 ("benefit of the lessor") seem to be words of explanation rather than of limitation.

19.28. *Reasons summed up*—In our view, while in the absence of a power of re-entry, forfeiture may not be ordered, the covenant should be enforceable at least to the extent of nullifying the assignment. To sum up the reasons in favour of such a view—

(a) such a construction has been favoured by the Madras High Court, though not by the Calcutta High Court;

(b) it is, in general, what the parties intend, since any other view would amount to thrusting an unwanted tenant on the landlord;

(c) it is, in consonance with justice;[4]

(d) it satisfies the wording of section 12.

Speaking realistically, one would think that when parties to a lease insert a stipulation against assignment, they intend that the stipulation is for the benefit of the lessor; it certainly is not for the lessee's benefit, and if it is for neither's benefit, there would hardly be any occasion for inserting it—save in the exceptional cases where the covenant is intended to assist a third party.

We may add that we consider it sufficient if the breach of condition is made to render the assignment or subleting *voidable at the instance* of the lessor. We recommend an amendment on these lines. This recommendation is subject to reservation by Shri Dhavan.[5]

19.29. The reason in support of this approach may be summarised again—

(i) textual—based on section 7, read with section 108(j);

(ii) textual again; but based on section 108(j); which makes a specific provision that the right to assign the lease is only conferred in the absence of a contract to the contrary. Section 108 does not deal only with the contractual aspect. It deals with the rights of property;

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1 Mulla (1973), page 107, commentary on section 12.
2 Mulla (1973), page 712, comment on section 108(g).
3 *Gurushantappa* v. *Mallaya*, A.I.R. 1921 Bom. 27.
4 Para 19.18, *supra*.
5 Reservation by Shri Dhavan as to section 12.

(iii) juristic—any other approach would make property which is non-transferable, transferable;

(iv) effect of the contrary view on section 10;

(v) sociological;

(vi) support afforded by the Madras view.

This recommendation is subject to reservation by Shri Dhavan.[1]

19.30. *Forfeiture*—As regards forfeiture, there is a distinction between cases where there is a covenant in the lease against alienation, *but no right of re-entry reserved in the landlord;* and cases where there is a covenant in the lease against alienation coupled with a clause for re-entry. In the first class of cases,[2] the remedy is of the landlord is either by way of injunction against an apprehended breach,[3-5] or by recovery of damages for a breach already committed.[6-9]

In the second class of cases, the lessor can[10] forfeit the lease. But this distinction is for purposes of forfeiture only. It need not be material in regard to the validity of an assignment made in breach of a covenant.

19.31. *Recommendation to amend section* 12, *and to insert section* 108A—In the light of the above discussion, we recommend[11] that to section 12, the following Explanation should be added :

> "*Explanation.*—For the purpose of section 10 and of this section, a condition prohibiting or restraining the assignment of a lease or subletting of the leased premises is a condition for the benefit of the lessor or those claiming under him."

A new section be inserted after section 108 to provide that the lease shall be voidable in such cases.[12]

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1 Reservation by Shri Dhavan.
2 *Doe* v. *Godwin,* (1815) 16 R.R. 463; 4 M & S 205.
3 *Bibi Sahodra* v. *Rai Jang Bahadur,* (1882) 8 Cal. 224; 8 I.A. 210 (P.C.).
4 *Governors of Bridewell Hospital* v. *Pawkner,* (1892) 8 T.L.R. 637.
5 *McRacharn* v. *Colton,* (1902) A.C. 104.
6 *Williams* v. *Earle,* (1863) 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231.
7 *Paul* v. *Nurse,* (1828) 8 B & C 480; 2 Ma Ry. 525.
8 *Weatherall* v. *Geering,* (1860) 12 Vos Jun 504; 8 R.R. 369.
9 *Basarat Ali Khan* v. *Manirulla* (1909) 36 Cal. 745; 2 I.C. 416.
10 On the wording of section 108(j) can be followed—para 19.13.
11 This recommendation is subject to reservation by Member, Shri Dhavan.
12 See section 108A, *infra.*

## CHAPTER 20

## *TRANSFERS TO UNBORN PERSONS*

### SECTION 13

20.1. *Introductory*—So far we were concerned with conditions or limitations restraining the assignment or enjoyment of the interest created by a transfer. The object of the provisions prohibiting or restricting the insertion of such conditions is to encourage the free circulation of property. In order to encourage the vesting of interests within a reasonable time, certain provisions could be thought of. Based on this broad principle, certain rules were evolved in England[1]—they are no longer in force in their original form. The rules were adopted in India—though in a different form, and perhaps with an unnecessary variation. The beneficiaries whose interests are the subject matter of the rules are unborn persons. The object of the law is to determine the point of vesting—in England, or to define the quantum of interest—in India.

20.2 *Section* 13—The freedom of disposition is, then, restricted by the provision in section 13, which concentrates on unborn persons, or rather persons "not in existence" at the date of the transfer. While ordinarily, it is open to the transferor to define the quantum of interest, yet if the beneficiary is unborn or non-existent, certain restrictions have been considered desirable.

Section 13 is in the following terms :—

> "Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."

(There is an illustration which we are not quoting).

20.3. *Scheme of discussion*—This section is generally understood to codify what is known in England as the rule against double possibilities or the rule against remotences of limitation, though this is not strictly accurate. We propose to deal, in connection with this section, with a few important questions, namely, the rationale of the rule, the English law, the scope of the rule in relation to conditions which affect the certainty of vesting, and the position of a child in the womb. We shall also deal with the question whether the rule should be retained at all.

20.4. *Rationale*—It is generally thought that section 13 was an attempt to import into and adopt for use in India what was known in England as the rule against double possibilities. However, the product, as was observed by Blagden J.,[2] might have suffered in transit. The proposition in *Whitby* v. *Mitchell*—the English rule—was somewhat different, and as will be noted later,[3] has been abolished in England.

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1 Chapter 21, *infra*.
2 *Ardeshir*, A.I.R. 1945 Bom. 395.
3 Para 29.9, *infra*.

20.5. *Future intrests*—Section 13 assumes a grant to commence in interest at a future time, or in other words, it relates to future estates. We are now concerned with contingent remainders. A contingent remaider may be created by any mode of conveyance, but an executory interest can arise only by the instrumentality of a will, or under the Statute of Uses. The subject of contingent remainders has been dealt with in the Act. If a grant is made to A for his life, and after his death to B for life and after B's death to C for his life, and so on; the estates of B and C are intended to be as immediately and effectually vested as the estate of A, so that B could take on determination of the estate of A, and C would take on the determination of the two prior estates. The future estates created in favour of B and C are then spoken of as vested remainders, and their characteristic is that they are always ready to come into possession the moment the prior to estate is determined.[1] The gift is immediate, but its enjoyment may be postponed till the determination of the prior estate.

20.6. *Contingent remainder*—As contra-distinguishd from such an estate, the contingent remainder is not ready from its commencement to its end, to come into possession at any moment when the prior estate may happen to deermine.[2] As an example, suppose that a gift is made to A, *a bachelor*, for his life, and after determination of that estate by forfeiture or otherwise in his life time, to B and his heirs during the lifetime of A, and after the decease of A to the eldest son of A, and after the decease of A to the eldest son of A and the heirs of his body. Here B's estate is again a vested remainder, but the estate to A's eldest son is a contingent remainder, for, while B's estate is ready to come into possession whenever A's estate may happen to determine, the estate tail to the eldest son of A is contingent, since A being a bachelor may never marry, or may never have a son to take possession on determination of the estates of A and B. But if A should marry and have a son, the contingent estate would then immediately become vested, for then the estate is ready to come into possession on determination of the prior estate.

20.7. *Propositions in the background—Transfer to unborn person*—The rationale of the rule can be best understood if certain fundamental legal propositions—propositions not dealing with the policy of the rule but relevant to an understanding of the significance and operation of the rule—are borne in mind. In the scheme of the Act, a transfer of a property is a transfer made to a living person.[3] A transfer in favour of an unborn person—"a person not in existence" at the date of the transfer—cannot be made directly; this is true whether the intended transferee is an unborn human being or a corporation not yet in existence. Though this proposition is not expressly enacted in the Act—as in section 112 of the Indian Succession Act—it is assumed. If a transfer is to be made creating an interest for the benefit of an unborn person or a corporation not yet created, there must, under the terms of the transfer, be created a prior interest.

In this respect, the Act is more liberal than the Hindu law, which did not contemplate transfer of property for the benefit of a person *not yet in existence*,—if we leave aside those borderline cases where dedication was to be made in favour of a deity whose image has not yet been installed.

1 *Sundar Bibi* v. *Lal Rajendra Narain Singh*, I.L.R. 47 All. 496.
2 Section 20.
3 Section 4-5.

20.8. *Dedication to deity*—A Hindu deity is, in the contemplation of the Hindus, always in existence; the establishment and consecration of a visible image is merely a manifestation. Hence the principle of Hindu law which invalidates a gift other than to a sentient being capable of accepting it does not apply to bequests to trustees for the establishment of an image and a worship of a Hindu deity after the testator's death.[1]

The principle of remoteness is not unknown to Hindus. It is in fact one of the rules determined in the Tagore case.[2] Two Hindu brothers, subject to Dayabhaga Law, executed a deed by which they purported to provide for the permanent devolution of their respective properties *in the direct male line*, including adopted sons, with the condition, that, in case of failure of lineal male heirs in one branch, the properties belonging to that branch should go to other, subject to the same rule, and, only in the absence of male descendants in the direct line in either branch, the properties were to go to female heirs or their descendants. Throughout the deed *there was no intention to make a gift to any person.* The Privy Council held that the deed was void, because it was an attempt to alter the mode of succession prescribed by Hindu law, and that there was no gift over at all, since the devised estate was, in every case, defeasible in the event of his death without male issue. It happened that as the facts turned out, there was a gift over which could have taken effect, but that did not save the deed, since "that question is not whether the gift ever was good in the event which happened afterwards, but whether it was good in its creation".[3] A person cannot change the rule of succession under the colour of a fictitious endowment.[4]

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1 (a) *Bhupati* v. *Ramlal*, (1910) 14 C.W.N. 18; I.L.R. 37 Cal. 128 (F.B.);
(b) *Chaturbhuj* v. *Chatarjit*, I.L.R. 33 All. 253;
(c) *Parmanandas* v. *Vinayak*, I.L.R. 7 Bom. 19;
(d) *Gokool* v. *Issur*, I.L.R. 14 Cal. 22;
(e) *Monohar* v. *Lakshmi*, I.L.R. 12 Bom. 267;
(f) *Purna* v. *Kalipada*, A.I.R. 1942 Cal. 386; 46 C.W.N. 477.

2 *Tagore* v. *Tagore*, 9 B.L.R. 337 (P.C.).

3 *Purno Shashi* v. *Kalidhan Rai*, (1911) I.L.R., 38 Cal. 603 (P.C.).

4 *Sitaram* v. *Jadunath*, 10 L.J. 204; 26 I.C. 72.

## CHAPTER 21

## *RESTRICTIONS AS TO INTERESTS FOR UNBORN PERSONS*

### SECTION 13—*Continued*

21.1. *Kind of interest created in favour of unborn person*—Now, assuming that after a prior interest is created in favour of an existing person, and subject to such prior interest, a transfer can be made conferring the interest for the benefit of the person not in existence, the next question to be considered is—what kind of interest may be created in favour of such a person? To deal with this problem, English law evolved what is known as the "rule against double possibilities. This was not a very expressive phrase. It sacrificed clarity for brevity;[1] but it came into vogue. Under this rule, it was requisite that on the birth of an unborn person the estate must vest in him within the proper period. The emphasis in England was on the date of commencement or first taking effect of the limitation. The estate must vest within the proper period. It was also requisite that if land is limited to an unborn person during his life, a remainder cannot be limited so as to convey an estate to that person's children. In legal literature, the matter is discussed conveniently under the head of the rule in *Whitby* v. *Mitchell*[2], but the propositions enunciated above were evolved long before the decision in *Whitby* v. *Mitchell.*

21.2. *English common law*—The scope and direction of English common law rules—whatever they were—was slightly different from the provisions of section 13.[3] To draw attention to a few major points of difference, in England, it was not necessary that the interest conferred on the unborn person must be the entire interest. It was permissible, for example, to give the unborn person a life interest, provided it vested within the requisite time and provided further that the later interest was not limited to the issue of the unborn person to whom the life interest was given.

21.3. The rule here, laid down was expressed in the old legal language, that you could not limit a possibility, (now abolished by statute).[4] It means, first, that there might never be such a person as an unborn person. That was a possibility, not a certainty. Besides, there was another possibility. There might *never be issue of that person.* Therefore, there was double contingency or a double possibility.[5]

214. *Rule in Whitby* v. *Mitchell*—The rule against double possibility, known as the rule in *Whitby* v. *Mitchell,*[6] is actually older than the case of *Whitby* v. *Mitchell,* as was pointed out by Farewell, J.[7] For some time both the rule in *Whitby* v. *Mitchell* and the rule against perpetuities operated together in England. But, in 1925, when the law of

1 See criticism in *Ardeshir A.I.R.* 1945 Bom. 395 (Biagden J.).
2 *Whitby* v. *Mitchell* (1890) 44 Ch. D. 85.
3 Gour.
4 Chapter 21, *infra.*
5 Gour.
6 *Whitby* v. *Mitchell,* (1890) 44 Ch. D. 85.
7 *Re Nash,* (1908) 1 Ch. 1.

property was revised, this rule was abolished in regard to instruments taking effect after 1925. The policy of the law of restricting the period of time during which an owner of property may control its future devolution was regarded as sufficiently implemented by the residue of the rule against perpetuities. Section 161 of the Law of Property Act, 1925, which was in these terms,[1] the altered position :

> "161. (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.
>
> (2) This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act."

21.5. *Perpetuities Act,* 1964—Section 4(1) of the Act of 1964 (which applies to gifts over, as well as to direct gifts), provides[2] that where there is a gift to an unborn person, which vests at an age greater than twenty-one, and the gift is not saved as a result of the procedure introduced by section 3 of the Perpetuities and Accumulations Act, 1964, then the specified age must be reduced, not to twenty-one but to the age nearest the specified age, which will permit the gift to take effect. Section 4(2) makes a similar provision for the saving of gifts where there are two or more specified ages (a case which was not provided for in section 163 of the Law of Property Act, 1925)."

21.6. *Section* 113, *Succession Act*—The provisions of section 13 of of the Transfer of Property Act broadly correspond to section 113 of the Indian Succession Act, 1925—with one difference which will be noted later. Section 113 created certain serious problems by virtue of the decision of the Privy Council in *Sopher's*[3] *case*. It was held in that case that if under a bequest in the circumstances mentioned in section 113, there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it, and therefore the bequest does not 'comprise the whole of the remaining interest' of the testator in the thing bequeathed, within the meaning of section 113.

21.7 *Difference with section* 113, *Succesion Act*—The wording of section 113 speaks of the later bequest 'comprising' the whole of the remaining interest of the testator, while section 13 of the Transfer of Property Act speaks of the later transfer 'extending' to the entire interest. Even so, it can be argued that section 13 should be similarly construed. If so, the Privy Council decision in *Sopher's case* would apply to the Transfer of Property Act also. In fact, in a Calcutta case,[4] the decision in *Sopher's case* was applied to a settlement, and the High Court held that trusts in favour of the grand-children, some of whom were unborn, were void as the trusts were subject to their attaining a certain age and surviving their parents.

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1 Section 161, Law of Property Act, 1925.

2 Section 4(1), Perpetuities and Acquisitions Act, 1964.

3 *Sopher* v. *Administrator General of Bengal,* A.I.R. 1944 P.C. 67.

4 *Isaac Nissim* v. *Official Trustee of Bengal,* A.I.R. 1957 Cal. 118 (Mallick, J.).

21.8. *Effect of Sopher's case*—As has been pointed out by a writer on the Law of Succession,[1] the decision in *Sopher's case* upset the view of the legal profession which upto then held that if to an unborn person the whole of the remaining interest was given, that would be sufficient compliance with the provisions of section 13 and section 113 respectively, and the contingency of attaining majority or surviving a certain person or the conditions attached to the gift or bequest or any provision reserving power to revoke the trust, did not violate the law. Since this view was held to be erroneous by the Privy Council in *Sopher's case,* there was public agitation and, in fact, a Bill was introduced in the Central Legislative Assembly[2] proposing to omit section 13 and section 113. The Bill did not become law, but the Bombay Legislature passed in 1947 an Act to validate dispositions made previously on the basis of previous understanding, of the law.

21.9. The application of section 113 of Succession Act to certain dispositions of property in the erstwhile State of Bombay is restricted by the Dispositions of Property (Bombay) Validation Act, 54 of 1947 (an Act to validate certain dipsositions of property in the Province of Bombay), which came into force on 16th January 1948, as under :—

*Application of Act forty-five*—"2. This Act shall apply to all trusts made and to all wills and other testamentary dispositions of persons who have died, before the first day of January one Thousand nine hundred and forty-five;

(a) Where such trusts, wills, or testamentary dispositions relate to immovable property situate within the Province of Bombay;

(b) Where such trusts, wills or testamentary dispositions relate to property of every description other than immovable property and are declared, executed or made by a settlor or testator, as the case may be, in the Province of Bombay, notwithstanding anything to the contrary contained in Part II of the Indian Succession Act, 1925.

3. (1). *Validation of certain dispositions*—The following provisions of law shall not apply and shall be deemed never to have applied to the dispositions of property contained in or made by the instruments mentioned in section 2, namely, (a) section 13 of the Transfer of Property Act, 1882, and (b) section 113 of the Indian Succession Act, 1925.

(2) the dispositions of property contained in or made by the instruments mentioned in section 2, the enactments mentioned in the first column of the Schedule to this Act shall apply, and be deemed to have always applied, with the omissions and modifications specified in the second column of the Schedule.

4. *Saving*—Nothing in this Act shall be deemed to affect or prejudice in any way any right, title or interest accrued to any person under a final decree "or order of a competent court or acquired by any person for valuable consideration before the coming into force of this Act.

(Schedule not reproduced)".

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1 Paruck. Indian Succession Act (1966), page 238.
2 Transfer of Property and Successions (Amendment) Bill, 1946 (Gazette of India, Part V, page 92, dated 16-2-1946).

21.10. *Recommendation to repeal section* 13—We are of the view that having regard to the fact that there is also in force the rule against perpetuities, it is not necessary that the rule in section 13 should be continued on the statute book. This section seems to have been suggested by the corresponding section in the Succession Act, and the Report of the Law Commissioners relating to the Succession Act, 1865, merely states that it has been provided that the interest to be given to the unborn child must extend to the whole of the interest. Having regard to the fact that the object of the law to prevent provisions fettering the free circulation or postponing the vesting of property is sufficiently achieved by section 14, we think that section 13 should be deleted. Even if the unborn person is allowed to take a limited interest, the subsequent interest must vest within he period allowed by section 14 and this, in our view, is enough as a safeguard.

21.11. *Alternative recommendation*—However, if it is decided not to delete the section, it is, in our view, necessary to make it clear that conditions of the nature involved in *Sopher's case*[1] which, while not restricting the quantum of interest of the unborn person, make it defeasible or affect the certainty of its vesting,[2] are not to be construed as violating section 13.

21.12. *Child in the womb*—It is also necessary—if the section is retained—to add an Explanation to the effect that a child in the womb, if born alive, is not deemed to be an unborn person. Such an addition would be merely codifying the judicial construction.

21.13. *Recommendations summed up*—Our recommendation then is that—

(a) Section 13 should be deleted;

(b) in the alternative, that is to say, if section 13 is retained, clarification as suggested above[3] should be made on two points, namely—

(i) the scope of the expression "extends to the whole of the remaining interest" should be explained; and

(ii) the case of child in the womb should be dealt with expressly.

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1 *Sopher's* case, *supra.*

2 This is not a draft.

3 Para 21.10 and 21.11, *supra.*

## CHAPTER 22

## *THE RULE AGAINST PERPETUITIES*

### SECTION 14

22.1. *Introductory*—The policy of the law of favouring the free circulation of property and its alienability within reasonable limits has led to the evolution of rules relating to the vesting of estates. Circulation is thwarted if vesting is delayed unreasonably, hampered unduly or made uncertain. The doctrine that property should not remain ownerless has given rise to several interesting rules of common law and equity. It explains, in part, the doctrine under which the State takes property as the ultimate heir. It supplies, indirectly, the justification for the appointment of 'curators' in the law of intestate succession. It is the principal basis of the English doctrine that on the death of a person, until the Administrators take charge under Letters of Administration, the estate vests in the President of the Probate, Divorce and Admiralty Division, Now Family Division. There are many other doctrines based wholly or in part upon a similar rationale. The rule against perpetuities, to which we shall now direct our attention, could be attributed to the anxiety of the law to ensure that vesting is not unreasonably delayed—with the ultimate objective that its free circulation may be facilitated.

22.2. *Tensions*—Since medieval times, English law has been subject to the tension between two conflicting influences. Land and other property owners have desired to tie up their property indefinitely, usually for the benefit of their family or for some institution or cause, while the courts and the legislature have always felt that it is in the interest of the nation as a whole that wealth should circulate freely and that property should not be made inalienable. The result has been a compromise. Property may be tied up indefinitely for a purpose which the law wishes to advance, namely, a charity.[1] Otherwise, property may be tied up, but only for a comparatively short period. The rule which governs this is known as the rule against perpetuity.

22.3. *Two aspects*—This rule has two aspects.[2] First, that relating to vesting. In its basic form, it provides that property must vest in the recipient within the period of a life or lives in being at the time when the gift is made, and twenty-one years thereafter (with allowance being made where appropriate for the period of gestation).[3] The second aspect is that property must not be limited in such a way that it is inalienable in the hands of the recipient.

22.4. *Section* 14.—Under section 14, 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 of that period, and to whom, if he attains full age, the interest created is to belong.

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1 Parker & Mellows, Modern Law of Trusts (1966), page 71.

2 (a) *Cadell* v. *Palmer*, (1833) 1 Cl. & Fin. 372;
(b) *Re Wilmer's Trusts*, (1903) 2 Ch. 411.

3 Parker & Mellows, Modern Law of Trusts (1966), page 71.

22.5. *Succession Act*—The corresponding section 114 of the Indian Succession Act, 1925 is as follows :—

*Rule against perpetuity*—"114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons, living at the testator's decease, and the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

There are a few illustrations to the section

"(i) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator." Here "the son of B who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life and after his death to B for his life and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18; but that if no child of B shall attain the age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her *children as shall attain the age of* 18. Any daughter of the testator to whom the direction applies must be in existence at his decease and any portion of the fund, which may eventually be settled as directed must vest not later than 18 years[1] from the death of the daughters whose share it was. All these provisions are valid."

22.6. *Genesis of the Rule*—The rule in section 14 is borrowed from the English law, where[2] it has been recognised from very early times.[3] After property in future estates had begun to be recognised, and the limitation of estates in remainder to unborn children, as well as the creation of future estates by way of shifting use and executory devise began to be permitted, it was felt that unless some rules restraining the creation of such

1 This is not accurate by giver as a reader.

2 Gour.

3 1 Rep. 84A, 88a. 131b.

estates were devised, property may, by a single transfer, be tied up in perpetuity. "In the case of future estates to arise by way of shifting use and executory devise, these due bounds were gradually settled by successive decisions. Such estates were allowed to take effect at first, within the compass of an existing life,[1] then within a reasonable time after.[2] This reasonable time after an existing life was next extended to the period of the minority of an infant actually entitled under the instrument, by which the executory estate was conferred.[3] It was then held that any number of existing lives might be taken.[4] Finally, it was settled that the time allowed after the duration of existing lives *should be a term of twenty-one years* independently of the minority of *any person*, whether entitled or not, with the possible addition of the period of gestation, but only where the gestation actually existed.[5]

22.7. *Applies to moveables*—The rule applies to all property. In England also, the rule extends to personal property as well, for, if it were otherwise, trusts of an indefinite duration might have engendered and same mischief which the rule is designed to guard against.[6]

The rule has been extended in India equally to moveable property.[7] But, its application to personal contracts,[8] such as a contract for the sale of land which creates no right *in rem*,[9] is a matter of doubt. A covenant to do any act, as for example, to pay money, cannot it seems, be avoided by reason that the time of performance may not arise within the period allowed by the rule.[10] It would, however, be otherwise if the contract created an equitable interest in property.[11] As a contract for the sale of lands or for pre-emption does not create such an interest, it would not be void as opposed to the rule, although there may be cases in which it may be void for remoteness.[12]

22.8. *Charities*—As regards the application of the rule against perpetuities to charities, there seems to be some misconception. It is commonly stated that the property must vest within the specified period and that the only relaxation is that a gift over to charity is valid even if the previous gift to charity is contingent and is invalid under the rule against perpetuities. Whatever may be the position in English law, this is not true in India. As Mulla has pointed out,[13] section 18 of the Transfer of Property Act relaxes the rule against perpetuities embodied in section 14 in respect

1. *Howard* v. *Duke of Norfolk*. 2 Swanst. 454.
2. *Marks* v. *Marks*. 10 Mod. 419.
3. *Stephens* v. *Stephens*. 1 De. G. & J. 62.
4. *Thelluson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112.
5. Will's R. P. (18th Ed.), 379, 380; citing *Cadell* v. *Palmer*, 7 Bingh. (N.S.), 202.
6. Gour.
   Cf. Accumulations Act, 1892 (55 & 56 Vict., c. 58).
7. *Cowasji* v. *Rustomjis* I.L.R. Bom. 511.
8. *London and South Western Ry. Co.* v. *Comm.* 20 Ch. D. 562.
   *Borlands* v. *Steel Bros. & Co.* (1901) 1 Ch. 279.
9. *Southern Eastern Ry.* v. *Associated Portland etc. Ltd.* (1910) 1 C. 12. 33;
   *Charamudi* v. *Raghuvulu*, 39 Mad. 462, 469; *Ali Hossain* v. *Rajkumar*, A.I.R. 1943 Cal. 417.
10. *Walsh* v. *Secretary of State for India* 10 H.L.C. 367.
11. *London & South Western Ry. Co.* v. *Comm.* 20 Ch. D. 562.
12. *Ramaswamy* v. *Chinnan*, I.L.R. 24 Mad. 449, 457, 469.
13. Mulla (1973), page 179.

of the transfer for purposes mentioned in section 18. Therefore, the vesting of such transfers may be delayed beyond the period mentioned in section 14 in the case of charities. In contrast, in English law, charitable trusts *in futuro* are no exception to the modern English rule against perpetuities which deal with estates *in futuro*. While charitable trusts, in England, can be valid even though the property is tied up for an indefinite period, a gift to charity *upon a remote event* is void in England except in the case of a gift over from one charity to another. Whatever may be the position under the Indian Succession Act; section 114,[1] the Transfer of property Act has relaxed the rule against remoteness of vesting in the case of charities in clear and positive terms in section 18.

22.9. This does not, of course, involve any amendment of section 14, but the matter is mentioned here by way of anticipating the provisions of section 18 which (*inter alia*) specifically provides that the restriction in section 14 shall not apply in the case of a transfer of property for the benefit of the public for the specified purpose.

22.10. *Two senses*—We have referred above to the two senses of 'Perpetuity'—inalienability and remoteness of vesting of future interest. The first sense is concerned with present interest and the second sense is concerned with future interest. Section 14 is concerned with the second sense which pertains to the period upto which vesting of an interest can be legitimately delayed.

22.11. *Inalienability*—Perpetuity in the sense of inalienability is outside the provisions of section 14, of course, as already stated, the policy of making illegal, the undue postponement of vesting has, as its ultimate objective, the end of promoting free alienation. But there is no direct prohibition against alienation in section 14. That topic is, to some extent, dealt with in sections 10 to 12, concerned with conditions or limitations prohibiting or restricting alienations. Apart from those sections, the policy of the law to promote alienability is reflected in its attitude towards restraints imposed in grants and gifts even where not governed by the Act.

Irrespective of the provisions of the Act, it was held in Calcutta that perpetuity is repugnant to Hindu law except in the case of religious and charitable endowments.[2] This position was reaffirmed in a Bombay case.[3]

22.12. *Move for Reform*—During the last forty years or so, the Rule against Perpetuities has come under fire in many parts of the world. While the rule expresses a perfectly reasonably policy—a fair balance between the desires of members of the present generation, and similar desires of succeeding generations to do what they wish with the property which they enjoy[4]—yet it has inevitably become 'encrusted with barnacles'. The law will be improved, and the Rule itself simplified and strenghtened, it has been though, by removing these barnacles.

22.13. *Causes of dissatisfaction and some representative examples of reform*—The main causes of dissatisfaction with the Rule are two : first, the requirement of absolute certainty that the interest will vest within the

1. *Jones* v. *Adm. General*. I.L.R. (1946) Cal. 485.
2. *Sukhmai* v. *Monohari*, (1885), I.L.R. 11 Cal 684.
3. *Vallabh* v. *Goverdhan Das* (1880) I.L.R. 14 Bom. 360.
4. Simes, Public Policy and the Dead Hand (1955), page 58.

perpetuity period, and its consequent invalidity if any possible combination of events, however, improbable or fantastic, could cause it to vest outside the period; and, secondly, the harsh consequences of violating the Rule, whereby the interest fails completely instead of being 'cut down to size'. There is widespread agreement today that some statutory reform of the Rule is necessary. There is much less general agreement as to the form which is such amending legislation ought to take. The various proposals and experiments can be reduced to three main types :

(1) The first is legislation specifically directed against the well-known 'trade' which so often cause a violation of the rule when the age limit is exceeded. In England, section 163 of the Law of Property Act, 1925, reduced age contingencies to twentyone—when this is necessary to save the gift; similar statutes were enacted in many other jurisdictions.[1] Difficulties arising from 'the unborn widow trap' were sought to be remedied in New York, Western Australia and California. Administrative powers of trustees were excepted from the Rule, in Western Australia, Victoria and New South Wales.

(2) A second type of reform is to introduce a 'wait and see' rule, whereby the validity of interests depends *on actual,* and not on possible, events. Legislation to this effect was first introduced in Pennsylvania in 1947, and, though in a somewhat different from, later in Massachusetts, connecticut, Maine, Maryland, Vermont, Kentucky, Washington and Western Australia.

(3) A third method is to give the courts a general discretionary power to reform limitations which would otherwise be void so as to make them approximate most closely to the testator's or settlor's intention within the limits of the Rule. This 'cy-pres method', as it is called, has been enacted in varying forms in Vermont, Kentucky, Washington, Idaho and California.[2]

In England, an elaborate measure was passed by way of reform in 1964, which we shall deal with later.

22.14. No account of the reform of the rule against perpetuities in England would be complete without a tribute to professor Leach of Harvard. It was his article published in 1952[3] which first attracted the attention of high authorities in England to the need for reform, and caused the

1. E.g., Victoria (1918), New South Wales (1919), Western Australia (1941), New Zealand (1944), Massachusetts (1954), Maine (1955), Connecticut (1955), Maryland (1956) and New York (1960). (The dates are those in which the reform was first enacted).

2. Information is compiled from various articles by Professor W. Barton Leach of Harvard in the Law Quarterly Review, the Harvard Law Review and by a few others in the Yale Law Journal.

3. Leach, 'Perpetuities : Staying the Slaughter of the Innocents' (1952) 68 L.Q.R. 35.

4. Leach, 'Perpetuities in Perspective : Ending the Rules Reign of Terror' (1952) 65 Harv. L. Rev. 721 : Leach, 'Perpetuities Reform by Legislation' (1954) 70 L.Q.R. 478; Leach, 'Perpetuities Legislation, Massachussetts Style' (1954) 67 Harv. L. Rev. 1349; Leach, 'Perpetuities Reform by Legislation, England' (1957) 70 Harv. L.Rev. 1411; Leach, "Perpetuities Legislation : Hail Pennsylvania" (1960) 108 U. of Penn. L. Rev. 1124; Leach, 'Perpetuities Reform : London Proposes, Perth Disposes' (1963) 6 U. of W.A.L. Rev. 11.

Rule against Perpetuities to be referred to the Law Reform Committee. It was his tireless advocacy of the 'wait and see' doctrine that made it seem the obvious method of reform, despite some vigorous dissent.

In the second reading of the debate on the English Bill in the House of Lords, Lord Evershed paid a graceful tribute both to Professor Leach's reforming zeal and to the draftsman's skill.[1]

22.15. *Need for reform in India*—Lest this should sound pedantic and lest it should be thought that there is no need for reform in India and that all is well with our statutory provisions, we would like to refer at this stage to situations wherein difficulties could be experienced in India also. A slight disregard of the stringent statutory provisions, or a misconception about the age of majority, may lead to defeating the intention of the transferor. In one of his famous articles published in the Harvard Law Review, Professor Leach had this criticism to make of the rule—

> "The Rule against Perpetuities is a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself. It is a dangerous instrumentality in the hands of most members of the bar. It ought to be substantially, "changed by statute, and the lawyers ought to see that this is done."[2]

Every word of it may not apply to Indian Codified law. But difficulties could arise. In fact, difficulties have arisen. Let us take a reported case.

22.16. *Case of Soundararajan*—The case of *Soundarajan*[3] illustrates the anomaly resulting from the fact that a slight excess over the legally permissible age may defeat the transfer. That case was, no doubt, a case relating to succession on death, but the position would be the same in respect of a transfer during lifetime. In that case, an estate was given to the testator's daughters for their lives with the remainder for the children on attaining the age of 21 *years*. The age of majority in India is 18 years, unless guardians are appointed or a court of Wards takes charge. It was held, that, as at the testator's death, it could not be certain that in the case of every child a guardian would *necessarily be appointed* so as to postpone the minority of the child till 21 years, there *was a possibility* that the bequest would be held beyond the lifetime of the daughters and *the minority* of some of the children of the daughters. Hence by virtue of section 102 of the Indian Succession Act, 1965, broadly corresponding to section 114 of the Indian Succession Act, 1925 and section 14 of the Transfer of Property Act, the whole bequest in favour of the children was illegal.

Of course, this case involved also another complication, namely, that of a bequest in favour of a class and the law on the subject has now been altered in amended section 15 of the Transfer of Property Act. We are not, however, concerned with that complication, but with the difficulty created by the fact that an excess of 3 years (21 minus 18) destroyed the vesting of the estate.

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1. Hansard, Vol. 256, Col. 246.
2. Leach, in (1954) 67 H.L.R. 1349.
3. *Soundararajan* v. *Natarajan*, A.I.R. 1925 P.C. 244, 147.

22.17. There are several Indian decision under the Succession Act which illustrate the problems that could arise under the present formulation of the rule.

*Other decisions*—In *Putlibai* v. *Sorabjee*,[1] the testator devised his house upon trust to allow his daughter until her death or marriage and all his sons and their respective families *including widows* to reside therein until the youngest of his grandsons should attain the age of 18 years and then for sale and conversion. It was held that during the sons' lives their wives took no independent gift, but the gift to the son entitled him to reside there with his wife. As all the sons were alive, no question arose as to the title to reside that could be claimed for the widows of the sons and their Lordships refrained from expressing an opinion on the title of the claim of such a widow to reside if any son died. They, however, pointed out that sections 99, 100, 101 (i.e., sections 112, 113 and 114 of the present Succession Act) might give rise to difficulty in the claim of a widow if she survived the son, as it was not clear that the whole of the testator's interest was bequeathed.

22.18. *Reform by judicial decisions*—It is because of such difficulties which defeat the intentions of the testator or the transferor that need for reforming the law arises. We have briefly mentioned statutory reforms effected elsewhere, and shall deal with them in detail later. It may, however, be mentioned incidentally that in some countries, some of the anomalies have been sought to be mitigated by judicial approach in respect of the ingredients of the rule in common law.

22.19. *Example from U.S.A.*—To borrow one example from the U.S.A., in 1953, the New Hampshire Supreme Court in *Merchants Nat. Bank* v. *Curtis*,[2] determined the validity of future interests on the basis of facts *existing at the end of preceding* estates. The Florida court has given evidence of similar views.[3]

22.20. *English rule as to possible events*—This is a modification of the Enlgish rule. At common law, if an interest is to satisfy the Rule against Perpetuities, it must be absolutely certain to vest (if it even vests at all) within the perpetuity period; and this certainty must exist at the time when the perpetuity period starts to run or (in the case of appointments under special powers) at the time when the appointment is made. Extreme probability of vesting within the period is not enough. Nor is it enough that the interest does, in fact vests within the period as events actually occur. The result is that many perfectly reasonable dispositions are held void because, on some outside chance (not foreseen by the testator or his draftsman) it is mathematically possible that the vesting might occur at too remote a time. No reason for this strange rule has ever been given, except the statement that it is undesirable in property law that the validity of interests should be allowed to remain in suspense too long. This certainty is undoubtedly desirable; but it can bought at too high a price.

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1 *Putlibai* v. *Sorabjee*, 25 Bom. L.R. 1099 (P.C.)

2 *Merchants Nat. Bank* v. *Curtis*, 98 N.H. 225; 97 A. 2d 207, 67 Harv. L. Rev. 355. 1352. The court relied principally upon 6 American Law of Property, s. 24.10 (1952).

3 *Story* v. *First Nat. Bank & Trust Co.*, (1934) 115 Fla. 436, 156 So. 101; 67 Harvard Law Rev. 1352.

Statutory reform made in England now ensures that the validity of a limitation under the rule should depend not on the facts which may occur, but on the facts which do in, fact occur; the principle should be 'wait and see'. Section 3(1), (2) and (3) of the 1964 Act gives effect to this recommendation. Section 3(1) provides as follows :

> "3(1). Where, apart from the provisions of this section and sections 4 and 5 of this Act, a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the Rule against Perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise."

We are mentioning at this stage how courts in one country have anticipated, by judicial law-making reforms which in another country had to await legislation.

22.21. *Comparison*—In order that the points to be made hereafter may be properly appreciated, it may be convenient to give, in a brief, a comparison of the English common law rule and the Indian statutory law.

According to the English law, the vesting of property might be postponed for any number of lives in being and an additional term of 21 years, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist (*Jee* v. *Audley*);[1] and the additional term of 21 years might be independent of the minority of any person to be entitled (i.e. irrespective of the fact whether such person is a minor or not). Indian law, however, allows the vesting to be delayed beyond the life-time of persons in being, for the period only of the minority of some person born in their life-time; the addition of an *absolute period* of 21 years has not been adopted by this section. So, whereas under the English law the additional period allowed after lives in being is a term of twenty-one years *in gross*, without reference to the infancy of any person, under the Indian Statute the term is the *period of minority* of the person to whom, if he attains full age, the thing bequeathed is to belong—at 21, if he has a guardian appointed by the Court; at 18 in other cases.[2]

In short, at common law, property must best within the period of a life or lives in being, or within twenty-one years after the end of that life.

22.22. *Life interest*—This is perhaps a convenient point for dealing with life interest. When some portion of the rights of full ownership is given to a person other than the owner to be exercised by such person to the exclusion of the owner, such detached rights were called in Roman law *jura in re aliena*. "Servitudes" were a familiar example. If the rights of ownership are limited in duration—an estate for life in land is one example—then there emerges a class that is differently described in different systems of law.[3] In England, life interest is generally spoken of a limited

1. *Jee* v. *Audley*, 1 Cox. 324.
2. Mukhopadhyaya's Law of Perpetuities, page 29.
3. Hunter, Introduction to Roman Law (1921), page 74.

interest. In Rome, a life interest was regarded not as a form of ownership, but as the "antithesis" of ownership, a subtraction from the ownership or a burden upon it—in a word, a servitude.[1]

Technically, then, this term was also applied to the indefinite use of land—for example, the Roman usufruct or estate for life.

The usufruct in Roman law is the right of using something belonging to another, coupled with the right of taking the fruits of that thing. Unless a shorter period was expressed, it was understood to be given for the life of the receiver.[2]

22.23. *Reform by legislation in England*—Need for reform of the rule against perpetuities—in the sense employed in the present discussion, as dealing with the aspect of remoteness of vesting—was felt in England for a long time but in general, such reforms have to wait until the legislature intervenes. The only noteworthy "amelioration" of the rule by judicial action is the judgment in the famous *Thelusson case* wherein it was specifically held that the 'lives in being' for the purposes of the common law formulation of the rule, need not be lives of persons who take interest under the will or transfer, nor need they be lives of persons related to the testator or transferor or his acquaintances. They must be persons in existence at the date when the transfer takes effect. On this view, theoretically, property could be tied up for a period specified with reference to any number of lives in being at the date when the transfer takes effect. It is not necessary to discuss in detail the repercussions of this doctrine in the contemporary legal world. It is enough to state that major reforms in the field had to await legislative action.

22.24. *Act of* 1925—The Law of property Act, 1925 represents the first major step. Section 163(1) provided that[3] where the vesting of property is made to depend on the attainment by the beneficiary of an age greater than twenty-one and that by virtue of that condition the gift would be void for remoteness, the age of twenty-one is to be substituted for the age stated in the instrument. The section applies only when the gift would have been void for remoteness.

It may be noted that so far as regards instruments coming into operation after July 15, 1964, section 163, Law of Property Act, 1925, has been replaced by section 4 of the Act of 1964. By this section, there is not substituted the age of twenty-one, but the age nearest to the age which would have prevented the disposition from being void. Under the Act of 1964, therefore, the instrument is altered only to the extent necessary to save the disposition from offending against the rule. This is because the Act of 1964 reformulates the main rule in different terms. We shall deal with that Act later.

22.25. *Developments leading to Act of* 1964—While, thus, reform of the rule in regard to the condition of age was effected in 1925, there still remained a need for rectifying other anomalies, including, in particular, the anomally that even possible events might defeat an interest violating the rule though actual events showed that the property did not actually come to be tied up for an unduly long period. This point received the attention of

1. Hunter, Introduction to Roman Law (1921), page 74.
2. Hunter, Introduction to Roman Law (1921), page 75.
3. Section 163(1), Law of Property Act, 1925.

courts and legislatures in other countries, and was the subject matter of articles in learned journals in England as well as elsewhere. As we have already stated,[1] legislative measures on the subject were first enacted in some parts of the Commonwealth and in some States of the U.S.A. In England, it was in 1964 that the major legislative reform was effected by the Perpetuities and Accumulations Act.

22.26. *The Act of* 1964—*The principal rule*—The Act of 1964 came into force on July 16, 1964, but, in general, applies only to instruments taking effect after July 15, 1964. The common law rule is thus state—

> "No interest is good unless it must vest, if at all, not more than twenty-one years after some lift in being at the creation of the interest"[2] A gift by deed is created on delivery of the deed; a gift by will is created on the testator's death.

In contrast, if the interest is created by an instrument taking effect after July 15, 1964, the interest is good if, *in fact*, it vests within twenty-one years after some life in being at the creation of the interest.[3]

In both cases, an interest is not vested until : (a) an ascertained beneficiary stands ready to take on the *determination of a prior interest,* and (b) the size of the beneficiary's interest is ascertained. This later requirement is in addition to the normal rules as to vesting, and has important consequences in the field of class gifts.

22.27. *The Act of* 1964—*The period*—Let us deal in greater detail with the permissible time limit. At common law, the perpetuity period is the duration of any relevant life or lives in being *plus twenty-one years,* or, if no life in being is applicable, a period in gross of twenty-one years. A life in being is any person expressly chosen as a measuring life, or any person impliedly mentioned in the gift and who is alive at the date of the gift; for example, a living ancestor of a beneficiary.

Under the Act of 1964, a period in gross not exceeding eighty years may (but need not) be chosen as the perpetuity period instead of the common law period.

Section 1 of the Act reads—

> 1. (1) Subject to section 9(2)[4] of this Act and sub-section (2) below, where the instrument by which *any disposition is made so provides,* the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.
>
> (2) Sub-section (1) above shall not have effect where the disposition is made in exercise of a special power of appointment, but where a period is specified under that Sub-section in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.

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1 Para 22.13 *supra.*

2. Gray, Rule Against Perpetuities, 4th ed., section 201.

3. Section 3, Perpetuities and Accumulations Act, 1964.

4. Section 9(2) relates to options in gross to purchase land.

This section creates an entirely new power to specify a perpetuity period as a term not exceeding eighty years.

22.28. *Act of* 1964—*Fertility*—Another matter in respect of which the English Act has made a change relates to what may be conveniently called the presumption of fertility. The position at common law and apart from the Act is illustrated by the leading English case on the subject which went upto the House of Lords.[1] A testator by his will left property in trust for his wife for life and then for his children, but if he should have no children then for the children of his brothers and sisters. By a codicil, the testator revoked the gift in the will and provided that after the death of his wife, the property should be held on trust for the children of his brothers and sisters, who being a son attained the age of twenty-one or being a daughter attained that age of married. At the date of the will (1915), the testator's father and mother, both of whom survived him were both aged sixty-six. The testator died without issue in 1916 and his father died in 1921. All the testator's brothers and sisters were over thirty years of age at the date of the testator's will and all had children. The question arose whether the gift in the codicil was void for perpetuity. If it was void, the original gift took effect.

It was held that the fact that the testator's mother was past the age of child-bearing when the will took effect was inadmissible to prove that after the date of the will (1915) and certainly after the date of death, no brother or sister could be born subsequently so that every brother and sister who could take under the will would necessarily constitute a life in being at the date when the will took effect. The argument that the testator must have intended to refer to his brothers and sisters *already born* and to no others, was also rejected, since the phrase in the will described a class "general in its extent and clear in its description". This was the principal conclusion, Lord Blanesburgh, while reluctantly agreeing with this conclusion in view of the past precedents observed that "it is the legislature alone which, maintaining the salutary purpose of the rule in its proper application, can, if it pleases, remove from it those incidents or excrescenses which, without assisting to achieve its legitimate object, have done must mischief in other directions."

22.29. *Section* 2(1)—Lord Blanesburgh's prophetic observations[2] came true in 1964 when section 2(1) of the Act[3]—to state its terms in non-technical language—provided, in paragraph (a), that, subject to paragraph (b) below, it shall be presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over but not under that age, or over the age of fifty-five years.

According to paragraph (b) of section 2(1) of the Act of 1964, in the case of a living person, evidence may be given to show that he or she will, or will not, be able to have a child at the time in question.

It may be stated that the provision for admitting other evidence—this will be mostly medical evidence—to prove infertility, inserted in the 1964 Act, is in conformity with the judicial view taken for *other purposes* in the

1 *Ward* v. *Van Der Loeff*, (1924) A.C. 653 (H.L.).
2. *Wards case, supra.*
3. Section 2 is quoted in para 22.30, *infra.*

law of property. In a case reported in 1963[1], for example, a life tenant under a protective trust, with discretionary trusts over to herself, her husband and children, applied for an order under the Variation of Trusts Act, 1958 on the basis that she was past the age of child-bearing. That Act, *inter alia*, empowers the court to vary the terms of the trust deed in certain circumstances, even in the case of a private trust. Medical evidence was admitted in proof of infertility in this case. The solution adopted by the 1964 Act became necessary because in the field of law of perpetuity, past judicial decisions[2] had laid down a rigid rule that it is conclusively presumed that any person however old, is capable of having children.

Conversely, there have been rare cases of girls below the age of 12 years becoming mothers. A case[3] recorded in medical journals in 1939 would seem to furnish an instance of an extraordinary character—fertility at the age of six years. These very rare situations would, in any case, be taken care of by section 2(1)(b) of the Act of 1964.

22.30. *Section* 2—The following is the text of section 2 of the English Act of 1964—

"2. (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the ability of a person to have a child at some future time, then—

"(a) subject to paragraph (b) below, it shall be presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child at the time in question.

(2) Where any such question is decided by treating a person as unable to have a child at a particular time, and he or she does so, the High Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided.

(3) Subject to sub-section (2) above, where any such question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child, but those provisions [except subsection (1)(b)] shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her ability at that time to beget or give birth to a child."

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1 *Re Westminster Bank Ltd.'s Declaration of Trust*, (1963) 1 Weekly Law Reports 820.

2 *Jee* v. *Audley*, (1787) 1 Cox 324.

3 Discussed in 65 Harvard Law Review 725.

22.31. By way of further comment, it may be stated that section 2 reverses, as to the future, the decision in *Ward* v. *Van der Loeff*[1] by means of rebuttable presumptions as to the minimum age of childbearing, and also, in the case of a female, as to the maximum age. Evidence may, therefore, be given for the purpose of rebutting these presumptions, or for the purpose of showing that a person within the ages of childbearing is nevertheless incapable of having a child; for example, evidence of impotence.

Section 2 also applies to the right of a beneficiary to terminate accumulations of income under the rule in *Saunders* v. *Vautier*.[2-3]

Section 2(2) empowers the court to grant a tracing order against a beneficiary who, as events turn out, has been wrongly paid on the statutory presumptions, subject to the overriding requirement that such an order is just in all the circumstances.[4] In practice, distriution on the statutory presumptions will probably be effected only after insuring against the risk of the presumptions being rebutted by later even.

22.32. *Act of* 1964—*Actual and possible events*—The next important reform effected by the Act of 1964 relates to actual and possible events.

22.33. *Common law*—At common law, the rule is concerned with possible, not with actual, events. The slightest possibility of the period being exceeded invalidates the interest.

Under the Act of 1964, one may await the outcome of actual events within the period.

The standard perpetuities doctrine (as unmodified by legislation) does not permit consideration of facts which occurred after the death of the testator or the date on which the transfer takes effect. Nevertheless, in practice, it is often seen that the contingencies on which the testator or the transferor insisted have happened well within the lives in being plus twenty-one years (in England) or attainment of age of majority (in India).

In the U.S.A., this situation was dealt with by the Supreme Court of Florida[5] by holding that it will not invalidate an interest on the basis of contingencies which never happened. In England, in order to modify the common law position that the application of the rule has regard not only to actual events but to the possible events, the English Act of 1964 has made several provisions, of which the principal one dealing with this point appears to be section 3(1). Under that sub-section,—to state the matter in non-technical terms[6]—if a disposition is void by reason of the rule against perpetuities, even then, it is to be treated as valid until events have shown that the interest must vest (if at all) after the end of the perpetuity period. For example, the transferor or testator—T—gives property to the first daughter of A who gets married. At common law, if A survived the testator and no daughter of A was at that time married, then the gift is too remote, because it is possible that a daughter who was born after the death of T might be the first to marry and she might not do so until more than twenty-one years

1 *Ward* v. *Van der Leoff*, (1924) A.C. 653, *supra*.

2 *Saunders* v. *Vautier*, (1841) 4 Beav. 115.

3 Section 13, Act of 1964.

4. *Re Diplock*, (1951) A.C. 251; (1948) Ch. 465.

5 *Story* v. *First National Bank & Trust Company*, (1934) 115 Florida 436; Leach. "Perpetuities in Perspective" 65 Harvard Law Review 725, 730.

6. Section 3 is quoted later—para 22.34.

after the death of A, A being the only available life in being. Under the Act of 1964, section 3(1), the gift will be valid if a daughter marries before the expiration of twenty-one years from the death of A. If necessary, we must wait and see for that length of time.[1] As to the situation where ultimately the gift is found to be invalid by reason of perpetuity, a provision—though a cryptic one—is to be found in section 3(1).

22.34. *Section* 3.—This is the text of section 3—

"3. (1) Where, apart from the provisions of this section and sections 4 and 5 of this Act, a disposition would be void on the ground that the interest might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed by way of advancement, application of intermediate income or otherwise.

(2) Where, apart from the said provisions, a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, as if the disposition were not subject to the rule against perpetuities.

(3) Where, apart from the said provisions, a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and, subject to the said provisions, shall be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period.

(4) Where this section applies to a disposition and the duration of the perpetuity period is not determined by virtue of section 1 or 9(2) of this Act, it shall be determined as follows :—

(a) where any person falling within sub-section (3) below are individual in being (or on ventre sa mere) and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) or (c) of that subsection shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor.

(b) where there are no lives under paragraph (a) above, the period shall be twenty-one years.

(5) The said persons are as follows :—

(a) the person by whom the disposition was made;

1 Text of section 3(1) of the Act of 1964 will be quoted later. Para 22.34.

(b) a person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person, or where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) above, or any of whose children or grand children, if subsequently born, would by virtue of his or her descent fall within those sub-paragraphs;

(d) any person on the failure or determination of whose prior interest the disposition is limited to take effect."

22.35. *Effect*—Sub-section (1) has the revolutionary effect of introducing the principle of "wait and see" into the rule against perpetuities, and sub-sections (2) and (3) extend the rule to general and special powers of appointments, options and similar rights. "Wait and see" was impossible under the old law which as a general rule concerned itself with possible, not actual, events. Thus, in *Re Wood*,[1] the testator devised certain gravel pits to his trustees on trust to work them until the pits should be exhausted, and then on trust for sale and to divide the proceeds equally among the testator's issue then living. The pits were exhausted six years after the testator's death and before the litigation commenced, but the gift to the issue was held void, since at the date of the gift and pits might not have been exhausted for more than twenty-one years. A *fortiori*, if the contingency is unsatisfied at the commencement of litigation, and might not be satisfied until after the perpetuity period.

Such absurdities will not arise under the Act of 1964, for the validity of a gift is now determined by the outcome of actual events; if the contingency is, in fact, satisfied within the perpetuity period, the gift is valid; if the event has still not happened when that period ends, the gift will then fail.

The question arises as to the destination of the intermediate income during the wait and see period. This appears to have been dealt with by the last sentence of sub-section (1), which provides that the ultimate invalidity of the contingency shall not affect the validity of an intermediate dealing "by way of advancement application of income or otherwise" on the footing that the interest is valid. This seems to imply that if the interest in question carries the intermediate income, that income is payable to the contingent beneficiary under section 31(1)(ii) of the Trustee Act, 1925,

1 *Re Wood*, (1894) 3 Ch. 381.

and that the statutory powers of maintenance and advancement under sections 31 and 32 of the Trustee Act, 1925, will also be available. The powers were not available before the Act of 1964, since an interest which infringed the rule was void *ab initio*. But now, by virtue of the wait and see rule, one awaits the outcome of the events, and until the end of the perpetuity period or earlier happening of the relevant event, the interest is merely contingent and is presumptively valid.

22.36. *Act of* 1964 *and maximum age.*—The common law rule was that the interest must vest within 21 years of the death of the last of the lives in being mentioned in the deed or will. This rule created difficulties where the testator or settlor made the vesting conditional on an age higher than 21 years, because then there is a possibility that the interval between the termination of the life and the vesting in the ultimate unborn beneficiary may exceed twenty-one years. Reform was, by legislation, affected on the subject in England first in 1925.[1]

Sections 4(1) and 4(2) of the Act of 1964 now read—

"4. (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—

(a) that the disposition would, apart from this section, be void for remoteness, but

(b) that it would not be so void if the specified age had been twenty-one years,

the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age nearest to that age which would, if specified instead have prevented the disposition from being so void.[2]

(2) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons—

(a) the reference in paragraph (b) of sub-section (1) above to the specified age shall be construed as a reference to all the specified ages, and

(b) that sub-section shall operate to reduce each such age so far as it is necessary to save the disposition from being void for remoteness."

22.37. It is important to notice that under section 4 the age can be reduced only if the disposition would otherwise be void. For example, a devise. "To such of *my children as* shall reach the age of twenty-gxe," is valid as it stands, since all the beneficiaries are *lives in being*. It is expressly provided in section 4(1) that the age may be reduced to the age which is necessary in order to save the gift; this implies that the "wait and see" rule enacted by section 3 must be applied first, since otherwise the only relevant age would be twenty-one.

1 Section 163, Law of Property Act, 1925.

2. These replaced section 163, L.P. Act, 1925.

22.38. *Bombay case on age.*—Incidentally, it may be mentioned that the provisions in India—section 14, Transfer of Property Act and section 114, Succession Act—are linked up with the *attainment of majority* by the unborn beneficiary, and not with the length of the interval. However, problems of the nature that have arisen in England can arise in India also. A Bombay case[1] furnishes illustration of the difficulty raised by the age-limit. The will ran as follows :—

> "I give the property to my son and for life and I give the property after his death to his sons in equal shares. In case he leaves no son behind him, my mukhtiar shall get a son adopted by his wife and thus perpetuate his name and they shall give the property to him (adopted son) on his attaining the age of twenty-one."

It was held that the bequest in favour of the adopted son who might be adopted at any time after the date of the son's death, was void under the rule against perpetuities. No argument was considered as to whether theoretically adoption could have been regarded as having retrospective effect.

22.39. *Act of* 1964—*Time of death The unborn widow*—Then there is the question of limitations dependent on the time of death of the survivor of two persons—

(i) a person in being at the commencement of the transfer, and
(ii) his spouse.

Difficulty may arise because the spouse may not necessarily be a person in existence when the transfer takes effect.

22.40. *Unborn widow.*—What has come to be known as the trap of the "unborn widow" (or unborn widower) may be referred to at this stage. Property is given to A for life, then to A's widow who may survive him for life and then to the children of a living at the death of the survivor of A and his widow. Since A may marry a woman who was unborn at the time of death of the testator, and since the woman so married may survive A by more than 21 years, the gift *to be children* vest *too remotely and* such gifts were held to be void in a number of cases decided at common law. Even if, at the time of the death of the testator, A was married and his wife died earlier while A remained alive and did not marry again, yet the gift to the children as framed in the will would not be saved, because of the common law rule that possible and not actual events had to be considered.

In *Re frost,*[2] the testator,, Frost, devised land on trust for his daughter, Emma, for life, and then on trust for any husband whom she may hereafter marry for life; and after the death of the survivor of Emma and her husband, on trust for such of her children as she should appoint, and in default of appointment on trust for all the children of Emma who should be living at the death of the survivor of *her and her husband,* or should have previously died leaving issue then living.

Kay J. held : "The question is, whether the limitation in favour of the children of Emma Frost ..... is good .... Emma Frost was unmarried at the date of this will. She *might have married after the death* of the testator a person who was not born in his lifetime, and it might therefore

1 *Kashinath* v. *Chinnaji,* I.L.R. 30 Bom. 437.
2. *Re Frost,* (1889) 43 Ch. D. 246.

have been a limitation to Emma Frost for life, *remainder to an unborn person for his life,* with a contingent remainder over to the children of Emma Frost living at the death of that unborn person or such of them as should be then dead leaving issue then living ..... That clearly would be a limitation which would offend against the rule of perpetuity, because it would tie up the estate, not merely during the life of Emma Frost, who was in existence at the death of the testator, but during the life of Emma Frost's husband, who might possibly not be living at the death of the testator. So that it would not merely by tied up for a life in being and twenty-one years after, but for a life in being, with remainder for a life not in being, with a contingent given over ..... I think, therefore, .... that this limitation .... is void, because it offends against the rule of perpetuity."

22.41. In the case of *Re Frost*[1] it was clear from the fact that Emma Frost was unmarried at the date of the will, and from the use of the phrase "any husband she may hereafter marry," that a possibly unborn husband was included. If, however, Emma had been already married at the date of the will, and the gift had been simply "to her husband for life," that gift would, it seems, have been construed as a gift *to her existing husband* alone, and the gift to their children would have been valid.

If the gift is to A for life, remainder to any husband whom she may marry for life, and who shall survive her, remainder to such of the children of A as shall attain the age of twenty-one, the gift over to the children is valid, since all A's children are ascertained at her death, and they must reach the age of twenty-one, if at all, within twenty-one years of that date.[2]

22.42. *Section* 5.—For cases of the nature involved in *Re Frost,* section 5 of the Act of 1964 now provides—

> "5. Where a disposition is limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and *any spouse of that person,* and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes, where to do so would save it from being void for remoteness, as if it had instead been limited by reference to the time immediately before the end of that period."

22.43. Sctone 5 of the Act of 1964 reverses the effect of *Re Frost*[3]. Take the case of a bequest to A for life, remainder to any widow A may leave for a widow's life, remainder to such of the children of A as survive A and the widow. The gifts to A and his widow are valid at common law. So far as the rule against remoteness is concerned, this position will continue. Gift to children is not presumption valid under the "wait and see" rule, if the question of survivorship is not settled within the perpetuity period. The perpetuity period will normally be the life of A plus twenty-one years.

22.44. If the widow dies within that period, the gift is valid under section 3 of the Act of 1964 (which substitutes the rule of actual events in place of the rule which has regard to possibilities). If the widow is still

1 Para 22.40, *supra.*
2 *Re Hancock,* (1896) 2 Ch. 173.
3. *Re Garnham.* (1916) 2 Ch. 413.
4. *Re Frost.* (1889) 43 Ch. D. 246.

living twenty-one years from the death of A, the gift—which would be void under common law and not saved by section 3—will vest in the children then living. The ameliorative provision in section 3 would not suffice to cure the invalidity which require some other help. That help is furnished by section 5.

22.45. *Options.*—Coming to the question of options to purchase land, it is to be noted that in England it was held in 1882 in the case of *London & South Western Railway Co.*,[1] that the rule was applicable to options to purchase land—in that case, a perpetual option. On this proposition being established, specific performance was denied. In a suit in equity against a transferee of the person who gave the original option, an action for damages is also denied, on the theory that the threat of money less would have the indirect effect of inducing compliance with the option which (according to the hypothesis) is against public policy. Similar course has not been denied in America, however, in regard to options to purchase which are held by a lessee.

22.46. In England, the rules were, at common law, applied even to options to purchase in a lease. One criticism of such an approach is that it seeks to apply to commercial transactions a rule which was evolved in the context of property in the limited sense—excessively long family settlements. It was to meet the needs of public policy in regard to gifts in the family that the period of perpetuities was tailored. The requirement of "lives in being" has no significance in commercial transactions, nor has the period of majority or similar period. Secondly, specific enforcement against a transferee was denied in England against assigns of the lessor,[2] but it was granted against the original person who gave the option if he still retained the land.[3]

Thirdly, even where specific performance was refused, damages were permitted.[4] A corrective provision would be a provision exempting from the rule real commercial options to purchase and placing upon such options, if necessary, any time limitations which a study of the commercial dealings in land may show to be desirable.

22.47. *Not a rule of thumb.*—Finally, it may be stated that the rule against perpetuities, whose origins are usually traced to the opinion of Lord Nottingham,[5] is intended to express a policy and not to operate as a rule of thumb. The test, in the opinion of Chancellor Nottingham, was whether the challenged limitation produce a visible inconvenience. Hency any aberrations that produce more inconvenience must require consideration, since such an aberration would defeat rather than promote the objective of the rule.

22.47A. *Options in India.*—So far as Indian law is concerned, previously there was a conflict in Madras on this point.[6-7]

1 *London & South Western Railway Co.* v. *Gomm*, (1882) 22 Chancery Division 562.

2. *Woodall* v. *Clifton*, (1905) 2 Chancery 257, 265, 179.

3. *Hutton* v. *Watling* (1948) 1 Chancery 26, 36 (Jenkins J.) (Review cases).

4. *Worthing Corporation* v. *Heather*, (1906) 2 Chancery 532.

5. *Duke of Norfolk's case*, (1682) 22 English Reports 931, 960.

6. *Avala Charanudi* v. *Marriboyina Raghavalu*, (1915) 28 M.L.J. 471.

7. *Kolathu Ayyar* v. *Ranga Yadhyar*, I.L.R. 38 Mad. 114.

22.48. *Possible arguments.*—All the arguments pro and con (except one which we shall presently notice) have been considered in these two cases. The question is one of election between what look like two equally tenable contentions. It can also be argued that a contract which aims at the creation of a future interest contrary to section 14 of the Transfer of Property Act is "of such a nature" that if permitted, it would defeat the provisions of that law.

An argument like this appears to have caught in *Jagannatha Raju* v. *Balasurya Prasada Rao*,[1] where the High Court held, relying on section 23 of the Contract Act, that a contract which provided for the conveyance of a property when the defendant inherited it, was bad.

22.49. *Supreme Court decisions—Test of interest in property.*—It has now been settled by the Supreme Court[2] that the rule against perpetuity does not apply to agreements which do no *create an interest in property*. Thus, an agreement by a permanent lessee to surrender the lease whenever the land should be required by the landlord is a personal agreement, not void for remoteness.[3] An agreement in a lease granting a perpetual *option to renew* from time to time is not hit by the rule, as it does not create an interest in property.[4]

22.50. *Pre-emption.*—As to a covenant for pre-emption, it has been held[5] that reading section 14 along with section 54 of the Transfer of Property Act, it is manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it, therefore, follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of section 40 makes a substantial departure from the English law, for, an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who take from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under section 40 of the Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further, and the rule against perpetuity, which applied to equitable estates in English law, cannot be applied to a covenant of pre-emption, because section 40 does not make the covenant enforceable against the assignee on the footing that it creates an *interest in the land*.

22.51. *Need for reform in India*—We have so far drawn attention to the problems that have arisen in the application of the rule against perpetuity in India and elsewhere and opportunity has been taken of referring to some

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1 *Jagannatha Raju* v. *Balasurya Prasada Rao*, (1915) 28 M.L.J. 630.

2 *Rambaran* v. *Ram Mohit*, (1967) 1 S.C.R. 293; A.I.R. 1967 S.C. 744.

3 *Rama Rao* v. *Thimmappa*, (1925) 48 Mad. L.J. 463; A.I.R. 1925 Mad. 732; *Ganesh Sonar* v. *Parendu Narayan*, A.I.R. 1962 A.P. 201.

4 *Kempraj* v. *Barton Son & Co.*, (1970) 2 S.C.R. 140; A.I.R. 1970 S.C. 1872; (1970) 1 S.C.J. 905.

5 *Ram Baran* v. *Ram Mohit*, A.I.R. 1967 S.C. 744.

of the judicial developments on the subject elsewhere as well as to the reforms introduced by legislation. In the light of this material, the next question to be considered is—how far and in what manner and to what extent the statutory provisions in India on the subject should be amended? That there is need for amendment is obvious, not because other countries have taken such a need for granted or experience difficulties, but because difficulties can be experienced and have, in fact, been experienced in India, though, perhaps, not on the same scale as elsewhere.

22.52. Apart from the fact that the present sketchy provision is capable of causing injustice, there is an—ethical aspect to it. Usually in the legal system, when A violates a rule, only A suffers—unless, of course, the question is of a defect in the title of A. But, under the rule against perpetuities, when A violates the rule, property is taken away from B and given to C. This is another reason for adopting the approach of "cutting it down to size".

The need for amendment requires no further elaboration. The question then is, in what directions should the law be amended.

22.53. *Aspect of unperfecting conveyancing to be taken into account*—In formulating the proposals for amendments we must take into account the fact that deeds in India are not always drawn by expert conveyancers and those who are consulted may not necessarily be experts in that art. We may say so without meaning any disrespect to the members of the learned profession. This position is not attributable to any deficiency in the intellectual sphere or to any reluctance to learn the art or any inherent incompetence. It is due to the fact that many practitioners in the mofussil do not have an opportunity of dealing with complicated transactions and, to some extent, it is also due to the social reality that people who execute documents of transfer or wills either are not in a position to consult legal practitioners for financial reasons, or are unwilling to do so from a desire to keep their affairs private, or have an insufficient appreciation of the fact that if they can afford to do so, it would be better to consult a lawyer. The point to be made is that in the interest of those who will be called upon in future to understand and comply with the law either for the purposes of their own property or as legal advisers to private parties, it is desirable that the amendments should not be so cumbersome as to be practically unintelligible. It is because of this important consideration that a method of selection has necessarily to be employed.

Adopting this approach, it seems to us that not all the amendments made in England could be adopted *verbatim* in India. Attention must be confined to some of the important propositions which seem to be in need of being introduced into our law, having regard to the problems that have arisen or are likely to arise with some frequency in India.

It seems to us that two reforms could be usefully made in our law. We are concerned only with transfers *inter vivos*, though, of course, section 114 of the Succession Act stands on the same footing. The two reforms which we have in mind are—

(i) regard be had to actual events;

(ii) mischief arising from conditions as to age should be remedied.

22.54. *Gist*—We would set out the gist of the amendments needed in regard to section 14 in the form of propositions which indicate the substance. The drafting device to be adopted to implement them could vary. One possible drafting device would be to re-number present section 14 as sub-section (1) and then to insert the new propositions as new sub-sections. Another possible drafting device would be to insert the new propositions as Explanations to section 14. Yet another possible device would be to insert these propositions as section 14A. This last mentioned device would be useful in the sense that the readability of section 14 will then not be burdened or encumbered.

22.55. Here, then, is a statement of the propositions. We give only the gist thereof and not the exact legislative language. Also, as to the precise legislative device, we leave it to the draftsman.

22.56. *Proposition* 1.—Our first proposition deals with the date for fixing the application of the rule.

*Proposition* 1

In applying section 14 to an interest in property limited to take effect at or after the termination of one or more life interest of persons in being when the period mentioned in section 14 commences to run or on or after the termination of lives of persons in being when such period commences to run, the validity of the interest shall be determined on the basis of the facts existing at the termination of such one or more life estates or lives.

*Explanation.*—For the purposes of this proposition, an interest which must terminate not later than the death of one or more persons is a life interest, even though it may terminate at an earlier time.[1]

22.57. *Effect.*—If such a provision is enacted, the court will determine the validity of the gift by examining the actual facts as they appear at the end of the life interest. To take a simple case, if a fund is given in trust to pay the income to A for life and then to pay the principal on various contingencies to A's son, not being attainment of majority, the amended section requires that the validity be determined, as far as the son is concerned, on the basis of the facts existing at the *end of A's life interest.*

If, at that point of time, the contingencies have happened—even contingencies which possibly may be postponed beyond majority, the gift is valid.

As to the Explanation, its utility lies in covering the following types of provisions in deeds :

"(1) To my widow so long as she shall remain unmarried.
(2) To A until his age of 30.
(3) To B for 100 years terminable upon his death."

In these cases, the facts upon which the *future interest* is adjudged under the Explanation to proposition 1, are those existing when, (1) the widow remarries or dies unmarried, (2) A reaches the age of 30 or dies under 30, (3) 100 years pass or B dies, respectively.

22.58. *Life in being.*—It may be noted that the first proposition does not project itself beyond the end of the life estates of living persons or the lives of living persons, because there may be practical difficulties in waiting indefinitely to find out what events ultimately happen.

1 The significance of the Explanation is indicated later.

22.59. *Proposition* 2.—To deal with conditions as to age, we recommend the following proposition.

***Proposition* 2**

**If an interest in property would be void under section 14 because it is contingent upon *any person* attaining or failing to attain an age in excess of majority, the contingency shall be reduced to the age of majority, as regards all persons subject to the same age contingency.**

22.60. *Illustrative cases.*—We have already[1] referred to some Indian rulings as to age which show the desirability of such a reform.

The difficulty arising by reason of the present law which prescribes an age-limit and which looks at the possibilities is furnished by a case which went upto the Privy Council.[2] That was, of course, a case of will, but the position would be the same under the Transfer of Property Act. The testator bequeathed his property to his sons for life and further directed that the share of each son if he left a son or issue of such son living at the death of the last survivor of the testator's son, is to be held for the sons of such son and the issue of his pre-deceased son *per stripes* for their life and if the son of the testator left no such son or issue, then for his widow and daughters. It was held that as the title of the sons of the testator was only for their lives and the bequest to the unborn beneficiaries did not cover the whole of the remaining interest, section 113 of the Succession Act was violated. But the Privy Council also pointed out that since it was not clear as to whether all the widows *would be living at the date of the death of the testator, section* 114 *of the Succession Act might also come in the way.*

22.61. Then, there is a Calcutta case[3] dealing with the validity of some of the restrictions. In a Calcutta case,[4] the bequest was as follows :—

> "When my grandsons may attain their age into five shares and give away the same to their respective sons, that is to say, my grandsons."

It was held that the distribution was to take place only after all these sons who might be born to the sons of the testator should have attained their majority and that it was invalid having regard to sections 101 and 102 of the Succession Act (sections 114-115 of the Act of 1925).

The amendments recommended will meet such cases.

22.62. *Precedents.*—This is not a new concept, since, in England, section 163 of the law of Property Act, 1925 made a similar provision.[5] The present law in England is more complicated and differently worded, but it will not be feasible to adopt it. The proposed provision is not likely to cause litigation. Of course, the contingency of age is not reduced if, under the amendment already recommended,[6] the gift is saved even with the age given in the document. The first proposition is applied first, and then the second proposition is applied if necessary.

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1 See para 22.63.

2 *Pultibai* v. *Sorabji*, A.I.R. 1923 P.C. 122, 126.

3 *Rameshwar P. Singh* v. *Lachman P. Singh*, I.L.R. 31 Cal. 111.

4 *P. V. S. Pillai* v. *R. V. M. Pillai*, 17 Calcutta Weekly Notes 488.

5 See *In re Gilpin*, (1953) 2 W.L.R. 746, 749 (Chancery).

6 Proposition 1, *supra*.

22.63. *Textual comment, on Proposition* 2.—A few explanatory comments on proposition 2 are appropriate. The words referring to *any person* attaining or failing to attain majority may be explained. A common type of gift is the following : A trust to pay the income to A for life, and then to pay the principal to such children of A as reach 25, but if none reach 25, then to B. Under the amendment, the age contingency is cut down as regards both the remainder to A's children and as regards the alternative remainder to B. In other words, the use of the expression "any person" in proposition 2 will ensure that whether the interest is of the person who has to reach the age *limit or interest of any other persons,* the new provision operates.

The words "as to all persons subject to the same age contingency" may be explained. Where there is a gift to those members of a class who reach 25, and this is reduced to majority under the amendment, the reduction applies to all other members of the class, even though some of them were living at the testator's death.

However, this part of the amendment must be applied in the light of the other amendment[1] which declares that no gift shall be *invalidated or modified* if it would have been valid before enactment of this amendment. There can be cases in which an age contingency in excess of majority would be valid as to some parts of a disposition and invalid as to other parts; in such cases the age contingency is reduced only as to those parts of the disposition which would otherwise be void.

22.64. *Proposition* 3.—The next proposition to be inserted will save the validity of, and operation of, limitations which are valid under the present law. The third proposition, then, is :

*Proposition* 3 :

Propositions 1 and 2 shall not be construed as invalidating or modifying the terms of any limitation which would have been valid under section 14 apart from those propositions.

Propositions 1 and 2 are intended to validate certain gifts that would be invalid by reason of certain hardships arising from the present law. If, however, a gift is valid under the present law, then propositions 1 and 2 are not called into operation.

As regards the mention of the word "modify", it may be stated that Proposition 2, if it becomes operative, "modifies" a gift by altering the age contingency to the age of majority. This modification is, however, not intended to take effect as to any interest which would have been valid in the absence of this proposition. This is desirable by way of abundunt caution.

22.65. *Proposition* 4.—To avoid retrospective effect being given to the changes suggested in propositions 1 and 2,—which are the principal substantive amendments—the following proposition is suggested :

*Proposition* 4

Propositions 1 to 3 shall apply to—

(a) transfers taking effect on or after the date on which those propositions become operative.

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1 Proposition 3, *infra.*

(b) appointments made after that date in exercise of a power of appointment, including appointments made by an instrument under a power created before that date.

By way of explanation of paragraph (b), it may be stated that when a power has been created *before* the amended law becomes operative, and the appointment is made *after* that date, the new law is intended to apply to the interests created by the exercise of that power.

22.66. *Summary.*—It may be convenient to draw attention to some salient features of the law.

(1) *The Test.*—Under the common law Rule the validity of an interest depends upon whether it vests in time. Under some laws in the U.S.A., the basic test of validity depends upon whether the absolute power of alienation is suspended for too long.[1-2] "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than" the specified time which varies from state to state).

(2) *The Period.*—Under the common law rule, the period of perpetuities is "lives in being plus twenty-one years". At present in India, it is lives in being plus minority. Under the New York statute, it is "two lives in being". States in the U.S.A. that have followed the general form of the New York statute have, more often than not, adopted a more ample statutory period. But the two-life period is onerously restrictive.

The type of corrective legislation that is now being recommended leaves the present provision unchanged as to (1) the test, which continues to be "vesting", and (2) the period, which, in its basic form, continues to be "lives in being plus minority". It seeks, however, to apply the Rule more rationally and to eliminate certain exceptions and extensions.

22.67. *Presumption of fertility.*—A few words about the aspect of fertility are required to explain why no amendment is suggested on that point. Proposition 1 will, to a large extent, take care of those cases where the argument is made that *at the time of the transfer taking effect* the question arises whether there is a chance, however small, that an event could *occur in future* which may tie up the property for a time longer than the period of perpetuities. The amendment in proposition 1 will enable the Court to have regard to facts as they exist at the date of termination of the life estate or life in being. If, therefore, the question is whether a woman can have a child and the answer sought is in the affirmative in order to vest a gift and that event (birth) *has happened* by the time of termination of the life interest, the question of fertility or infertility becomes academic. Where, however, the question is whether looking from the point of view even of the date of termination of the life interest, a woman may be regarded as potentially fertile, there are two competing alternatives :—

(i) Will the question be determined on the basis of the rigid English rule of common law ?, or

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1 E.g. N.Y. Real Property Law, section 42.

2. There are other statutory sections that prescribe other restrictions; but section 42 can be considered basic.

(ii) will the question be determined, like any question of fact, on the normal rules of presumption and other evidentiary rules ?

Alternative (i) is the approach adopted in England where, at common law, there was a rigid position taken whereunder a woman was regarded as fertile at any age. The position had to be modified by statute,—The Perpetuities and Accumulations Act, 1964—to which we have already referred.

According to the second alternative, the matter is not determined by any unrealistic rule as at common law. It is legitimate to have regard to the common course of natural events—in fact, section 114 of the Evidence Act expressly so provides. If that is the correct legal position, no statutory reform is needed on this point.

The further provision in England creating a presumption of fertility and a presumption of infertility (sterility) is not inserted in the propositions which we are recommending, partly because it would unnecessarily complicate the text of the amendments and partly because of our assumption that the common law presumption applicable only in the field of law of perpetuities, (that a woman can have a child at any age), is not likely to be followed in India, particularly because our codified law of evidence, in section 114 of the Evidence Act, empowers the court to draw inferences that are permissible having regard to the common course of natural events, human conduct and the like. There being no conclusive presumption in the codified law, the matter is likely to be determined on common sense principles.

22.68. *Options and re-entry.*—Elsewhere, we find (a) a provision exempting from the Rule commercial options to purchase and placing upon such options any time limitations which a study of the realities of commercial dealings in land may show to be desirable;

(b) a provision from the Rule rights of entry for condition broken and possibilites of reverter but declaring that such interests shall become void after a specified period of years or at such earlier date as the condition ceases to have any utility.

These are not considered necessary having regard to the judicial decisions confining the rule of interests proper in property.

22.69. *Clarification.*—By way of clarification, it may be stated that the proposed amendments are confined to the provision in secion 14, and are not intended to affect rules of law other than those concerned with remoteness of vesting as enacted in section 14.

22.70. *Gifts to unborn persons.*—For example, the proposition that a gift in Hindu Law cannot be made to an unborn person is, as we have stated above, well established.[1] In a Bombay case,[2] the will contained a provision for the future children of the testator's daughter. She had no children at her death. The provision was void. This rule of Hindu law,—and indeed, of general Indian law[3]—is not intended to be disturbed by section 14. In fact, it postulates the existence of that rule, and provides or

1 *Rai Bishan Chand* v. *Asmodia Koer*, I.L.R. 6 All. 560 (P.C.).

2 *Bai Manu Bai* v. *Dossa Morarji*, I.L.R. 21 Bom. 709 (P.C.), on appeal from I.L.R. 15 Bom. 443.

3. Compare section 112, Indian Succession Act, 1925.

rather assumes that the ultimate beneficiary may not be in existence at the time of the transfer. But is the demand of the section that besides the requirement imposed by section 13 to the effect that the whole of the remaining interest of the transferor in the thing transferred should be covered,[1] it is also necessary that the ultimate beneficiary should be in existence at the expiration of the period earlier mentioned and it is also necessary that the thing transferred must belong to him not later than the attainment of majority. There are then three postulates and one prohibition in the section as follows :—

(i) Vesting may be delayed;

(ii) The first stage of permissible delay is represented by the lifetime of one or more persons in existence at the time of the transfer— it is not necessary that they must themselves be beneficiaries under the transfer;

(iii) The second permissible stage of delay is the minority of some person to whom if he attains full age the thing trasferred is to belong;

(iv) That person must, however, be in existence at the expiration of the earlier periods.

22.71. Thus, there are two types of periods which may be conveniently described as the right time period and the minority period. Between the two, there must not be any interval, and in any case the vesting should not be delayed beyond the end of minority period. Thus, while section 14 is not concerned with commencement initially and allows an interval between the transfer and the vesting, the intervals are represented by two periods which must be continous and which must be at the specified time. In this sense, the journey of the interest and its ultimate destination are both regulated in point of time.

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1 Section 13 will however be deleted.

## CHAPTER 23

## *TRANSFER TO A CLASS*

### SECTION 15

23.1. *Section* 15.—When a gift is made to only one person the simple provisions in secions 13-14 apply. When the beneficiaries are a class, more elaborate provisions are required. Section 15 provides as follows on the subject :

> "15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class."

23.2. *Class gifts.*—The section deals with class gifts. A class gift is a gift of property to all who come within same description, the property being devisible in shares according to the number of persons in the class.

At common law, a class gift fails *in toto* if any beneficiary may enter the class outside the perpetuity period, for the size of the shares is not then ascertained in time.

Under the English Act of 1964, persons entering the class within the perpetuity period will take to the exclusion of persons who enter outside the period.

23.3. *Amendment of* 1929.—In the great majority of cases where the rule against perpetuities is successfully invoked, the offending provisions is a gift to a class. In such a case at common law, gifts to A1, A2, A3, valid in themselves, are rendered invalid by the fact that gift to A4, is invalid. Leach has criticised this doctrine as "guilt by association". Realising that a gift which threatened to tie up a property for too long a period should not be invalidated *in toto,* the legislature in India in 1929 amended section 15 by substituting a rule which was thus the reverse of the rule as contained in the old section. Before the Amendment of 1929, section 15 incorporated the rule of English law as enunciated in the leading case of *Leake* v *Robinson*[1] holding that in the case of a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity,—for example, a gift to the unborn children of a living person who shall attain the age of twenty five—the whole gift is void. In cases not governed by the Act at a time when the Act did not apply to Hindus, there was judicial reluctance to apply the English doctrine.[2] Notwithstanding the provisions in section 102 of the Succession Act, 1865, and section 15 of the Transfer of Property Act as it then stood—provisions which were cited for invalidating the gift by way of an analogy—it was held that even though a gift to unborn grand-sons was invalid under Hindu law, that did not necessarily make the gift void so far as it was in favour of a grand-son *in existence.* It was pointed out that the English rule usually defeats the intention of the testator and that in any case the English rule was not a safe guide for the construction of Indian gifts.

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1 *Leake* v. *Robinson* (1817) 2 Mer. 633.

2 *Rai Bishan Chand* v. *Mst. Asvardia Koer.* I.L.R. 6 All. 560 (P.C.)

23.4. *Hindus.*—When, however, the Transfer of Property Act was made applicable to Hindus, naturally the position was reversed and, by virtue of the unamended section, such gifts totally failed. It was in 1929 that the section was amended to read as it now stands. The principle under the amended section is that if there is a gift to a class and the interest fails with regard to *some of the members of the class* by virtue of the rules contained in sections 13 and 14, such interest fails only in regard to those persons, and not in regard to the whole class. If, therefore, the whole plan of a donor of property cannot be carried into effect, the court will yet give effect to a part of it rather than hold that it shall fail entirely. After the gift has vested in all or some members, they will hold it as tenants in common, so long as they take as members of the class unless a joint tenancy is created by express words.

23.5. *English Act.*—It may, as a matter of interest, be noted that the English Act of 1964 has also now adopted the same approach by proving,[1] in effect, that person who entered the class within the perpetuities period will take, while those who entered the class too late will be excluded. Writers on English law usually describe this reforming provision as an amendment providing a "class-splitting" rule.

Of course, before applying this "class-splitting" beneficial rule, one has to apply the other beneficial rules enacted in the 1964 Act, namely, the "wait and see rule" and "rule for reduction of age". Thus, take "a gift to my grand-children on their attaining the age of twenty-five," which may be void under the common law rule if the grandchildren are unborn at the date of the gift. It may, in the first place, be valid if all the grand-children have reached the age of four on the death of the donor who made the will or on the death of the previous holder of the life interest. This is by virtue of the wait and see rule. Next, the age could be reduced under the statutory provision for reduction. The gift may still be void (even if the age is reduced to twenty-one) in the case of a grand-child *born after the termination of the previous life interest.* Now the class-splitting rule must be applied, with the result that any grand-child who satisfies the contingency in time—the contingency of attaining the age of twenty-five years—will take to the exclusion of grand-children who do not so satisfy the contingency.

23.6. *Recommendation.*—Since the substance of section 15, as amended in 1929, is sound, the only amendment which we recommend is the deletion of the reference to section 13. This is consequential on the recommended deletion[2] of section 13.

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1 Sections 4(3), 4(4), and 4(5), Perpetuities and Accumulations Act, 1964.

2. See recommendation as to section 13.

## CHAPTER 24

## *DEPENDENT TRANSFERS*

### SECTION 16

24.1. *Dependent transfers.*—Section 15 having dealt with one situation concerned with the effect of interests which become void—gifts to a class—another situation concerned with an infectious vice is dealt with in section 16, which is concerned with what are known as dependent transfers.

Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

24.2. *Principle.*—The rule in the section is primarily based upon the presumed intention of the transferor. The transaction being indivisible, once a person transfers property and his whole interest is transferred, the failure of the period interest leads to the failure of the whole transaction.[1] As observed by Lord St. Leonards[2] in respect of a gift over, which was void :

> "It was void, not because it was not within the line of perpetuity, but on the ground that the limitation over was never intended by the testator to take effect unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event where the person to take was in actual existence, but could not take."

The rule in section 16 applies only when the two events cannot be separated; if they can be separated, then the transfer is not void, only the invalid limitation is disregarded.[3]

24.3. *Scope of dependent transfer.*—The scope of "dependent transfer" may be illustrated from a case under the Hindu Wills Act. Though section 16 is now made independent of the Hindu law, still there does not appear to have been any conflict between the rule of that law, at any rate the rule applicable to those to whom the Hindu Wills Act[4] applied and the rule enacted in the section. In a Calcutta case[5], a bequest of the trust-fund was made in these terms : "My great-grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law. God forbid, it, but should I have no great-grandsons in the male line, then my daughters' sons, when they are of age, shall take the said property from the trust-fund and divide it according to the Hindu Shastras in vogue."

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1. Gour.
2. *Moneypenning* v. *Derring*, 2 De G.M. & G. 182.
3. (a) *Evers* v. *Challis*, 7 H.L.C. 531. 534.
   (b) *Watson* v. *Young*, 28 Ch. D. 436, 443;
   (c) *Jones* v. *Westcomb*, 1 Eq. Ca. Ab. 245;
   (d) *In re Bence, Smith* v. *Bence*, (1891) 3 Ch. 242.
4. Now sections 255—260, Indian Succession Act, 1925.
5. *Brajanath* v. *Anandamayi*, 8 B.L.R. 208.

Here the bequest to the daughters' son was dependent on, and not alternative to, the gift to the great-grandsons and was therefore void.

24.4. *Alternative gifts.*—But, if, on the other hand, the bequest is in these terms : "If, at the time when my daughters' sons come of age, the gift to *my great-grandsons has not taken effect for* any reason; then my daughters' sons shall take the property". Then, the gift, being in the alternative, would take effect, since it can be presumed that the grantor intended the subsequent gift to take effect *in any event.* The section being based on the presumed intention of the grantor, there is scope for applying a different rule where the deed shows that the intention of the testator was different. This aspect will be further illustrated later.[1]

24.5. *Analysis of section* 16.—Let us now analyse the important requirements of the section. The first requisite is that the gift over must have been created *in the same transaction.* The gift over, being based upon a contingency which is bad, becomes itself invalid, the reason being that the persons entitled under the subsequent limitation were not *intended to take*[2] unless and until the prior limitation *is exhausted;* and, as the prior limitation is void, the subsequent gift can never come into operation. It is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation.[3] But this limitation does not necessarily apply to limitation *in default of appointment,* in which usually the intention is that they should take effect unless displaced by a valid exercise of the preceding power of appointment. Thus, where the donees of a limited power of appointment purported to exercise it by appointing trustees upon such trusts as A, one of the objects of the power should, with certain consent, appoint, and in default of, and subject to, any such appointment, upon certain trusts which were within the power, it was held that, although the power of appointment purported to be conferred on A was void, the trusts in default of appointment were valid.[4]

24.6. *Section restricted to dependent transfer.*—The second requisite of the section is that it is restricted to dependent transfers. If the gift over is dependent upon the happening of either of two events, of which one is valid as a condition and the other is void, and the former event happens, the succeeding interest will take effect even though the latter event may be void as a condition. If the conditions are divisible, the valid disposition would take effect without reference to the invalid contingency. Thus take a deed in which a gift over of property is made in the event of there never being any child of A or in the event of no child attaining twenty-one.

24.7. *One of two events.*—Again, if the gift over is dependent upon the happening of either of two events, one of which is legal and the other void, the succeeding interest will take effect if the former event in fact happens, although the second event may offend against the rule. In such cases, the whole question depends upon whether the clause for carrying the estate over

1 Para. 24.6, *infra.*

2. Para. 24.2, *supra.*

3. (a) *Robinson* v. *Haricastle.* 2 R.R. 241. 151;
(b) *Routledge* v. *Dorrie,* 2 Ves. 357;
(c) *Beard* v. *Westcott,* 5 B. & A. 801;
(d) *Moneypenny* v. *Derring* 2 De G.M. & G. 145, 181, 182.
(e) *In re Abbott Peacock* v. *Frigout,* (1893) 1 Ch. 54, 57.

4. *Webb.* v. *Sadler,* L.R. 8 Ch. 419.

is divisible or not. If it is, the valid disposition would take effect without reference to the invalid contingency. Thus, take a deed in which a gift over is made of property in the event of there never being any child of A or in the event of no child attaining, etc., twenty-one. Now, here the first contingency is valid, but the second is too remote, but the gift over would nonetheless take effect on the happening of the former event.[1] The question in such cases is, whether the gift can be split into two alternatives, in which case, if the alternative, which is within the legal limits, happens, the gift over would take effect.[2]

24.8. *English Act of* 1964.—We now turn to the English law. At common law, if a subsequent gift is limited on the same contingency as a void gift, that subsequent gift also fails. At common law, any gift which is dependent or expectant upon a prior void gift is invalid.

Under the Act of 1964, section 6, a subsequent gift must be viewed on its own merits, and will not fail merely because of dependency. Section 6 of that Act reads—

> "6. A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness."

This provision would seem to place the burden of proving that the subsequent gift is void on the person who so affirms. It reverses the common law rule based on[3] the presumed intention of the grantor in favour of the opposite rule based on the policy of the law to validate gifts.

24.9. *Need for revising section* 16.—We have given some thought to the matter and have come to the conclusion that there is need for revising section 16 on the same lines as section 6 of the English Act of 1964. Although it can be said in favour of the existing section that it is based upon the presumed intention of the transferor, the same argument can be addressed in support of the opposite view, namely, that the transferor intended a benefit for the ultimate beneficiary also, and that he himself would have desired that if the first gift is legally not recognisable, the subsequent gift should take effect.

24.10. *Recommendation to revise section* 16.—In the light of the above discussion, we recommend that section 16 should be revised as follows :

> "16. Where, by reason of *the rule* contained in[5] . . . . . Section 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest shall *not fail by reason only of failure of the first mentioned interest.*"

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1. *Watson* v. *Young*, 28 Ch. D. 436, 443; *Evers* v. *Challis*, 7 H.L.C. 531.
2. *Evers* v. *Challis*, 7 H.L.C. 531, 547.
3. Para 24.2, *supra*.
4. Para. 24.8, *supra*.
5. Mention of section 12 has to be omitted in any case, as that section is being defeted.

## CHAPTER 25

### *DIRECTION FOR ACCUMULATION*

### SECTION 17

25.1. *Gist of section* 17—Restrictions on the alienation or a vesting of the corpus have so far been dealt with. In order to encourage the free circulation of property, the law also considers it necessary to provide restrictions on the accumulation of income. Income cannot unreasonably be accumulated for a long period. Though opinions may vary as to what is and what is not an unreasonably long period, yet the principle, broadly stated, has been accepted in the common law and also in our statutory provisions. That the opinion may vary from time to time and place to place is obvious from the fact that the law on the subject has undergone a lengthy process of evolution in England. It may be noted that in Hindu law, the rule was more general than as stated in section 17. In Hindu law, a direction for accumulation is not void unless it is found to be so unreasonable as to be against public policy, or if it is given for the purpose of carrying out an illegal object or is, in its effect, inconsistent with Hindu law.[1]

We shall revert to this aspect later. The section is in these terms :

> "17. (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—
>
> (a) the life of the transfer, or
>
> (b) a period of eighteen years from the date of the transfer,
>
> such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period, the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed."

There are exceptions to this general provision contained in sub-section (2). It provides that this section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

25.2. *The right to terminate accumulation.*—A beneficiary of full age who has an absolute vested and indefeasible right to the capital and income may terminate the accumulation by directing the trustees to pay the fund to him.[2]

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1 *Rajendra* v. *Raj Kumari,* (1907) I.L.R. 34 Cal. 5.

In the case of *Saunders*,[1] the testator bequeathed his stock to trustees on trust to accumulate the dividends until Vautier should attain the age of twenty-five, and then to transfer the capital and the accumulated dividends to Vautier. Vautier, having attained the age of twenty-one, contended that he was entitled to stop the accumulations and to have the fund transferred to him immediately. Counsel for Vautier argued that he now had a vested interest in the stock, and that since accumulation was for his sole benefit, he was entitled to waive, it and demand an immediate transfer.

Lord Langdale M.R. held :

> "I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period but may require payment the moment he is competent to give a valid discharge."

25.3. *History*. Before 1929, the section was numbered as section 18, and present section 18 was numbered as section 17. Also, the provision was differently worded.[2]

25.4. *History of English law*. The English rule as to accumulations has undergone a process of evolution for about two centuries. It was the outcome of the decision in the case of *Thelluson*.[3] That case arose out of the will of Peter Thelluson, who, in 1796 A.D., disposed of his vast property by will and excluded his issue from enjoyment, directing accumulation of income for the period of nine lives—all in being—at the date of his death. At that time, there was no statute, prohibiting accumulation and the bequest had to be upheld, but the will led to the passing of the Accumulation Act, 1800 (39—40 Geo. 3, s. 98), which was replaced by the Conveyancing Act, 1881, and which, in its turn, was replaced by sections 164—166 of the Law of Property Act, 1925, slightly amended in 1964.

25.5. *Pre*-1929 *Law in India*—Before its amendment in 1929, the law in India allowed accumulation for a period of one year only. But, in cases decided independently of the statutory provision, it was held that if there was nothing *per se* illegal in a direction to accumulate, and if such a direction was not unreasonable or for carrying out an illegal object, it should be upheld. However, the cases did not lay down any definite rule which the lower courts could easily follow. In 1929, the law was amended as it now stands.

25.6. *English law*.—The English rule prescribes several periods during which accumulation can validity be directed,[4] viz.,—

(a) the life of the grantor or settlor; or

(b) a term of 21 years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities only of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator; or

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1. *Saunders* v. *Vautier*, (1841) 4 Beav. 115.
2. Para 25.5, *infra*.
3. *Thelluson* v. *Woodford*, 4 R.R. 205, affirmed (1805) 8 R.R. 104.
4. Section 164, Law of Property Act, 1925, as amended in 1964.

(d) the duration of the minority or respective minorities only of any person or persons, who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated; or

(e) a term of twenty-one years from the date of making of the disposition; or

(f) duration of the minority or respective minorities of any person or persons in being or *en ventre sa mere* at that date.

Section 165 of the Law of Property Act, 1925 provides—

"165. Where accumulations of surplus income are made during a minority under any *statutory power or under the general law*, the period for which such accumulations are made is not to be taken into account in determining the periods for which accmulations are permitted to be made by the last preceding sections, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority."

Section 166 of the Law of Property Act, 1925 provides—

"166. (1) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

"(2) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purpose of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land."

Section 12 (2) of the Perpetuities and Accumulations Act, 1964, provides—

"12. (2) It is hereby declared that the restrictions imposed by ....section 164 ( of the Law of Property Act, 1925) apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and that they apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated."

Sub-section (2) deals with two previously uncertain points: (i) whether a power, as opposed to a trust, to accumulate was caught by section 164. It was held in *Re Robb*[1] that the section applied to mere powers, and that decision is now confirmed; (ii) whether section 164 applied to an accumulation at simple interest, as opposed to compound interest. There were decisions either way, but the Act now provides that section 164 shall apply to such a case. Section 12(2), however, is not retrospective.

25.7. *Comparison with the English law.*—It may be noted that the provision in England is more liberal than section 17, and permits accumulation for the longer of several alternative periods mentioned in section 164

1 *Re Robb*, (1953) Ch. 459.

of the Law of Property Act, 1925, slightly amended in 1964. In contrast, under section 17 of the Transfer of Property Act, the period is reduced to 18 years or life of the transferor. In England, on the other hand, the period is more elastic. The question then arises whether there is need to revise our law, or whether it should be kept as it is. It appears to us that some of the provisions made in English law are worth adopting in our section inasmuch as such liberalisation is not likely to create any practical difficulties and, speaking theoretically also, the law should not object, as a matter of policy, so long as income is not tied up for an unduly long time. After all, the period of life of the transferor or the period of 18 years from the date of the death of the transferor is not the only reasonable period, and there could be cases where a direction expressed differently may yet be reasonable. For example, a period of 18 years from the date of the death of the transferor or a period expressed as expiring with the minority of a living person or a person living at the date of the death of the transferor would, *prima facie*, appear to be reasonable.

25.8. We have taken note of the fact that the English law is more liberal than section 17, inasmuch as a term of twenty-one years from the death of the grantor, settlor or testator is allowed in England as one of the permissible periods—in addition to any other alternative periods mentioned in the law.[1] It also permits the alternative of expiry of minority. There is also the fact that the English law has regard to persons in the womb. With suitable adaptations, these alternative periods are worth adding to the section.

25.9. *Hindu law.*—We may note that the Hindu law was not right. As far back as 1855, no less an authority than Colville C.J., delivering the judgment of the Supreme Court of Calcutta,[2] expressed the opinion that it was competent to Hindu testator expressly to provide for the accumulations of the surplus income of his estate within the limit allowed by law and to make those accumulations subject to a limitation order as there described.

Thus, a direction to accumulate is not fundamentally bad; it is bad only if it offends some independent rule of Hindu law. Thus, it may infringe the rule against perpetuities or be repugnant and void as an attempt to deprive a person of the enjoyment of that which has become his property. In *Watins* v. *Administrator-General*,[3] Jenkins C.J., observed that, on principle, an accumulation can be validly directed, for so long as at a time as the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable, or its course or is devolution can be directed and controlled by a testator.

This is an additional consideration for making the law liberal within due limits.

25.10. *Recommendation as to section* 17(1).—Accordingly, we recommend that section 17(1), clauses (a) and (b), should be revised to read as under :

"(a) the life of the transferor, or

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1. Section 164, Law of Property Act, 1925, as amended in 1964.
2. *Smt. Sooryumoney Dossee* v. *Dinoobandoo Mullick*, (1855) 1 Boulnois 223, cited by Jenkins C.J. in *Watkins* v. *Administrator-General*, (1914) I.L.R. 407 Cal. 88, 91, 92.
3. *Watkins* v. *Administrator-General*, (1914) I.L.R. 47 Cal. 88, 93.

(b) a period of eighteen years from the date of the transfer, or

(c) *a period of eighteen years from the date of the death of the transferor, or*

(d) *the minority of any person living or in the womb at the date of the transfer or at the date of death of the transferor.*"

25.11. *Amendment of section* 17(2).—As to sub-section (2) of section 17, we recommend the addition of a further exception in these terms—

"(iv) *the accumulation of the produce of timber or wood.*"

This has been suggested by the corresponding exception in England,[1] which reads—

"'(iii) respecting the accumulation of the produce of timber or wood."

We believe that this amendment should not raise any controversy.

1. Section 164(2)(iii), Law of Property Act, 1925.

## CHAPTER 26

## *TRANSFERS FOR BENEFIT OF PUBLIC*

### SECTION 18

26.1. *Gist*—Transfers for the benefit of the public have been excluded by section 18 from certain restrictions. The section is in these terms :—

> "18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind."

Although the section does not use the word "charity" or "charitable purposes", there is hardly any doubt that it is meant for transfers in favour of charities. The words "benefit of the public" and "object beneficial to mankind" make this clear.

26.2. *Gifts for charity—special position*—Both in India and elsewhere, gifts for charity have received social approval. They have also received certain special privileges in a law, though the abuse—suspected or real—of some of those privileges has sometimes led to a fluctuation of views as to the propriety of conferring special benefits on charities. This has been particularly so in the field of fiscal privileges. Confining ourselves, however, to non-fiscal matters, and leaving aside the peculiar historical developments in England which led to the Statutes of Mortmain, we may state that the law has been tender towards transfers for charitable purposes in general and it would be true to say that several types of provisions which would not be normally permissible, become so where a charitable purpose is shown. The section under discussion, to put the matter broadly, exempts charities from the rule against perpetuities (section 14) and from two other provisions—dependent transfers (section 16) and accumulation (section 17).

26.3. *Charity in Vedic and post-Vedic texts*—From the earliest times, the merit of charity has been recognised in India. The Rig Veda contains passages extolling the merits of charity. One of them is thus translated by Max Mueller :[1] "He who gives alms goes to the highest place in heaven."

The Hindu concept of charity is not confined to religious purposes, even though the two often co-exist. Purely secular objects were equally praiseworthy. The Vedic notions of hospitality are interesting, and it is well-known that in the Hindu household the guest is treated as a divinity hence the social recognition of "guest houses" as a kind of charitable institution.

26.4. *Impartible property*—Property dedicated for pious uses has been made impartible under Hindu law, as much from the fundamental idea of its not being private property, as from a desire to maintain uninterrupted use of the same for pious purposes.[2] This is one example of the special treatment afforded to charities.

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1 Rig Veda 1, 125, 5-6, cited in Max Mueller's Chips from a German Workshop, Vol. I, page 46; Hemadri, Danakhanda, Bib. Ind., page 6.

2. P N. Saraswati, Hindu Law of Endowments (1897 Ed.), Chapter 7.

We need not, for the present purpose, detain ourselves with a detailed discussion of the expressions used in the texts to indicate what are now described as "religious and charitable" purposes;—expressions such as Ishta and Purtta, Yoga Kshema. Nor are we concerned with the meaning of the latter. But, at least according to the one construction of the passage in the Mitakshara,[1] dealing with property not liable to partition, where it speaks of "Yoga Kshema", the expression is taken in this sense—Yoga means a fund for the performance of *religious* ceremonies and Kshemam signifies a reservoir of water or the like ***constructed for public benefit.***[2]

Of course, the mention of "reservoir of water" is merely to be taken as an illustration. The dominant element is public benefit—which, it may be of interest to note, is also the most important element in the modern concept of charities. The construction of reservoirs is unanimously classified by the Hindu ages amongst purtta (roughly, charitable works). The commonest enumeration of these reservoirs is "Vapi-Kupa-tarnagini", an enumeration occurring not only in later texts,[3] (Yama, Atri and Varsha Purana), but also in Ashwalayana. But these were not the only instances of purtta works. Gifts for learning and gifts for hospitals form an equally important category of "purtta" works.[4]

26.5. *Meaning of Ishta and Purtta*—Ishta, in ancient texts, includes Agnihotra, Vedic gifts, sacrifices, Pashubandh, Chaturmashya, Agnistoma, offered to priests at sacrifies, religious austerity, truth, studying in the Vedas, Vaisvedeva sacrifice and Atithya.

Purtta works are gifts and charity, according to the Smarta and not Vedic rites. A text of a Smriti cited by Hemadri says,—they are gifts made outside the sacrificial ground. Purtta works include the following—gifts made during eclipses, and other days auspicious for such acts, tanks, groves, processions for the gods, wells, temples, rest-houses, giving of food and relief to the diseased. Gifts for educational purposes, though strictly not coming within the definition of Purtta, have been extolled in the Smrities and Puranas as of high merit. Imparting learning and gifts of land and cows are declared to be gifts of surpassing merit, in a text of an Upanishada cited by Hemadri. Hemadri also declares, by citing many texts, that assistance to stdudents in any shape in prosecuting their studies is of great merit.

26.6. *History of charities in the West*—So far as the West is concerned, it is highly probable that the rudiments of the law of charities were derived from the Roman or Civil law.[5] In Lord Chief Justice Wilmot's notes of his opinions (pp. 53, 54), it is said : "Donations for public purposes were sustained in the civil law, and applied, when illegal, *cy pres* to other purposes, one hundred years before christianity was the religion of the Empire." And for this cited Dig. Lib. tit. 2, De Usuet usufruc. Legatorum, 16, 17.

1 Mitakshara, Chapter 1, section 4, clause 3, reproduced in Vira Mitrodaya, Chapter VII, Section 2.

2 See Golap Chandra Sarkar's Translation, quoted by P. N. Saraswati, Hindu Law of Endowments (1897 Ed.) Chapter 7.

3 Ashwalayana, Grihya Parishishta, IV, 9, Bib. Ind., page 342, P. N. Saraswati, Hindu Law of Endowments (1897 Ed.), Chapter 8.

4 P N Saraswati, Hindu Law of Endowments (1897 Ed.), page 27, para 24.

5 Story, Equity Jurisprudence (1919), page 475, 1137.

One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the Church.[1] Of course, the Church was originally regarded as the "bride" of God—whence the word "endowment" which has its association with dower.

The permission given by Constantine was soon abused to so great a degree as to induce the Emperor Valentinian to enact a "mortmain law", by which it was restrained.[2]

But this restraint was gradually relaxed; and in the time of Justinian it became a fixed maxim of Roman jurisprudence, that legacies to pious uses (which included all legacies destined for works of piety or charity, whether they related to spiritual or to temporal concerns), were entitled to peculiar favour, and to be deemed privileged testaments.[3]

Thus, for example, a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, were esteemed legacies to pious and charitable uses.[4]

26.7. *Public benefit in regard to religion*—In general, a charitable endowment is one which has for its object the benefit of the public or of mankind. A religious endowment is one which has for its object the establishment, maintenance or worship of an idol, deity or other object or purpose subservient to religion. Every religious endowment, in the sense explained above, is not charitable. The following definition of "charitable purpose" occurs in the Charitable Endowments Act :[1]

> "2. In this Act, 'charitable purpose' includes relief of the poor, education, medical relief—and the advancement of any other object of general public utility but does not include a purpose which relates exclusively to religious teaching or worship."

An endowment may be charitable without being religious, and it may be religious without being charitable—particularly where the element of public benefit is missing. This is true where an endowment is private in the sense that the dedication is limited to a family god, meant for a family or families or a small and certain body of individuals and the public has no access to the idol. In general, any property, movable and immovable, that a person can dispose of by gift or will may form the subject of endowment by gift or will, as the case may be.

26.8. *Hindu endowments*—Hindu endowments are mostly intended for the benefit of the public, but, by way of exception, private ownership may be found. In general, the distinction between a public and private endowment depends upon its extensiveness.[6] The essential characteristic of a charitable gift is that is must be for the benefit of the public or mankind.

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1 Cod. Theodos. Lib. 16 Tit. 2, 1.4.
2 Cod. Theodos, Lib. 16, title 2, 1.20.
3 Domat, Civil Law, Vol. 2, B. 4, tit. 2, 6.
4 Domat, Vol. 2, B. 4, tit. 2, 6.
5 Section 2, Charitable Endowments Act, 1890.
6 *Prakash Chandra* v. *Subhash Chandra*, I.L.R. 37 Cal. 67, 79.

Wholesale bequests of the estate to religious charity are not unknown.[1] In fact, where a gift is made not a living person but to an idol—a dedication—one cannot engraft upon it the English law of perpetuities.[2]

26.9. *Statutory precedents*—Indian statute law contains a number of provisions wherein the aspect of charity becomes important. While section 18 confers a benefit on charity, section 118 of the Succession Act contains a restrictive provision for death-bed gifts to charity.

Section 118 of the Indian Succession Act[3] is based on the Statute of Mortmain (9 Geo. II c. 36). Although it was held in *Mayor of Lyons* v. *Eats India Co.*,[4] that this statute has no application in India, the words used in this section are "religious uses or charitable uses" and the illustrations are adopted from the enumerations of objects mentioned in the Statute of Elizabeth, and the provisions as to the execution of wills for a period of six months in the registry are also borrowed from the English law mentioned above.

26.10. *Income-tax Act*—In section 4(3) of the Indian Income Tax Act 1922, *charitable purposes* included relief of the poor education, medical relief and advancement of any other object of general public utility. The word "include indicates that the definition is merely enumerative.[5]

In the Charitable Endowments Act VI of 1890, charitable purposes "include relief of the poor, education, medical relief and the advancement of any other objects of general public utility but does not include a purpose which relates exclusively to religious teaching or worship." In section 92 of the Code of Civil Procedure, 1908, the words used are "public purposes of a charitable or religious nature."

In the Bombay Public Trusts Act,[6] a 'public trust' is defined as meaning as express or constructive trust for either a public religious or charitable purpose or both; there is an inclusive portion which is not material for the present purpose. In the same Act,[7] it is provided that for the purposes of that Act, a charitable purpose includes—

(1) Relief of poverty *or distress;*

(2) Education;

(3) Medical relief;

(4) Provision for facilities for recreation or leisure-time occupations (certain conditions are added which are not reproduced here); and

(5) The advancement of any other object of general public utility, but not including a purpose which relates exclusively to religious teaching for worship.

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1 Gour, Hindu Code (1938), page 804.

2 *Markby J. Esamy* v. *Krishna,* 2 Bengal Law Reports Original Cases 47; *Jamshedji* v. *Sona,* I.L.R. 33 Bom. 122.

3 Paruck, Succession Act (1965).

4 *Mayor of Lyons* v. *East India Co.,* I. M.I.A. 175.

5 *Commissioner I. T.* v. *National Mutual Association,* I.L.R. 57 Bom. 519.

6 Section 2(13), Bombay Public Trusts Act, 1950.

7 Section 9, Bombay Public Trusts Act, 1950.

In the Income-tax Act, 1961,[1] 'charitable purposes' are defined in an inclusive manner. They are defined as including "relief of the poor, education, medical relief and advancement of any other object of general public utility not involving the carrying on of any activity for profit."

26.11. *Modern decisions*—It is now time to refer to the modern doctrines as to charity found in judicial decisions. Without necessarily implying that every rule of English law in this field will be valid in India also, we would like to draw upon the rich material presenting a variety of fact situations available in English decisions.

In order that a trust may be legally charitable, its purposes must, in England, fall within the spirit and intendment of the preamble to the Statute 43 Elizabeth I Chapter 4, often referred to as the Charitable Uses Act, 1601. Though that statute was repealed by the Mortmain and Charitable Uses Act, 1881, its preamble was preserved by section 13(2) of that Act. Later, by the Charities Act, 1960, the preamble was also repealed, but section 38(4) of the Act of 1960 provides that any reference in any enactment or document to a charity within the meaning, purview and interpretation of the Charitable Uses Act, 1601, or of the preamble to it shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales. The general understanding is[2] that even now, in order for a trust to be legally charitable, its purposes must fall within the spirit and intendment of the aforesaid preamble—a proposition which has been re-affirmed by the House of Lords.[3] The same opinion has been expressed in one of the annual reports of the Charity Commissioners in England.[4]

26.12. *Statute of Elizabeth I*—Every reported English case has been[5] decided, or ought to have been decided, with the preamble to the Statute of Elizabeth I in mind. The objects enumerated in the preamble to the Statute were :

> "The relief of aged, important, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives, and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."

26.13. *Case-law based on the statute (Romilly)*—Looking to the preamble, and not behind it, the courts have built up a great body of case law. "Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages.[6]" For more than 200 years after the enactment of the Statute of Elizabeth I, no attempt was made to

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1 Section 2(15), Income-tax Act, 1961.

2 O. R. Marshall (1961), 24 Modern Law Review 444; Spencer Maurice in (1960) 24 Conveyancer 390.

3 *Scottish Br. etc. Society* v. *Glasgow City Corporation.* (1967) 3 All. E.A. 215.

4 Report of the Charity Commissioners in 1966, paragraph 31.

5 Tudor on Charities.

6 See *Gilmour* v. *Coats*, (1949) A.C. 426, 443, (per Viscount Simonds).

classify the objects or purposes which had been held to be charitable as being within the letter or the spirit and intendment of the preamble. However, in 1805, Sir Samuel Romilly (then Mr. Romilly), arguing in *Morice* v. *Bishop of Durham*,[1] put forward a classification under four heads. These heads were—first, relief of indigent, second, advancement of learning, third, the advancement of religion, fourth, "which is the most difficult", the advancement of objects of general public utility.

26.14. *Pemsel's case*—Lord Macnaghten, in *Income Tax Commissioners* v. *Pemsel*,[2] substantially accepted Sir Samuel Romilly's classification with two significant variations. He classified charitable purposes under four heads :

(1) The relief of poverty;

(2) The advancement of education;

(3) The advancement of religion;

(4) Other purposes beneficial to the community not falling under any of the preceding heads.

A significant variation in contrast with Romally's classification is the substitution of the advancement of "education" for the advancement of "learning". In this respect, Lord Macnaghten's language was more accurate than the language used by Sir Samuel Romilly.

26.15. *Genesis of section* 18—It is well known that the enunciation in *Pemsel's case* was based on the classification put forward by Sir Samuel Romilly as counsel in the case of *Morice*.[3] Section 18 was inserted at a time when the decision in *Pemsel's case* had not been rendered, although the arguments of Sir Samuel Romilly in the case of *Morice* were perhaps known to the draftsman of our Act. It is not very clear whether the enumeration in section 18 deliberately adds certain objects,—such as "commerce"—which were not usually mentioned in the judicial formulations of charity in England. It is, however, possible that the mention of "commerce" was suggested by the enumeration, in the preamble to the Statute of Elizabeth, of certain objects, such as the "repair of bridges, ports, havens, causeways.....sea banks and highways and the supportation, aid and help of young tradesmen, handicraftsmen...." Specific mention of "commerce", in any case, creates no anomaly, since the dominant requirement of the public object is very much there.

26.16. *Question of law*—It is to be noted that whether or not a trust is charitable is a question of law, and the same principle would apply to the construction of words referable to public benefit even in a statutory formulation. The question has to be decided by the judge in the light of the circumstances in which the institution or trust came into existence and the sphere in which it operates.[4] In arriving at his conclusion on this point, the judge is completely unaffected by the opinion of the settlor or testator as to whether the purpose which he has chosen is charitable or not. This has

1 *Morice* v. *Bishop of Durham*, (1805) 10 Ves 583.
2 *Income Tax Commissioners* v. *Pemsel*, (1891) A.C. 531, 583.
3 *Morice* v. *Bishop of Durham*, (1805) 10 Ves. 522.
4 *Incorporated Council of Law Reporting* v. *Attorney-General*, (1971) 3 All. E.R. 1029, 1033.

been settled long ago in England, and is the law in India. It is equally well settled that the opinion of the trustees in this respect is not binding.[1] It was on this principle that in the oft-cited case of *Hummeltenberg,*[2] Russel J. observed that trusts might be established in perpetuity for the promotion of "all kinds of fantastic (though not unlawful) object, of which the training of poodles to dance might be a mild "example.". Conversely, even if the motive of the stipulation is not necessarily that of generosity, the purpose may still be regarded as charitable if it is charitable in the eye of the law. In another case decided in the same year as *Hummeltenberg,* it was held[3] that a bequest to provide for the erection of a stained glass window in a church was charitable even though the motive of the testatrix was to perpetuate her memory and not to beautify the church or to benefit the parishianers.

26.17. *Vagueness*—The spirit and intendment of the Statute of Elizabeth has received considerable attention in recent times. In a case which arose in West Indies[4], a tax payer had covenanted to make an annual payment to a "Citizens Advice and Aid Service", and the issue before the court was whether this was a charitable purpose. Lord Wilberforce observed that the object of the service did not reveal any single dominant purpose of a manifestly charitable character and held that the trust was not charitable. This was primarily for the reason that the trust was expressed in language that was vague as to permit the property to be used for non-charitable purposes. In order that a trust may be valid under the fourth head of the enumeration in *C.I.T.* v. *Pemsel,* it must be for the purpose *sufficiently definite and specific* to enable the court to control and, if necessary, administer its application in a manner recognised as charitable.

26.18. *Public purpose*—The aspect of benefit of the community was given a wide construction in a fairly recent English case relating to Law Reports,[5] where it was held that the role which the Law Reports play in the development and administration of judge made law was a purpose beneficial to the community, since without them the administration and development of the law would be difficult, if not impossible.

26.19. *Recent cases*—As to the word "charitable" or "charity" appearing in a statute, after some vacillation, there has emerged a judicial opinion that a strong presumption exists in favour of their interpretation in a legal sense. In England, by this is meant the interpretation given by the House of Lords in *Income Tax Special Purposes Commissioners* v. *Pemsel*[6]. It was there laid down that the words "for charitable purposes" and "charity" have a clearly defined legal meaning in English (and, since that case, United Kingdom) laws, i.e., a meaning which is to be derived from that which the courts, including particularly the House of Lords in *Pemsel,* placed upon that expression by reference to the "index or chart" provided by the preamble to the Statute of Eliz. 1 (Charitable Uses Act, 1601).

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1 *Re Wooten's Will Trust* (1968) 2 All. E.R. 618.

2 *Hammeltenberg,* (1923) 1 Chancery 237, 242.

3 *Re King,* (1923) 1 Chancery 243.

4 *D'Aguiar* v. *Commissioner of National Inland Revenue,* (1970) 15 West Indies Reports 198; (1970) Tax Reports 31; (1970) Current Law 178 (P.C.); see 85 Taxation 286.

5 *Incorporated Council of Law Reporting etc.* v. *Attorney-General,* (1971) 3 All. E.R. 436.

6 *Income Tax Special Purposes Commissioners* v. *Pemsel.* (1891) A.C. 531.

We may now deal with a few important points concerning some of the heads of charity.

26.20. *Poverty*—"Poverty" has been dealt with in some of the judicial decisions : To quote Lord Evershed M.R.[1]

> "Poverty, of course, does not mean destitution. It is a word of wide and some what indefinite import, and, perhaps, it is not unfairly paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life and so forth."

As Lord Smonds observed,[2] "there may be a good charity for the relief of persons who are not in grinding need or utter destitution.... (but relief connotes need of some sort, either need for a home, or for the means to provide for some necessity or quasi-necessity, and not merely an amusement however healthy."

26.21. *Poverty and public benefit*—Poverty is the major anomalous head of charity for which the requirement of public benefit is not essential, or is, at least, greatly modified. The law of charity in relation to poverty has followed its own line, and a series of cases beginning with *Isaac* v. *Defriez*,[3-4] has established the validity of trusts for "poor relations", or other groups of persons who are not normally regarded as forming for this purpose a section of the community. Thus, a trust for the relief of poverty was held to be charitable in *Gibson* v. *South American Stores*, (Gath and Chayes, Ltd.)[5] where the beneficiaries were selected by the tie of common employment, and *in Re Young's Will Trusts*,[6] where there was a gift to the trustees of the Savage Club "upon trust to be used by them as they shall in their absolute discretion think fit for the assistance of may fellow members by way of persons or grants who may fall on evil days." The existing cases on this matter were considered by the Court of Appeal in *Re Scarisbrick*,[7] where, following life interests to her children, a testatrix gave half her residue to such relations, i.e., relations in any degree, of her children as should be in needy circumstances. It was held that the exceptional rule in relation to trusts for the relief of poverty applied just as much to a trust for immediate distribution as to a perpetual trust. It was pointed out, however, that it would be different where the trust was not for the relief of poverty, albeit among a class not normally regarded as forming a section of the public, but an ordinary gift to some particular individual or individuals, even though limited to the amount required to relieve his or their necessities if in necessitous circumstances—such as gifts to *named persons* in needy circumstances, or to a

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1 I*n Re Coulthurst's Will Trusts*, (1951) 1 All. E.R. 774, 776 (1951) Ch. 661, 666 (C.A.) (Evershed M.R.).

2 *I. R. Commrs.* v. *Saddeley*, (1955) 1 All. E.R. 525, 529; (1955) A.C. 572, 585 H. L. (Lord Simonds).

3 Petit, Equity and Trusts.

4 a. *Isaac* v. *Defriez* (1754) 2 Amb. 595;
*A.-G.* v. *Price* (1810) 17 Ves. 571.

5 *Gibson* v. *South American Stores (Gath and Chaves, Ltd.)* (1949) 2 All. E.R. 985; (1950) Ch 177, C.A.; *Re Coulthurst's Will Trusts*, (1951) 1 All. E.R. 774; (1951) Ch. 661. C.A.

6 *Re Young's Will Trusts*, (1955) 3 All. E.R. 689.

7 *Re Scarisbrick*, (1951) 1 All. E.R. 822; (1951) Ch. 622.
*Re Cohen*, (1973) 1 All E.R. 889.

narrow class of near relatives, for example, such of a testator's statutory next of kin as at his death should be in needy circumstances. Most of the cases were reviewed by the House of Lords in *Dingle* v. *Turner*,[1] where the validity of the property exception was confirmed. Their Lordship agreed that it was a natural development of the "poor relations" decisions to hold as charitable trusts, for "poor employees" of an indvidual or company (the case before the House), or poor members of a club or society, and they held that it would be illogical to draw a distinction between different kinds of poverty trusts.

26.22. *Education*—"Education" has furnished a useful ground for controversy—we are dealing with the cases relating to education though the expression used in section 18 is "knowledge".

Schools of learning, free schools and scholars in universities are specifically mentioned in the Statute of Elizabeth, and many other educational purposes have been held to come within its spirit and intendment.

Education is not restricted to the narrow sense of a master teaching a class, but includes the education of artistic taste,[2] the promotion or encouragement of those arts and graces of life which are, perhaps, the finest and best part of the human character".[3]

Education includes the improvement of a useful branch of human knowledge and its public dissemination.[4] As Farewell, J. observed—"a ride on an elephant may be educational. At any rate it brings the reality of the elephant and its uses to the "child's mind, in lieu of leaving him to mere book learning. It widens his mind, and in that broad sense is educatonal."

26.23. *Knowledge*—It has since been explained[5] that education was used here in a wide sense "certainly extending beyond teaching, and that the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge, in an area which education may cover—education in this last context extending to the formation of literary taste and appreciation." It is not enough, however, that the object should be educational in the sort of loose sense in which all experience may be said to be educative.[6]

26.24. *Religion*—Advancement of religion is a separate head of charity, and this obviously is not confined to any particular religion. Even in England, it was not so confined. Romilly, M.R. observed in Thornton's case :[7]

"It is generally accepted that the Court of Chancery makes no distinction between on religion and another..... (or one sect and

1 *Dingle* v. *Turner* (1972) 1 All. E.R. 876; (1972) A.C. 610. H.L.
2 *Royal Choral Society* v. *I. R. Commrs.*, (1943) 2 All. E.R. 101. C.A.
3 Per Vaisey J. *in Re Shaw's Will Trusts*, (1952) 1 All. E.R. 49. 55; (1952) Ch. 163, 172 (the wife of G. Bernard Shaw).
4 *Incorporated Council of Law Reporting for England and Wales* v. *A.G.*, (1971) 3 All. E.R. 1929, 1046; (1972) Ch. 73, 102 (C.A.) (per Bucklay, L.J.).
5 *Re Hopkins' Will Trusts*, (1964) 3 All. E.R. 46. 52; (1965) Ch. 669, 680, per Wilberforce J. See (1965) 29 Con. 368 (M. Newark and A. Samuels).
6 *I. R. Commrs.* v. *Beddelep*, (1955) 1 All. E.R. 525, 529; (1955) A.C. 572, 585 (H. L. per Lord Simonds).
7 *Thornton* v. *Howe*, (1862) 31, Bear, 14, 19 (Romilly, M.R.) *Gilmour* v. *Coats*, (1949) 1 All. E.R. 848;
(1949) A.C. 427 (H.L.); *Re Watson, Hobbs* v. *Smith*, (1973) 3 All E.R. 678.

another.... (unless) the tenets of a particular sect inculcate doctrines adverse to the very foundations of all "religion and .... subversive of all morality.... If the tendency were not immoral and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, the trust would nevertheless be charitable."

Of course, though *prima facie,* there is a presumption that religious purposes are charitable, in English law they are not regarded as so if they lack the vital element of public benefit. Apart from the probably anomalous case of relief of poverty, it is well settled in England that a trust will not be legally charitable unless it is for the benefit of the community or public or an appreciably important section of the community or public.

26.25. *Other objects*—Besides the objects specifically enumerated, other objects of public benefit fall within charity. These cannot be exhaustively enumerated, but the most important ingredient is of public benefit.

26.26 and 26.27. *Public benefit*—The question that usually presents some difficulty is one relating to the aspect of "public benefit". As Lord Gross pointed out in *Dingle* v. *Turner*[1]

> "After all, either a part of the public is composed of individuals and is susceptible of increase or decrease. No doubt, some classes will be more naturally described as sections of the 'public' than as private classes, while other classes are more naturally described as private classes rather than a section of the public. For example, the blind can naturally be described as a section of the public and not as a private class. On the other hand, the descendants of Mr. Gladstone might more reasonably be described as a private class. It is when one turns to large companies employing thousands of men and women, that difficulty arises. In Truth, then the question whether or not the potential beneficiary of a rust can fairly be said to constitute a section of the public is a question of degree."

> "Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, *prima facie* charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also *prima facie* charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public. In answering the question whether any given trust is a chartiable trust, the courts—as I see it—cannot avoid having regard to the fiscal privileges accorded to charities. As Counsel for the Attorney-General remarked in the course of the argument, the law of charity is bedevilled by the fact that charitable trust enjoy two quite different sorts of privilege. On the one hand, they enjoy immunity from the rules against perpetuity and uncertainty and though "individual potential beneficiaries cannot sue to enforce them the public interest arising under them is protected by the Attorney-General. If this was all, there would be no reason for the courts not to look favourably on the claim of any "purpose" trust

1 *Dingle* v. *Turner.* (1972) 2 Weekly Law Reports, 523, 535.

to be considered as a charity if it seemed calculated to confer some real benefit on those intended to benefit by it whoever they might be and if it would fail if not held to be a charity. But that is not all. Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer. Indeed, claims of trusts to rank as charities are just as often challenged by the revenue as by those who would take the fund if the trust was invaild. It is, of course, unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for the question whether a trust to further some purpose is so little likely to beenfit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions. The logical solution would be to separate them and to say—as the Radcliffe Commission proposed—that only some charities should enjoy fiscal privileges. But, as things are, validity and fiscal immunity march hand in hand and the decisions in the *Compton* (1945) Ch. 123 and *Oppenheim* (1951) A.C. 297 cases were pretty "obviously influenced by the consideration that if such trusts as were there in question were held valid, they would enjoy an undeserved fiscal immunity."

26.28. *Public benefit*—Benefit to the community is a very wide category. Law reporting has been held to possess public benefit in the context of charity.[1]

It must be agreed that law reporting could fall into the residual head of charity. Barwick, C.J.'s broad ground for so holding is—".... in modern times without the availability of law reports in book form the law could not be adequately administered ....The production of law reports is beneficial to the whole community because of the universal importance of maintaining the socially sustaining fabric of the law."

26.29. *Dharma*—There has been considerable discussion about the precise meaning of the word "dharma" which unfortunately, was misconstrued by the Privy Council.[2] Classical Sanskrit texts would seem to use this word—so far as proprietary disposition for *dharma* are concerned—as comprising both the types of charity—*ishta* and *poorta*.. There are, in fact, two verses of Manu[3] in support of this statement. One of these verses[4] has been thus translated by Dr. Buhler :

> "Let him always practise, according to his ability, with cheerful heart, the duty to liberality (*dandharma*) both by sacrifice (ishta) and by charitable works (*poorta*) if he finds a worthy recipient (of the gift)."

Then, it was pointed out by Subramania Iyer, J. in his dissenting judgement in a Madras case[5] that the principle of the injunction as to *poorta* works is service to fellow-beings, though some of the forms in which each

1 *Incorporated Council of Law Reporting Queensland* v. *Commissioner of Taxation* (1971) 45 A.L.J.R. 552, 555C.

2 *Ranchoddas* v. *Parvati Bai*, 26 Indian Appeals 71 (P.C.).

3 Manu, Chapter 4, Verses 226 and 227.

4 Buhler, Sacred Books of the East, Vol. XXV, page 164, verse 227.

5 I.L.R. 30 Mad 340.

service is rendered are peculiar to this country—"charity, like water, taking its colouring from the soil through which it flows."

26.30, *Amendments needed*—This brief survey was intended to bring out certain aspects of the law. While no changes of substance are needed in section 18, a few additions and modifications and amendments are required. In the first place, it is appropriate that the subject of "relief of poverty" should find a specific mention in the section. Relief of poverty has, not only in England but also in India, always been regarded as one of the paramount heads of charity and even though there may be no controversy on the subject, yet, having regard to the fact that all other heads are specifically mentioned in section 18, it is, in our view, necessary that this object should find mention in section 18.

26.31. *Recommendation to substitute "education for knowledge"*—As to the word "knowledge" which occurs in section 18, the word currently in use in judicial parlance is "education".[1] The statutory precedents have already been cited.[2] Education is obviously a much wider term than "knowledge"; and instead of leaving it to be covered by the residuary words in section 18 which embraces other objects beneficial to mankind, it is appropriate that the expression currently in use should be inserted. It could hardly be the intention of the legislature that education which is not "knowledge" should be excluded from the ambit of the beneficial provision in section 18. We recommend that "knowledge" should be replaced by "actionable claim".

*Reasons restated*—This recommendation[3] is subject to reservation by Shri Dhavan and Shri Sen-Verma. The recommendation is based on several considerations based on the fact that (i) Indian legislative precedents all use "education"; (ii) judcial decisions generally in the field of the law of charity employ, or confirm the use of, the expression "education"; (iii) "education" is not construed narrowly in the judicial decisions; (iv) to use both the expressions "education" and "knowledge" would be inappropriate, because it would cast a doubt on the other statutory precedents; (v) still, if any case is left out, the residuary words in section 18 will cover it.

26.32. *Recommendation to revise section* 18—In the light of the above discussion, we recommend that section 18 should be revised as foilows :

*Revised Section* 18

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

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1 Para 26.22 and 26.23, *supra.*

2 Paras 26.7 and 26.10, *supra.*

3 Reservation of Shri Dhavan and Shri Sen-Varma, as to section 18.

## CHAPTER 27

## *VESTED INTEREST*

### SECTIONS 19 AND 20

27.1. *Vested interest*—The provisions so far contained in the Act dealt with certain fundamental matters concerning the question and commencement of interests in property. Assuming that a valid interest is created, it becomes necessary to consider the nature of the interest that is, by the terms of the transfer, created. The most important question to be considered is whether the interest is a present one, or whether it is future one. In this connection, it may be recalled that in the scheme of the Act, a transfer of property can be made in present or in future. Since two alternatives as to the time of taking effect of the transfer are expressly permitted, suitable terminology had to be devised for dealing with the two situations and it was also necessary that appropriate rules be available for determining whether in a particular case the interest created is to be regarded as a present interest or as a future interest.

As regards the terminology, the Act employs the expressions "vested" and "contingent". Vested interests themselves are divided into two classes, which will be dealt with later.

First, as to vested interests, section 19 provides as follows :

> "19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.
>
> A vested interest is not defeated by the death of the transferee before he obtains possession.
>
> *Explanation.*— An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person."

27.2. *Other provisions*—This is a definition of "vested interest". Section 21 defines the correlative "contingent interest". The term is used in the same sense in the Indian Succession Act, where a legacy is said to be vested in the interest when its payment or possession is postponed;[1] but when its vesting depends upon a specified uncertain event, the interest of the legatee is, until the condition has been fulfilled, "contingent".[2] It would equally serve as a definition of the term as used in the Indian Registration Act.[3]

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1 Section 119, Succession Act.
2 Section 120 Succession Act.
3 Section 17, Registration Act;
*Abdool* v. *Goolam*, I.L.R. 30 Bom. 304, 315, 316.

27.3 *Principle*—The difference between the two interests is that while a vested interest takes effect from the date of transfer and does not depend on a period or event that is uncertain, a contingent interest is contingent upon the happening of a *contingency which may or may not take place*—Whilst the one is unconditional, the other is solely dependent upon the fulfilment of the condition which may or may not be fulfilled. In the one, the transfer itself is immediate, but, in the other, there is no immediate transfer. The latter may develop into the former, but until it does so, it is uncertain.

The word "vested" is sometimes used as payable, as where the charges of members of a class or directed to be vested at a particular time[1], there being a gift over to the other members of a class of the shares of those dying before that time without issue. Thus, where A bequeaths to B 100 rupees, "to be paid" to him at the death of C, on A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.[2] But where an estate is bequeathed to A until he shall marry, and after that event, to B, B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.[3] The law is said to favour the vesting of estates,[4] the effect of which principle seems to be that property, which is the subject of any disposition, whether testamentary or otherwise, will beolng to the object of the gift immediately on the instrument taking effect, or afterwards as such an object comes into being or the terms thereof will permit.[5]

27.4. *Two kinds of vesting*—Estates and interests may be (a) vested in possession—as where there is a present right to the immediate possession or enjoyment; (b) vested in interest—where there is a present indefeasible right to the future possession or enjoyment. Therefore, an interest may be vested, although there may not be a right to present possession, and it may be that the transferee may never enjoy possession or the vested right may subsequently be divested. Thus, where there is a gift to an infant with remainder over in the event of his dying under twenty-one, the infant has a vested interest subject to be divested on his death under age.[6] A subscriber who relinguishes his right of complete control, has still a vested interest in the money.[7]

27.5. *Explanation to section* 19—The Explanation to section 19 guards against an inference that may be made against the interest being vested from—(i) a provision whereby the enjoyment is postponed,[8] (iii) or whereby a prior interest in the same property is given or preserved to some other person,[9] (iii) or whereby income arising from the property is

1. *Williams* v. *Haythrone*, L.R. 6 Ch. 782.
2. Section 119, iii, (i) Succession Act, 1925.
3. Section 120, iii, (vi) Succession Act, 1925.
4. *Charlton* v. *Thompson* L.R. I.Sc. Ap. 232;
   *Taylor* v. *Graham*, 3 App. Cas. 1287.
5. *Maseyk* v. *Fergusson*, I.L.R. 4 Cal. 304.
6. *O'Mahoney* v. *Burdett*, L.R. 7 H.L. 388;
   *Masevk* v. *Fergusson*, I.L.R. 4 Cal. 304;
   *Branstrom* v. *Wilkinson*, 7 Ves, 421.
7. *Das* v. *Secretary of Burma Oil, etc. etc.*, A.I.R. 1941 Rangoon 239.
8. *Kally Nath* v. *Chuder Nath*, I.L.R. 8 Cal. 878.
9. *Kaly Nath* v. *Chunder Nath*, *I.L.R.* 8 Cal 878.

directed to be accumulated,[1] or (iv) from a provision that on the happening of a particular event the interest shall pass to the another person.[2]

It will be seen that in no case mentioned above is the vesting contingent upon the happening of an uncertain future event.[3]

27.6. *Question of death*—Since death is a certain event though the time is not certain, it follows that an interest created in favour of a person on the death of another is one created "in terms specifying that it is to take effect on the happening of an event which must happen". Accordingly, such interest is to be regarded as vested, unless a contrary intention appears from the terms of the transfer.

In contrast, the words in the section dealing with vested contingent interest —section 21—are "a specified uncertain event." Where interest is given to A for life and after his death to B if B shall be *then living*, the interest given to B is not vested, but only contingent.[4]

27.7. *Obscurity as to cases of contingency of death*—This general criterion appears to be simple enough, but it would appear that there is some obscurity as to the precise position where the contingency is the death of the holder of the prior life estate. The ordinary rule would be that a gift to A on the death of B after termination of the life interest of B creates a vested interest in A even during the life time of B, because there is nothing more certain than death.[5] It is not always easy to decide whether a particular transfer discloses a contrary intention within the terms of section 19. The judgement of the Supreme Court in the case of Rajes Kanta Roy[6] in a case which illustrate *no contrary intention.* On the other hand, a Patna case[7] illustrates a contrary intention.

In the Patna case, a husband, by a taksimnama, provided as follows : "The property shall devolve upon B or *his legal heir* shall become the absolute owner of my property on the death of my wife." During the widow's lifetime, B sold the widow's property and B died during the life-time of the widow. The reversioner of the widow brought a suit for possession of the property. It was held that the case really came within the principle of section 24 (interest conditional on survivorship) and not section 19. and that the interest in favour of B was contingent and not vested, and *came to an end on his death during the life-time of the widow.* The sale made by him during the widow's life time therefore would not affect the reversioner's right over the property after the death of the widow. In coming to this conclusion the High Court relied primarily on the words "B or his heirs", holding that survivorship of B was a condition precedent *for vesting in B.*

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1. *Cossain* v. *Gossain*, I.L.R. 13 Bom. 463.
2. *Barnes* v. *Allen*, 1 Bro. C. C. 18; *Basant Kumar* v. *Ramsankar Ray*, I.L.R. 59. Cal. 859; *Lal Bahadur Singh* v. *Rajinder*, A.I.R. 1934 Oudh 161.
3. Gour.
4. Compare section 120, Indian Succession Act, 1925, illustration (iii).
5. Mulla (1973), page 133.
6. *Rajes Kanta Roy* v. *Shanti Devi*, (1957) S.C.R. 77; A.I.R. 1957 S.C. 255.
7. *Ram Chandra* v. *Jagadeshwara Prasad*, A.I.R. 1937 Patna 147 (Dhavle & Varma. JJ).

27.8. *Recommendation to amend section* 19—The correctness of this judgement of the Patna High Court is, with respect open to doubt. We think that it takes a view which might, in most cases, defeat the real intention of the transferor. When the transferor uses the words "B or his heirs" or words to that effect, the intention of the transferor, at least from the point of view of the layman, would ordinarily be that the interest should immediately vest in B— as a matter of "vesting of interest" as distinct from vesting in possession. The mention of the heirs does not indicate an intention that the survivorship is a condition precedent to the vesting of the interest in the abstract. It merely states the obvious situation as regards possession if B does not survive. This is precisely what happens at law in the case of vested interest—a gift vested in interest, though not in possession. To reach a contrary conclusion on the basis of an *assumed* different intention is hardly justifiable, since the assumption does not appear to be correct. It may be that the layman is not familiar with the distinction between vested and contigent interests, but once the distinction is introduced by the law, and the test of intention is made the crucial one, then it is better to take the view that if the refined scheme of the law had been before the transferor, he would, in cases of the nature under consideration, rather have preferred that the interest should be regarded as vested during the lifetime of the life estate holder. It is only when such a view is taken that the heirs of the beneficiary would be able to take the interest if the beneficiary dies during the continuance of the life interest.

We, therefore, recommend that the law should be laid down in terms contrary to what was held by the Patna High Court. It is, therefore, desirable to add a suitable Explanation to section 10,[1] providing that where the transferor uses the word ".....or his heirs" or words substantially to that effect, a contrary intention shall not be presumed, for the purposes of the section, merely from these words.

27.9. *Section* 20—The subject of vesting of interests in relation to persons *not living* at the date of the transfer is dealt with in section 20, in these terms :

> "20. Where, on a transfer of property, an interest therein is created for the benefit of a person *not then living*,[2] he acquires upon his birth, unless a contrary intention appears from the term of the transfer, a vested interest, although he may not be entitled to enjoyment thereof immediately on his birth."

The section is in harmony with the English law.[3] There is no section corresponding to this in the Indian Succession Act. So far as the Transfer of Property Act is concerned, an alternative placing of the section would have been after section 13 and 14, which deal with an interest created in favour of unborn persons. However, the present placing is also appropriate.[4]

27.10. *Principle*—Generally speaking, property cannot be transferred nor an interest therein created in favour of a person not in existence; but there are certain exceptions which the law allows in favour of unborn persons. These are stated or assumed in sections 13 and 14 and 20. The

1 This is not a draft.
2. Contrast the formula "in existence" employed in some other sections.
3. *Lewis* v. *Walters*, 6 East 336; *Goodright* v. *Jones*, 4 M. & Sel. 88; *Doe* v. *Dacre*, 8 T.R. 112.
4. See below.

effect of these sections, then, is that an interest created in favour of an unborn person will take effect upon his birth, in the absence of a contrary intention, provided that it does not *offend against* the rule as to perpetuities, and—as the law now stands—the interest extends to the whole of the remaining interest of the grantor.[1]

The only proposition this section is intended to enact, is that an interest created in favour of an unborn person will take effect, as a vested interests, even though the transferee may not have become entitled to an immediate enjoyment.[2]

27.11. *Need and significance*—It is to be noted that section 20 is subject to a contrary intention appearing from the terms of the transfer. This section is, in substance, based on the same principle as is the basis of section 19, namely, the policy of the law of favouring the vesting of interests. The general position as to transfers in favour of living persons is the subject-matter of section 19, which obviously could not apply to unborn person since, if that section is taken literarlly, the vesting takes place on the execution of the transfer. Obviously, this would not be appropriate in the case of an unborn person; hence the need for a specific provision as in section 20.

Of course, section 20 applies only where there is a "transfer". Relinquishment of an interest in a joint Hindu family in favour of unborn persons is not a "transfer of property", as it is only an extinction of the interest of the person releasing it.[3]

27.12. *Rights of unborn persons*—The fact that a person is unborn at the date of a transaction dealing with proprietary affairs which gives him no interest in the property dealt with by that transaction does not, of course, necessarily imply that the unborn person can claim no rights in the property. The position depends on the system of law by which the parties are governed. Consider, for example, the position regarding rights of sons born after partition in Hindu law. The favoured position[4] which a child in embryo thus occupies under the Hindu law in respect of partition and succession is by no means singular, for whatever may have been the law in early times, it is a rule generally adopted in mature systems of jurisprudence that a child in embryo is to be considered as born when it will be for its benefit so to be considered, although the question is not free from metaphysical difficulties whatever view we may adopt on the subject. In the Roman Law, existence was, for certain purposes, assumed to begin before birth. Thus, although upon the authority of Ulpian[5] : "The fruit of the body before it is born is part of the mother or the womb," and natural capacity for rights begins with the birth of men—that is, the complete separation of a living human being from the mother—yet Paul points out the ways in which the embryo in the mother's womb is recognised by law : "Attention is bestowed upon that which is in the womb, just the same *as if it had come to life*, whenever a question arises as to the embryo's own privileges, although in no way benefiting another before it is born."[6] "Our speaking of him whose birth is

1. *Cadell* v. *Palmer*, 1 Cl. & Fin. 372.
2. Gour.
3. *Anjaneyulu* v. *Ramayya*, A.I.R. 1965 A.P. 177, 183, para 17.
4. *Kusum Kumari* v. *Dasarathi*, A.I.R. 1921 Cal. 487, 488.
5 Dig 15, 4, 1, 1.
6 Dig. 1, 5, 7.

anticipated as though he were in existence, is correct when the question is as to his own right."[1] "The ancients paid regard to the child in the womb in such way that they maintained all rights in its favour intact until the time of birth, as may be seen in the law of inheritance."[2-3]

27.13. *Unborn persons*—In section 20 and subsequent sections, the expressions referring to the person not in existence should, of course, be so construed as to take into account of the legal doctrines relating to the position of a child in embryo. While the general rule that the vsteing will take place on birth certainly applies, an important consequence of the legal doctrine is that, as Blackstone put it[4]—

"An infant in *ventre semere* is supposed to be born for many purposes; it is capable of having a legacy or a surrender of a copyhold estate made to it; it may have an estate assigned to it and it is enabled to have an estate limited to its use and to take afterwards by such limitation as if it were then actually born."

27.14. *Impact of section* 13—Reverting to section 20, a Mysore case under section 20 illustrates how some misunderstanding exists as to the precise meaning of section 13[5] and its impact on section 20. In that case the donor, by a gift deed, transferred his property in favour of A, the then living son of the donor's daughter. In the same deed he directed that the property was to be enjoyed not only by A, but also by other sons who might be born by the donor's daughter, before A attained majority. B, another son, was born before A attained majority. A, however, alienated the entire property by a sale deed, and B sued for recovery of the half share of the property and mesne profits. The lower court rejected his claim on the ground that section 13 was infringed. Under section 13, so far as is material, where, on a transfer of property, an interest is created for the benefit of an unborn person "subject to a prior interest created by the same transfer", the interest in the unborn person must extend to the whole of the remaining interest in the property. The judgment was reversed on appeal. The High Court had to point out that section 13 had no application to the facts of the case. There was not a limited interest *followed by* the creation of an interest in favour of an unborn person. The grantor in this case had transferred property in favour of two persons in the first instance, one of whom was unborn. Since, under section 20, an unborn person on birth acquires a vested interest, he had a right to challenge the transfer. If our recommendation to delete section 13 is accepted,[6] such controversies will not arise.

27.15. *No change*—The above discussion does not involve any amendment in the section.

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1. Dig. 50, 16, 231.
2. Dig. 5, 4, 3.
3. See Markby's Jurisprudence 132; Holland's Jurisprudence, page 83; Sohm's Institutes (ledlie). Art. 20; Savigny System, Art. 62; Mackeldy's Roman Law (Dropsic) Art. 669; Salkowaki Roman Law (Whitefield), Art. 32; Goudemit Pandects (Could) Art. 21.
4. Blackstone, Commentaries, Vol. 1, page 130, cited by Mookerjee, J., in *Kusum Kumari* v. *Dasarathi*, A.I.R. 1921 Cal. 486, 490.
5. *Yasanthappa* v. *Channappa*, A.I.R. 1962 Mys. 98, 99, 100.
6. See our recommendation as to section 13.

## CHAPTER 28

### *CONTINGENT INTERESTS*

### SECTIONS 21 TO 27

28.1. *Introductory*—In contrast with vested interests, which are disposed of in two sections only, the subject of contingent interests and allied subjects occupy seven sections. Most of these sections contain rules for determining in what cases an interest is to be regarded as contingent. They are mostly—but not exclusively—based upon the intention imputed by the law to the transferor.

28.2. *Rationale*—These rules for the construction of contingent interests, contained in sections 21 to 27, are mostly based on the underlying rationale that the law favours the *vesting* of estates and also that the law favours the *early vesting* of estates.

28.3. *Section* 21—*Analysis*—Under section 21, where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event or if a specified uncertain event shall not happen, such person thereby acquires a contigent interest in the property. This is the first proposition enacted in the section and the contingent interest described in the section is to be contrasted with the vested interest dealt with in section 19. The essence of a contingent interest is a contingency which may or may not happen—this is indicated by the word "uncertain" which occurs in section 21.

The second proposition enacted in section 21 is to the effect that such (contingent) interest becomes a vested interest when the specified uncertain event happens or when the specified uncertain event becomes impossible, as the case may be.

28.4. *Exception*—However, on the principle that the law always favours the vesting of estates, the section makes an exception concerned with interests contingent on age. Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age or directs the income or so much thereof as may be necessary to be applied for his benefit, then under the Exception to section 19, such interest is not contingent. The Exception is based on an English decision[1] where Page Wood V.C. held that where the principal is given at a distant epoch and the income is given in the meantime, the court, leaning in favour of vesting, has said that the whole thing is given.

28.5. *Rule in England*—In England, the rule is well established by several decisions, of which we may mention only two,[2-3] that a gift apparently contingent must be held to be vested in interest where it is accompanied by a gift of the intermediate income or a direction for application of

1 *Pearson* v. *Dolmont*, Law Reports 3 Equity 321, discussed in *Cosavi* v. *Rivett Carnac*, I.L.R. 13 Bom. 463.

2 (1801) 6 Ves. 239.

3 (1839) 5 My and Cr. 125.

weighted with Ramesam J. in a Madras case[1] in holding that a bequest, by a testator leaving the estate to the grandson or grandsons who might be born within 10 years after the testator's death would be void under Hindu law, as there would be an interval of 10 years after the testator's death during which the estate is not vested in any person.

So far as Hindu law, apart from statutory provisions, is concerned, it is Mulla's view, relying on the judgement of the Privy Council in Gadadhar's case,[2] that after the decision of the Privy Council, the Madras view cannot be accepted as correct.

28.13. *Section* 23-*consider*—Let us now consider the text of section 23. On the one hand, the mandate in the last 22 words of the section to the effect that the interest fails unless such event happens before or at the same time as "the intermediate or precedent interest ceases to exist", has to be applied. On the other hand, it is not clear whether the expression "intermediate or precedent" covers the transferor's interest also. As a matter of construing the intention of the transferor, however, a contrary view would appear to be arbitrary, since one can assert that "every settler or testator intends the contingent remainder to take effect"—as was observed by Jessel M. R.[3]

There is, therefore, something to be said for taking the same view as Mulla has expressed.

28.14. *Property without owner*—If the difficulty of the property remaining without owner could be surmounted, there is much to be said for Mulla's view. It would appear that the difficulty could be surmounted by holding that until the contingency happens, the property remains in the ownership of the transferor,—we are taking a case where the very first gift is contingent one. On this view, the text of the section is also satisfied, because the "precedent" interest of the transferor has not yet come to an end.

28.15. *No change needed*—On the whole, we think that the language of the section could, and should, be construed as not ruling out a contingent interest dependent on an uncertain event not proceeded (by a "supporting" gift) and the technical rule of English law does not necessarily apply. Of course, the relevant contingency like the contingency attached to any other interest must fall within the perpetuity period and must comply with such other provisions as may be applicable. But no amendment is needed.

## SECTION 22

28.16. *Gist*—Contingent interests in favour of members of a class are covered by section 22. Under section 22, where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

This sections corresponds to section 121 of the Succession Act,[4] which reads—

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1. *Official Assignee of Madras* v. *Ved Vali*, A.I.R. 1926 Mad. 966 (Ramesam, J.).
2. *Gadadhar* v. *Official Trustee of Bengal*, A.I.R. 1940 P.C. 45.
3. *Qualiffe* v. *Brancker*, 3 Ch. D. 393, 399.
4. Section 121, Indian Succession Act, 925.

"121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy."

*Illustration*

A fund is bequeathed to such of the children of A as shall attain the ago of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A under the age of 18 has a vested interest in the bequest.

28.17. *Rationale*—Section 22 deals with gifts to a contingent class, and, therefore, it follows that, unless the condition of the transfer is fulfilled, the wishes of the transferor cannot be carried out. As observed by Rest, C.J.[1] unless the requisite age is attained, no child completely answers the description of those who are to be transferees. So, in England, a gift to children who shall have attained 21, or to such children as shall have attained that age is contingent, and no child before attaining that age can have a vested interest.[2]

28.17A. The rule in section 22 seems, in substance, to be an exception to the Exception[3] to section 21. Under the Exception to section 21, at least where there is a direction to apply the income for the benefit of a particular person until he attains a particular age on which the interest is to belong to him, the interest *is not contingent,* while, under section 22, in such a situation the interest is contingent. In a similar manner, section 121 of the Indian Succession Act, 1925 overrides the Indian Succession Act, section 120.

28.19. *No Change*—The section seems to need no change.

28.20. *Section* 23—This takes us to section 23, which reads—

"23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist".

28.21. *Section* 23—Section 23 pre-supposes that there is a terminable antecedent interest and a subsequent contingent interest.[4] The object of the rule enacted in the section is to prevent an estate from remaining without an owner. It is on this principle that an artificial rule—artificial in the sense to be explained presently—is laid down in the section. It has often been thought[5] that the rule is a relic of the ancient rule relating to the creation of a contingent remainder.

The ancient rule was usually expressed in the maxim that every contingent remainder must have a particular estate of freehold to supoprt it.[6]

1. *Duffield* v. *Duffield,* 3 Bli. (U.S.) 216, 333.
2. *Bull* v. *Pritchard,* 1 Russ. 213.
   *Leake* v. *Robinson,* 2 Mer. 363.
   *Thomas* v. *Wilberforce,* 31 Beav. 299.
   *Williams* v. *Hawthorne,* L.R. 6 Ch. 782.
3. Para 28.4. *supra.*
4. Gour
5. *Abbis* v. *Burney.* 17 Chancery Div. 211, 229.
6. Gour.

When there was a tenant for life with several contingent remainders, the tenant for life might have, not only by death but by surrender or other methods, determined or terminated his own life interest before the remainder vested. In such cases, it became necessary to have trustees appointed to preserve the contingent remainder. If, therefore, the estate for life determined otherwise than by death, then for the residue of his natural life, the trustees would take possession. To avoid such consequences, the rule seems to have been evolved. This rule, however, produced arbitrary consequences, and was not much favoured in England even at the time when the rule was inforce.

28.22. *No need for supporting interest*—We have already[1] stated that the assumption that a contingent remainder cannot be created without a supporting precedent interest does not appear to be true of India. One must, therefore, read the words "if any" after the words "intermediate or precedent", in regard to cases where the very first gift is contingent. Where no precedent interest is crated, and the case is one of the first gift, these words do not come in the way. Nor does the section apply where a time is fixed.

No change, of course, is recommended in section 23.

28.23. *Section* 24—Section 24 reads—

> "24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.
>
> *Illustration*
>
> A transfers property to B for life, and after his death to C and D, equally to be divided between them, or the surviver of them. C dies during the life of B. D survives B. *At B's death* the property passes to D".

28.24. *Analogous Law*—This section corresponds to section 125 of—the Indian Succession Act,[2] which runs as follows :—

> "125. Where a bequest is made to such of certain persons as shall be surviving at same period but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appears by the will.
>
> *"Illustrations*
>
> (i) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If A dies before the testator, and B survives the testator, it goes to B.
>
> (ii) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.
>
> (iii) Property is bequeathed to A for life and after his death to B and C, or the survivor with a direction that of B should not survive the testator,

1. See discussion as to section 21, para 28.13 to 28.15 *supra*.
2. Section 125, Indian Succession Act, 1925.

his children are to stand in his place, C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

(iv) Property is bequeathed to A for life, and after his death to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. The legacy goes to the representative of C."

28.25. *Principle*—Section 24 enacts a rule of construction and as Mulla observes, in best explained by the following passage from the judgment of Turner, L. J., in *White* v. *Baker* :[1] "Where there is a bequest to A for life and after his death to B and C or the survivor of them, some meaning must, of course, be attached to the words "the survivor". They may refer to any one of three events—to one of the persons named surviving *the other*, or to one of them only surviving *the testator*, or to one of them only surviving the *tenant for life*, and in the absence of any indication to the contrary, they are taken to refer to the latter event as being the more probable one to have been referred to".

28.26. *English law*—The rule enacted in section 24 is generally in accordance with the English law, but it may be noted that the words "unless a contrary intention appears from the terms of the transfer" allow a wider latitude for construction. It may also be noted that such an interest does not vest before the occurrence of the event and therefore, the provision in section 19 relating to a vested interest will not apply. The interest to which section 24 refers is interest created to a contingent class which is to be ascertained at the time when the intermediate or precedent interest ceases to exist—the time which is described in the corresponding section in the Succession Act[2] as the time of payment or distribution.

28.27. *Rule of construction*—Section 24 is, to a large extent, a rule which construes the expression relating to survivorship as used in the *instrument of transfer*. Thus, under the illustration to the section, property is given to B for life and after his death to C and D equally to be divided between them or the survivor of them. Here the instrument does not mention the *period with reference* to which survivorship is to be ascertained. The law creates the test of survivorship *at the termination of the precedent interest* of B. Therefore, if D survives B, the property passes to D. There is, of course, greater need for such a rule of construction in the case of wills, since one of the competing events in the case of a will is the date of death of the testator. The significance of section 24 lies in filling up the date for ascertaining survivorship, when it is not mentioned in the transfer. If the date is mentioned, the case falls within the last 11 words of the section which take notice of a contrary intention.

We have no further comments on the section.

28.28. *Section* 25—*Principle*—The importance attached by the law to the intention of the transferor as expressed in the deed, granted the legality of the terms expressing that intention, *basic*. As far as possible the law will not make a new transfer, for if he has expressed his intention not in an unconditional transfer but in the creation of an interest subject to a condition, the condition must be respected. There may sometimes be other considerations—such as, that an estate once *vested is not easily divested*—

1. *White* v. *Baker*, (1860) 2 De G. F. & I 55, 64.
2. Section 125, Indian Succession Act, 1925; *supra*.

which operate to balance the importance attached to the transfer. But, the interest must first vest on the terms stipulated by the transferor. If therefore the condition cannot be upheld, the transfer subject to that condition cannot be upheld.

28.29. *Section* 25—*Gist*—This is the principle underlying section 25. Under section 25, an interest created on a transfer of property, and dependent upon a condition, fails if the fulfilment of the condition is impossible or is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy. There are four illustrations to the section, which take familiar and not difficult cases of impossibility or illegality of conditions. The section carries out the policy incorporated in section 6(h)(ii) under which no transfer can be made for an object or consideration which is unlawful within the meaning of section 23 of the Indian Contract Act, 1872. It has been pointed out in the commentaries that the conditions referred to in the section are conditions which, as agreements, would be void under sections 23, 26, 27 and 56 of the Indian Contract Act.[1]

28.30. *Effect of impossible condition*—The section refers to conditions precedent, in contrast with section 32 which makes a provision for conditions subsequent which are void. The distinction is important, because where a condition precedent is void, the transfer does not take effect, while where a condition subsequent is void, the transfer takes effect and the condition subsequent is to be disregarded.[2] A surprisingly unusual instance of an impossible condition is furnished by a Calcutta case,[3] in which the testator left a legacy on condition that the legatee should excavate a tank. The testator, however, himself excavated the tank before his death. The bequest, it was held, failed. In this case, performance of the condition was regarded as the "motive" of the bequest, so that impossibility barred the claim of the legatee. The English law as to illegal conditions also appears to be substantially the same. If the condition precedent to a transfer is illegal, then the transfer is void.

28.31. *Verbal change needed*—Only a verbal change seems to be required in section 25, to make it clear that it deals with a *condition precedent*. The general topic of contingent interest is dealt with in section 21 which, so far as is material, provides that "where on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property". That condition is not confined to events independent of the will of the party—compare the illustrations to section 120 of the Indian Succession Act, illustrations (vi), (vii), (viii) and (ix). Accordingly, section 25 should also be taken as a species of contingent interest. We recommend that in section 25, for the words "and dependent upon a condition", the words "*and intended to take effect on a condition*" should be substituted

1. Mulla, (1973), page 148.
2. *Ram Sarup* v. *Bala*, (1884) I.L.R. 6 All. 313 (P.C.).
3. *Rajinder Lal* v. *Marnalinidasi*, A.I.R. 1922 Cal. 116.

28.32. *Civil law*—It would apepar that the position in civil law is different with respect to legacies of a personal estate. The rule of civil law[1] is, where a condition precedent is originally impossible or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest or its impossibility was unknown to the testator or the condition has become impossible by the act of God or where it is illegal as involving *malum in se*, the civil law agrees with the common law in holding both the gift and the condition void.

This rule of the civil law was applied in England in the case of Re Elliott,[2] where the condition was not *malum in se*. The condition was avoided and the gift took effect free from the condition.

28.33. *Impossibility as known to the transferor*—So far as impossibility is concerned, it is quite likely that if the transferor had known of the impossibility, he would still have maintained the transfer. Since, however, all such questions are difficult to determine on facts, the law seems to have treated all cases of impossibility on the same footing. In this connection, attention may be drawn to the more restrictive language in the first paragraph of section 56 of the Indian Contract Act, under which an agreement to do an act impossible *in itself* is void. As regards supervening impossibility or illegality, that section (in its second paragraph) provides that the contract becomes void when the act becomes impossible or unlawful. The leading case on the subject is still the case of *Satyabrata*.[3] a judgment of B. K. Mukherjea J., as he then was. The law on the subject would appear to be still "in the process of evolution"—a statement made by A. L. Corbin long ago, but still substantially true.[4]

28.34. *Recommendation*—In the result, the only change needed is a verbal one already mentioned.[5]

28.35. *Section* 26—That the law has regard to the substance of the matter and not to its minutiae, is a principle often met with in judicial decisions construing statutory provisions. This principle, in its application to the vesting of property, finds express recognition in section 26. Accordingly, that section, in regard to conditions precedent, has regard to the substance and not to the form.

This is what the section provides—

> "26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with."

There are two illustrations to the section—

"(a) A transfers Rs. 5000 to B on condition that he shall marry with the corsent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.[6]

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1. Jarman on Wills, 4th Edition, Volume 2, page 12, cited in *Moors*, (1888) 39 Chancery Division 116, 128.
2. *Re Elliott*, (1952) 1 All. E.R. 145, 148.
3. *Satyabrata* v. *Muenee Ram*, A.I.R. 1954 S.C. 44.
4. A. L. Corbin, "Recent Development in Contracts", (1937) 50 Harvard Law Review 459, 465 466.
5. Para 28.31, *supra*.
6. This also illustrates partial supervening impossibility. Contrast section 25.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent *after the marriage.* B has not fulfilled the condition."

28.36. *Analogous law*—This section closely corresponds to section 128 of the Succession Act, which runs as follows :—

"128. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with."

*"Illustrations*

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A, *previous to the marriage.* E has been personally informed by A of his intentions, and has made no objections. A has fulfilled the condition.

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(vi) A makes his will, whereby he bequeathes a sum of money to B, if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy."

28.37. *No change*—Both the sections are based on the principle that vesting is favoured. The above discussion discloses no need for amending section 26.

28.38. *Section* 27—Section 27 provides as follows :—

"27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred *in the manner contemplated* by the transferor.

**But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.**

*Illustrations*

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months *after A's death*, and if he should neglect to do so, to C, B dies in A's life-time.[1] The disposition in favour of C takes effect."

"(b) A transfers property to his wife, but in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it *impossible* to prove that she died before him. The disposition in favour of B does not take effect."[2]

28.39. *Premises*—In the case of *Jones* v. *Westcombe*,[3] the testator had bequeathed a term of years to his wife for life, reminder to the child with whom she was believed to be pregnant *and if the child died under twentyone*, a third part of the term was to belong to his wife and the remaining two-thirds to certain others. Although the wife was not pregnant when the will was made, it was held that the devise to her was good. *Prima facie*, the testator is deemed to have intended that the second gift should take effect upon failure *in any manner* of the prior gift, though this can be displaced by proof of a contrary intention.

28.39A. *Comment on illustration*—Illustration (a) to section 27 is the English case of Avelyn.[4] In the case put in the illustration, failure of the interest sought to be created in favour of B is due to the death of B before time had arrived for performance of the condition laid down to avoid failure.

With this, one should contract the stricter approach adopted[5] in regard to conditions precedent whose performance is impossible—in section 25. If the condition in section 27, illustration (a), is a condition precedent, then the question arises whether section 25 is confined to initial impossibility.

If section 27, illustration (a), is regarded as contemplating a condition subsequent, then the section does not appropriately cover them; see the word 'failure'. Conditions subsequent are dealt with in later sections. It would then appear that while performance of a condition inherently impossible is governed by section 25, performance of a condition which subsequently becomes impossible is covered by section 27.

Section 27, illustration (b) also is taken from an English case.[6] It raises the interesting question of *commorientes* (persons dying in a natural

1. This is also a situation of supervening impossibility. It illustrates the first paragraph.
2. Illustration (b) illustrates the second paragraph.
3. *Jones* v. *Westcombe*, (1711) Precedents 316.
4. *Avelyn* v. *Ward*, (1750) 1 Ves. 420.
5. Section 25
6. *Underwood* v. *Wing* (1885) 4 De. G.M. & Y 633.

calamity or other disaster, making proof of survivorship impossible). This topic has been the subject-matter of interesting debate and legislative reform in the law of evidence, and has also been considered in our Report on the Evidence Act.[1]

28.40. *Valid gift*—Section 27 of the Act (and section 129, Succession Act) seem to contemplate failure of a valid gift,[2] otherwise the matter would be governed by section 16 of the Act (section 116, Succession Act).

28.41. *Intention*—The rule laid down in this section will not apply if the testator has expressed a contrary intention.[3] Section 130, Succession Act, indicates an exception to this rule. In the Transfer of Property Act, the rule and the exception are both embodied in one section.

28.42. *Section* 27—Roper on Legacies,[4] contains the following statement :

> "It is a general rule of the common law, *applicable to real estates*, that where an interest is so devised "as only to arise upon a preceding condition, it cannot vest until that condition be performed, or the event happen, upon which it is given. This rule has been acknowledged and acted upon ever since the time of LORD COKE. The principle is, that there is no devise until the happening of the event, of performance of the terms upon which the disposition is made; a principle which applies to every case, so that although the condition require the performance of an impossible act, as for the devises to go to paris in half an hour, or it require the devises to do an illegal act, as to kill B, or to burn his house (conditions *male in se*); or whether it require a woman to separate from her husband (a condition against the policy of law); or whether the devise be made on condition that the legatee have criminal connection with a particular person (a condition *contra bonos mores*); the before stated principle authorises the conclusion, that, as all such conditions are void, the dispositions to arise only upon their performance are also void. But the rule of the civil law is different. . . .".

28.43. *Principle*—Where the intention of the parties can be clearly ascertained, effect is given to it, but otherwise, to prevent lapse, it is sufficient if their intention is substantially carried out. If the transferor provides against failure, the ulterior disposition will take effect in case of failure, although it may not have occurred in the manner contemplated by the parties. But where [as in illustration (b)] the intention is that the ulterior disposition will take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposiiton does not take effect unless the prior disposition fails in that manner. In such a case the failure of the prior interest in a particular manner is a condition precedent to the transfer, and must be fulfilled.

28.44. *Prior bequest*—The words "if the prior bequest shall fail" are important, for they indicate that if the prior bequest is void *ab initio* under section 113 or 114, the subsequent bequest will also fail under section 116. In other cases where the prior bequest is valid but fails, the ultimate bequest

1. Report on Evidence Act, Section 108A.
2. *Ismail Haji* v. *Umar Abdulla*, A.I.R. 1942 Bom. 155, 158 (Chagla J.).
3. *Jones* v. *Westcombe*, (1711) Prec. Ch. 316.
4. Roper, 4th ed. (1847), Vol. 1, p. 754.

is accelerated, e.g., in the English case of *Jull* v. *Jacobs*[1], there was a bequest to A for life and then to his children. The bequest to A failed, as he had attested the will. It was held that the bequest to the children took effect.

28.45. *Recommendation*—Incidentally, it may be noted that section 130, Indian Succession Act, 1925 is more precise, inasmuch as it repeats the word "particular" at the end also. The section, omitting the illustration, provides as follows :

"130. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner."

It may be desirable to add the word "particular" towards the end of section 27. This, of course, is a very minor change, which we recommend.

1. Jull v. Jacobs, 1976) 3 Ch. D. 703.

## CHAPTER 29

## *CONDITIONS SUBSEQUENT*

### SECTIONS 28—30

29.1. *Introductory*—Where a qualification is annexed to an interest which provides that the interest shall take effect if the qualification is fulfilled, the case is one of a condition precedent which we have so far discussed. On the other hand, there may be created an interest to which a qualification is annexed whereby it is provided that the interest shall be transferred if a certain event happens or does not happen. The former types of conditions were dealt with in the last chapter and the latter type of conditions are now to be dealt with. They can also be called conditions subsequent—that, in fact is the terminology used in England, even where the interest entirely ceases and is not transferred to another person[1]. Conditions relating to events on the happening or non-happening of which the interest already created is directed to pass to another person, contemplate a prior disposition and an ulterior disposition[2]. The imposition of such conditions is permitted by the earlier half of section 28, subject to certain restrictions which are indicated in the latter half of that section.

29.2. *Section* 28—The section reads—

"28. On a transfer of property, an interest therein may be created to accrue to any person with the condition superadded that, in case a specified uncertain event shall happen, such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven."

29.3. *Section* 28—*Case of duress*—Section 28 contemplates a literal transfer on the happening or non-happening of a certain condition. Since this is a condition of forfeiture, it appears that if the condition cannot be fulfilled or is violated on account of duress, the forfeiture is not incurred. Thus, a testator by his will directed that if any of the female members of his family, either from misunderstanding or any other reason, should live in a place other than a holy place for more than three months except for pilgrimage, they should forfeit the rights under the will. The plaintiff, a widowed daughter-in-law of the testator and minor, was removed from the house of the testator by her maternal relations and brother with the aid of the police and had to reside for more than three months with her mother. It was held[3] that although the police help was properly and legally given, this was a plain case of duress at the time of leaving, and ought not to attract forfeiture.

29.4. *Policy*—Since the insertion of a condition subsequent has a divestiture effect, the law considers it desirable to provide that the condition must be strictly fulfilled. This is another example of the anxiety of the law to favour the vesting of estates and the preservation of estates already vested.

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1 Cheshire, Modern Law of Real Property (1972), page 314, Section I.
2 For these expressions, see sections 29 and 30.
3 *Tin Cowri* v. *Krishna*, I.L.R. 20 Cal. 15, 17.

29.4A. *No change*—No change is needed in the section.

29.5. *Section* 29.—While in the case of a condition precedent, substantial compliance is enough, the reverse is the position in the case of a condition subsequent. It is on this principle that section 29 provides that an ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

In the illustration to the section, A transfers Rs. 500 to B, to be paid to him on his attaining his majority or remarrying, with a proviso that, if B dies a minor or marries without C's consent the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

29.5A. *Analogous law*—This section and its illustration correspond to the section and illustration (iii) of s. 132 of the Succession Act, which extends the same rule to bequests. The illustration to section 29 is adapted from the three illustrations to section 132. The English cases lay down an identical rule and furnish apt illustrations of the doctrine here codified[1].

29.6. *Principle*—This is in accordance with the English law where it is held that a condition subsequent must be strictly fulfilled[2]. It will not occasion forfeiture if the fulfilment of the condition becomes impossible[3], if it is reasonably fulfilled[4].

29.6A. *No change in section* 29—No change is needed in the section.

29.7. *Section* 30—Cases may arise—these are taken care of by section 30—where the same transfer makes a prior disposition which is valid and an ulterior disposition which is not valid. In conformity with the policy of the law that what is vested ought not be divested or affected by collateral factor unless there are weighty reasons, the provision in section 30 is to the effect that if the ulterior disposition is not valid, the prior disposition is not affected by it.

The illustration is as follows—

"A transfers a farm to B for her life, and if she does not desert her husband to C, B is entitled to the farm during her life, as if no condition had been inserted."

This section and its illustration correspond to section 133 and illustration (ii) of the Succession Act, which run as follows :

"133. *Original bequest not affected by invalidity of record*—If, the ulterior bequest be not valid, the original bequest is not affected by it.

*Illustrations*

(i) An estate is bequeathed to A for his life, with a condition superadded that, if he shall not, on a given day, walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

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1 *Clavering* v. *Ellison*, 7 H.L.C. 707; *Kiallmark* v. *Kiallmark*, 26 L.T. Ch. 1; *Harvey Bathrurah* v. *Stanley*, 4 Ch. D. 272; referrd to in Gour.

2 *Wagstaff* v. *Crossly*, 2 Coll. 746; *Re Sander's Trusts*, 1 Eq. 675; *Clavering* v. *Ellison*, 4 Drew. 451 : 7 H.L.C. 707.

3 *In re Brown's Will*, 18 Ch. D. 61.

4 *Astley* v. *Earl of Essex*, L.R. 18 Eq. 290; *Wynne* v. *Fletcher*, 24 Beav. 430.

(ii) An estate is bequeathed to A for her life, and if she do not desert her husband, to B, A is entitled to the estate during her life, as if no condition had been inserted in the will.

(iii) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 105 and A is entitled to the estate during his life."

29.8. *No change*—No change is needed in the section.

## CHAPTER 30

## *CONDITIONS OF DEFEASANCE*

### SECTIONS 31-32

30.1. *Introduction*—As distinguished from conditions which terminate an estate by transferring it from A to B, we have, in section 31, the situation of a condition which merely provides that the interest shall cease to have effect in case a specified uncertain event happens or does not happen. This, as we have already pointed out, is known in England as a condition subsequent. But, to distinguish it from those conditions which transfer the interest to another person, we can describe such conditions as conditions of defeasance, to bring out the narrower sense. They are dealt with in section 31. This is how the section reads :—

"31. Subject to the provisions of section twelve, on a transfer of property, an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

*Illustrations*

(a) A transfers a farm to B for his life with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

(b) A transfers a farm to B provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease, B does not go to England within the term prescribed. His interest in the farm ceases."

30.2. *English law—Theory of re-entry*—In England, the theory is that in all cases of this type, there vests in the grantors, his heirs and assigns a right of re-entry, the exercise of which determines the estate of the grantee.[1] Of course, an interest may terminate by the *very nature of its tenure*—for example, a life interest.

This is not a case of termination by "condition"; the very words which create the estate denote its quantum, extent and duration, because the utmost time for which the interest can continue is indicated. This is not concerned with a condition which specifies some event which, if it takes place during the time for which an estate continues, will defeat the estate. We are concerned with terms which while creating an interest, define its duration.

The word "condition" in this context seems to have a heritage of about 400 years. In a case reported in 1596[2], it was observed—

"And here is a condition, because there is not a new estate limited over, but the estate to which it is annexed is destroyed".

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1 Cheshire, Modern Law of Real Property, (1972), p. 315.

2 *Sergeant Rudhalls case*, (1596) Savile 76 cited in Re : Hollis Hospital (1899) 8 Chancery, 540, 549.

It is needless to say that a condition precedent creates a future interest, while a condition subsequent is concerned with a present interest subject to determination.

30.3. *Duration*—It is not always easy to decide whether a particular term in the transfer imposes a condition subsequent, or whether it defines the duration of the estate. This seems to have created an interesting debate in England. For example, Williams[1] states : A devise to a school in fee simple "until it ceases to publish its accounts" creates a determinable fee (duration of the interest), whereas a devise to the school in fee simple "*on condition* that the accounts are published annually" creates a fee simple *defeasible by a condition subsequent.*[2] In the first case, the determination is automatic, while in the second case, according to the theory of the English law, a right of re-entry is given. The distinction is subtle; and, according to some writers, it is a mere matter of words. It may assume importance in practice only if the condition subsequent is void. A condition subsequent in the strict sense, when void, is disregarded, and the transfer takes effect as if the condition had not been imposed. On the other hand, a determinable interest fails altogether if the possibility of revertor is invalidated. To take a hypothetical though not very realistic situation to illustrate this distinction, a property is given to a girl "until she ceases to carry on prostitution" (an obviously immoral stipulation). If the condition is not regarded as a condition subsequent in the strict sense but as a limitation of the tenure defining its duration, then, it would seem that the transfer itself is void, at least according to the English law.[3]

30.4. *Principle*—The condition here mentioned is a condition subsequent, and must, it appears, be construed subject to the provisions of sections 14 and 23. It must not be invalid as laid down in section 32.

A gift to a person on condition that if he marries under the age of twenty-five without the consent of a person named, the estate shall cease to belong to him is valid under the section; and the donee will forfeit the estate if he breaks the condition[4]. A proviso that, if the donee becomes a nun she shall forfeit the estate, is similarly enforced[5]. Similarly, a clause in a gift deed executed by one V who was sentenced to transportation for life in favour of S on the eve of V's departure for Port Blair (the place for transportation), providing that in the event of V's return, all the properties gifted to S should revert to V, was held to be legal and enforceable.[6]

30.5. *Conditions repugnant*—The difference between a repugnant clause which is invalid and a clause of defeasance to which the Court will give effect, has also been pointed out often. We cannot do better than quote the words of Chitty. J. In *Govindaraja's case*[7], where the court had

1 Williams, Real Property (1966), page 77.

2 Re : Da Costa, (1912) 1 Chancery 337.

3 Cheshire Modern Law of Real Property, (1972), page 318, (sub-paragraph (4). The hypothetical illustration is not taken from Cheshire.

4 S. 134, ill. (b), Indian Succession Act, 1925.

5 Section 134, Indian Succession Act, 1925, ills. (d) and (e).

6 *Venkatrama v. Aiyaswami*, 43 M.L.J. 340.

7 *Govindaraja* v. *Mangalam Pillai*, A.I.R. 1933 Mad. 80; 63 M.L.J. 911, 913

to construe a pre-nuptial settlement by a husband in favour of his wife in the following terms :

> "I have accordingly given you the undermentioned properties valued at Rs. 1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers should take the properties".

The wife pre-deceased the husband, leaving no issue. The Judge, in giving effect to the claim of the brothers, observed :

"The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative".

30.6. *Case law*—There have been many cases in which the Courts, in construing a deed of gift or a will, have found that the earlier clauses of the document if read by themselves and without reference to the rest of the document would confer an absolute estate, but that subsequent clauses if, read with the earlier clauses, indicate that the intention of the donor or testator, as the case may be, was that the donee should have such a degree of power of disposing of the estate as should not be inconsistent with the subsequent enjoyment of the second donee on the happening of the specified uncertain event. The earliest, of these cases was that of *Bhoobun Mohini Debia*[1], where a Hindu granted a talook to his sister, K by a sanad in the following terms :

> "You are my sister; I accordingly grant you as a talook for your support the three villages H, P. and K. belonging to my zamindari, with all rights appertaining thereto at a jama of Rs. 361. Being in possession of the lands and paying rent according to the tabutjama, do you and the generations born of your womb successively enjoy the same. *No other heir of yours shall have right or interest.*"

The opinion of the Privy Council, delivered by Sir Robert Collier, was that these words, had they stood exclusive of the last sentence, would have conferred an absolute estate upon K, but the last clause cut down this gift so that in the event of failure of issue living at the time of her death, the estate was *to revert to the donor and his heirs, that there was* nothing in the condition repugnant to Hindu law, and, that as the uncertain event contemplated had not occurred, K, the sister was able to dispose of the property by will.

1 *Bhoobun Mohini Debia* v. *Hurrish Chunder,* (1879) 4 Cal. 23; 5 I.A. 139; 3 Suther 537; 3 Sar 815 (P.C.)

30.7. In *Sreemutty Soorjeemoney Dossoy*[1], a Hindu testator governed by the Dayabhag law devised all his real and personal estate among his five sons in equal shares. The will contained the following clauses :

"should any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow nor his daughter nor his daughter's son, nor any of them will get any share out of the share that he has obtained of the immovables and moveables of my said estate. In that event, of the said property, such of my sons and my son's son as according to their respective shares."

On the construction of the will that the uncertain event was a failure of male issue of any one of his sons at the time of the death of that son, it was held that the gift over was not inconsistent with the general principles of Hindu law, and therefore the gift over was valid. The precise terms of the first gift are not described in detail in the report.

This case[2] was explained by the Privy Council in the subsequent case of *Kristoromoni Dasi*[3].

30.8. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift.[4]

30.9. *No change*—No changes are needed in the section.

30.10. *Section* 32—*Invalid condition*—Under section 32, in order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

30.11. *Principle*—This section is the same as section 135 of the Succession Act. The section merely lays down that a condition must be valid before it can operate. Section 25 enumerates the conditions that are valid. An invalid condition precedent invalidates a transfer, though an invalid condition subsequent does not.

30.11. *No change*—The section needs no change.

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1 *Sreemutty Soorjeemoney Dossoy* v. *Denobundoo Mullick* (1861—63) 9 MIYA 123, I Sar 837 (P.C.)

2 *Sreemutty Soorjeemoney Dossoy* v. *Denobundoo Mullick*, (1861—63) 9 MIYA 123, 1 Sar 837 (P C).

3 *Kristoromoni, Dasi* v. *Narendro Krishna Bahadur*, (1889) 16 Cal. 383-16 IA 29-5 Sar 285 (PC).

4 *Jotendromohan Tagore* v. *Gunendra Mohan Tagore* (1872) IA Sup vol. 47—49 Beng LR 377-18WR 359-2 Suther 692-3 Sar 82 (PC).

# CHAPTER 31

## *TIME FOR PERFORMANCE*

### SECTIONS 33-34

31.1. *Introduction*—Transfers of property are sometimes conditional on the performance of an act by the transferee. The transfer may not specify the time of performance, or it may specify such time. The first case is dealt with by section 33, and the second case by section 34. In the first case, the condition may be a condition precedent or a condition subsequent. The case of a condition subsequent is the case which section 33 has in mind, vide the use of the words "condition is broken", and the illustration to the corresponding section 136 of the Succession Act. The case of a *condition precedent* is not dealt with by section 33, and must be left to be dealt with by the general rule[1] as to contingent interest under which, until the condition is performed, the interest will not vest.

The language of section 34 which deals with cases where time *is specified*, is, in contrast, wide enough to cover both the types of conditions.

31.1A. *Section 33—Transfer conditional on performance of act, no time being specified for performance*—Section 33 provides that where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the Act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the Act.

31.2. *Analogous law*—This section corresponds to section 136 of the Succession Act, and section 34 of the Contract Act[2].

The two illustrations appended to section 136 of the Succession Act are instances of cases (i) when the fulfilment of the condition is rendered impossible and (ii) when its fulfilment is indefinitely postponed[3]. These illustrations run as follows :—

*Illustrations*

"(i) A bequest is made to A, with a proviso that unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect."

31.2. *Principle*—The principle embodied in this section is the same as discussed in the discussion under the preceding sections. In this

1 Section 21, first two sentences.

2 Gour.

3 Gour.

section the contingency is only the act of the person on which the transfer depends, and the transfer fails on account of his own act.

31.3. *English law*—Illustration (ii) to section 36, Succession Act quoted above,[1] is not in consonance with the English law on the subject. Thus, in a case[2] where a testator, after giving certain legacies to J and M, added—"If either of these girls should marry into the families of G or R, and have a son, I give all my estate to him for life (with remainder over); and if they shall not marry", to other persons. Lord Thurlow held this to be a condition precedent; and that nothing vested in the devisees over, while the performance by J and M was possible, which was during their whole lives; and that their having married into other *families did not preclude the possibility* of their performing the condition, as they might survive their first husbands.[3]

31.3A. *No change*—No change is needed in section 33.

31.4. *Section* 34 *Transfer Conditional on performance of act, time being specified*—Where the time for performance of the act is specified, the matter is dealt with by section 34, as under.

> "34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall, as against him, be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall, as against him, be deemed to have been fulfilled."

31.5. *Fraud*—In order to constitute fraud, there must be some abuse of a confidential position, some intentional imposition or some deliberate concealment of facts.[4] The term 'fraud' has been this defined in the Indian Contract Act[5].—

17. "Fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

(2) The active concealment of a fact by one having knowledge or belief of the fact;

(3) A promise made without any intention of performing it;

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1. Para 31.1, *supra*.
2 *Randall* v. *Payne*, 1 B.C., C. 55.
3 2 Jarm 3; see also *Lester* v. *Garland* 15 Ves. 248.
4 *Dean* v. *Thwaite*, 21 Beav. 621.
5 Section 17, Contract Act.

(4) Any other act fitted to deceive;

(5) Any such act or omission as the law specially declares to be fraudulent.

"Explanation :—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech".

31.6. *Width*—This definition of fraud, however, is by no means exhaustive. Indeed, of fraud no definition is possible. It is infinite : *crescit in orbe dolus.*[1] Fraud may be positive or constructive. In the latter category, the term is used in its widest sense as embracing such acts or contracts, as, though not originating in any actual evil design or contrivance to perpetuate fraud or injury upon others, yet, by their tendency to deceive or mislead, or to violate public or private confidence, or, to injure the public interests, are equally reprehensible with positive fraud. and therefore, equally prohibited.[2]

31.7. *Scope*—Section 34 is general and would apply equally to a condition *whether precedent or subsequent.*[3]

31.8. *Principle*—The justification for the rule is the broad principle that no man can take advantage of his own fraud, or as Coke says : "Fraud *at dolus, nemini patrocinari debent.*"[4] It is contrary to natural justice that a person who prevents a thing from being done should avail himself of the non-performance he has occasioned. The rule in the first place goes only so far as to undo the mischief attempted, where that can be done, and not to the extent of entirely dispensing with the observance of the condition, but where this would entail indefinite delay or inconvenience, equity regards it as done, what would have been done, but for the fraud of the adversary who is thenceforward precluded from taking advantage of it.[5]

No man shall gain a right by his own wrong, this does not imply that if he had a right independently of the fraud, he shall lose it, or the power of exercising it, by a wrong done in connection with it. The rule, again, is inapplicable where the right of a third party is to be affected. For a man cannot, by his wrongful act to another, deprive a third person of his right, against another.[6]

31.9. *No change*—No change is needed in the section.

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1 Gour.

2 Story Eq. Juris., 253.

3 *Sidhee Nusur* v. *Ooloodhyaram*, 10 M.I.A. 540; *Edwards* v. *Aberayon Mutual Insurance Society*, I Q.B.D. 563.

4 I.E. "Fraud and deficit ought not to be benefit any person" 3 co. 78. The same sense is conveyed by the maxim "Nullus commodum capere potest de injuria sua propria". (No one can take advantage of his own wrong.) So Ex dolo malo non oritur actio. (A right of action cannot arise out of fraud).

5 *Rooper* v. *Lane* 6 *H.L.C.* 443 (460, 461), In re : London Celluloid Co., 39 Ch. D. 190 (206).

6 Cf. C.108, Indian Contract Act (IX of 1872).

## CHAPTER 32

## *ELECTION*

### SECTION 35

32.1 *Introductory*—Section 35 gives effect, though with a modification, to the doctrine of election. Where by a transfer property which does not belong to the transferor, is given to A and the same transfer gives another property to A, A must elect.

32.8 *Hypothetical case*—The position in regard to wills is the same. Suppose,[1] therefore, that Edward makes a will leaving £ 5,000 to Frank, and Frank's car, worth £ 2,000 to Geraldine. In this case, there are three possibilities open to Frank :

(a) he may disclaim the legacy under the will.[2] In this case he derives no benefit whatever from that gift and keeps his car;

(b) he may "take under the will", namely, accept the legacy of £ 5,000 and transfer the car to Geraldine; or

(c) he may "take against the will", namely, accept the legacy of £ 5,000 and retain the car, but pay to Geraldine £ 2,000 to compensate her for not receiving the car.

In both the second and third cases Frank is a net sum of £ 3,000 better off, and Geraldine receives either the asset or cash to the value of £ 2,000.

32.3 *Equity*—In our introductory discussion in this Report, we had referred to the fact that many of the provisions of the Transfer of Property Act have their genesis in Equity in England which were evolved in the Court of Chancery. Election furnishes an interesting example. This is incorporated in section 35—a principle which has been described by Lord Haldane[3] as "a principle which the courts applied in the exercise of *an equitable jurisdiction* enabling them to secure a just distribution substantially in accordance with the general scheme of the instrument".

This quotation from Lord Haldane shows that the paramount object is justice, and that literal compliance is replaced by substantial compliance in the interest of justice, taking care at the time that such action is in conformity with the general scheme of the instrument. The intentions of the testator or transferor are thus carried out and the expression thereof in the terms of the transfer is now moulded so that justice is done. The doctrine of election is rested usually on the rule that a person cannot accept and reject the same instrument.[4] This is a statement of another aspect of the rule which *shows why the* rule requires a person to elect.

32.4. *History*—The doctrine of election owes its origin to the civil law[5] By that law, a bequest of property which the testator knew to belong to another was not void, the legatee was entitled to recover from the heir

1. Illustration taken from Mellows, Law of Succession (1973), p. 485.

2 With the result that it is usually only prudent to disclaim where the value of the gift under the will does not exceed the value of the property to be given to the third party.

3 *Brown* v. *Greekson* (1920) A.C. 860, 868.

4 *Burmingham* v. *Kirwan*, (1805) 2 Sch. & Lef. 444, 450.

5 Story, Equity Jurisprudence, (1919) page 451, 1018.

either the subject of the bequest or, if the owner was unwilling to part with it for a reasonable price, its value. The heir, on his part, had the option of renouncing a burdonsome inheritance, for the heir could not accept the benefit offered by the will apart from its burden, nor, having accepted the former, could not discharge the latter by merely indemnifying the disappointed claimant, whom he was bound to satisfy to the extent provided in the will, irrespective of the benefit he had himself received.

32.4A *Need for election*—Why does need for election arise ? The need, it would appear, arises because, in the same instrument there is a duality of gifts or purported gifts. The two gifts cannot be given effect literally, and the law must evolve some just mode of giving them effect as far as possible. Where there is a gift of the donor's own property to E and also a gift of the property of E to a third person, an intention is implied that the gift to E shall take effect only if E *elects* to permit the gift to the third person also to take effect.' That the aspect of the *presumed intention* (and not the expressed intention) is important, would be clear from the fact that if a testator gives property subject to some *express condition* (for example as to abandoning a claim against the testator), the donee must elect in the sense of choosing whether to comply with the condition or totally lose the gift. This, however, is slightly different from the doctrine of election as it originated in equity. Again, if two gifts are made distinctly in the same instrument of *the property of the transferor* and one gift is beneficial while the other onerous, the doctrine of election (in the proper sense) does not compel the donee to adopt a particular course of action. He can take both, or he can accept the one which is beneficial and yet reject the onerous gift unless, of course, the intention of the transferor is to make the acceptance of one, a condition for the acceptance of the other. Such a case is outside section 35, which applies only when the transferor *professes to transfer property not his own.*

32.5 *Scope of section* 35—The case to which section 35 addresses itself is a narrow one. Where a person insists on transferring a property which he has no right to transfer and, as a part of the same transaction, confers any benefit on the owner of the property, it is then that the owner of the property professed to be transferred to a third person has to elect. The election is between confirming the transfer and dissenting from it. If he confirms the transfer, it takes effect in its entirely. If he dissents from the transfer, then certain consequences ensue,—(i) compulsory relinquishment of the benefit conferred (under the Indian law) subject to compensation by transferor in some cases, or (ii) liability imposed on that person (usually called the refractory donee) to compensate the disappointed donee, that is to say, the third person who does not get the very property which the transferor professed to transfer under English law. By a suitable arrangement, full effect is given to a donation of that which is not the property of the donor—not in a literal manner spelling out the terms of the transfer, but in a substantial manner. The arrangement is still based on carrying out in substance the intention of the transferor. The aspect of intention is brought out by Story[2] : Story takes the case where a testatory devises an estate belonging to his son to a third person, bequeating in the same will to his son a legacy of one hundred thousand pounds. "It would manifest that the testator intended that the son should take both, to the exclusion of the other devises and therefore he ought to be put to his election (as to)

1. *Noys* v. *Mordaunt*, (1706) 2 Vern. 581.
2. Story, Equity & Jurisprudence, (1919), page 450, paragraph 1076.

which he would take; that is, either to relinquish his own estate, or to compensate the party disappointed, or in the case of a testator his estate, out of the bequest under the will." Story[1] further points out that every case of election pre-supposes a plurality of gifts or rights, with an intention of the party who has a right to control one or both, that one should have a substitute for the other. The party has to make the choice—hence the word "election"—but he cannot enjoy the benefit of both.

32.6 *Choice*—The last-mentioned proposition has been taken substantially from Mr. Swanston's note to one of the early English cases.[2] The aspect of choice becomes significant in giving rise to the rule that for a binding election there must be a deliberate choice made with full knowledge of the rules relating to election and the relevant circumstances.[3] This is on the principle that if we exclude a party on the basis of his own election, it is necessary to show that he knew all the facts.[4] It is for this reason that an election made under a mistake of fact will not be binding.[5]

32.7 *Section* 35—In this background, we may now deal with the text of section 35, quoted below :

> "35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case, he shall relinquish the benefit so conferred and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of subject nevertheless, where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee, the amount or value of the property attempted to be transferred to him.
>
> *Illustrations*
>
> The farm of Sultanpur is the property of C and worth Rs 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs 1,000.
>
> In the same case, A died before election. His representative must, out of the Rs 1,000, pay Rs 800 to B.
>
> The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.
>
> A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly need not elect.
>
> A person who, in his own capacity, takes a benefit under the transaction, may in another dissent therefrom.

1 *Story*, Equity & Jurisprudence, (1919), page 350, paragraph 1075.
2 *Dillon* v. *Parker*, (1883) 1 Swanston's 394 Note (b); 1 Ct & F 303;
3 *Wilson* v. *Thornburry*, (1865) 10 Chancery Appeals 239.
4 *Pread* v. *Morgan* 11 House of Lords cases 588.
5 *Kidney* v. *Coussmaker*, (1806) 12 Vos. 136.

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

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

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

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

*Illustration*

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

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

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

32.8 *Compensation of forfeiture*—It is sometimes stated that the doctrine of election as incorporated in section 35 is based on forfeiture, unlike the English law which is based upon compensation. This is true to a large extent; but it must also be pointed out that even under section 35,—as is apparent from the third and fourth paragraphs,—while forfeiture takes place from the point of view of the refractory donee, yet the transferor or his heirs must compensate the disappointed donee, in certain cases specified in the section. The illustration to the fourth paragraph of the section makes this amply clear. In fact, the situations in which compensation is compulsory under the section cover most, if not all, of the situations in which justice requires that compensation ought to be made.

The only difference is that the compensation is to be made by the transferor or his representative and not by the refractory donee, unlike the position in English law and the liability is confined to the specified situations.

32.9 *Declaration of intention*—It is to be pointed out that the general and presumed intention of the transferor may be repelled by a *declaration in the instrument* of a particular intention inconsistant with the presumed

and general intention. This is the English law.[1] Though section 35 does not provide for such a case, Mulla[2] has expressed the view that the operation of the section can, in India, similarly be excluded by express words.[3]

One example of a provision giving effect to the contrary intention is already found in the Exception appearing after the 4th paragraph of the section, which corresponds to a similar provision in section 186 of the Indian Succession Act, 1925. The illustration to section 186, Succession Act, is as follows :

> "Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life, *in lieu of her interest in the* estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, *but not the legacy of* 1,000 *rupees*".

A somewhat similar situation was also present in a Calcutta case.[4]

32.10 *No change*—Indian case law on the section has been gone through and discloses no need for amending the section.

1 In re. *Vardon's Trusts* (1885) 31 Ch. D. 275., 279.

2. Mulla (1973) Comment on section 35.

3 Shephard and Brown. Tranfser of Property Act. note on section 35, referred to by Mulla.

4 *Pramada v. Lokhi* (1885) I.L.R. 12 Cal. 60

# CHAPTER 33

## *APPORTIONMENT*

### SECTIONS 36-37

33.1 *Introductory*—The transfer of an interest in property sometimes raises problems, where the property carries income and the income is to be received from a third person. Such problems may arise either because of the creation of *successive* interests in property, or because of the co-existence of *concurrent* interests in property arising by reason of severance. In the first case, the chronological element becomes important. What are the respective rights of the predecessor and the successor? In the second case, the simultaneous co-existence of more than one beneficiary raises this question—What are the respective rights of the co-shares ? The first topic, conveniently described as "apportionment in point of time," is dealt with in section 36. The second topic, conveniently described as "apportionment in point of estate", is reserved for section 37.

33.2 *Section* 36—Apportionment of periodical payments in point of time, then, is the subject matter of section 36, which is condensed[1] from sections 2 to 4 of the (English) Apportionment Act, 1870.

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

The section applies only where there is a transfer of property, though it relegates the words "upon the transfer of the interest" somewhere in the middle. What is transferred is the transfer of the interest of a person entitled to receive the specified payments, namely, rent etc. On such a transfer, it lays down the rule to be applied, *as between the parties to the transfer.*

33.3 *Meaning of apportionment*—Lord Coke remarked[2] that the word 'apportionment' cometh of the word *portio*, quasi *partio*, which signifieth a part of the whole, and "apportion" signifieth a division of a rent common, etc. or a making of it into parts. The term[3] is used in two senses; (i) to denote distribution of a common fund among the several claimants; and (ii) sometimes, to denote the contribution made by several persons having distinct rights to discharge a common burden. The words "rents, annuities, etc." here used, are nowhere defined in this Act or in the General Clauses Act. They are, however, defined in section 5 of the English[4] Statute in the following terms : "5. In the construction of this Act, the word 'rents' includes rent service, rent charge; and rent seek; and also tithes and all periodical payments or rendering in lieu of, or in the nature of rent or tithe. The word "annuities" includes salaries and pensions. The word 'dividends' includes (besides dividends strictly so-called) all payments made by the

1 Gour.

2 Co. Lt. 147-b, cited in Gour.

3 Story's Eq. Jur. (2nd Eng. Ed.) 305.

4 Apportionment Act. 1870.

name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed time or otherwise; but this does not include payments in the nature of a return or reimbursement or capital." It includes, however, occasional bonuses or surplus profits of the share-holders.[1] The phrase "as between the transferor and the transferee," implies that a stranger cannot apportion them, and the provisions expressed by "to accrue due from day to day", is only for the purpose of apportionment. Under the Bengal Tenancy Act, rent is not ordinarily regarded as accruing from day to day, but as falling due only at stated times according to the contract or tenancy of the general law[2].

33.4 *No change*—We have no changes to recommend in section 36.

33.5 *Section* 37—The subject matter dealt with in section 37 is apportionment by estate, in contrast with apportionment by time which was dealt with in section 36.

33.6 *Analysis*—The first proposition in section 37 lays down that when in consequence of a transfer, a property is divided and held in several shares and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property. The second proposition makes the above rule subject to the proviso which requires that the duty must be a duty which can be severed and that the severance does not substantially increase the burden of the obligation. If the duty cannot be so severed or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose.

This is yet another proviso, under which no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in the manner provided by this section unless and until he has had reasonable notice of the severance.

Finally, nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the official Gazette so directs.

33.7 *Illustration*—There are two illustrations to the section. In illustration (a), A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one-quarter-each. E, having notice of this, must pay Rs 15 to B, Rs. 7½ to C, and Rs 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

This illustration illustrates the principal proposition laid down in the section as well as the first and the second provisoes. There is a duty in E to render the obligation to the several persons by breaking *up the amount*, but, so far as the *sheep* is concerned, the burden cannot be increased and it is for the owners to jointly designate the person in whose favour the obligation is to be performed. The illustration provides for notice, thus complying with the second proviso.

1 *Carr* v. *Griffith*, 12 Ch. D. 655.
2. Per Banerjee, J., in *Satyendra Nath* v. *Nilkantha* I.L.R. 21 Cal 383, 385.

Illustration (b) to section 37 takes the case where each house in the village being bound to provide 10 days' labour in each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten day's work in all, according to such directions as B, C and D may join in giving. This illustration lays emphasis on the fact that the burden is not to be increased by severance. It is not stated in the illustration, but it is assumed, that the ownership of the house of A was in consequence of a transfer, divided and came to be held in several shares by B, C and D.

33.8 *Easements*—This section is similar to section 30 of the Indian Easements Act, 1882 which refers to the effect of the partition of the dominant heritage upon an easement annexed to the dominant heritage. To take one of the illustrations to that section, A having in respect of a house an easement of light, divides the house into three distinct heritages. Each of these continues to have a right to have its windows unobstructed.

33.9 *Death*—Although section 37 does not deal with succession on death, that is, succession to property by several cosharers, it may be of interest to mention the position briefly. In India, on the death of the creditor, his numerous heirs are only jointly entitled to enforce the right which the deceased creditor if alive, could have singly enforced.[1] This also seems to be the English law, under which the debtor is not liable to as many claims as there are heirs of the promisee. The theory of English law is that the number of parceners constitute one heir and they are connected together by unity of interest and unity of title—unless of course, one of the heirs has received an authority from the other or others to enforce the share of the assigning heir also.

33.10 *English Law*—In England, certain special provisions seem to have been made in regard to leases where the reversion is severed.[2] But the general rule is as above.

33.11 *No change*—In this section also we have no changes to recommend.

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1 *Kandhiya Lal* v. *Chander*, I.L.R. 7 All. 313, 324 (F.B.) followed in *Ahimsa Bibi* v. *Abdul Khadir*, I.L.R. 25 Mad. 26.

2 Section 140, Law of Property Act, 1925.

## CHAPTER 34

## *TRANSFER BY LIMITED OWNERS*

### SECTION 38

34.1 *Section* 38—With section 38 begins a group of sections which is concerned only with the transfer of immovable property. Of these sections, the first is section 38, dealing with transfer by a person authorised only under certain circumstances to transfer. According to Mulla,[1] the section would appear to be based on the leading case of Hanooman Prasad,[2] the principle whereof, laid down in the specific situation of the manager for an infant heir under Hindu law, has been regarded as applicable also to a Hindu widow or other limited heir,[3] and to transactions in which a father has made an alienation of an ancestral family estate.[4] The same principle applies to alienations by a Mahant or Shebait of property.[5] Though some of the situations have lost their importance because of the reform of the Hindu Law of succession, many of them have not, partly because the Hindu law of co-parcenership has not yet been modified and partly because the Hindu law of religious and charitable endowments has been left untouched by legislation so far as the limited nature of the power of Mahant or Shebait is concerned.

34.2 *Illustration*—The Illustration to section 38 takes a familiar case, now obsolete, of a Hindu widow whose husband has left 'collateral *heirs*'—described in the text-books as reversioners—where the property held by her *as such widow* is insufficient for her maintenance and she agrees for purposes neither religious nor charitable to sell a field which is part of the property to B. Sale for the purpose of maintenance, it may be stated, is competent if there is a real necessity. The illustration further states that B satisfies himself by reasonable enquiry that the income of the property is insufficient for maintenance and the sale of the property is necessary. So satisfying himself and acting in good faith B buys the field from the Hindu widow. In such circumstances, as between the purchaser B and the widow and the reversioners, a necessity for sale shall be deemed to have existed.

34.3 *Crux*—The crux of section 38 lies in the expression "authorised only under circumstances in their nature variable to dispose of immovable property". This is the draftsman's way of describing what the Judicial Committee in *Hanooman Prasad's case* described as a limited and qualified power which can only be exercised rightly in the case of need or for the benefit of the estate, what is a case of need or which transfer is for the benefit of the estate must depend on circumstances which are in their nature variable.

34.4 *English law*—In England, a somewhat similar principle seems to have been followed in regard to transfer *per stripes*[6]. Ultimately, the rationale of the provision favouring the beneficial purchaser for value with-

1 Mulla (1973), page 179.

2. *Hanooman Prasad* v. *Mst. Bibee,* (1856) 6 Moores Indian Appeals 393, 423.

3 *Devi Prasad* v. *Gulal Bhagat,* (1913) I.L.R. 40 Cal. 721 (F.B.).

4 *Kameshwar Prasad* v. *Run Bahadur,* (1881) Law Reports 8 Indian Appeals 8.

5 *Niladri Sahu* v. *Mahantan Mahant Chaturbhuj Das,* A.I.R. 1926 P.C. 112.

6 *Societe General de Paris* v. *Walker,* 11 A.C. 20, 28.

out notice is protection against latent frauds perpetrated by the limited owner. This is not to say that any person can transfer the property of any other person. The section pre-supposes at least some right to transfer in the transferor, though that right is dependent on circumstances in their nature variable. The other conditions laid down in the section must also be satisfied in order to bring the rule of equity into operation. But neither good faith nor value nor reasonable enquiry will suffice to confer title where the transfer is by a person who has not a semblance of interest of property.

34.5 *No change*—The above discussions discloses no need to change the law.

## CHAPTER 35

## *MAINTENANCE AND OTHER RIGHTS TO RECEIVE MONEY OUT OF PROFITS*

### SECTION 39

35.1. *Section* 39—The enforceability of certain rights connected with immovable property, though not directly amounting to an interest therein, is a topic which may arise in a number of situations. Of these, two are dealt with in the Act, namely, (i) right of maintenance and (ii) restrictive covenants on the use of land or obligations annexed to ownership, not amounting to interest or easement. These are contained in sections 39 and 40, respectively. They both speak of a "third person", but the third is not necessarily a person other than the transferor and the transferee. He could well be the transferor himself, at least in a case falling under section 40[1]. In fact, even under secton 39, one can well imagine a case where a person transferring property reserves the right to receive maintenance out of profits.

35.2. Coming to the text of section 39, it provides that where a third person has a right to receive maintenance, or a right to provision for advancement, or marriage, from the profits of immovable property, and such property is transferred, the right (to receive maintenance or to such advancement or provision for marriage) may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against the transferee for consideraton without notice of the right, nor against such property in his hands.

35.3. *Amendment of* 1929—Section 39 has been radically altered by the amendment of 1929. Under the old law, emphasis was laid upon the intention of defeating the right of maintenance etc., while under the present law, emphasis is laid on the element of notice. The mental element of the parties is irrelevant, except that the person against whom the right is sought to be enforced must have notice, or the transfer must be gratuitous. In short, the amendment renders it unnecessary for the maintenance holder to prove that the transfer was made with the intention of defeating the right[2].

There is a similar provision in the Hindu Adoptions and Maintenance Act, 1956, section 28 of which is modelled on section 39 of the Transfer of Property Act[3].

35.4. *Rights created by decree and rights amounting to charges—Scope of the section*—There appears to be some incompleteness in the language of the section on two questions which are of considerable practical importance, namely,—

(a) is it under the section, necessary that the right must be one in the form of a change ?

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1 **Mulla (1973) p. 185, paragraph (2), third paragraph.**

2 ***Ramamurthy*** v. ***Kanakarathnam,*** A.I.R. 1948 Mad. 205.

3 ***Kavari*** v. ***Parmeshwar.*** A.I.R. 1971 Ker. 216, 217 paragraph 3.

(b) is the section applicable to a charge created by decree ?

On the second question, we do not see any reason why the provisions legislature that the right should assume the form of a charge. In fact, it is a correct view—as was taken in a Nagpur case[1]—that section 39 is meant for rights which fall short of a charge. This is for the reason that enforcement of charges is a matter specifically dealt with in section 100.

On the second question, we do not see any reason why the provisions of section 39 should not apply to a right created by a decree not amounting to a charge enforceable under section 100. It is true that the Act, in general, does not apply to transfer by decree, but there are two weighty reasons why, in this particular case, a different approach could be adopted. In the first place, section 39 is not concerned with enforceability against a transferee by operation of law. The proposed amendment will not disturb that position, but will merely bring within the fold of the section rights of maintenance created by decree. Enforcement of the right will still be limited to a transferee by act of parties and, of course, will be subject to the other requirements of the section. Secondly, as a matter of policy, it is desirable that the beneficial provisions of this section should be extended to a transfer of a right created by a decree even if, in general, there may be any theoretical difficulty in extending a provision of the Act to transfers by decree.

We may incidentally mention that the question how far section 100 applies to decretal charges is one which we propose to examine[2] under section 100.

For this reason, we recommend that the following Explanation should be inserted below the section by way of making an amendment or clarification on both the points raised above :—

> "*Explanation.— This section applies also to a right created by a decree or order of a court, but not to a right* enforceable as a charge under section 100."

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1 *Ghasi Ram* v. *Kundan Lal*, A.I.R. 1940 Nag. 163, 165 (Stone C.J. & Vivian Bose J.).

2 To be considered under section 100.

## CHAPTER 36

## *RESTRICTIVE COVENANTS AND OBLIGATIONS ANNEXED TO OWNERSHIP OF LAND*

### SECTION 40

36.1. *Introductory*—Questions concerning the rights of third persons may arise from covenants that are often entered into while transferring property. These covenants may impose a positive duty or a negative duty. The primary object in inserting such covenants, when property is transferred outright, is, in general, to preserve the saleable value of the residental amenities of the property of the transferor—though there may sometimes be other considerations not connected with the ownership or enjoyment of any particular property. Whether such a covenant is binding *qua* contract between the parties to the covenant personally is a matter which depends on the law of contract and, to some extent, on the provisions in the Transfer of Property Act relevant to the subject, of which sections 10 to 12 have been already considered. The question now to be considered is whether such a covenant entered into by a person, while transferring or accepting a transfer of property, can be enforced against a future transferee. In legal language, this question is concerned with the running of the burden of the convenant with the land. Conversely, when the person in whose favour the convenant was entered into—briefly, the beneficary—transfers the property—the question may arise whether the transferee can claim the benefit of the covenant. In legal language, the question is concerned with the running of the benefit with the land.

36.2. *Easement and leases*—This has been one of the most difficult matters in the law of transfer. In order to avoid discussion on matters about which there is no controversy, it is desirable to leave out of the discussion rules relating to two spheres of the law, namely, easements and covenants contained in leases. In general easements bind the servient heritage and permanently enure for the benefit of the dominant heritage, irrespective of who is the owner thereof.[1] As regards leases, again, normal covenants in a lease will run with the land and with the reversion. It was realised very early even by those who administered the common law that covenants contained in a lease might have a wider operation than ordinary contracts. They were, in a sense, regarded as being annexed to an estate in the land so that they could be enforced by any one who took that estate in the land.[2]

36.3. *Types of question arising*—Leaving aside these two matters, the possible queries that theoretically could be raised on the subject of transfer of the burden of a covenant could be fourfold :

(1) The transferee assigns his interests to A. Can A enforce the covenants inserted in the transfer in favour of the original transferee and binding on the original transferor ?

(2) The transferee assigns the interests to A. Can A be sued on the covenant inserted in the transfer binding on the original transferee.

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1 Cheshire, Modern Law of Real Property, (1972), pp. 578, 579.

2 Holdsworth, History of English Law, Vol. 3, page 158. See also Vol. 7, pages 287 to 292.

(3) The transferor assigns his interests to Z. Can Z enforce the covenants inserted in the original transfer and binding on the original transferee.

(4) The transferor assigns his interests to Z. Can Z be sued upon the covenants contained in the original transfer and binding on the original transferee.

There could, of course, be complex situations raising more questions than one. For example, A having made B enter into a covenant for the beneficial enjoyment of a property belonging to A, transfers the property to C. B in his turn transfers the burdened property to D. The questions to be considered would be—and this is not necessarily an exhaustive enumeration :—

(a) Can C enforce a covenant entered into for his predecessor's benefit ?

(b) Assuming that he can do so, can he do so against D who is not the original covenantor but his successor ?

36.4. *Act not comprehensive*—Unfortunately, the Act does not deal, in a comprehensive manner, with these questions in the manner set out above. This is partly due to the fact that the law on the subject was not in such a condition that a codification could be easily and confidently suggested. Partly, such an attempt was also, rendered unnecessary by the fact that some of the covenants concerning the sale of immovable property have been set out in section 55, and similar is the position regarding mortgages, the intention being that these covenants would not be affected by the transfer of the property, after the sale or mortage.

36.5. *General rule privity*—The general rule of the common law was that if there was privity of estate and not privity of contract, then only covenants which *concern the land* are enforceable. This rule became useful in relation to leases, mainly because privity of estate means that here is a tenure between the parties, that is, the relationship of landlord and tenant exists between them, though the contract was between the purchaser and the lessor.[1]

But if there is no privity of contract, nor of estate, then at common law, subject to two exceptions, no covenants are enforceable. The general rule is that covenants concerning the land are not, in the absence of privity of either type, enforceable. To this general rule, there were two important exceptions, namely, (a) the benefit of a covenant could be assigned with the land for the benefit of which it was made if the covenant was one which touched and concerned the land, for example, the grantor's covenant for title *concerning the land*. The benefit ran with the land conveyed, so that whoever is entitled to the land is entitled to the benefit of the covenant[2] Equity want further in enforcement of assignments of the benefits of the contracts generally, *whether or not connected with land*,—a matter now governed, as to the procedure, by statute both in England and in India. Thus, the benefit of a contract became assignable. But the burden remained unassignable at common law, except when there was privity of estate.

1 Williams, Real Property, (1966), page 725, paragraph 2.

2 Williams, Real Property, (1966), page 726, paragraph 3.

36.6. *Restrictive Covenants in equity*—Equity added another exception. It allowed the assignment not only of the benefit (as stated above), but also of the burden of *restrictive* covenants.[1]

36.7. *Restrictive*—A restrictive covenant is one imposing a negative obligation (for example, a covenant not to build), as opposed to a positive covenant (for example, a covenant to build); both the benefit and the burden of the restrictive covenant can run in equity only if there is both land which is benefitted and land which is burdened. And even this is subject to the qualification that a purchaser of a legal estate without notice takes it free from the burden. This qualification was based on the general principle[2] :—

> "Legal rights are good against all the world; equitable rights are good against all persons except a *bona fide* purchaser of a legal estate for value without notice ....."

36.7A. *Background of section* 40.—It is in this background that section 40 was enacted. The doctrine of equity relating to restrictive convenant was laid down in the leading case of *Tulk* v. *Moxhay*[3] and the provision in the first paragraph of section 40 is obviously based on that decision. There was, however, in 1882 one misconception as to scope of the rules as to enforcement of positive covenants, resulting from a misunderstanding of the observations made in *Tulk* v. *Moxhay*. This misconception was removed in later English cases, and in conformity with the later trend, section 40, first paragraph was enacted in 1929, so as to remove postive covenants from its scope. So, after 1929, the burden of a positive covenant does not run against the transferee from the covenant or except where a statutory provision governs the matter. This non-enforceability of a positive covenant has, of course, nothing to do with the position *as between the original covenantor and covenantee*. We have discussed[4] this aspect while considering section 11.

36.8 *Section* 40—*first paragraph*—Coming to the details of section 40, first paragraph, we may state that its gist can, in simple language, be expressed thus. Where, on a transfer of property a restrictive covenant (covenant to restrain the enjoyment of a piece of immovable property) is entered into, such covenant can be enforced against a transferee of that property with notice or without value, if intended for securing the beneficial enjoyment of another piece of immovable property of the covenantor. It may be noted that this proposition says nothing about personal covenants which do not purport to benefit the covenantee in the enforcement of immovable property whether such covenants are valid between the parties, and if so, whether they are enforceable against third persons who take the property from the covenantor are questions outside section 40. When they arise, they are to be determined with reference to the law of contracts and its rules relating to the legility of agreements and the assignments of contractual burdens.

36.9. Section 40—second paragraph—Section 40, second paragraph, dealt with an entirely different matter. It is not concerned necessarily with covenants entered into for the beneficial enjoyment of another

1 Williams, Real Property (1966), p. 726, paragraph 3.
2 Phill, Land Equity, 114, 115, referred to by Williams, Real Property, (1966), p. 119, paragraph 3.
3 *Tulk* v. *Moxhay*. (1848).
4 See discussion as to section 44.

piece of immovable property, reserved by the covenantee. Nor is it confind to covenants of a purely negative character. It devotes itself to "obligatons annexed to the ownership of immovable property, arising out of contract." These obligations do not, in postulates, amount to an interest in the property or to an easement therein. Nevertheless, the obligation can be enforced against the transferee of the property unless he be a transferee for value without notice. The word "obligation" emphasises the contractual element and is an apt word for another reason also—its enforceability only against a limited class of persons.

The principal examples of such obligations are—(a) the obligation resulting from a contractual right of pre-emption, and (b) an obligation undertaken by the owner of immovable property who has contracted to sell it.[1] This does not amount to an interest in property, but, can yet be enforced against a transferee with notice or without value.

36.10. *True position under section* 40—It would appear that the position is fairly clear after the amendment of 1929, which is based on the English law.[2] There was some difficulty before the amendment by reason of certain judicial decisions, holding that it was doubtful whether section 40 applied to affirmative covenants involving expenditure of money.[3] On the whole, the view prevailed that the first part of section 40 was not applicable to affirmative convenants[4] In view of this position, a further amendment of section 40 is not called for.

36.11. *Other provisions*—It should, however, be noted that section 40 does not deal with obligations which may be enforceable under some other provisions. There may, for example, be a charge created on the property, enforceability of which can be supported by reason of the specific provisions of section 100, even where section 40 does not apply.

36.12. *Case of attachment*—As regards the second paragraph of section 40, it was held in a Madras case[5] that the private sale of property pending attachment under a contract entered into prior to attachement confers good title even though the sale actually takes place after the attachment. This was on a construction of the term "transferee" in section 40 as including an *execution purchaser*. The matter, however, really pertains to the realm of procedure,[6] and need not be discussed in the present context.

36.13. *Multistoreyed buildings*—We have dealt with the implications and limitation of section 40, as it now stands. At this stage, it should be mentioned that need for legislation has often been felt in regard to multistoreyed residential or office accommodation which is now coming up in urban areas on an increasing scale. As was noted in the introductory discussion, many countries have enacted elaborate laws for regulating property rights in such cases. A fairly well-known example is the Conveyancing strata Titles Act, 1961, New South Wales. Legislation similar to it is in force in some other States of Australia and in Canada, Ceylon,

1 Section 54.

2. *Smith* v. *Colboural*, (1914) 2 Ch. 533.

3 A.I.R. 1925 Bom. 183, 185.

4 A.I.R. 1927 Cal. 41.

5 A.I.R. 1917 Mad. 4.

6 See section 64 of the Code of Civil Procedure, 1908.

Jamaica, Singapore and the U.S.A. To mention a few of the important provisons normaliy to be found in such legislation, a developer may adopt the device of registering a plan with the approval of the local authority—thereupon, the proprietors collectively become a corporate body which can sue and be sued, employ servant etc. and has powers for the management of the whole unit. Common property, such as, stair-cases, car-drivers and gardens, is held by the proprietors as tenants in common and they have easements of shelter, water supply and other services with rights of entry to do repairs in case of need. Such a scheme provides a more convenient range of proprietary rights and duties than the ordinary law of property. Where such a scheme recognised or regulated by statute is in operation the need for express comments practically disappears, and such limitations of the common law as are concerned with the enforceability of the burden of a covenant against assignees of the land are also modified to that extent.[1]

36.14. However, for obvious reasons, it is impracticable to introduce such detailed provsions in the general law of property which is codified in the Act. Legal difficulties in imposing obligations on future owners to keep a proper standards of repair, or to contribute to the cost of common services and amenities and so forth will, in the nature of things, have to be dealt with by special legislation.

*Benefit and burden*—We may also point out that apart from statutory developments, it is recognised even at common law that the person who takes a benefit under a deed must also accept its obligations. Upjohn J. in the case of *Halsall*,[2] in substance, hold that a long-standing obligation to contribute to the cost of maintaining roadways and other common amenities on a developed estate could be enforced against future purchasers. This decision was followed in a later case[3], and is based on the maxim that a person who wishes to take advantage of a service or facility must comply with any corresponding obligation to contribute to the cost of providing or maintaining it. In Latin, the maxim is *qui sentil commodum sentire debet et onus*.

36.15A. *Perpetuities*—Finally, we may state here that covenants, at least in Indian law, are not subject to the rule against perpetuities and they do not amount to an interest in land[4].

36.16. *No change*—In the result, no change is needed in section 40.

1 D. J. Hayton, "Restrictive Covenants as Property Interests" (1971) 87 L.Q.R. 539.

2 For comment see Megarry (1957) 73 L.Q.R. 154.

3 *E. R. Iyer Investment Ltd.* v. *High* (1967) 1 All. E.R. 504.

4 *R. Kempraj* v. *Burton Son & Co.*, A.I.R. 1970 S.C. 1872, 1875, para 8.

## CHAPTER 37

## *TRANSFER BY OSTENSIBLE OWNER*

### SECTION 41

37.1. *Introduction*—To the general rule that only a person "competent to transfer" and "entitled" to transfer property can transfer property, the Act creates another exception in section 41. A transfer by a person who is not the real owner but only an ostensible owner of immovable property would, under the strict general rule of law, be ineffective. But, where the person concerned is an ostensible owner with the consent of the real owner, and the transfer is for consideration, a conflict of interests arises between the real owner and the transferee for consideration. Now, if the transferee for consideration further proves good faith and reasonable enquiry, the conflixt becomes more acute. Strict law would support the real owner, while equity would operate in favour of the transferee.

In the above circumstances, there are ethical considerations in his favour which override the purely legal considerations that could be urged in favour of the real owner. It is axiomatic that the business of the law is to provide for the resolution of conflicts.

Section 41 reflects the decision of the law to adopt one particular approach for resolving the conflict. Where, of two persons, one must suffer, he who is less innocent must suffer, because the equities are against him though strict law is in his favour. On this principle, section 41 favours the *bona fide* transferee for value without notice—not in every case but where the transferor is the ostensible owner with the consent of the true owner.

37.2. *Section* 41.—To quote the section—

> "41. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

37.3. *English law*—This section harmonizes with the English Law, which similarly lays down that, if a person having a right to an estate, permits or encourages a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age[1]. Even at law, as regards chattels, if a party negligently or culpably stands by, and allows another to contract in the understanding of a fact which he can contradict, he cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

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1 *In re Morgan, Pilgrem* v. *Pilgrem,* 18 Ch. D. 93;
*Carrit* v. *Real and Personal Advance Co.* 42 Ch.D. 263.

37.4. *Estoppel*—This rule is hardly discussed in this form in modern English text books on the law of real property. It is regarded as belonging properly to the domain of estoppel. It is also true that with the increasing use of registration of land titles, occasions for using this doctrine are not so frequent in modern times as before. In India, also, such occasions would have been rare, since the person who purchases or becomes a mortgagee of land would be expected to investigate the title of his immediate transferor, and it is, in most cases, necessary that the title to the land must ultimately find its source in an instrument registered and compulsorily registrable, thereby fixing the ultimate purchaser with notice. But a peculiar feature of Indian society—the practice of holding land benami—leads to the position that even the registered owner is not the real owner. So a person investigating title even on the basis of registered documents still remains unaware of the title of the real owner. If, in such circumstances, he can satisfy also the other conditions laid down in section 41, the section could come into play. We do not, of course, imply that *benami* ownership is the only case of ostensible ownership.

37.5. *Transfer need not be with consent*—There seems to be some misconception on the question whether *the transfer must be* with the consent of the real owner in order that the section may apply. While it is necessary that the ostensible ownership must have been permitted or created by the real owner, it is not necessary that he must have consented to the actual transfer which is now sought to be validated under the section. Thus, the view that the words "with the consent, express or implied" govern the word[1] "transfer" seems to be erroneous, and is opposed to the current of authority.[2-3]

37.6. *Recommendation, to amend section* 41—To express the position with greater clarity in this regard and to avoid misunderstanding, we recommend that the opening words of the section should be revised so as to read—

> "Where, a person *is the ostensible owner of immovable property* with the consent, express or implied, of the persons interested in such property and transfers the same for consideration .....".

The object is to separate the phrase "consent express or implied" from the word "transfers".

37.7. *Subsequent transfers*—It stands to reason that the operation of the section should not be limited to the immediate purchaser from the ostensible owner, but should extend to subsequent purchaser also, subject to certain conditions. Here, however, a question of detail arises. Is it necessary that the subsequent transferee must satisfy the other requirements prescribed in the section—such as, consideration, reasonable care and good faith ? Or, is it enough if the immediate purchaser had satisfied these requirements ? Or, is it necessary that *both the immediate* purchaser and the *subsequent transferee* must satisfy these requirements ? Yet another alternative would be to take the view that *either the immediate purchaser or the ultimate* purchaser satisfies the requirements. The last mentioned view seems to be the view judicially

1 *Shafiqullah* v. *Samiullah*, A.I.R. 1929 All. 923.

2. *Fazal Hussein* v. *Mohd. Kasim*, A.I.R. 1934 All. 193.

3. *Fakhruddin Sahib* v. *Ram Sethi*, A.I.R. 1944 Mad. 299.

taken.'-[3] There is much to be said in favour of each of these views. In support of proposition that it is necessary and sufficient that the immediate purchaser satisfies the requirements laid down in the section, we can state that it is only if he gets a title not challengable by virtue of the section that he in his turn can pass on a good title.

On the other hand, in support of the proposition that it is enough if the ultimated owner satisfies the requirements, it can be stated that since the ultimate purchaser acted honestly and with care, he meets the desideratum of equity and therefore, he is entitled to the protection irrespective of the non-fulfilment of the statutory requirements by the first purchaser. Then, in support of the view that it is enough if *either of them* satisfies the requirements, it can be urged that such a view would combine the good features of the first and the second views.

37.8. *No Change*—Having considered all aspects of the matter, we think that although theoretically there is much to be said for the first view, yet, having regard to the fact that courts have taken a different view, it may not be expedient to disturb the judical construction which seems to adopt the last view. We do not, however, think that there is need for putting in the section what has been held by the courts.

37.9. *Mortgages*—It remains now to deal with the questions of applicability of the section to mortgages. There are two aspects of the matter. That the expression "transfer" in the section is not limited to an outright sale, is fairly apparent from the judicial decisions on the subject[4] relating to mortgages by the ostensible owner, and needs no clarification. The other aspect of the matter is concerned with the question whether an ostensible mortgagee could be treated as an ostensible owner. In this connection, it is to be pointed out that he is the ostensible owner of 'immovable property'—using the expression 'immovable property' as wide enough to cover an interest in such property. On this view, we agree with Mulla's view that an ostensible mortgagee is the ostensible owner of the mortgagee's interest. This point was the subject-matter of a difference of opinion in a Calcutta case[5], and has been discussed in a Madras case[6]. In our view, the section applies to an interest in immovable property as much as it applies to full-ownership of the property, there being no reason for taking a different view, and we do not consider any amendment to be necessary on this point.

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1 *Cholam Saddique* v. *Jogindernath*, A.I.R. 1926 Cal. 916.

2. *Porminderath* v. *Dhanmal*, A.I.R. 1940 Cal. 565.

3 See also Mulla (1973), page 206.

4 See case law cited in Mulla (1973), page 198.

5 *Jogendra* v. *Solaman*, A.I.R. 1930, Cal. 92.

6 *Parvati Amal* v. *Angamutu*, A.I.R. 1942 Mad. 730.

## CHAPTER 38

### *TRANSFER AFTER REVOCABLE TRANSFER*

### SECTION 42

38.1. *Introductory*—Doubts or defects regarding title may arise from various causes. The defect may be of a fundamental nature—no title—section 41—or non-existence of the property or right in the property—section 43. But it could be a defect of a different nature, arising from the fact that certain powers which could have been, and ought to have been, exercised by the transferor have not been exercised by him. In other words, the property is in existence and the transferor has also, in the abstract, power to transfer it, but this power is subject to the fulfilment of a certain condition. The law then, in the interests of justice, takes a position as to the performance of the conditions.

In particular, there may arise a competition between two transferees of the same property, claiming under a transfer executed by the same transferor. Such a situation justifies the application of certain equitable doctrines.

The first transfer is in favour of A, but is revocable. The same property is then transferred to B, but the transferor has not exercised the power of revocation. The transferor, by the second transfer, creates a conflict of interest, which now must be resolved. The approach of equity in such cases is that though the power of revocation has not been exercised expresely, it should be deemed to have been exercised by the transferor. This is analogous to the implied repeal of a statute.

38.2. *Maxim*—This is similar to the maxim of equity that equity regards that as done which ought to be done, or that equity imputes an intention to perform an obligation. It is this principle which is enacted in legislative language in section 42. This section is fundamentally linked with equity. Its connection with the earlier sections which are themselves based on equitabic considerations is also not difficult to perceive, because the object of the section is to protect the subsequent transferee against the fraud, mistake as well as indifference of the transferor. This protection, of course, is subject to the qualification that if the equities are in favour of any other person deserving of a better protection, then the section does not apply.

In equity, where a man covenants to do an act and he does some other act which may be regarded as a completion of the covenant, equity presumes that the latter act was intended to be in performace of the covenant. Thus, in *Sowden* v. *Sowden*,[1] a husband on marriage, covenanted to pay the trustees the sum of £ 2,000 to be laid out by them in land in the county of D to the uses of the marriage settlement. The husband did not pay the money, but himself purchased lands in the county of D and died intestate. It was held that the lands must be deemed to have been purchased by the husband in *pursuance of his covenant* and so subject to the trusts of the settlement.

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1 *Sowden* v. *Sowden*, (1785) 1 Cox, Eq. Cas. 165, 29 E.R. 1111.

The doctrine of performance proceeds upon the ground that a person is to be presumed to do that which he is bound to do and, if he has done anything, that he has done it in pursuance of his obligations.[1] Section 42 reflects a similar though not identical, principle. According to section 42, where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

The illustration to the section is a case of lease. A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease, subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

38.3. *Two transfers*—This section contemplates the case of two transfers, one conditional and the other absolute. It lays down that where the transferor reserves to himself power to revoke the first conveyance, and, subsequently transfers the same property to another, the latter transfer operates as a cancellation of the first transfer, subject only to fulfilment of the condition upon which revocation was dependent. The object of this section is to validate such transfers and to declare that in such a case the subsequent transfer has the effect of cancelling the former, for, the subsequent transfer being only possible when it is made to take effect in defeasance of the prior transfer, the transfer is deemed to have been thereby revoked by necessary implication[2].

In construing the section, the intent of the statute "is to be expounded against fraud and to suppress fraud and to maintain just dealing[3].

38.4. *History of section* 42—The provisions of the section ultimately owe their origin to an English statute passed in 1584—section 5, 27 Elliz. Ch. 4—later repealed by the statute law Revision Act, 1863[4]. It may be of interest to note that a power to revoke a transfer can, in certain circumstances, be reserved by the transferor, though not in the case of a gift[5].

38.5. *First transfer*—It would appear that the first transfer referred to in section 42 could be a transfer for consideration. In fact, if the first transfer is a gift and is revocable at the will of the donor, then the gift is void under section 126. This has been pointed out by Mulla[6]. It may also be stated that the illustration to the section itself takes the case of lease, which is for consideration.

38.6. *Recommendation for verbal amendment*—While no changes of substance are needed in section 42, it seems to be desirable to improve the

1 (a) *Tubbs* v. *Broadwood*, (1831) 2 Russ & M. 487; 39 E.R. 479;
(b) *Lechmere* v. *Lechmere* (Lady), (1735) Cas. Temp. Talb. 80; 25 E.R. 673.

2. Gour.

3. *Bullock* v. *Thorne*, F. Moo. 615, T.P.A. 63.

4. Gour.

5. Section 126.

6. Mulla (1973), p. 207.

drafting of the latter half of the section. At present, the language employed is—"such transfer operates in favour of such transferee....." It would be better if the words "such transfer" and "such transferee" are replaced by the words "the subsequent transfer" and "the subsequent transferee" respectively.

This would bring this part of the section in harmony with the earlier portion, where the expression "subsequently transfers" is used. It would also indicate that we are speaking of the subsequent transfer, in contrast with "the former transfer" mentioned towards the end of the section. Accordingly, we recommend that section 42 should be revised as under :—

> "42. Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently, transfers the property for consideration to another transferee, *the subsequent* transfer operates in favour of *the subsequent* transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power."

## CHAPTER 39

## *TRANSFER BY UNAUTHORISED PERSON SUBSEQUENTLY ACQUIRED INTEREST*

### SECTION 43

39.1. *Introductory*—An important situation involving a consideration of more than one provision of the Act and requiring a discussion of certain important doctrines is dealt with in section 43. What happens when a person professes to transfer property which he is not, *at the time of transfer*, entitled to transfer, but which be becomes competent to transfer by reason of subsequent events ? Should the law take a strict view and take into account only the facts as they stood at the time of transfer ? Or should it also have regard to later developments ?

39.2. *Section* 43—Equity's choice was for the latter alternative. In the Act, the rule on the subject is to be found in section 43.

> "Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. .
>
> Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

### ILLUSTRATIONS

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

39.3. *Amendment*—The words "fraudulently or" added by the Amending Act, 1929, were intended to improve the sense of the section; since a fraudulent representation cannot fail to be erroneous, and it was so held even before the amendment.

The use of these two expressions points to the fact that it is the position of the innocent transferee that the section has in mind. This brings us to the relevant doctrine of equity.

39.4. *Halroyd* v. *Marshall*—In equity, the famous rule in *Halroyd* v. *Marshall*[1] lays down that the mortgage of non-existent property, though inoperative as a present transfer, operates as an executory agreement which attaches to the property the moment it is acquired, and which, in equity, transfers the beneficial interests to the mortgages when any new act is done by the mortgagor to confirm the mortgage. This subject was closely connected with the evolution of rules of equity relating to assignment. At common law, an assignment of property to be *acquired in the future* was

1 *Halroyd* v. *Marshall*, (1862) 10 House of Lords Cases, 191.

void, but, in equity, such an assignment was treated as an enforceable contract, if made for valuable consideration.[1] In fact, in equity, even the mere expectancy of the heir-at-law of succeeding to the estate of his ancestors or the next of the kin succeeding to the personality of a living person was treated as assignable and this included an interest which a person might take under the will of a living testator.[2] There is an interesting English case[3] in which copyright in songs yet to be written was held to be assignable. The principle was long ago stated by Story[4] in these words :

> "Courts of equity give effect to assignments of interest held in trust; and whether the interests are contingent or executory including so remote an interest as a *spes successionis*, whether they are in real or in personal estate, as well as to assignments of choses in action."

Thus, while at law, to make an assignment valid, the thing which is subject of it must have actual or potential existence at the time of grant or assignment, courts of equality recognised assignment of things which have no present or potential existence. In equity, such an assignment was considered as amounting to a *declaration of trust* and to permit the assignee to make use of the assignors name in order to recover the debt or to reduce the property into possession. This seems to be the explanation of the fact that section 43 makes an exception in regard to intermediate transfers of value without notice.

39.4A. *English law*—Under section 43, the right is declared to exist only as against the transferor and persons claiming under him, e.g., the heir[5]. Thus, where he is deprived of the property in an execution sale, it has been held that the transferee cannot follow up the property in the hands of his auction purchasers[6].

39.5. *Meaning of transfer*—It is to be noticed with reference to section 43 that the expression used is "transfer" and this is wide enough to cover not only a sale but also a mortgage, lease or exchange. Since the section is a kind of 'Estoppel', there is no need why the operations should be confined to sale, and the section does not contain any such restrictive language.

39.6. *Evidence Act*—In the Evidence Act, section 115, the words used are "declaration, act or omission", while in section 43, the words used are "fraudulently or erroneously *represents*". However, it is generally understood that representation, within the meaning of section 43, would include not only an express declaration, but also an act or omission which amounts to an implied representation. In fact, the section is believed to be nothing but a branch of the law of estoppel.

39.7. *Obscurity*—There seems to be a certain amount of obscurity as to the application of section 43 to cases of after acquired property. The controversy becomes acute where the property is not yet in existence. The correct position would seem to be that the section should operate, unless, of course, the transfer of a particular property is prohibited by law on the ground of fundamental public policy.

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1 *Warmatrey* v. *Tanfiend*, (1628) 1 Reports of Chancery 191.

2 Snell, Equity (1966), pages 91, 92.

3 *Performing Right Society* v. *London Theatre of Waristics*, (1924) A.C. 1.

4 Story, Equity Jurisprudence (1919), page 432, paragraph 1040.

5 *Radhey Lal* v. *Mahesh Prasad*, I.L.R. 7 All. 864.

6 *Alukmonee* v. *anee Madhub*, I.L.R. 4 Cal. 677.

An important question to be considered in this context is—where a person has only a hope of succeeding—section 6(a)—should section 43 apply ? The proper view would seem to be that section 43 should apply if what is *professed to be transferred* is present property; this does not nullify section 6(a). Section 6(a) deals with certain kinds of expectations and prohibits a transfer *simpliciter* of such expectations. On the other hand, section 43 deals with representations as to title or right to transfer, made by a transferor who had no such title or right at the time of the transfer. Section 6(a) enacts a rule of substantive law, while section 43 enacts a rule of estoppel. The two provisions operate in different maner. Where the transferee knows as a fact that the transferor does not possess the title which he professess to transfer, then, of course, he cannot be said to have acted on it when taking a transfer. But there is a distinction between a transfer which is professedly one of a mere hope (reversion or expectancy) and a transfer of specific property which, the transferor erroneously represents, he is authorised to transfer though actually he has only the interest of a reversioner therein. The former transfer falls under section 6(a) and hence is void, but there is no reason why the latter transfer should not be given the benefit of section 43.[3]

The correct view is that section 43 applies even to cases of heirs if they profess to transfer the *property itself* and not only the right of succession. Where professedly there is a transfer of a mere hope of succeeding, section 6(a) would apply, but, where an erroneous representation is made by the transferor to the transferee that he is a *full owner* of the property and the property purporting to be transferred is not a mere chance of succession, and the transferee acts upon such erroneous representation, then, if the transferor subsequently happens to acquire an interest while the contract is still subsisting, the previous transfer can, at the option of the transferee, operate on the subsequently acquired interest according to the Allahabad view.[2] To some extent, support for such construction can also be drawn from the illustration (a) to section 43.

*Case law*—The earlier case law on the subject was discussed in a case decided by the Madras High Court[3] and need not be discussed in this Report.

39.8. *Supreme Court Case*—It has been decided by the Supreme Court[4] that where a person transfers property, representing that he has a present interest therein while in fact he has only a *spes successionis*, the transferee is entitled to the benefit of section 43. If he has taken the transfer on the faith of the representation and for consideration. This judgment of the Supreme Court settles the position. In view of the fac tthat a cursory reading of section 6(a) may give a different impression it seems to be desirable to state the true position in section 43 so that the section may be made self-contained. We shall make a recommendation on that point in due course.

Although the section is confined to immovable property, the principle should apply to movable property. The statement of the law in the leading

1 *Shyam Narain* v. *Mangal Prasad*, A.I.R. 1935 All. 244, 246 (Sulaiman C.J. and Rachhpal Singh J.).
2 *Shyam Narain* v. *Mangal Prasad*, A.I.R. 1935 All. 247.
3 *Jamma Masjid* v. *K. Devich*, A.I.R. 1953 Mad. 637.
4 *Jamma Masjib* v. *K. Deviah*, A.I.R. 1962 S.C. 847, 853 paragraph 18.

case of *Halroyd* v. *Marshall*[1] is not confined to real property. This is what Lord Westbury observed in that case—

> "If a vender or mortgagor agrees to sell or mortgage property *real or personal,* of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering to the description in the contract, there is no doubt that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

39.9. *Section* 43—*Recommendation*—For the reasons stated above, it seems to be desirable to add a provision in section 43 clarifying the position as regards the non-applicability of section 6(a). The best course would be to insert a sub-section as follows :—

> "(2) *Where the case falls under this section, it shall not be a defence that the interest which the transferor had at the time of the transfer was of the nature referred to in clause (a) of section* 6."

We recommend that the section should be so revised.

39.10. *Acting on the representation—Recommendation to add*—There is one important ingredient of estoppel, which does not find an express mention in the section. The section does not provide that the transferee seeking the protection of the section must have *acted on the representation*—whether fraudulent or erroneous—made by the transferor. If the transferee knows the truth and is in no way misled by the transferor's representation, what are his equities ? On the one hand, it can be contended that the section operates on the interest acquired subsequently independently of the transferee's having acted on the representation, since the section contains no such restriction. On the other hand, there can, in general, be no estoppel by a false or erroneous statement when the truth as to the matter state dis known to both parties. If so, one should read into the section such a condition to be satisfied by the transferee. Although the point was not in issue before the Supreme Court in the *Jama Masjid case,*[2] the observations in the judgment support the narrower view, namely, that the transferee must have acted on the representation.

In a sense this position is implicit in the expression "represents", because it connotes a corresponding action on the part of the person to whom it was made. If the representation has not had any effect. It should have no significance. That, indeed, comes to be the rationale, underlying those judicial decisions which held that the expression of a non-committal opinion does not bring the equity into being. It appears to be desirable to state the position clearly in the section by adding after the words "for consideration", the words *"and the transferee acts on the representation"*. We recommend accordingly.

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1 *Holroyd* v. *Marshall,* (1862) 10 H.L.C. 191.
2 *Jama Masjid* v. *K. Deviah,* A.I.R. 1962 S.C. 847.

# CHAPTER 40

## *TRANSFERS BY CO-OWNERS*

### SECTION 44

40.1. *Introductory*—Cases of transfers by a person who is not the real owner having been discussed in the preceding section, the Act now proceeds to deal with transfer by a person who, though he has an interest in the property, is only a co-owner. In such a case it becomes necessary to work out the rights of the other co-owners who are not parties to the transfer and also of the transferee who would certainly have an interest in implementing his transfer and exercising the rights of the co-owner which are transferred to him, in so far as such exercise is practicable. We shall refer later to the background of the section and its utility in the field of Hindu law, but it will be appropriate to mention that the section is not confined to an alienation by one of the co-parceners in an undivided Hindu family. At least the first paragraph of the section is wide enough to cover every case of co-ownership. An undivided Hindu family or coparcenary is not the only case governed by the section.

40.2. *Aspect of Partial interest*—Section 44, with the three following sections (45 to 47) sets out the law relating to the transfer of property where the transferor or transferee possesses or obtains *only a partial interest*[1] therein. As the transferee acquires all the right, title, and interest of the transferor conveyed to him, it follows that he may claim joint possession like his predecessor-in-title, but since the presence of a stranger might lead to serious breaches of peace, these sections confer on certain parties, the right to partition. The second paragraph has been inserted in accordance with the judgment of Westropp, C.J., who observed.[2]

> "We also deem it a far safer practice, and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with members of a Hindu family, which may be not only of different caste from his own, but also different in race and religion."

40.3. *Right of purchaser*—A purchaser of a co-parcener's undivided interest in joint Hindu family property is not *entitled to separate possession of what he has purchased.* His only right is to sue for partition of the property and to ask for allotment to him of that which on partition, might be found to fall to the share of the co-parcener whose share he has purchased. His right to possession would date from the period when a specific allotment was made in his favour. The purchaser is not entitled to possession of the interest purchased by him till the partition has been made[3].

40.4. *Section* 44—This principle is put in legal language in section 44. It reads—

> "44. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share

1 Gour.
2 *Balaji* v. *Ganesh*, (1880), I.L.R. 5 Bom. 504.
3 *Sheo Nath* v. *Krishna Kumari* A.I.R. 1973. All. 496.

or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not member of the family nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house".

40.5. *Second paragraph*—The second paragraph to the section did not find place in the Bill of 1879, but was subsequently added by the Select Committee with a view[1] to preventing a stranger from claiming joint possession of a family dwelling house. In cases determined before the Act, it was held that according to the law as administered in Bengal, the purchaser at a Court-sale of the rights of one member, may be entitled to be put into physical possession even of a part of the family house, which could only be obviated by purchase of the right by the other members at the sale, or by a suit for partition.[2] The inconvenience and in inequity of permitting a stranger to intrude himself upon the privacy of a joint Hindu or Mohamedan family residence was manifest, and the second paragraph was accordingly considered necessary.

40.6. *Scope of discussion*—Having regard to the fact that the section deals with a matter affecting the mode of living of almost every inhabitant of the country, we propose to deal with it at length. After considering a few general propositions as to its significance and scope, we shall discuss the connected provision in section 4 of the Partition Act, 1893. We shall then revert to a more detailed treatment of certain specific questions arising out of a few important ingredients of section 44 and recommend amendments that will be intended mainly to make the section self-contained in its expression and more helpful to lawyers as well as to laymen.

40.7. *Significance*—The section provides for partition as a means of making the possessory right available. This is its significance.

40.8. *Scope*—The section applies to all kinds of transferees including mortgages and lessees. This shows its wide scope.

40.9. The principle of the section can be applied to involuntary sales as a rule of equity, justice and good conscience[3].

Hence, a suit by an auction-purchaser for joint possession against the other co-parceners in the family dwelling house would not lie.

40.10. *Hindu law—Pre-1929 position not affected*—The Act—and therefore section 44—now applies to Hindus. Of course, the fact that by the amendment of 1929, the section is made applicable to Hindus and Buddhists does not mean that the right of an alienee to institute a suit for partition to work out his purchase is enlarged, or that the principles pre-

1 Gour.

2 *Ramtonoo* v. *Gobindo*, (1857) S.D.A. 1585; *Koonwar Bijoy* v. *Shama Soonduree*, 2 W.R. 30 (Mis) F.B.; *Eshan Chunder* v. *Nund Coomar*, 8 W.R. 239; cited in Gour.

3 *Jagatbandhu* v. *Ishwar Chandra*, A.I.R. 1948 Cal. 61.

viously evolved by the courts in this context are effected.[1] The section does not override the provisions of Hindu law.[2] At the same time, it is to be noted that in regard to those areas where a right of alienation by a co-parcener was recognised, the section is substantially in conformity with the previous law.

40.11. *Evolution of Hindu law*—Long before the Act was passed, courts in India had laid down that in certain parts of India, Hindu law recognised the rights of a co-parcener even where he was not the father or manager, to alienate his interest in the joint family property, at least by way of sale or mortgage.

As early as 1813, the right was recognised by Sir Thomas Strange.[3] The right to partition at the instance of the alienee began slowly to be recognised and was settled by 1863, both in Madras[4] and in Bombay.[5] In this connection, the form of decree granted by the Privy Council (Sir James Colville) in *Deen Dyal*[6] is of interest. Though it was a case of the rights of an execution purchaser, it was expressly observed that judicial decisions had affirmed the general right of one member of a joint family to dispose of his share in his joint estate by voluntary conveyance without the concurrence of his co-parceners—the reference was to the Madras and Bombay cases. A declaration was granted to the purchaser at the execution sale that he had acquired the share and interest of the judgment-debtor in the property and that he was entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition.

One cannot fail to notice the substantial similiarity between this declaration and the provisions of section 44.

40.12. *Landmark case in Bombay*—The year 1874 saw a landmark in the law—a decision of West and Nanabhai Haridas JJ.[7] This was a case of mortgage by two members of an undivided Hindu family. In execution of the mortgage decree, the property was purchased by the plaintiff, who then instituted a suit against the third member of the undivided family for possession of the extent which he had purchased in the court sale. It was held that the right of the purchaser was to sue for partition and not for recovery of possession. But it was also observed that while, in an undivided family, the share of a person in the estate as a whole could be ascertained only by taking a general account and making a distribution in accordance with its results, yet, in making that distribution it would only be equitable that the share purchased by the auction purchasers be so made up as to embrace wholly or so far as possible, what the auction purchaser has purchased as his. Similar principles were laid down by the Privy Council in 1879[8].

1 *Pernakayam* v. *Shiv Ram*, A.I.R. 1952 Mad. 419, 434, para. 28.
2 *Laxminarasamma* v. *Rangaviangakamma*, A.I.R. 1964, Orissa 43, 45.
3 *Ramaswami* v. *Sehsadiri*, (1827) Strangers Notes of Cases, Vol. 2, 234.
4 *Veeraswamy* v. *Aayaswamy*, (1863) 1 Madras High Court Reports 471.
5 *Damodar Vithal* v. *Damodar Hari*, (1363) 1 Bombay High Court Reports 182.
6 *Deen Dyal* v. *Jagdip Narain Singh*, (1876—1877) I.L.R. 3 Cal. 198 (C.B.).
7 *Pandurang* v. *Bhaskar*, (1874) 11 Bombay High Court Reports 72.
8 *Suraj Bansi* v. *Shiv Prasad*, (1879) I.L.R. 5 Cal. 148 (P.C.).

40.12. *Madras view*—The subject received an illuminating treatment in a judgment of Bhashyam Ayyangar J. in Madras.[1] It was there stated to be settled law that the purchaser can enforce the sale by a partition of the entire family property and if, in such a partition, the property sold can, with due regard to the interests of the other shares and to the debts due by the family and to an equitable allotment of the various items of family property, be wholly allotted to the vendors, the purchaser will be entitled to the whole property which the vendor professed to convey to him. Of course, it would not be strictly accurate to describe the interest of a co-parcener in an undivided family as his "share". But this expression is ordinarily used as meaning the interest of a co-parcener in the undivided property.[2]

40.13. *Position in England before* 1926—In England, before 1926, it was possible to hold land under four types of "co-ownership", namely,

(a) joint tenancy;
(b) tenancy in common;
(c) co-parcenary;
(d) tenancy by entireties.

The terms "co-ownership" or "concurrent interest" would each be used to include all the four forms of co-ownership.[3]

40.14. *Joint tenancy in England*—As regards joint tenancies, joint tenants, as between themselves, can have separate rights, but as against everyone else, they have no separte right[4].

The right of survivorship and the "four unities"—unity of possession, unity of interest, unity of title and unity of time—along with survivorship, were the principal features of a joint tenancy.

In a tenancy in common, the tenant's interests could arithmetically be separate, though the property has not yet been divided among them. Then, there is no right of survivorship and of the four unities predicated of a joint tenancy, only the unity of possession is essential in a common tenancy[6].

40.15. *Co-parcenary in England*—Co-parcenary, in England, arose mainly when there was the death of a person interstate before 1926, and his real property descended to two or more persons who were not males. They took the land as "parceners" or "co-parceners". For example, where two or more females inherited the land of an interstate, co-parcenary would arise. *In* the theory of law, they constituted a single heir[6]. Each co-parcener held a distinct but undivided share, which might be equal or unequal to the size of the share of others. The co-parcenary could come to an end, *inter alia*, by partition or by alienation. Where the co-parcener alienated his share, it was forthwith held under a tenancy in common, the other tenants remaining co-parceners *inter-se*. At common law, the remaining co-parceners could enforce a partition, but the purchaser, being a tenant in common, could not[7].

1 *Salgiri Ramaiya* v. *Venkataramaiya*, (1902) I.L.R. 25 Mad. 690 (F.B.).
2 *Peranakayam* v. *Sheo Ram*, A.I.R. 1952 Mad. 419, 432, para. 25.
3 Magarry and Wade, Real Property (1966), page 408.
4 Megary and Wade Real Property (1966), page 408.
5 Megary and Wade Real Property (1966) page 408.
6 Megary and Wade, Real Property (1966), page 441.
7 Megary and Wade, Real Property (1966), page 443, and footnote 79.

40.16. *Position in England after* 1925—After 1925, by reason of the Law of Property Act, lands which would have previously been held in co-parcenary or tenancy in common or joint tenancy—i.e., every case of undivided share—would now be held subject to a statutory trust for sale[1]. The legislation of 1925 further enacted that an undivided share in land shall not be created except behind a trust for sale. It also abolished tenancy by entirety, previously existing in regard to husband and wife.

Of course, the "statutory trustees" are not necessarily bound to sell the property because, instead of selling it, they can partition the land among the beneficiaries entitled[2]. Disputes as to the appropriate date of sale are to referred to the court which hears the application[3]. It is only with the consent of all the trustees that the sale can be postponed.

40.17. *Section* 44, *second paragraph—principle*—To revert to section 44, the principle of the second paragraph can be deduced from the judgment of Westropp C.J. in a Bombay case[4].

> "We deem it a far safe practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only of a different caste from his own, but also different in race and religion."

40.18. *Second paragraph—principle*—The principle of the second paragraph is that a stranger purchaser cannot have joint possession of the family dwelling-house. While this paragraph takes away the right of a stranger purchaser of a share of a dwelling-house belonging to an undivided family to ask for joint possession along with other co-owners, but, at the same time, it does create a right in favour of the other co-owners of the dwelling house who are affected by the sale, to ask for an injunction restraining the stranger purchaser from exercising any act of joint possession with them in respect of the joint family residence. The stranger purchaser has certainly a title to the share of the dwelling-house purchased by him; but his remedy lies in a suit for partition and he can possess his own share by instituting a suit for partition unless, of course, he is pre-empted under section 4 of the Partition Act[5].

40.19. *"Co-owner"—meaning of*—Reverting to the section, the expression "co-owner" in section 44 is not defined, but it is wide enough to cover almost every case where more than one person is interested in the ownership and the interests are of a concurrent nature and of a similar nature, *even if not arithmetically equal.* The principle of the section is that of substitution, but on certain conditions. The transferee steps into the shoes of the transferor who is a co-owner, but with certain restrictions.

40.20. *Dwelling house*—Some of the important expressions may now be dealt with. The word "dwelling house" does not mean a dwelling

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1 Sections 1—6 and sections 34—36, Law of Property Act, 1925, rea dwith Schedule IV, para 1(10).

2 Section 37, Law of Property Act, 1925.

3 Section 30, Law of Property Act, 1925.

4 *Balaji* v. *Ganesh*, (1881) I.L.R. 5 om. 499, 504 (Westropp C.J.).

5 *Alekha* v. *Jagabandhu*, A.I.R. 1971 Orissa 127.

house occupied by the undivided family which owns it; the words "belonging to an undivided family" do not mean that the house must be occupied temporarily or permanently by the undivided family or that they be joint in mess[1].

40.21. *Undivided family*—In section 44, "undivided" family includes a group of persons related in blood who live in one house or under one head or management. This is the interpretation placed on the word "family" by Ashutosh Mookerjee, J. with reference to section 4 of the Partition Act,[2] and it should apply to section 44 also.

40.22. *Belonging to undvidide family*—It is also well established that the expression "undivided family" merely means a family which is not divided *qua the dwelling house*.[3] It is not confined to a Hindu joint family or a joint family The essence of the matter is that the house itself should be undivided amongst the members of the family who are its owners.[4]

Chakravarti C. J.'s observations are of interest.[5]—

> "But assuming that the house concerned must be a residential house of the members of the family owning it, I am altogether unable to agree that any suspension of occupation or, for the matter of that, the absence of the owners of the house therefrom or an occupation or terminable occupation by tenants, can have the effect of making the house cease to be a dwelling-house. As is well known, the object of both section 4(1), Partition Act and section 44, Transfer of Property Act, is to keep off strangers who may purchase the undivided share of some co-owner of an immovable property and so far as dwelling houses are concerned, to make it possible for the co-sharer, who has not sold his share, to buy up the stranger purchaser. The whole object therefore is to provide for peaceable privacy. The need for making such provision cannot possibly come to an end, if, by reason of special circumstance the owners of the house find it necessary to let it out to tenants for a time or to allow it to be occupied by a licensee. It has already been held in cases, too numerous to mention, that in order that an application under section 4(1), Partition Act, may lie, it is not necessary that the co-sharer owners should be in constant residence at the house. From that position to the position where the house has been let out to tenants, is but a short step forward."

40.23. *Undivided family*—An undivided family means simply a family not divided *qua* the dwelling-house—in other words, a family which owns a dwelling-house and has not divided it. It does not mean a Hindu joint family or even joint family. The members need not be joint in mess. The essence of the matter is that the house itself should be undivided amongst the members who are its owners.[6]

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1 *Subramanya* v. *Sh. Ghannu*, A.I.R. 1935 Mad. 628.
2 *Khirode Chandra* v. *Saroda Prosad*, (1910) 7 Indian Cases 436, cited in *Paluni Devi* v. *Rathi Mallick*, A.I.R. 1965 Orissa 111.
3 *Bhim Singh* v. *Ratnakar*, A.I.R. 1971 Orissa 198.
4 *Boto Krishna* v. *Akhoy Kumar*, A.I.R. 1950 Cal. 111.
5 *Dulal Chandra* v. *Gosthabehari Mitra*, A.I.R. 1953 Cal. 259, 260, para 6 (Chakravarti C.J. and G. N. Das, J.).
6 *Bheim Singh* v. *Ratnakar*, A.I.R. 1971 Orissa 198 (R. N. Misra).

40.24. *Section 4 analogous to section 44, Transfer of Property Act*—Section 4 of the Partition Act, 1893, is also based on the same principle as forms the basis of section 44, Transfer of Property Act. As the two provisions are supplementary to each other, courts have always tried to ensure that they are construed in harmony with each other.[1]

40.25. *Section 4, Partition Act*—Section 4 of the partition Act, 1893, has been described as a logical sequel or corollary to section 44 and makes certain provisions relevant to the topic under consideration. The relevant portion of section 4(1) is quoted below :

> "4. (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such share-holder and may give all necessary and proper directions in that behalf."

40.26. *Section 4, Partition Act,* 1893—Section 44 having provided that the stranger purchaser is not entitled to joint possession or other common or part enjoyment, section 4 of the Partition Act takes the next step, and enables the members of the family to buy out the outsider. It can, therefore, be said, that section 4 takes up the law from the point at which section 44 of the Transfer of Property Act has left it.

40.27. *Section 4-Contitutional validity of*—The constitutional validity of section 4 has been upheld in a Madras case,[2] where the court seems to have rejected the argument that it was "illegal discrimination" to enable the member of the family to buy out the transferee, while denying that right to the transferee.

40.28. *Section 4—Interpretation of*—The various expressions used in section 4, such as "dwelling house", "undivided family", and "member of such family", have come up for interpretation in several decisions of the various High Courts and the courts have placed a wide and liberal construction on these expressions, keeping in view the object underlying section 4, namely, to provide for peaceable enjoyment of the property and to secure privacy.[3] For example, it has been held, that a "dwelling house" does not cease to be so merely because of a temporary suspension of occupation or absence of the co-sharers, provided the members are likely to return to its occupation.[4] Constant residence of the members is not necessary.[5] The

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1 *Cf. Boto Krishna* v. *Akhoy Kumar,* A.I.R. 1950 Cal. 111 113, para 11 (R. P. Mookerjee and P. N. Mitra, JJ.).

2 *Krishna Pillai* v. *Perukutty Ammal,* A.I.R. 1952 Mad. 33, 34, para 6 (panchapakesa Ayyar J.).

3 *Dulal Chandra* v. *Gosthabehari,* A.I.R. 1953 Cal. 259 (Chakravarti C.J. and G. N. Das, J.).

4 *Kalipada* v. *Tulsidas,* A.I.R. 1960 Cal. 467.

5 *Sushila* v. *J. B. Baral,* A.I.R. 1956 Orissa 56 (Case of Christians) (reviews case-law).

term "house" has also been liberally interpreted, so as to include the appurtenant lands or premises which are necessary for its proper occupation enjoyment.[1] The word "family" has also been given a liberal interpretation.[2]

40.29. *Undivided family*—As regards the requirement connected by the word "undivided" in section 4, it has been held,[3-5] that it does not mean a joint Hindu family, or even any joint family, but simply connotes that there is a family the members whereof have not divided the *property*.[6] The emphasis is on the undivided *character of the house*.[7] Accordingly, a Muslim widow who, though re-married long ago, continued to live with the second husband in the family house, has been held entitled to the benefit of the section.[8] The fact that all other property has been partitioned, would also not take away the operation of the section, if the family is still undivided in relation to the *dwelling house*.

The term "family" has also been widely construed, so as to cover cases of Hindu sisters[9] or Muslim sisters[10] living together.

40.30. *Summary of position concerning section* 4, *Partition Act*—A good summary of the effect of the various decisions regarding section 4 is contained in a Calcutta decision as follows[11].

> "These decisions lay down that the word "family" as used in the section ought to be given a liberal and comprehensive meaning and it includes a group of persons related in blood, who live in one house under one head or management; that is "not restricted to a body of persons who can trace their descent from a common ancestor; but it is not necessary, for the members to constitute an undivided family, that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess; that it is sufficient if the members of the dwelling house which they own; that it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play : and that the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live."

40.31. *Injunction*—To revert to section 44 of the Transfer of Property Act, there seems to be some misconception on the question whether a person who is a stranger who purchases a share in a joint property with reference to section 44, 2nd paragraph, can be restrained by injunction

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1 *Nilkamal* v. *Kamakshy Charan*, A.I.R. 1928 Cal. 539, 542.
2 *Khirode Chandra* v. *Saroda Prasad*, (1910) 12 Cal. L.J. 525; 7 I.C. 436 (Mookerjee, J.).
3 *Babulal* v. *Hulla Mollah*, A.I.R. 1938 Pat. 13.
4 *Bai Fatima* v. *Gulamnabi*, A.I.R. 1936 Bom. 197.
5 *Mt. Gangi* v. *Atma Ram*, A.I.R. 1936 Lah. 291.
6 *Sultan Begum* v. *Debi Prasad*, (1908) I.L.R. 30 All. 324 (F.B.).
7 *Boto Krishna* v. *Akhoy Kumar*, A.I.R. 1950 Cal. 111.
8 *Shafian Begum* v. *Mt. Kifiata*, A.I.R. 1939 All. 640 (Collister J.).
9 *Krishna Pillai* v. *Parukutty*, A.I.R. 1952 Mad. 33.
10 *Aley Husson* v. *Toorab Hussain*, A.I.R. 1958 Pat. 232 (Ramaswami C.J. and Prasad J.).
11 *Nilkamal* v. *Kamakshya Charan*, A.I.R. 1928 Cal. 539, 541 (M. N. Mukherji, J.).

from taking possession. There is a Calcutta decision[1] to the effect that since the provisions of section 44 are of a negative nature, no positive right is created in favour of the members of the family and such a threat by the stranger purchaser is not in the nature of a tort. On the other hand, it has been held by the Orissa High Court[2] to the effect that the strange purchasers in such circumstances are liable to be restrained from claiming possession and even a decree for ejectment is sustainable. With great respect to the judgment of the Calcutta High Court, it appears to us that the section, by framing the provision in negative terms, does not necessarily imply that the rights of the stranger purchaser are enlarged in other respects. Since the object of the section is to keep off strangers so far as dwelling houses are concerned,[3] it is a reasonable view to take that the injunction of the nature quoted above could be so issued provided the case is otherwise a fit one for the grant of injunction. In fact, we find another judgment of the same High Court taking a different view.[4]

40.32. *Recommendation to revise section* 44—Having considered the scope of the important expressions as used in section 44 of the Act and section 4 of the Partition Act, 1893, it appears to us that it is desirable to codify in the section the important propositions laid down judicially. This is desirable in view of the practical importance of the section and in order to avoid future controversies as far as possible, as well as to make the section self-contained. It is not, of course, necessary to encumber the section with every small point that has been decided in the courts, but the following appear to be worthy of codification—

(a) meaning of the expression "undivided family" in the second paragraph,[5]

(b) meaning of the words "belonging to"—there is no requirement that the house must be occupied,[6]

(c) meaning of "house" as including grounds and structures appurtenant thereto,[7]

(d) permissibility of remedy of injunction—express provision[8] on the subject.

We recommend that the law on the above points should be codified on the basis of the position as discussed above in the relevant paragraphs.[9]

1 *Jogendra Nath* v. *Adhar Chandra*, A.I.R. 1951 Cal. 412, 413 para 14 (R. P. Mookerjee, J.).

2 *Bhim Singh* v. *Ratnakar Singh*, A.I.R. 1971 Orissa, 198, 202, para 23 (R. N Misra, J.).

3 *Dulal Chandra Chatterjee* v. *Gosthabehari Mitra*, A.I.R. 1953 Cal. 259.

4 *Lal Behari* v. *Gourhari*, A.I.R. 1958 Cal. 253 (Lahiri, J.).

5 Para 40.21, *supra*.

6 Para 40.22, *supra*.

7 Para 40.28, *supra*.

8 Para 40.31, *supra*.

9 See the preceding footnotes.

## CHAPTER 41

### *TRANSFERS TO MORE THAN ONE PERSON*

#### SECTION 45

41.1. *Introductory*—The arithmetical adjustment of interests in property becomes necessary where property is transferred to two or more persons and there is nothing in the contract between the parties to indicate what is the numerical extent of the share of each transferee in the property. Not the entire topic, but a few segments of it, are dealt with in section 45. The section is so framed that at the first sight, the situations dealt with in the section are not very clear. However, by way of introduction, it may be stated that where there is a joint transfer for consideration—joint in the sense that there is more than one transferee—the section determines the arithmetical share of each transferee by having regard to the consideration paid by each. Such consideration might have been paid out of a common fund, or it may have been paid out of separate funds belonging to the various transferees. The broad principle in those cases is that the amount of consideration paid by each measures the interest of each in the property bought.[1] If the consideration is paid from a common fund, then their interests are measured, in the absence of a contract to the contrary, with reference to the interests to which they were respectively *entitled in the fund.* If the consideration is paid out of separate funds belonging to them respectively, then, in the absence of a contract to the contrary, their interests are measured with reference to or in proportion to the *shares of the consideration* which they respectively advance. In other words, the fraction of the total amount of the consideration, as borne by each represents the fraction showing his interest in the property purchase therewith. In this sense, the section adopts the principle of substitution.

Cases may, however, arise where evidence as to the consideration paid by them is absent. For this situation the rule enacted in the section is that such persons—that is, the transferees—are presumed to be equally interested in the property. As every student of equity knows, equity leans towards equality and the rule in question is in consonance with this doctrine of equity, apart from the fact that it is the only just and practicable solution which can be adopted where the cirmcustances rule out evidence.

41.2. *Scope for improvement by way of addition and structural changes*—One can hardly quarrel with the substance of the section so far as it goes. But reported cases show that there are a few points on which we can usefully add to the section. It would also appear that there is a structural defect in the framework of the section, in so far as it does not deal with the two situations in distinct paragraphs, so that the reader does not at the first sight easily get the sense of the section. We shall make our recommendations on both these aspects in due course.

41.3. *Section* 45—This is the text of the present section—

"45. Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the

[1] *Arakal* v. *Domungoinas,* (1911) I.L.R. 34 Mad. 80.

contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they are respectively entitled in the fund and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advance.

> "In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advance, such persons shall be presumed to be equally interested in the property."

41.4. *Scope*—A similar rule prevails for determining partners, mutual relations. The principle of section 45 applies to involuntary sales also.[1]

41.4A. *Nomenclature*—The section, it has been stated,[2] does well in sailing clear of the corresponding English nomenclature, and thus avoiding the technical and sometimes embarrassing distinctions drawn in that law between a joint tenant and a tenant in common. In India, where proprietary rights to property are recognised, to designate a co-owner as a joint-tenant, would have been singularly inapt and inaccurate, and yet such terms of English feudalism are often used in discussions on Indian law as if they had been part and parcel of Indian jurisprudence.

41.5. *Position in England and India*—The incidents of the law of joint tenancy have but limited application to the Indian co-sharer. In England, a joint contract for purchase by two persons with equal payments, creates a joint tenancy, which therefore carries with it the right of survivorship.[3] But it is by no means necessarily so in India.[4] Even in England, a tenancy-in-common is presumed if there are circumstances showing that the right of survivorship was not intended to be preserved, or if the proportions of the contribution are not equal or the parties have been dealing with the estate as tenants-in-common.[5]

41.6. *Rights of co-owners*—As to the rights and liabilities of co-owners, it may be generally presumed that as regards the possession and enjoyment of the quantum of interest, co-owners stand in the relation of partners to one another, and therefore any advantage secured by one[6] by means of any dealings within the scope of the business,[7] e.g. the renewal of a lease,[8] or an abatement of incumbrances charged on the property,[9] or a secret bonus from the vendor for effecting the sale[10] enures to the benefit of the others. On the other hand, one co-owner cannot infringe the right

1 *Reazaddi* v. *Yakub*, A.I.R. 1941 Cal. 416.
2 Gour.
3 *Aveling* v. *Knipe*, 19 Ves. 441; *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291; *Rigden* v. *Valliar*, 2 Ves. 253.
4 *Cf. Jogeswar* v. *Ramchandra*, I.L.R. 23 Cal. 670 (P.C.).
5 *Harrison* v. *Barton*, 1 John & H. 287;
*Bigden* v. *Valliar*, 2 Ves. 258.
6 *Somerville* v. *Mackay*, 16 Ves. 382.
7 *Dean* v. *McDowell*, 8 Ch. D. 345, 351.
8 *Featherstonchough* v. *Fenwick* 17 Ves. 298;
*Clegg* v. *Fishwick*, 1 M. & G. 294.
9 *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7 Dart., p. 1051
10 *Beck* v. *Kantorowick*, 3 K. & J. 230.

of the other by either taking exclusive possession of the property or altering its condition materially, without his permission.[1] He cannot exclude the other co-shares from equal enjoyment.[2] In any of these cases he can be restrained by an injunction,[3] or the aggrieved party may obtain redress by a suit for partition,[4] or for compensation.[5-6] Relief by way of an injunction being discretionary, the Privy Council[7] has held that where no specific rule exists, the courts are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restraint him from proceeding with his work, or to allow any shareholder to appropriate to himself the fruits of the other's labour and capital.

41.7. *Second paragraph*—The second paragraph of section 45 is a rule of construction based upon the principle that in the absence of evidence to the contrary, which the party alleging inequality must adduce,[8] all co-sharers are to be deemed to be equally interested in the property jointly acquired by them. otherwise, their shares will be proportionate to the consideration paid by each, or in the case of the consideration being paid out of a joint fund, to the interests to which the co-sharers were respectively entitled. The section does not declare that in such a case, the co-sharers would become joint-tenants or only tenants-in-common without the right of survivorship. The section defines only the quantum, and not the quality, of the interest of joint-transferees.[9]

41.8. *Nature of interest not dealt with*—Section 45 thus deals only with the quantum of interest, and not with the mode of enjoyment or nature of interest. Whether the transferees take as "tenants-in-common" or "joint tenants", is not a point specifically dealt with in the section. Our use of these expressions should not be taken as implying that the use of these expressions should be perpetuated. They have come into vogue as convenient starting, points for discussion—pegs on which to hang the bases of classification. The point to be made is that if, in theory, the mode of enjoyment and other rights of co-owenrs could be of more than one species, then the section is non-committed about that. Since the section is silent, controversy arose in the past as to whether the transferees should be regarded as joint tenants or an tenants-in-common. We need not elaborate again the meaning of these two expressions—a matter which we have dealt with while considering section 44.[10]

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1 *Lala Bishambhar Lal* v. *Rajaram*, 3 B.L.R. (App) 67;
*Nocury Lal* v. *Bindabun*, I.L.R. 8 Cal. 708.

2 *Shadi* v. *Anup Singh*, I.L.R. 12 All. 436 (F.B.).

3 *Rajendrolal* v. *Shama Charan*, I.L.R., 5 Cal. 188;
*Holloway* v. *Wahid Ali*, 12 B.L.R. 191.

4 *Parasram* v. *Sheriff*, I.L.R. 9 All. 661;
*Shadi* v. *Anup Singh*, I.L.R. 12 All. 436.

5 *Watson & Co.* v. *Ramchand*, I.L.R. 18 Cal. 10 (P.C.),
overruling *Ramchand* v. *Watson & Co.* I.L.R. 15 Cal. 15 Cal. 214.

6 Caselaw taken from Gour.

7 *Watson & Co.* v. *Ramchand*, I.L.R. 18 Cal. 10. 22

8 *Jadabram* v. *Bulloram Dey*, I.L.R. 26 Cal. 281. 282.

9 *Gobind Prasad* v. *Inayat Khan*, I.L.R. 27 All. 310

10 See Chapter 40, *supra*.

But it is necessary to state here that notwithstanding repeated pronouncements from the highest Court, this obscurity does persist. The reported cases—some of them not very old—show this.[1] Our law does not, as a rule, favour joint-tenancy.[2] In this position, it is hardly proper that such important points should be left to implication. There may be cases—e.g. transfers to members of a joint Hindu family—where there may be room for application of some of the incidents of joint-tenancy. But, by and large, there is no room for the application of the technical concept of joint-tenancy in India. We shall make an appropriate recommendation on this point in due course. At this stage, a few theoretical matters relevant to the concept may be usefully dealt with.

41.9. *Joint-tenancy not favoured in equity*—Unlike the common law, equity did not favour joint tenancy,[3] for equity often did not follow the law where it was merely feudal in character, and equity in this case was more concerned to achieve fairness than to simplify the tasks of conveyancers. Equity therefore preferred the certainty and equality of a tenancy in common to the chance of "all or nothing" which arose from the right of survivorship.[4] "Equity leans against joint tenancy". This maxim meant that a tenancy in common would exist in equity not only in those cases where it would have existed at law, but also in certain other cases where an intention to create a tenancy in common ought to be presumed. There were three such special cases, in all of which persons who were joint tenants at law were compelled by equity to hold the legal estate upon trust for themseleves as equitable tenants in common. We are concerned with one of them—purchase money provided in unequal shares.

41.10. *Purchase-money provided in unequal shares*—If two or more persons together purchased property and provided the money in unequal shares, the purchasers were presumed to take beneficially as tenants in common in shares proportionate to the sums advanced.[5] This, if A found one-third and B two-thirds of the price, they were presumed to be equitable tenants in common as to one-third and two thirds respectively. If, on the other hand, the purchasers provided the money in equal shares, they were presumed joint tenants. This distinction has been criticised,[6] but it has long been accepted as sound.[7] The presumptions could be rebutted by evidence of circumstances showing that those providing the purchase-money equally intended to *take as tenants in common*,[8] or *vice versa*.[9]

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1 E.g. (a) *Mahomed Jusab* v. *Fatimabai*, A.I.R. 1948 Bom. 53;
(b) *Venkayya* v. *Subbarao*, A.I.R. 1957 A.P. 619.

2 *Venkatakrishna* v. *Satyavathi*, A.I.R. 1968 S.C. 751.

3 *Gould* v. *Kemp*, (1834), 2 My. & K. 304, 309.

4 "Survivorship is looked upon as odious in equity";
*R.* v. *Williams*, (1735) Bunb. 342, 343, per cur;
and see *Re Wooley*, (1903) 2 Ch. 206, 211.

5 *Lake* v. *Gibson*, (1729) 1 Eq. Ca. Abr. 290, 291;
*Robinson* v. (1858) 4 K. & J. 505, 510;
*Bull* v. *Bull*, (1955) 1 Q.B. 234.

6 *Jackson* v. *Jackson*, (1804) 9 Ves. 591, 604n.

7 See Lewin 131.

8 (a) *Edwards* v. *Fashion*, (1712) Prec. Ch. 332;
(b) *Ayeling* v. *Knipe*, (1815) 19 Ves. 441, 444;

9 *Harris* v. *Fergusson*, (1848) 16 Sim. 308, as explained in *Robinson* v. *Preston*, (1858) 4 K. & J. 505, 516 (*initial joint tendency held to extend to addition to it made with purchase-money provided unequally*); *Garrick* v. *Taylor*, (1860) 29 Beav. 79.

Further, the principle of proportionate division does not always apply as between husband and wife[1] (as distinct from a man cohabiting with his mistress),[2] for, in such cases, not only statute gives the court a wide discretion[3] but also courts have adopted a different approach.[4]

41.11. *Quantum of interest "Gifts"*—To revert to section 45, the section as it stands at present, is confined to transfers for consideration, and does not lay down any rule for determining the quantum of interest in cases where there is a gift of property. The question then requires to be considered is, whether such a provision should be inserted. While the first paragraph of the section obviously cannot be extended to gifts—since it is based on consideration,—the provision in the second paragraph which is based on the well-known maxim of equity, appears to be of great practical utility.

41.12. Where property is gifted to A and B without specifying the shares which they are to hold, that is to say, without delimiting the quantum of their interest, the question naturally arises how such quantum is to be determined.

41.13. *Sections* 106-107, *Succession Act*—In the Indian Succession Act,[5] certain rules are laid down on the subject and it is sometimes taken for granted that these Rules lean in favour of joint tenancy. Sections 106-107, Succession Act, are in these terms :—

> "106. If a legacy is given to two persons *jointly*, and one of them dies before the testator, the other legatee takes the whole."

*ILLUSTRATION*

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

(This section applies also to Hindus etc.)

Section 106 deals with a bequest to persons as joint-tenants; section 107 deals with a bequest to persons as tenants-in-common.

Section 107 reads—

> "107. If a legacy is given to legatees in words *which show that the testator intended to give them distinct shares of it*, then if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.
>
> *Illustration*
>
> A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have and if A had survived the testator."

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1 *Rimmer* v. *Rimmer*, (1953) 1 Q. B. 63;
*Appleton* v. *Appleton*, (1965) 1 W.L.R. 25.

2 *Diwell* v. *Farnes*, (1959) 1 W.L.R. 624.

3 Married Women's Property Act, 1882, Section 17.

4 Para 41.17, *infra*.

5 Sections 106 and 107, Indian Succession Act, 1925, *infra*.

This section also applies to Hindus etc.

The principle is that as equity leans against joint tenancy and favours a tenancy-in-common, any words which in the slightest degree indicate the testator's intention to give distinct shares will create a tenancy-in-common.

41.14. *Extension of section* 106, *Succession Act*—It has been held by the Andhra High Court that even where section 106 is, in terms, inapplicable, e.g., where one of the joint donees *dies after the testator,* the rule underlying it could be made use of in construing wills in proper cases.[1] But unless there is an intention expressed to the contrary, the sons, taking the self-acquired property of their Hindu father under a will or gift by him, take it as tenants-in-common, and not as joint tenants,[2], according to the Patna High Court.

41.15. *View that sections lean in favour of joint tenancy criticised*—We are not sure if the view sometimes taken that these sections lean in favour of joint tenancy,[3] is entirely accurate. It should be noted that section 106 uses the word "jointly", which makes all the difference. We are concerned with a deed of gift where the quantum of interest of each donee *is not specified.* It stands to reason that in such cases there should be a presumption that the intention was to benefit both the donees equally.

Since we are concerned with transfers without consideration, the test adopted in the first paragraph of section 45, namely, the source of the purchase money, would be of no use, and in the general run of cases, there would not be available any other test indicating the positive intention. Therefore, if some rule, constituting a provision in the nature of a presumption to start with, could be inserted, its practical utility can hardly be contested.

41.16. *Equality is equity*—In equity, a maxim of general use is, that equality is equity; or, as it is sometimes expressed, "equity delighteth in equality". This maxim is variously applied; as, for example, to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of the land; and especially to cases of the marshalling and the distribution of equitable assets, which were applied in payment of debts proportionally, without reference to their dignity, or priority of right at law, except as regards Crown debts.[4]

41.17. *Husband and wife*—In this connection it may not be inappropriate to refer to a few English decisions relating to husband and wife where the doctrine of equity that "equity delighteth in equality" was, in substance, applied. Some of these cases were cases of purchases and not of gifts, but what is relevant to our purpose is the judicial attitude favouring the application of the doctrine of equality where the facts, as a whole, permit of its application.

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1 *Surareddy* v. *Venkata Subbareddi*, A.I.R. 1960 AP. 368.

2 *Srimati Tewary* v. *Ramsurat Devi*, A.I.R. 1959 Pat. 116.

3 *Arakal Joseph* v. *Domingo Imas*, (1910) I.L.R. 34 Mad. 80 (Case on old Act).

4 Story, Equity Jurisprudence (1919).

Thus, in *Rimmer* v. *Rimmer*,[1] where it was not possible fairly to assess the separate beneficial interest of the husband and wife by a reference to the contributions which they had made towards the purchase of the house, and where in all the circumstances the proper and equitable course was to divide the proceeds of sale between them in equal shares, Evershed M. R. and Denning and Romer L.JJ. applied this doctrine. Even though the husband and wife contributed to the cost of the house in varying amounts, Romer L.J. observed that cases between husband wife ought not to be governed by the same strict considerations as are commonly applied to the ascertainment of the respective rights of strangers, when each of them contributes to the purchase price of the property.

41.18. *Need for tentative provision*—Of course,, we are not concerned with the precise situation in issue in *Rimmer* v. *Rimmer*, but the point to be made is that where there is absolutely no evidence of a contrary intention, the law should have a tentative provision at least in the case of gifts, whether such gifts be in favour of a married couple or otherwise. The case of married couple and disputes between the parties to the marriage may in the future social conditions even in this country be more frequent. Not only can such disputes arise when the marriage comes to end, but also they may arise where one of the parties dies and the question arises of the respective rights of the survivor and the heir of the deceased.

41.19. *Property rights-husband and wife*—Questions often arise between husband and wife as to the ownership of property. Property rights, of course, have to be ascertained as at the time of purchase of transfer; the rights so ascertained will not be altered by subsequent events, unless there is an agreement to alter it.[2] In the first place, the beneficial ownership of the property in question must depend on the agreement of the parties determined at the time of acquisition.[3] If the property in question is land, ordinarily there must be some lease or conveyance which shows how it was acquired—"conveyance" is used here in a wide sense as to include all transfers of ownership of immovable property. If the document declares not merely in whom the legal title is to vest, but also in whom the beneficial title is to vest, it necessarily includes the question as to title as between the spouses for all time, subject to variation by a subsequent agreement where permissible.[4] But if the document is silent as to the beneficial title or as to the arithmetical shares of each spouse and if there is no available evidence on that point, then what are called, the presumptions come into play.

41.20. *Presumptions*—What, then, are the presumptions? In England, it used to be considered previously that there was a presumption of advancement in the case of husband and wife, but it appears that the strength of this presumption has much diminished in the changing conditions of society.[5] In India, the presumption of advancement was long ago discarded by the Privy Council, at least so far as the majority of the inhabitants are concerned.[6]

1 *Rimmer* v. *Rimmer*, (1952) 2 All E.R. 683 (Court of Appeal).
2 *Pettit* v. *Pettit*, (1969) 2 Rll. E.R. 385, 397 (H.L.).
3 *Pettit* v. *Pettit*, (1969) 2 All. E.R. 385, 405 (H.L.).
4 Article in (1966) Vol. 30 Conveyancer, 354, 428.
5 Pettit, Equity and the Law of Trusts, (1974), page 107.
6 *Gossain* v. *Gossain*, (1863) 6 M.I.A. 53 (P.C.).

41.21. *Section* 82, *Trusts Act*—The Indian Trust Act[1] deals with the case of transfer of one person for consideration paid by another in these terms :

"82. Where property is transferred *to one person for a consideration paid* or *provided by another person* and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36."

We are, however, concerned at the moment,[2] with a different situation, namely, where *there is a transfer to two or more persons, without consideration.* In such cases, the most equitable and convenient provision to be inserted, in the absence of evidence to the contrary, would be to provide for equal shares for each transferee.

41.22. *Joint account of husband and wife*—It would, appear that in England even in cases where there was a certain consideration given by the husband, the Courts applied the doctrine of equality. In *Jones* v. *Maynard*,[3] the facts were interesting. In 1941, a husband, about to go overseas, authorised his wife to draw on his bank account, which was thereafter operated as a joint account. Both the husband and the wife drew upon the account and both paid their earnings into it. The husband withdrew money to pay for investments made in his name from time to time In 1948, they were divorced. The former wife now brought an action against the former husband, claiming the balance of the account and half the investments. The claim was upheld. Vaisey, J., in his judgment held that where there is a joint account between husband and wife, and a common pool into which they put all their resources, it is not equitable that it should be subsequently picked apart to establish the proportionate shares of each, the husband being credited with his earnings and the wife with hers. This would be quite inconsistent with the original fundamental purpose of a joint purse or common pool—

> "That being my view," he continued, "it follows that investments paid for out of the joint account although made in the name of the husband, "were in fact made by him in his own name as a trustee as to a moiety for his wife. If the investments out of the joint account had been made in the name of the wife alone, there is no doubt that the ordinary presumption of law would have applied and she would have been entitled to the investments; but as they were made in the name of the husband, it seems to me that the assumption of half and half is the one which I ought to apply."

41.23. *Judicial attitude*—We need not go into the troublesome and thorny area of joint accounts in bank payable to "either or survivor". The above case is cited here for an entirely different purpose—judicial attitude favouring equality. In conformity with that attitude, the case of gifts should be covered and the principle of equality introduced.

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1 Section 82, Indian Trusts Act, 1882.
2 See para 41.11, *supra.*
3 *Jones* v. *Maynard,* (1951) 1 Ch. 572 (Vaisey, J.).

41.24 *Recommendation*—In the light of the above discussion, our recommendations to section 45 are as follows :—

(a) the section should be split up to indicate distinctly the various situations with which it concerns itself;

(b) the case of gifts should be added to the section besides the doctrine of equality. A provision per (d) below be also inserted;

(c) if the transfer is for consideration, it should be made clear that in the absence of evidence to the contrary, the nature of their interests[1] in the property will be identical with the nature of their interests in the consideration;

(d) if the transfer is not for consideration, the transferees should, in the absence of evidence to the contrary, be taken to be common owners of their interests in the property. The expression 'common owner' is one which we choose to rule out 'joint tenancy' in the absence of evidence to the contrary.

41.25. *Revised section* 45—Revised section 45 should be somewhat on the following lines :—

"45. (1) Where immovable property is transferred for consideration to two or more persons, *the following provisions shall apply* in the absence of a contract to the contrary—

(a) *the nature of their interests in the property shall be identical, as nearly as may be, with the nature of their interests in the consideration, subject to clauses (b) and (c) of this sub-section;*

(b) *where* such consideration paid out of a fund belonging to them in common, they are, *as regards the quantum of their interests respectively* entitled to interests in such property identical, as nearly as may be, with the interests to which they are respectively entitled in the fund;

(c) *where* such consideration is paid out of separate funds belonging to them respectively, they are, as regards the *quantum of their interests* respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced;

(d) in the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property."

(2) *Where immovable property is transferred otherwise than for consideration to two or more persons, the following provisions shall apply in the absence of evidence to the contrary—*

"(a) *the transferees shall be common owners*[2] *of the property which is the subject matter of the transfer;*

(b) *they shall be presumed to be equally interested in the property.*"

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1 This is different from quantum, already dealt with in the section.

2 The expression "common owners" is tentatively used to rule out joint tenancies.

## CHAPTER 42

### *TRANSFERS BY PERSONS HAVING DISTINCT INTERESTS*

SECTIONS 46-47

42.1 *Introductory*—The case dealt wth in section 45 was one in which several persons are *transferees*. The case where several persons are *transferors* is dealt with in section 46, which is the converse of section 45. The problem in section 45 is—What is the share of each transferee *in the property* transferred ? The problem in section 46 is—What is the share of each transferor in the consideration received for the property transferred ? In this manner, section 46 is the converse of section 45. The principle adopted is, in substance, the same—the principle of substitution, in the absence of a contract to the contrary.

42.2 *Section* 46—Accordingly, section 46 provides as follows :

"46. Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests."

There are two illustrations to the section in these terms—

(a) A, owing a moiety, and B and C, each a quarter share, of mouza Sultanpur, exchange an eighth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura and B and C each to a sixteenth share in that mouza.

This is, of course, simple arithmetic. In illustration (b), A, being entitled to a life-interest in mouza Atrali, and B and C to the reversion, sell the mouza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase money, B and C are entitled to receive Rs. 400.

This illustration takes the case of interests which, though concurrent, are not of identical character. One is a life interest, the other a reversion. This shows that "interests" in section 46 is not identical with share.

43.3 *Principle*—It has been laid down[1-2] that the proper mode of apportioning the prices of a life-estate and reversion, when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price.

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1 In *re Cooper and Allen's Contracts*, 4 Ch. D. 802; *Rede* v. *Oakes*, 32 Beav. 555; *Cavendish* v. *Vavendish*. 4 L.R. 10 Ch. 319; *Morris* v. *Debenham*, 2 Ch. D. 54.

2 Gour.

42.4 *Distinct interest*—As illustration (b) shows, the principle is applicable where the interests, though concurrent, are of different nature. The owner of a lease has a distinct interest from that of a reversioner.[1] So also has the owner of an undivided fourth part of an estate, joining with the owners of the rest, in selling the whole for a lump sum[2].

42.5 *No change*—The above discussion does not disclose any need for amending the section.

42.7 *Section* 47—A slightly different and more complicated situation is dealt with in section 47. When the property transferred is not immovable *property in the entire,* but a share therein, two situations are possible. A co-owner may transfer his specific share therein. In such a case, the transferee is not concerned with the interests of the other co-owners, since the other co-owners do not participate in the transfer. Of course, the transferee has to satisfy himself that the co-owner is competent to transfer his share. This is a matter which may affect the validity of the transfer, but if the transfer is valid, then this aspect has no relevance to the quantum of interest and its ascertainment. But there could be a slightly different situation. All the co-owners join, but what is transferred is neither (i) the entire property, nor (ii) the share of one co-owner, but (iii) a notional share in the property not corresponding to a particular share. This share is just a mathematical abstration. How is such a transfer to be worked out ?

Section 47 provides the answer as follows :

"47. Where several co-owners of immovable property transfer a share *therein without* specifying that the transfer is to take effect on any *particular share or shares of the* transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares."

The illustration to the section takes these facts—

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza to D, *without specifying from which of their several shares the transfer is made.* To give effect to the transfer, one-anna share is taken from the share of A and half-anna share from each of the shares of B and C.

42.7 *Principle*—It is to be observed, that here the transfer takes effect according to the extent of the shares of each co-owner, and not according to the quantum of consideration received by each. Probably, this rule was enacted to guard against the complications which the latter course would have entailed. For, the value of two shares, otherwise equal, may considerably vary, and if inquiry had to be made as to the value of each share, much unnecessary inconvenience and delay would have been inevitable[3].

42.8 *Construction*—Of course, a general agreement to sell property implies sale of the *proprietary rights therein,* and a transfer of a limited interest cannot be inferred from the smallness of the price[4]. The section does

1 *In re Cooper and Allen's Contracts,* 4 Ch. D. 802; *Clark* v. *Seymour,* 7 Sim. 67.
2 *Powlett* v. *Hood,* L.R. 5 Eq. 115.
3 Gour
4 *Hughes* v. *Parker,* 8 M. & W. 244.

not apply merely because a person's ownership is found to be deficient, Where a person conveys property, a portion of which he has no right to convey, the purchaser is entiled to treat the whole contract as broken, and to sue for damages; and the vendor cannot be heard to say, that he would make an allowance *pro tanto,* for the purchaser may reply that it is not the interest which he had agreed to purchase[1]. But, in such a case, the purchaser may elect to take the interest which the smaller has, with compensation. In certain cases where the deficiency is negligible, it seems that the purchaser may even be compelled to take it at a proportionate price[2]. But, if there be a material discrepancy between the property sold and the property offered, the court, so far from interfering in the vendor's favour, will assist the purchaser in recovering his deposit[3].

In such cases, if the other co-owners can be made to join in the transfer and the entire property is not transferred, the section could apply.

42.9. *No change*—No changes appear to be needed in the section.

1. *Farrer* v. *Nightingale*, 2 Esp. 639.
2. *Guest* v. *Homfray*, 5 Ves. 818; *Hauger* v. *Eyles*, 2 Eq. Cas. Abr. 639.
3. *Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5.

## CHAPTER 43

## *PRIORITY OF RIGHTS CREATED BY TRANSFER*

### SECTION 48

43.1 *Introductory*—Where the same transferor creates or purports to create by transfer rights in or over the same immovable property, it obviously becomes necessary to determine whose right shall prevail. Such a situation may arise by mistake, accident or design. Whatever be the circumstances leading thereto, a conflict arises and requires to be resolved.

43.2 *The priority of rights created by transfer*—The general rule for resolving the conflict on the subject is contained in section 48, which reads—

> "48. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

We propose to examine first the principle of the section then its scope and operation and then certain supposed and real limitations and exceptions.

43.3 *Principle*—The section is a statement of the English equitable maxim "*qui prior est tempore, potior est jure*"[1] a relic of the primitive law to which the right of ownership in property may be ultimately traced. The section is, however, subject to the exceptions comprised in cases falling under sections 78 and 79. The rule, again, does not affect the specific provisions of section 50 of the Indian Registration Act[2], under which registered documents relating to land, of which registration is optional, were for the first time declared to take effect against unregistered documents relating to the same property, not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. As regards property generally, whether movable or immovable, a registered instrument relating to property is, by another section (section 48—Registration Act), declared to take effect against any oral agreement or declaration relating to such property, except where the agreement or declaration has been accompanied or followed by delivery of possession.

Section 48 of the Transfer of Property Act states the rule applicable in general to resolve conflicts arising by successive transfers of the same interest.

43.4 *Natural justice*—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 advangtage in *time* should also have the advantage *in law*. This rule, however, applies only to cases where the conflicting equities are otherwise equal. In a contest *between persons having only equitable interests*, priority of time is the ground of preference last resorted to, *i.e.*, a court of

1 "He who is first in time is better in law". Co. Litt. 14a. Broom's Legal Maxims (6th Ed.), 335.

2 Indian Registration Act, 1908.

equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground for preference between them. But the rule, in general, is as stated above.

This approach of the law could be justified on certain deeper considerations. The law favours security of title, and is hesitant to interfere with the status already established except for special reasons. If a person has acquired an interest in property, he who comes later on the scene must show an overriding consideration for superseding the state of things already existing—or, to put it in legal language—to disturb a right already created. It should not be forgotten that if the law creates a right, there is, in general, an ethical justification for the creation of that very right. A right is, in the language of jurisprudence, a claim recognised or enforceable in law. But it has roots in the implicit ethical notion that the law recognises or enforces the claim because it is just to do so. The German word "Recht" indicates this link more expressly. Such a right having been created over a property, the legal system would be failing in consistancy if another "right" in the same property is recognised or enforced. There would be chaos and it would be impossible to maintain any certainty or order in the application of the law. Priority in point of time thus becomes, in general, an imperative necessity of the legal system of a civilised society, once that system has decided to recognise or enforce a claim and a claim of that nature has already been created by the parties, relying on the legal system. Exceptional circumstances may necessitate a different approach, but those exceptional circumstances themselves are illustrations of situations where ethical considerations of a wider import are present—*e.g.* claims in salvage—or the demands of greater certainty constitute the basis of a different rule—*e.g.* registration.

43.5 *Doctrine of priority in Hindu law*—The doctrine of priority was not unknown to Hindu Law. It is given by Yajnavalkya as follows :—

> "In the case of a pledge, a gift and a sale, however, evidence in support of the prior claim pre-ponderates."[1]

Jimultavahana, commenting upon this verse, provides the exception that if possession is given to the second transferee, who retains it for 20 years, he will get preference over the first transferee. So he says :[2]

"If a person after a gift, or mortgage to him allows the property to remain with the seller, donor or mortgagor, who subsequently transfers it to another with possession and the latter holds it for 20 years then the first dealing, though prior is, of no avail".

*Scope*—To revert to the section, let us say a few words about its scope.

43.6 *Need for the section—Modes of transfer*—If there had been only one legal mode of transfer, namely, by delivery or possession, there would be no great need for a provision regulating priority. But the law does not provide transfer of possession as the only mode of transferring an interest in property. And, further, certain kinds of transfer e.g. certain species of mortgages—do not contemplate a transfer of possession at all. There is scope for conflict between two transfers, because the law leaves scope for a variety of modes of transfer.

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1 Yaj. II. 23(2).

2 Jimutavahana—Vyavaharamatrika, pages 348-349. Lingat Classical Law of India page 162.

The modes of transfer allowed by law vary—in some cases, there can be an oral transfer; in some cases there may be transfer by an instrument in writing without registration; and, in some cases, there may be a requirement of writing coupled with registration. Where the transferor employs such a mode of transfer (that is, a transfer otherwise than by delivery of possession), difficulty could arise if the oral transfer is made or the transfer in writing is executed at different times in favour of different persons. For example, a writing may be in favour of transferee A, in regard to an interest in immovable property and after a few days (or, may be, at a later time on the same day)[1] the same transferor executes a transfer in favour of B in regard to the same interest. So long as physical delivery of possession is not the only legal mode of transfer, theoretically the possibility of such a conflict always remains.

43.7 *Conditions for application of the section*—The section postulates that the rights so created cannot co-exist or be concurrently exercised. The words "cannot exist together", indicate that the two interests cannot be beneficially enjoyed without prejudicing each other. Equitably, the prior transferee has the preference, unless there is a contract or reservation by which he is bound or where through his fraud, misrepresentation or gross neglect, another person has been induced to advance money. In the latter case, the prior transferee, being estopped, is postponed to the subsequent transferee[2].

43.8 *Separate rights*—There can be no need for priority where separate rights created in favour of different persons can all be exercised to their full extent without encroaching on each other. In that case they may be treated as relating to different entities. This section does not apply to two substituted security rights. The case of priority arises only where the same property is successively mortgaged.[3] A case for priority arises not because the persons are different, but because the interest cannot all be fully exercised. Such interests may coalesce by merger, or one interest may be waived or abandoned and priority may be conferred by contract and forfeited by negligence.

43.9 *Scope for priority*—The principle of the section cannot, therefore, apply where the two interests do not conflict. Thus, in a case where the property is mortgaged to one and subsequently sold to another, this section will not apply, for the purchaser has obtained only the equity of redemption, an interest which can exist side by side with the mortgage.[4] So there is no conflict between a completed sale and a contract for sale, as the latter confers no right on the property[5]. An unregistered sale-deed, where registration is compulsory, would confer also no rights upon the vendee, and he cannot, therefore, claim as against the registered transferee.[6-7]

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1 *Cf.* para 43.12, *infra.*

2 Section 78.

3. *Krishnaveni Ammal* v. *Subramaniam Chetty*, A.I.R. 1938, Mad. 547.

4. *Ramachandra* v. *Krishna* I.L.R. 9 Mad. 495.

5. Section 54, last paragraph.

6. *Waman* v. *Dhondiba*, I.L.R. 4 Bom. 127;
*Chundernath* v. *Bhovrub*, I.L.R. 10 Cal. 250;
*Ram Autar* v. *Dhanauri*. I.L.R. 8 All. 540.

7. Illustrative cases taken mostly from Gour.

If A mortgages or sells property to B, and afterwards C purchases at a court-sale the then existing right, title, and interest of A, C buys in the first case (mortgage), the equity of redemption, and in the second case (sale), nothing at all. In such a case registration cannot help C for, on the very fact of his certificate of sale, the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.[1]

43.10 *Time of taking effect*—For the determination of the question as to the priority of rights created by transfer, it is, in the first place, essential to inquire as to the exact time from which a transfer begins to operate—a question which, in its turn, depends upon the mode and nature of the transfer. A sale[2] or a mortgage[3], except a mortgage by deposit of title deeds, or an exchange[4] of immovable property of a value of less than Rs. 100 may be made either by a registered instrument or by delivery of the property. A lease of immovable property for more than one year can only be made by a registered instrument[5], and a gift of whatever value must needs be registered[6].

43.11 In cases where a transfer may be validly made by delivery of possession, it will take effect only when possession is transferred, but in other cases where registration is resorted to, the transfer is deemed to take effect not from the date of the registration, but from the date of the execution of the conveyance[7].

Now, since a document may be presented for registration at any time within four months[8], and in special cases within eight months[9], it is conceivable that by merely antedating a deed one transferee may obtain priority over another, and thereby defeat its purpose. Other things being equal, a deed takes effect from the moment of its execution, even though its registration is delayed.

43.12 *Time of execution*—On a question arising[10] as to the effect of two deeds relating to the same subject-matter, *both executed on the same day*, it must be proved which was, in fact, executed first; but if there is anything in the deeds themselves to show an intention that they shall take effect *pari passu*, then the Court will presume that the deeds were executed in such order as to give effect to that intention.

43.13 *Transfers by operation of law*—As regards transfers by operation of law, it is provided by the Code of Civil Procedure that "when a sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time

1. *Sobhagchand* v. *Bhaichand*, I.L.R. 6 Bom. 193 (F.B.) followed in *Bamaraja* v. *Arunachala*, I.L.R. 7 Mad. 248.
2. Section 54.
3. Section 59.
4. Section 118.
5. Section 107.
6. Section 123.
7. Section 47, Indian Registration Act, 1908.
8. Section 23, Indian Registration Act, 1908.
9. Section 24, Indian Registration Act, 1908.
10. *Gartside* v. *Silkstone and Co.* 21 Ch. D. 761

when the sale becomes absolute.[1] This was an alteration of the law as laid down in section 316 of the old Code of 1882, by which the title of the purchaser dated only from the date of confirmation of the sale.[2]

43.14 *Competing auction-purchasers*—As between the competing auction-purchasers, the principles which govern preference are the same as those which regulate the claims of priority among mortgagees. Independently of any preference secured by reason of registration or possession, the purchaser must redeem all charges created before the sale. He must be held to have made his bid with full knowledge that the property was burdened with debts, and he can only claim possession by paying off those debts. His certificate of sale confers on him no right to require the later mortgagees (or those purchasing under them as auction-purchasers) to return back the money he paid either personally or out of the property[3]. The plea of purchase without notice, though it may be a good defence against an equitable claim, is no defence against a legal claim[4].

A person purchasing property with notice of prior contract in favour of another is bound to hold the property for his benefit to the extent necessary to give effect to that contract[5]. Where the subsequent transferee has taken a conveyance, the person in whose favour the prior contract subsists suing for possession will get a decree declaring that the subsequent transferee holds the property for the benefit of the plaintiff to the extent necessary to give effect to *his contract*, and that he do execute to the plaintiff a proper conveyance, and a decree for possession. Where the prior transferee suing his vendor for specific performance of his contract knows of the subsequent interest he should also implead him in the same suit. But where, he is ignorant of the subsequently created right a separate suit would then be necessary.[6]

43.15 *Notice*—It is to be pointed out that section 48 does not operate on the basis of notice. A subsequent transferee cannot, therefore, get higher rights on the ground that he had no notice of the prior transfer, except in cases which are specifically dealt with by a distinct provision of the law which recognises the relevance of notice.[7]

43.16 *Registration*—We may state that registration has no relevance, so that even if a document is registered later, yet if it is executed earlier, the registration has retrospective effect. Conversely, it is not in every case that prior registration of a subsequently executed document necessarily confers priority. The answer depends on the terms of the provisions in the Registration Act and the circumstances of the case. Under section 50 of the Registration Act, a deed registered subsequently gets priority over a prior un-

1 Section 65, C.P.C.

2 *Mohima Chander* v. *Nobin Chunder* (1805) I.L.R. 23 Cal. 48, 51. (Petheram C.J. & Baverlay J.).

3 *Baijnath* v. *Bhimappa*, 3 Bom. L.R. 92.

4 *Gaffur* v. *Bhikaji* I.L.R. 26 Bom. 159.
Section 91, Indian Trusts Act (2 of 1882).

5 *Gaffur* v. *Bhukaji*, I.L.R. 26 Bom. 159.

6 *Gaffur* v. *Bhikaji*, I.L.R. 26 Bom. 159, 162.
H. G. Section 40.

registered deed of which registration is optional. But this execution is subject to the doctrine of notice.[1]

An instrument operates from the date of its execution and even if it is registered, it will operate from the date of execution.[2] Therefore, while registration may be necessary to confer validity on an instrument where the Registration Act or any other law so provides, it does not except the operation of section 48 as such.

43.17 *Registration and interests whose co-existence is compatible*—Where there is a competition between two registered documents in respect of the same property, the document executed first has priority, even though the document executed subsequent was registered first[3].

It has already been pointed out that section 48 has no relevance where the two interests created by successive transfers can co-exist. For example, the purchaser of immovable property cannot evict from possession a tenant for cultivation admitted into the property by the mortgagee in possession[4].

43.18 *Limitations*—The limitations of the section ought also to be noted. 'Transfer' in this section means a complete transfer, and does not include a mere contract for sale, or an incomplete sale by an unregistered sale-deed where registration is compulsory.

Where one of the documents is only an agreement to transfer and the later document is a transfer in the completed sense, then again section 48 has no relevance[5]. This is for the reason that an agreement to transfer immovable property not only does not create an interest in land in general, but also is not a 'transfer' within the terms of section 48. Of course, there could be other provisions which may bind the subsequent transferee with the obligation created earlier by the transferor in the form of a contract to transfer. Such is section 40, but in such cases notice and certain other ingredients will have to be fulfilled.

43.19 *Charges*—Difficult questions arise in regard to charges and equitable mortgages. In determining such questions, we must have strict regard to the scheme of the Act and to the concept of 'equitable mortgage' and the concept of 'charge' as spelt out in section 100. A charge does not create an interest in property; it creates rather a right to property, but this does not mean that it is entirely disregarded. How far a charge binds persons subsequently dealing with the property charged, depends upon how far the case falls within section 100, of which the most important ingredient is the requirement of notice.

As regards equitable mortgages, it is to be remembered that an equitable mortgage—in those cases where it is permitted—is as much a mortgage as any other type of mortgage. Section 58 does not create any distinction as

1 Amir Chandra v. Sohi Bhushan, (1904) I.L.R. 31 Cal. 305.

2 Section 47, Indian Registration Act, 1908. For earlier law, see *Santaya Mancarsava* v. *Narayan*, I.L.R. 8 Bom. 182.

3. *Arunachalam* v. *Sivan*, A.I.R. 1970 Mad. 226.

4. *Thakur Singh* v. *Karam Singh*, A.I.R. 1925 Lah. 165.

5. A.I.R. 1938 Bom. 357.

between the various kinds of mortgages enumerated in that section *inter se*. In fact, the expression 'equitable mortgage' is one used in practice for the sake of convenience, but the legal name in section 58(f) is 'mortgage by deposit of title deeds'. A mortgage by deposit of title deeds does not require writing.[1] If a writing is executed and it incorporates the mortgage, it requires registration, but, if the mortgage is complete without the writing, a mere memorandum of the mortgage does not require to be registered. Subject to these observations, there is no superiority conferred by the law on any other kind of mortgage in contrast with equitable mortgages.

43.20 *Priority for Government debts*—While the Government possesses, to a certain extent, a priority in regard to debts, this does not appear to extend to conferring a priority in regard to secured debts.

The result is that such priority as the Government possesses, does not affect the provisions of section 48. Therefore, the area of operation of the Government priority in respect of debts does not embrace the priority of transfers. This is for the reason that generally the priority is understood as extending only to unsecured debts, in the absence of specific statutory provisions to the contrary.

43.21 *Exception-Section* 78—Some of the exceptions to section 48 may now be considered. One exception to the rule enacted in section 48 is enacted by section 78, under which a prior mortgagee is postponed to a subsequent mortgagee, where, through the fraud, misrepresentation or gross neglect of the prior mortgagee, another person has been induced to advance money on the security of the mortgaged property. The postponement of the prior mortgagee in such cases is really a species of estoppel, which enables the creation of the subsequent mortgage. While the prior mortgagee need not go out of his way to give notice of his security when he fears that the mortgagor is dealing with the property, the situation is different where there is fraud[2].

43.22 An exception to the rule "*qui prior est tempore*" is also to be found in the salvage charges created on account of advances made to save the encumbered property from loss or destruction[3]. Such advances are payable in priority to all other charges of earlier date, and, amongst themselves, have precedence in the inverse order of their respective dates. On the same principle, where the Court authorizes the Receiver to borrow money on a mortgage, directing that it should constitute a first charge on the property, it will take priority over any other mortgage though of an earlier date[4]. But, in order to confer such priority, the loan must have been raised for the purpose of *preserving the property*. If, in such a case, the court even improperly confers priority, of which the mortgagees affected thereby have notice, the order may hold good against them unless it is set aside.

43.23 *Estoppel*—The rule in section 48 also yields to the equitable principle of estoppel. So also where the registered purchaser was present

1 Jeevan Das v. Framji (1870) 7 Bombay High Court Reports 45 (Original Civil Jurisdiction.).

2. Mulla (1973) page 541.

3. Fisher, Mortgage, 958, cited in Gour.

4. *Giridharilal* v. *Dhirendra* I.L.R. 34 Cal. 427, 441, 442.

when possession was made over to the unregistered purchaser, the former was, on that account, postponed to the latter,[1] when he raised no objection.

43.23. *Registration*—An instrument operates from the date of its execution,[2] and it immaterial that it is compulsorily registrable, for in that case too, it will operate from the same date.

43.24. *No change*—The above discussion, which was intended to draw attention to a few salient features of the section, does not disclose any need for amendment of the section.

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1 *Somnathdas* v. *Sindhu*, 5 C.P.L.R. 97, cited by Gour.

2. Section 47, Indian Registration Act, 1908.

# CHAPTER 44

## *TRANSFEREE'S RIGHT UNDER POLICY*

### SECTION 49

44.1. *Introductory*—As between the transferor and the transferee of immovable property, a number of situations arise where the adjustment of claims becomes necessary in regard to immovable property. Many such problems are sought to be dealt with in sections 54-55—the latter section, incorporating a large number of provisions which constitute a Code for regulating the relations between the seller and the purchaser of tangible immovable property. Similarly, in sections 108 to 112, there is given, in relation to leases, an elaborate set of provisions regulating the inter-relationship of lessor and lessee. Certain matters of a general nature were considered appropriate for being dealth with in the present Chapter by way of working out the mutual rights of the transferor and the transferee. Section 49 addresses itself to one specific problem, namely, what happens to rights under a policy of insurance against loss or damage by fire in regard to immovable property which is transferred *for consideration* ? The section deliberately avoids any provisions for gifts,—probably on the assumption that since the principal property itself is transferred for love and affection or on other non-mercenary considerations, the rights under a policy of insurance would also be expressly provided for if necessity arises.

44.2. *Section* 49—Section 49 reads—

> "49. Where immovable property is transferred for consideration, and such property or any part thereof is, at the date of the transfer, insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property."

44.3. *Period to which section* 49 *applicable—first view*—There seems to be considerable misconception as to the setting in which section 49 is to operate. Does it deal with the period between the contract for transfer and the actual transfer ? Or, does it deal with the situation after the completed transfer ? The first view seems to have been taken in a Rangoon case,[1] and it is sometimes stated that the section is based upon the dissenting judgment of James, L.J., in *Rayner* v. *Preston.*[2] The English case was, however, concerned with the sale of property where damage by fire occurs *after the contract* but before the completion of the sale. The majority of the judges of the Court of Appeal in that case, with James, L.J. dissenting, held that the purchaser was not entitled to the benefit of insurance money. James, L.J., in his dissenting judgment, took the view that though the seller in a contract of sale was not technically a trustee, yet, once a contract is completed by an actual conveyance, then that relates back to

1 A.I.R. 1923 Rang. 6, 8.

2 *Rayner* v. *Preston,* (1881) 18 Ch. D. 1.

the contract and then it is ascertained that the relation was of trustee and beneficiary. The legal estate, it is now ascertained, was in the vendor, but the beneficial interest was in the purchaser. "This being the relation between the parties", James, L.J. continued, "I hold it to be a universal rule of equity that any right which is vested in a trustee—the benefit of which accrues to a trustee, from whatever source or under whatever situation of legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner." We shall revert to the merits of this point later, but, at present, it is enough to say that the English case was not concerned with post transfer position.

44.4. *Period to which section applicable—second view*—The second view of section 49 is that the section deals with completed transfers. This view gets support from the words "is transferred" which occur in the section. However, a query then could naturally arise—why would the transferor get it insured after he has already dealt with the property ? The answer would be that where the transfer is by mortgage or lease, the mortgagor or the lessor would have an insurable interest. He would recover the amount from the insurer on the basis that he has suffered a loss. If so, he should transfer it to the transferee. Also, it can be suggested that if the policy has not been transferred as such, and the transferor, even by way of sale, recovers the amount, he should be made to apply it as provided in the section. It is to be noted that under section 55(5)(c), the purchaser is to bear the loss occurring to the property after purchase. Section 49 does not exclude sales of immovable property, which is an aspect which might require consideration.

44.5. *Need for amendment to guard against non-receipt*—After transfer, the purchaser is liable to bear the loss arising from destruction or deterioration of the property, not caused by the seller[1]. In England, the purchaser becomes, in equity, the owner of the property by mere force of the contract, but in India, this doctrine of the Court of Chancery has been expressly departed from[2]. Now, while it is clear that the transferor may be compelled to apply the insurance money which he actually receives under the policy in reinstating the property,[3] what is to happen if he declines to receive it from the insurer ? Having once completed the sale of the property and received the purchase-money, the vendor may well decline to enforce payment of the insurance money, and the insurer may equally decline to make payment; for the contract being one of indemnity the insurer is not bound to pay when the assured has already recovered full value of the property[4]. Of course, if the vendor's right under the policy has been assigned over to the purchaser, there is no difficulty. But, if no such assignment has been made, the solution of the problem is only possible by describing the position of the vendor and purchaser as that of trustee and *cestui que trust*, as long as the contract is *in fiedi* and therefore, "any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property, that right and that benefit he takes as trustee for the beneficial owner"[5]. In this view, the vendor is both (a) bound to recover the amount due under the policy and (b) to pay it over to the purchaser, or, as is

1 Section 55(5)(c).

2 Section 54.

3 Gour.

4 *Castellain* v. *Preston*, 11 Q.B.D. 380: *West of England & Co.* v. *Issaacs*, (1986) 2 Q.B. 377, 383, o.a. (1897) 1 Q.B. 226.

5 *Rayner*, v. *Preston*, 18 Ch. D. 1, 13, 14 (James, L.J.).

enacted in the section, to apply it towards re-instating the property. The balance, if any, may have to be repaid to the insurer. On the other hand, the purchaser may compel the insurer to pay and the vendor to receive the money, if necessary, though he cannot recover it himself[1].

44.6. *Rule not in conformity with English rule*—The section states a rule departing from the decided cases in England[2], where the contract for fire-insurance is held to be a contract for mere personal indemnity[3]. Applying[4] the same principle, it is further settled in England that where a vendor receives his purchase-money without any abatement on account of damage by fire pending completion, the insurance company is entitled to recover from the vendor, out of the purchase-money, a sum of equal to the insurance money upon the principle of subrogation.[5] But, in English conveyancing practice, it was usual, even before 1925, to insert a clause providing for reinstatement, in case of destruction, and such a condition was then, of course, enforced.[6]

The position has been further modified by the Law of Property Act, 1925, section 47, to be mentioned later.

44.7. *Passing of risk*—In England, since in equity, the property at once belongs to the purchaser, the risk also passes to him at once.[7] Thus, if a house has been sold and is, without fault of the vendor, destroyed by *fire before completion*, the purchaser must nevertheless pay the full purchase-money and take the land as it is. It is important for a purchaser of buildings to insure at once in his own name, since he undertakes the risk of accidents *before he takes the property itself*. He cannot take the benefit of any insurance maintained by the vendor in the vendor's name alone; for insurance is normally only a personal indemnity against loss, and since the vendor is entitled to the whole purchase-money and so loses nothing, he can recover nothing under this policy[8]. If the vendor does, in fact, obtain payment of the insurance money, the insurers can recover it[9]. Even if they do not, equity does not require the vendor to pay the money to the purchaser, for his qualified trusteeship extends only to the land, and not to the proceeds of a personal contract of insurance[10].

44.8. *Section 47, Law of Property Act*, 1925—It is, therefore, essential for the purchaser, if he wishes to insure buildings, to take out insurance on his own account. A common practice is to arrange, with the consent of the insurers, for the vendor's existing insurance to be extended to cover the purchaser. Before 1926 it was usual to stipulate that this should be done

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1 *Chetty* v. *Motor Union Insurance Co.*, A.I.R. 1923 Rang 6.

2 *The North of England & Co.* v. *The Archangel & Co.*, L.R., 10 Q.B. 249, following *Pawls* v. *Innes*, 11 M. & W. 10; *Poole* v. *Adams*, 12 W.R. (Eng.) 683; *Colingridge* v. *Royal Exchange Assurance Corporation*, 3 Q.B.D. 173.

3 *Darrel* v. *Tibbitts*, 5 Q.B.D. 560.

4 See Gour.

5 *Castellain* v. *Preston*, 11 Q.B.D. 380.

6 a. *Garden* v. *Ingram*, 23 L.J. Ch. 478;
b. *Less* v. *Whiteley*, L.R. 2 Eq. 143.

7 Megarry & Wade, Real Property (1966), pages 584—586.

8 See *Castellain* v. *Perston*, (1883) 11 Q.B.D. 380.

9 *Castellain* v. *Preston*, (1883) 11 Q.B.D. 380.

10 *Rayner* v. *Preston*, (1881) 18 Ch. D. 1 (Majority view).

and that the purchaser should pay the premium as from the date of the contract[1]. It is now provided by the Law of Property Act[2] that any insurance money which becomes payable under the vendor's policy in respect of damage to the property *after the date of the contract* shall be paid by the vendor to the purchaser *at completion*, subject to (a) the terms of the contract, (b) any requisite consents of the insurers, and (c) the payment by the purchaser of his share of the premium. Where, therefore, the insurers consent to include the purchaser in the insurance, it is now unnecessary to make further terms about the insurance money or premium. Where the insurance is left in the vendor's name only, section 47 will not normally apply at all: for if the vendor can prove no personal loss, no insurance money will ever become payable under the Policy[3].

44.9. *Position in England—Effect of assignment of insurable interest*—In England, the position in the law of insurance[4] is this. Where the assignment is by the voluntary act of the assured, e.g., in the case of a sale or a gift, the validity of the policy depends upon whether the assured, after the assignment, retains his insurable interest in the subject-matter.

An absolute conveyance of the subject-matter from the assured to a purchaser, accompanied by the receipt of the agreed price, divests the assured of his interest in the subject-matter[5]. He cannot, therefore, in the event of its subsequent destruction, e.g., by fire, recover upon any policy by which it may have been insured, since he has suffered no loss, and there is consequently nothing to which the right of indemnity can attach[6].

44.10. *Effect of contract on validity of insurance*—The validity of a policy is not affected by the mere fact that the assured has entered into a contract to convey the subject-matter of insurance[7], even though, as between the assured and the purchaser, the risk has been passed to the purchaser[8].

The existence of the contract does not, in itself, divest the assured of his insurable interest, which continues by reason of his legal ownership of the subject-matter; and he acquires a further interest arising out of the possibility of the purchaser refusing to carry out the contract, and thereby throwing the loss on him[9].

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1 Williams, Vendor & Purchaser, 88, 89.

2 Section 47, Law of Property Act, 1925.

3 Megarry & Wade, Real Property (1966), page 586.

4 Ivamy, General Principles of Insurance Law (1966), page 256.

5 *Colinridge v. Royal Exchange Assurance Corp.* (1877) 3 Q.B.D. 173 (fire insurance) per Lush, J., at p. 177: where the fire took place before the conveyance; *Ecclesiastical Commissioners v. Royal Exchange Assurance Corp.*, (1895) 11 T.L.R. 476 (fire insurance) where the fire took place after the conveyance.

6 *Rayner v. Preston*, (1881) 18 Ch. D. (C.A.) (per Cotton L.J.), "The fact that the insured had parted with all interest in the property insured would be no answer to the claim on the principle that the contract is one of indemnity only."

7 *Collinridge v. Royal Exchange Assurance Corporation*, (supra). (Fire insurance)

8 "The risk of fire was the Corporation's risk from the time of the notice to treat" *Phoenix Assurance Co. v. Spooner*, (1905) 2 K. B. 753 per Bigham, J., at page 756.

9 *Castellain v. Preston*, (1883) 11 Q.B.D. 380 (C.A.) (fire insurance) per Brett, L.J. at page 385.

**44.11.** ***Fire before completion***—In the case of a fire policy, where the fire takes place before the sale is completed by the execution of the conveyance and the receipt of the price, the assured is entitled to recover to the full extent of his loss within the limits of the policy. The existence of the contract and even the certainty that the assured will finally suffer no loss at all because of the purchaser's intention to complete, and his undoubted solvency, cannot be taken into account as diminishing the amount recoverable[1].

44.12. *Effect of completion*—Where, however, the sale is afterwards completed, and the price paid, the assured has, in the events that have happened, suffered no loss[2]. He cannot, therefore, either enforce the policy, or, if he has received the proceeds of the policy, retain both the proceeds and the price for his own benefit.[3]

A conveyance of the subject-matter, unaccompanied by the receipt of the price, does not, apparently affect the validity of the policy, if the fire takes place before the assured has parted with his lien as unpaid vendor[4]. Although the conveyance divests him of his legal ownership, he nevertheless retains, by virtue of his lien, an insurable interest sufficient to keep the policy alive, and it is immaterial that it is reduced from a legal interest to a mere equitable one. He, therefore, is entitled, as in the previous case, to enforce his policy, so long as such interest remains. If, however, he parts with his lien before he has received his price, his insurable interest under the policy is extinguished, inasmuch as his relationship to the subject-matter of insurance has ceased to exist. He has no longer a right to look at the subject-matter as securing payment of the price: his sole right is a personal right as an ordinary creditor against the purchaser himself[5].

44.13. *Payment of price*—If the price has been paid, but the conveyance of the subject-matter has not been completed, the assured retains an insurable interest by virtue of his legal ownership[6]. The policy therefore remains in force, notwithstanding such payment[7]. But, in the event of a loss before completion, the assured, not being indemnified by the loss, will not be entitled to enforce it against the insurers for his own benefit, although if the conditions of the Law of Property Act, 1925, section 47 are fulfilled, he may enforce it for the benefit of the purchaser. Where, however, the assured has contracted with the purchaser to be responsible for the safety of the subject-matter, the position will be different; and, unless the language of the policy is prohibitive, the value of the subject-matter will be recoverable by the assured[8].

44.14. The contract under which the assignment of the subject-matter takes place may contain a provision that the assured is to keep alive an

1 *Collingridge* v. *Royal Exchange Assurance Corporation* (*supra*) (fire insurance).
2 Ivamy, General Principles of Insurance Law (1966), page 257.
3 *Castellain* v. *Preston*, (*supra*) (fire insurance).
4 Cf. Sale of Goods Act, 1893, section 41.
5 Cf. Sale of Goods Act, 1893, section 43.
6 Ivamy, General Principles of Insurance Law (1966), page 256.
7 *Castellain* v. *Preston*, (*supra*) (fire insurance).
8 *Martineau* v. *Kitching*, (1872) 7 Q.B. 436 per Blackburn, J., at page 458.

existing policy for the benefit of the purchaser.[1] Where,—as is usually the case,—the consent of the insurers is obtained to what is to all intents and purposes, an assignment of the policy[2] no difficulty can arise.

44.15. *Recommendation to remove difficulties arising from the present section*—It appears to us that the section, taken literally, is of very limited application and in any case its full implications are not set out. Moreover, there is the problem arising from the rule of insurance law—that after title passes, the vendor has no insurable interest. Lastly, the vendor is not, at present, compellable to sue the insurer. All these difficulties should be removed by a suitable amendment which we recommend.

44.16. *Propositions*—The true position can be stated as follows, with reference to the various stages at which the loss or damage occurs—

(a) Where the loss or damage by fire *occurs before the contract*, the transferee is not concerned with the matter, since at that time he had no interest in the property. Moreover, when he offered the price or other consideration, he would, at least in the vast majority of cases, have fixed it on the basis of the property as already damaged.

(b) Where the loss or damage by fire *occurs after the contract but before the transfer*, the transferee, though he has not yet acquired an interest in the property in the legal sense, is concerned in so far as the value of the property diminishes after the price or other consideration is fixed. The price or other consideration may have been fixed on the basis of the state of the property as existing previously, that is to say, in the "undamaged" condition. If so, the benefit of the policy—i.e., the amount received by the transferor under the policy on account of that loss or damage—should go to the transferee. All that can be said in favour of the transferor is that the transferor should be entitled to the proportionate premium attributable to the period in question. This situation is not covered by section 49 as it stands at present. It should be added in the Act to complete the statement of the law.

(c) Where the loss or damage by fire *occurs after the transfer*, the transferee is definitely interested in the property and should be reimbursed as already provided by section 49. In case of a sale, the Act in section 55(5)(c) expressly provides that the purchaser has to bear the risk. That merely means that he cannot rescind the sale on the ground of such loss or damage. It does not affect the justice of the provision in section 49.

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1 *Doed Pearson* v. *Ries*, (1832) 8 Bing. 178;
*Poole* v. *Adams*, (1864) 33 L.J. Ch. 639;
*North British and Mercantile Insurance Co.* v. *Moffatt*, (1871) L.R. 7 C.P. 25;
*Martineau* v. *Kitching*, (1872) L.R. 7 Q.B. 436.

2 *Garden* v. *Ingram*, (1852) 23 L.J. Ch. 478, where the insurers were willing to pay the purchaser;
*Darrell* v. *Tibbitts*, (1880) 5 Q.B.D. 560 (C.A.) where it was purchaser who had received payment under the policy.

(d) In the case mentioned in (c) above, there is need for adding a further provision that the transferee may call upon the transferor to take effective steps for realising the amount and if he fails to do so, he may himself take such steps, making the transferor a party in any legal proceedings that may have to be instituted. Also it should be provided that the insurer shall not be entitled to object on ground of transfer. Also the seller may retain the right to enforce the unpaid vendor's lien.

In the result, amendments as per propositions (b) and (d) above should be made, by revising section 49.

44.17. In this context, we may make it clear that the amendments which are being recommended would not conflict with any specific provisions of the Act regarding the passing of risk or with any provisions of the general law of insurance. What is being suggested is only an adjustment of the mutual rights of the transferor and transferee, in relation to the benefit of an insurance policy against fire. In particular, in regard to proposition (b) above, it may be made clear that such a clarification or amendment will advance the cause of justice and will, in general, be equitable. Of course, if there is a contract to the contrary, that will prevail.

It has not been possible to ascertain the business practice in this regard, but we believe that the section as proposed to be amended does not introduce any such rigidity as would interfere with the practice of businessmen or owners of property.

44.18. *Movable property*—Incidentally, it might also be stated that the action is not concerned with movable property, and if a question of a similar nature arises on the transfer of a movable property,—say, a motor car or jewellery or other costly articles,—the matter would have to be determined on general principles of law; but a comprehensive and self-contained section—which section 49 would become after the recommended amendment —might well serve as a model as illustrating the principle that can be applied on the grounds of justice, equity and good conscience. We have devoted some length to a discussion of this topic in view of its practical importance and in view of the fact that to the layman the general principles of insurance law and their application in this particular field are matters of obscurity.

# CHAPTER 45

## *RENT BONA FIDE PAID TO HOLDER UNDER DEFECTIVE TITLE*

### SECTION 50

45.1. *Introductory*—The transfer of immovable property may raise questions which affect the position of third parties, of which a particular situation which is a frequently recurring one, is the position of a person who holds property "of another person", in regard to rents or profits of the property. Difficulties may arise where a person, having paid the rents or profits of property to A, is faced with the objection by B that A has transferred the property to B and that the rents and profits should be paid to B. In such a case, if the person paying the rents or profits is made to pay twice over, there would be hardship. Instead of compelling the person paying to bear the hardship where he has acted in good faith in all respects, the law adopts a different approach; it protects him, leaving the transferor and the transferee—A and B in the above illustration—to litigate against each other, if they so choose. The determination of the relevant question in that litigation will, of course, in general, depend on specific statutory provisions—for example, section 55(4)(a) and 55(6)(a) of the Act or a contract between the parties. But so far as the person paying the rents or profits is concerned, he receives protection. Of course, our mentioning the situation of a transfer of immovable property should not be taken as implying that the section which we are going to discuss is confined to that situation.

45.2. *Section 50*—The section reads—

> "50. No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits."

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

Incidentally, this illustration omits to mention one important ingredient of the section, namely, that B should have accepted the lease in good faith or should be holding the property in good faith. As we shall show later, good faith is required in two aspects in the section.

The section does not deal with rights to rent as between transferor and transferee. In regard to sale,[1] this aspect is separately dealt with.

45.3. *Sections 109 and 130*—This section (like the proviso to section 109 and section 130) is an application of the general principle of law, that if a party fulfils an obligation without notice of the rights of a third party, his obligation is discharged. The section is a general provision, applying to all cases where property is held by one person under another. Section 109, proviso, applies only to leases for non-agricultural purposes.

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1 Sections 55(4)(a) and 55(6)(a).

The section covers several classes of cases :

(1) Where a person who has a right to a land or other property lets it to X and then transfers the property. Thereafter X, without notice of the transfer, in good faith, pays the rent to the transferor. This is the case referred to in the illustration to the section.

(2) Where a person who has no title to a property lets it to X, who takes it in good faith and pays the rent to the lessor in good faith. In this case there is no 'transfer' to any person during the tenancy of X. But the lessor has no title to let it to X. Even in such a case, X cannot be charged by the real owner with rents and profits of the property. The remedy of the latter is only to proceed against the lessor.

(3) The lessor has a defective title and the person having superior title comes on the scene. He cannot demand the rent again.

45.4. *Lis pendens*—This section is subject to the doctrine of *lis pendens* contained in section 52. If, therefore, the tenant takes the lease and makes any payment to the mortgagor during the pendency of the suit to enforce the mortgage by the mortgagee, the tenant does so at his own risk and he cannot claim protection under this section[1].

45.5. *Genesis*—Section 50 is, almost word by word, the same as an earlier Indian Act[2] which was applicable only to cases governed by the English law under section 3 thereof. That section was, in turn, based on earlier English statutes, and its ancestry could be traced to the Statute of Anne[3].

The principle of the section represents a general rule of jurisprudence that if a person enters into a contract without notice of any assignment and fulfils the contract to the person with whom he has made that contract, he is discharged from his obligation.[4] A tenant is not bound to canvass his landlord's title more than is necessary for his purpose. Indeed, any attempt by him to probe into the secret flaws in the landlord's title might have the effect of terminating his own tenancy in many cases.[5]

45.6. *Cases other than transfer*—Of course, the section is not confined to cases of transfer or to cases of landlord and tenant. Any payment of rent or delivery of profits in regard to immovable property, made *bona fide*, is protected. This is illustrated by a Bombay case[6]. A took possession of certain property as a mortgagee and created a lease for 12 years. A died and his interest as mortgagee survived to his brother B. After B's death, A's widow took possession of the property and managed the same and got her name recorded in the revenue papers. The person really entitled to the property was, however, B's sister. B's sister sued the tenant for rent, but the tenant pleaded payment *bona fide* to A's widow. By reason of section 50, the tenant was held to have been protected.

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1 *Girdharlal* v. *Liladhar*, A.I.R. 1931 Bom. 539.

2 Mesne Profits and Improvements Act, 1855 (11 of 1855).

3 4 Anne Chapter 16, sections 9 and 10.

4 *Alimuddin* v. *Hira Lal*, (1896) I.L.R. 23 Cal. 7 (F.B.).

5 Gour.

6 *Kaveriamma* v. *Lingappa*, I.L.R. 33 Bom. 96 (Scott C.J. and Chandavarkar, J.).

45.7. *Scope of section* 50— We have already pointed out[1] that section 50 is not confined to cases of transfer. Not only is it applicable to cases of succession, but also it applies when there is neither succession nor transmission of interest. Thus, a person paying rent to A in good faith after taking a lease from A in good faith, is not required to pay rent to B, even though it is ultimately held by a court that A had no title or had a defective title to the property. In this sense, it would be correct to say that the person paying rent to the ostensible owner or *de facto* owner is protected if the other requirements of the section are satisfied.

45.8. *Ingredients*—What, then, are the ingredients of the section ? In the first place, the person making the payment must have done so in good faith. In the second place, he must have held the property of the person to whom he makes the payment in good faith. If these two ingredients are satisfied, it is immaterial that the person to whom such payment was made had no right to receive it. (For brevity, we are not specifically mentioning the case of delivery other than payment, but the principle is the same).

45.9. *Good faith—Two aspects*—In order that X who has paid or delivered the rents and profits of immovable property to Y may be protected under this section from the demands of Z,—the person who is really entitled to such rents and profits,—it is necessary for X to show that—

(1) he held the property in good faith from Y and

(2) he paid the rents or delivered the profits to Y in good faith.

If he did not hold the property in good faith from Y, a payment of rents and profits to the latter cannot obviously be in good faith. X is, therefore, not protected under this section. The mere fact, however, that he holds the property in good faith from Y, does not necessarily mean that payment of delivery of the rents and profits to Y is in good faith. He may hold the property from Y in good faith, but at the time of payment he might have become aware of the fact that Z and not Y was entitled to such rents and profits.

45.10. *Good faith—Proper construction of the expression*—Having regard to the importance of the requirement of good faith, it is obvious that its scope and meaning ought not to be subject to serious obscurity. It is well known that Indian statutory law contains two parallel definitions of the expression "good faith"—the one in the General Clauses Act, section 3(22), and the other in section 52 of the Indian Penal Code. According to the General Clauses Act, an act is said to be done in good faith if it is done honestly, whether or not it is done negligently. According to the Penal Code, nothing is said to be done in good faith unless it is done with due care and attention. Thus, the General Clauses Act does not require due care and attention. Of course, want of due care and attention may be evidence in some cases of want of *bona fides*. But, as a matter of theory, the definition in the Penal Code is more stringent than the definition in the General Clauses Act. In this position, two questions arise for consideration, namely, (a) which definition is applicable to section 50, and (b) if the definition in the General Clauses Act is the one applicable, which definition ought to be favoured as a matter of legislative policy ? On the first question, the answer would appear to be simple. The definition in the Penal Code is meant only for the purposes of that Code, having been enacted in stringent terms by reason of the

1 Para 45.6 *supra*.

fact that the sections in which the definition occurs exempt a person from criminal liability or reduce the gravity of the offence. It would, however, appear that there have been judicial decisions[1], which regard the tenant's failure to make an inquiry as a grossly negligent act and as one taking away the protection of section 50 on the ground of want of good faith. We are not, with respect, convinced that this is a correct approach. Whatever may be the aspect of evidence, the concept of honesty of purpose and the concept of due care and caution are two different concepts. In the absence of express statutory provision, we do not think that it would be a proper construction to read due care and attention as an ingredient of good faith.

45.11. The Patna judgment[2] expressly holds that by reason of want of proper enquiry, the payment falls outside section 50, even though the person paying honestly believed that the person receiving was entitled to receive the rent. With this construction, we do not find ourselves able to agree.

45.12. This, however, disposes of only part (a) of the query raised above. It still remains to consider query (b), namely, what ought to be the law ? This is a difficult question to decide, since the monetary rights of the real owner are involved. At the same time, it should not be overlooked that the real owner is not entirely without remedy, because he can recover the rents and profits from the person who received them from the innocent payer. On the whole, therefore, it would appear that it would not be unjust to provide that good faith need not require due care and attention.

45.13. The second aspect of good faith relates to good faith as holding the property "of another person". The section raises the question of good faith on the part of the payer twice; good faith has to be proved not only with regard to the payment, but also with regard to the title of the person from whom the property is held. Here again, good faith should be so defined as to exclude need for due care and caution. We recommend that the section should be suitably amended.

45.14. *Rent payable in advance*—Some obscurity exists on the point of rent payable in advance. One comes across judicial decisions taking the view that the rent must not be paid in advance, as rent paid in advance would become a mere loan[3], as was held in Rajasthan. However, it is obvious[4] that where it is a part of the contract, that the lessee should pay the rent in advance, he does so in fulfilment of an obligation under the contract and section 50 ought to apply.

45.15. The Rajasthan case[5] was one of loan. Rent paid in advance before the rent became due was treated as substantially a loan. It was held that if rents and profits are paid to the former landlord before they became due, it is a simple loan and cannot be taken as a discharge for the rent becoming due after notice of transfer to the tenant.

It is not very clear from the facts as given in the judgment whether there was a specific obligation to pay the rent in advance. But there is a

1 *Butto Kristo Roy* v. *Govindram*, A.I.R. 1939 Patna 540, 544 (Harries, C.J. and Chatterji, J.).

2 *Butto Kristo Roy* v. *Govindram*, A.I.R. 1939 Patna 540.

3 *Katha Bhatt* v. *Chokylal*, A.I.R. 1960 Raj. 19, 20, para. 6.

4 *Mani Ram* v. *Satpal*, *A.I.R.* 1972 J. & K. 37.

5 A.I.R. 1960 Raj. 19. Para 45.14, *supra*.

review of the case law. To avoid, doubts in the matter, it is, in our view, desirable to provide that the section applies to rents or profits payable in advance of the period to which they relate, where the person paying them is *under a legal obligation to do so*. The definition of "lease" is wide enough to cover a lease accompanied with payment of advance rent[1].

45.16. *Recommendation*—In the light of the above discussion, we recommend the insertion of the following Explanations at the end of section 50 :—

> *"Explanation 1.—A thing is said to be done in good faith if it is in fact done honestly, whether or not it is done negligently".*
>
> *"Explanation 2.—This section applies also be rents or profits paid or delivered by a person in advance of the period to which such payment or delivery relates, if such payment or delivery is made or done in good faith in the discharge of an obligation to make payment or delivery as the case may be, in advance[2]."*

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1 *Lachman Das v. Zumbermal*, (1972) 75 Bom. L.R. 678, 680 (Vaidya J.).

2 See para. 45.11 and para. 45.13 *supra*.

3 See para. 45.15, *supra*.

## CHAPTER 46

## IMPROVEMENTS MADE IN GOOD FAITH

### SECTION 51

46.1. *Introduction*—The golden thread of good faith which is woven into section 50, and which runs through some of the earlier sections, appears again in the next section, where good faith has even a positive role to play. If, section 50 merely gives protection from liability for a payment made in good faith, section 51 goes further and confers positive rights in regard to improvements made by a person on immovable property who, owing to defective title, is ultimately evicted. If he can show good faith, he is entitled to compensation. The legal defect in his title is not allowed to override his claim based on equitable considerations. This is yet another example of the genesis of some of the important provisions of the Act in equity[1] and gives the lie to the charge sometimes made that the law is based on technicalities. Justice in the wider sense, justice with an all-embracing eye, is the dominant spirit underlying section 51.

46.2. *Not based on estoppel*—Although an equitable claim for compensation for improvements can arise on the basis of estoppel also, that is not the factual situation contemplated by section 51. The section reads :

> "51. When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of improvement estimated and paid or secured or the transferee, or to sell his interest in the property to the transferee as the then market value thereof irrespective of the value of such improvement.
>
> The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.
>
> When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted thereof, he is entitled to such crops and to free ingress and egress to gather and carry them."

The situation which the section is concerned with is one mainly of eviction. Eviction being a remedy of a specific nature, equity would compel the persons seeking that remedy to have regard to the position of the person evicted, where improvements have been made by that person *bona fide* and in the belief that he was absolutely entitled to the property. There are certain conditions to be satisfied in this regard, but at this stage it is sufficient to point out that the crux of the protection given by the section is "good faith". The rest are matters of detail, while good faith constitutes the heart of the matter.

This section is, to some extent, founded upon the principle that he who will have equity must do equity. As observed by Snell : "A constructive trust may also arise where a person, who is only part-owner, acting *bona*

1 For a detailed discussion of the English law, see "Quickied Plantation" solo credit selo (1963) 215 L.T. 143.

*fide*, permanently benefits as estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements.[1]

46.3. *Hindu law and Muslim law*—Somewhat similar principles are recognised in Hindu law and Muslim law. Narada says—[2]

> "If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks and the other building material; but if he has been residing on the ground of a stranger, *without paying rent and against that man's wish*, he shall, by no means, take with him, on leaving it, the thatch and the timber."

Under the Muslim law, according to the 'Hedaya' :

> "A person usurping land and planting trees in it, or erecting building upon it, must be directed to remove the trees and clear the land and restore the same to the proprietor. If the removal is injurious to the land, the proprietor of the land has the option of paying to the proprietor of the trees or of the buildings, a compensation equal to the value and thus possessing himself of them[3]."

46.4. *Civil law*—The section deals with only one aspect of a wider principle which allows similar relief. It declares only what has been the pre-existing law on the subject[4]. Embodying as it does a rule of equity, it is applicable alike to both Hindus and Mahomedans[5]. The Civil law carried its doctrine in cases of this sort much further, and allowed[6] the purchaser or other person making improvements innocently and under the belief that he was the true owner, compensation for the benefit actually conferred upon the property[7]. (described as "meliorations")[8] Domat lays down as a general doctrine that those who have spent money on improvements of an estate, have, by the civil law, a privilege upon those improvements, as upon a purchase with their own money.

46.5. *English law*—The rule here enacted is much wider than that deducible from the English cases, according to which it is necessary that the real owner must have had knowledge not only of the expenditure incurred[9], but also of his own rights in the property[10]. But this is by no means

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1 *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 290.

2 Sacred Books of the East, 1889 Edn., Vol. 33, pages 114, 145. Ganganath Jha, Hindu Law in its Sources (1930 Edn.) Vol. 1, page 302, Narada, Vol. VI-20, 21, cited in *Mofiz* v. *Rasik Lal*, (1910) I.L.R. 37, Cal. 815, 820.

3 (a) Hedaya : (Hamilton's Translations), Vol. 3; cited in *Pannalal* v. *Gobardhan Das*, A.I.R. 1949 All. 757, 759, 760.

(b) (1902) 26 Bom. 1, 15, 16, 28 Ind App 121 (P.C.) (Case from Zanzibar where Muhammadan law applied—the above passage was held to contain the rule applicable).

4 Gour.

5 Section 2(d); *Durgosi* v. *Fakeer Sahib*, I.L.R. 30 Mad. 197.

6 See *Pannalal* v. *Govardhan Das*, A.I.R. 1949 All. 757, 759.

7 Dig. Book 50, tit. 17, l 206 "June nature cequm est, reminem cum alleries detrimento et injuria fieri l ;upletiorem.

8 A creditor was allowed lien for meliorations (Dig. Bk. 121, tit, 1, I, 25; 1 Domat. Bk 3, tit. 1, 5 arts. 1 -7).

9 *Ramsden* v. *Dyson*, L. R. 1 H.L. 129, 141.

10 *Wilmott* v. *Barber*, 17 a. D. 36, o.a., 17, Ch. D. 772.

necessary under the section, which requires only that the person making improvements must have acted in the *bona fide* belief that he was *absolutely* entitled to the property. Where he fails to prove this, he cannot claim protection[1]. Provision for compensation for improvements under varying and various conditions is also made in the several Provincial Acts which provide for compensation to tenants and persons occuping land.[2-3]

46.6. *Other situations*—A claim for compensation for improvements may be made successfully or unsuccessfully in several situations. Some of the important ones are the following[4] :

(a) When improvements are made by a person who believes himself in good faith to be absolutely entitled to the property. This is the situation in section 51. Relief under that section has nothing to do with the conduct of the real owner.

(b) Where the owner has encouraged another person to make improvements by his declaration, act or omission. Relief in this case is based on estoppel[5] which bars ejectment without compensation.

(c) Where improvements are made by a co-owner without the concurrence of the other co-owners. In such a situation the other co-owner may obtain relief without proof of material injury[6]. The case would be decided purely on proprietory rights.

(d) Where improvements are made by holders of a limited interest. In such a case, compensation is admissible only when the improvements can be traced to some encouragement by the full owner. Such a claim may be made by the tenant against the landlord[7-8] or by a mortgagee against the mortgagor.

(e) Where improvements are made by a pure trespasser without the consent of, or encouragement by, the owner. In such a case, compensation is not allowed.[9-10]

As to situation (b) above, it may be stated that where the owner encourages improvements to be made, equitable estoppel may arise by reason of the conduct of the real owner.

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1 *Moti Chand* v. *Hr. India Corp. Co. Ltd.*, I.L.R. (1932) All. 210.

2 Section 69(1), Punjab Tenancy Act (XVI of 1887). The Central Provinces Tenancy Act (XI of 1898). Bengal Tenancy Act (VII of 1885). Malabar Compensation for Tenants Improvements Act (Madras Act 1 of 1900).

3 Gour.

4 Gour.

5 *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, 168.

6 (a) *Paras Ram* v. *Sherjit*, I.L.R. 9 All. 661, 664;
(b) *Nocury Lal* v. *Bindabun* I.L.R. 8 Cal. 708;
(c) *Joy Chunder* v. *Bipproo*, I.L.R. 14 Cal. 236;
(d) *Madan Mohun* v. *Rajab Ali*, I.L.R. 28 Cal. 223;
(e) *Sashi Bhushan* v. *Ganesh Chunder*, I.L.R. 29 Cal. 500;
(f) *Fazilatunnessa* v. *Liaz Hassan*, I.L.R. 30 Cal. 901.

7 Section 108(m), (n), (q).

8 (a) *Beni Ram* v. *Kundan Lal*, I.L.R. 21 All. 496 (P.C.).
(b) *Raja of Venkatagiri* v. *Mukku*, 7 I.C. 202, 208.

9 Section 63.

10 *Maddanappa* v. *Chandramma*, A.I.R. 1965 S.C. 1812, 1816, para 14.

After discussing these theoretical aspects, we proceed to a consideration of some concrete questions.

46.7. *Food faith and inquiry*—We have already stated[1] that good faith is the crux of the section. Its content is therefore a matter of some importance.

46.8. *Inquiry*—On the question whether good faith in section 51 also requires proof of proper inquiry, there is some obscurity. In a Madras case,[2] the grantee of land under an order of the Tehsildar spent money on improvements without knowledge of an appeal which had been filed against the order and which had resulted in cancellation of the grant. The section was regarded as applicable. Probably in this case proper inquiry would have disclosed the proceedings by way of appeal. In an earlier case of the same High Court,[3] however, the claim of a purchaser from Hindu widow for compensation for improvements was repelled on the ground of want of good faith. The purchaser in that case did not make any inquiries as to necessity for the sale and the sale was set aside at the instance of the reversioner. It was held that since the purchaser could not, in the circumstances, have believed that he was absolutely entitled, there could be no valid claim under section 51.

There are some decisions of the other High Courts taking the same view.[4]

With respect, we are not convinced that this is a correct view of the section as it now stands. The question is whether or not that honest belief is preceded by proper inquiry. To say in such circumstances that the purchaser could not have believed that he was absolutely entitled, is to equate good faith with the element of careful inquiry, which is not the ordinary understanding of the expression "good faith". Theoretically, one cannot overlook the distinction between what is the belief of the person and what is the reasonable belief of that person. While actual knowledge of a defect in one's title may bar the application of section 51 for want of good faith, it does not appear to be a correct view to take that negligence as such would preclude good faith. We would agree rather with those decisions,[5] which take the view that honesty of purpose suffices. So far as the section under consideration is concerned, it should be provided that what is done honestly is done in good faith, whether or not it is done negligently.[6]

46.9. *Invalid instruments*—There is a difference of opinion as to whether a person in whose favour an instrument is executed which is invalid for want of registration is a "transferee" within the meaning of section 51. According to the High Court of Madras[7] he is a transferee. According to the High Courts of Allahabad[8] and Rangoon,[9] he is not.

1 Para 46.3, *supra.*

2 *Naravanmurthi* v. *Secretary of State,* 48 M.L.J. 682, A.I.R. 1925 Mad. 63.

3 *Nangappa* v. *P. Goundan,* I.L.R. 32 Mad. 530.

4 *Bimol Chandra* v. *Mammatha Nath,* A.I.R. 1954 Cal. 345, 347.

5 *Mohammad Ali Khan* v. *Kanulal,* A.I.R. 1935 Cal. 625.

6 *Cf.* discussion as to section 50, *supra.*

7 *Ramanathan* v. *Ranganathan,* A.I.R. 1919 Mad. 1083, 1090, (F.B.).

8 *Ram Prasad* v. *Chajju,* A.I.R. 1964 All. 300, 302.

9 *Madan Gopal* v. *Sundaran,* A.I.R. 1940 Rang. 172, 174.

46.10. *Qualified owner*—Then, there is a controversy as to whether the section applies to a case where the transfer is from a qualified owner. It is the view of the Allahabad High Court[1] that section 51 is applicable only to defective transfers and not to defensible transfers. The Madras and Nagpur view is to be contrary[2-3]. One is reminded in this context of the phrase used in section 43—power of a person to transfer property "in circumstances which are in their nature variable." We are of the opinion that the wider view—the Madras view—should be adopted, having regard to the beneficial object of the section.

The answer to such questions depends partly on the meaning which one attaches to the expression "transferee" and partly on the emphasis to be placed on the words "believing himself to be absolutely entitled in good faith." We see every reason why the wider view should be adopted. The emphasis should be on the honest belief of the person making the improvements that he is a transferee and not on the validity of his title. Once good faith is established, the equities in his favour should not be disregarded.

46.11. *Compensation—whose option*—Although the language of section 51 might suggest that the choice of mode of compensation is of the person evicted, that is not the intention.[4] *The choice is of the* person evicting.[5-6-7]. This seems to be a point requiring clarification by express amendment in the section.

46.12. *Amount*—As to the amount of compensation, it has been decided by the Privy Council[8] that the amount of expenditure has occasionally very little to do with the real issue, and that the real issue is to what extent enhancement of the subject matter has been brought about. In other words, the real question is: Has the property as a marketable subject enhanced in value or not? In that case a temple built on the land did not enhance its marketable value and was not regarded as falling within section 51.

46.12A. *Removal*—This brings us to a connected question, namely, is the evicted person entitled to remove the materials which constitute the improvements ? The answer could appear to be in the affirmative[9-10] provided the land is not injured.

46.13. *Estoppel*—We must make a distinction between those improvements which involve an equitable estoppel and those which do not. Equitable estoppel goes far beyond the rule in section 51, because while section 51 merely puts the party on terms to pay compensation, estoppel may compel him to make good his representation. In the well-known case of *Forbes* v. *Ralli Brothers*,[11] the defendant lessee raised a pucca guilding on a leasehold.

1 *Lachmi Prasad* v. *Lachmi Narain*, A.I.R. 1928 All. 41—42, (Ashworth, J.).
2 *Nangappa* v. *P. Coundan*, I.L.R. 32 Mad. 530.
3 *Vithal* v. *Narayan*, A.I.R. 1931 Nag. 69 (Jackson, A.J.C.).
4 *Famaiya* v. *Narayanaswamy*, 51 M.L.J. 313.
5 *Narayan* v. *Ganesh*, A.I.R. 1926 Bom. 599, 600.
6 See decree in A.I.R. 1956 S.C. 727. 729, *Narayan Rao Basavarayappa*.
7 *Nagaratnamma* v. *Ramayya*, A.I.R. 1963 A.P. 177, 184, para 18.
8 *Kedar Nath* v. *Muthumal*, I.L.R. 48 Cal. 555 (P.C.).
9 *Hans Raj* v. *Somi*, I.L.R. 44 All. 655.
10 *Krishna Prasad* v. *Adyanath Ghatak*, A.I.R. 1944 Pat. 77.
11 *Forbes* v. *Ralli Brothers*, A.I.R. 1925 P.C. 146.

He purported to do so on the strength of the permission of the landlord, given by a letter which stated that the lease was a permanent one and gave to the lessee the right to erect buildings.

It was held that though the lessee was not entitled to hold the land at a fixed rate of rent and that the rent was liable to be enhanced after proper legal notice, yet a suit by the landlord for ejectment on the ground of construction of the pucca building was not maintainable by reason of estoppel arising on the letter written by the landlord.

46.14. *Meaning of transferee*—How does section 51 apply to a transferee from a transferee? A decision of a single judge of the Calcutta High Court[1] is to the effect that a claim for improvements under section 51 can be made only by the first transferee, and not by his representative in interest.

In the Calcutta case, these observations were made with regard to the argument relating to section 51:—

> "I had best state my construction of that section at once. If it was intended to provide for rights higher and wider than those that *I shall now state, in my view, the section should be re-drafted.* I will paraphrase it as follows: X has a right to compensation provided that he is (1) a transferee, (2) he has made such improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled, and (4) he was evicted. In my view, the section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It appears to me that it was intended to provide for a right to compensation to an individual who fulfils all the conditions laid down."

It is held in the Calcutta decision that such a right is neither heritable nor transferable and apart from section 51, there are no equitable principles under which the evictee can claim compensation. The actual decision in that can be supported on the ground that the defendant who claimed compensation was the purchaser of the *property at a court sale* so that he cannot claim to be a transferee within meaning of section 51 of the Transfer of Property Act.

But the reasoning goes beyond that, and would deny the benefit of section 51 to any transferee. The judgment gives a very mild hint of a need for reform of the law.

A different view was expressed in a Madras case,[2] holding that section 51 applies to the subsequent transferee also. The Madras case dissents from the Calcutta case.

There are at least two Privy Council decisions[3-4] in which compensation seems to have been awarded to the transferee's representative in interest. The first case was one in which a transferee from a Hindu widow without legal necessity effected permanent improvements. His successor-in-interest was allowed to claim compensation for the improvements made by

1 *Nagendrabala* v. *Panchanan*, A.I.R. 1934 Cal. 290.
2 *Md. Basiruddin* v. *Govindroy*, A.I.R. 1971 Mad. 44.
3 *Bhagwat Dayal* v. *Ram Ratan*, A.I.R. 1922 P.C. 91, 93.
4 *Narayanan* v. *Rama Iyer*, A.I.R. 1930 P.C. 297, 300.

his predecessor. In the second case, the transferee who had effected improvements in good faith was succeeded by his heir and it was the heir who was awarded compensation for the improvements effected by his predecessor. Having regard to this position, it is desirable to take the opportunity of making it clear that the expression "transferee" in this section includes his successors in interests.

46.15. *Recommendation—Amendments summed up*—As a result of the above discussion, we recommend that the following propositions[1] should be inserted in section 51:—

(a) "Good faith" in the section requires only honesty of purpose, and not proof of absence of negligence.[2]

(b) Invalid transfers, including invalid transfers by qualified owners, are covered.[3]

(c) The choice between the two modes of compensation is of the person evicting,[4] and not of the person evicted.

(d) The expression 'transferee' includes successors in interest.[5]

46.16. *Recommendation*—In the light of the above discussion, we recommend the addition of the following Explanations to section 51 :—

"Explanation 1.—In this section, "transferee' includes a person claiming under or through a transferee.

"Explanation 2.—In this section, the expression 'good faith' has the same meaning as in section 50.

Explanation 3.—A person who purports to derive title under a transfer which is not valid in law is a transferee within the meaning of this section.[6]

"Explanation 4.—A person causing the eviction has the option of deciding whether the transferee should be entitled to have the value of the improvements estimated and paid for, or whether the transferee shall be entitled to require that person to sell his interest in the property to the transferee, as provided in this section."

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1 For draft amendment, see para 46.16, *infra*.

2 Para 46.8, *supra*.

3 Para 46.9 and 46.10, *supra*.

4 Para 46.11, *supra*.

5 Para 46.14, *supra*.

6 Of course the other conditions of the section, including belief in good faith, must be satisfied.

# CHAPTER 47

## *TRANSFER PENDING LITIGATION*

### SECTION 52

47.1. *Introductory*—Certain provisions of the Act are aimed not at giving effect to any specific doctrines of equity, but at effectively carrying out certain requirements of public policy. In the field of the law of procedure, we are familiar with the principle that there should be an end to litigation. The policy of the law to avoid unnecessary litigation and to avoid the same matter being litigated again is well known. A similar policy finds manifestation in the principle that litigation conducted without collusion and in a competent court, must be effective and the energy and money spent thereon must not be rendered futile by one party transferring the property in issue in the litigation.

47.2. *Principle*—Section 52 is an expression of the principle underlying the maxim *pendente lite nihil innovetur* (pending a litigation nothing new should be introduced). The section is intended to protect the parties, but there is a deeper consideration of public policy, namely, the act of Court must not be thwarted by private act.

47.3. *Section* 52—This is how the section reads—

"52. During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits, by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

47.4. *History*—Lis pendens is a doctrine known to English law at least since the 17th century.[1] There was, however, some obscurity as to its rationale, since some persons thought that the doctrine rested on notice. In the leading case on the subject—*Bellamy* v. *Sabine*[2]—decided in the latter

1 (a) *Self* v. *Madox*, (1687) 23 E.R. 585;
(b) *Sorrell* v. *Carpenter*, (1788) 24 E.R. 325.
2 *Bellamy* v. *Sabine*, (1857) 44 E.R. 842.

half of the 19th century, the Lord Chancellor (Lord Cranworth), observed :

> "It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party".

"where a litigation is pending between a Plaintiff and a Defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, *whether such alienees had or had not notice of the pending proceedings*. If this were not so, there would be no certainty that the litigation would ever come to an end."

*Basis*.—After referring to certain cases which were to the effect that lis pendens was "implied notice" to all the world, Lord Cranworth continued :

"The language of the court in these cases, as well as in *Worsely* v. *The Earl of Scarborough*,[1] certainly is to the effect that lis pendens is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that pendente lite, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to courts of Equity."

Turner, L.J. in the same case observed that the doctrine rested not on any peculiar tenets as to implied or constructive notice, but upon this foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.

47.5. *Analysis*—The section was analysed by R. B. Pal, J., of the Calcutta High Court as follows[2] :

"The requirements of the section are : (1) the pendency of a suit, (2) non-collusive character of the suit, (3) any right to immovable property being in question in that suit, being in question directly and specifically, (4) the other party (other than the party making the transfer *pendente lite*) having some right under the decree in, that suit. The consequence of the doctrine is that the transaction *pendente lite* shall not be allowed to affect the right under the decree."

The first and the third ingredients have been the most fruitful source of controversy. Some of the important points will be dealt with in due course.

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1 *Worsely* v. *The Earl of Scarborough*, (1746) 26 E.R. 1025, 1026.

2 *Haranya Bhushan* v. *Goura Dull*, A.I.R. 1943 Cal. 227, 230 (Judgment approved by the Privy Council in A.I.R. 1948. P.C.).

47.6. *Principle*—We have already stated[1] that the section intended to ensure that a private party does not defeat the authority of the court. The *status quo* is maintained unaffected by the act of a party to the litigation. In other words, the section takes away the subject of transfer of property pending litigation from the realm of volition of the parties, and places it in the domain of the court, so that successive alienations of property in dispute may not render nugatory judicial verdict on that dispute. It is for this reason that the emphasis is not on notice of pendency, but on pendency itself. It is sometimes stated that the law of lis pendens is an extension of the law of res judicata. This is true, if it is understood in the sense that res judicata is on the basis of parties whose names appear on record of the proceedings, and lis pendens binds all persons who purport to be transferees of the property in the suit. If he was a party, then he would be bound by reason of res judicata. If he was not a party, he would be bound by lis pendens. In this sense, lis pendens supplements *res judicata.*

47.7. *Decretal charge*—A pretty large number of judicial decisions on section 52 relate to the question of charge. Controversy used to arise in the past on the question whether the doctrine of *lis pendens* applies to claims for maintenance resulting in a charge. The correct position as now settled seems to be that if the claimant for maintenance has made a prayer for charge and the charge is ultimately incorporated in the decree, then the doctrine applies, so that, as the section says, "the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party to the suit under any decree which may be made therein".[2] Of course, there should be a prayer for a charge on a specific immovable property mentioned in the plaint and the decree must have been passed creating a charge on such property. We shall deal late[3] with a right which is created by the decree though not prayed for in the pleadings.

47.8. *Limony*—The emergence of matrimonial legislation and the increasing number of suits in that jurisdiction has lent new importance to the question of application of the doctrine of lis pendens to prayers for alimony and for a charge on specific immovable property. In one of the very early American cases,[4] the following observations were made :—

"In many cases where, in divorce proceedings the application is for alimony proper, that is, an allowance to be paid at regular periods for the wife's support, it was held that the rule of lis pendens does not apply where the suit is in personam, and did not relate to any specific part of the personal or real estate of the husband. If, however, the wife in her complaint specifically describes property which she asks the court to decree *to her for her support*, there seems to be no well founded reason why the rule of lis pendens should not apply..... In such a case, a purchaser *pendente lite*, with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects

1 Para 47.4. *supra.*

2 *Bose Chinamma Dhutta* v. *Krishna.* (1906) I.L.R. 29 Mad. 508.

3 Para 47.9, *infra.*

4 *Powell* v. *Campell*, 19 Am. St. Rep. 350 cited in *Seetharamanuja Charyulu* v. *Venkatsubbamma*, A.I.R. 1930 Mad. 824, 832.

of the suit is to obtain decree awarding such property to her; see section 284 of Hukam Chand's law of Res Judicata, pages 722 and 724, and Benndt on Lis Pendens, page 267, section 219".

This position is substantially true in India and elsewhere, today also.

47.9. *Charge created by decree but not prayed for in the pleading*—One situation arising out of the charges does not appear to have been dealt with in section 52. What happens if the charge is not prayed for in the plaint, but is granted by the decree and the transfer (now sought to be challenged) is made after the decree but before the decree is completely satisfied? Taking literally the language of the section, the matter is not covered in the main part, because when the suit was instituted, there was no right to immovable property directly and specifically 'in question'. In such a case, is it not just and fair that the doctrine of *lis pendens* should be extended? We are not, this time, concerned with the case where there is in the plaint itself a prayer for a charge. In such a case the lis involving immovable property commences from the date of the plaint. We are concerned with the question whether there could be a case where the lis, though not commencing from the date of the plaint, commences from the *date of the decree*. If the decree directs the sale of a certain property, and then, after the decree and before the sale, a private transfer is effected, should it be allowed to defeat the rights under the decree? As the law now stands, until the actual order is passed for the sale of the property, no priority is created, in such a situation.[1] Take another situation. An injunction is not prayed for in the plaint, but is ultimately granted by the decree—a rare but no an inconceivable case. After the injunction is granted, but before it is executed, property is transferred. Should the injunction not be executable against the transferee?

We are of the view that the section should be amplified in this regard, and we recommend accordingly.

47.10. *Charge created by decree*—It would appear that when a charge is created by a decree, the doctrine of lis pendens still applies,—unless the decree is merely declaratory.[2] If a person purchases property from a party after an order creating a charge is passed in an inter-pleader suit, the transfer is governed by *lis pendens*, according to some cases.[3] The Explanation to section 52, however, where it relates to the starting point, may give a different impression. This should be remedied. As to the point of substance, it is to be noted that while a charge, as such, can be enforced only against a person who purchases with notice or for value, the doctrine of lis pendens makes no exception in favour of a bona fide transferee for value without notice.

47.11. *Notice of suit—Registration of*—An amendment made by the erstwhile State of Bombay[4] has provided for the registration of notices of suit with reference to the Registration Act and has consequentially amended section 52 of the Transfer of Property Act so as to limit its operation

1 *Bepin Krishna* v. *Byamdesh Deb*, A.I.R. 1925 Cal. 395 (2).
2 *Mahesh Prasad* v. *Mt. Mundar*, A.I.R. 1951 All. 141, 151, 153 (F.B.).
3 *Kulanadaivelu* v. *Sowbagyammal*, A.I.R. 1945 Mad. 350, 351.
4 Bombay Act. 57 of 1959.

to cases where notice of the pendency of the suit or proceeding is registered under the Registration Act as amended in that State. We have considered the question whether such an amendment should be extended to the rest of India, but are not inclined to do so. Apart from the fact that it may involve an amendment of the Registration Act, and apart from the fact that such an amendment in that Act was not favoured by the Law Commission in its Report on that Act[1], we are not certain whether the amended procedure would be appropriate for all the territories to which the Transfer of Property Act extends.

47.12. *Meaning of Court*—Questions arise as to whether a particular authority is a "court" or not for the purpose of the section. Generally, a wide view is taken. We need not quote the case law.

47.13. *Competence of the Court*—An important ingredient which is usually read into the main paragraph of section 52 is not mentioned expressly in the section, namely, that the Court before which the proceeding is pending must be a court of competent jurisdiction. The words "having authority" which appear in the main paragraph are intended mainly to emphasise the fact that the Court must be an Indian Court. But it is not meant to indicate that, as amongst Indian Courts *inter se*, the court must be a competent court having regard to all the law that governs the jurisdiction of courts dealing with civil allied proceedings. This further requirement should find a place in the main paragraph. The idea is indirectly brought out by its mention in the definition of pendency of a suit as given in the Explanation. But it is important enough to deserve mention in the main section.

47.14. That the court must be competent is an aspect which may become material either where the suit was going on in a court which has no jurisdiction so that the plaint is ultimately rejected or the suit dismissed, or where the plaint was returned by the incompetent court for presentation to the competent court. In fact, the words "court of competent jurisdiction" in the Explanation which was inserted in 1929 make it clear that the court must be competent. The only point which is now sought to be emphasised is that this important requirement may usefully find a place in the main paragraph of the section.

Where the Court has no jurisdiction to try the suit, a transfer pending such suit cannot operate as lis pendens, and cannot affect any decrees or orders in such suit.[2] In an early Calcutta case[3], it was held that a suit filed on the equity side of the Supreme Court of Calcutta did not operate as lis pendens so as to affect a transfer of immovable property in the mofussil, inasmuch as the Supreme Court has no jurisdiction over property in the mofussil. The present High Courts have, under their Letters Patents, power to try suits relating to land partly within their jurisdiction and partly without it, provided the leave of the Court is obtained for doing so. When the High Court so acquires jurisdiction to determine the suit, the suit will operate as lis pendens.[4]

1 Law Commission's 34th Report on the Registration Act.
2 *Devassya* v. *Thommani*, A.I.R. 1953 Trav-Co. 573, 574.
3 (1869) 11 Suth W. R. 554, 555 (D.B.).
4 *Kiernanda* v. *Beni Madhab*, A.I.R. 1931 Cal. 763, 767.

47.15. *Recommendation*—It may be desirable to bring out the above aspect in the main paragraph and we recommend accordingly.

47.16. *Scope as to movable property*—Because of the setting in which the section appears, section 52 does not apply to movable property. Further, because the Act does not extend to certain territories, the section does not apply to those territories. Nevertheless, the principle of the section must also extend to the territories to which, strictly speaking, the Act does not apply. The same reasoning applies to execution sales. Although "transfer" and "dealing" are not expressions appropriate for execution sales, yet it is well established that the principle applies to execution sales as well[1].

47.17. *Meaning of "otherwise dealt with"*—The section is not confined to "transfers". The words "otherwise dealt with" will include the several other transactions which we need not enumerate.

47.18. *Recommendations for amendment*—As a result of the above discussion, we recommend two amendments in the section—

(i) insertion of the requirement of competence of the Court in the first paragraph;

(ii) amplification as regards a right[2]—particularly, a charge—created by a decree, though such right or charge was not prayed for in the plaint. Of course, in such a case the lis commences from the date of the decree and not from the date of plaint. But the expression "right ..... is ..... .....in question" may require to be amplified.

47.19. *Illustrative situations*—In elucidiation of the second proposition, it may be stated that a suit or proceeding, in which, at its inception, no question as to right to any property is directly or specifically raised, may, at a subsequent stage thereof, become a suit or proceeding in which such question is involved. Thus, a suit for maintenance in which no charge is asked for against any property is not, at its inception, one in which any right to immovable property is in question. But, if the decree declares a charge on any particular property, the litigation thereafter becomes one in which such right is in question and a subsequent transfer of the property will be affected by lis pendens[3]. Similarly, where in a suit for mesne profits, the defendant furnishes security of specific immovable property for any amount that may be decreed in the suit, the litigation becomes, from the date the security is given, one in which a right to immovable property is in question. A transfer, therefore, of such property after the date on which it is given as security, will be affected by lis pendens[4]. In *Bazayet Hossein* v. *Dooli Chand*[5], there was a suit by the creditors of a deceased person against his heirs, for recovery of money

1 *Jayaram* v. *Ayyavam*, A.I.R. 1973, S.C. 569, 578.

2 Para 47.19, *supra*.

3 *Jagannatha* v. *Ram Chander*, A.I.R. 1936 Mad. 589, 592.

4 *Subramania* v. *Esakki Madan*, A.I.R. 1953 Trav-Co. 364, 366.

5 *Bazayet Hossein* v. *Dooli Chand*, (1879) I.L.R. 4 Cal. 402, 420; 5 Ind. App. 211 (P.C.).

from out of the assets. A decree was passed directing the defendants to account for the property. A transferee who took the property after the decree, was held affected by lis pendens.

A contrary view has, however, been taken by the Nagpur High Court[1], namely, that the doctrine of lis pendens will not apply *unless from the very beginning of the suit or proceeding* the right to the property was in question, and that, where in a suit for money, a charge *is declared* by the decree on certain property, a transfer of the property subsequent to the decree, is not affected by lis pendens. Reliance was placed upon the decision of the High Court of Patna in the undermentioned case[2]. In that case the plaintiff sued for the recovery of money and also claimed that certain properties should be charged for the amount that may be decreed, but the Court granted merely a money decree without giving any charge on any property. It was held that a transfer of the property pending the suit was not affected by lis pendens for two reasons, first, that the actual decree did not affect in any way the property transferred, and secondly, that the suit, *even though asking for a charge* in the plaint, was not one in which any right to immovable property was in question. We are, with respect, of the opinion that the Nagpur view is not correct.

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1 *Badri Das* v. *Raja Pratpgir*. A.I.R. 1940 Nag. 8, 13 (D.B.).

2 *Bhagwan Das* v. *Akbar Hussain Khan*, A.I.R. 1936 Pat. 571, 572.

# CHAPTER 48

## *FRAUDULENT TRANSFERS*

### SECTION 53

48.1. *Introduction*—Ordinarily, the law does not, in determining questions of civil liability, take account of the motives of person. An act which is lawful does not, in general, become actionable merely because the motive is improper. But there are exceptions to this general rule. One such exception is created by section 53 in the interests of creditors of the transferor and subsequent transferee of the same property. It constitutes a qualification of the general rule that a person may do what he likes with his own property. The exception is created on the basis of the paramount policy of the law to check fraud. No one is permitted to effect a transfer with the object of defrauding his creditors or with the object of defrauding a subsequent transferee.

48.2. *Section* 53.—Section 53 reads—

"53. (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

48.3. *History*—The ancestry of the section is usually traced to two statutes of Elizabethan times. By 13 Eliz., Chap. 5 it was provided that convevances of any kind of property, whether land or goods, with intent to defraud creditors were voidable at the instance of the person thereby prejudiced, except where the transferee had taken the property for good consideration and without notice of the intent to defraud. By 27 Eliz. Chap. 4, it was provided that convevances of lands (not goods) with intent to defraud subsequent purchasers were void against such purchasers for value, except where the prior transferee had taken the property for good consideration and *bona fide*.

Before the 1882 Act was passed these two statutes were applicable to the Presidency Towns of India. The principles underlying them were also applied in the mofussil, as being in conformity with justice, equity and good conscience. In section 53 of this Act, the Legislature introduced with some modifications the above-mentioned provisions of the two statutes and thus codified what had been recognised as the law in this country. The two statutes were repealed by this Act. It was held in a Bombay case[1] that the above statutes may be accepted as guides to the law before the Act.

48.4. *Law in England*—In England, the law was altered by the Voluntary Conveyances Act, 1893. That Act, and the earlier statutes, are now replaced by sections 172-173, Law of Property Act, 1925. In India, in 1929, section 53 was amended in the light of the English statute of 1925.

48.5. *Scope*—Section 53, in its first sub-section, deals with transfers in fraud of creditors. In sub-section (2) it deals with transfers in fraud of subsequent transferees. Neither of these sub-sections deals with a transfer giving one creditor preference over the other. That is a matter dealt with by the Insolvency law under "Fraudulent preference[2]."

48.6. *Sub-section (1)—Evidence of intention*—We shall now consider a few points of detail concerning sub-section (1). The section as it stands after the 1929 amendment contains no presumption as to intent. There may be a fraudulent intent even though the transfer is for consideration. Conversely, the transfer may be without consideration and yet there may be bona fides. The principal object of the first sub-section is to ensure that the property of the debtor is applied in payment of the demands of the creditors and that there is no intention to defeat or delay them. Creditors may be prejudiced not only by a transfer without consideration, but also by a transfer with consideration whereunder the debtor reserves a substantial benefit for himself. Conversely, a transfer even without consideration may be bona fide—for example, a transfer to a charity in performance of a moral obligation undertaken in good faith at a time when the transferor was in financially comfortable circumstances.

48.7. *Law before 1929*—Before 1929, the section provided that a transfer may be presumed to have been made with a fraudulent intent if its effect was to defeat or delay creditors and it was made gratuitously or for a grossly inadequate consideration. The provision, however, created doubts as to whether it implied that in regard to a transfer for adequate consideration a conclusion of fraudulent intent could not be made. The paragraph has now been deleted. This does not, of course, mean that as a matter of policy a different view was taken. The Court is still free to make such a presumption, but it must have regard to the whole of the circumstances. The principle that every man ought to be just before he is generous[3] has not been given the go-bye. But it has to be applied on a consideration of all the circumstances. Regard will, therefore, have to

1 *Bhagwant* v. *Kedari*, (1901) I.L.R. 25 Bom. 202, 208, 209.

2 See para. 48.12, *infra*.

3 *Freeman* v. *Popa*, (1870) 5 Ch. D. 538

be had to the extent of his indebtedness, on the one hand, and the circumstances leading to the voluntary transfer on the other hand. Thus when the transferor has no debts and is not in embarrassed circumstances, the execution of a voluntary transfer cannot be held in itself to be in fraud of subsequent creditors[1]. Even if he is under a debt, a transfer cannot be considered to be fraudulent only on that account, as otherwise a person of means, indebted in a trifling sum of money, may be prevented from making a transfer—let us say,—a mortgage of property to secure future advances for bona fide investments in a lawful business. Thus, in an Allahabad case[2], a mortgagor who had executed a mortgage, gifted non-mortgaged property. The gift was challenged as voidable under this section. It was, however, found that the mortgaged property was sufficient to satisfy the mortgage debt. It was held that the gift could not be said to be with a view to defeating the mortgagee. In contrast[3], where the mortgaged property is not sufficient to satisfy the mortgage debt, a transfer by the mortgagor of his other property can indicate a fraudulent intention. It is therefore legitimate to consider the value of the property sold and its proportion to the extent of the demands of the creditors at that time. In recommending the deletion of the relevant paragraph of section 53, the Special Committee of 1927 stated that its object was "to leave the determination of the question of intent to be determined by the ordinary rules of evidence[4].

48.8. *Transfer voidable under sub-section* (1)—It is obvious from the language of the section that the transfer hit by sub-section (1) is not absolutely void. It is voidable at the instance of the creditors, and the suit to set it aside must be a representative suit. This does not, of course, mean that there must necessarily be numerous creditors in every case. There may be only one creditor at the time of the transfer. If the intention of the transferor was to defraud that creditor who was the only creditor at that time, the section would be attracted. Of course, if, by the time, a suit is instituted, other debts also come into existence, the suit must be for the benefit of all.

48.9. *Suit not the only remedy*—If a suit is filed for a declaration that the transfer does not bind the body of creditors, then all creditors must be the beneficiaries. But this does not mean that a suit must be filed for the purpose of expressing a creditor's repudiation of the transfer. Judicial decisions[5] established the proposition that any act of the creditor showing an unequivocal repudiation of the transfer is enough.

48.10. *Benami transactions*—There appears to be a misconception as to the relationship between benami and fraudulent transactions. A benami transaction may or may not be fraudulent, and a fraudulent transaction may or may not be benami. This does not, of course, mean that against a benami transaction a creditor has no remedy. Rather, the opposite is the position in general. As a rule, a creditor of A can always prove that property standing in the name of B is held benami and that the real owner is A. If the creditor succeeds in proving it, the property becomes available to the creditor, not under section 53 but because of the

1 *Umar Sait* v. *Union of India*, A.I.R. 1965 Mad. 395, 397.

2 A.I.R. 1928 All. 476, 479.

3 *Raj Kuer* v. *Ra'endra Bahadur*, A.I.R. 1951 All. 443, 447.

4 Report of the Special Committee (1927), discussion on section 53.

5 E.g., A.I.R. 1963 S.C. 1150, 1160.

position that the creditor of A has always available the property of A, *whoever be the ostensible owner*. This is subject, of course, to any transactions already entered into by the ostensible owner that are recognised by special rules of law.[1]

48.11. *Good faith*—Even where the other ingredients are satisfied, protection is given only to a transferee in good faith for consideration. This practically means that the transferee must have been party to the fraud if the section is to apply,—although the burden of proving good faith is on the transferee. There is a difference between good faith and proper inquiry, as we have pointed out under sections 50-51. The mere fact that the transferee has some reason to suspect[2] that there may be other creditors, or even his knowledge[3] that the transferor is in financial embarrassment, does not necessarily prove absence of good faith.

48.12. *Fraudulent preference*—The law of insolvency invalidates fraudulent preferences[4] in certain circumstances. The principles applicable for the operation of such provision are, however, different from those on which section 53 rests. The object of the prohibition in the Insolvency law is to secure rateable distribution of the assets amongst the creditors and to prevent discrimination *inter se*. The object of section 53, on the other hand, is to protect all creditors. The *lis* is between the body of creditors on the one hand and the transferee on the other. In the case of a fraudulent preference, the *lis* is between creditors *inter se*. That provision incidentally is applicable only to a transfer within two years before insolvency. The provision in the Transfer of Property Act, on the other hand, is applicable at all times.

48.13. *Subsequent transferees—Position under sub-section* (1)—Two further propositions are worth pointing out regarding sub-section (1) of section 53—

(a) Where the first transferee is a bona fide transferee for consideration, he gets a good title, and a subsequent transferee from that transferee, even if not *bona fide*, is protected[5].

(b) A bona fide transferee from a fraudulent transferee would also be protected[6].

48.14. *Sub-section* (2)—*Transfer in fraud of subsequent transferee*—This disposes of sub-section (1) of section 53. Under sub-section (2), a transfer can be set aside, if in fraud of subsequent transferee, but only if without consideration. Fraud must be proved. The last paragraph provides, in effect, that a transfer made without consideration shall not be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

48.15. *No change*—The above discussion discloses no need to change the section.

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1 E.g. section 41.

2 *Razina Khalun* v. *Abida Khalun*, A.I.R. 1937 All. 39, 41.

3 *Rajbari Bank* v. *Harshamukhi Sinha*, A.I.R. 1947 Cal. 154.

4 Section 54, Provincial Insolvency Act, 1920; Section 56, Presidency Towns Insolvency Act, 1909.

5 *Brandlyn* v. *Ord.*, (1738) 26 E.R. 359.

6 (a) *Firm Man Singh* v. *B. N. Sinha*, A.I.R. 1940 Lah. 198, 199;
(b) *Kunhu Pothu* v. *Raru Nair*, A.I.R. 1923 Mad. 558, 560;
(c) *Parthasarathy* v. *Subbaraya*, A.I.R. 1924 Mad. 67.

## CHAPTER 49

## *PART PERFORMANCE AS A DEFENCE*

### SECTION 53-A

49.1. *Introductory*—The conflict between strict law and equity assumes a new form when the strict law is in the form of a *statutory provision* prescribing a particular formality for the transfer of property. When a situation presents itself where that formality has not been undergone but the intention to transfer has been implemented in fact, and the transferee, acting in performance of the contract, has taken possession and performed his part, the conflict becomes apparent. Is it, then, equitable that the transferor should be permitted to repudiate the transfer on the ground of a mere technicality? In some form or other, such conflict between strict law and equity arises daily. But the peculiarity this time is that there is a specific legislative mandate before the Court, and the Court has to decide the delicate question whether it should disregard the statute and if so, to what extent. In a situation not governed by statute, the solution would not be too difficult, because the Court has the whole jurisprudence of estoppel for its guidance. A person is not allowed to assert his legal rights where to do so would be to allow him to repudiate his own representation which has led a third party to act on it, to his prejudice.

Estoppel having evolved its own set of rules and propositions familiar to lawyers and founded on non-controversial moral postulates, Courts would, in general, find no difficulty in solving a problem by resorting to that doctrine where there is no possibility of a conflict with a specific legislative provision.

49.2. *Statutory provision*—Where, however, there is a statutory provision, the matter creates problems. Difficulty arises because the resort to estoppel is ordinarily not regarded as permissible where a *statutory provision* has to be complied with. How far can estoppel override a statute is the fundamental question to be considered. In answering this question, the Court must necessarily embark upon an investigation of the object of the particular statutory provision in question. This is the general pattern of the judicial process. In the context of statutory provisions requiring (i) registration of the instrument of transfer, or (ii) execution of an *instrument of transfer* (as distinguished from the contract), the specific question to be considered is—What is the object of such requirements?

49.3. *French*—English Courts, when faced with the problem, assumed that such requirements are primarily intended to prevent fraud. They started giving relief where strict enforcement of those provisions would itself effectuate a fraud. The English doctrine of part performance was evolved to counter the strict provisions of the Statute of Frauds. It may be that statutory language to some extent left scope for such benevolent construction. But that is not an essential aspect. As Lord Cranworth L.C observed[1]—

> "Though Courts of Equity have held themselves bound by this last enactment (the Statute of Frauds), they have yet in many cases,

1 *Caton* v. *Caton*, (1883) 8 App. Cas. 467, 475, 476.

felt themselves at liberty *to disregard it* where to insist on it would be to make it the means of effecting..... fraud."

49.4. *Equity*—It would be observed later that the other party is prevented from setting up the legal invalidity of the contract on the faith of which he intended or allowed the person contracting with him to act. This was a victory of equity over statute. At times, it was described as the result of a process of construction of statutes so as to limit its scope to avoid fraud. But, in substance, it amounted to clipping the wings of the statutory provisions prescribing technicalities. Such a victory is not achieved easily, since parallel sources of law are in competition. The history of the recognition of this doctrine—which we shall deal with later—shows how tiresome the process could be. In fact, in India, the long-drawn process culminated in a specific stautory provision in 1929 in the shape of section 53A, so that the movement has now turned a full circle. What began with a construction of statutory provisions has itself ended in another specific statutory provision.

49.5. *Estoppel*—Estoppel is the chief moral justification for the doctrine of part-performance. The Court of Equity felt themselves at liberty to receive parol evidence as to the terms of the contract and to grant relief to the parties on the basis of such contract, such as, by decreeing specific performance of the contract[1] or by granting an injunction preventing a party from acting in breach of the contract, because there was, in substance, action in reliance on a promise. In *Caton* v. *Caton*,[2] Lord Cranworth, LC, emphasised the aspect of preventive fraud. He observed :

> "This is the ground on which they decree specific performance of parol contracts for the sale or purchase of land, when the contract has been in part performed. The right to relief in such cases rests, not merely on the contract, but on "what has been done in pursuance of the contract. .... The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds, is, that when one of the two contracting parties has been *induced or allowed by the other*[3] to alter his position on the faith of the contract; as, for instance, by taking possession of land, expanding money in building, or by other like acts; there, it would be fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act."

49.6. *Section 53A*—To come to the section proper, section 53A reads—

> "53A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

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1 *Lawson* v. *Laude*, (1761) 21 E.R. 303; 1 Dick 346;
*Gunter* v. *Halsey*, (1739) 27 E.R. 381; Amb. 586.
*Lockey* v. *Lockey*, (1719) 24 E.R. 232; Pre Ch. 518.

2 *Caton* v. *Caton*, (1866) 35 L.J. Ch. 292, 395.

3 Emphasis supplied.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

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

49.7. *History in India*—The history of the doctrine of part performance in India is a history of fluctuation of views in the courts. Incidentally, it shows that where the law on a particular subject is codified incompletely, controversies are likely to arise on those topics which are left out of codification. It would be tedious to discuss here all the judicial decisions on the subject preceding the introduction of section 53A. It will suffice to refer to a few important judgments, representing the following stages—

(a) Before the passing of the Act, the doctrine of part performance was, speaking broadly, regarded as applicable in India, as would appear from cases decided before the Act[1] or cases decided after the Act relating to pre-Act transactions.[2]

(b) After the passing of the Act but before the insertion of section 53A in 1929, the position remained fluid. The applicability of the doctrine was recognised in a judgment of the Privy Council[3] of 1901, though on the facts, no valid contract was held to be established.

(c) There arose a conflict of views amongst the High Courts on the subject; the main reason for the conflict being the difference of approach on the basic question whether the express provisions of a statute can be overridden by equitable considerations. The doctrine was applied in *Mahomed Musa* v. *Aghora Kumar Ganguli*[4] by the Privy Council to a compromise by which certain mortgage debts were to be extinguished and certain property divided in specific shares. No conveyance was executed, but possession of their respective shares was taken by the parties who enjoyed them in accordance therewith. The observations of the Privy Council were, however, ambiguous. The same doctrine was applied[5] in 1916.

1 (1861) 9 M.I.A. 43, 65.

2 (1901) I.L.R. 28 Cal. 693, 705 (P.C.).

3 *Immudipatran Thiruganga* v. *Periya Doraisami*, (1901) I.L.R. 24 Mad. 377, 385 (P.C.).

4 *Mahomed Musa* v. *Aghore Kumar Ganguli*, A.I.R. 1914 P.C. 27, 30.

5 *Venkayyamma* v. *Appa Rao*, A.I.R. 1916 P.C. 9, 13.

(d) Conflict of decisions arose as to the exact scope of the doctrine in some of its aspects, namely, whether it was confined to use as a ground of defence, effect on limitation and so on.

(e) More serious doubt was thrown by a decision of the Privy Council on an appeal from Ceylon[1]. The relevant Ceylon Ordinance required that a contract for the transfer of immovable property should be made in writing and attested by a notary. In the absence of compliance with those formalities, the contract was "of no force or avail in law". On this statutory provision, the Privy Council held that the doctrine of part performance could not be invoked.

(f) In 1929, section 53A was introduced in the Indian Act, placing the law on a statutory footing. We need not refer to the controversy that arose as to its retrospective operation. But questions that have arisen with reference to some of the ingredients of the section will be discussed in due course.

49.8. *Ingredients*—It will be useful to draw attention to the important ingredients of the section. We are deliberately stating them below in language which does not purport to adhere necessarily to the actual wording of the section—

(1) There should be a contract for the transfer of immovable property.

(2) The contract should be in writing signed by the party sought to be charged therewith and from it the terms should be ascertainable with reasonable certainty.

(3) The transferee should, in part performance of the contract,
   (a) take possession, or
   (b) continue in possession and do some act in furtherance of the contract.

(4) The transferee should perform, or be willing to perform, his part of the bargain as contained in the writing.

(5) The application of the doctrine should not affect the right of a transferee for consideration without notice of the contract or of the part performance thereof.

Subject to these conditions and reservations, the effect of the section is that notwithstanding that the transaction has not been completed according to law, all rights and liabilities under the contract should arise and be enforceable as between the parties to the contract and persons claiming under them.

49.9. *Title*—The transferee, however, does not get a good title unless the transfer is completed according to law. Non-registration means that the title has not passed. Part performance means that certain equities have arisen, which the courts recognise. Such recognition of the equities, however, does not convert the contract into a conveyance. In order that the law of registration is not evaded, the section takes care to ensure that the transferee does not get a perfect title which he could have obtained by a registered transfer. This it ensures by protecting subsequent *bona fide* transferees for value.

1 *John H. Arseculeratne* v. *Pereira*, A.I.R. 1928 P.C. 273, 275.

49.10. *English law*—There are certain important differences between the English law and section 53A, which may be usefully noted at this stage—

(a) In England, the contract could be oral[1], in India, it must be in writing.

(b) In England, the doctrine can be used as a shield and also as a sword, inasmuch as both the parties can claim that the contract be carried into execution and each can resort to a suit claiming rights in violation of the contract.[2] In India, the section can be said to be ambiguous as some judicial decisions[3] seem to have taken a wider view in this regard. The section, as it now stands, is non-commital as to any positive rights arising in favour of the transferee.

(c) In England, the doctrine is uncodified in its content, though referred to in statute.[4] In India, it is codified.

49.11. *Position in England*—In England, the Statute of 1677 was intended to prevent fraud and perjury which is possible where a contract for transfer of the land could be alleged by the mere oral testimony. But this Statute opened a new and different avenue of fraud, namely, a person who had made a genuine contract might repudiate it on the ground that there was no proper memorandum as required by statute. In certain cases, the part performance was applied to check such fraud. This doctrine is not to be viewed in isolation, but only as one instance of the relief granted by equity against fraud. "In cases of fraud, equity should relieve even against the words of a statute." So observed Lord Parker, Lord Chancellor in 1720[5].

49.12. *Evolution*—The doctrine first appeared in England in 1686, and was established by a decision of the House of Lords in 1701[6]. Its found mental postulate is that a party performing a part of the contract on his side, in reliance on the promise which is made by the defendant, has a right to require the defendant to keep his promise[7]. The use of the expression "plaintiff or defendant" in some of the English cases incidentally shows that in England this doctrine is available to the plaintiff also. We shall revert to this aspect later.

It may be noted that section 40(2) of the Law of Property Act, 1925 has given statutory recognition to the doctrine. Sub-section (1) of that section requires writing, by providing that no action may be brought upon any contract for the sale or other deposition of land or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the parties or by some other person lawfully authorised. Sub-section (2) provides that the section shall not affect the law relating to part performance. In England, the effect of

1 *Caton* v. *Caton*, (1866) 35 L.J. Ch. 292, 295.
2 A.I.R. 1938 Cal. 97, 103.
3 See *infra*.
4 Section 40, Law of Property Act, 1925.
5 *Countess Mountacuta* v. *Crosswell*, (1720) 1 Williams 618, 620.
6 *Lester* v. *Foxcroft*, (1701) Colles P.C. 108.
7 *Mundy* v. *Jolliffe*, (1839) 5 My & Cr. 167, 177.

the doctrine of part performance is to remove the barrier set up by statute and to open the door to parol evidence of the whole agreement for the grant of equitable relief.

But a long line of decisions has laid down certain ingredients and the following important conditions must be satisfied[1] :—

(1) Clear evidence of the contract is required.

(2) The plaintiff should establish a case for specific performance of the contract.

(3) The act of part performance must have been done by the plaintiff or on his behalf.

(4) Such act of part performance must be unequivocally referable to some such agreement as is alleged.

49.13. *Possession*—Taking possession on the land with the vendor's consent is an "act of part performance par excellence[2]". Continuing in possession, where such act is referable to the contract, is also good part perforamnce. But there may be other instances, for example, the making of expenses on alterations in the property, when carried out by someone who has no right of possession to the alleged property[3].

49.14. *Basis*—It is to be noted that the basis of the doctrine of part formance is, in general, specific performance. Of course, like all remeacquires an equity against the defendant[4].

The remedy of the person who has satisfied the condition of part-performance is, in general, specific performance. Of course, like all remedies of equity, this is discretionary, so that, if in a particular circumstance, the Court does not grant it, then he is without remedy. The plaintiff must adduce proof for his act of part performance. The plaintiff is also allowed by equity to give parol evidence of an agreement that would otherwise require a written evidence. If he satisfies the Court in these two aspects—proof of part performance and evidence of agreement though not in writing—he is entitled to a decree ordering the other party to execute a formal transfer to include the terms which have been agreed upon[5].

49.15. *Contracts to transfer and instrument of transfer*—A document of transfer which is not registered or not completed in the manner prescribed by law, may operate as a contract to transfer. Consequently, the section applies not only to contracts to transfer as such, but also to instruments of transfer. This is made clear by the words "or where there is an instrument of transfer" in the first paragraph of the section.

49.16. *Invalidity on other grounds*—The section has no application where the contract to transfer or the instrument of transfer is invalid on any ground other than that it was not completed in the manner prescribed by the law for the time being in force. Where the flaw in the transferee's position is not a defect of form or the absence of some formality, normally

1 Megarry and Wade, Real Property (1966), pages 571—573.
2 Williams, Statute of Frauds, page 256.
3 *Brouten* v. *Snook* (1928) Ch. 505.
4 Cheshire, Real Property (1972), page 382.
5 Cheshire, Real Property (1972), page 380.

necessary, but is one which, apart from form, renders the transaction unenforceable—e.g. minority,—the equitable doctrine of part performance is not applicable.

49.16A. *Rights provided by the Act*—The words "other than a right expressly provided by the terms of the contract" show that the transferor is not debarred from enforcing rights expressly provided by the terms of the contract.[1] Thus, the transferor can, where the transfer is by way of a lease, sue for damages for breach of an agreement as provided by the terms of the lease,[2] or sue for the rent due,[3] or enforce the terms of the lease entitling him to re-enter if there is default in payment of rent.[4] A contrary view has been held in some cases.[5] In those cases the transferor was held debarred from suing to enforce merely rights given by the contract of transfer. The expression "other than a right expressly provided by the terms of the contract" has not been adverted to in those said decisions. It is submitted that this view is not correct.

49.17. *Third person*—The section has no operation against third persons. In *S. N. Banerji* v. *Kuchwar Lime & Stone Co. Ltd.*[6] A leased property to B with the condition that if B transferred his interest, the lease would be forfeited. B transferred his interest to C, but without a registered instrument and gave him possession of the properties. Thereupon, 9 purported to forfeit the lease to B and granted a fresh lease to D who sued C for ejectment. It was held that the transfer by B to C was invalid for want of registered instrument, that the lease to B therefore subsisted, that D could not invoke the aid of section 53A and claim that by reason of that section B's transfer to C was valid and that he was entitled to claim possession from C. The Privy Council observed as follows :

> "The section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right. It merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons."

49.18. *Judgment creditor*—It has been held[7] in Madras that a judgment—creditor, who has attached the property of his judgment—debtor in execution of his decree, is a person "claiming under" the judgment—debtor, within the meaning of this section. A contrary view has been taken by the High Court of Orissa.[8]

The Bombay High Court[9] has held that an auction purchaser is not a person claiming under the judgment debtor.

We think that it is just and fair that effect should be given to the Madras view, and we recommend accordingly.

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1 *Lal Behari* v. *Kanak Kanti*, A.I.R. 1962 Cal. 502, 503.
2 A.I.R. 1950 Cal. 23, 28.
3 A.I.R. 1942 Oudh 231, 236.
4 A.I.R. 1953 Cal. 349, 352.
5 (a) *Ramarao* v. *Purnand*, A.I.R. 1954 Mad. 702, 704.
(b) *In the matter of Jambad Coal Syndicate Ltd.* A.I.R. 1940 Bom. 281, 282.
6 *S. N. Banerji* v. *Kuchwar Lime & Stone Co. Ltd.*, A.I.R. 1941 P.C. 128, 130,
7 *Audinarayudu* v. *Mangamma*, A.I.R. 1943 Mad. 706, 707.
8 *Padmalabha* v. *Appalanarasamma*, A.I.R. 1952 Orissa 143, 149.
9 *Maruti* v. *Krishna*, A.I.R. 1967 Bom. 34, 38, 39 (Naik J.) (reviews cases).

49.18A. *Onus*—The onus under the proviso is on the person claiming part performance to show that the transferee had notice of the contractor of the part performance thereof. The Court would expect that those who allege that the subsequent transferee had notice of the prior contract or of possession thereunder, would make it out, not by evidence of any casual conversation but by proof that the mind of the subsequent transferee had in some way been brought to an intelligent apprehension of the nature of the transaction in respect of the property so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it. Explanation II to section 3 provides that possession of a person is notice of the title of the person in adverse possession. The High Court of Patna has held that although section 53A does not confer full title to the property, it is nevertheless an interest sufficient to attract the provisions of Explanation II to section 3. The subsequent transferee will therefore be deemed to have notice of the title of the prior transferee and consequently it will be the duty of the subsequent transferee to make diligent enquiries regarding the nature of the equitable interest of the prior transferee in possession[1]. On this view with respect it is somewhat difficult to see what cases are contemplated by the proviso. For the applicability of the proviso it must be assumed that the title referred to in the said Explanation does not include the right of the transferee under a contract which has been partly performed.

49.19. *Title whether passes*—At this stage it may be convenient to discuss the question whether title passes under contract. In ordinary legal and juristic discussion, the word "title" is understood as meaning the source of a legal right, but the matter is not so simple in the context of section 53A, because section 54 (So far as sale of tangible immovable property of the value of rupees one hundred and upwards is concerned), provides expressly that the transfer can be made *only by a registered instrument*. If any other mode of transfer is not recognised, can it transfer an interest in the property ? And if not, can it pass title ? In general, if an unregistered deed of sale is executed where registration is required, there is no transfer and the property does not pass.[2]

49.20. The true position is that a contract does not pass any right *in rem*. A contract for the sale of such property is merely a document *which creates a right to obtain another document*... That, indeed, is the basis why it is not regarded for the purposes of the Registration Act, as creating declaring, assigning etc. any right in immovable property. The Patna judgment[3] under section 53A read with section 3, after noting the argument of counsel that title refers to a completed title and not a mere equitable interest rejected the argument on two grounds :—

(i) Counsel could not cite any authority in support of his contention;

(ii) in an English case,[4] it has been held that possession of a tenant is a notice to a purchaser of the actual interest which he may have either as tenant or, farther by an agreement *to purchase the premises.*

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1 *Rama Krishna* v. *Mahadevi*, A.I.R. 1965 Pat. 467, 469.

1 Mulla (1973), page 306.

2 *Ram Krishna* v. *Mahadevi*, A.I.R. 1965 Pat. 467 (Narasimhan, C.J. and G. N. Prasad, J.).

3 *Daniel* v. *Davison*, (1808) 33 English Reports 978.

With great respect, to Court, this judgment misses one important aspect, namely that an agreement for the sale of land does not, in India, create any interest in land; this is expressly provided by section 54 as already pointed out.

49.21. *Salmond's analysis*—Salmond[1] says that every right involves a title or source from which it is derived, title being the *de facto* antecedent of which the right is the *de jure* consequent. He adds that the titles are of two kinds : original and derivative. Original title is something which creates a right *de-novo*—the catching of fish is an original title of the right of fishing. A derivative title transfers an already existing right to a new owner—the purchase of fish is an illustration of a derivative title.

49.22. *Position in England*—In England, a contract for the sale of immovable property makes the promise the owner in equity of the estate.[2-3] But, in India, this is not the possition. Section 54 makes it very clear that the contract does not create any interest in the property. Even in the case of a decree for specific performance, it has been held[4] that the title passes with the execution and registration of a sale deed, and does not immediately flow from the decree.

49.23. *Perpetuities*—Again, it is for this reason that the rule against perpetuities does not affect a contract for the sale of property. Even for the purposes of section 24 of the Bombay Agriculturist Debtor's Relief Act, an agreement to sell does not create any "interest", in the land.[5]

49.24. *Interest and title*—Under section 55(2), there is an implied convenant that *the interest* which the seller professes to transfer subsists, and that he has power to transfer the same. This shows the connection between the concept of *title* and the concept of *interest.*

49.25. *Title deeds*—Again, section 58(f), which empowers the creation of a mortgage by deposit of "title deeds", obviously does not mean that a person can create a mortgage of this nature by merely depositing a contract for sale in his favour.

In general, in the Law of Real Property,[6] a document of title is a document which describes a land sufficiently to identify it, which shows a *disposition* of the whole legal interest and which contains nothing to throw any doubt on the title.

In India, a contract for sale of land, would hardly satisfy the last two conditions.

According to Cheshire[7] the usual way in which the vendor proves his title is to produce the deed or other document by which the land has been *disposed of,* in order to show that *the interest* which he has agreed to sell devolved upon him. In England, if the contract for sale is capable of specific performance, an immediate *equitable interest* in the land passes to

1 Salmond, Jurisprudence (1966), page 431.
2 A.I.R. 1916 P.C. 193.
3 A.I.R. 1967 S.C. 744, 748.
4 *Mrs. Christine* v. *Ugappa,* A.I.R. 1966 Mys. 299, 303.
5 *Gurappa* v. *Basawanappa,* A.I.R. 1957 Bom. 31, 32 (Shah, J.).
6 Megarry and Wade, Real Property (1966), page 586.
7 Cheshire, Real Property (1972), page 73.

the purchaser and the legal estate remains in the vendor until the conveyance has been executed. Specific performance of a contract for the sale of land is ordinarily available to a purchaser.[1] But, until specific performance is granted and a conveyance executed (thereunder, title does not pass. Even in England, the position regarding completion of the contract is[2] that after the purchaser has investigated the abstract of title, it is his duty either to accept or to reject the title offered to him. Again, completion means that the purchaser should prepare deed for conveyance which is to vest the interest in the purchaser, and which contains the usual convenants by the vendor.

49.26. As to the judicial decisions on section 3, definition of 'notice', Explanation II, the whole question depends on the meaning of the word 'title'. Reference has been already made to the Patna case. In an Orissa case,[3] it was held that assuming that mere occupation of property as a tenant would be notice of an agreement not connected with its occupation, the doctrine cannot be extended to cases where the tenant has also a contract to purchase in his favour.

It is to be noted that a contract for the sale of immovable property does not (in the scheme of the Act) confer any interest in the property. This is expressly enacted in section 54 of the Act. In the circumstances, it is difficult to see how the word "title" could apply to the equities recognised by section 53A.

49.27. *Position summed up as to passing of title under contract*—The above discussion as to the passing of title under contract may be thus summed up—

(i) No interest in the property passes under a contract. Section 54 is a specific on this point.

(ii) Since no interest passes, no 'derivative' title is created to borrow the phraseology used by Salmond. And the present is undoutedly not a case of original title.

(iii) That no interest passes, is a position further substantiated by the fact that the rule against perpetuity does not apply to a contract for sale.

(iv) English cases on equitable interest are inapplicable.

(v) A contract of sale cannot be appropriately described as a title deed.

(vi) Estoppel creates a bar and confers no title.

(vii) Where the law prescribes a mode of transfer, derivative title can be created only if that mode is followed.

(viii) This position remains unaffected by section 53A. It confers no title, though it creates certain bars between the parties and their successors in interest.

(ix) Such rights as are created, rest on estoppel. Eestoppel passes no title—See proposition (vi) above.

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1 Cheshire, Real Property (1972), page 75.

2 Cheshire, Real Property (1972), page 740.

3 A.I.R. 1962 Orissa 86, 89.

(x) That section 53A is available also against transferees with notice of part performance does not mean that the right amounts to title within section 3, definition of notice, Explanation 2. That Explanation invests possession with notice of "title".

If, on general principles as discussed above, no title is created, availability against transferees cannot modify the position.

49.28. In view of the above position we do not recommend any change in the law.

49.29. *Gifts*—We shall now consider the question whether gifts fall within the doctrine of part-performance. At a time when the law on the subject was not codified, it was held that the doctrine was applicable even to gifts. This was the Nagpur view.[1]

In a Rangoon case,[2] it was assumed that where a donee of property is in *bona fide* possession of it, the donor cannot evict the donee even though the gift had not been made by a registered instrument, but it was also held that the protection is not available to a subsequent donee from the donee whose deed of gift is not registered. In some cases before the amendment, however, it was held that the doctrine did not apply to gifts.[3]

So far as the present section is concerned, the case is clearly outside the section, because the section contemplates the existence of a 'contract' for the transfer of property. That part of the section which speaks of "an instrument of transfer" refers to an instrument executed in pursuance of the contract. In fact, the opening words "contract to transfer for consideration" put the matter beyond doubt.

49.30. *Need for amendment of the law*—The question now to be considered is whether this position requires to be altered as a matter of justice. Although it can be argued that there are no equities in favour of the donee, one must not overlook the fact that where the donee has taken possession, the position is different. On this basis, there is sufficient justification for extending the law to gifts with suitable amendments in the section.[4] We shall recommend the insertion of a suitable provision on the subject in the chapter on gifts.[5]

49.31. *Defendant*—We may now consider the nature of the right. The right conferred by this section is a right on the part of the transferee to take a plea that the transferor is debarred from en-forcing any right in respect of the property transferred.[6] Whether this means that the right is available

1 A.I.R. 1927 Rangoon 128 *U. Sayainda* v. *Mngala*

2 A.I.R. 1927 Rangoon 128 *U. Sayainda* v. *Mngala.*

3 *Maung Hla Maung* v. *Maung PO Htai.*
a. A.I.R. 1929 Rangoon 316, 317;
b. A.I.R. 1928 All. 699, 703.

4 This recommendation is subject to reservation by Shri Dhawan and Shri Sen-Verma.

5 Chapter on gifts *infra.*

6 A.I.R. 1954, Mad. 702, 703.

*only* to a person who appears on the record *as defendant* is a difficult question.[1]

49.32 *Section 53A as a basis of suit*—Although it is often taken for granted that section 53A cannot be used *as a basis of a suit by the plaintiff*, the position requires to be considered at some length. Whether the transferee who claims part performance is a plaintiff or a defendant should be immaterial so long as he does not claim that he *has a title to the property* and so long as his only object is to prevent the transferor from "enforcing" against him any rights other than these flowing from the contrast. The law on the subject, however, is not in a very satisfactory condition. This will be apparent from a few judicial decisions on the High Courts to which we refer below, before coming to a decision of the Supreme Court which professes to leave the matter open.

49.33. *High Court cases*—First, we take the cases holding that the person claiming on the basis of part performance can, in appropriate cases be in the position of a plaintiff. This view is represented by a decision of the Allahabad High Court,[2] a Bombay case,[3] by a judgment of the Oudh Chief Court[4], and a judgment of the Andhra Pradesh High Court[5]. The judgment in the Andhra Pradesh's case was delivered by Subba Rao, C.J., and the pertinent observations are as follows :

> "Whether the transferee occupies the position of *a plaintiff or a defendant*,[6] he can resist the transferor's claim against the property. Conversely, whether the transferor is the plaintiff or the defendant, he cannot enforce his rights in respect of the property against the transferee. The utility of the section or the rights conferred thereunder should not be made to depend on the manoeuvring for positions in a court of law, otherwise a powerful transferor can always defeat the salutary provisions of the section by dispossessing the transferee by force and compelling him to go to a court as plaintiff. Dubtless, the right conveyed under the section can be relied upon only as a shield and not as a sword but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield".

49.34. Suppose a transferee under a contract of transfer takes possession of the property in part performance of the contract. The property is sought to be taken in execution of a decree for ejectment previously obtained by the transferor against a third person. The transferee raises objections in the execution proceedings, but does not succeed, and is deprived of possession. Then, he sues under Order 21, Rule 103, Civil Procedure Code, for getting rid of the order in execution proceedings and for recovering back possession of the property. Is he entitled to succeed, relying on the provisions of this section ? It was held by the Chief Court of Oudh

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1 (a) See A.I.R. 1959 A.P. 568, 570.
(b) A.I.R. 1959 Mad. 354, 355.
(c) A.I.R. 1956 Punj. 181, 185.
(d) A.I.R. 1950 Cal. 23, 27.
(e) A.I.R. 1966 Mys. 86, 89 and
(f) Cases in para 49.33 to 49.40 *infra*.

2 *Ram Chander* v. *Maharaja Kunwar*, A.I.R. 1939 All. 611.

3 See *infra*.

4 *Ewaz Ali* v. *Firdouz Jehan*, A.I.R. 1944 Oudh, 212, 319.

5 *Achayya* v. *Venkatasubbarao, A.I.R.* 1957 A.P. 854.

6 Emphasis applied.

in the undermentioned case[1] that the transferee can rely on this section in such a case, because he is only defending his possession. The decision proceeds on the ground that the words of the section do not warrant a conclusion that the *plaintiff as such* is necessarily debarred from the benefit of the rule. It was observed :

> "Where by the nature of the case, as disclosed by the pleadings or otherwise, it is apparent that the transferee comes to court to defend his possession against the invasion of it by the transferer he is entitled to invoke the equitable doctrine therein embodied. The present suit under O. 21, R. 103, Civil Procedure Code, is of that nature, being, in our opinion, practically a continuation of the proceedings before the execution court, wherein the transferor and his representative succeeded in ejecting Mt. Firdaus Jahan from possession which she had originally taken in pursuance of the contract of purchase".

49.35. *Acts of aggression*—The trend of remarks in the judgment of the Oudh Chief Court referred to above seems to imply that a transferee may come to Court to defend his possession against acts of aggression on the part of the transferor or his representative, whatever form such aggression may take. In *Ram Chandra* v. *Mahraj Kunwar*,[2] the transferor's acts of aggression were not in the form of any legal proceedings. The transferor was trying to disturb the transferee's possession otherwise *than in due course of law*, and the transferee brought a suit for an injunction restraining him from interfering with his possession. It was held that the suit was but a form of defence by the transferee to the invasion of his rights by the transferor, and as such, was competent under this section.

49.36. The Oudh and Allahabad view has been followed in the following cases,[3] but has been dissented from in the undermentioned decisions.[4]

49.37. *Mulla's view*—Mulla, in his commentary on the Act,[5] has commented that the true position was explained by Subba Rao, C.J., in the observations which we have also quoted above.

49.38. *Bombay case*—In the Bombay case,[6] the questions considered were whether (i) section 53A can be used by the plaintiff, and (ii) whether the transferee in possession of property in part performance of the contract for the sale of property can maintain a suit under Order 21, Rule 103 of the Civil Procedure Code against the auction purchaser of the same property. The first question was answered in the affirmative. However, on the basis that the auction purchaser was not "claiming under the transferor", the second question was answered in the negative. On the major question, *viz.*, whether section 53A can be used as a ground of attack in this particular case, the High Court took the view that in a suit under Order 21, Rule

1 1944 Oudh 212, 218, 219 (Affirming A.I.R. 1940 Oudh 1).
2 *Ram Chander* v. *Maharaj Kunwar*, A.I.R. 1939 All. 611, 613.
3 A.I.R. 1967 Bom. 34, 37; I.L.R. (1966) Bom. 291.
I.L.R. (1960) 2 All. 71. 90 (DB..).
A.I.R. 1957 A.P. 859, 861.
A.I.R.. 1956 Cal. 350, 351.
A.I.R. 1954 Mad. 702, 703.
4 A.I.R. 1964 Raj. 11. 13
A.I.R. 1952 Orissa 143, 145.
5 Mulla (1973), page 293
6 *Maruti* v. *Krishna*, A.I.R. 1967 Bom. 34, (Naik J.).

103, the plaintiff does not claim title but only a right to present possession. "In essence, such a suit is defensive in character." Therefore, it agreed with the decisions in Oudh. Allahabad and Andhra Pradesh already referred to.

49.39. *Madras view*—In Madras also, the view has been taken that in a suit under Order 21, Rule 63 or Rule 103, Civil Procedure Code, the plaintiff can rely on part performance since he is not using it as a weapon of offence.[1]

49.40. *Supreme Court judgment*—We come now to the judgment of the Supreme Court. In *Delhi Motor Company's case*,[2] it was held that the section is available only as a defence to a lessee, and not as conferring a right on the basis of which the lessee *can claim possession or other rights on an unregistered lease*. It observed that the section is available only as a defence to a lessee. In the Supreme Court case, the facts were as follows :

There was an unregistered sub-lease, purporting to have been executed by the respondents in favour of the appellants. Possession of the premises had been given to the appellants. After this, they were forcibly dispossessed by the respondents.

The first appellant, the Delhi Motor Company, was a partnership firm, of which the other four appellants were partners. The main respondent, the New Garage Ltd., was a private Limited company of which one of the respondents was the managing director and the others were members of the board of directors. According to the appellants, an agreement to sub-lease and an actual sub-lease in pursuance thereof was evidenced by three *unregistered documents* exhibited in the case. Appellant K. S. Bhatnagar on behalf of the Delhi Motors entered in correspondence for lease with U.A. Basrurkar, the Managing Director of the New Garage Ltd. They arrived at an agreement on February 22, 1950. The Managing Director had at that time no power to enter into such an agreement on behalf of the company, and so on March 22, 1950 a resolution was passed by the board of directors authorising the managing director to enter into the transaction. Thereafter, the first appellant came into possession of *two portions only*, out of the three actually sub-leased and commenced its business there with effect from April 1, 1950. Further, it was alleged that when Messrs Kanwar Brothers Ltd., vacated the other portion of the premises which was also included in the sub-lease, the respondents did not give possession of it to the appellants. On the contrary, they began to obstruct the appellants in their use of the two portions actually delivered to them and finally a stage came when they were completely dispossessed from them. The principal prayer in the suit was for delivery of possession in respect of all the three portions included in the sub-lease. The suit was decided in favour of the plaintiffs.

In appeal, the High Court of Punjab held that the three documents constituted either an agreement to sub-lease or a sub-lease falling within the provisions of section 2(7) of the Indian Registration Act, and since

1 *E. P. Uma*, v. *K. Kelandan*, A.I.R. 1954 Mad. 702, 703 (Ramaswami, J.).

2 *Delhi Motor Company* v. *Basrurkar* (Shah, Ramaswami and Bhargava, JJ.) (Judgment by Bhargava, J.).

the documents were unregistered, the plaintiffs were not entitled to a decree. The firm came in appeal to the Supreme Court by special leave.

The Supreme Court held that the suit was one for decree for possession on the basis of the *unregistered lease*, and such a suit did not fall within section 53A.

49.41. *Reasons given by to Supreme Court*—In the Supreme Court, the judgment of the Allahabad High Court[1] was referred to, but the Supreme Court did not express any opinion as to the correctness of the view taken by the High Court, since in the case before the Supreme Court, the firm was seeking to "enforce rights" under the unregistered case and to seek a decree for possession against the lessor. Unfortunately, the attention of the Supreme Court was not drawn to the Andhra and other cases. One may also be permitted to observe, with great respect, the Allahabad judgment is clearly based on the proposition that although, in form, the person before the Court was the plaintiff, in fact, he was merely seeking to debar the defendants from asserting certain rights, namely, he was seeking to debar them from interfering with the possession into which the plaintiff had entered with the consent of his transferor after the execution of a transfer in his favour.

49.42. *Need for clarification*—In the circumstances, the question remains to be considered whether a clarification on the subject under discussion would not be desirable. There hardly appears to be any reason why the beneficial object of preventing fraud—which was the main consideration which gave rise to the doctrine of part-performance—should be laid aside and the matter left to be determined by consideration of the accidents of litigation. So long as the person claiming part-performance does not claim title against third parties but merely seeks to compel the transferor (or his successors in interest) to adhere to the contract, the equities should be in his favour.

49.43. *Question whether possession should exist on the date of suit*—So far as the factual situation that was in issue before the Supreme Court is concerned, the essential question of law that arises is whether the section requires, or ought to require, that the transferee who obtains possession in part-performance *must also be in possession* at the time when he seeks relief. While the section speaks of a transferee who has obtained possession or has continued in possession, it does not make any commitment as to whether it should also be proved that the transferee was *in possession at the time of the suit*. One would have thought that once the transferee has obtained possession, his subsequent dispossession should not come in the way of claiming equities on the basis of part-performance, because he has done all that he could under the contract, and has acted on the representation made by the transferor. After all, there is no magic as such in the requirement that the transferee must have obtained possession. This requirement has been inserted only to *show unequivocally* that part-performance of the contract, so far as the transferee's side is concerned, has taken place. Change in the possession is an act of part-performance both of the person who gives and of the person who takes possession. In *Morphett* v. *Jones*,[2] Sir Thomas Plumber said—

1 A.I.R. 1939 All. 611.

2 *Morphett* v. *Jones* (1818) 1 Swans. 172, 181.

"The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms; the court regarding what has been done as a consequence of contract or tenure."

Where the transferee has taken possession, this requirement is satisfied, and the fact that subsequently the transferor *illegally* dispossesses the transferee ought not to make a difference to the application of the doctrine. On a proper consideration of section 53A even as it now stands, it stands to reason that a transferee, who otherwise satisfies the section, cannot be debarred from claiming that possession, at least from the transferor or the person claiming under him, excluding of course, the case already stated by the proviso namely, the right of a transferee for consideration who has not notice of the contract or of the part-performance. There are no practical considerations which compel the insertion of a rigid requirement that the transferee must be in possession at the time of seeking relief. And considerations of justice seem to be in favour of the transferee, because on any other view a transferor can, by his unilateral act, defraud the transferee of a valuable protection given to him by the law on weighty considerations of justice.

49.44. *Privy Council Case*—There is a Privy Council case[1] in which there are dicta to the effect that section 53A is meant for defendant. The observation in that judgment, however, must be read with the facts of the case. It does not say that a person cannot claim part-performance otherwise than as a defendant in any case.

49.45. *Recommendation for change*—It is, therefore, proper to incorportate the liberal view on the subject. Such a wide view would not defeat the law of registration. The transferee claiming part-performance would still not be able to defeat the rights of *bona fide* transferees.

49.45. *Recommendation for change*—It is, therefore, proper to incor- view would be to amend section 53-A by adding an Explanation somewhat on the following lines :—

"*Explanation.*—For the purposes of this section, it is immaterial whether the transferee or a person claiming under him is a plaintiff or a defendant."

The words "the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him" may also be revised as follows (in the fourth para of the section) :—

"The transferor or any person claiming under him shall be debarred from enforcing *or maintaining* against the transferee and persons claiming under him ....."

It should also be provided that a person who obtains or continues in possession, but is dispossessed otherwise than in due course of law, can claim the benefit of the section.

Amendment should also be made regarding the judgment creditor.[2]

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1 *Probodh Kumar Das* v. *Gautmeri Tea Company*, A.I.R. 1940 P.C. 1.

2 Para 49.18, *supra*.

## CHAPTER 50

## *SALE OF IMMOVABLE PROPERTY : THE CONCEPT*

50.1. *Introductory*—Having dealt with the general principles applicable to the transfer of property, the Act is now concerned with rules relating to specific kinds of transfers of immovable property. An interest in immovable property can be transferred by a variety of modes. Sale, mortgages, lease and gift are more particularly dealt with in the Act, though the Chapter on gifts is not confined to immovable property. The present Chapter is concerned with sale.

50.2. Section 54 defines "Sale" as follows :—

> "54. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

This definition, incidentally, does not, in terms, mention immovable property. The rest of the section does. The section proceeds to lay down the mode of transfer as follows :—

> "Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument."
>
> "In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property."

Lastly, the section deals with the contract for sale :

> "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

50.3. *Statutory mode of transfer*—It is a general principle that where the law prescribes a mode of transfer, compliance with that mode is necessary before property can pass so as to confer title against third persons. Where, therefore, this section requires a registered instrument, title cannot pass by mere admission or by mere agreement of parties. There can, in other words, be no such thing in law as a *title by estoppel*, even though estoppel may create many precious rights.

A transfer under a decree or order of Court is outside the operation of section 54. The reason is, first, that such a transfer cannot be considered to be a transfer by act of parties and is, therefore, not a "transfer of property" at all;[1] and secondly, section 2, clause (d), provides that nothing in this Act shall be deemed to affect any transfer by operation of law or by, or in

1 *Poras Ram* vs. *Mehsai*, A.I.R. 1928 All. 67, 68.

execution of, a decree or order of a Court of competent jurisdiction. Such a transfer need not, therefore, be made by a registered instrument as is required by this section. Thus, a sale in execution of a decree need not fulfil the conditions of this section and need not be registered.[1] Similarly, the assignment of a security bond by the Court in favour of a party is not a sale within the Act. Nor is a transfer effected by a compromise decree, a sale, though such a compromise transfers property from one party to another for "price"[2].

50.4. *Insolvency*—There is a difference of opinion on the question whether a sale by the Official Receiver in insolvency with the sanction of the Court is a transfer by operation of law, or by or in execution of, a decree or order of Court. According to a Full Bench decision of the Madras High Court,[3] it is not. The same view has been held by the High Courts of Calcutta[4] and Allahabad.[5] A contrary view has been expressed by the Chief Court of Oudh[6] in a case decided by a single Judge, on the ground that it is in the nature of a Court sale and that its validity really depended on the order of the Insolvency Court vesting the property in the Official Receiver. But a later Division Bench of the same Court[7] has dissented from this view and has followed the view taken by the High Courts of Calcutta and Madras. Where no Receiver in insolvency is appointed and the Court, by virtue of the powers conferred on it by section 58 of the Provincial Insolvency Act, 1920, sells the property, the sale can be made by a registered instrument.

It appears to us that the Madras view is the correct one, since the Official Receiver, though functioning under statute, is really acting as a successor in interest of the insolvent. We do not think that the state of the case law necessitates any express amendment of the section.

50.5. *Transfer of ownership*—In order to constitute a sale there must be a transfer of ownership from one person to another. A "transfer of ownership" by a person means a transfer by such person of his rights and interests in the property in full and permanently. A transfer of a part only of such interests or for a particular period reserving the rest for the transferor himself is not a transfer of ownership. But it is not necessary that the transferor should be a full proprietor. He may be the owner of a partial interest in the property such as that of a mortgage or an occupancy tenant.

Where there is no transfer of ownership, the transaction, though in form a sale, cannot be considered to be a sale. Thus, a sham transaction, not intended to pass any title, is not a sale. A *bona fide* settlement of a disputed claim which is a mere recognition of each other's antecedent title is not a sale.

The question whether there has been a transfer of ownership in any particular case will depend upon the intention of the parties. This again, must be ascertained from the facts and circumstances of the particular case.

1. *Prem Nath* v. *Sundaranath*, A.I.R. 1960 Punj. 630, 632.
2. *Bindraban* v. *Rajpal Singh*, A.I.R. 1931 All. 389, 390 (F.B.).
3. *Sankara* v. *Narasimhulu*, A.I.R. 1927 Mad. 1, 3; I.L.R. 50 Mad. 135 (F.B.)
4. A.I.R. 1919 Cal. 193; I.L.R. 46 Cal. 887 (D.B.).
(Per Full Bench; Krishnan, J., dissenting).
5. A.I.R. 1942 All. 39, 41.
6. *Waziray* v. *Mathura Prasad*, A.I.R. 1939 Oudh 55, 56.
7. A.I.R. 1942 Oudh 424, 425.

50.6. *Price*—It is an essential requisite of sale that the transfer of ownership must be for a consideration which is known in legal language as 'price'. Price is thus an essential ingredient in all sales, in the absence whereof the transfer is not a sale.

What, then, is the meaning of the expression 'price' ? It has been held by the Supreme Court[1] that this expression in section 54 must be construed in the same sense in which it is used in section 4, read with section 2(10) of the Sale of Goods Act. The substantial result of this position is that price means money only. Payment may not be immediate—section 54 expressly so provides. Payment need not even be in cash or current coin; it could be in any mode which represents money, such as a cheque or bank draft. But the transfer of ownership must bring, in return therefor, something which constitutes money or represents money according to legal concepts.

Difficult questions arise where the transfer is in lieu of a debt due to the purchaser from the seller. In general, such a transaction would be regarded as a sale[2] and not as an exchange or as any kind of residuary transaction, provided the amount of the debt can be definitely ascertained.[3]

This would appear to be the general position. The question assumes practical importance in the case of Muslim husbands who execute instruments of transfer in consideration of dower. Either the transfer is made expressly in substitution for the monetary dower, or the document might provide that as a result of the transfer the claim to the dower debt is relinquished. It would appear that in both cases the transaction should, in general, be regarded as a sale.[4]

Although there are a few judicial decisions taking the view that, where the husband is *released* from a dower debt, the transaction is not a sale,[5-6] we do not, with respect, agree with such construction. A determination of the matter depends on whether the consideration in such case is "price" within the meaning of section 54 or whether it is a "thing" within the meaning of section 118. We think that, in general, release of a debt should be treated as a price and not as a "thing".

50.7. *Payment of price*—It follows from the definition of "sale" that to constitute a sale the parties must intend to transfer the ownership of the property and that they must also intend that the price should be paid, whether in present or in future. Where there is no intention to pass the ownership, the transaction is a colourable one.

This does not, of course, mean that the non-payment of the price will necessarily prevent title from passing to the buyer. This depends on the terms of the bargain. If the conveyance has been executed, the mere fact that the price has not been paid will not prevent title from passing to the buyer unless the conveyance so provides.

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1 *I.T.C.* v. *M & G Stores*, A.I.R. 1968 S.C. 200, 202.
2 A.I.R. 1951 All. 86, 89, 90.
3 AI.R. 1935 P.C. 73, 78.
4 A.I.R. 1917 Pat. 18, 24;
A.I.R. 1915 Lah. 251, 253.
5 *Bashir Ahmad* v. *Mt. Zobadia*, A.I.R. 1926 Oudh 186, 189.
6 *Talib Ali* v. *Kaniz Fatima*, A.I.R. 1927 Oudh 204, 206.

This is for the reason that full payment of the price is not an essential requisite of sale as defined in section 54, and if the intention is that the sale deed should operate as a transfer, then it is immaterial whether the whole or part of the consideration remains unpaid.[1]

50.8. *Seller's right on non-payment*—Once the title has passed, the seller cannot, in the absence of an agreement to the contrary,—

(a) claim to retain possession as against the buyer of the property sold[2] or

(b) set aside the sale on the ground of non-payment of price. His remedy is—

(i) to sue the purchaser for the recovery of the purchase money, or

(ii) to enforce the seller's charge for the unpaid purchase money against the property sold and in the hands of the purchaser.[3]

The fact that price has not been paid may, show that the transaction was the result of undue influence, or that the transaction was a colourable one. But these are questions of evidence depending on the facts of the case, the burden of proof of which, in the ordinary run of cases, would lie upon the person alleging such special facts.

Conversely, once the execution of the instrument of sale is proved and it is found that the instrument contained a recital of payment of consideration, such a recital is *prima facie* proof of payment against the executant or person claiming under him.[4]

50.9. *Inadequacy of price*—Inadequacy of consideration does not, by itself, render a sale invalid.[5] Thus, the mere fact that the purchaser gets the property for one fourth of its market value cannot render the sale invalid, although, in an appropriate case, it must constitute evidence of one of the ingredients of the concept of undue influence. In the absence of proof of undue influence, however, such a transaction is regarded as one in which the doctrine of "lucky purchasers",[6] is applied.

On the same reasoning, the coverse is also true, *viz.*, the fact that the price, as stated in the sale deed, is an inflated one has no effect on the validity of the sale if it is otherwise valid.[7] Such devices are frequently adopted to defeat the right of pre-emption which is available to a third person under the ordinary law in some situations. On realising that the price is very high, the third person might feel disinclined to assert the right of pre-emption; that is the psychological reason operating in the minds of the parties in overstating the price in the sale deed. Of course, as between the parties, evidence is always admissible to show that the 'price' was not really the amount representing the consideration for the sale, but a security for a pre-existing

1 *Bhomi Lal* v. *Vincent*, A.I.R. 1922 Pat. 619, 641 (F.B.).
2 *Dhuri* v. *Kishun Prasad*, A.I.R. 1965 Pat. 29, 30.
3 Section 55(4)(b).
4 *Ramaswami* v. *Jagannadha Rao*, A.I.R. 1962 A.P. 94—97.
5 A.I.R. 1957 Mad. 630, 631.
6 A.I.R. 1957 Mad. 630, 631.
7 A.I.R. 1924 All. 938, 939.

debt. And even third persons can show that what is stated in the deed was not the price agreed upon. But these aspects do not affect the validity of the deed of sale.

50.10. *Meaning of reversion-Recommendation*—So much as regards the first paragraph of section 54. There occur, in the second paragraph, the words "in the case of a reversion or other intangible thing". The section provides that such a transfer, *i.e.*, a transfer by way of sale, can be made only by way of a registered instrument. Obviously, the expression "reversion" here is wide enough to apply to immovable property in the possession of a tenant.[1] Consequently, such transfer must be made only by a registered instrument, *irrespective of the value*.[2] There are, however, decisions of the Oudh Chief Court and the Nagpur High Court[3] holding that property in the possession of a tenant is tangible property and is not included in the expression "reversion or intangible thing". We are, with respect, of the opinion that this view is not correct. "Reversion" in ordinary parlance is undersood certainly as covering such a situation, whatever else it may or may not cover.

In order to avoid controversy on this point, we recommend that an Explanation may be added to the effect that where immovable property is in the possession of person other than the transferor, the transfer of that property is a transfer of the reversion, if the person in possession has an interest in the property by way of lease.[4]

50.11. *Intangible thing*—The expression "intangible thing" is, in the context, to be taken as confined to immovable property, and not as covering movable property.[5-6] It is for this reason that a licence to sell electricity,[7] a permission to plant trees on land and to enter the land to gather the fruits,[8] a copyright in books,[9] a money decree or a decree for possession of immovable property,[10] is not an "intangible thing" within section 54.

On the other hand, a right to rents and profits that may accrue in immovable property, or an interest under a deed of settlement by which a person is granted as income in future rents and profits in immovable property and also a share in the proceeds of the sale of the property in future, would be within the section,[11] since they relate to immovable property.

50.12. *Recommendation as to second paragraph*—It is proper to make it clear that in the second paragraph, when it speaks of reversion or other intangible thing, it is confined to immovable property as is shown by the

1 A.I.R. 1938 Lah. 304, 305;
A.I.R. 1916 Bom. 223.
2 A.I.R. 1938 Mad. 100, 101.
3 (1899) 2 Oudh Cases 754, 757;
A.I.R. 1954 Nag. 109, 113.
4 This is not a draft.
5 A.I.R. 1939 All. 305, 307;
A.I.R. 1935 Pat. 492, 493.
6 A.I.R. 1935 Pat. 492, 493.
7 A.I.R. 1940 All. 458, 460.
8 A.I.R. 1952 Nag. 321, 322.
9 A.I.R. 1939 All. 305, 307.
10 A.I.R. 1935 Pat. 492.
11 (a) A.I.R. 1935 Pat. 492, 493;
(b) A.I.R. 1936 P.C. 230, 233, 234.

decisions just now referred to.[1] We recommend that the second paragraph should be suitably amended to bring this out.

50.13. *Section 54, third mode, tangible and intangible property*—This takes us to the third paragraph of section 54. Under the third paragraph, different modes of delivery on the sale of immovable property are prescribed. The modes prescribed consist of two alternatives. In the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing (irrespective of value), such transfer can be made *only* by a registered instrument. The word 'only' here indicate that delivery is ruled out as a mode of transfer. In contrast, in the case of tangible immovable property of a value of less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. It follows, therefore, that the law is more restrictive in the case of (i) tangible immovable property exceeding the specified value and (ii) reversion or other intangible. thing, since only a registered instrument is permissible. We may state that this dichotomy between tangible and intangible immovable property becomes of basic importance where the mode of transfer adopted is not by a registered instrument, but by delivery. The question that arises in such case is whether delivery is sufficient as a mode of transfer. The answer would be in the negative if the case falls in the rst category which, as already stated, is governed by a restrictive provision. The answer would be in the affirmative in the second situation.

50.14. *Controversy caused where delivery is the mode adopted*—Since the second situation (tangible immovable property of less than one hundred rupees)[2] depends upon it being established that the property is tangible, controversies have arisen in particular cases where delivery was the only mode adopted. The adoption of a registered instrument raises no problems, since that mode is valid in both the cases, but the adoption of delivery raises problems, since it is permissible only in the second case.[3] Those who would like to challenge the transfer would naturally argue that the mode of transfer adopted—delivery—was not permissible, and that the property was not tangible immovable property. It is to be remembered that in the case of an "intangible thing", there is no question of value, minimum or maximum. Irrespective of value, the transfer can be made only by a registered instrument and not by delivery. Usually, this controversy[4] arises where the mortgagor sells the property to the mortgagee for less than rupees one hundred by delivery and the court is then called upon to consider the question whether what is transferred is tangible property or intangible property. The meaning of "tangible" thus becomes crucial.

50.14A. *Meaning of "tangible*—Grammatically, the word "tangible" means something that can be appreciated by the senses, that is to say, a material object. Strictly speaking, all rights are intangible things, since what one owns is not a thing, but a bundle of rights in a thing.

50.14B. *Meaning of "property and interest"*—Statutory language as employed in the Transfer of Property Act, however, does not go by this strict doctrine. Sometimes, it employs the expression "immovable property"

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1 Para 50.11, *supra*.

2 Parra 50.13, *supra*.

3 Para 50.13, *supra*.

4 See para 50.16, *infra*.

as covering the bundle of rights which one can have in that property and in this context, the Act seems to have in mind the expression "immovable property" as applicable to the object as appearing in the external world, as well as the legal concept of the totality of rights.

But occasionally the Act speaks of "interest in immovable property", which would seem to show that it is possible to conceive of two different categories,—"immovable property", being the wider and generic one, and "interest" in immovable property being the narrower and specific one. Thus, a person who has a lease in his favour has an interest, but he does not own the "property". Of course, section 6 uses the expression "property" in a wide sense, because it says "property of any kind may be transferred", but it cannot be denied that in ordinary language—and sometimes in the Act also —where the totality of rights is intended to be connoted, the expression "immovable property" is more often employed while where not the totality but a specific right is intended, the expression "interest" is more often employed.

50.15. *Privy Council case*—In *Moolla Sons* v. *Official Assignee*, Rangoon,[1] the Privy Council observed :

> "....for the reason that in the absence of registered instrument, delivery is to be required as a formality necessary to the completion of the transaction, section 54 "divides its provisions as to immovable property according as the immovable property is 'tangible or intangible'.

50.16. *Equity of redemption whether intangible thing*—There is no definition or explanation of the expression "tangible" and intangible". This has created certain problems. For example, there is a conflict of decisions on the question whether an equity of redemption vested in the mortgagor is or is not an "intangible thing".

(a) One view on the subject is that the equity of redemption vested in the mortgagor is "tangible immovable property", whatever may be the nature of the mortgage—simple or usufructuary.[3]

(b) The second view is that in all cases the equity of redemption is an intangible thing.[4]

(c) The third view makes a distinction between various types of mortgages.[5]

50.17. *Juristic views examined*—A few juristic writings referred to in the Allahabad judgment may be referred to. Holland in his "Elements of Jurisprudence", says :[6]

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1 *Mools Sons* v. *Official Assignee, Rangoon*, A.I.R. 1936 P.C. 230, 232.

2 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726, 728, 729 (Majority view).

3 *Sohon Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726, 728, 729 (F.B.)
*Suraj Prasad* v. *Agula Devi*, A.I.R. 1959 Pat. 153, 155.
*Venkatasubbamma* v. *Subbayya*, A.I.R. 1964 A.P. 21, 22, 23 (Chandra Reddy C.J. & Chandra Sekhar J.).
*Tukaram* v. *Atmaram*, A.I.R. 1939 Bom. 31, 33 (Broomfield & Macklin, JJ.).

4 (a) *Sakharam* v. *Ramachandra*, A.I.R. 1917 Bom. 287 (Scott, C.J. & Shah J.);
(b) *Lachman Prasad* v. *Fida Husain*, A.I.R. 1915 Oudh 149, 150.

5 Para 50.21, *infra*.

6 *Holland, Elements of Jurisprudence* (1924 Ed.), pages 209, 223, 233, cited in *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726.

"It (ownership) may ..... continue to subsist although stripped of almost every attribute which makes it valuable....."

Later he says :

"One or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right or ownership ..... remains unimpaired."

The same author, further, talking of pledge, says :

"Probably the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor ..... and such is the English mortgage of lands or goods except in so far as its theory has been modified by the determination of the "Court of Chancery and of the legislature to continue, as long as possible, to regard the mortgagor as the owner of the property."

Similarly, Salmond in his Jurisprudence says[1] :

"The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet, he nonetheless remains the owner of the thing, while all others own nothing more than 'rights' over it, .... He, then, is the owner of a material object, who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

Poolock says[2]

"We must not suppose that all the powers of an owner need be exercisable at once or immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment and suspend his power of disposal, provided that he reserves for himself or his successors, the right of ultimately reclaiming the thing and being restored to his power."

These passages were relied upon by the majority judgment in the Allahabad case[3] in support of the proposition that mortgagor's right, even in a possessory mortgage, is tangible property.

50.18. The opinions of these distinguished jurists are, however, hardly of any relevance to the question under discussion. They merely deal with "ownership", and not with what is tangible property.

50.19 *Case law as to equity of redemption.*—Let us now examine a few cases as to equity of redemption. In a Madras case,[4] Bhashyam Ayyanagar, J., made the following observations :

"The equity of redemption in a usufructuary mortgage is only an intangible thing like a reversion which immediately precedes the expression 'or other intangible thing' (vide Williams on 'Real Property', 18th Edition,

1 Salmond, Jurisprudence (1924), page 280, cited in *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726.

2 Poolock, First Book of Jurisprudence (1923), pages 179, 180; cited in *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 728.

3 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 728, 729 (Majority view).

4 *Ramaswamy* v. *Chinna Asavi*, (1901) I.L.R. 24 Mad. 449, 463.

pages 30, 31, and it can be transferred by sale only by a registered instrument and not by delivery of the property. Equity of redemption in a simple mortgage may be tangible immovable property, and its sale can be effected, if its value be below Rs. 100/-, without registered instrument by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is in my opinion only an intangible think like a charge on immovable property within the meaning of section 54....."

In a Pata case,[1] it was held that the mortgagor, though not remaining in possession, yet transfers the tangible property when he sells it, because what passes to the mortgagee is not ownership and therefore the mortgagor remains the owner. The mortgagee, even though in possession, cannot transfer the property itself. He can only transfer the interest which he has acquired in the property. Whether the mortgagee is or is not in possession cannot according to this view make a distinction for the purpose of determining whether the property is tangible or intangible.

50.20 In a Bombay Full Bench decision,[2] Chagla, C.J., who delivered the judgment of the Court, was inclined to hold that a sale by mortgagor of immovable property in the possession of a mortgagee is a sale of tangible immovable property, but he left the question open and decided the case on another ground.

50.21. *Third view.*—We have referred to two views on the subject under discussion. There is yet a third view. The third view is that (i) where the property is subject to a simple mortgage, the equity of redemption is tangible immovable property, but (ii) where the mortgage is a usufructuary one, the mortgagor's interest is an "intangible thing" within the meaning of this section.[3-4-5-6] This view is based on the ground that "tangible property" means property capable of present possession, while "intangible property" would connote a right apart from a right to immediate possession.[7]

50.22. *Correct view.*—In our opinion, the last-mentioned view is to be preferred. As pointed out by Sulaiman, Ag. C.J. in *Sohan Lal* v. *Mohal Lal* (dissenting judgment)[8] :—

"According to its literal meaning, 'tangible' property would be one which is capable of being touched, and therefore capable of being possessed. It must accordingly be property which is capable of delivery of possession from one person to another. A mortgaged property itself is undoubtedly 'tangible', but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee, *including the right to remain in possession and appropriate the profits.* The interest which the mortgagor

1 *Suraj Prasad* v. *Agnta Devi*. A.I.R. 1959 Pat. 153. (V. Ramaswamy, C.J., R. K. Chowdhury & K. Sahai, JJ.).

2 *Bhikhabhai* v. *Chiman Lal*, A.I.R. 1953 Bom. 437, 439.

3 *Ramasami* v. *Chinnal Ansari* (1901) I.L.R. 24 Mad. 449, 463 (D.B.).

4 *Dhareshwar* v. *Lakhradhar*, A.I.R. 1950 Assam 107, 113 (per Ram Labheya, J.) (review).

5 A.I.R. 1936 Bom. 175.

6 A.I.R. 1921 Oudh 124.

7 *Kushwat* v. *Jamil*, A.I.R. 1919 Cal. 325, 326.

8 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726, 733 (F.B.) (dissenting judgment of Sulaiman, Ag. C.J.).

possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible, when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as 'tangible'. The subject matter of ownership is 'tangible', but the interest which the mortgagor can transfer is intangible'."

We find this reasoning logically convincing.

50.23. *Recommendation to add Explanation as to usufructuary mortgage.*—To avoid further controversy on the subject, we recommend that the third view,[1], which appears *to be a logical view*[2], should be codified by inserting a suitable Explanation[3] in section 54, namely, the mortgagor's interest in a usutructuary mortgage is an intangible thing.

50.24. *Mortgagee's right.*—This is as regards the *interest of the mortgagor.* As to the right of the *mortgagee,* where the mortgage is *simple one,* his right would be "intangible property",[4] and the right of a usufructuary mortgagee would be "tangible immovable" property.

The contrary view has, however, been expressed by the High Court of Allahabad in Sohan Lal's case,[5] namely that it is "intangible property" in the case of a usufructuary mortgage. We think that the amendment which we propose regarding the mortgagor[6] will indirectly settle the position regarding the mortgagee also.

50.25. *Delivery how effected in case of sale by mortgagor to mortgagee.*—Even if the mortgagor's interest is tangible property, some difficulty has been created on the question whether the 'delivery contemplated by section 54 is real delivery, or whether it can be constructive delivery. This question has normally arisen where a mortgagor sells the mortgaged property to a mortgagee in possession. Since the mortgagee is in possession, no real delivery can be given to him. Is symbolical delivery permissible then? Or, is it correct to say that the only way of obtaining transfer of ownership by the mortgagee in possession who purchases the property is by registered instrument? It would appear that on this point a conflict of views prevails. The case law on the subject is conveniently discussed in a Patna judgment.[7] There are, what may be called, two views—the narrower view and the wider view.

According to the narrower view, a registered instrument is the only mode of transfer and delivery is not *possible,* because the mortgagee being already in possession, no further possession can be given to him.[8] He must

1 Para 50.21, *supra.*

2 Para 50.22, *supra.*

3 For suggested re-draft, see para 50.37, *infra.*

4 (a) *Moola Sons* v. *O. A. Rangoon,* A.I.R. 1935 P.C. 230, 232;
(b) A.I.R. 1941 Nag. 5, 6.
(c) A.I.R. 1934 Nag. 13, 15.
(d) A.I.R. 1924 Rang. 267, 268.

5 *Sohan Lal* v. *Mohan Lal,* A.I.R. 1928 All. 726, 733 (Usufructuary Mortgage)

6 Para 50.23, *supra.*

7 *Suraj Prasad* v. *Aguta Devi,* A.I.R. 1959 Patna 153, 157, paragraphs 14 to 21.

8 *Bhika Bhai* v. *Chiman Lal,* A.I.R. 1953 Bom. 437, 439 and 440, paragraphs 4 and 10.

to deliver the property to the mortgagor and then obtain possession again, if delivery is the mode adopted. According to the wider view,[1] there is no reason why the mortgagee should be required to re-deliver the property and then to take back possession.

50.26. Where the vendee is a usufructuary mortgagee of the property sold and is in possession as such, the sale can only be of the equity of redemption. If, in such cases, it is regarded as intangible property, no question of a sale by delivery of such property can arise, whatever may be the value of property. Similarly, where the vendee is a lessee of the vendor, what is sold would only be a reversion which is also an intangible thing, and no question of a sale by delivery can arise in such cases.

But if it is regarded as tangible, there is, as already stated, a conflict of opinion among the High Courts on the question whether a sale in such cases should be only *by a registered* instrument or whether it might be by delivery of the property. This difficulty arises because of the word 'delivery'. What is transferred by the vendor may be tangible immovable property. According to the contrary view (which also proceeds on the assumption that what is transferred is tangible immovable property), the delivery of possession contemplated in such delivery as the nature of the property admits of, and where the vendor, by appropriate acts or declarations, converts the vendee's possession into that of an owner, it is sufficient delivery of property within the meaning of this section.

50.27. *Meaning of 'delivery'—Privy Council case.*—In *Mathura Prasad* v. *Chandra Narain*,[2] it was held by the Privy Council that for the purposes of this section there must be a real and not a constructive delivery of property. In that case the question was whether the delivery to vendee *of an unregistered instrument of transfer* was a delivery of the property for the purposes of this section. The Privy Council observed as follows :

> "Their Lordships cannot accept the suggestion made on behalf of the applicants that for the purposes of section 54 some sort of constructive possession resulting from the *delivery of the alleged instrument of transfer might* be sufficient For this purpose, their must be a real delivery of property." These observations were not made to rule out symbolical delivery. But they have created that impression in some courts.

50.28. *Other cases.*—The same view has been expressed in the undermentioned cases.[3]

50.29. *Scope of the problem.*—If our recommendation[4] to treat the mortgagor's right in a usufructuary mortgage as intangible property is carried out, the problem will not survive in this form, for that situation. But in regard to other situations, the practical question will still remain though their number will be limited.

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1 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726 (Majority view).

2 Mathura Prasad v. Chandra Narain, A. I. R. 1921 PflC. 8, 9, 10.

3 (a) A.I.R. 1956 Hyd. 170, 171.
(b) A.I.R. 1953 Bom. 437, 438, I.L.R. (1953) Bom. 1071 (F.B.).
(c) A.I.R. 1938 All. 726, 728;
(d) A.I.R. 1933 Cal. 544, 545.
*Sohan Lal* v. *Mohan Lal*

4 Para 50.23 *supra*.

50.30. *Difficulty how can be removed.*—It appears that the difficulty would disappear if the distinction between two kinds of possession—a distinction which is recognised by the Legislature in the Code of Civil Procedure, 1908, in relation to execution proceedings—is borne in mind. To quote Mr. Justice Aikman,[1]—"if a person is wrongfully ousted from possession, he is entitled to a decree replacing him in such possession as he had, when his cause of action arose. If, at that time, he had a right to *immediate* or what is called in country *khas* possession, then he is entitled to a decree replacing him in such possession. If, on the other hand, his possession was only derived from the enjoyment of the rents and profits, then the possession to which he is entitled is that provided for by secion 264 of the Code (corresponding to present Order 21, Rule 35)."

50.31. *Symbolical delivery.*—We could introduce, on the analogy of Order 21, Rule 36, Code of Civil Procedure (symbolical possession), a provision to the effect that any formality which gives notice to all concerned that the interest has been transferred will suffice where the transferor is not in possession.

50.32. *Recommendation as to delivery.*—In our opinion the best course would be to define 'delivery' as above,[2] i.e. to cover both the modes of delivery—real and symbolical. We recommend that such an amendment be made.[3]

50.33 *Sale of possession. Mortgagor's interest to mortgagee in possession.*—As to the mortgagor's interest, it appears to us that, theoretically speaking, as already stated, there is much to be said in favour of the view that after the possession has been transferred to the mortgagee, the interest has already passed to the mortgagee, including the right to remain in possession and to appropriate the profits. Although the interest of the mortgagor survives and it would not be inaccurate to say that he remains to be the "owner"—a proposition which cannot be disputed—that interest is not *tangible property*. He remains the owner without possession. As Sulaiman, C.J., in his dissenting judgment, in the Allahabad case,[4] observed, tangible property, according to its literal meaning, would be one which is capable of being touched and therefore capable of being possessed.

"It must, accordingly, be property which is capable of delivery of possession from one person to another". A mortgaged property itself is tangible, but the interest of the mortgagor is not, because that interest is not identical with the property itself. The mortgagor's interest is not capable of being touched; and, therefore, it is not capable of being delivered by actual delivery.

50.34. *Possible solution.*—How, then, is a transfer to be effected when the mortgagor sells the property to the mortgagee already in possession? If the mortgagor's right to redeem is not tangible property, 'delivery' is, in the scheme of section 54, as it now stands, out of question. A registered instrument is, at present, the only way of effecting the transfer, if the property is to be regarded as intangible. What happens in practice is

1 *Sita Ram*, I.L.R. 18 All. 440, 453 (F.B.).

2 Para 50.31, *Supra*.

3 For suggested redraft, see para 50.37, *Infra*.

4 *Sohan Lal v. Mohan Lal*, A.I.R. 1928 A.I.R. 1928 All. 725, 733.

that parties regard registration as an irksome and inconvenient formality in such cases. They try to effect the transfer by delivery, where the amount is small. Then difficulty arises. The remedy for this is not in an artifiical construction of the expression "tangible property", but in an amendment in the law as incorporated in section 54 as to the mode of transfer.

One possible way of dealing with this would be to provide for an additional mode of transfer, i.e., apart from registered instrument, we have to conceive of some other procedure where the sale is to a person in actual possession of the property.

50.35. *Recommendation as to sale to a person in possession.*—Having regard to practical considerations, we recommended[1] that in the case of sale to a person in possession, any act effective to make it known that the vendee has acquired the vendor's interest by purchase should be a permissible mode, in addition to registered instrument (which is already provided for) if the consideration does not exceed Rs. 100.

50.36. *Summary of recommendations.*—It will be convenient to summarise our recommendations for the amendment of section 54—

(i) It should be made clear[2] that where immovable property is in the possession of a person (other than the transferor) who has an interest by way of lease, transfer of that property is a transfer of the reversion.

(ii) It should be made clear[3] that the words "reversion or other intangible thing" occurring in the second paragraph are confined to immovable property.

(iii) In the case of a usufructuary mortgage, the mortgagor's interest is an intangible thing.[4]

(iv) It should be made clear that in the limited number of cases where property is in the possession of a person *who has no interest therein*, so that the property so far as the owner is concerned, still remains tangible immovable property, symbolical delivery is permissible.[5]

(v) Where a person in possession of immovable property purchases that property, any act effective to make it known that the purchaser has acquired the vendor's interest should be a permissible mode of transfer (in addition to registered instrument which is already provided for),[6] where the consideration does not exceed one hundred rupees.

50.37. *Re-draft.*—The following is a suggested re-draft of section 54 to implement the amendments recommended above:—

"54.(i) 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

1 For suggested redraft, see para 50.37, *infra.*
2 Para 50.10, *supra.*
3 Para 50.12, *supra.*
4 Para 50.23, *supra.*
5 Para 50.32, *supra.*
6 Para 50.35, *supra.*

(2) Such transfer,—

(a) in the case of tangible immovable property of the value of one hundred rupees and upwards, can be made only by a registered instrument;

(b) in the case of tangible immovable property of the value of less than one hundred rupees, may be made either by a registered instrument or by delivery of the property.

(3) Such transfer in the case of a reversion *in immovable property of any other intangible thing constituting immovable can be made only by a registered instrument* :

*Provided that where immovable property is transferred to a person in possession thereof, who has transfer of the property by its owner to that person may be effected—*

(a) either by a registered instrument as provided in this sub-section, or

(b) if the consideration for the transfer does not exceed one hundred rupees, by any act effective to make it known that the ownership has been so transferred.

(4) Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

(5) and (6)—(Fifth and sixth paragraph as at present).

*Explanation* 1.—*Where immovable property is in the possession of a person other than the transferor, being a person who has an interest therein by way of lease, transfer of that property is a transfer of a reversion for the purposes of this section.*

*Explanation* 1.—Where immovable property is in the possession *of a mortgagee under an usufructuary mortgage as defined in section* 58, *the interest of the mortgagor is an intangible thing for the purposes of this section.* .

*Explanation* 3.—*Where immovable property is in the possession of a person who has no interest therein—*

(a) *the transfer of the property by its owner is a transfer of tangible immovable property, for the purposes of this section.*

(b) *delivery thereof for the purposes of such transfer may be effected by any act intimating to the person in possession that its ownership has been transferred to the person specified in the intimation."*