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## PROPERTY LAW INCLUDING TRANSFER OF PROPERTY AND EASEMENT ACT

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### ABSTRACT

*The issue dealt in the project is what transactions do not amount to transfer under Transfer of Property Act. Transfer as defined under Section 5 of the Act includes transfer by the act of the parties not transfer by operation of law. There are some transactions which are not transfer under the Act. These include partition, family arrangement, charge etc. Section 6 also states what may not be transferred.*

*The word 'transfer' is defined with reference to the word 'convey.' This word in English law in its narrower and more usual sense refers to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance inter vivos. The word 'conveys' under Section 5 of the Transfer of Property Act is used in the wider sense referred to above.*

*The objective of the project is to know the meaning of transfer and which transactions do not come under Section 5 of the Transfer of Property Act. The property which cannot be transferred is stated under Section 6 of the Act. "Transfer of property" means 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; and "to transfer property" is to perform such act.*

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## INTRODUCTION

In the Transfer of Property “transfer” is defined as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons, and ‘to transfer property’ is to perform such act. In this section ‘living person’ includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

It is important to note the meaning of the word property as applied in the act. Property has been given a rather wide spectrum covering both tangible material things, e.g., land and houses as well as rights which are not exercised over any material, e.g., a right to repayment of a debt. The word ‘transfer’ in the Act has also been used in a wide sense. It may mean either transfer of all the rights and interests in the property or transfer of one or more of subordinate rights in the property. Thus, the expression ‘transfer of property’ may, therefore, imply either transfer of things, transfer of one or more of the rights in a thing, or transfer of a debt.

These words exclude transfers by will, for a will operates from the death of the testator. Transfer of share or interest in a co-operative society to the nominee of its member operating on his death would also be excluded like transfer by will. When the beneficiary is not a living person, the expression used is the creation of an interest in an unborn person.

The words 'living person' include a juristic person such as a corporation. A court is not a juristic person.

A transfer of property may take place not only in present, but also in the future, but the property must be existence. The words 'in present or in future' qualify the word 'conveys', and not the word 'property'. A transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence.

## WHAT DOES NOT AMOUNT TO TRANSFER UNDER SECTION 5

### Charge

Charge cannot be transferred because it is a right, which is a part of property. Compromise cannot be transferred. Easement cannot be transferred because these are the rights or interest arising of land, which is a part of the property but cannot be transferred. Family arrangement may be transferred. A will cannot be transferred because it does not operate by act of parties. Auction sale cannot be transferred because property is in possession of another

### Partition

Partition of property does not amount to 'transfer' as contemplated by s 5. Doctrine of part performance, therefore, does not apply to partition. Partition is really a process, in and by which a joint enjoyment is transformed into an enjoyment severally. Each one of the co-sharers had an antecedent title and, therefore, no conveyance is involved in the process, as the conferment of a new title is not necessary.<sup>2</sup>

### Family Arrangement

It has been held by the Supreme Court that a family arrangement, like a compromise, is 'based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of the others, as they had previously asserted it, to the portions allotted to them respectively'.<sup>3</sup>

It is not necessary that every party taking a benefit under such a settlement must be shown to have, under the law, a share in the property; it is enough if they have a possible claim or even, if they are related, a semblance of a claim.<sup>4</sup>

If, however, there is no real dispute or claim at all, the transaction might amount to a transfer.

Such an arrangement is not a transfer, and requires no conveyance to pass the title.

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<sup>2</sup> *A Vasantiben Prahladinayak v Somnath Muljibainayak* (2004) 3 SCC 376.

<sup>3</sup> *Sadhu Madho Das v Pandit Mukand Ram* AIR 1955 SC 481.

<sup>4</sup> *Ram Charan Das v SGirjanandini Devi* AIR 1966 SC 323.

### **Compromise**

A compromise of doubtful rights is not a transfer, but is based on the assumption that there was an antecedent title of some kind in the parties which the agreement acknowledged and defined

The position would be different if such a compromise also transferred properties to a person who has neither a pre-existing title, nor a claim to such title.<sup>5</sup>

### **Easement**

The creation of an easement does not involve a transfer.

### **Auction Sale**

Section 5 does not apply in respect of the property sold in auction sale.

### **Recitals**

Recitals in deeds of mortgage and in petitions to officials do not, of course, amount to a transfer.<sup>6</sup>

Where a partner contributed towards the capital of the firm by bringing in shares held by him in a company, then it is a 'transfer' within section 45, Income Tax Act 1961. To the extent to which exclusive interest is reduced to a shared interest, there is a transfer of interest.<sup>7</sup>

### **Surrender**

Surrender is not a transfer of property as defined in this section<sup>8</sup>

It is the falling of a lesser estate into a greater one.

## **SECTION 6 UNDER THE ACT**

Section 6 of the Act explains the nature of the property liable to be transferred under the said provision.

In general "property of any kind may be transferred". There is however, a series of exceptions to this, as enumerated under sub-sections (a) to (i), explained hereafter. It is interesting to note the distinct similarity between these sections and those made by Section 60 of the Civil Procedure Code as to the property which cannot be attached in the execution of a decree. Although there is

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<sup>5</sup> *Reddiar, MP v A Ammal* AIR 1971 Mad 182.

<sup>6</sup> *Immudipattam Thirugnana v Periya Dorasami* (1901) ILR 24 Mad 377.

<sup>7</sup> *Sunil Siddharthabhai v CIT* AIR 1986 SC 368.

<sup>8</sup> *Makkan Lal Saha v Nagendranath Adhikari* (1933) ILR 60 Cal 379.

this similarity yet there is a difference between the exceptions made in this section and exceptions made in Section 60. Certain things such as tools of artisans and necessary cooking vessels can be transferred, yet they, under Section 60 of the Code cannot be attached. Apart from the exceptions made by the present section there are certain restrictions imposed by other laws on the power of transfer. For example, restrictions in Hindu law against the transfer of coparcenary property.

### **Spes Successions:**

Spes successionis within the meaning of Section 6 of the Act: The things referred to in this Sub-section as non-transferable are the chance of an heir succeeding to an estate, the chance of a relation obtaining a legacy (a gift by will) on the death of a kinsman, and any other mere possibility of a like nature.

A mere possibility of an heir succeeding to an estate is excluded from the category of transferable property. The prohibition enacted in this clause is based on public policy, namely, that if these transfers were allowed speculators would purchase the chance of succession from possible heirs and there would be increase in speculative litigations.

Under Sec. 6 (a), however, transfer of a bare chance to get the property is prohibited. After the death of the husband, for example, if two widows inherit their husband's properties together, the transfer of bare chance of the surviving widow taking the entire estate as the next heir of her husband on the death of the co-widow is prohibited under Sec. 6 (a). It, however, does not prohibit the transfer by the widow of her present interest in the properties inherited by her together with the incidental right of survivorship. Such widows could validly partition the properties and allot separate partitions to each and, incidental to such an allocation, could agree to relinquish her right of survivorship in the portion allotted to the other.

### **Illustrations-**

A expecting that C, his paternal aunt, who had no issues, would bequeath her house worth Rs.20000, transfers it to B. The transfer is invalid. The above rule regarding prohibition of the bare chance doctrine and spes succession apply in this case. A has a wife B and a daughter C. C in consideration of Rs. 1,000 paid to her by A, executes a release of her right to share in the inheritance to A's property. A dies and C claims her one-third share in the inheritance. B resists

the claim and sets up the release signed by C. The release is no defence, for it is a transfer of a spes successionis, and C is entitled to her one-third share but is bound to bring into account the Rs. 1,000 received from her father

### **Right of Re-Entry**

By a mere right of re-entry is meant a right to resume possession of land which has been given to another person for a certain time. This right of reentry is usually inserted in leases empowering the lessor to re-enter upon the demised premises if the rent is in arrear for a certain period or if there is a breach of covenants in the lease. This Sub-section lies down that the right of reentry cannot be transferred by itself apart from the land.

Example- A grants a lease of a plot of land to B with a condition that if B shall build upon it, he would re-enter. A transfers to C his right of re-centering in case of breach of the covenant not to build. The transfer is invalid for two reasons, one, the right is a personal licence and not transferable, second, the transferee could only use it for the purposes of a suit to enforce the right without acquiring any right in the property. But if A transfers the whole of his interest in the property, i.e., ownership along with the right of re-entry to C, the transfer shall be valid being a legal incident of the property.

### **Easement**

An easement is a right to use, or restrict the use of land of another in some way. Examples of easements are rights of way, rights of light and rights of water. An easement involves the existence of a dominant heritage and a servient heritage. That is, there must be two parcels of land, one (the dominant heritage) to which the benefit of the easement attaches, and another (the servient heritage) which bears the burden of the easement. But technically an easement cannot exist in gross (independently of the ownership of land but only as appurtenant) attached to a dominant heritage. It follows therefore that an easement cannot be transferred without the property which has the benefit of it.

Example- A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B. A transfers this right of way to C. The transfer is a transfer of easement and therefore invalid. But if A transfers the house itself, the easement passes on to C on such transfer.

### **Restricted Interests**

This clause states, a person cannot transfer an interest restricted in its enjoyment of him. A transfer of such interest would defeat the object of the restriction. As an example, if a house is lent to a man for his personal use, he cannot transfer his right of enjoyment to another. Under this clause, the following kinds of interest have been held not to be transferable:—

- a) A religious office
- b) Emoluments attached to priestly office. Where, however, the right to receive offerings made at a temple is independent of an obligation to perform services involving a qualification of personal nature, the right is transferable.
- c) A right of pre-emption.
- d) Service tenures.

### **Maintenance**

A right to future maintenance is solely for the personal benefit of the person to whom it is granted and, therefore, cannot be transferred. Before the insertion of this Sub-section in 1929, there was a conflict of opinion whether the right to future maintenance when it was fixed by a decree was transferable. It was held in Madras that it was, and in Calcutta that it was not. The amendment supersedes the Madras decision. The result is that the assignment of a decree for maintenance is valid if the maintenance has already become due but as to future maintenance it is not valid. Arrears of maintenance, therefore, can be assigned.

### **Mere Right to Sue**

A mere right to sue, as for instance, in respect of damages for breach of contract, or for tort, cannot be transferred. The object of the prohibition is to prevent gambling in litigation. Moreover, a right to sue is personal to the party aggrieved.

Example- A, contracts to buy goods from B. On due date A fails to take delivery and B sells the goods in the market at a loss of Rs.10000. B transfers the right to recover the damages to C. The transfer is invalid.

### **Public Office**

According to this section, a public office cannot be transferred. The prohibition is based on the grounds of public policy. A public office is held for qualities personal to the incumbent, and obviously it would be against public interest to permit alienations of public officer.

The salary of a public officer is not transferable, although, under Section 60, C.P.C, it is attachable with certain limits.

If the office is not public, it would be transferable even though the discharge of its duties should be indirectly beneficial to the public.

### **Pensions**

Under this clause, stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred. The term 'pension' means a periodical allowance or stipend granted not in respect of any right of office but on account of past services of particular merits or as compensation to dethroned princes, their families and dependents. Accordingly, a reward is not a pension. Section 60 of the Civil Procedure Code also exempts a pension from attachment in execution of a decree against the pension holder.

### **Nature of Interest**

This sub-section forbids transfer

- in so far as such transfer would be opposed to the interests affected thereby,
- for unlawful object or consideration, and
- to a person legally disqualified to be a transferee.

### **Untransferable Interests**

The last sub-section of Section 6 is identical with the proviso in Sub-section (i) of Section 108 of this Act and was inserted by the Amendment Act, 1885 to obviate any doubt which might arise owing to the fact that section does not primarily apply to leases for agricultural purposes.

In general leaseholds are transferable but this sub-section makes an exception of this rule and declares certain interest immutable. Thus, under this rule, a tenant having an un-transferable right of occupancy cannot alienate or assign his interests in the occupancy.

## SECTION 6(a) AND SECTION 43: DIFFERENCE

- **Transfer by Unauthorised Person (Doctrine of feeding empty grant by estoppel)**

A person who has no title or interest in an immovable property, cannot transfer that property. Transfer by such person is a transfer by unauthorised person. Section 43 of the Ac provides the effect when such unauthorised person subsequently acquires interest in property transferred.

Section 43. Transfer by unauthorised persons who subsequently acquires interest property transferred—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.

Illustration—A, a Hindu who has reported 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, it having been retained by B on the partition, but on B's dying A as heir obtains Z, C not having rescinded the contract of sale, may require A to deliver Z to him.

The general rule of *nemo dat quod non habet* (no one can give to another, what he himself does not have) has been relaxed through this section. The principle of this section is based partly on the English doctrine of estoppel by deed and partly on the equitable doctrine that a person who has promised more than he can perform must make good his promise when he acquires the power of performance.

For application of this section requisites must be satisfied—

- There must be fraudulent or erroneous representation of ownership by the transferor.
- Transfer must be by the wrong owner.
- Transferee must act on that false representation, in good faith.
- Transfer is for the consideration.
- Transfer subsequently acquires some interest in that property which he professed to transfer.

- The contract of transfer still subsists.

Subsequently acquired interest does not pass automatically to transferee but only when he claims the right in such property.

The exception to this section (Second paragraph of Section 43) protects the rights of the record transferee in good faith and for consideration who has no notice of the option in favour of the first transferee.

#### ➤ **Section 6(a) and Section 43 compared**

Section 6(a) and Section 43 seems to conflict each other. Where Section 6(a) deals with spes-cessionis and sender mere possibility/expectancy of a heir succeeding to an estate as an un-transferable property, through Section 43, such transfer can be made effective if transferor subsequently acquires those property and other conditions satisfied.

In *Jamma Masjid v. K. Deviah*, AIR 1962 SC 847 Supreme Court explained the relationship between two sections. Court said that Section 6(a) and Section 43 relate to two different subjects and that there is no necessary conflict between them. Section 6(a) would apply where there is a transfer of a mere spes-cessionis and the party knowing that the transferor has no more right than that of a mere expectant heir Section 43 applies where an erroneous representation is made by the transferor to the transferee that he is the full owner of property and authorised to transfer it.

Supreme Court held that Section 6(a) enacts a rule of substantive law while Section 43 enacts a rule of estoppel which is one of evidence. Thus, these two provisions operate on different fields and under different conditions and there is no ground for reading a conflict between or cutting one b reference to the other. Each of them can be given full effect on their down the ambit of their own terms in their respective spheres.

## CONCLUSION

Property is not only the thing which is the subject-matter of ownership, but includes also *dominium* or the right or ownership or of partial ownership, and as Lord Langdale said it 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.

Therefore for a property to be transferable several conditions need to be satisfied. These include that of constituting a transfer; it to come within the definition of an immoveable property and it should not be amongst those items, which may not be transferred under Section 6 of the Transfer of Property Act. In addition to this it is clear that there are several kinds of transfer that may take place. Each kind of transfer as has been explained has different procedures and conditions, which need to be satisfied. These are hence the various elements that are required to be transferred for a property to be transferable.

The researcher has tried to incorporate the difference in position in this regard between the said provisions of the Code and the Act, illustrating how though the conceptual similarity is apparent on the face of the matter, there is a great difference in terms of the meaning and content of the two statutory provisions. Also, it has been concluded that though in general, 'all property may be transferred', this is subject to the exceptions mentioned in Section 6(a) to (i) of the Act. Thus, one may safely assume that, due regard being given to such exceptions, expressly mentioned in the Act, transfer of all other categories of property is possible and this Act is in furtherance of the selfsame objective of arriving at the desired level of uniformity in terms of regulating property issues throughout the length and breadth of this diverse nation.