

CHAPTER-II

HISTORICAL PERSPECTIVE OF TRANSFER OF PROPERTY IN INDIA

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Importance and relevance of property in today's materialistic world is undeniable. Property related disputes dominate the courts among strangers, former friends and relations who fight tooth and nail with fret and flume wasting several precious years. It is also true that relevance of property in the socio-economic life of an individual is relatable more with respect to its disposition rather than its abstract content which indicates the inherent necessity of awareness of the basic concepts with respect to transfer of property. Fighting immense battles and losing precious lives and time can be avoided to a large extent with right guidance at the initial level of its transfer.¹

Property can be transferred in several ways, and conveyance of title in India is not subject to one single piece of legislative enactment. Thus different legislations exist that govern the transfer of title from one person to another with respect to the property depending upon the mode of conveyance. One of the basic features of the Transfer of Property Act, 1882 is that it governs transfer of property *inter vivos* or between living persons only. It does not apply to acquisition of title through inheritance and succession which are subject to distinct religious specific personal

1. Dr. Poonam Pradhan Saxena, ***The Transfer of Property Act***, 2nd Edition, 2011, Lexis Nexis Butter Worths, Introduction, p. XIII.

laws, including the Indian Succession Act, 1925. It is also inapplicable to dedication of property to *God* or where the transfer is subject to the relevant religious and Charitable Endowment Acts.

The Transfer of Property Act primarily deals with transfer of immovable property and interests in immovable property. However, some of its provisions also apply and govern transfer of movable property. It provides a specific method of transfer of immovable property and one of the very important feature of the Act is that barring few exceptions, transfer of immovable property is no longer a private affair as it requires compulsory registration of the transfer document.

Prior to the Transfer of Property Act, 1882, there was practically no law as to real estate in India. A few points were covered by the Regulations and Acts which were repealed either wholly, or in part by section 2 of the Act. But for the rest of the law, the courts, in the absence of any statutory provisions, adopted the English law as the rule of justice, equity and good conscience. This was not satisfactory, for the rules of English law were not always applicable to social conditions in India, and the case law became confused and conflicting. To remedy this state of affairs, Commission was appointed in England to prepare a code of substantive law of India.²

The classical law relating to transfer of property was purely customary. Before the advent of the British and their active intervention in the Indian legal system, Hindus and

2. Mulla, ***The Transfer of Property Act***, 10th Edition, Lexis Nexis Butter Worth, Introduction, p. XI.

Muslims were governed by their respective law in relation to transfer of property. This arrangement worked adequately in the informal and traditional judicial system of panchayats because, those who decided the matter were not only familiar with the nature of the dispute but also with the law and the litigants as well. However, the same scenario proved to be very confusing and uncertain with the establishment of the informal courts in India by the British Govt. In this adversarial litigation system, the disputes were decided by impartial judges who were unfamiliar with the litigants and the distinctive social system of India. Realizing the absence of a concrete and ascertainable law of property comparable to what they had in England, these courts applied English rules governing transfer of property with modifications, to suit the Indian conditions. However, such application of the British principles even with modifications, at times, was grossly inappropriate due to the social and cultural differences between England and India. Thus, the desirability of enacting the law relating to transfer of property, was perceived soon after the consolidation of British authority in India. In addition, various High Courts in the absence of clear rules made a very liberal use of their own notions of the principles of equity, justice and good conscience, and laid down diametrically opposite principles further compounding the confusion and uncertainty. Even the *Privy Council* noted this uncertainty with concern, and attributed this undesirable scenario to a lack of codification

of the law of property in India calling upon the authorities to take urgent steps in this direction.³

The first Law Commission⁴ was appointed by the British Queen primarily to codify the civil law in India including the one relating to transfer of property. The Transfer of Property Act, though drafted in 1870, was the last of these drafts to become law. The draft was sent to India by the Duke of Argyll who was then Secretary of State for India, and after some amendments, it was first introduced as a Bill in the Legislative Council in 1877. The Bill was then referred to a Select Committee, by whom it was revised and circulated for public criticism. In deference to this criticism, all matters not directly referring to transfers *inter vivos* were omitted, some clauses, referring to trusts, powers and settlements were dropped and other clauses were added with a view to save the provisions of local law and usage.

The Bill thus redrafted and was referred to the Second Law Commission,⁵ but no less than seven Bills were prepared before the first Bill was introduced in the Legislative Council by Mr Whitley Stokes and passed into law on 17 February 1882.

The Second Law Commission in their Report of 1879 said that ***'The function of the Bill was to strip the***

3. **Mulla, *The Transfer of Property*** (ed. Solil Paul) Ninth edn., p. xi.

4. The ***First Law Commission*** consisted of Lord Romilly MR, Sir Edward Ryan, Chief Justice of Bengal; Lord Sherbrooke; Sit Robert Lush and Sir John Macleod. Besides the Transfer of Property Act, this committee also drafted the Indian Evidence Act, the Indian Contract Act, the Indian Succession Act, and the Negotiable Instruments Act.

5. ***Second Law Commission*** Consists of consisting of Sir Charles Turner, Chief Justice of Madras; Sir Raymond West; and Mr Whitley Stokes; Law Member of the Council of the governor-General.

English law of all that was local did historical, and mould the residue into a shape in which it would be suitable for an Indian population and could easily be administered by non-professional judges.

Some of the provisions of the Bill were borrowed from the enactments which it repealed and superseded, but the Bill was based mainly on the English law of real property. The Law of Conveyancing and Property Act, 1881 had been enacted in England before the Bill was passed into law, and some of the provisions of the Act, notably sections 57, 61 and 69, are borrowed from that statute. The Act was afterwards amended on 12 separate occasions by the Amending Acts which follows :

1. **Act No. 3 of 1885**—amending sections 1, 4, 6(i), and 69. It abolishes exemptions from the Act on the ground of race, and reconciles the provisions of the Registration Act with those of the Transfer of Property Act.
2. **Act No. 15 of 1895**—which exempts government grants from the operation of the Transfer of Property Act.
3. **Act No. 2 of 1900**—amending sections 3, 6(e), and 6(h), and remodelling chapter VIII which deals with transfers of actionable claims.
4. **Act No. 6 of 1904**—amending sections 1, 59, 69, 107 and 117. It enables a local government to extend part of the Act of specified territories, and to apply the provisions of the Act relating to leases to particular classes of agricultural leases. It provides for the

registration of certain mortgages and leases, and for equitable mortgages in *moulmein*, *bassein* and *akyab*.

5. **Act No. 5 of 1908**—transferring the adjective law of mortgages to the Code of Civil Procedure.
6. **Act No. 11 of 1915**—amending section 69.
7. **Act No. 26 of 1917** - validating mortgages and gifts in Agra and Oudh executed before 1 January 1915, and attested on acknowledgement of execution.
8. **Act No. 38 of 1920**—omitting the words ‘with the previous sanction of the Governor-General in council’ from sections 1 and 117.
9. **Act No. 38 of 1925**—amending section 130.
10. **Act No. 27 of 1926**—amending section 3 by inserting a definition of the word 'attested'.
11. **Act No. 10 of 1927**—amending section 3 by making the definition of the word 'attested' retrospective.
12. **Madras Act No. 3 of 1922**—modifying the provisions of the Act to give effect to the provisions of the Madras City Tenants Protection Act, 1922.

Despite these amendments, here were conflicting decisions on nearly every section of the Act, and a further exposition of the law became necessary. Accordingly in 1927, a Special Committee,⁶ was appointed to examine the provisions of a Bill prepared by the Legislative Department of the Government of the India for the purpose of making a general amendment of the Act. The Bill which, was the

6. Consisting of Mr S.R. Das, Law Member of the Council of the Governor-General, Mr B.L. Mitter (afterwards Sir Brojendro Lal Mitter), then Advocate-General of Bengal, Dr S.N. Sen, and Mr Dinshah Mulla (afterwards the Honourable Sir Dimshah Mulla, PC) was

result of their labour was, after a slight amendment in Select Committee, enacted in the Transfer of Property (Amendment) Act No. 20 of 1929.

The Act as amended sets at rest points on which decisions have been conflicting, and makes several changes in the law, of which the most important are:

- Registration amounts to notice, (Section 3).
- Constructive notice to an agent is notice to his principal, (Section 3).
- Validation of transfers to a class of some members as regards which fails, (Section 15).
- Statutory recognition of the doctrine of part performance, (Section 53A).
- In a mortgage by conditional sale, the condition must be embodied in the same deed, (Section 58).
- A mortgagor entitled to redeem may require the mortgagees to transfer the mortgage debt to a third party, (Section 60A).
- Statutory recognition of the mortgagor's right of inspection of title deeds, (Section 60B).
- Mortgagor's right to redeem several mortgages to the same mortgagee separately, or simultaneously, (Section 61).
- Statutory recognition of the mortgagee's right to compensation for necessary improvements, (Section 63A).
- Statutory recognition of the mortgagor's power to lease, (Section 65A).

- Abolition of the remedy of foreclosure in certain mortgages, (Section 67).
- Mortgagee's obligation to enforce several mortgages by the same mortgagor simultaneously, (Section 67A).
- Provision for appointment of a receiver by a mortgagee exercising power of sale without the intervention of the court, (Section 69A).
- An extension of the principle of subrogation, (Section 92).
- A modification of the law of merger, (Section 101).
- Provision requiring registered leases to be executed by both parties, (Section 107).

2.1 Scope of The Transfer of Property Act :

This Act defines and amends certain parts of the law relating to transfer of property by act of parties.⁷ The important words used in the Act are '**by act of parties**',⁸ and therefore, it applies and governs the transfers by act of parties only and does not govern transfers that take place due to operation of law. Accordingly, it does not govern transfers of property through court auction,⁹ forfeiture, acquisition or due to insolvency proceedings or government grants.¹⁰ It also does not govern transfers of property through intestate¹¹ or testamentary¹² succession.

7. Preamble, The Transfer of Property Act, 1882.

8. In some cases the Act has been applied to transfers by operation of law as well.

9. The Act does not apply to a sale in execution, *Dinendronath Sanyal v. Ramcoomar Ghose*, (1881) ILR7 Cal 107.

10. *Dwarkaprasad v. Kathlen*, (1955) ILR 1955 Nag 538.

11. *Kishori Lal v. Krishna Kamini*, (1910) ILR Cal 377.

12. *Rajaparthasartbi v. Raja Venkatadesi*, AIR 1922 Med. 457.

2.2 Basic Objectives of the Transfer of Property Act :

The Act defines certain expressions used in relation to transfer of property and amends the (then) prevailing rules governing the same. It does not purport to introduce any new principle of law.¹³ One of the basic objectives of the Act was to bring in harmony the rules relating to transfer of property between living persons and those applicable in case of the devolution of the same, in the event of the death of a person, through intestate and testamentary succession. The Act also seeks to complete the law of contract, as most of the transfers primarily arise out of a contract between the parties. The Act has also, by providing for the compulsory registration of the transfers,¹⁴ changed the nature of a transfer of property from a private to a public affair.

The Transfer of Property Act, 1882 was intended to define and amend the existing law, and not to introduce any new principle.¹⁵ It embodies principles of equity, justice and good conscience.¹⁶ The chief objects of Transfer of Property Act were first to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution on death and thus, to furnish and complement the work commenced in framing the law of testamentary and intestate succession; and secondly, to complete the code of contract law so far as it relates to immovable property.¹⁷

13. **Tajjo Bibi v. Bhagwan**, (1899) 16 All 295.

14. Except when the property is of a nominal value, or where it is let out for a short time period.

15. **Tajjo Bibi v. Bhagwan** (1899) ILR 16 All 295.

16. **Nalakath Suinuddin v. Kooridakan Sulaiman** (2002) 6 SCC 1, para 21.

17. Whitley stokes, **Anglo-Indian Codes**, vol. I, p 726.

The Act is not exhaustive, and it does not profess to be a complete code.¹⁸ This is apparent from the omission of the word ‘consolidate’, which occurs, for instance, in the preamble to the Indian Evidence Act, 1872.¹⁹ The preamble to the Indian Contract Act, 1872 is worded in terms similar to the preamble of Transfer of Property Act.²⁰ In *Irrawaddi Flotilla Co. v. Bhugwandas*,²¹ which was a case under the Contract Act, the Privy Council observed that the said Act did not profess to be a complete code dealing with the law relating to contracts, that is purported to do no more than to define and amend certain parts of that law, and that the legislature did not intend to deal exhaustively with the law relating to contracts.

2.3 Legislative Competence Relating to Transfer of Property :

Both the Parliament and the State Legislature have the power to make laws with respect to ‘**transfer of Property other than agricultural land**’, which matter is included in Entry 6 of the Concurrent List in the Seventh Schedule to the Constitution. Legislation relating to the relationship of landlord and tenant, including rent control with respect to non-agricultural land, will come under Entry 6 of List III.²² The subject of transfer of agricultural land is covered by entry 18 of the state list. A state law relating to the transfer of agricultural land may override the provisions of the Transfer of Property Act, for instance, as to mortgages of

18. *HV. Low & Co. Ltd. v. Pulin Beharilal Sinha* (1933) ILR 59 Cat 1372

19. *Collector of Gorakhpur v. Palakdhari* (1890) ILR 12 All 1, p 35.

20. Preamble, The Indian Contract Act, 1872.

21. (1891) ILR 18 Cal 620, p 628.

22. *Bapalal v. Thakurdas* AIR 1982 Mad 399.

agricultural land.²³ Transfer of agricultural land, whether belonging to scheduled tribes or other persons, would come under entry 18 of list II, which carries with it not only a power to make a law placing restrictions on transfers and alienations of such land including a prohibition thereof, but also the power to make a law to re-open such transfers and alienations.²⁴ The Supreme Court has held that the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 in so far it deals with a licensee of premises other than premises belonging to the Central Government, falls in entries 6, 7 and 46 of list III.²⁵ It is held that Benami Transactions (Prohibition) Act, 1988 is not an enactment relating to the transfer of property, but is a law relating to trusts and trustees and, therefore, cannot be related to the legislative head 'Transfer of Property' in entry 6 of list III.²⁶

2.3.1 Transfer by act of Parties and by operation of Law :

The Supreme Court *Bharat Petroleum Corporation Ltd. V. P Kesavan*,²⁷ has held:

As would appear from the preamble of the Transfer of Property Act, the same applies only to transfer by act of parties. A transfer by operation of law is not validated or invalidated by anything contained in the Act. A transfer which takes place by operation of law, therefore, need not meet the requirement of the

23. *Megh Raj v. Allah Rakhia* (1947) FCR 77, p 86.

24. *Lingappa Pochanna v. State of Maharashtra* MR 1985 SC 389.

25. *Accountant & Secretarial Services Pvt. Ltd. v. Union of India* (1988) 4 SCC 324; AIR 1988 SC 1708; *Ashok Marketing Ltd and anor v. Punjab National Bank and ors* AIR 1991 SC 855, pp 876; 877.

26. *S Mohammad Anwaruddin v. Sabina Sultana* (1989) 179 ITR 442, p. 455.

27. (2004) 9 SCC 772, para 12.

**provisions of the Transfer of Property Act
or the Indian Registration Act.**

These words exclude transfer by operation of law, i.e., by sale in execution,²⁸ forfeiture, insolvency or intestate succession. It also limits the scope of the Act to transfers *inter vivos*, and excludes testamentary succession. The principles embodied in some of the provisions have been applied to transfers by the operation of law in some cases.

A cardinal rule of interpretation of statutes, which is often referred to as the golden rule is that the grammatical sense of the words used should be adhered to, technical words being construed according to their technical meaning, and other words in their most ordinary and popular acceptance.²⁹ It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily, but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law it is impossible to arrive at a conclusion without considering what the place. The court held that cases³⁰ of compulsory acquisition by the state stand on a different footing since in such cases, there is neither any question of offer and acceptance, nor of consent, either express or implied.

The principle of these decisions must be applied with caution to the provisions of Transfer of Property Act, as an involuntary 'sale' is not necessarily a transfer by the operation of law. Legislature can modify, annul and

28. ***Dinendronath Sannyal v. Ramcoomar Ghose*** (1881) ILR 7 Cal 107, 8 IA 65, p 75.

29. ***Queen Empress v. Abdullah*** (1885) ILR 7 All 385, p 398.

30. ***Chhitter Mal Narain Das v. Commr of Sales Tax*** (1970) 3 SCC 809.

substitute the contracts *inter-vivos*. Therefore, when by a legislative provision parties to the lease are substituted, it cannot be held that there is assignment or transfer of the lease or sub-letting of the premises, by the lessee to the person or authority in whom the leasehold rights are vested by operation of law.³¹

However, although section 2(d) makes the Transfer of Property Act inapplicable to transfers by operation of law, the principle of some sections, for instance section 36,³² 44,³³ and section 53³⁴ has been applied to such transfers.

2.3.2 Inconsistency of Transfer Rule with Mohammedan Law and Hindu Law :

An exception is made with reference to section 57 and chapter IV as the latter provides for the transfer and extinction of a mortgagor's interest by a decree of the court, and the former provides for the discharge of encumbrances by order of a court. With reference to these sections, 2(d) overrides the provisions of section 5.³⁵

Section 2 says that 'nothing in the Chapter II of this Act shall be deemed to affect any rule of Mohamedan law. The reason for this provision is that some of the rules of law differ from the general rules as to the transfer of property enacted in chapter II. Thus, a Mohamedan may settle

31. **G Sridharamurthi v. Hindustan Petroleum Corpn Ltd.** AIR 1991 Kant 249, p 252.

32. **Shivaprasad v. Prayag Kumari**, AIR 1935 Cal 39.

33. **Puddipeddi Laxminarasamma v. Gadi Rangnayakasnrna** AIR 1962 Ori. 147

34. **Akramunissa Bibi v. Mustafa-un-nissa Bibi**, AIR 1929 All 238.

35. **Laxrni Devi v. SM Kanwar**, AIR 1965 SC 834.

property in perpetuity for the benefit of his descendants, provided there is an ultimate gift in favour of charity.³⁶

This rule is not affected by section 13 and 14 of the Transfer of Property Act. The Mohamedan law of gifts is expressly saved by section 129. Under that law, writing is not essential to the validity of a gift,³⁷ but delivery of possession or of such possession as the subject-matter of the gift is susceptible of, is necessary for a transfer by way of gift.³⁸

Although section 2 saves rules of Mohamedan law, it does not follow that the general rules in chapter II cannot apply to Mohamedan transfers. These general rules are excluded only if there is an inconsistent rule of Mohamedan law. Where there is no inconsistent rule of Mohamedan law, the sections in chapter II apply *proprio vigore*, for all that section 2 says is that nothing in chapter II shall be deemed to affect any rule of Mohamedan law. However, in any case not covered either by the sections in chapter II or by Mohamedan law, the English law is applied on the ground of justice, equity and good conscience.

The Transfer of Property Act as it stood before the amending Act 20 of 1929, also saved rules of Hindu law. The word 'Hindu' has been omitted as the differences between that law and the Transfer of Property Act have now been removed. The rule in *Tagore v. Tagore*³⁹ and *Chundi*

36. The Wakf Validating Act, 1913, to which retrospective effect was given by the Musalman Wakf Validating Act, 1930.

37. **Kamar-un-Nissa v. Husaini Bibi** (1880) ILR 3 All 267.

38. **Muhammad Raza v. Abbas Bandi Bibi** 59 IA 236, (1932) All IJ 709, 34 Bom LR 1048, 63 Mad IJ 180, 137 IC 321, AIR 1932 PC 158.

39. (1872) 9 Beng LR 37.

Churn v. Sidheswari,⁴⁰ that bequests and transfer in favour of unborn persons are- wholly void, was in conflict with sections 13, 14 and 20 of the Transfer of Property Act. The Hindu law on this subject had been modified by the Hindu Disposition of Property Act, 1916, Madras Act, 1914, and Act 8 of 1921, which validated such transfers. These Acts have been amended by sections 11, 12 and 13 of Act 21 of 1929, and the effect of the amendments is that subject to the limitations in chapter II of Transfer of Property Act and in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer *inter vivos*, or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. The Transfer of Property Act is in consonance with these amendments and so the word 'Hindu' is omitted in this section. Another difference was the rule enacted in sections 15 and 16 of the Transfer of Property Act before the amendment in 1929, that if a transfer to a class fails as to some of its members by reason of remoteness, it fails as to the whole class. This is not Hindu law, and the sections have been amended so as to accord with the law.

2.4 Subject matter of Transfer under Transfer of Property Act :

The term property has nowhere been defined in the Act,⁴¹ but it is used in the widest and most generic sense.⁴² Property is the most comprehensive of all terms which can

40. (1889) ILR 16 Cal 71, IA 149.

41. The Transfer of Property Act, 1882.

42. **Mata Din v. Kazim Husain**, (1819) ILR 14 Cal 241; **Bans Gopal v. Banerji**, AIR 1949 All 433.

be used, as much as it is indicative and prescriptive of every possible interest which any person can have.⁴³ Thus, it means not only the physical objects, but includes rights and interests existing in or derived out of the actual physical object as well.⁴⁴ For instance, the beneficial interest of the head of a religious endowment such as a *mutt*,⁴⁵ an actionable claim,⁴⁶ a right to a re-conveyance of land, a right to obtain shares in a company,⁴⁷ is property.

An owner has three basic rights in the property, i.e.—a right of ownership, of having the title to the property, secondly, an exclusive right to possess and enjoy the property and thirdly, an exclusive right to alienate the property in any manner that he likes. Absolute ownership is therefore an aggregate of component rights, including a right to enjoying the usufruct of the land.⁴⁸ These rights are called ‘interests’ in the property under Indian law, and are referred to as ‘real rights’ under English law. Where only some rights in property are transferred, it would be a right of transfer of an interest in the property.⁴⁹ A vested remainder,⁵⁰ a contingent interest,⁵¹ a lease⁵² or a mortgage of an immovable property is the transfer of an interest in the property. Where all the interests in the property are transferred, it is called an absolute transfer of property.

43. **Jones v. Shainner**, (1835) 5 LJ Ch 87, 90.

44. **Ramshankerlal v. Ganesh Prashad**, (1907) ILR 29 All 385.

45. **Commr. v. Lakshindra**, AIR 1954 SC 282.

46. **Muchiram v. Ishan Chander**, (1894) ILR 21 Cal. 568; **Rudra Prakash v. Krishna**, (1887) ILR 14 Cal 241.

47. **Narasingerji v. Panaganti**, AIR 1924 PC 226.

48. **Indar Sen v. Naubar Sen**, (1885) ILR 7 All 533.

49. **Sunil Sidhartbbai v. Commr of Income Tax**, AIR 1986 SC 368.

50. **Gulum Husein v. Fakir Mahamed**, AIR 1947 Bom. 185; **Umesh Chander v. Jaboor Fatima**, 17 IA 201.

51. **Ma Yait v. Official Assigner**, AIR 1930 PC 17.

52. **Indraloke Studio Ltd. v. Santi Debi** AIR 1960 Cal.

Property can be transferred absolutely by sale, gift, exchange, relinquishment, dedication etc.

2.4.1 Classification of Property :

Property can be classified into several categories such as tangible and intangible, corporeal and incorporeal, movable and immovable. For the purpose of the Transfer of Property Act, it is the last categorization, i.e., the distinction between movable and immovable property that is relevant.

The primary reasons why the study of the character of property, i.e., whether it is movable or immovable, is relevant, is .due to the difference in procedural formalities in the transfer, and the different time stipulated in the law of limitation in having recourse to the litigative system in case of disputes. Thus, three predominant reasons necessitate a study of the distinction between movable and immovable property.

- (i) Though the Transfer of Property Act lays down general rules relating to the transfer of both movable as well as immovable property, it governs and lays down rules for the specific transfers of immovable property only.
- (ii) The Transfer of Property Act provides a specific procedure for the transfer of immovable property that is distinct from the one followed in the case of movable property. The transfer of immovable property must take place with the help of a written document that is properly executed by the transferor and the execution should be properly attested and registered, Unless the transfer

complies with all the three requirements, it will not convey any right from the transferor to the transferee. In contrast, the transfer of movable property in several cases will be complete by simple delivery of possession of the property, coupled with an intention to convey the title by the owner to the recipient. For conferment of rights 'in the 'property through a transfer, the knowledge of the character of the property and the correct procedure for its transfer is a must.

- (iii) The law of limitation specifies different time periods within which a civil suit can be filed with respect to movable and immovable property. In case of immovable property' it is generally 12 years from the date the cause of action arises, 'but in case of movable property, the suit must ordinarily be filed within a period of three years from the date of the cause of action, otherwise it will be dismissed as time barred. Thus it is extremely relevant to know the character of the property that is the subject matter of dispute, before a suit can be filed with respect to it in a court of law.⁵³ In a suit relating to movable property, where it is filed after the expiration of three years from the date the cause of action arises, the first question that the court will decide, will be the character of the property. If the court comes to the conclusion that it is immovable property, it will decide the case on merits, but if the

53. Except when property is of nominal value or is let out for a short duration.

court concludes that the character of the property is movable, the case will not be heard on merits, but would be held barred by limitation and will be thus dismissed.

2.4.2 Immovable Property :

In section 3, the definition of Immovable property is neither clear nor complete. It simply says that immovable property excludes standing timber, growing crops or grass. It is not clear as to what it includes. In any Act, if the meaning of any word is not given clearly, the meaning of that word may be found in the General Clauses Act, 1897, if given there. According to section 4 of the General Clauses Act, immovable property includes land, benefits to arise out of land and, things attached to the earth. The definition of immovable property given in the General Clauses Act is applicable to the Transfer of Property Act.⁵⁴ But this definition is also not complete. Moreover, the expression 'things attached to the earth' which is not defined in the General Clauses Act has been defined separately in section 3 of the Transfer of Property Act. Thus in order to get a clear and complete meaning of 'Immovable property', it is necessary to consider the definitions given in section 3 of the Transfer of Property Act as well as the definition given in the General Clauses Act. On the basis of the definitions given in both these Acts, the expression 'immovable property' may now be defined properly in the following words.⁵⁵

54. **Babulal v. Bhawani**, (1912) 9 A.L.J. 776.

55. Prof. R.K. Sinha, Transfer of Property Act, VIth Edition, 2002, Central Law Agency, p. 17.

Immovable property includes.—

- (1) Land,
- (2) Benefits to arise out of land, and
- (3) Things attached to the earth, i.e.—
 - (i) things embedded in the earth,
 - (ii) things attached to what is so embedded in the earth,
 - (iii) things rooted in the earth except.—
 - (a) standing timber,
 - (b) growing crops, or
 - (c) growing grass.

Land: Land means surface of the earth. It includes everything upon the surface of land, under the surface of land and also above the surface of land. Anything upon the land, so long as it is not removed from there, shall be part of the land and as such an immovable property. Thus, soil or mud deposited on the surface of earth would be immovable property. The water collected in a pit or accumulated in the pond or lake is also immovable property because the water is part and parcel of the surface of earth. Water flowing in the river gives the impression that it is movable but its water always remains on the surface of the earth. Therefore, all the rivers have been regarded as part of the land and as such immovable property although the water is moving. Everything under the surface of land is also part of land and is included in the expression 'immovable property'. For example, sub-soil, minerals, coal or gold mines etc. The underground streams of water are immovable properties because they flow under the land.

Therefore, they are included in the term 'land'. Moreover, not only the things on the land and under the land are immovable properties, but the space' which is above the land is also part of land and is an immovable property. Looking closely, we see that space begins just from the surface of land and goes upto sky, as if it has been placed on the land. Thus, being part and parcel of the land, the space above the land is also immovable property.⁵⁶ It may be concluded therefore, that immovable property includes land and land means and includes everything upon the surface of earth, under it and also above it.

Benefits to arise out of Land.—Besides land, the 'benefit' which a person gets from land, is also an immovable property. One may get a benefit from a land under some right. A right by the exercise of which a person gets certain benefits is called beneficial right or beneficial interest of that person. 'Beneficial interest" in a property is called intangible or incorporeal property.⁵⁷ Thus, any right which is exercised over a land (or any other immovable property) and by the exercise of which a person gets certain

56. Owner of an open piece of land is, therefore, also the owner of the space. But because it is not practically possible to get it separated from the land and give it separately to another person who is not the owner of the land, it would be against the nature of this thing (i.e. space) to transfer it. Therefore, although space which includes also air and light is an immovable property, it is not transferable under section 6(4)(i) of the Transfer of Property Act.

57. Properties are generally classified as movable and immovable. But, besides this classification there is another classification of properties. Properties may also be 'tangible' and 'intangible'. Tangible or corporeal properties e.g. those properties which have physical existence and can be seen or 'touched e.g. land, house, table etc. Intangible or incorporeal properties are in the form of rights under' which one gets certain benefits. They have no physical existence. Existence of such properties (beneficial rights) can be known only when they are being exercised.

profit or gain, would be his intangible immovable property. For example a piece of land is immovable property, therefore, if any right is exercised by a person upon that land, that right becomes intangible immovable property of that person. The Word Land is here used in wider sense. It means and includes everything upon its surface such as house, pond or river. It also includes everything beneath the land such as minerals or mines etc. Thus, right of way exercised on the land or a right to use a land under lease or tenancy is an immovable property. Therefore 'right of a tenant' to live in the house of his land-lord is an immovable property of the tenant. Similarly, right of fishery i.e. right to catch fish from a pond or river, is also an immovable property. It may be noted that the water in the pond or river is an immovable property, therefore, everything in this water including fish shall also be immovable property. And since the right of fishery is exercised on 'fish in the water', which is an immovable property, therefore, this right is an immovable property. Right of ferry means right of transportation on rivers or lakes by boats or steamer. Since river or lake-water- is an immovable property and boats or steamers are used on such waters, therefore 'right of ferry' has been held to be an immovable property. Similarly, since land also includes everything beneath its surface such as mines, therefore, right to extract coal or gold or minerals etc.: from the mines is also an immovable property.

Things attached to the Earth.—The expression 'things attached to the earth' has been defined separately in section 3- of the Transfer of Property Act. Things attached

to the earth means (I) things imbedded in the earth (ii) things attached to what is so imbedded in the earth, and (iii) things rooted in the earth.

(i) Things imbedded in the earth.—Things which are fixed firmly in the earth and become part of the land are things imbedded in the earth. For example, houses, buildings, walls, or electricity poles are immovable properties because they are things imbedded in the earth. Walls and houses are not just placed on the surface of the land ; the surface of the earth is dug deep and thereafter the whole structure is fixed pertinently. Where the things are just placed on the surface of the earth without any intention to make them part of the land, the things may not be immovable properties even if they appear to be- fixed in the land. For example, heavy things such as anchor, road-roller or a heavy stone placed on the land may go two or three feet deep into the earth by virtue of their own weight. But such things are not annexed to or imbedded in the earth. Therefore, the anchor fixed to the land in order to stop the movement of a ship and a-road-roller imbedded a few feet deep into the land or other heavy things which are fixed in the land only due to their own weight, are not things attached to earth.⁵⁸

A machinery which is attached to a concrete base by nuts and bolts to fix it firmly, cannot be regarded as a thing

58. Whether a thing is imbedded in the earth or has simply been placed on it, would depend on the fact whether the thing is intended to be a part of the land or not. Such intention can- be inferred from 'mode' as well as the 'purpose' of annexation. Thus, an anchor which is fixed in the ground to hold a ship is not immovable property but the same anchor fixed firmly in the land to hold a suspension bridge would become an immovable -property.

imbedded in the earth because machinery is not fixed or attached, to the land with intention of any beneficial enjoyment of the land where it is installed. As a matter of fact machineries or other installations of business are fixed to the land for commercial purposes only. They are, therefore, regarded as accessory to the business and not an annexation to the premises.⁵⁹ Large vessels were fixed in a distillery for brewing liquors. It was held by the Court that the vessels (vats) were movable properties because they were fixed in the land not with the intention of any beneficial enjoyment of the land as such; they were fixed for trade purposes.⁶⁰

(ii) Things attached to what is so Imbedded—Where a thing is attached to something which is imbedded in the earth for its permanent beneficial enjoyment, the thing so attached would also become immovable property. Doors, windows or shutters of a house are attached to its walls for permanent enjoyment of that house. Therefore, the doors, windows and shutters are regarded as immovable properties. Things imbedded in the earth are immovable properties because they become part of the land. Things permanently attached to what is so imbedded would also be part of a thing which in itself is a part of land. Accordingly, doors or windows are regarded as part of the house which is part of the land. However, it may be noted that the thing attached must be (a) attached permanently and must also be (b) attached for the beneficial enjoyment of the house or

59. Mulla; Transfer of Property Act, Ed.V. p.27.

60. **Narayana Sa v. Balaguruswami**, A.I.R.(1924) Mad. 187; See also **State Bank of Patiala v. M/s. Chohan, Huhtamaki** (India) Pot. Ltd. A.I.R. (1982) H.P., 27

building. Things attached without any intention of making them a part, of the house or building would not, be 'immovable' properties. For example, electric bulbs, window-screens or the ornamental articles are movables because such things are attached to walls not for the permanent beneficial enjoyment of the house but only for the use and enjoyment of the 'things' itself.

(iii) Things rooted in the earth.—Trees, plants or shrubs which grow on land are rooted in the earth. With the help of their roots, they keep themselves fixed in the earth and become part of the land. Until cut down, the trees are permanently attached to the land where they are grown. Therefore, a general rule in respect of all the trees, plants, herbs and shrubs is that they are immovable properties.⁶¹ However, there is an exception to this general rule. Standing timber, growing crops and grass, though rooted in the earth, are movable properties.

Standing Timber.—Standing timber is movable property. A green tree rooted in the earth is called a 'standing timber' provided its woods are generally used for timber purposes i.e. for making houses or household furniture. If there is a tree, the woods of which are fit to be used for making doors, windows or furniture, the same tree which under general rule is an immovable property, shall be treated as 'standing timber' and as such a movable property. For example, the woods of *Sheesham*, *neem*, *babool* or teak trees are used for making houses doors,

61. But as soon as a tree or plant is cut down it is detached from the land and is no more a part of the land. Therefore, a cut down tree or a tree which falls on the ground otherwise, shall be treated as movable property.

tables or chairs, therefore these trees have been held to be movable properties although they are the 'things rooted in the earth'.⁶² Bamboo trees have no utility except that they may be used in making houses or as poles, therefore, bamboo trees have been held to be movable properties.⁶³

Fruit-bearing trees are not standing timber. They are planted and grown for taking fruits etc. from them and not for taking their wood. Therefore, fruit-bearing trees are immovable property.⁶⁴ *Mahua* tree has been held as an immovable property.⁶⁵ Similarly, palm or date-trees which are used exclusively for taking their fruits or drawing toddy from them, have been held immovable property.⁶⁶

Growing Crops and Grass.—Growing crops and growing grass are movable properties. Growing crops means crops standing in the field. Although the crops, say of wheat and barley, are nothing but a collection of plants rooted in the field yet they are not immovable property because every crop is bound to be cut in the near future when it becomes ripe. The crops in the field have no use except their produce. The crops of wheat or paddy etc. and also the vegetable crops of potato etc. are, therefore, movable properties. Sugarcane crops⁶⁷ and the crops of indigo (neel)⁶⁸ have been held movable property. Crops

62. *Baijizath v. Ramadhar*, AIR. (1963) All. 214; *Ramkurnar v. Krishna Gopal*, A.I.R. (1946) Oudh 106; *Kunhlkoya v. Ahmed Kutty*, A.I.R. (1952) Mad. 39.

63. *State of Orissa v. Titaghur Paper Mills Co. Ltd.*, A.I.R. (1985) S.C. 1293.

64. *Moti Singh v. Deoki Singh* A.I.R. (1936) Pat. 46

65. *Chandi v. Sat Narain*, A.I.R. (1925) Oudh 108.

66. *Sheik Jan Mohammad v. Umanath Mishra*, AIR (1962) Pat. 441.

67. *Kalaka Pasad v. Chandan Singh*, (1888) 10 All. .20.

68. *Bansidhar v. Sant Lal*, (1887) 10 All. 133; *Misri Lal v. Mozhar Hossein* 1886) 13 Cal.262.

include creepers. Crops of grapes and the crops of betel leaf (pan) etc. are also movable properties.

Like crops, the growing grass rooted in the earth, is also a movable property. Grass in the field has no other utility except that it could be used as fodder for the cattle. For this, it is bound to be cut down or be grazed by some animal. No further vegetative growth may be intended by the owner of the land upon which the grass is grown. However, since the right owner, such as a tenant, a licensee or a mortgagee, the presumption would be that it is still a chattel.

2.4.3 Judicial Innovation for Immovable and Movable Property :

In *Holland v. Hodgson*,⁶⁹ while holding that looms attached to earth and floor of a worsted mill were fixtures BLACKBURN J held:

...the general maxim of the law is that what is annexed to land becomes part of the land; but it is very difficult if not impossible to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case and mainly on two circumstances indicating the intention viz. the degree of annexation and the object of annexation.

In *Leigh v. Taylor*,⁷⁰ the House of Lords held that certain valuable tapestries affixed by tenant to the walls of a house for the purpose of ornament, and for better enjoyment of them as chattels had not become part of the house, and therefore retained their character as chattels.

69. (1872)7DP328,334.

70. (1902) AC 15 at 161.

In *Duncan Industries Ltd. v. State of Uttar Pradesh*,⁷¹ a company agreed to transfer its fertilizer business including the plant and machinery. The issue before the court was with respect to the character of plant and 'machinery. The parties had treated them as movables and had delivered possession of the said plant and machinery as movables. This plant and machinery related to the fertilizer business of manufacturing, marketing distribution and sale of urea fertilizer, and included ammonia manufacturing plants, captive power plants, vehicles, furniture, air conditioners, standby systems, pipelines, railway siding, etc. The machineries which formed the fertilizer plant were permanently embedded in the earth, for running the fertilizer factory and at the time, when these machineries were embedded in earth, they were done so by the owner with an intention, to use them permanently. Further, in the very nature of the user of these machineries, it was necessary that they be permanently attached to the ground. The court held that these were immovable properties. Therefore, physical delivery of possession, without a written, attested and registered document could not convey soy tide to the other party in these properties.

However, it does not mean that in all cases where the machinery is attached to or embedded in earth, it would be categorized as immovable property. It would depend upon the facts and circumstances of each case where the machinery is attached to the earth only because of its

71. (2000) SCC 633.

operational efficiency, and removed from the base easily, it would continue to be called movable property.⁷²

In *Bamdev Panigrahi v. Monorama Raj*,⁷³ a person, A, was conducting a business under the name of 'Kumar Touring Talkies'. He 'obtained land under possessory mortgage from the Raja or Mandasa in 1957, and built a temporary cinema structure and erected a temporary pandal over it. For the purposes of exhibiting cinema shows, he purchased a cinema projector and a diesel oil engine. This equipment was embedded and installed in earth by construction of foundation. For the purpose of running the cinema shows; A, applied and got a license that was purely temporary for a period of one year from the concerned authorities. He allegedly entrusted the management of this business to his friend B, out of trust and confidence in him. However, B colluded with the Rajah and obtained the mortgage in his name. A issued a notice in May '1961, calling upon B to render correct account of the management of the entire cinema concern including the machinery, equipments, records, etc. B denied his liability to account for the management of Kumar Touring Talkies by a Written reply in June 1961. A became sick in 1963, and continued to be so till Aug 1965, when he died. Thereupon, A's widow W filed a suit in July 1966, praying for a declaration that she was the owner of Kumar Touring Talkies, and a direction that the equipment including the cinema projector and the diesel oil engine be returned to her. This case illustrates the importance of understanding the distinction

72. *Surpur Paper Mills Ltd. v. CCE*, (1998) 1 SCC 400.

73. AIR 1974 AP 226.

between movable and immovable property. The court, in such cases, even before going into the merits of the case, has to decide the character of the property. If it comes to the conclusion that the disputed property is immovable, it will go ahead and decide the case on merits, and if it concludes that such property is movable, then the case will be dismissed as time barred, it having been filed after more than three years from the date the right or claim was denied, i.e., B had denied the claim of A in June 1961 while the suit was filed in this respect in July 1966 after more than five years. The law of limitation prescribes a limitation period of three years in case of movables. The court here noted that the operation of the business by its very name, 'Kumar Touring Talkies' showed that exhibiting cinema shows at a specific place was purely temporary. Therefore, even if the two items of disputed property were attached and embedded in earth, the intention can only be to have them affixed to earth temporarily. The license to exhibit the shows was only for a period of one year, and there was no guarantee that the owner would have applied for its renewal or the authorities would have renewed it. Thirdly, the person who fixed them to the land was not the owner of the land. These items were in fact been removed from the land subsequently. The court held that these were movable properties and the suit being time barred was dismissed.

In *Shantabai v. State of Bombay*,⁷⁴ A, the owner of a forest, executed an unregistered document styled as a lease in favour of his wife W, for a consideration of P.s. 26,000,

74. AIR 1958 SC 532: (1959) SCR 265.

for a period of 12 and a half years. As per the deed, the right was conferred upon her to enter the estate for cutting and taking out bamboo, fuel wood and teak. At the same time, she was prohibited from cutting teak plants that were under the height of one and a half feet, but the moment the teak trees reached that girth, they could be felled by her, but within 12 years. She enjoyed this right for two years, when the Madhya Pradesh Abolition of Proprietary Rights (Estate, Mahals, Alienated Lands) Act, 1950 was passed, under which all proprietary rights in the land vested in the state and W was stopped from cutting any more trees. W claimed compensation from the government for being ousted from the forest from 1951 to 1955, but gave up the claim initially on the understanding that she would be allowed to work the forests for the remaining period. Though she applied to the Divisional Forest Officer and asked for permission to work the forests, it was not granted to her, and when she started cutting the trees on her own, she was stopped by the Forest Officer from doing so. She filed a petition in the court under Art. 32 of the Constitution. W contended that as the right granted to her was a right in standing timber, she was entitled to compensation. The issue before the court was: what was the nature of right created in her favour, a right in movable or immovable property?

The relevance of this question as to whether the right granted in her favour was a right in movable or immovable property was that if the right was in immovable property, then irrespective of the fact of the change in ownership, she

would still be entitled to realise the right but provided it was conferred in her favour with the help of a document capable of taking effect in law, i.e., where it was a lease for a period of 12 years it should have been executed in her favour with the help of a written, attested and registered document. If it is not, then it will not pass the right or title in her favour with respect to the property for 12 years. Secondly, if it was a right in movable property, then if the ownership changes hands, then, though the right to take the benefit as per the original contract will come to an end, but the grantee would be entitled to compensation for the rest of the time period for which she was not able to realise the right. She would never have succeeded if the right was in immovable property as the document on which she relied was in writing, but was neither attested nor registered. Thus, she tried to prove that the grant was in standing timber, and therefore in movable property.

The court held that a right to enter upon the land of another and carry a part of the produce is an instance of profits a prendre, i.e., benefit arising out of land, and therefore a grant in immovable property. Pointing out the distinction between timber trees and standing timber, the court held that the grant here was not merely of standing timber, but the grantee here was empowered to take the benefit of the soil. The court said:

...the duration of the grant is 12 years. It is evident that trees that will be fit for cutting 12 years hence will not be fit for felling now. Therefore it is not a mere sale of the trees as wood. It is more. It is not just a right to cut a tree, but also to

derive a profit from the soil itself, in the shape of nourishment in the soil that goes into the tree and make it grow till it is of a size and age fit for felling as timber and if already of that size in order to enable it to continue to live till the petitioner choose to fell it.

Here the right was spread over a period of 12 years and the intention was not to cut the trees at a reasonably early time period, and as the right was created with the help of an unregistered lease deed, W could not be granted any remedy.

On a question whether a contract to cut standing timber would require registration or not, the court in *State of Himachal Pradesh v. Mothal Pratap Singh & Co.*,⁷⁵ held that where *deodar*, *kail* and *rai* trees that are used for building purposes are earmarked after ascertaining the required growth, silviculturally and some of them were felled and other to be cut within a short period of time, the contract is for standing timber and not timber trees and therefore of movable property. Hence, the documents for sale of these trees do not require registration, but where the contract is with respect to land having bamboo clumps and trees and the intention was not to cut them within a short period of time, rather they stood on the land for a period of ten years, it was held, that that it is immovable property. In *Jagdish v. Mangal Pandey*,⁷⁶ the issue was whether the trees were movable or immovable property. The disputed trees were in the nature of five bamboo clumps, 39 mango trees

75. AIR 1981 HP 8.

76. AIR 1986 All 182.

and one *sheesham* tree. With respect to bamboo trees, whether they would be called immovable property or not, as the primary objective was to use them for construction purposes, the court said:

...it is true that bamboos are also used for building purposes but they cannot be regarded as such until it is intended to cut them for such use... one thing would be obvious that in the larger definition of immovable property any thing attached to the earth would normally be treated, as immovable property and a tree which is attached to the earth and seeks its nourishment and sustenance from the soil in which it stands will be deemed to be attached to the earth with the only distinction that if it was tree of a kind which is usually used as timber and was of sufficient size so as it could be used as such and is intended to be severed from the soil reasonably thereafter, it may be treated to be immovable property.

Therefore, apart from the size of the trees, the relevant consideration would be the intention to cut the tree or to let it remain attached to the earth. In the former case, it will be termed as 'standing timber' while in the latter it must remain immovable property. Similarly in *Banaras v. Ghubi Rai*,⁷⁷ the court said that the real test for judging whether a tree is immovable or movable property is not the nature of the tree alone, but the way in which it is intended to be dealt with. If the intention of the parties in respect of a particular transaction is that tree, whether that be a neem tree or mango tree, is to be cut by the purchaser and removed, it will become timber, but if the intention is that it

77. AIR 1956 All 680.

will after the purchase, continue to grow and to yield fruit or shade, it may not be timber. In the matter of *Raj Balamgir*,⁷⁸ a person had contracted to purchase standing timber in the forest of B, and had agreed that the wood of the forest will be cut and removed within a year. The court held that the contract related to movable property. In *Chhotabhai Jethabai Patel & Co. v. State of Madhya Pradesh*,⁷⁹ the petitioners had entered into contract with the proprietors of certain estates, under which they acquired the right to pluck, collect and carry away *tendu* leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos. The court held that these contracts did not create any interest either in the land or in trees or in plants. In *Nanhe Lal v. Ram Bharosey*,⁸⁰ it was held that a grove consisting of shisham and neem trees will be covered under the expression 'standing timber' and does not constitute immovable property. In *Bharat Sebaigrass Ltd. v. State of Madhya Pradesh*,⁸¹ bamboos were held to be immovable property and when they were sold as so attached, the transaction was treated as a sale of interest in land. In *State of Orissa v. Titaghur Paper Mills Co. Ltd.*,⁸² one of the contracts related to an agreement of the petitioners company with state of Orissa for the purpose of felling, cutting and obtaining and removing bamboos from forest areas for converting the bamboo into paper pulp, or

78. AIR 1931 All 392.

79. AIR 1953 SC 108.

80. AIR 1955 NUC 5612 (Cal).

81. AIR 1985 SC 1293: (1985) Supp SCC 280.

82. AIR 1938 All 115.

for purposes connected with the manufacture of paper, or in any connection incidental therewith. Thus, the company had the right to use all lands, roads and streams within, as well as outside the contract areas for the purposes of free ingress to, and egress from, the contract areas. It was also given the right to make dams across streams, cut canals, make water courses, irrigation works, roads, bridges, buildings tram- ways and other work useful or necessary for the purpose of its business of felling, cutting and removing bamboos for the purpose of converting the same into paper pulp or for purposes connected with the manufacture of paper. For this purpose, they also had a right to use other forest produce. The agreement extended to 14, 13 and 11 years with respect to different contract areas with an option to the company to renew the contract for a further term of twelve years and it embraced not only bamboos which were in existence at the date of the contract but also bamboos that were to grow and even come in existence thereafter. The court held that the bamboo contract related to immovable property as a benefit to arise out of land and did not relate to a contract of movable property. It was a single integral and indivisible contract which was not to be severed.

2.4.4 Examples of Immovable Property :

Besides well known examples of immovable property given above, there are several interests or rights which have been recognized by the Courts as immovable property. Some of such immovable properties are given below:

- (1) Beneficial interests arising out of land, for example, right of way⁸³ or an easement.⁸⁴
- (2) Rights under lease or tenancy.⁸⁵
- (3) Rights to extract gold, silver, coal or other minerals from their mines.⁸⁶
- (4) Right of fishery i.e. right to catch and collect fish from a pond, tank, lake or river.⁸⁷
- (5) Right of ferry i.e. right of transport through rivers.⁸⁸
- (6) Right to collect dues from fair or *hat*.⁸⁹
- (7) Right to hold exhibition or fair on one's land.⁹⁰
- (8) Right to take forest produce e.g. *tendu* leaves etc. and soil for making bricks.⁹¹
- (9) Right to collect Lac from its trees.⁹²
- (10) Mortgage-debt i.e. a loan secured by mortgaging an immovable property.⁹³
- (11) Equity of redemption.⁹⁴
- (12) Office of the hereditary priest of a temple and also its emoluments.⁹⁵

83. **Bejoy Chandra Nag v. Banku Banke**, (1908) 4 I.C. 116.

84. **Mahader Rao v. Kashibai**, I.L.R. 34 Bom. 287.

85. **Municipal Corpn. Bombay v. Lola Pancham**, A.I.R. (1965) S.C. 1008.

86. **Kumar Pashupati Nath v. Sri Sankari 'Pd.**, A.I.R (1957) Cal.128.

87. **Bihar Fishermen Co-operative Society v. Sipathi Singh**, A.I.R. (1977) S.C. 2149. **Satosh Jaiswal v. State of M.P.** AIR (1996) S.C. 207.

88. **Krishna v. Akilenda**, (1885) 13, Mad. 54

89. **Sikhandar v. Bahadur**, ILR. 27 All. 462.

90. **Ganpati v. Ajmer**, (1955) S.C.R. 1065.

91. **Mahadeo v. State of Bombay**, AIR (1959) S.C. 735.

92. **Kamal Singh v. Kali Mehton**, A.I.R. (1955) Pat. 402.

93. **Perumal v. Perumal** A.I.R. (1921) Mad. 137.

94. **Umesh Chandra v. Zahur Fatima**, I.L.R. 18 Cal. 164 (P.C.); **Paras Ram v. Govind**, (1897) 21 Bom. 226.

95. **Raghoo v. Kasshy**, (1883) 10 Cal. 73 ; **Krisnabhat v. Kapabhat** 6. B.H.C.R. 137.

(13) Right of a *Mahabrahmin* to receive at a funeral.⁹⁶

A property which is not immovable. Movable property has not been defined in the Transfer of Property Act. Section 3 of the Act excludes standing timber, growing grass and the crops from the definition of 'immovable property'. This simply means that standing timber, growing grass or crops are movable property because what is not immovable may be movable. The General Clauses Act, 1897 defines movable property as "property of every description except immovable property". According to section 2(9) of the Registration Act, 1908 movable property includes standing timber, growing crops and grass, fruits on the trees, fruit-juices in the fruits on the trees and the property of every, description except immovable property. Besides well known movable properties such as tables, chairs, cars etc. following properties and interests have been regarded as movable properties because they are not *immovable property*.

2.4.5 Examples of Movable Property :

1. Standing timber, growing crops and the growing grass.
2. Things placed on the land or attached to it without any intention of making them a permanent part of the land e.g. a machinery attached to land but capable of being shifted from that place is movable property.⁹⁷
3. Government Promissory Notes.

96. **Sukh Lal v. Bishambhar**, (1917) 39 All. 196 However/'Yajman Vritti' i.e. right to collect offerings from 'Yajmans' is not immovable property.

97. **State Bank of Patiala v. M/s. Chohan Huntamaki Ltd.**, A.I.R. (1982) H.P. 27.

4. Royalty⁹⁸ or, the copy-right.
5. Right of worship i.e. right to offer prayers.⁹⁹
6. Yajman Vriti i.e. right to receive offerings in cash or kind from the Yajmans.¹⁰⁰
7. Payments made to Pandas by the pilgrims.¹⁰¹
8. Decree for the arrears of rent.
9. Decree for the sale of any immovable property on a mortgage.¹⁰²
10. Right to get maintenance allowance even if its payment is a charge on some immovable property.¹⁰³
11. Right to enjoy the usufruct (benefit) of fruit trees e.g. right to enjoy palm nuts.¹⁰⁴

2.5 What May be Transferred :

For a valid transfer of Property, the Property must be a transferable property. As, a general rule property of every kind may be transferred. This rule of transferability is based on the Maxim "alienation rei preferture juri accrescendi," which means law favours alienation to accumulation. Therefore, any attempt to interfere with the power of the owner to alienate his interest in the property is frowned upon by the law. At the same time, where either the transferor does not possess a valid title to the property and is merely hoping to acquire one in future, or has an interest in property that is solely by its very nature created for his personal enjoyment, or as a rule of public policy, transfer of

98. **Krishna Kishore v. Kusunda Nyadi Collieries**, A.I.R. (1922) Pat. 36.

99. **Eshan Ch. Roy v. Monomohini Dasi**, 4 Cal. 683; **Jugadeo Singh v. Ram Saran**. 6. Pat. 245.

100. **Kodulal v. Beharilal**, AIR. (1932) Sind 60; 137 I.C. 136.

101. **Balkrishna v. Salegrah**, A.L.R. (1947) All. 391.

102. **Jiwan Ali v. Basu Mal**, 9. All.108 (F.B.)

103. **Altaf Begum v. Brij Narain**, AIR. (1929) All. 281.

104. **Sultan Ahmed v. State of Madras**, A.I.R (1954) Mad. 949.

such interests in property should not be allowed to be transferred, a transfer of property in such cases by him, are prohibited. It is only when the transferor has a present subsisting title or interest in the property and is capable of delivering the same of another, that he is a permitted to transfer it. The transferor may get the physical possession of the property in future, but of he has a subsisting title to it in Present, the restriction on his power to alienate the same cannot be applied. In (N. Ramaiah v. Nagraj S.)¹⁰⁵ it is said that the Act deals with transfers inter vivos, the act of a living person, conveying property in present or in future, to one or more living persons. The provisions of the Act are inapplicable to testamentary succession which are governed by the provisions of.

2.5.1 The Indian Succession Act, 1925 :

Exception : Exceptions to the general rule that property of every kind may be transferred are given in section 6 of the Transfer of Property Act. Section 6 lays down ten kinds of specific properties or interests which cannot be transferred.

2.5.1(a) Spes Successions :

Spes-Successions is means expectation of succession. Exception of succession is expecting or having a chance of getting a property through succession i.e. inheritance or will. Spes-succession is therefore, not any present property. It is merely a possibility of getting certain property in future.

105. AIR 2001 Kant 345 (398) DB : 2001(4) Kant LJ 12: ILR (Kant) 2001 (3) Kar 3466.

In *Samir Kumar v. Nirmal Chandra*,¹⁰⁶ it is stated that where a person is not heard of for a long period and is believed to have been dead, the transfer of his properties by his brother, as his legal heir would be a valid transfer because under the circumstances, brother is not merely an heir – apparent but a legal heir.

2.5.1(b) Clause(B) : Mere right of Re-Entry : 'Right of re-entry' means right to resume possession. Where a person gives the possession of his property to another for a certain period and is afterwards entitled to get it back his right of entering into the possession of that property once again, is technically called as his right of 're entry'.

In *re Davis & Co. Ex parte, Rawling*,¹⁰⁷ Certain goods are delivered under hire-purchase agreement giving the bailor a right to re-enter the godown where goods are kept and take possession in default of Payment of any installment. The bailor transferred his rights under the agreement by way of security to his creditor. The assignment is invalid. Creditor can not enforce the right of re-entry because it is merely a personal licence unaccompanied with any interest in the goods.

2.5.1(c) Easement : An Easement is a right which the owner or occupier of certain land possesses for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something from being done, in or upon, or in respect of certain land that is not his own.¹⁰⁸ It is a privilege without Profit that the

106. (1975), 79 C.W.N. 934.

107. (1889) 22 Q.B.D. 193.

108. The Indian Easements Act, 1882, Sec. 4 Explanation.

owner of one tenement has a right to enjoy in respect of that tenement, has a right to enjoy in respect of that tenement, in or over the tenement of another person, where the owner of the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former.¹⁰⁹

2.5.1(d) Restricted Interest : This clause has made an interest in property restricted in its enjoyment to the owner personally has been made non-transferable. Beneficial interests or an interests or an interest by Virtue of which a person derives certain benefits is the property of that person. Such property is owned by that Person but he cannot transfer it. It is restricted to his own enjoyment.

2.5.1(e) Clause (d) Right to Future Maintenance :

A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.¹¹⁰ This term 'whatsoever manner arising secured or determined' is very exhaustive and covers cases where this right has been created either under a will, deed or compromise. Thus the right of a woman to either receive maintenance under a decree or award of the court from her husband, or ex-husband, or from his property on his demise or under a will is a personal right. It is neither transferable nor can it be attached by a court's decree.

2.5.1(f) Mere Right to Sue :

Right to Sue for a certain sum of money is actionable claim. Actionable claim is a claim for a certain amount of money and can be transferred. But right to sue for

109. *Mohammed v. Ananthachari*, AIR 1988 Ker 298.

110. Code of Civil Procedure, 1908, Se. 60.

uncertain or indefinite sum of money is not transferable 'right to sue' means right to sue for the claim of any uncertain sum of money. Claim for uncertain sum of money arises where the claim is for unliquidated damages either in tort or in contract or where the claim is for any amount which is not fixed.

In *M/S MC Dowell and Co. Ltd., v. District Registrar, Vishakhapatnam*,¹¹¹ a manufacturing Co. insured its goods with an insurance Co. for the loss or damage of its goods during transportation. The Insurance Co. in turn was entitled to Proceed directly against the transporter in the event of such loss or damage of the goods. A document, to this effect, was executed by manufacturer in favour of Insurance Co. Wherein the manufacturer had substituted its right to sue the transporter for any loss or damage to goods in consideration of the payment of amount under insurance policy. The question arose as to whether this document is to be treated as convenience for purpose of stamp-duty. The Andhra Pradesh High Court held that the document was not a deed of convenience.

2.5.1(g) Offices and Salary :

A public officer cannot be transferred. Similarly, the salary of a public officer cannot be transferred whether before or after it has become payable.

2.5.1(h) Pensions and Stipends :

The stipends allowed to military, naval, air force and civil pensioners of the Government and the Political Pensions, cannot be transferred.

111. AIR (2000) Amdh. Pra. 374.

2.5.1(i) Transfer Opposed to the Nature of Interest :

No transfer can be made insofar as it is opposed the nature of the interest affected thereby. ¹¹²

2.5.1(j) Untransferable Right of Occupancy :

A tenant having untransferable right of occupancy can not transfer his right to another person.

Every person competent to contract and entitled to transferable property, or authorized 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 is force. ¹¹³

2.6 Transfer for Benefit of Unborn Person :

A transfer cannot be made directly to an unborn person, for the definition of transfer in Sec. 5 is limited to living persons. Such a transfer can only be made by the machinery of trusts. Possibly it is intended to express this distinction by the words 'for the benefit of', the trustees being the transferees who hold the property for the benefit of unborn person. Sec. 13 provides for a specific mechanism for transferring property validity for the benefit of unborn persons. The procedure is as follows :

- i. The person intending to transfer the property for the benefit of an unborn person, should first create a life estate in favours of a living person and after it, an absolute estate in favour of the unborn person.

112. The Transfer of Property Act, 1882, S. 6.

113. The Transfer of Property Act, 1882, S. 7.

- ii. Till the person, in whose favour a life interest is created is alive, he would hold the possession of the property, enjoy its usufruct i.e. enjoy the property.
- iii. During his lifetime if the person (who on the day of creation of the life estate was unborn) is born, the title of the property would immediately vest in him,¹¹⁴ but he will get the possession of the property only on the death of the life holder.

Pries Life-Interest :

For instance, a transfers property to B for life, and after him, to C and then to D again for their lives and then absolutely to B's urban child UB.

A	B (life interest)
	C (life interest)
	D (life interest)
	UB (absolute interest).

Only Absolute Interest May be given :

For example, a creates a life estate in favour of his friend B, and a life estate for the benefit of B's unborn first child UB₁ and then absolutely to B's second child UB₂.

A	B (life interest)
	UB ₁ (life interest)
	UB ₂ (absolute interest).

2.7 Rule Against Perpetuity :

Perpetuity literally means eternity or infinity, and is also generally understood as an indefinitely, long time period, and in relation to transfer of property, it means creation of an interest in present, but which is to take effect

114. The Transfer of Property Act, 1882, Sec. 20.

after perpetuity. Though the term perpetuity is not explained anywhere with reference to specific number of years, it is understood under s. 14 as equivalent to the lifetime of one or more living persons plus the minority (till attainment of eighteen years) of an unborn person, who would take the absolute interest in the property.

The object of the rule against perpetuity to ensure free and active circulation of property both for purposes of trade and commerce as well as for the betterment of the property itself. Frequent disposition of property is in the merest of the society an also necessary for its more beneficial enjoyment. A transfer which renders property inalienable for an indefinite period is detrimental to the interest of its owners who are unable to dispose it of even in urgent needs or for any higher value. It is also a loss to society because when property is tied up from one generation to another in one family, the society as such would be deprived of any benefit out of it. Free and frequent disposal ensures wholesome circulation of properties in society. Rule against perpetuity is, therefore, based also on broad principles of *public policy*. Stating the object of rule against perpetuity, *Jekyll M.R. in Stanley v. Leigh*¹¹⁵ has observed that if the rule were otherwise then :

“a great mischief would arise to the public from estates remaining for ever or for a long time inalienable or in transferable from one hand to another, being a damp to industry and a prejudice to trade, to which may be

115. (1732) All E.R. 917 at p. 918; Cited in Shah's Principles of the Law of Transfer, Ed. III, p. 44.

added the inconvenience and distress that would be brought on families whose estates are so fettered."

Minority, in India, terminates at the attainment of 18 years. However, the term 'minority' in s. 14 is to be understood as only 18 years and not an' other age, i.e., legal minority, where the age of minority was extended to 21 years,¹¹⁶ because, the validity of creation of an interest for the benefit of a person not in existence is to be judged by the transfer deed. 'this transfer deed is executed even before the person in whom the property is to Vest absolutely, was born and therefore, whether, the minority of such a person would terminate at 18 years or 21 years cannot be foreseen its advance. It is something that may happen actually and in determining the validity of the transfer, regard cannot be had to actual events.

Where the bequest was in favour of the daughters of the testator for life and after that the interest was to go to her children at the age of 21 years, and a guardian was appointed for them so that their minority terminated at the age of 21 years, it was held that the bequest failed as offending the rule against perpetuity because on the date of the testator's death, it was not certain whether any guardians would be appointed for the children.¹¹⁷

*Saundara Rajan v. Natarajan*¹¹⁸ the privy Council has held that since at the date of the transfer it is not known whether or not a guardian would be appointed by Court for

116. The Indian Majority Act, 1875 has recently been amended and the age of majority is now the attainment of eighteen years only.

117. ***Saundara Rajan v. Natarajan***, AIR 1925 Pat 244.

118. AIR (1925) PC 244.

the minor in future, for purposes of section 14 the normal period of minority would be eighteen years. So, the vesting may be postponed up to the life of the last person (B) holding property for his life and the minority (18 years) of the ultimate beneficiary.

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

Thus, the maximum limit fixed for postponing the vesting of interest is the life or lives in existence at the date of transfer plus the minority of ultimate beneficiary with the addition of the period of gestation provided gestation actually exists i.e. the ultimate beneficiary is actually in mother's womb at the death of the last person.

The rule against perpetuity is not applicable in the following cases :

Where a property is transferred for the benefit of public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind, the transfer is not void under the rule against perpetuity.¹¹⁹

Personal agreements which do not create any interest in property are exempted from the rule against perpetuity. Rule against perpetuity is applicable only to a transfer of property. If there is no transfer of property i.e. no transfer of interest, the rule cannot be applied. Contracts are personal agreements even though the and obligations in some

119. Section 18, Transfer of Property Act, 1882.

property.¹²⁰ In *Ram Baran v. Ram Mohit*¹²¹ the Supreme Court has held that a mere contract for sale of an immovable property does not create any interest in immovable property and, therefore, the rule cannot apply to such contracts.

Section 114 of the Indian Succession Act corresponds to s. 14 of the Transfer of Property Act and provides as follows :

No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

2.8 Doctrine of Lis Pendens- Its General Meaning and Relevance:

Rights depend upon remedies.¹²² This also holds good as regards the right to property. Since speedy and efficient remedies are of utmost importance, it has to be ensured that once a person has initiated legal process in any court to seek remedy against any invasion on his right or threat of invasion thereto, the legal process should not be defeated on account of private deals or any transaction, that is, transfer of property in dispute or on account of any other action of any party to such legal process, otherwise the very purpose of seeking relief against any grievance would be meaningless and ineffective. In order to ensure that the

120. *Jagar Nath v. Chhedi Dhobi*, AIR (1973) All 307.

121. AIR (1967)SC 744: See also *Shivji v. Raghunath*, AIR (1997)SC 1917.

122. Law Commission nic.in/old/reports/reports/20No./20157.pdf.

legal remedy remains efficient throughout the legal process, jurists had evolved a general principle known as "lis pendens" basing it on the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponent.

"Lis" means an action or a suit. "Pendens" is the present participle of "Pendo" meaning continuing or pending, and the doctrine of Lis pendens may be defined as 'the jurisdiction, power, or control that courts have, during the pendency of an action over the property involved therein'.¹²³

The basis of the doctrine is given as follows in the aforesaid volume:

"Two different theories have been advanced as the basis of the doctrine of lis pendens. According to some authorities, a pending suit must be regarded as notice to all the world, and pursuant to this view it is argued that any person who deals with property involved therein, having presumably known what he was doing, must have acted in bad faith and is therefore, properly bound by the judgment rendered. Other authorities, however, take the position that the doctrine is not founded on any theory of notice at all, but is based upon the necessity, as a matter of public policy, or preventing litigants from disposing of the property in controversy in

123. 34 American Jurisprudence 360

such manner as to interfere with execution of the court's decree. Without such a principle, it has been judicially declared, all suits for specific property might be rendered abortive by successive alienations of the property in suit, so that at the end of the suit another would have to be commenced, and after that, another, making it almost impracticable for a man ever to make his rights available by a resort to the courts of justice."

The doctrine of *lis pendens* is an expression of the principle of the maxim "*ut lite pendente nihil innovetur* (pending litigation nothing new should be introduced). In the *Corpus Juris Secundum* (LIV, p.570) as quoted by the Supreme Court in *Jayaram Mudaliar v. Ayyaswami* and *Rajendar Singh v. Santa Singh*, we find the following definition :-

"*Lis pendens* literally means a pending suit, and the doctrine of *us pendens* has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein.

As was observed by the Supreme Court in *Jayaram's* case, *supra*, "Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject matter of litigation

so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings in fructuous."

The principle on which the doctrine of *lis pendens* rests is explained in the leading case of *Bellamy v. Sabine* where Turner, L.J. observed—

"It is as I think, a doctrine common to the courts both of Law and Equity, and rests, as I apprehend, upon this foundation— that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceeding de novo, subject again to be defeated by the same course of proceeding."

In the same case, Lord Cranworth explained that the doctrine did not rest on the ground of notice. His Lordship said:

It is scarcely correct to speak of *lis pendens* as affecting 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."

