CHAPTER-I
INTRODUCTION

1.1 Prelude:

Property is in a sense accumulated labour, that is, the fruit of man’s labour, otherwise perishable, can only be stored in property. It is almost universally recognized fact that every man has got a natural instinct to enjoy the fruits of his labour. According to some jurists, it is this instinct that brings the property into being. The law, in fact, recognizes this instinct by conferring certain rights on individuals over the things which they have acquired.

Locke is the pioneer of a school of thought which projects the right to property as man’s supreme natural right and a limitation upon the state. Locke assumed that the natural state of man was a state of perfect freedom, in which men were in a position to determine their actions and dispose of their persons and possessions as they saw fit, and that it was, furthermore, a state of equality, in the sense that no man in this state was subjected to the will or authority of any other man. This state of nature was governed by a law of nature which looking towards the peace and preservation of mankind, taught men that all persons being equal and independent, no one ought to harm another in his life, health, liberty, or possessions. As long

as the state of nature existed, everybody had the power to execute the law of nature and punish offences against it with his own hand. This situation was fraught with disadvantages, inconveniences, and dangers. In the first place, the enjoyment of the natural rights of life, liberty, and property was uncertain and constantly exposed to the invasions of others. Second, in punishing infractions of the law of nature, each man was a judge in his own cause and liable to exceed the rule of reason in avenging transgressions. In order to end the confusion and disorder incident to the state of nature, men contemplated body politic or a community. In contrast to Hobbes, who constructed the social contrast as a pact of complete subjection to an absolute sovereign, Locke asserted that men is establishing a political authority retained those natural rights of life, liberty, and property (often grouped by Locke under the single concept of property) which were their own in pre-political stage. In Locke's contemplation the right to property was not created by the community or state, but existed already in the state of nature. To him, state came into existence for its protection. His follower, Pound expresses "In civilized society men must be able to assume that they control, for purposes beneficial to themselves, what they have discovered and appropriated to themselves, what they have created by their own labour, and what they have acquired under existing social order." To Aristotle property is the condition of good life. He regards it as the extension of human personality. He is of the view

3. *Id.*, Ch. VII, Sec. 87; Ch. IX, Sec. 123.
that property is essential for satisfaction of a natural instinct of possession as of an equally natural impulse of generosity.

Locke wrote: "The measure of property nature well set, by the extent of men's labour and the convenience of life. No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part, so that it was impossible for any man, this way, to entrench upon the right of another or acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as a large a possession (after the other had taken out his) as before it was appropriated.\(^4\)

In 1302 John of Paris argued that property was a means to enable clergy to do their spiritual work and therefore, there was nothing wrong in their owning property.\(^5\) Similarly in Mahabharat, it is engrafted "From Wealth come all religious acts (like charity); it is the means of enjoying all pleasures, heaven itself can be attained, Oh king, through (Artha) wealth."\(^6\) Kautaliya also holds that "wealth and wealth alone is important inasmuch as charity and desire depend upon wealth for their realization."\(^7\)

To Bodin as to Locke the right of property is rooted in the law of nature, for basic instinct of man is self preservation. Bodin regards property as an attribute of family and family according to him is the basis of the State.

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4. Id., p. 4  
Hegel maintained that property was necessary for the expression of man's personality. "It is in possession first of all", he said, "that a man becomes rational". He justifies private property as the objectification of man's will.

Right to property is, therefore, an incentive to effort. It induces men to industry and prudence. The state should guarantee it not only to meet the demand of natural justice that man should be entitled to the reward of his labour but also to promote economic growth.

The concept of property also changes with economic evolution. In the primitive state (hunting and fishing) of man's existence right to property was confined to effective occupation. Ownership and use went together. In the Hindu religious endowment's case the Supreme Court took the view that the term property should be given a liberal and wide connotation and extend to those well recognized types of interests which have the insignia or characteristics of proprietary right.

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

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9. http://lawcommissionofindia.nic.in
Before the advent of the Britishers, each community in India was governed by its respective customary law in matters relating to transfer of property. With the establishment of the formal litigative system and in absence of any legislation in this area, to begin with, the English Judges applied the common law of England and the rules of equality, justice and good conscience with respect to disputes relating to transfer of property. The unsuitability of these provisions to the Indian conditions: the resulting conflict and the need for clarity of rules relating to this important branch of law necessitated the enactment of a legislation. Drafted in 1870, the Transfer of Property Act saw the light of the day in 1882 and provide the basic principles for transfer of both movable and immovable properties. Based primarily on the English law of Real Property', it attempted to mould these principles to suit the Indian conditions; but certain provisions of the Act remained inapplicable to Hindus and Muslims, to start with. In order to put at rest the confusion created by the conflicting decisions and to extend the application of the Act in totality to Hindus, the Transfer of property Act, 1882 was amended in 1929. However, till date, the provisions of Chapter II of the Act that are inconsistent with the Quranic laws are inapplicable to Muslims. Moreover, a separate enactment titled as the 'Sale of Goods Act, 1930' was passed to deal with transfer of movable property by sale.

The Transfer of Property Act, 1882 contains the general principles of transfer of property and detailed rules
with respect to specific transfer of immovable property by
sale exchange, mortgage, lease and gift.

Right to Property in the Constitution of India:

Realizing the man's natural instinct and expectation to
enjoy the fruits of his labour, right to property was initially
included in the Constitution of India as a Fundamental
Right under Articles 19(1) (f) and 31, subject, of course, to
certain exceptions carved out therein keeping in view the
larger interests of the society. Now while clause (1) of article
31 has been shifted from part III to article 300A, clause 2 of
that article, which dealt with compulsory acquisition of
property, has been repealed by the Constitution (44\textsuperscript{th}
Amendment) Act, 1979. Sub-clause (f) of Clause 1 of article
19 which guaranteed the right to acquire, hold and dispose
of property has also been deleted by that Act. Newly
inserted article 300A of the Constitution now provides that
"no person shall be deprived of his property save by
authority of law." The result of these changes, in short, is
that the right to property has ceased to be a fundamental
right under the Constitution of India but has been retained
as a constitutional right under article 300A.\textsuperscript{10}

More than a century and a quarter ago, the great
authors on English Wills, Hayes and Jarman observed:

"A notion has unfortunately obtained that, while to the
preparation of a deed learning and-experience are essential,
the disposition of a man's property by Will may be safely
confined to the minimum legal knowledge. Hence the

\textsuperscript{10} Law Commission of India : One Hundred Fifty Seventh report on
Section 52 : The Transfer of Property Act, 1882 and its Amendment at
p. 9
conveyancer is rarely consulted, the solicitor is often dispensed with, and the school-master too frequently called in; or if the school-master be not at hand, there is commonly, to be found in every village a will-maker of equal courage and ignorance. This notion proceeds upon the twofold error, that wills are expounded not, according the rules of law, but according to the dictates of common-sense—and that common-sense is the same to all men. The rules of law, when applied (as applied they must be) to wills thus unadvisedly prepared, often defeat, the intention, that is, the probable intention: but if these rules were discarded for a reason common-sense outraged by the conflict of opinion, making one poor word, perhaps, the spot of many contrariant decisions would soon demand their, restoration. The general impression, however, that wills are not amenable to the strict rules of legal construction extended its influence to the judicature and introduced a certain laxity of interpretation which confirmed and encouraged, the original error." Later judgments, however established a wholesome tradition of interpreting even informal, wills as near as may be according, to rules of law—and it came to be recognised both by the legal profession in England and by the public that the important office of providing for, the disposal of men's possessions when death has precluded the possibility of explanation or, correction, requires at least the same degree of information and intelligence which is confessedly necessary to the conveyance of rood of land from a seller to a purchaser.
The position in India today is perhaps the same as it was in England in the beginning of the last century. The practice of making wills is becoming more and more common and with the passing of the Hindu Succession Act, XXX of 1956, even Hindus, be they members of a coparcenary or owners of separate property, can now make wills. However, at all events, in the mofussil, it is the ill-trained and ill-educated document-writer that is consulted. The warning given by Hayes and Jarman deserves notice in this context. "There cannot, indeed, be a greater mistake, than that of supposing that a very small, stock of legal terms, added to a very ordinary education, suffices to accomplish, the will-maker. On the contrary, a will is alone capable of exhausting the science and ingenuity of the most able conveyancer. It may embrace every allowable modification of property, every possible scheme of disposition."\textsuperscript{11}

Where there is a Will, there is a way.... Without a Will to indicate our wishes, the court steps in and distributes our property according to the laws of our State. If one has no apparent heirs and die without a Will, it's even possible that the State may claim our estate. Yet 80 per cent Indians die without making a Will.

"Wills are not just for the rich. What a Will ensures is that whatever assets you have will be given to family members or the other beneficiaries you designate. By making a Will you not only ensure that your children are

\textsuperscript{11} T.P. Gopalakrishnan, Law of Wills, 1965, p. 1
you also reduce the likelihood of future feuds in the family,” says Sunita Bhardwaj, a leading lawyer.

“The Will is, in fact, the simplest way to ensure that your funds, property and personal effects will be distributed according to your wishes after your death.” says noted lawyer Kapil Sibal. Any person over the age of 18, who is of sound mental health, can write this legal document.

When it comes to succession issues, it’s not just the Birlas and the Lodhas alone who are engaged in a dispute. Many of us may have property with no clear inheritors that could result in succession disputes later.

The reasons for this can vary. Some people feel their children have drifted away from them or are treating them badly. And they get back at them by giving away their wealth to others outside the family. In some cases, old family feuds come to the fore with a senior refusing to allow a much disliked daughter-in-law any inheritance.

Sometimes a sense of gratitude towards people outside the family drives the Will decision, leading to property being bequeathed to an outsider while excluding immediate successors.

Take the Priyamvada Birla case, says Mukul Rohtagi, former Additional Solicitor General, Supreme Court of India: “The facts have not been established, but from what I read and understand I feel it is not unnatural. They were a childless couple and the husband died 14 years ago. It seems nobody from the Birla family was close to Priyamvada over the last 15-20 years. Lodha was running the show for
the last 15 years and he became the trusted man of Priyamvada Birla.\textsuperscript{12}

In Indian Law expression "\textit{will}" has been defined under Section 2(h) of the Indian succession Act, 1925, to mean:

\begin{quote}
"The legal declaration of the intention of the testator with respect of his property which he describes to be carried into effect after his death".
\end{quote}

Will is a translation of the Latin word "\textit{voluntas}", a term used in the text of Roman Law to express the intention of a testator. It is of significance that the abstract term has come to mean that document in which the intention is contained.\textsuperscript{13} A Will denotes a testamentary document. It means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is in its own nature ambulatory and revocable during his life.\textsuperscript{14} The word "\textit{testament}" is derived from "\textit{testation mentis}", it testifies the determination of mind. A will is thus defined by Ulpian as "\textit{testamentum est mentis nostrae justa contestio in id solleminter facta to post mortem nostrum valeat.}" Modaininus defines it by means of voluntos.

It is "\textit{voluntatis nostrae justa sententia de eo quod quis post mortem svam fieri vult}" which means that the testament must be made in compliance with the forms of law, in order to be valid. It means, "\textbf{the legal declaration of}\n
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\item \textsuperscript{12} http://timesofindia.indiatimes.com/Avoid-disputes-wirte-a-Will/articleshow/802650.cms (accessed on 6-2-2013)
\item \textsuperscript{13} \textit{Uma Devi Nambiar v. T.C. Sidhan}, 2004 (2) SCC 321
\item \textsuperscript{14} \textit{S. Rathinam v. L.S. Mariappan}, 2007 (6) SCC 724
\end{itemize}
a man's intentions, which will be performed after his death." A last will and testament is defined to be "the just sentence of our will, touching what we would have done after our death." Every testament is consummated by death, and until he dies, the will of testator is ambulatory.  

1.2 Problem Profile and Objective of the Study:

The main objective of the study is to analyze various modes of Transfer of Property by virtue of which a person can transfer his property to another. As provided in the transfer of property Act 1882, there are various modes of Transfer of property viz sale, lease, mortgage, gift, charge etc. through which property can be transferred by its owner in favour of another. Although, will is also an important mode of transfer of property, yet, it does not find mention in the provisions contained in the Transfer of property Act 1882. Therefore, by virtue of the present study it has been tried to find out as to whether will can also be an effective mode of Transfer of Property? Similarly it has also been the main goal of the study as to find out that why people favour to execute gift deeds in place of sale deeds as a means or mode to transfer their property to their beloved ones. What steps can be taken by State Governments to encourage people to transfer their properties through sale deeds or other equally good modes of transfer of property is also the subject matter of the study as most of the people, to avoid the stamp duty on the registered sale deeds, prefers other modes of transfer of their properties than by way of registered sale deeds.

15. Uma Devi Nambiar v. T.C. Sidhan, 2004 (2) SCC 321
At present, as far as the state of Haryana is concerned, the stamp duty applicable on the Registered sale deeds is 7% on the sale price (in case of transfer of property in favour of a male person) if the property is situated in Urban area. However, if the sale deed is to be registered in favour of a female and the property is situated in urban area then the stamp duty is leviable at the rate of 5%. The rate of stamp duty is 6% in case the sale deed is registered in favour of both male and female, property being situated in the urban area. Similarly, the stamp duty leviable on registered sale deeds in case of immovable property situated in rural area of the state of Haryana is 5% on the sale price if the sale deed is in favour of the male. The same is 3% on the sale price if the sale deed is registered in favour of a female.

In case of mortgage at present the stamp duty is leviable at the flat rate of 3% irrespective of the situation of the property being situated i.e. either in urban area or in the rural area. Similarly, in case of gift deed of the immovable property the stamp duty is leviable at the rate of 5% on the amount mentioned in the gift deed, property being situated in the urban area. The same is 3% if the property gifted through gift deed falls in the rural area. However interestingly, as far as the transfer of immovable property through Will is concerned, then there is no stamp duty which is required to be paid by the testator in case of registered will. Therefore it is a sound reason for the transferor to transfer his property through mode of wills
instead of any other mode of transfer as mentioned in the transfer of property Act, 1882.

The another aspect of the study is the scope of registered and non registered wills. The registration of a will is optional as per the provisions of the Registration Act 1908 rather than the compulsory. An endeavour has been made in the present research to compare the registered will with the non registered wills. Whether the registration of a will should be made compulsory by amending the provisions of the The Registration Act 1908 in the present scenario is also the center point of the study so as to curtail down the unwarranted and uncalled for litigation on the subject matter of wills with which the courts of law in our country are flooded with.

Although the Act does not purport to codify the whole law of property or of transfer of property and although its application in regard to territories, persons and subjects has certain limitations, yet the fact that law dealing with the transfer of property affects almost every citizen renders it desirable that legislation on the subject should be reviewed from time to time. It is not only men of property who are governed by the Act or by rules of law analogous to its provisions. The provisions of the Act, or analogous rules, are of importance for almost every citizen. Every individual may not, during his life-span, have occasion to buy or sell or mortgage land or other immovable property Almost everyone is affected by the law relating to what property can or cannot be transferred. For example, the proposition that future maintenance cannot be transferred is one which has
been enacted by legislation or judicially recognized for the protection of those who are entitled to maintenance because, without the right to maintenance, life itself would be impossible.

Mere loud legislation and declarations are not sufficient to achieve the desired goal of universalization of education. Till the time the rules and laws are not followed from the heart of the common man, the desired goals remains untouched. Thus, the objective of the study has been two fold i.e., in the first part, the efforts of the policy makers and law makers are to be studied to find out to what extent work has been done in this direction. In the second part, the aim has been to see that whether the laws enacted and enforced are really known to the people and rule enacted laws and policies framed have been able to achieve the desired goals. Therefore, a comprehensive study and analysis of existing laws and government policies as well as evaluation of both laws and policies is undertaken.

1.3 Research Hypotheses:

To achieve the aforementioned objectives, the research hypotheses rests on the following assumptions:

(i) Apart from the various modes of transfer of property as mentioned in the transfer of property Act, 1882, Will is also an effective mode of transfer of property.

(ii) By making the registration of a Will compulsory, by amending the provisions of the The Registration Act, 1908, huge litigation pending in the courts of law with regard to transfer of property by way of Wills can be curtailed down.
The present research work is intended to analyse various modes of transfer of property as contained in the provisions of Transfer of Property Act, 1882 and also to analyse and study the wills as a mode in perspective of the transfer of property.

1.4 Research Methodology:

The research of the topic required both doctrinaire and non doctrinaire study. For the purpose of this research study materials have been collected from the primary as well as secondary sources. The doctrinaire study comprises of secondary data or materials collected from various sources like books, Law Journals materials available on internet (websites), magazines, legal periodicals and judicial pronouncements. Use of secondary data such as the various reports of the law commission of India on the subject of transfer of property has been used in the present research on the topic by the researcher. The analysis of the study will provide the real picture about the need for taking various steps for creation of an effective legislation with regard to disposal of property by way of wills being an important mode of transfer of property.

1.5 Review of Literature:

Every research takes the advantage of the knowledge that has accumulated in the past as a result of constant human endeavour. It can never be undertaken in isolation for the work that has already been done on the problems which are directly or indirectly related to the study proposed by the researcher and rather the same proves to be a guiding force. A careful review of the related literature
viz., research journals, periodicals, abstracts, book materials and other sources of information on the problems similar or related to the one being investigated is one of the most important steps in the planning of any research.

Realizing the importance of review of literature Best says "a familiarity with the literature in any problem area helps the students to discover what is already known, what others have attempted to find out, what methods have been promising and disappointing and what problems remained to be solved. Unlike other animal that start afresh with each generation, man builds upon the accumulated and recorded knowledge of the past, his constant adaptation in all possible areas of human endeavour."16

Dr. Poonanam Pradhan Saxena in her book "Property Law"17 deals with Importance and relevance of property in today's materialistic world in undeniable. Property can be transferred in several way, and conveyance of title in India is not subject to one single piece of legislative enactments. Thus, different legislation exist that govern the transfer of title from one person to another with respect to the property depending upon the mode of conveyance. The writer emphasis on clarity of fundamental concepts, viz what are the kinds of transfers contemplated under the Act, in what ways can they validly be executed, i.e., in what manner the rights can be conveyed in the property from one person to another, and what are the corresponding rights and obligation of the parties towards each other. The books

explains a through anlaysis of important cases at appropriate places.

'Transfer of Property Act'\(^\text{18}\) a book by Professor, R.K. Sinha deals with the transfer inter vivos of immovable properties albeit some of its provisions are applicable to the transfers of moveable properties also. In this book, attempt has been made to explain the technical concepts, on which the infra structure of whole body of law of transfers is based, in simplest possible language. Explanation of the concepts and statement of law both have been given with suitable illustrations. The book is in the form of section-wise commentary on The Transfer of Property Act. But special case has been taken to explain the provisions of each section in such a manner that law laid down in one section does not appear to be an isolated exposition of the provisions on particular topic.

MULLA 'The Transfer of Property Act, 1882'\(^\text{19}\) by Dr. GC Bhawka, former Judge High Court of Patna and Karnataka is the book under review has blossomed as the author has pointed in the preface. The principles statutorily recognized in the Transfer of Property Act are essentially principles of justice, equity and good conscience. These principles underlying the various provisions of the Act particularly relating to mortgage and lease have been applied in areas where otherwise the Act has not been made applicable. An attempt has been made to incorporate and update the Supreme Court decisions. The book has provided


volume of Supreme Court judgments on almost on all the facets of litigation in this area. The law of transfer of property has to a great extent settled and crystallized.

DARASHAW J KAKIL’S commentaries on the Transfer of Property Act. This book underlines the significance of a law relating to the transfer of property. The special features of this essentially practical work, besides a full discussion of English and Indian case law are, an easily read summary of the Act, changes made by Transfer of Property Amendments Act, 20 of 1929, Pitfalls to which a conveyances is exposed, Information on matters dealing with authoritative case law such as stock-mortgage, power of attorney, income tax payable by a mortgagor, broker’s position in the transaction, conditions on a sale by auction, transfers by limited holders, remedies of vendor and purchaser on breach, etc. Hints on drafting and various stages through which a draftsman has to pass in the preparation of a conveyance, mortgage, lease, licence for transferring a leasehold property, creation of charge, assignment of a chose in action, or of a policy of insurance, instruments of gift and exchange, requisitions of title, parallel references of old English cases from the English Reports.

'Law of Wills' by N.D. Basu is a commendable work. The book defines wills in sec. 2(h) of the Indian succession Act, 1925, would show that it is the legal declaration of the intention of a testator with respect to his property, which he

desires to be carried into affect after his death. He is simply exercising a power to which he is entitled to under the usage of the institution. A nomination takes effect in presenti. It is the declaration of the intention of the head of the for the time being as to who his successor would be; therefore although it is said that the usage is the mutt is that the power of nomination is exercisable by will, it is really a misnomer, because a will in genuine sense of term can have no effect in present. There can be no dispute that a nomination can be made by deed or word of mouth. In such a case, the nomination invests a nominee with present status. Book is an good attempt made to state the principles of law of will in a clear and concise form, suitable for Lawyer's reading and at the same time to make the book useful to the profession. A number of cases sufficient for ordinary purpose have been cited.

Justice P.S. Narayana's 'Law of wills'\textsuperscript{22} stated that a will is an instrument by which a person makes a disposition of his property to take effect after his death. In other words, it is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the statue. The book had been received well by legal fraternity and others. An attempt had been made to incorporate all the latest cases decided by the Supreme Court and various High Courts till date.

'Law of Wills'\textsuperscript{23} by T.P. Gopalakrishnan. In this book author has attempted to present in a vivid and systematic manner the various aspects of the law relating to wills. The

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expositions have been based on the relevant materials from the decided cases and works of eminent authorities. Wherever there are statutory provisions relating to a particular matter, proper references have been made to them. This book made a great effort to make the commentaries easily assimilable even by the layman who may be concerned with making and interpreting the provisions of a will.

Indu Kumar's 'Make Your Will Yourself'\textsuperscript{24} is a humble effort to guide to the discerning reader a revised edition with hope that it will help readers to understand the implications in better prospective, it incorporated the latest case law, terms commonly used for making wills is defined very efficiently. This book explains the terms, types, need effects, registration, probate and letter of Administration and drafting of will in very simple and easy language.

\section*{1.6 Scheme of Study :}

The present study has been divided into seven chapters:

The \textbf{Chapter-I} introduces the concept of transfer of property and the Law of Wills. It gives the introduction of the topic, its problem profile, objective of the study, research hypothesis, review of literature, research methodology and the scheme of study adopted by the researcher.

The \textbf{Chapter-II} explains the historical development of transfer of property in India with special reference to the law regarding transfer of property prevailing in British

\textsuperscript{24} Indu Kumars', \textit{Make Your Will Yourself}, 2007, Universal Law Publishing Co.
India. The chapter also details the Law Commission Reports on the law related to transfer of property, scope of The Transfer of Property Act, its basic objectives and legislative competence relating to transfer of property.

The Chapter–III discusses the various modes through which immovable property can be transferred by one person to another. The chapter also discusses the scope, characteristics, legal provisions, characteristics and effects of registration and non registration of the various modes of transfer of property.

The Chapter–IV gives a detail perspective (historical) background of Law of Wills. The chapter deals with the origin, scope, nature and historical development of the law of wills.

The Chapter–V involves a detailed study of wills under different laws. It enumerates the legal provisions regarding the law of wills under Hindu, Muslim and Christian Law. The chapter also throws light on procedure followed for registration of wills in different laws as well as also about the extent to which the testator can bequeath his property by way of a will.

The Chapter–VI examines the effects of Registered and non Registered wills. The chapter specifically deals with the necessity of getting a will registered as well as also the approach of the courts of law on the subject of registration and non registration of the wills.

The Chapter–VII submits the conclusions and suggestions for the future course of action on the subject of transfer of immovable property in India. The chapter is
finally based upon the research, and all the subjects of the research topic that had been studied, are examined and concluded. Various existing loopholes are discussed which further follows with few important suggestions for the future course of action and for effective implementation of laws relating to transfer of immovable property in India.

In brief, an attempt has been made through this research to reiterate the law with regard to transfer of immovable property in India and its comparison with the law relating to wills.