CHAPTER-III

MODES OF TRANSFER OF IMMOVABLE PROPERTY

There are different modes by virtue of which immovable property can be transferred. Property can be transferred by different modes or ways viz. Sale, mortgage, lease, gift, exchange etc. Transfer of immovable property by each of the aforesaid modes has its own significance, advantages and disadvantages. Apart from it, it is to be seen as to whether Will can also be an effective mode of transfer of immovable property?

Section 54 of the transfer of Property Act (IV of 1982) defines sale as under:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

3.1 Sale How Made:

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
3.1.1 Contract for Sale:

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

3.1.2 The essential elements of a sale are:

- parties to a sale;
- subject matter of sale;
- price or consideration;
- mode of execution of sale.

3.1.2(a) Parties to Sale

The parties to a sale are—the transferor who is called a seller, and the transferee known as the buyer. A contract of sale must be based on a mutual agreement between the seller and the buyer.\(^1\) The transferor or the seller must be a person who is competent to enter into a contract i.e., he must be a major and of sound mind and should not be legally disqualified to transfer the property. A minor or a person of unsound mind is incompetent to transfer his own property despite being its owner, but a transfer by a mentally lenged person during lucid intervals is valid.

Statutory incompetency refers to an, incompetency imposed under law or a statute. When a person is declared as an insolvent, his property vests in the official receiver and he is incompetent to transfer the same. Similarly, a judgment debtor is not capable sell his property that is to be sold in execution under the order of the court. The

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property cannot be sold when it is under the management of the Court of Wards.

The transferor should either be the owner of the property or should have an authority to dispose of it. For example, the *karta* of a joint family property is authorized to transfer the property under certain specified circumstances.  

Similarly, the guardian of the property of a minor is empowered to sell it with the permission of the court, and without such permission the sale would be invalid. An agent having a power of attorney to sell the property can also sell it without being the owner of the property. Where the sale is executed after getting a general power of attorney; without obtaining the requisite permission of the court, the sale deed is invalid and would not confer any title on the transferee, but if the Power of Attorney executed in favour of the holder expressly authorizes him to transfer the property he would be a competent seller.

The transferee must be a person competent to receive a transfer in his favour and he should not be subject to a legal disqualification. For example, an actionable claim cannot be purchased by a judge, legal practitioner or an officer connected with the court under section 136. Similarly, an officer performing an official duty in connection with the sale of the property cannot purchase the same.

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A minor is a competent transferee in a transaction of a sale. Similarly, a mortgage or a lease can be executed in favour of a minor, but a minor cannot take a lease in his favour, as a lease has to be executed by both the parties. A lease in favour of a minor is therefore, void.\(^6\)

3.1.2(b) Subject Matter of a Sale

Section 54 only governs the sale of immovable property. Immovable property can be tangible or intangible. Tangible property is one that can be touched, such as a house, a tree etc., while intangible property refers to property that cannot be touched such as a right of fishery, a right of way etc.

The property must be properly and sufficiently identified. In a suit for declaration of title of the property, the controversy was with respect to the identity of the property.\(^7\) There was a mistake in the plot number. The court held that as both boundaries and plot number were given in the sale certificate a mistake in the plot number must be treated as a misdescription which did not affect the identity of the property sold. Rather, it is intrinsic evidence in proving that seller wanted to convey the right and title in the suit property to the buyer.

If there is no sale, there is no need for an agreement to be executed to that effect on the stamp papers In Rail Vihar Kalyan Sahkari Awas Samiti v. State of Uttar Pradesh\(^8\), a co-operative group housing society and its members filed a writ against additional chie-executive officer, Noida, by which the Noida directed the individual members to execute a tripartite agreement with the welfare societies/co-operative

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8. AIR 2005 All 86.
society as lessee and NOIDA as lessor for sale of superstructure and sublease deed for respective flats, apartments, residential accommodation allotted by the society to its individual members and restraining them from charging stamp duty on execution of tripartite-deed. Noida had issued a notice to flat owners to execute the deed through their respective bodies by a specific date. Failing which, the flat owners were to be declared unauthorised occupants, on whom penalty was to be charged. While allowing the writ petition filed by the flat owners, the court held that the societies do not have corpus and the entire consideration for lease was paid by the contributions received from the members. They constructed these flats/apartments under the self-finance arrangement in which the amount was paid by allottee member in instalments. There was no sale of land or superstructure in their favour and thus, the direction to execute a tripartite transfer deed which includes sale of superstructure and the payment of stamp duty on the said document, was grossly arbitrary and violative of Art 14 of the Constitution.

3.1.2(c) Price or Consideration

Price, in the ordinary sense connotes money consideration for the sale of property. Where, instead of


price, some other valuable consideration is kept, the transaction is not a sale but can be an exchange or a barter. Where the consideration is money but is not specific, the transaction would still be a sale. Thus, if the transaction on the face of it is complete, it cannot be regarded as a mere agreement only on the ground that the price is unascertained at that time.

A compromise, a decretal amount, an advance made by one person to another, or an agreement to protect and defend the property at the purchaser’s cost, is a good consideration for sale. Likewise, a family settlement is a valid consideration for an agreement to sell. Where a son-in-law executed an agreement for sale in favour of his mother-in-law in consideration of a family settlement, it was held that it amounted to a valid consideration for the sale.

An agreement to maintain the transferor or not to contest a suit, or to file a suit for redemption and bear all its costs, cannot be called price as is understood under this section and therefore, if these are the considerations,


13. **Alagappa Chettyar v. Chettyar Firm**, AIR 1934 Rang 287. A compromise it has been held is an existing right and cannot be regarded as a sale, see **Krishan Tanjabi v. Aba**, (1910) ILR 34 Bom 139.


the transaction would not be a sale. Similarly, a transfer effected where the consideration is the work done in clearing and sinking a well,\textsuperscript{22} or for the satisfaction of charge of maintenance,\textsuperscript{23} or in lieu of kharcha-e-Pandan\textsuperscript{24} is not a sale, but a transfer of immovable property in lieu of dower of a Muslim woman can be a sale.\textsuperscript{25}

The ordinary rule governing sale is that payment of consideration is simultaneous with the time when the conveyance is executed by the seller. This rule can be deviated from in case of an agreement to the contrary by the parties.\textsuperscript{26} For example, A agrees to sell the land to B, and executes a sale deed for the same. Ordinarily, the buyer would pay the consideration on the same day. However, if they agree to pay the entire consideration or part of it at the time of the registration of the document, and partly at the time of the execution or even subsequent to registration, this would be a valid sale. Price is the essence of the contract of sale but the time for payment of it is not the

\textsuperscript{22} Ghulam Mohamad v. Tek Chand, AIR 1921 Lah 82.
\textsuperscript{23} Rajjo v. Lajja, AIR 1928 All 204; see also Madan Pillai v. Badrakali, AIR 1922 Mad 311, where in it was held that the a transfer of a life interest in land in discharge of a claim for maintenance is neither a sale nor an exchange nor a gift.
\textsuperscript{24} Malik Mohamad Shujaaggt v. Salim Jahan, AIR 1949 All 204.
\textsuperscript{25} It has been held that extinction of dower debt is equivalent to price, see Saburannes\textsuperscript{sa} v. Mohiuddin, AIR 1934 Cal 693; Gopal Das v. Sakina Bibi, AIR 1936 Lah 307; Saiful v. Abdul, AIR 1932 All 596. In some cases it has been treated as a Hiba Bil iwa\textsuperscript{z} i.e., a gift for consideration, see Basir v. Zubaida, AIR 1926 Oudh 186; Chaudhary Talib Ali v. Mimsani (1955) NUC Ass 622; Masum v. Iluri, (1952) ILR Mad 1010; Ghulam v. Razia, AIR 1951 All 86; it has been held in some cases that the consideration of dower would not be a price, see Ghulam Abbas v. Razia Begum, AIR 1951 All 86; Mohamad Hashimi v. Aminabi, AIR 1952 Hyd 5; Basir v. Zubaida, AIR 1926 Oudh 186.
\textsuperscript{26} Chandra Shankar v. Abbia AIR 1952 Bom 56; Prasanta v. IC Ltd., AIR 1955 Cal 101.
essence of the sale, unless the contract stipulates so. Therefore, it is not mandatory that payment of the price should beat the time of the execution of the sale. Price can be paid even before, at the time or even subsequent to the completion of the sale. It is also not necessary that the whole of the consideration or price should be paid at one time. This would depend purely on the terms and conditions agreed upon as between the parties. If the recitals are indecisive, surrounding circumstances or conduct of parties are the relevant factors to decide the validity of sale. The term ‘paid or promised’ shows that a sale is complete on registration even though price has not been paid but is promised to be paid. Thus, payment of price is not a sine qua non to the completion of sale. A promise that price will be paid within a year is valid, but if it is no paid the seller cannot set aside the sale or sue for getting the possession back. His only remedy would be sue the buyer for the price. However, where the intention of the parties was clear that the title in the property would pass in favour

31. Kamleshwar Prasad v. Abadi, (1915) ILR 37 All 631
34. Sahadeo Singh v. Kurbennath, AIR 1950 All 632; Bai Devmani v. Ravi Sahnkar, AIR 1929 Bom 147.
of the transferee only after the payment of complete consideration, then notwithstanding the fact that the sale deed has been registered, the transfer of ownership would not take place till the payment of the total price.\textsuperscript{35}

The term ‘paid or promised to be paid’ also suggests that this promise to pay must be genuine. The buyer cannot escape his primary liability to pay the consideration and if he tries to evade payment by dubious means, no title would pass from the seller to the buyer. For instance, if the buyer pays money through a cheque which is dishonoured, the sale would not take effect.\textsuperscript{36} The same rule would apply if there is an intention to the contrary expressly incorporated in the contract, that the title would not pass unless the payment has been made in full, or if consideration is paid in advance. This would entitle the purchaser to sue for possession.\textsuperscript{37} Notwithstanding an admission in the sale deed that consideration has been received, it is open to the seller to prove that no consideration has actually been paid.\textsuperscript{38} A seller may retain the deed pending payment of price; and in that case the ownership will not pass, and no transfer would take place until the price is paid and the deed delivered.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{35} \textit{Kaliperunal v. Rajagopal}, AIR 2009 SC 2122.
\item \textsuperscript{36} \textit{Inder Kaur v. Tara Singh}, (1978) 80 Punj LR 41.
\item \textsuperscript{37} \textit{Vidhyadhar v. Manikro}, AIR 1999 SC 1441; \textit{Ananda Chandra v. Nilakanta}, AIR 1972 Ori 99.
\item \textsuperscript{38} \textit{Shah Lalchand v. Indrajit}, 27 IA 93.
\end{itemize}
Price is an essential ingredient of the essence of the contract for sale.\(^{40}\) There cannot be a valid sale without price. Price should either have been paid or promised to be paid. Adequacy of price is not mandatory. It can be lower\(^{41}\) or higher than the market value, yet the sale would be valid, but evidence can be adduced that in fact the transaction is not a sale but a gift,\(^{42}\) or even a mortgage more so where the price on the face of it appears to be grossly inadequate. There is no enforceable contract unless the price is fixed and despite the registration of the sale deed no title would pass. A transfer merely to enhance the status without any price is not a valid sale.\(^{43}\) A purchase of 33 years net income by way of price is valid.\(^{44}\) Where no price is paid but the transfer is a reward for past or future cohabitation, it is not a valid sale.\(^{45}\)

3.1.2(d) **Conditions of a Valid Sale**

Section 54 lays down a specific method for the execution of a sale deed with respect to immovable property and completion of sale. Generally speaking, in a sale, the three requirements of law are that transfer of property by sale must take place with the help of a validly executed sale deed, by the transferor in writing, is properly attested, and registered.\(^{46}\) Unless, the all three conditions are complied

40. *Bombay Tramways Co. v. Bombay Municipal Corp.,* (1902) 4 Bom LR 384
41. *Hakim Singh v. Ram Sanehi,* AIR 2001 All 231
42. *Hanifunissa v. Faizunissa,* 38 IA 85.
with, no right passes from the seller to the buyer or in other words, there can be no sale. However, in case where the property is of nominal value, the sale of property can be completed by a simple delivery of possession of such property. In such cases, due to the small value of property, the formality of writing, attestation and registration is dispensed away with, but this does not mean, that immovable property whose value is less than Rs. 100 cannot be transferred by adhering to above mentioned these three requirements. It is only that writing, attestation and registration in such cases is optional. The test is the value of the property and nor the amount of consideration or the price.

The above-mentioned requirements of executing a formal sale deed so as to confer a valid title in favour of the transferee are not applicable in case of sale of property at a court auction and a certificate of sale issued by the court is enough as the purchaser's document of title.

The rules specified under section 54 govern the transfer of immovable property only by sale and not movable property.

### 3.1.3 Ownership Transfer and Registration:

As earlier mentioned, writing, attestation and registration are the essential requirements for the completion of a valid sale of property, whose value is more than Rs. 100. Transfer of ownership cannot take place

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without registration, and it concludes on registration unless there is a clause contrary in the contract. Therefore, a suit for preemption that can be filed only after the conclusion of the sale, if filed before registration, will be premature. Thus, where the sale deed was executed on 28 July 1989, but was registered on 22 June 1992, a pre-emption suit filed on 18 June 1992, was held by the Calcutta High Court as premature. Once registration takes place, the ownership passes with effect from the date of the execution of the sale deed, unless there is an intention of the parties to the contrary. Ownership under a deed for sale executed before but registered after a suit was filed with respect to this property, will not be lis pendens. Similarly, a subsequently registered deed will not affect a former executed sale deed, though registered later.

The general rule of passing of ownership on registration is subject to the intention of the parties (i.e. buyer and seller) explicitly expressed in the contract. Where the intention cannot be gathered from the document or

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54. See *Kaliaperumal v. Rajagopal*, AIR 2009 SC 2122, wherein it was held that despite registration the ownership would pass only on payment of complete consideration to the seller; *Sheu Narain Singh v. Darbari Mahton*, (1897) 2 Cal WN 207; *Hira Bewa v. Bunchanidhi*, AIR 1957 Ori 243; *Bihari v. Rohini*, (1908) 13 Cal WN 692; *Mauladan v. Raghunandan*, (1900) I LR 27 Cal 7; *Sangu Ayyar v. Cumaraswami*, (1895) ILR 18 Mad 61.
55. *Venkataramana v. Rangia*, AIR 1922 Mad 249.
appears ambiguous, extraneous evidence is admissible for clarity. An intention that the deed would be void unless the price is paid in a fixed time is valid, and accordingly, if the price is not paid within a specific time, the sale would become invalid. Similarly, if in accordance with the intention of the parties a contract of sale is to be treated as a sale deed if certain conditions are fulfilled, it will be so treated on the fulfillment of those conditions or if the intention was that transfer of ownership is to take place on the registration, the ownership in the property passes on such registration even though the possession has not been delivered or the price has not been paid.

If there is no registration of the sale deed, no property passes as there is no transfer. Execution of a mere power of attorney or an agreement of sale without a registered conveyance would not transfer ownership in the property. An admission that the land has been sold will not operate estoppel so as to do away with the necessity for a registered conveyance. Title to the land does not pass by mere admission when the Act requires a conveyance. The law gives no protection to a person claiming a right under an

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60. Konda v. Vishnu, (1913) ILR 37 Bom 53.
64. G Ram v. Delhi Development Authority, AIR 2003 Del 120.
65. Maung Po Yin v. Maung Tel Tu, AIR 1925 Rang 68.
unregistered alleged sale. An unregistered sale deed can be used as evidence as to character of possession of the property, despite its value, such as adverse possession or of co-ownership. Where an unregistered sale deed was accompanied by a money receipt stating that the transferor had received a specific amount as consideration for the land that he had sold to B, without any registration or revenue stamp it was held that the document did not affect a valid sale in favour of B. In such cases even if possession were delivered to B, he would not be entitled to the benefit of the doctrine of part performance.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. Possession of house can be given by delivery of keys, and that of land by going over to the land.

3.1.4 Non-Registration of Sale Deeds:

If there is an unregistered sale deed, transfer of tangible immovable property worth less than Rs. 100 can be validly effected by delivery of possession, which may be subsequent to the execution of the deed. Since transfer of

68. Varatha Pillai v. Jeevarathamal, (1919) 43 Mad 244; Abdul Alim v. Abdul Sattar, AIR 1936 Cal 130.
69. Kemam Kandaswamy v. Chinappa, AIR 1921 Mad 82.
71. Tarini Kamal v. Prafulla Kumar, AIR 1979 SC 1165.
73. See The Transfer of Property Act, 1882, s. 54
74. Guest Homfray, (1901) 5 Ves 818.
75. Hannanta v. Mir Ajmodin, (1904) 6 Bom LR 1104.
immovable property worth less than Rs. 100 is statutorily permissible without a registered document, such unregistered sale deed is admissible in evidence. In absence of delivery of property effecting a transfer of tangible immovable property worth less than Rs. 100 the transfer must be effected by registered instrument. An unregistered instrument unaccompanied by possession is of no avail, and would not support a suit on title, but the party is not precluded from proving the sale from delivery of the property.

Where there is a sale of property worth less than Rs. 100 with delivery of possession of property the effect of the transaction is not destroyed because an unregistered sale deed was executed at the same time, the unregistered sale can be referred to in order to ascertain the nature of the possession of the purchaser.

### 3.1.5 Contract of Sale:

There can be an agreement of sale before the execution of a sale deed. A contract, for sale of immovable property is a contract that a sale of such property shall take place on

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78. *Punchha Lal v. Kunj Bihari Lal*, (1913) 18 Cal WN 445; *Brajaballav v. Akhoy Bagdi*, {AIR} 1926 Cal 705; *Sheikh Juman v. Mohamad*, (1917) 21 Cal WN 1149; see also *Kuppuswami v. Chinnaswami*, {AIR} 1928 Mad 546, wherein it was held that the execution of an unregistered sale deed invalidates the oral sale by delivery.


terms settled between the parties.\textsuperscript{85} There is a conflict of judicial opinion on the issue whether a contract for sale, which is not in writing nor signed by the parties, is valid. The Jammu and Kashmir High Court has ruled that it is not valid.\textsuperscript{86} However, the Andhra Pradesh High Court has ruled that an agreement of sale can be even oral\textsuperscript{87} and would be as valid as a written agreement. In yet another judgment, the Andhra Pradesh High Court, has also ruled that even if it is in writing but is not signed by the purchaser, it does not mean that there is no concluded contract.\textsuperscript{88}

A contract of sale is different from a sale, as it does not require registration. However, it does not create a charge or an interest in the property. It is merely a document or an agreement that gives a right to obtain another document, i.e., a sale deed. Therefore, it does not require registration.\textsuperscript{89} However, some equities do arise in favour of the transferee. For instance: where, despite an agreement of sale, the property is transferred to another person, the subsequent transferee with notice of the earlier transaction holds the property in trust for the prior agreement holder.\textsuperscript{90} A suit for specific performance can be

\begin{footnotesize}
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  \item \textsuperscript{86} Gh Mohd Matoo v. Gh Rasool Sofi, AIR 2005 J & K 48.
  \item \textsuperscript{87} Moturi Seeta Ramabrahman v. Bobba Rama Mohana Rao, AIR 2000 AP 504.
  \item \textsuperscript{88} B Rajamani v. Azhar Sultana, AIR 2005 Andh Pra 260.
  \item \textsuperscript{89} Dave Ramushankar v. Bai Kailasgoure, AIR 1974 Guj 69.
  \item \textsuperscript{90} Kondapalli Satyanarayan v. Kondapalli mayullu, AIR 1999 Andh Pra 170.
\end{itemize}
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granted on the basis of an agreement of sale. But if the contract of sale is subject to future negotiations for finalization of more terms of contract for sale, such a suit cannot be granted.

In *Ramesh Chand Ardavatiya v. Anil Pangwani,* the owner of a piece of land entered into an agreement for its sale with B. On payment of the advance amount, he handed over the possession to B but failed to execute a sale deed in his favour. B constructed a boundary wall, but this land was encroached upon by the trespassers on behest of A. B filed a suit in a court of law for a declaration that he was in peaceful possession of property and sought a permanent injunction from the court restraining the trespassers from interfering with his peaceful possession of the property. The court held that B is entitled to protect his possession. Directions were issued that A should assert his title through due process of law and was restrained from taking the law his own hands. The court observed as under:

A contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties; it does not of itself create any interest in or charge on such immovable property. However, still if a person who entered into possession over immovable property under a contract for sale and is in peaceful and settled possession of the property with the consent of the person in whom the title vests, he is entitled to protect his possession against the whole world,

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91. *Ram Swarup Gour v. Rati Ram,* AIR 1984 All 369, see also the Specific Relief Act, 1963 s. 10
excepting a person having a title better than what he or his vendor possesses. If he is in possession of the property in part performance of the contract for sale and the requirements of Section 53 A are satisfied, he may protect his possession even against the true owner.

A contract of sale can be completed and—would be valid upon execution by the seller and it is not necessary that the agreement to sell must have been signed by the purchaser.94

An agreement of sale itself does not create any interest or charge on such property95 even after a decree for specific performance has been passed with respect to it.96 All that a person gets is a right of litigation on this basis.97 A person who has contracted to buy some land is not entitled to mense profits98 or to apply to set aside an execution sale of the same property.99 Where the land is compulsorily acquired and the person who has entered into a contract to purchase it sues for specific performance of the contract, he is not, entitled even to compensation.100 Where there is a contract for sale of unascertained goods the requisite

95. See The Transfer of Property Act, 1882, s. 54 majidan v. Ishaq, AIR 2008 (NOC) 1135 (UI Basant Kaur v. General Public, AIR 2008 (NOC) 1406 (P & H); Ramesh Chandra v. Prem Lal Sinha, AIR 2008 Pat 155; Raghunath Rai v. Jogeshwar Prasad Sharma, AIR 1999 Del 383; Mun Viniyog Ltd., v. Registrar of Assurance, AIR 1989 Cal 85; Gopal Singh v. The State, AIR 1984 R 174; Ram Baran v. Ram Mohit, AIR 1967 SC 744; Indira Fruits v. Bijendra Kumar Gupta, All 1995 All 316; Dewan Investments v. DDA, AIR 1997 Del 388; jayshree Oza v. Rakesh Mohun, (1998) DLT 11; see however Rabindra Nath v. Haredra Kumar, AIR 1956 Cal 462, wherein was held that though a contract of sale does not itself create an interest in the property there is transfer of ownership when in addition a part of the purchase money has been paid.
98. Ramalingam v. GR Jagadammal, AIR 1957 AP 960
permission for cutting and felling trees can be obtained only by the owner of the trees, and not by a person who has entered into an agreement to fell them. In absence of a registered sale deed no one can call himself an owner on the basis of an agreement to sell, but an obligation can be annexed to the property, which is enforceable against a voluntary transferee.

An agreement to sell will prevail over attachment before judgment made subsequent to such agreement to sell.

The executant of the sale deed may incorporate an agreement for reconveyance of the property. However that depends purely on the terms and conditions agreed upon as between the parties. Therefore, in absence of any such clause, no inference can be drawn that the contract for reconveyance of land is included in any contract. If there are two separate deeds and it is stipulated in the subsequent deed, it can be proved as genuine. Once the sale is made absolute by a valid transfer the vendor is divested of the ownership of the property and does not retain any control or right over the property. Such a

transfer cannot be annulled or cancelled unilaterally by the vendor by executing a deed of cancellation.  

3.2 Mortgage:

Justice Mahmood in *Gopal v. Parsotam* has defined mortgage as under:

Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in section 58 of the Transfer of property Act (IV of 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of textbooks on Indian mortgages. Every word of the definition is borne out by the decisions of Indian Courts of Justice.

The definition of simple mortgage seems to be taken from Macpherson’s Law of Mortgages. It is almost the same as the classic definition given by MR Lindley, in *Santley v Wilde*:

A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.

The Supreme Court in *Kedar Lal v. Hari Lal*, has observed that the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer

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109. (1883) ILR 5 All 121, p. 157
110. 6th edn, p. 10; *Nabin v. Raj Commar* (1905) 9 Cal WN 1001.
111. (1899) 2 Ch 474.
112. AIR 1952 SC, p. 50, 1952 SCR 179
of Property Act read with the Code of Civil Procedure. The court cannot travel beyond these statutory provisions.

Section 58(a) defines mortgage as under:

"Mortgage is the transfer of an interest in specific immovable property for the purpose of Securing payment advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability".

Mortgage as defined in this section is transfer of an interest in some immovable property. It is not transfer of all the interests but only of some interest in the property. The purpose of this transfer of interest is to give security for repayment of loan. Therefore, where a person mortgages his property, the legal effect is that there is a transfer of an interest of that property in consideration of money advanced to him by the money-lender.

The person who takes loan under a mortgage i.e: transfers the interest in his immovable property, is called mortgagor. The person in whose favour, the property is mortgaged i.e. who advances loan, is called mortgagee. The sum of money and the instrument or deed of transfer is called mortgage-deed.

3.2.1 **Ingredients of a valid Mortgage:**

The following are the essential ingredients or elements which are necessary in a mortgage:

- There must be transfer of a interest.
- The interest transferred must be of some specific immovable property.
• The purpose of transfer of interest must be to secure payment of any debt or, performance of an engagement which may give rise to a pecuniary liability.

3.2.1(a) Transfer of Interest:
In a mortgage there is transfer of only an ‘interest’ of the immovable property. There is no-transfer of absolute interest or ownership. The ‘interest’ is transferred in favour of the mortgagee who advances the money as loan. It is the ‘interest of property’ which gives him (mortgagee) the right to recover his money from mortgagor’s property. A peculiar feature of the interest transferred is that such ‘interest’ itself is an ‘immovable property’. However, mortgage is not a transfer of all the interests. After transferring this interest in favour of mortgage, there still remains a vested remainder with the mortgagor.\(^{113}\)

3.2.1(b) Immovable Property to be specific:
The property which is being mortgaged must be specific immovable property. The immovable property must be specifically mentioned in the deed. In other words, the immovable property should be mentioned with certainty so that it can be identified as to which property has been mortgaged. The property must not be described in general terms.

3.2.1(c) The consideration of Mortgage should be the Purpose of Mortgage:
The last essential element of mortgage is its own purpose. The purpose of mortgage must be to secure a debt. Mortgage is a transfer of property supported with some

consideration; the consideration of mortgage is to secure a debt. Mortgagor transfers the interest in his property to mortgagee in consideration of security for payment of some kind of loan taken by him.

3.2.2 Types of Mortgage:

As per Section 58 there are following kinds of mortgage:

- Simple mortgage,
- Mortgage by Conditional Sale
- Usufructuary mortgage
- English mortgage,
- Mortgage by deposit of title-deeds, and
- Anomalous mortgage.

The classification of mortgage has been made on the basis of the nature of interest which is transferred for securing the loan. Accordingly, there is difference in the rights and liabilities in each kind of mortgage. These six kinds of mortgage also differ regarding the formalities that are necessary for effecting them. The classification is also called as various forms of mortgage. Each kind of mortgage is discussed below in brief.

As per Section 58 (b). Where the mortgagor promises to pay the mortgage-money (loan) without delivering possession of the mortgagor-property and agrees expressly or impliedly that in case of non-payment of loan, the mortgagee shall have the right to cause the mortgage-property to be sold, the mortgage is a simple mortgage. The characteristics of a simple mortgage are as under:
• The mortgagor takes a personal undertaking to pay the loan.
• The possession of the mortgagee-property is not given to the mortgage.
• In the case of non-payment of loan the mortgagee has right to have the mortgage-property sold.

The fact that some immovable property has been mentioned as security for its repayment, does not displace the personal liability of mortgagor to repay the loan with interest.\textsuperscript{114}

Simple mortgage can be made only through a registered document. Even if the sum of money secured is less than Rupees one hundred, a simple mortgage must be effected by registered instrument.\textsuperscript{115}

As per section 58(c) of the Transfer of Property Act, the sale with a condition that upon repayment of the consideration amount, the purchaser shall retransfer the property to the seller is known as Mortgage by conditional sale. Although, the whole transaction looks like a conditional sale, yet, in the intention of the parties is to secure the money which the seller takes as loan from the purchaser.

According to Section 58 (c) the mortgage by conditional sale has the following characteristics :

• There is an ostensible sale of an immovable property.
• The sale is subject to any of the following conditions:

\textsuperscript{115} Section 59 of the Transfer of Property Act, 1882.
- On non-payment of mortgage-money (price) the sale would become absolute or,
- On payment of mortgage money the sale shall become void or the buyer shall retransfer the said property to the seller.

- The condition must be embodied in the same document.

In *Prakasam v. Rajambal*,\(^{116}\) the document was described as a sale deed but the stamp paper was provided by transferor and the consideration (price) was much less than the actual value of the property. There was a specific condition that on payment of 'principal' amount the property should be reconvened. It was held by the Madras High Court that the transaction was a mortgage by conditional sale and not an outright sale. Where A, the owner of a land, gave possession of his land of B on receipt of money from him, and under the agreement B was to execute reconveyance on payment of amount by A otherwise the sale was to be confirmed, the Bombay High Court held that the transaction was sale with condition to repurchase and not a mortgage by conditional sale. It may be noted that in this case, payment of interest was not stipulated in the agreement. Accordingly, the court found that there was no intention of parties to treat the transfer of land as 'security for debt' which is an essential feature of a mortgage.\(^{117}\)

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In *Mushir Mohammed Khan v. Sajeda Bano,*\(^{118}\) a property was sold by the seller. There was a separate agreement of reconveyance executed by purchaser under which he promised to reconvey the property to seller on return of the sale-consideration. There was also a third document executed by seller in favour of purchaser in the form of rent note. The Supreme Court held that on considering these document the transaction is not a mortgage or mortgage by conditional sale nor a usufructuary mortgage. Where the parties have executed three documents, almost simultaneously all the three documents are to be taken into account to find out the true nature of the transaction. The Supreme Court observed that the Madhya Pradesh High Court (which treated the transaction usufructuary mortgage) did not take into consideration the second document which represented as agreement between parties, that if the price-money for which sale was executed by plaintiff in favour of the defendant, was returned within the stipulated time, the defendant would reconvey the property to the plaintiff. Further, the Supreme Court observed that although it was found that plaintiff (seller) had offered Rs. 1 Lakh to be paid within six months, the defendant (purchaser) made a counter-offer of Rs. 1.5 Lakh but, the plaintiff was not prepared to transfer the title in the property. This indicates that the amount (Rs. 1000) for which the property was sold did not represent the true market value, neither at the time of sale deed executed in favour of defendant (purchaser) nor

\(^{118}\) AIR (2000) SC 1085.
today. Accordingly, in order to do justice in such situations, the Apex Court held that "if the defendant (purchaser) pays a sum of Rs.2 Lakh (foregoing also the arrears of rent update) within three months, the judgment of High Court shall stand set aside i.e. the transaction would not be treated as usufructuary mortgage. "In case the amount is not paid within aforesaid period the appeal shall stand dismissed."

As per section 58(d) of the Transfer of Property Act, A Mortgage is usufructuary where the mortgagor gives possession of the property to mortgagee. Since possession is with mortgagee, he enjoys the fruits of the property i.e. produce, benefits, rents or profits of the mortgage-property. In a usufructuary mortgage, the mortgagee is entitled to enjoy the benefit of mortgage-property in lieu of interest on the principal money (debt) advanced by him. Therefore, on payment of debt (principal money).the mortgagee has no right of possession.

Essential ingredients of usufructuary mortgage:—The following are the essential elements of usufructuary mortgage:

- Delivery of possession of the mortgage-property or, an express or implied undertaking by mortgagor to deliver such possession.
- Enjoyment or use of the property by mortgagee until his dues are paid off.
- No personal liability of the mortgagor.
- Mortgagee can not foreclose or sue for sale of mortgage-property.
Where the mortgage-property is a tenanted house the only way in which possession can be given to mortgagee is to give him the right to collect the rents and appropriate them towards the debt.\textsuperscript{119}

The mortgagee is entitled to continue possession and enjoy the usufruct until the debt is fully paid off...: He can neither sue the mortgagor personally nor can exercise his right of foreclosure under section 67 of this Act This right is not available to usufructuary mortgagee. It is significant to note that in this form of mortgage \textit{no time-limit is fixed for the payment}. Mortgagee is entitled to retain possession untiff the money due is paid. In a usufructuary mortgage the time upto which money may be paid by mortgagor is uncertain. If any time is fixed the mortgage would not be a usufructuary mortgage.\textsuperscript{120}

As per section 58(e) of the Transfer of Property Act, in English mortgage there is absolute transfer of property to mortgagee with a condition that when the debt is paid off on a certain date, he (mortgagee) shall re-transfer the property to mortgagor. According to section 58 (e) of this Act, where mortgagor binds himself to repay the money (debt) on a certain date and transfers the mortgage-property absolutely subject to proviso that mortgagee will re-transfer it to mortgagor on payment of debt as agreed, the mortgage is English mortgage. The following are the essential elements of English mortgage are as under:

\textsuperscript{119} Butto Kkristo v. Govindram, AIR (1939) Pat. 540.
\textsuperscript{120} Hikmatulla v. Imam Ali, (1890) 12 All 203; cited in Mitra's Transfer of Property Act Ed. XIII, p. 480.
- The mortgagor binds himself to repay the mortgage-money (debt) on a certain date.
- The mortgage-property is transferred absolutely to mortgagee.
- The absolute transfer is subject to a proviso that mortgagee will re-transfer the property to mortgagor on payment of mortgage-money on the said date.

The definition of English mortgage must be read subject to the general definition of mortgage given in section 58(a) of this Act. Consequently, an English mortgage in India can hardly be regarded as the transfer of entire estate of mortgagor to mortgagee.\(^\text{121}\) In *Ramkinkar v. Satyacharan*\(^\text{122}\) the Privy Council observed:

"Section 58(e) deals with form, not substance. The substantial rights are dealt with in section 58(a) and 60. Whatever form is used, nothing more than an interest is transferred and that interest is subject to the right of redemption."

It is, therefore, settled law that the word ‘absolutely’ in English mortgage is used merely as a matter of form. What really passes to the mortgagee under this mortgage is only an interest in the property which is liable to be redeemed by the mortgagor under Section 60 of this Act.

In the event of non-payment of mortgage-money (debt) under an English mortgage, a decree of foreclosure is not passed. In this form of mortgage, the mortgagee has right to


\(^{122}\) AIR (1939) P.C. 14.
apply for passing decree for sale of the mortgage-property.123

Section 58(f) provides for the mortgage by way of deposit of Title deeds. Mortgage by deposit of title-deeds is a peculiar kind of mortgage. It is peculiar in the sense that in this mortgage, execution of mortgage-deed by mortgagor is not necessary. Mere deposit of title-deeds of an immovable property by mortgagor to mortgagee is sufficient. Title-deeds are those documents which are legal proof that a person owns a particular property.

The object of this kind of mortgage is to provide easy mode of taking loans in urgent need particularly by trading community of the commercial towns. The borrowing transaction is a matter to faith or equity justice and good conscience that money-lender advances loan only by having possession of certain papers (titles-deeds) without any wridngor legal formality. Mortgage by deposit of title-deed resembles the English equitable mortgage because it does not require registration and other formalities.

According to Section 58(f), where a person in any of the Specified towns, delivers to a creditor or his agent documents of title to immovable property, with intent to create to security thereon, the transaction is called a mortgage by deposit of title-deeds. Therefore, as per this definition, the following are the essential ingredients of a mortgage by deposit of title-deeds:

- Existence of a debt,
- Deposit of title-deeds,

• Intention ‘to create security, and
• Territorial Restrictions; application of this form of mortgage.

Title-deeds may also be deposited with banks to secure an overdraft account. This is a common practice among the trading community or persons involved in business. Title-deeds may be deposited also to cover a general balance which may be found due on a running account. In this form of mortgage, title-deeds are deposited under an oral agreement to secure present or future advance. When the money is advanced, there is creation of a charge upon the land comprised in the title-deeds.

The only fact that there is some debt and that the title-needs of debtor are somehow found in possession of the creditor would not be sufficient to create an equitable mortgage. There must be a bona fide intention that possession of title-deeds with the creditor is by way of security for the money advanced by him. However, intention to create security by deposit of title-deeds is a question of fact and not of law. Therefore, the facts that title-deeds are in custody of the creditor or that there exists a debt, both alone cannot give rise to a presumption that there is an equitable mortgage. There is no equitable mortgage unless there is a connecting link between the debt and the possession of title-deeds suggesting a definite intention on the part of the debtor that deeds are in possession of

creditor as security for the debt.\textsuperscript{126} Where the title-deeds of a partner were in possession of the managing partner and the managing partner admitted that the received the title-deeds in the capacity of a manager, the Privy Council held that there was no intention to create an equitable mortgage because delivery of the deeds was merely a part of partnership transaction.\textsuperscript{127}

In \textit{K.J. Nathan v. S. Maruthi},\textsuperscript{128} the physical delivery of the title-deeds had taken place outside the towns specified. But the intention to create equitable mortgage by these deeds was formed after delivery of the deeds and in a town which was within notified area. The Supreme Court held that an equitable mortgage was created under section 58 (f) of the Transfer of Property Act.

Section 58 provides for various kinds of mortgage. But the classification of mortgage given in this section is not exhaustive. Besides these forms of mortgage, there are other methods of taking loans on the security of immovable property. These methods, although not included in section 58, but are in practice in India. Such modes of taking loans fulfill the essential requirements of a mortgage but do not come under any category of mortgage given under this section. These transactions are mortgage, though, without any specific name. Since most of such mortgages are either customary or combinations of two or more forms of mortgages and thereby causing anomaly, therefore, these are called anomalous mortgage.

\textsuperscript{126} \textit{Jethibai v. Putlibai}, (19612) 14 Bom. L.R. 1020.
\textsuperscript{127} \textit{Heny Moh v. Lim Saw Yeart}, AIR (1923) P.C. 87.
\textsuperscript{128} AIR (1965) S.C. 430.
According to section 58 (g), a mortgage is anomalous mortgage if it is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or, a mortgage by deposit of title-deeds.

When a transaction is a mortgage in all respects i.e. there is existence of debt and security of an immovable property for re-payment of that debt but the agreement between the debtor and creditor is of such nature that it cannot be included in any specific category of mortgage, the transaction is anomalous mortgage. It may also be combination of any two or more forms of specific categories of mortgage.

The following Some well known examples of anomalous mortgage are given below :—

Where terms of mortgage are mixture of a simple mortgage and of an usufructuary mortgage, the transaction is simple mortgage-usufructuary. This is an example of an anomalous mortgage. Where there is a personal covenant with an express or implied right of sale and the mortgagee is given also possession of the property so that he may adjust his loan from the rents and profits of the property of the interest thereof, the mortgage is neither a simple mortgage nor usufructuary mortgage. It is a combination of the two and hence will be a simple mortgage usufructuary.

In *Munni Lal v. Phuddi Singh*,\(^{129}\) the mortgage-deed provided that in the event of failure on the part of mortgagor to pay up the amount due within the specified period of time, it shall be open to the mortgagee to recover the same

by sale of the mortgage-property. The mortgage-deed also provided that mortgagee shall be entitled to realise rents from the shops situated in the mortgage-property. It was held by the Allahabad High Court that despite mortgagee’s right to recover his money by sale of property as is the case in simple mortgage, it was not a simple mortgage. The same deed also gave constructive (if not actual) possession by providing for mortgagee’s right to receive rents from certain shops situated in the mortgage-property. The Court held that it was a simple mortgage usufructuary which is an anomalous mortgage under section 58 (g) of the Act.

Another example of anomalous mortgage is usufructuary mortgage by conditional sale. In this form of mortgage, the mortgagee is first entitled to take possession and enjoyment of property but there is also a condition’ that in default of repayment within a specified period, the mortgagee shall’ have the right to cause the sale, of property. Thus, where the mortgage is usufructuary mortgage for a fixed term and there is also a condition that on expiry of the due date, it shall operate as mortgage by conditional sale. In Vaddiparthi v. Appalanarasimhulu,\textsuperscript{130} the mortgage was usufructuary mortgage in which the rents and benefits were agreed to be adjusted against interest. It was also agreed that the principal money shall be repaid in five years and if it is not paid within this period, the mortgage was to work out into a sale at the expiry of twenty years. The Madras High Court held that it was a typical mortgage usufructuary by conditional sale. In a mortgage-

\textsuperscript{130} AIR (1921) Mad. 517.
deed it was provided that mortgagee will have the possession of property in lieu of interest and that the debt was to be paid on a certain date. It was also provided that at the end of said specified period, the mortgagee would be entitled to foreclose according to law. It was held by the Court that the mortgage was a combination of mortgage by conditional sale with incidents of a usufructuary mortgage.\textsuperscript{131}

Customary mortgages are mortgages to which special incidents are attached by local usage.\textsuperscript{132} Certain peculiar mortgages are in practice in the form of local customs. They have the essential features of a mortgage but their terms and conditions are governed by local customary practices. Such customary mortgages are included in the category of anomalous mortgage. For example, \textit{Kanom} and \textit{Otti} mortgages of Malabar are peculiar forms of mortgage because they are not redeemable before expiry of twelve years. \textit{Kanom} mortgage operates as lease as well as usufructuary mortgage. \textit{Paruartham} mortgage of Malabar is also in the category of anomalous mortgage in redeeming this mortgage it is the market-value of the mortgage-property which is paid not the amount for which it was mortgaged.

\textbf{3.3 Charge :}

Where immovable property of one person is by act of parties or by operation of law made security for the payment of money to another, and the transaction does not amount

\begin{itemize}
  \item \textsuperscript{131} \textit{Sita Nath v. Thakurdas}, (1919) 46 Cal. 448; 52 J.C. 433.
  \item \textsuperscript{132} \textit{Mulla}; Transfer of Property Act, Ed. VII, p. 392.
\end{itemize}
to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and. save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

3.3.1 Essential Requirements for Charge:

The following are the essential requirements of a charge:

- Immovable property of one person is made security for the payment of money to another;
- By act of parties or by operation of law;
- This transaction does not amount to a mortgage;
- All the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge; and
- Charges cannot be enforced against any property in hands of a bonafide transferee for consideration without its notice.

3.3.2 How the Charge is Created:

A charge need not be in writing,133 but if it is reduced to writing, registration of the same is necessary in the case of a non-testamentary instrument of the value of Rs 100 or

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upwards.\textsuperscript{134} No particular words or form is prescribed to create a charge. However, the intention of the parties, that money is to be paid out of a specific property, must be very clear. For example, the husband carmarks a specific property for the wife so that she can realise her maintenance from that property. It does not amount to the transfer of an interest in the property in favour of the wife, but it is a charge, as the payment is to be made out of that property. An assignment of such a charge would also need to be registered.\textsuperscript{135} Electricity dues of an erstwhile consumer is not a charge on the property and cannot be recovered from the purchaser of the property.\textsuperscript{136}

A charge cannot ordinarily be split up by apportioning liability amongst various persons.\textsuperscript{137}

The following are the examples of creation of a charge:

- A document that gives only a right of payment out of a particular fund of property; \textsuperscript{138}
- An agreement which gives immovable property as security for the satisfaction of a debt; \textsuperscript{139}

\textsuperscript{134} The Registration Act, 1908's 17(1)(b); See Bengal Banking Corporation v. Mackertich, (1884) ILR 10 Cal 315; Maine v. Bachchi, (1906) ILR 28 All 655; Amratlal v. Keshavlal, AIR 1926 Bom 495; Imperial Bank v. Bengal National Bank, AIR 1931 Cal 223; Rangampudi v. Venkateswarlu, AIR 1934 Mad 713; Vishwanadhan v. Menon, AIR 1939 Mad. 202.


\textsuperscript{136} Subhendu Banerjee v. CESC, AIR 2002 Cal 242; a charge is a 'transfer' within the meaning of the Electricity Act. 9 of 1910 s. 9(2); see Uttar Pradesh Government v. Manmohan Das, (1941) ILR All 691: AIR 1941 All 345.

\textsuperscript{137} Har Charan Lal v. Agra Municipal Board Agra, AIR 1952 All 315.

\textsuperscript{138} Gobinda Chandra v. Dwarka Nath, (1908) ILR 35 Cal 837.
• A compromise under which the right is given to the other party for the payment of a maintenance allowance in property without transferring an interest in the property;

• An agreement by which an owner of a share in a village receives in lieu of his share a lump sum out of the income;\(^{140}\)

• An agreement executed by a person forbidden to execute a mortgage taking an advance on the same terms as a mortgage;\(^{141}\)

• An undertaking not to sell a particular share in the factory till the loan on promissory note is paid off;\(^{142}\)

• A covenant in a lease empowering the lessee to retain part of the rent in satisfaction of a previous loan to the lessor;\(^{143}\)

• A provision in a partition deed that a common family debt should be proportionately discharge by the respective sharers and that if any sharer defaults, the share of defaulting sharer constitutes a charge in favour of the sharer who has paid in excess.\(^{144}\)

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143. **Nathan Lal v. Durga Das.**, AIR 1931 All 62.

A charge to secure a liability which is not in existence but is contingent and is liable to arise in future is valid. A charge cannot be created on a future contingency though it is not necessary that there should be any pre-existing debt and a charge may be created for discharge of an indemnity or contingent liability. A charge holder in whose favour a charge is created on the property that is to come into existence in future will be entitled to priority over a person who attaches the property after that such charge comes into existence.

3.3.3 Enforceability of Charge:

A charge is enforced by sale and if it carries with it a personal liability, the charge holder is entitled to a personal decree. A person who purchases a portion of a property which is subject to charge with notice of the charge is liable to pay the whole amount, but he may sue for contribution. A recurring charge is not extinguished by a decree for sale. If two properties are burdened with a

152. Bau Ram v. Imam Ullah, AIR 1935 All 411; Raghukul Tilak v. Piitam Singh, AIR 1931 All 99.
charge and one of them is relieved of the liability of paying the charge as a result of its transfer by the owner to a person for consideration and without notice of the charge, the charge holder can recover the entire amount from the remaining property.\textsuperscript{154}

A charge declared in a decree must be enforced by a suit.\textsuperscript{155} The doctrine of subrogation applies to a charge and it is immaterial whether the prior mortgagee had notice of the charge.\textsuperscript{156} Where a portion of the property charged has been relieved thereof, without the consent of the holder or the charge, the charge holder can proceed against the whole property for the enforcement of the charge and the principle of ratable distribution is inapplicable.\textsuperscript{157}

### 3.4 Lease:

Section 105 of the transfer of property Act defines lease. Lease is a transfer of ‘right of enjoyment’ of an immovable property made for a certain period, in consideration of a price paid or promised to be paid or, money, share of crops, service or any other thing of value to be given periodically or on specified occasions to the transferor by transferee.

As is evident from the definition, lease is not a transfer of ownership in property, it is transfer of an interest in an immovable property. The interest is the \textit{right to use or enjoy the immovable property}. Since 'interest' in an immovable

\textsuperscript{154} \textit{Raghubir Dayal v. Hussain Mirza,} AIR 1948 Oudh 147.
\textsuperscript{155} \textit{Aubhoyessury Dabee v. Gouri Sunkur Panday,} (1895) 22 Cal 859; \textit{Matangini Dassee v. Chooneymoney Dassee.} (1895) 22 Cal 903; \textit{Venkata Lakshmamma v. Seetayya,} (1920) 43 Mad 786; \textit{Rajkumar Lal Vjai Karan Das,} (1920) 5 Pat 1J 248.
\textsuperscript{156} \textit{Aravamudhu Ayyangar v. Zamindarini Srinath Abiramvalli Ayab,} AIR 1934 Mad 353.
\textsuperscript{157} Hussain Mirza \textit{v. Raghubir Dayal,} \textit{AIR 1947 Oudh 122.}
property is considered as property, therefore, lease is a transfer of property. However, lease is a transfer of only a partial interest, it is not a transfer of absolute interest. Lease, contemplates separation of right of possession from the ownership. The interest which is transferred is the right of property for a fixed period on payment of some consideration in cash or kind. The transferor is called lessor and the transferee is called lessee. In common language the lessor is usually called landlord and the lessee is known as tenant. Price is called *premium* and the money, share, service or other things so given is called the rent.

### 3.4.1 Essential Ingredients of Lease:

The following are ingredients essential of lease:

- The parties i.e. transferor (also known as less or) and the transferee (also known of lessee).
- The demise i.e. right to enjoy immovable property.
- The term i.e. the duration.
- The consideration i.e. premium or rent

The lessor, who transfers the right of enjoyment of his property must be a person competent to contract and must also have right to transfer the possession of property. The lessor must have attained the age of majority and must possess a sound mind at the time of granting the lease. The lessor must not be only competent to contract but he must have also the authority to effect lease. Lessor has authority if he is either owner of the property or, has possession of the property.

Minor cannot grant lease; lease executed by minor is void. Minor's guardian of property is authorized to grant
lease without Court’s permission for a term not exceeding five years or ensuring for more than one year after minor’s attaining majority. 158

Lessee too must be competent to contract at the date of execution. Lessee must be of the age of majority and must be of sound mind. Lease in favour of a minor is void because the transfer by way of lease contemplates agreement by minor to pay rent and other obligations. Lessee may be a juristic person e.g. a company or, a registered firm. But, an unregistered firm is not juristic person. Therefore it cannot be a competent lessee.

Lease is a transfer of right of enjoyment in an immovable property. It is not a transfer of ownership; it is transfer of partial interest. Ownership or absolute interest is transferred. In mortgage only partial or limited interest is transferred for securing a debt. In a lease too partial or limited interest namely, the right of enjoyment of immovable property, is transferred. Lease is, therefore, transfer of limited estate. This limited estate which is right of enjoyment’ of property, is called demise. In a lease this right of enjoyment or demise is the subject matter transfer. The essential characteristic of a lease as that the subject (property) is occupied and enjoyed and the corpus of which does not, by reason of the user, disappear. 159

The right of enjoyment must be given to the lessee for a certain period of time. The period for which the right to use the property is transferred is called 'term' of the lease.

158. Sec. 29(b) Guardian and Wards Act, 1890.
159. Girdhari Singh v. Magh Lal Pandey, (1918) 45 Cal 87; 42 IC 651.
The term may be any period of time, longer or shorter, even for perpetuity. But, it must be specified in the deed.

The contract of lease must be supported with some consideration. Consideration in a lease may be *premium* or *rent*. Where the whole amount to be recovered as consideration from the lessee is paid by him in lump sum, (at one time) the consideration is called premium.

### 3.4.2 Creation of Leases:

Section 107 of the transfer of Property Act provides for the modes of making leases. There are certain formalities which are necessary for completing a lease. This section provides for two modes of creation of leases.

Leases which can be made only by registered deed:

- Leases from year to year.
- Leases for a term exceeding one year.
- Leases reserving a yearly rent.
- Permanent leases.

Leases in which registration is optional:

(a) Leases from month to month.
(b) Leases for a term of one year.
(c) Leases for a term of less than one year.

The *Indian Registration Act, 1908* also makes similar provisions regarding the registration of leases. Under Section 17, the leases mentioned in group (A) are compulsorily registerable. The leases grouped in (B) may be made either by registered instrument or by delivery of possession.

### 3.4.3 Effect of Non-Registration:
Where a lease is compulsorily registrable but has not been registered, the lease is invalid. If the registration of a lease is necessary under section 107, the provision for its renewal shall not affect the requirement of its registration when a registered lease is further renewed. In other words, a covenant for renewal contained in a lease does not ipso facto extend the tenure of the lease. If to the renewed lease, the requirements of registration are compulsory, no valid lease would come into existence unless registration is made.  

However, a person holding possession under an unregistered lease (which is invalid) is not a trespasser; he is treated as tenant-at-will. The lessor is entitled to receive rents or compensation from such tenant. An unregistered lease, though invalid, is sufficient basis for a suit for the specific performance under section 27-A of the Specific Relief Act. Further, a lessee holding possession under an unregistered lease may defend his possession, under section 53-A (part-performance) of this Act.

### 3.4.4 Modes of Termination of Lease:

‘Determination of lease means termination or end of the contract of lease. After the end of the lease of lease, the legal relation between lessor and lessee comes to an end. Section 111 deals with the various situations in which a lease is determined. Under this section, a lease may be determined in the following Situations:

- By lapse of time.
- By happening of specified event,

• By termination of lessor's interest.
• By merger.
• By express surrender,
• By implied surrender,
• By forfeiture,
• By expiry of notice to quit.

Lease is transfer of *demise* for a certain period. After expiry of the period specified in the lease, the lease is automatically determined. However, if there is a stipulation for its renewal, the lease continues even after expiry of the fixed period.

The term of a lease may be made subject to certain condition such a happening of some specified event. If the term is limited conditionally on the happening of a future event, the lease determines upon the happening of that event.

Where the lessor’s own interest in immovable property is limited, the lease comes to an end upon the termination of lessor's interest. Therefore, where a lessee sub lets the property, the sub lease comes to an end upon the death of lessee. Where a person is given an authority to make lease, the lease made by him determines when that authority is taken away. A lease made by mortgagee in possession determines upon the redemption of the mortgage. But, where a lease from year to year was granted by the Manager of a Temple in the course of management, the Supreme Court held that the lease does not come to an end with the expiry of the office of manager or his successor.\(^{161}\)

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Merger means meeting of one interest with another interest. When a limited interest becomes absolute interest, there is merger because smaller interest merges with larger interest. During tenancy, a tenant has only a limited interest namely, 'right to enjoy' the property (house). If the landlord makes gift of or, sells the tenanted house to the tenant, the tenant does not remain a tenant; he becomes owner of the house. The tenancy is, therefore, determined by merger of reversioner with tenants mere right of enjoyment.

Surrender is opposite of merger. In a merger, a larger interest is merged with smaller interest whereas in surrender the smaller interest unites with larger one. But, in both, the lease is determined because two interests unite. Thus, where a lessee vacates the premises before expiry of the term, lessee's smaller interest (right to enjoy property) reverts back to lessor's reversion (larger interest). Surrender yields up the lessee's interest in lease and put an end to the contract of lease.

However, mere relinquishment of 'right to enjoy' is not sufficient; it must be followed by delivery of possession. Surrender without delivery of possession is ineffectual. Surrender may be express or implied. In the express surrender, the lessee expresses his intension to relinquish his interest in the lease-hold to which lessor agrees and this is followed by delivery of possession. An express surrender becomes effective at once and the lease is determined immediately.
Surrender is implied if it takes place by operation of law. By operation of law, there is surrender (i) by creation of a new lease or, (ii) by relinquishment of possession. When a lessee accepts from the lessor a new lease of the same property which is already leased to him, there is implied surrender of the earlier lease. The former lease is thereby impliedly determined. When a lessee accepts an office inconsistent with lease, there is implied surrender. For example, where lessee accepts the lease by remaining in possession as a servant of lessor there is implied surrender because any possession by servant is treated as possession by master.

Forfeiture is another mode of termination of leases. Forfeiture of a lease means loss of lessee's right to use the property by some fault on his part. A lease is terminated by forfeiture on the following grounds:

- Breach of express condition by lessee.
- Denial of landlord's title.
- Insolvency of the lessee.

When the lessor imposes upon the lessee any express condition and lessee fails to perform that condition, there is breach of condition by lessee. The lessee's right under the lease is lost upon breach of such condition.

Lessee has only a limited right in respect of the tenanted property. He is not owner. When the lessee claims to be owner of the tenanted property he denies the status of landlord. But, by so doing he also denies his own status of tenant. Denial or disclaimer of lessor forfeits right to enjoy the property and the lease is terminated. Denial of lessors
title necessarily means that lessee asserts either himself to be the owner or regards another person as owner of the leased property. In Guru Amarjit Singh v. Rattan Chand\textsuperscript{162} the Supreme Court, held that disclaimer by denial of landlord's title or setting up title in himself or third party is a ground for forfeiture of lease but, the repudiation must be clear and unequivocal and also anterior (prior) to the issuance of the notice determining lease under Section 111(g). The court observed further that such disclaimer may be in the pleading anterior to the suit (for determining the lease) or in any other documents, but directly relatable to the knowledge of lessor. An incidental statement per se does not operate as forfeiture.

Insolvency of the lessee by itself does not forfeit the lease. There must be a stipulation between the parties that lessee's right shall be lost in case of his insolvency and lessor would be entitled to resume possession. Reason behind providing for a condition of forfeiture of lease upon lessee's becoming insolvent is to ensure regular payment of rent by lessee.

Under section 106 it is provided that for termination of periodical leases e.g. leases from year to year or month to month, notice is necessary. Where the term is fixed, no notice is required because such leases determine by expiry of the term under clause (a) of section 111. In permanent lease, no question of determination arises. Where notice is necessary to terminate the lease, the lease is determined.

\textsuperscript{162} AIR 1994 SC 227.
after expiry of six months and in month to month leases, the notice expires after fifteen days.

3.5 Exchange:

Section 118 defines Exchange as under: When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “exchange”.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

When two persons mutually transfer the ownership of one thing for the ownership of another,¹⁶³ neither thing or both things being money only, the transaction is called an 'exchange.' It is a transaction by which each party acquires property in which he had no Interest before. For a valid exchange, there must be a physical delivery of the property to the parties and each party to the exchange has the rights and is subject to the liability of the seller as to that which he gives, and also has the rights and liabilities of a buyer as to that which he takes.¹⁶⁴

3.5.1 Essential Requisites of an Exchange:

- There must be a minimum of two parties and two properties, one each belonging to each of them;
- There have to be a mutual transfer of these properties i.e., A transferring his property to B, and B in turn transferring his property to A;

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Property can be exchanged with either movable or immovable property;

No other consideration should be involved besides these properties.

An exchange involves a mutual transfer between two parties of their respective properties. The main factor that distinguishes an exchange from a sale is that in an exchange, no monetary consideration is involved. Exchange of one property for money is a sale, and an exchange of movable property with another movable property is barter.

3.5.2 Exchange Must be Mutual:

The term ‘mutually’ signifies that the parties must be same,\(^\text{165}\) and two things are exchanged. For Example, Y transfers his property to Z and Z transfers his own property in exchange to Y. If the transfer is only from the side of one of the parties, it is not an exchange. Thus a transfer by a husband to a wife in discharge of her claim to maintenance is not an exchange as the wife does not transfer ownership in anything.\(^\text{166}\) Similarly, a document whereby one decree is set off against another and the balance made up by a transfer of land is not an exchange, for there is no mutual transfer of two things.\(^\text{167}\)

3.5.3 Object to be Lawful:

The object of exchange must be lawful. Exchange is primarily a contract, and if the object is illegal or aims at

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166. Madan Pillai v. Badrakali AIR 1922 Mad 311.
defeating the provisions of law, it would be invalid. In *Shribari Jena v. Khetramohun Jaina*, a deed of exchange was executed to compromise criminal proceedings between the parties. The agreement between them stated, that till the proceedings are compromised the deed of exchange could not be taken from the Registrar’s office. The court field that in view of s. 23 of the Indian Contract Act, 1872, the exchange was invalid.

### 3.5.4 Mode of Transfer of Property by Exchange:

Transfers of property by way of an exchange can be made only in manner provided for the transfer of such property by sale. Hence, in case of immovable property the rules as to registration or delivery of possession apply. Therefore, an exchange of tangible immovable property of the value of Rs. 100 and upward, if not made by a registered instrument, is invalid. An exchange can be made by mutual conveyances, though two separate deeds are not necessary. This rule does not apply in Punjab, and therefore an exchange of property in Punjab can take place and validly completed even orally.

### 3.6 Gift:

Section 122 of the Transfer of Property Act defines "Gift" as under:

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168. AIR 2002 Ori. 195.
"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

3.6.1 Acceptance when to be made:

Such acceptance may be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Therefore, from the perusal of the aforementioned definition of gift, as per section 122, the following condition should be satisfied for a valid "Gift":

Gift is transfer of ownership without consideration. Gift must be made of existing movable or immovable property capable of being transferred. Therefore, the share of the coparcener property jointly hold by the coparceners cannot be transpired unless the share has been obtained after the partition of the said joint family coparcenery property as in that case the interest of the coparceners would be fluctuating.\textsuperscript{174} Meaning thereby, the property obtained after partition of the Joint Family property can only be gifted. Similarly, a gift of the property obtained after a preliminary decree of partition is passed by the court is valid.\textsuperscript{175}

"Gift" is valid only when the transfer of property is voluntarily and without consideration on the part of the donor. Voluntarily means that the transfer should be free and should not be obtained by force, fraud or undue influence. The offer to make the gift must be voluntary. A gift should be executed with free consent of the donor which

\textsuperscript{174} Munnial Mahto v. Chandreshwar Mahto, AIR 2007 Pat 66.
\textsuperscript{175} Renu Devi v. Mahendra Singh, AIR 2003 SC 1608.
should not be obtained by force, fraud or undue influence.\textsuperscript{176}

Gift must be made of existing movable or immovable property and the same should be capable of being transferred. The property which is to be acquired by the donor in future cannot be transferred therefore the donor can transfer only that property of which he is the absolute owner and the property which is in existence on the day of transfer by way of gift by the donor to the donee.

These are two parties to the transfer of property by the mode of Gift. The person who makes the gift is called "donor" and the person in whose favour the gift is made is called the "donee". Moreover, the donor should be competent to make a gift. A person who is not competent to contract cannot gift his property. It has been further held that a guardian of the property of a minor cannot make a transfer of the property without the permission of the court and if he exceeds his power by executing a gift of the property of minor then the same would be void.\textsuperscript{177} The donor must be either the owner of the property or be should be authorized by the owner to execute a valid gift of the property, otherwise the gift would be invalid. For example, a Hindu man cannot execute a valid gift of the property owned by his wife.\textsuperscript{178} Moreover, the Hon'ble Supreme Court has held that donee can even be a minor.\textsuperscript{179} A gift can also be made in favour of two or more donees, but they must be

\textsuperscript{176} Subhas Chandra v. Ganga Prosad, AIR 1967 SC 878.
\textsuperscript{177} Samitra Devi v. Sukhwinder Pal, AIR 1990 P&H 23.
\textsuperscript{178} Lakhwinder Singh v. Paramjit Kaur, 2003(4) R.C.R. (Civil) 26 P & H.
\textsuperscript{179} Chand Bee v. Hameed Unnissa, AIR 2007 AP 150.
\textsuperscript{177} K. Balakrishnan v. K. Kamalam, AIR 2004 SC 1257.
ascertainable persons. Gift made jointly to two donees jointly with the right to survivorship is valid in law.\textsuperscript{180}

The another essential and important condition of a gift to be valid is that the gift must be accepted by the donee himself. Acceptance of the gift should be made by the donee during the life time of the donor and while the donor is capable of giving. As per section 122, if the donee dies before acceptance, the gift is void. Though law does not specifies any specific mode of acceptance of a gift, yet, it should be clear and not ambiguous.

3.6.2 Modes of Making A Gift:

Section 123 of the Transfer of property Act provides for the requirements that are essential for completion of a gift. Unless and until these legal requirements are not met with, the donee has no legal title as regards property gifted by donor and consequently the gift is not enforceable by law. This section provides for two modes for making a gift, depending upon the nature of the property. In case of gift of movable property, the gift can be effected by delivery of possession of the same, whereas in case of immovable property, registration is essential for transfer of an immovable property by way of a gift.

Immovable property must be transferred by way of gift only through a registered document. The registration for the gift of an immovable property is essential irrespective of its valuation. The Supreme Court has held that in the absence of written instrument executed by donor, attestation by two witnesses, registration of the same and acceptance thereof by the donee, the gift of immovable property is not complete.

\textsuperscript{180} \textit{Cheria Kannan v. Karumpi}, AIR 1973, Ker 64.
In case of gift of movable properties, registration is not compulsory rather the same is optional. The gift of movable property is completed by delivery of the possession of the gifted property. As per section 33 of the sale of Goods Act, 1930 the mode of delivering the property to the donee depends upon the nature of the property. The only requirement is that the donee should get the title as well as the possession of the gifted property in case of movable property.

3.6.3 Revocation or Suspension of Gifts:

According to section 126 of the transfer of Property Act, a gift may be suspended or revoked. Section 126 further provides for two modes of revocation of gift which are as under:

- Revocation of gift by mutual consent of the donor and the donee.
- Revocation by rescission as in the case of contracts.

Prima Facie gift is a contract between both the parties and if they agree that it would be revoked on the happening of an event, the gift will be revoked on the happening of such an event.

Similarly, since gift is voluntary transfer of ownership of property in favour of donee by the donor, therefore, if it could be proved that the gift was not made voluntarily by the donor, then the gift must be revoked. Gift is always preceded by an express implied contract i.e. offer by the donor and acceptance by the donee. Therefore, if the preceding contract itself is rescinded then there is no question of taking place of gift under it.

3.7 Whether will is a mode of transfer of property:
Since a will takes effect from the death of the testator, it is not a transfer *inter vivos*, or between living persons, but is from a person, who is dead to the legatee and therefore, it will not be subject to the provisions of the Transfer of Property Act. It would be governed by the rules provided wider the Indian Succession Act, 1925. The question whether the acquisition of property or title through a testamentary disposition amounts to transfer of property has come up in several cases.

In *N Ramaiah v. Nagaraj S.*\(^{181}\) a person died leaving behind his wife W, and his brother's son, his nephew Br S. The nephew applied to the court for grant of letters of administration and claiming that the deceased had left his total properties in his favour under a Will. This claim was contested by the widow W, on the ground that the Will was a forged document, and she, as the legally wedded wife of the deceased was entitled to the total properties. The nephew sought and obtained a temporary injunction from the court to the effect, preventing or restraining the widow from transferring or alienating the suit properties till the case was decided by the court on merits. The widow was therefore asked to maintain the status quo with respect to these properties. Six months later, the widow executed a Will of these properties in favour of her brother and died three months later while the suit relating to be title dispute was pending in the court. Her brother applied for substitution of his name in the place of the testatrix. Br S, objected to this substitution on the ground, that as the widow was specifically directed by the court not to transfer

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\(^{181}\) AIR 2001 Kant. 395.
or alienate the property and was to maintain the status quo.
a transfer of property, under a will, so as to create rights in
a third party would be against the order of the court and
hence void, and such a transferee therefore would have no
locus standi to be substituted in place of the deceased
testatrix. The main issue before the court was whether
execution of a will amounts to a ‘transfer’ or alienation
within the meaning of the Transfer of Property Act, If it
does, then the execution of will was against the express
directions of the court, and would be void. Consequently,
the legatee tinder a void Will would have no right to
substitution. But, if a Will is nor included as a mode of
transfer within the meaning of s. 5, then the legatee tinder
this valid Will, would be entitled to step into the shoes of
the testatrix, and continue the litigation. The court held
that by making a Will, a testator neither changes title or
possession in regard to a property. Neither is the nature or
situation of the property altered, nor is anything removed or
added to the property, by such Will. Pointing out the
distinction between a transfer and a Will, the court said:

...the difference between a transfer and a
Will are well recognised. A transfer is a
conveyance of an existing property by
one living person to another (that is
transfer inter vivos). On the other hand, a
'sill does not involve any transfer, nor
effects any transfer inter twos, but is a
legal expression of the wishes and
intention of a person in regard to his
properties winch he desires to he carried
into effect after his death. Its other
words, a Will regulates succession and
provides for succession as declared by it
(testamentary succession) instead of
succession as per person law (non testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a Will, he provides for testamentary succession and clues not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus, to treat a devise tinder a Will, as a transfer of an existing property in future is contrary to all known principles relating to transfer of property and succession.

The court therefore, held that a Will does not amount to a ‘transfer’ within the meaning of s. 5 of the Transfer of Property Act, and allowed the legatee to pursue the litigation on behalf of the testatrix.

In Kenneth Solomon v. Dan Singh Bawa, the issue again was, whether devolution of interests in property through inheritance or testamentary succession (Will) would amount to transfer of an interest in the immovable property within the meaning of s. 5 of the Transfer of Property Act. The dispute related to the tenancy rights of the tenant, which he had bequeathed in favour of his heirs. On his death, the beneficiaries under his Will took possession of the tenanted premises as the contract of lease was still subsisting. The landlord filed a suit for eviction on the ground, that this transfer of the premises amounted to a violation of the provisions of the Delhi Rent Control Act,

1958, as the tenant had ‘parted with possession’ of the premises in dispute without the permission of the landlord.

The Delhi High Court here differed with the Karnataka High Court’s judgment and observed:

*Will is the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. One characteristic of the Will as distinguished from other kinds of instruments disposing of property is its revocable nature as it is ambulatory until the death of the testator. Till the death of the testator, it is barely an expression of intention to deal with the property in a specific manner, but the moment the testator dies, it has the effect of vesting the property, that is the subject matter of the bequest on the beneficiary. At that point of time, it would have the same effect as a transfer of possession by sale or mortgage. The process of parting with possession thus starts on the execution of the Will, but matures only on the death of the testator. The tenancy rights disposed under a Will would vest in the devisee immediately on the death of the testator.*

Holding here that a violation of the lease agreement had taken place by bequeathing tenancy rights, the legatee under the Will was directed to vacate the premises.

What is pertinent to note here is the fact that the two cases, though related to testamentary succession, differed fundamentally with each other. The main issue in *Ramaiah’s case* was whether bequeathing of rights under a will, amounted to transfer/alienation of rights under the
Transfer of Property Act, which the court answered in negative. In the present case, the issue was whether a person ‘pans with possession’ of the property through a devise of will, and not whether such parting of possession amounts to a transfer within the meaning of s. 5 of the Transfer of Property Act.

The court itself explained it in the following words:

The transfer of property according to the definition given in Section 5, of the Transfer of Property Act, means an act by which a living person conveys property in present or future to one or more other living persons or to himself and one or more other living persons. True, these words exclude transfer by Will, for a Will operates after the death of the testator.

In relation to the violation of the tenancy contract, the court said that the act of making a will, by itself, would not amount to parting with possession of the premises, as a will by its very nature is revocable, and does not vest possession, or for that matter any right in the legatee. Through a will, a person parts with possession only after his death, and therefore, though vesting and divesting of the rights in the property take place, the moment the testator dies, the whole transaction would be governed by the relevant succession laws and not by the provisions of the Transfer of Property Act.

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