

# GENERAL PRINCIPLES OF PROPERTY LAW

## CHAPTER - I

### Introduction:

Everything on earth was originally no man's property ("Res Nullius"). The Roman Doctrine of "Occupancy" may be treated as one of the natural modes of acquiring property i.e. a thing not previously belonging to anyone being occupied as one's property by taking possession of it

A similar idea of 'occupancy' is describable in the early Hindu Jurisprudence. Manu refers to this concept of property right in his quotes as a principle, "yield belongs to him who cleared away the timber". According to Hindu common law a right to the possession of land is acquired by the first person who makes a beneficial use of the soil

### Property means ownership

In common parlance, the term property is used to signify the thing over which a right of ownership subsists

It is by no means easy to define 'ownership'. Sir John Austin in his lectures on jurisprudence describes it as a right availing against the world (jus in rem)

### Classification:

Property is broadly classified into two kinds viz ,

- (i) Corporeal and
- (ii) Incorporeal property

'Corporeal property' is a right of ownership on material things or tangible things. It means things that can be touched and seen

'Incorporeal Property' means all other rights except over a material thing. It cannot be seen or touched. Eg. Trade mark, copy right, good will etc

### Corporeal property:

It is further divided under the following two heads

- (i) Movable
- (ii) Immovable

'Movable' property means property that can be moved from one place to another

'Immovable property' means property, which cannot be moved freely. "Immovable property does not include standing timber, growing crops or grass

We can find the working definition of immovable property in the General Clauses Act, 1897 to the following effect "immovable property includes lands, benefits arise out of land and things attached to the earth"

The expression 'attached to earth' means

- (a) Rooted to the earth, as in the case of trees and shrubs
- (b) Imbedded in the earth, as in the case of walls or buildings or
- (c) Attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached ( Section 3 of the Transfer of Property Act, 1882)

### Incorporeal property.

The rights over incorporeal property are further divided as

- (a) 'Right in propria' – right of ownership over material things or corporeal property
- (b) 'Right in re aliena' – right of ownership over all things whether material or immaterial things

### OWNERSHIP.

As we have seen earlier 'property means ownership' It is a right to own a particular thing

#### Characteristic of ownership:

According to Austin, the three chief characteristic of ownership are

- (i) Indefinite in the point of user
- (ii) Power of disposition and
- (iii) Perpetual interest

The first characteristic of ownership is that it is indefinite in point of user which means right of use of an owner is absolute. However, everyone has to use his land in such a way as not to harm other i.e. without injuring the rights of any person.

The second characteristic of ownership is that it is unrestricted in point of disposition. The owner may transfer his property to another either by an instrument which takes effect during his lifetime, or by a testamentary instrument, which becomes effective on his death.

The third one is that it is unlimited in point of duration. It is capable of existing so long as the thing owned exists.

#### Classification of ownership

- (i) Corporeal and incorporeal ownership
- (ii) Sole and co-ownership
- (iii) Legal and equitable ownership
- (iv) Vested and contingent ownership

"Corporeal ownership" refers to ownership with regard to material thing like land, goods etc

"Incorporeal ownership" refers to ownership with regard to immaterial like reputation, trade mark, copy right etc

"Sole ownership" refers to ownership vested with only one person

“Co-ownership” is used when more than one person shares ownership

“Legal and equitable ownership” – when ownership is recognized by law, it is legal ownership and if it is recognized by equity, it is known as equitable ownership

“Vested ownership” – a person is said to be a vested owner if the title to the property is already perfect. Eg. In a sale, if the purchaser ‘B’ (transferee) paid the entire sale amount and the seller ‘A’ (Transferor) transferred the title in favour of the transferee then ‘B’ is said to be the vested owner of the property

“Contingent ownership” – when the title to the owner is yet incomplete but is capable of becoming perfect on the fulfillment of some condition or become absolute on the happening of some future uncertain event, it is called contingent ownership. For example, if X agrees to transfer a property to Y if he marries his daughter Z, then the ownership of Y is contingent on the happening of his marriage with Z

### Modes of acquiring ownership

Property can be acquired by the following four methods

- (1) Possession
- (2) Prescription
- (3) Agreement
- (4) Inheritance

### POSSESSION

The term ‘Possession’ express the physical relation of control exercised by person over a thing. Salmond defines possession as ‘the continuing exercise of a claim to the exclusive use of it’

### Essentials

- (1) Physical element and consists in physical control over the thing is known as ‘corpus possessionis’
- (2) Mental element which consists in the determination to exercise that control named as ‘animus possidendi’

### Corpus possessionis.

It consists in the existence of physical power to exclude foreign interference and secure the enjoyment of the thing to oneself. This corpus is required for the commencement of possession. However, this physical power need not to continue in relation to a possession once acquired

### Animus possidendi.

It consists of the mental element in the conception of possession. Positively, it is an intention to exclude foreign interference. However, in certain circumstances the mental intention to use need not be over one’s own property. For example, a servant may have the intention to use a thing on behalf of his master and an agent on behalf of the principal. Though the property does not belong to the servant or agent, still the animus possidendi or his mental intention to use is valid

### PRESCRIPTION.

Prescription is a right which can be acquired only when a person enjoys a right peaceably without the intervention of any person for a continuous period over the property of another. If it is enjoyed for a prescribed period then it becomes absolute

According to Salmond, owners are usually possessors and possessors are usually owners. The longer the possession continued the greater is its eventual value.

Prescription is of two kinds viz,

- (i) Positive or acquisitive prescription
- (ii) Negative or extinctive prescription

'Positive prescription' means the creation of a right by lapse of time.

'Negative prescription' is destruction of a right by the lapse of time.

Long possession creates rights and long want of possession destroys them. The two forms of prescription may coincide i.e. what one man loses, another man gains.

### Agreement

According to Paton, 'an agreement is the expression by two or more persons communicated by each to the other of a common intention to effect legal relationship between them'. Agreement is the result of bilateral act. It transfers existing rights from one owner to another. Some agreements require formal registration and attestation and others may be verbal and informal.

### Inheritance

When a person dies, certain rights survive and pass on to his heirs and successors. The rights that survive even after his death are called heritable or inheritable rights.

Succession to the property of a deceased person may either be testamentary or intestate.

'Testamentary Succession' arises if a person dies by leaving a Will and in such an event, the property will be disposed of as per his direction in the will.

'Intestate Succession' arises when a person died without leaving a Will. In such cases the property will be inherited by his heirs as per the provisions available under various enactments like Indian Succession Act, 1925, Hindu Succession Act 1956 etc.

### Ownership of land and soil:

When we discuss about the immovable property, the following kinds of property will also be included-

- (i) A determinate portion of the earth's surface
- (ii) The ground beneath the surface down to the centre of the world,
- (iii) A reasonable space above the surface necessary and sufficient for the free beneficial enjoyment of the surface of land
- (iv) All objects above or under the surface in its natural state, like minerals and vegetation forming part of the land

### Possession:

Possession is the prima facie evidence of the title of ownership. Transfer of possession is one of the chief modes of transferring ownership. The concept of possession has grown gradually in the course of many centuries. The definition and ingredients of Possessions are (a) corpus possessionis – physical control and (b) animus possidendi- mental element.

## Modes of acquiring possession

Transfer or acquisition possession can be done in three ways viz ,

- (i) By taking
- (ii) By delivery and
- (iii) By the operation of law

### Taking

Possession without the consent of the previous possessor is 'taking' Wrongful possession of movable property is civil wrong and if it is done with intention it falls with the definition of 'theft' 'Taking' can be done only on movables When a person enters into the land in possession of another, it is termed as 'trespass', which means unlawful interference with the property of another

### Delivery.

Another way of acquisition of possession is by delivery or 'tradition' In such a case, a thing is acquired with the consent and co-operation of the previous possessor

The following are the two kinds of delivery

- (i) Actual delivery and
- (ii) Constructive delivery

'Actual delivery' means immediate possession being given to the transferee by physical handing over the property

'Constructive delivery' means that the delivery of possession is not direct or actual There are certain things, the physical handing over of which is not possible E g Handing over the key of a bungalow is a constructive delivery as the physical handing over of the property is not actual possible

### Transfer by operation of law:

When a person dies, the possession is transferred from the deceased person to his legal heirs When a person is declared insolvent, his property will vest with the Official Receiver or Assignee. Such transfer is known as transfer by operation of law

### Kinds of possession.

- (a) Immediate and mediate possession
- (b) Corporeal and incorporeal possession
- (c) Representative possession
- (d) Concurrent possession
- (e) Adverse possession

'Immediate possession' is also called as 'Direct possession' When possession is held directly by a person it is called immediate possession For example, if 'A' give cash and get things directly from the shopkeeper, it is immediate possession

'Mediate possession' is a relation through the intervention or agency of some other person. Eg If 'X' sends his son 'Y' to get a pen from the shop. The possession of 'X' is mediate through 'Y'. But when 'Y' hand over the pen to his father, his possession also becomes immediate.

'Corporeal possession' is the possession of a material object and 'Incorporeal possession' is the possession of anything other than material object and 'Incorporeal possession' is the possession of anything other than material object.

'Representative possession' is one in which the owner has possession of a thing through an agent or a servant. The real possession is that of the actual owner and not that of the representative.

'Concurrent possession' is the possession of a thing in the hands of two or more person at the same time. Eg Co-owners i.e. if A, B, C are three brothers who purchased a land jointly in their name, they are called co-owners and they can have concurrent possession.

'Adverse possession' means to acquire adverse possession, there must be a possession by invasion of the ownership of another. However, the acts of possession should be actual, Exclusive and adequate in continuity and must be exercised without violence and without getting permission. i.e. when it is had for the period laid down by law, it extinguishes the title of the true owner and creates a title in the adverse possessor.

### DISTINCTION BETWEEN POSSESSION AND OWNERSHIP

Possession is the external realization of ownership. It is a valuable piece of evidence to show the existence of ownership. Possession is the 'de facto' counterpart of ownership. Both differ in their mode of acquisition. Transfer of possession is less technical, but the transfer of ownership involves a technical process of Conveyancing. The difference between them may be the degree and not on concepts.

### IMMOVABLE PROPERTY -

Property can be classified as movable property and immovable property.

"Movable property" means property which can be easily movable from one place to another.

Eg Books, chair, timber, Etc

### Definition- immovable property -

Sec 3 of the TP Act defines, "immovable property does not include standing timber, growing crops and grass"

sec 2 (6) of The Registration Act, 1908 defines as "Immovable property includes land, buildings, hereditary allowances, right to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass"

Sec 3 (26) of The General Clauses Act, 1897 defines, "immovable property includes land, benefits arise out of land and things attached to the earth" The transfer of property Act has supplied the definition of the expression "attached to the earth" in para 6 of Sec 3 as follows

The expression "attached to earth" means -

(a) rooted to the earth, as in the case of trees and shrubs,

(b) Imbedded in the earth, as in the case of walls or buildings, or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached"

### “Rule in Marshall –vs- Green”-

In the above definition it is clear that land, buildings, benefits arise out of land like arrears of rent are immovable properties. Whether trees are movable or immovable? As long as they are rooted in the earth are immovable property and timbers are movables.

In \*Marshall –vs- Green 33 LT 404 there was a sale of trees to be cut and taken away immediately. It was held that the sale was related to movable. Since there is no benefit of further nutriment to be afforded by the land, the trees to be treated as timber as the intention is to cut and carry away.

\*Seenu Chettiar –vs- Santhanathan 20 Mad 58 (FB), a right to cut and enjoy trees was assigned for a period of four years. The question arose whether the document effecting this transaction required registration. If it was dealing with immovable property, it would have required registration. It was held that the parties contemplated further growth of the trees for four years and the purchaser was to derive benefit from this process of further vegetation. So the document related to immovable property and was held to be registered.

In \* Ansari –vs- Board of Revenue, AIR, (1959) A P 399 it was held that the right to take away beedi leaves, bamboos, and standing timber over a period of only one year is not immovable property.

In \* Ananda BEhara –vs- State of Orissa (1956) S C J 96 it was held that right to catch and carry away fish from lake is a benefit arising out of immovable property. So under General Clauses Act it is immovable property.

### DOCTRINE OF FIXTURES-

To understand under what circumstances a chattel (movable) becomes fixture (immovable) we have to understand the doctrines of fixtures. Under English law the doctrine of fixture is explained through two maxims.

(i) “*Quic quid plantatur solo, solo cedit*” means “whatever is planted in the earth becomes part of the earth and consequently whosoever owns that piece of earth will also own the thing planted”

(ii) “*Quic quid inaedificatur solo, solo cedit*” means “whatever is built into or embedded into or attached to soil becomes part of the earth and consequently, whosoever is the owner of that piece of land will also become the owner of the thing attached /built in or embedded”

### Indian law relating to fixtures -

The English law of fixtures does apply in India but with serious modifications. The maxim of English law, “*Quic quid plantatur solo, solo cedit*” does not generally apply in India. Here there are two rules that determine the entitlement issues, with respect to the things attached to or embedded in land by a person other than the owner. These rules apply only when this person was in lawful occupation of the property and not as trespasser.

- (i) The first rule is that he is entitled to remove the attachment if he vacates the premises provided he leaves the land in the same state as it was previous to the attachment.
- (ii) The second rule is that if he allows the attachment or improvement to remain on the land of the owner, so that the owner derives a benefit from it, he is entitled to compensation for the value of the attachment or improvement. This rule was laid down in *Thakoor Chunder –vs- Ramdhone* and subsequently approved by the Privy Council in *Narayan Das Khettry –vs- Jatindranath*, AIR 1927, PC 135.

And there are three tests to ascertain whether a chattel after attachment has become a fixture or not They are

- (i) Mode of attachment and consequences of its detachment
- (ii) Object or intention of attachment
- (iii) By whom attached

Refer cases -

Holland -vs- Hodgson (1872) 7 CP 328, 334

Leigh -vs- Taylor, (1902) AC 157 at 161

Md Ibrahim -vs- Northern Circars Fibre Trading Co, ILR (1945) Mad 304

Perumal Naicker -vs- Ramaswami AIR (1969) Mad 346

### ATTESTATION

Section 3 of the Transfer of Property Act defines "attested" in relation to an instrument means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and -by the direction of the executants, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary

Distinction between English Law and Indian Law -

| English Law   | Indian Law   |
|---|--|
| Both attesting witnesses are required to actually see the execution of the document | Witness may affix the signature after receiving mere personal acknowledgment |
| Both the witnesses should be present together                                       | Need not be present at the same time   |

Competency of attesting witnesses -

Transfer of Property Act does not stipulate any qualification for the competency of a witness An attesting witness must be a person who is competent to contract i.e. he must have attained majority and be of sound mind The witness must have 'animo attestandi' i.e. intention to attest

A scribe may also be an attesting witness provided the document is not executed by the scribe himself on behalf of the executants A party to the deed cannot attest An illiterate marksman may attest by his mark But a registering officer cannot be treated as an attestor

### TRANSFER OF PROPERTY:-

Definition -

Section 5 of the Transfer of Property Act defines transfer of property as "an act by which a living person conveys property, in present or in future, to one or more or other living persons or to himself and one or more living persons" In this section 'living persons' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals

Transfer should be between living persons (inter vivos) i.e. the transferor (the person who transfers his property) and transferee (person in whose favour the property is transferred). Therefore, conveying immovable property in favour of God Parthasarathy is not a transfer as transferee is not a living person.

### Conveyance of property:-

Conveying of property involves creation of new title or interest in favour of the transferee. A partition, a charge, a relinquishment, of reversionary rights by the reversioners, a surrender, a compromise, creation of an easement, are not transfers as they do not convey the property or an interest in the property. Since a Will takes effect from the death of the testator, it is not a transfer inter vivos, it will not be a subject under sec 5 of the TP Act. It would be governed by the rules provided under the Indian Succession Act, 1925.

### What may be transferred.- Sec 6

Though section 6 of TP Act is headed as what may be transferred, the provisions deal with property which cannot be transferred under the Act.

Under section 6, the following cannot be transferred

- a. Chance of succession (spes successionis)
- b. Right to Re-entry
- c. Easementary rights
- d. Service Inams
- e. Religious office
- f. Right to future maintenance
- g. Mere right to sue

#### a) Spes successionis

In earlier Hindu Law, Spes successionis means the interest of the reversionary heir expectant on the death of a Hindu female holding a limited estate (=A Hindu widow can only enjoy the property of her husband till her life time and does not have any right over the property like power of disposition etc). On her death the property reverts back to the heir of last male holder (reversioner) and not to her heirs. Until the property vests in the hands of a reversioner on the death of the widow her right is 'spes successionis'. Such right cannot be transferred.

#### b) Right to re-entry

In case of lease, the lessor may reserve to himself a right of re-entry on breach of a covenant by his lessee. This right cannot be transferred.

#### c) Easementary Rights

Usually a person is entitled to enjoy the right over his own property. But easement is a right over the property of another, which runs with land.

Eg. Right to way, right to light, air, water etc.

Suppose X purchased a back portion of a property from Y and if the public road can be accessed only through the front portion that is still held by the owner Y then X can enter into Y's land for right of way as

easementary right When the land moves from one person to another the right is also transferred from person to person (right in rem)

This easementary right cannot be transferred apart from the dominant heritage

d) all interests in the property restricted in its enjoyment to the owner personally cannot be transferred.

Sec 6 (dd) Right to future Maintenance

A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred This term 'whatsoever manner arising, secured or determined' is very exhaustive and covers cases where this right has been created either under a Will, deed or compromise

e) Mere right to sue

a mere right to sue cannot be transferred 'Mere' means that the transferee has acquired no interest than a bare right to sue A right to sue is again a personal right that only an aggrieved party can exercise to seek a remedy in the court of law Right of action for damages in tort or in respect of a breach of contract are bare rights to sue and cannot be transferred

Sec 6 (g) public office -

A public office cannot be transferred Similarly, the salary of the public officer cannot be transferred whether before or after it become payable 'Public officer' means a person who is appointed to discharge a public duty, and receives monetary returns for it in the form of a salary

In \*Raja Varma -vs- Ravi Varma,

Sec 6 (g)- stipends -

Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred Pension means periodical payments of money by the Government to the pensioner or allowance or any other periodical payments of money political pension refers to pensions and allowances paid to political prisoners or pension granted under a treaty entered into by the government of India with another sovereign country

Sec 6 (h)- transfer opposed to the nature of the interest -

No transfer can be made in so far as it is opposed to the nature of the interest affected thereby Thus, things dedicated to public or religious uses, regalia, heirlooms and debutter property or service inam cannot be transferred

**SEC 7 - PERSONS COMPETENT TO TRANSFER.**

The transferor should have competency to contract i.e he should be a person of sound mind (not being insane, lunatic or idiot) and have completed 18 years of age and not disqualified by any law for the time being in force Thus a person who is competent to contract can validly transfer the property if

- (i) He is the owner of the property,
- (ii) If he is not the owner, then must possess *authority* sustainable in law to transfer the same

The term 'authority' can be personal, under an agency or acquired under a law or statute or under the direction or permission from the court

In \*BC Mondal –vs- Indurekha Devi, AIR 1973 SC 782 , it was held that the agent managing the property of the principal is not competent to sell the property where the duties of a person extended only to collect the rent and manage the estate, it does not empower him to sell the estate

In \*Amirtham Kudumban –vs- Sarnam Kudumban, AIR 1991 SC 1256 it has been held that where a guardian of a minor sells his property without obtaining permission from the court, such a sale would be by a person not competent to transfer the same and the sale can be set aside

## **SEC 8 OPERATION OF TRANSFER -**

The clause 'unless a different intention is expressed or necessarily implied' shows that this section operates in absence of an express or implied contract between the parties. If the contract provides otherwise, the provisions of this section would not have any application. The rule enunciated here is designed to avoid confusion or speculations with respect to 'what, if any' in the, property passes with its transfer. Thus, the first thing would be to read the instrument as a whole to find the intention of the parties

For example, X' transfers a land on which there are trees or well. If nothing to the contrary is specified, the trees or the well would pass along with the land to the buyer

- (i) Where the property is land, it includes the transfer of easements annexed thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth
- (ii) Where the property is machinery attached to the earth, the movable parts thereof
- (iii) Where the property is house, the easement annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provide for the permanent use therewith
- (iv) Where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer

## **SEC 9 ORAL TRANSFER:-**

A transfer of property may be made without writing in every case in which writing is not expressly required by law

Prior to the enactment of TP Act, the primary condition for the transfer of property was the delivery of possession of the property. However, under the TP Act, transfer of every tangible property, reversion or other intangible things where its value is more than Rs 100, by mortgage (other than mortgage by deposit of title deeds) where the principal money secured by way of loan is more than Rs 100, or lease (a) from year to year or for a term exceeding one year or (c) reserving a yearly rent must be in writing and to be registered

## **SEC 10:- CONDITIONS RESTRAINING ALIENATION**

Where a property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with the disposing of his interests in the property, the condition or limitation is void. This is called Rule against Inalienability. However the transfer is valid if the condition imposes only a partial restraint and it is valid

### **Scope:**

The right of the transfer is incidental to and inseparable from the beneficial ownership of property. An absolute restriction on the power of transfer or prevents free disposition and circulation of property. Such

a restriction tends to create perpetuity, which is abhorred by law under section 14 (Rule against Perpetuity) of the Transfer of Property Act. Therefore, only the condition is declared void and transfer stands as valid

“An absolute restraint on alienation is void but a partial restraint is not”

#### Partial restraint on transfer

A condition only partially restraining the transferee from alienating his interest in the property is valid

e.g. (i) 'A' transfers property to 'B' on condition restraining the transferee from transferring to a stranger i.e. outside the family is only partial and not absolute and hence valid

(ii) 'A' transfers property to 'B' with condition that he should not sell the property to 'C'. Here 'B' has option to sell to anyone other than 'C' so the condition is partial and hence valid

#### Total restraint -

A condition which completely takes away the power of alienation of the transferee is considered to be total restraint. And thus the condition is void but the transfer is valid

If 'A' transfers property to 'B' on condition that 'B' shall not alienate it without obtaining A's consent, condition is void

Whether the restraint is partial or absolute has to be gathered from the intention of the transferor and from the contents of the document

#### Refer cases -

1. Mohammed Raza -vs- Abbas Bandi 7 Luck 257 (PC)

Condition - should not sell outside the family - valid

2. T V Sangam limited -vs- Shanmuga Sundaram, (1939) Mad 76

Condition - within family for a particular price - void

Followed the decision of In Re Rosher (1884) 26 Ch D 801 in which the condition was that the transferee should not sell the property to outsider during the lifetime of the transferor's wife 'A'. And if he wants to sell it, it should be only to 'A' and that too one fifth of the market value. It was held void

3. \*Attwater -vs- Attwater (1853) 52 E R 431

Condition - alienation is only within brothers - void (they are considered to be a class)

4. \*Sarju Bala -vs- Jvothirmoyee, 59 Cal 142 (PC)

Condition - donee should not convey the property by way of gift except to a limited extent for religious purpose - void

Section 10 applies only to transfer made by the act of parties and does not apply to sale under the Companies Act, nor to transfers by operation of law taking effect *in invitum* at a sale in execution of decree. Even though no transfer of right is contemplated in case of partition or family settlement, sec 10 of the Act does not apply

## Exceptions

There are two exceptions to the general rule that absolute restraint on power of the holder to dispose of or transfer his interest in the property is void. They are

- (i) Lease, where the condition is for the benefit of the lessor or those claiming under him
- (ii) Married women

## Lease

In the case of a lease if there is a condition that the lessee shall have no right to sublet or assign, the condition is valid even though the lease is a permanent one

## Married women:

This rule is applicable only to Christian women and not to Hindus, Mohammedans or Buddhists. So when a property is transferred to a Christian woman, a condition may be attached to the transfer to prevent her from alienating the property during her covertures

## **SEC 11 - RESTRICTION REPUGNANT TO THE INTEREST CREATED:-**

Once the property is transferred absolutely, the transferee acquires the right to possess and enjoy the property as an inherent right of the owner which is inseparable from the incidents of ownership. The transferor cannot dictate the transferee, how he should use the property. If he imposes any such restriction on enjoyment of the property by transferee, such condition is void. The transferee can enjoy the property as if there is no such condition

Illustration -

- (i) 'A' transfers his house to 'B' with the condition that 'B' would not demolish it. After purchasing the property B may retain or demolish it, and A cannot stop him from doing so
- (ii) X sells a field of land to Y with the condition that Y must grow vegetable/crops on it. After the transfer has been effected, Y may put it to any use he wants

## Condition postponing enjoyment -

Postponement during minority is valid

In \*Lloyd -vs- Webb, 22 Cal 44 – condition postponing enjoyment of property beyond minority of the donee is void for repugnancy

Exception - Para 2 of sec 11

If the transferor is the owner of another piece of immovable property, he may for the benefit of that property, impose restrictions on the enjoyment of the property transferred by him. (Refer Sec 40- Restrictive covenant)

## RESTRICTIVE COVENANT (SEC 40)

The general rule is that on a transfer of property condition restrictive of the enjoyment of the property should not be imposed on the transferee (sec 11)

## Two exceptions

Where there is neither privity to contract nor privity to estate the following two exceptions are enforceable

### Exception 1

If the covenant is intended to benefit another piece of land of the covenantee, then the benefit of the covenant runs with the land is the benefit that passes to an assignee of the land of the covenantee

In simple terms we can say that if any restriction or condition is imposed on a land for the enjoyment of another piece of land, then the condition runs with the land i.e. followed by persons whoever holds the land, for enjoyment of the proper of the original transferee

### Exception 2

If the covenant is one intended to benefit another piece of land of the covenantee and is annexed to his land and is of negative in character then even the burden of the covenant runs with the covenantor's land

### Restrictive/Negative covenant:

The burden of restrictive covenants runs with the land lies in equity though not at law. Such covenants are enforceable against everyone other than "a purchase for value without notice"

### Rule in Tulk -vs- Moxhay

The plaintiff owned a vacant site and an adjoining house. He sold the site to 'A' with a condition that it should be kept as an open site uncovered with buildings. The covenant was introduced for securing an uninterrupted view for the house retained by the plaintiff. It was thus for the benefit of the covenantee's house. The site was transferred to so many people and finally come to 'X'. X and his predecessors had notice of the covenant. Still X wanted to build on the site. 'A' sued in Equity to restrain X by an injunction. It was held that the covenant was negative in character and thus injunction was granted.

Also refer

In RE Nisbet and Potts contract

### Positive covenant:-

The burden of positive covenant does not run with the land either at law or in equity. So, if the covenant is positive in character, the transferee need not to fulfill the condition.

\*Austerberry -vs- Oldham Corporation

## SECTION 12:- CONDITION MAKING INTEREST DETERMINABLE ON INSOLVENCY OR ATTEMPTED ALIENATION.-

Section 12 provides that if the transferor includes a condition in the deed that the interest created in the transfer will be defeated if the transferee becomes insolvent, such condition would be void. The term 'defeated' implies that if the transferee becomes insolvent, the transfer would be treated as cancelled and the property would revert back to the transferor.

## SEC 13.- TRANSFER FOR THE BENEFIT OF UNBORN PERSON.

Section 5 of the TP Act provides that there can be no direct transfer in favour of a person not in existence and it can be done only between living persons. Therefore, an unborn person cannot be a party to a transfer.

Section 9 of the Indian Trust Act, 1882 also provides that a beneficiary under a trust must be person "capable of holding property"

The above two sections make it clear that a person not in existence can neither be a transferee of property nor a beneficiary under a trust until he comes into existence

Child in the womb or utero ("En ventre sa mere")

A person may be either in existence i.e. born or not in existence i.e. unborn. But difficulty arises in case of a child in the womb. However, Hindu law and English Law recognize a child in the womb to be in existence as is regarded to be potentially in existence. Under Mohammedan Law, property cannot be transferred to unborn person.

Section 13 and 14 of the TP Act lays down rules to be applied when a transfer is to be made in favour of an unborn person who is not in existence i.e. who is not even in utero (in the womb) at the date of transfer.

The rules are as follows.

- (i) The transfer cannot be made directly in favour of the unborn person
- (ii) Till the unborn person comes into existence, there should be a transfer in favour of a living person (prior interest to be created)

A —→ B (life) —→ C (unborn) valid

A —→ B (unborn) not valid

- (iii) The entire remaining interest of the transferor after the creation of the prior interest in favour of a living person should be given to the unborn person

A —→ B (life) —→ C (unborn- life) —→ D (unborn) void

A —→ B (life) —→ C (unborn- absolutely) valid

- (iv) The transfer should not be postponed to vesting of the property in the unborn donee beyond the attainment of majority

A —→ B (life) —→ C (unborn at the age of 25) Not valid beyond 18 years

Refer -

- (i) Tagore -vs- Tagore 18 W R 356 (PC)- alienation in favour of unborn is void ( valid after the Hindu Disposition of Property Act, 1916 came into force)
- (ii) Abdul Fara Mohammed -vs- Rasamaye 22 Cal 619 PC (under Mohammedan Law, transfer in favour of unborn is void. But according to Wakf Validating Act, 1913 if the ultimate beneficiary is Wakf, then valid)
- (iii) Sopher -vs- Administrator General of Bengal, (1944) PC 67

**SEC 14:- RULE AGAINST PERPETUITY:-**

'Perpetuity' means tying up property for an indefinite period. The Oxford dictionary meaning is "A restriction making an estate inalienable perpetually or for a period beyond certain limits fixed by law"

In early times, property will go on descending from generation to generation in the same family. To remedy this situation, the courts developed a Rule known as old Rule against perpetuity or Rule against Double possibilities

Rule in Whitby vs- Mitchel (rule against double possibilities)

A ———→B (bachelor for life)  
————→C (son of B for life)  
————→D (son of D)

In the above transfer, coming into existence of 'C' itself is a possibility and then to his unborn son is possibility upon possibility. It was held void.

As per sec 13 also, no life interest can be created in favour of unborn.

Under the rule, the landlords could give property to X for life then to his grandson as soon as he is born and then shift to the great grandson as soon as he is born as so on.

In this process, the property would always be in the hands of a minor and would be tied for a long time. The new rule against perpetuity rendered the old rule obsolete and superfluous. So the old rule was abolished.

### Principle.

Perpetuity may arise in two ways viz ,

- (i) By taking away the power of alienation from the owner of property
- (ii) By creating future remote interest in the property

### Essentials

- (a) There should be a transfer of property
- (b) Transfer should be to create an interest in favour of an unborn person
- (c) Interest so created must take effect after the life-time of one or more persons living at the date of such transfer and during the minority of the unborn person
- (d) The unborn person should be in existence at the expiration of the interest of the living person. i.e. if the unborn person has come into existence at the expiry of the last prior interest, the interest created in his favour shall be void.

### Modern English rule against perpetuity:

(perpetuities and Accumulation Act, 1964)

The English law of perpetuity differs from Indian Law. Under English Law, the period of perpetuity is fixed at life or lives in being and 21 years afterwards irrespective of the minority of the person entitled to the property. The transferor can specify any fixed period not exceeding 80 years.

## Evolution of modern rule against perpetuity.

Refer

Howard –vs- Duke of Norfolk

Lloyd –vs- Carew

Stephens –vs- Stephens

Thulluson –vs- Woodford

Cadell –vs- Palmer

### Child in womb

Suppose the transfer is to the child to be born to 'A' (then pregnant) for life Under English Law

Perpetuity period=life(or lives) + 21 years gross + period of gestation

It is noted that period of gestation can be added at both the ends of the perpetuity period

### Indian Law

Indian law does not recognize 18 years (Which is the age of attaining majority in India) as a gross period for the purpose of computing the perpetuity period Only the actual period for which the ultimate beneficiary (unborn at the time of transfer) remains a minor can be considered

Perpetuity period = life (or lives) + period of gestation + actual minority of the unborn ultimate transferee

Under Indian Law, period of gestation may be added only at its commencement

### Exceptions to the Rule against Perpetuity:

Rule against shall not apply o the following cases

(i) charities Section 18 of the TP Act provides that restrictions in section 14 shall not apply in case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind

(ii) Payment of debt: where income of property is accumulated under section 17(2) (i) for the purpose of the payment of the debts of the transferor or any other person taking any interest under the transfer, such direction is not affected under Rule against Perpetuity

(iii) Rule does not apply to personal agreements or obligation

(iv) Mortgages: the rule has never been applied to mortgage and thus a clause postponing the mortgagor's right to redeem the property is no invalid merely because the right is postponed for a longer period than the perpetuity period

(v) Covenant running with land Since it is annexed to the land and passes with it in much the same way as the title deeds of property, a covenant which runs with the land is free from any taint of perpetuity

## SEC 15 CLASS GIFT -

If, on a transfer of property, an interest therein is created for the benefit of the class of persons with regard to some of who such interest fails by reason of any of the rules contained in section 13 or 14, such interest fails in regard to those persons only and not in regard to the whole class

Under sec 15 as it originally stood none of the members of the class could take the benefit under such situation This section was amended by Act 20 of 1929 Under the amended section those who are unaffected by sec 13 or sec 14 can take the benefit though some members cannot take the benefit

Refer -

- (i) Leake -vs- Robinson
- (ii) Bagabathi -vs- kalicharan
- (iii) Anirudhha -v- Administrator General

## SEC 16. TRANSFER TO TAKE EFFECT ON FAILURE OF PRIOR INTEREST.-

According to sec 16, if, due to violation of the rules specified in ss 13 and 14, a specific transfer fails and any interest that is intended to take effect after or upon the failure of such transfer also fails

Illustration -

A ———→ B (life) ———→ C (unborn- life) ———→ D (unborn)

Here the prior interest in favour of C fails as affected by sec 13 The subsequent interest in favour of D also fails

## SECTION 17. DIRECTION FOR ACCUMULATION -

- (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than
  - (a) The life of the transferor or
  - (b) A period of 18 years from the date of the transfer

Such direction shall be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid period And at the end of such mentioned period the property and income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed

Exception -

Under the following the circumstances the period may be beyond the accumulation period mentioned in clause (1) of sec 17

Sec 17 (2) (i) the payment of the debts of the transferor or any other person taking any interest under the transfer or

- (i) The provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer or
- (ii) The preservation or maintenance of the property transferred

## SECTION 18: TRANSFER IN PERPETUITY FOR BENEFIT OF PUBLIC:-

The restrictions under sections 14,16 and 17 shall not apply in case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to the mankind

The rules regarding remoteness and perpetuity and against accumulation of income do not apply if the same is for the benefit of the public

The term mankind shows that the beneficiaries under the transfer must be unspecified class of persons generally and cannot be specific individuals, related or unrelated to the transferor. It means community as a whole with reasonable classifications

A settlement where funds are to be accumulated even in perpetuity for feeding poor pilgrims, for buying a public hall, for creating a welfare fund for the advancement of visually, physically and mentally challenged would be valid

As far as religion or its advancement is concerned, gifts or settlements for establishment of an idol and its worship [Bhupathi Nath –vs- Ramlal, (1909) 37 Cal 128], for performance of religious ceremonies [Prafulla –vs- Jogendra Nath, (1905) 9 Cal WN 528], for celebrating religious festivals, or creation of Wakfs [Fazlul Rabbi –vs- State of West Bengal, AIR 1965 SC 1722] are valid even if they offend the rule against perpetuity

## SEC 19: VESTED INTEREST:-

The following essentials to be fulfilled for invoking sec 19.

- (i) Interest is to be created in favour of a person *without specifying time* (future event) when it is to take effect
- (ii) Specifying that it should take effect *on happening of an certain event* which must happen

If the above essential are fulfilled, then the interest is vested in favour of the person on the happening of the event specified

Illustration .

X transfers his property to Y for life and then to Z here the interest is vested in favour of Z which would take effect on the death of Y, which is a certain event

## SECTION 20: WHEN UNBORN PERSON ACQUIRES VESTED INTEREST ON TRANSFER FOR HIS BENEFIT:-

Where a property is transferred in favour of a person not then living, he acquires vested interest on his birth though he may not be entitled to the enjoyment thereof immediately

## SECTION 21. CONTINGENT INTEREST.-

The following essentials to be fulfilled for invoking sec 21

- (i) Interest is to be created in favour of a person *without specifying time* (future event) when it is to take effect
- (ii) Specifying that it should take effect *on happening of an uncertain event* or if a specified uncertain event, shall not happen

Such interest becomes vested interest in the former case on the happening of the event and in the latter where the happening of the even becomes impossible

Both vested and contingent interests are transferable. Vested interest is heritable which means that it is not defeated by the death of the owner before the interest falls into possession

Illustration -

X transfers his property to Y for life and then to Z. If Z predeceases Y, Z's heirs are entitled to inherit the property on the death of Y

#### SECTION 22.- TRANSFER TO MEMBERS OF A CLASS WHO ATTAIN A PARTICULAR AGE -

Where on a transfer of property an interest therein is created in favour of 'such' members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age

#### SECTION 23.- TRANSFER CONTINGENT ON HAPPENING OF SPECIFIED UNCERTAIN EVENT:-

Where on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain even shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time, as the intermediate or precedent interest ceases to exist

This section is based on the principle that "*Property should at all times vest in some person and should not be without an owner*"

Illustration

Suppose property is given to A for life and then to B if he marries X. 'A' dies before B has married, B's interest fails

#### SECTION 24 TRANSFER TO SUCH OF CERTAIN PERSONS AS SURVIVE AT SOME PERIOD NOT SPECIFIC -

Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate and precedent interest ceases to exist

Illustration -

'A' transfers property to 'B' for life and then to C and D equally to be divided between them, or to survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D

#### CONDITIONAL TRANSFER. Sec 25

Section 25 provides that an interest created on a transfer of property and dependent upon a condition fails, if the condition is

(a) Impossible to be performed or

E.g. 'A' lets a farm to 'B' on condition that he shall walk a hundred miles an hour. The lease is void

(b) Forbidden by law or

E.g. 'A' transfers Rs 5000 to 'B' on condition that he shall murder 'C'. The transfer is void

- (c) Of such a nature that if permitted it would defeat the provisions of any law or
- (d) Fraudulent or
- (e) Involves or implies injury to the person or property of another or
- (f) The court regards it as immoral or opposed to public policy

e.g. 'A' agrees to transfer rupees 10,000 to his niece 'B', if she deserts her husband. The transfer is void.

Under this Act, a property may be transferred either without any condition or subject to any condition. When property is transferred without any condition the transferee immediately acquires interest in it. But when it is transferred subject to a condition, the interest of the transferee in the property depends upon the following two factors viz.,

- (i) Legality of the condition imposed and
- (ii) Fulfillment of the condition

The conditions so imposed may either be a

- (a) Condition precedent or
- (b) Condition subsequent

#### SEC 26- CONDITION PRECEDENT.

If the condition is one which must be fulfilled before the transferee acquires an interest in the property, it is condition precedent. The condition shall be deemed to have been fulfilled if it has been substantially (as far as possible) complied with (Rule of Cy pres)

#### Illustration. -

(a) 'X' transfers his property 'Blackacre' to 'Y' on condition that he shall marry with the consent of A, B and C. C died. Y married with the consent of A and B. Y is deemed to have fulfilled the condition.

(b) In the previous illustration, if Y marries without the consent of A, B, and C but obtains their consent after the marriage, Y has not fulfilled the condition.

#### SECTION 29: CONDITION SUBSEQUENT:

If the condition is one which is allowed to be fulfilled by the transferee after he has taken the interest in the property, it will be condition subsequent. A condition on its non-fulfillment terminates a vested interest and re-vests to the grantor or to any other person as per his direction.

#### Illustration -

'A' transfers his property 'B' (minor) with condition that on his attainment of majority he shall marry 'C' with the consent of 'X'. If B dies minor or marries without X's consent the said property shall go to D. B marries when only 17 years of age and without X's consent. The transfer to D takes effect.

Note - write sec 26 and 29 together if the question asked is "Law leans in favour of vesting and against divesting"

## Distinction between condition precedent and condition subsequent

| S No | Condition Precedent  | Condition subsequent   |
|------|--|--|
| 1    | By the fulfillment of the condition an estate not previously vested, becomes vested      | By the non fulfillment of the condition, an estate previously vested becomes divested          |
| 2    |  |  |
| 3    | If fulfillment is impossible, both the condition and the estate limited upon it are void | If fulfillment is impossible, the condition fails and the previous estate becomes indefeasible |
| 4    | Substantial compliance is sufficient (Doctrine of Cy Pres)                               | Requires strict fulfillment  |
|      | If condition is illegal, the estate limited upon it fails                                | If condition is illegal, the previous estate becomes indefeasible and the condition is ignored |

## SECTION 27 CONDITIONAL TRANSFER TO ONE PERSON COUPLED WITH TRANSFER TO ANOTHER ON FAILURE OF PRIOR DISPOSITION: (DOCTRINE OF ACCELERATION)

Where on a transfer of property, an interest therein is created in favour of one person and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor

Where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner

Illustration -

(a) 'A' transfers property to B on condition that he shall execute a certain lease within three months after A's death and if he neglects to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect [ \*Avelyn -vs- Ward (1750) ]

In \*Ajudhia -vs- Rakhman, 10 Cal 482, there was a bequest to the wife for life and a remainder to her children. The gift to the wife failed under a local Act for want of registration. The result was the acceleration of the gift to the children

(b) 'A' transfers property to his wife, but, in case she should die in his lifetime, transfers to B that which he had transferred to her. 'A' and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect

## SECTION 35. DOCTRINE OF ELECTION -

This doctrine is an exception to the maxim,

'Nemo dat quod non habet' which means, that "No one can convey a better title than what he has" i.e. a person cannot convey anything which is not in his possession. For competency to make a transfer, a transferor should have title to the property or authority to transfer

Other exceptions are

- (i) Doctrine of holding out (sec 41) and
- (ii) Feeding the grant by estoppel (sec 43)

Conditions to be fulfilled before the doctrine of election can apply

- (i) The transferor should dispose of property which he has no right to transfer
- (ii) The transferor should confer a benefit out of his own property on the owner of the property which he professes to dispose of
- (iii) The disposition of the property and the conferment of a benefit on its owner should be by parts of the same transaction
- (iv) The transferee put to election should have an independent proprietary right in the property dealt with to his detriment by the transferor.
- (v) The beneficiary's proprietary right should be such that the dispositions of the instrument can be perfected if he waives his objections

When these conditions are fulfilled, the transferee is put to election that is required to accept the transfer in toto or reject in toto

For any transaction, minimum two parties are sufficient. For doctrine of election, minimum requirement is three parties

Illustration -

The farm of Blackacre is the property of C and worth Rs 8 lakhs. 'A' by an instrument of gift professes to transfer it to B, giving by the same instrument his property Whiteacre worth Rs 10 lakhs to C. Now 'C' is put in election.

English doctrine of election is based on the principle of compensation i.e. if the person put in election does not like to transfer his property and also wants to retain the property of the transferor, he can retain both and pay compensation for the property. The compensation amount cannot be recovered personally but it is made a charge upon Blackacre.

Indian doctrine is based on forfeiture i.e. he cannot retain both the properties. If he does not want to give his property, he cannot retain the property of the other. If he chooses against the instrument, he is called refractory donee and the transferee is called disappointed donee. The transferor or his representative is liable to make good to the disappointed donee.

If he does not elect within one year, it is deemed to be elected. In case of disability, the election shall be postponed until the disability ceases or until election is made by some competent authority.

Refer \*Cooper -vs- Cooper (1874) L R 7 HL 53

## SEC 41- TRANSFER BY OSTENSIBLE OWNER:

### DOCTRINE OF HOLDING OUT

If any person holds an immovable property with the express or implied consent of the person interested in immovable property that person is the Ostensible owner of such property. When the Ostensible owner

transfer the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it

But the following two conditions are to be followed

- i) The transferee should purchase the property after taking reasonable care to ascertain that the transferor had power to make the transfer and
- ii) He must have acted in good faith

Case – Law :

- Ram comer – Vs-Mc Queen

Fact

Macdonald purchased the property but he took the sale deed in the name of his wife Bunno Bibee. She is said to be a benamidar, a lender or her name for the transaction. So, as between Macdonald and Bunno Bibee ownership is only in Macdonald. 'X' purchased the property from Bunno Bibee believing her to be the owner. He took possession. There was no objection by Macdonald. Later on Macdonald executed a will under which he bequeathed this property to the plaintiff. The plaintiff brought the suit to recover the property from the heir of 'X'. The Privy Council described Bunno Bibee as the apparent owner i.e. ostensible owner. She made the transfer for consideration. The purchaser was diligent had made reasonable enquiries and had acted in good faith. In these circumstances, said the Privy Council, the purchaser's title cannot be impeached and the transfer set aside simply because the transferor was not the real owner. The Doctrine of Holding out thus cured the infirmity in the title.

Effect of Sale by an Ostensible Owner.-

A transferee from the ostensible owner is protected against the real owner under the doctrine of holding-out embodied in Sec 41 of the transfer of Property Act.

Essentials

- (1) The transferor should be the ostensible owner of the property
- (2) The Ostensible owner should be holding the property with the express or implied consent of the real owner
- (3) The transferee should have paid consideration and acted with reasonable care and good faith

The onus is upon the transferee to show that he is a purchaser in good faith without knowledge of real state of title.

When the above conditions are satisfied, transferee from the ostensible owner is protected against the claims of the real owner.

Tests of Benami Ownership:

If 'A' buys property in the name of B, 'B' is called a Benamidar. As between A and B, 'A' is the real owner and he can get back the property from B at any time. 'B' is the Ostensible Owner so far as the outside world is concerned. The following are tests of benami, to find whether a person is a Ostensible owner of another's property.

- (1) Source of purchase money 'A' paid the consideration 'B' is only benamidar
- (2) Possession of property (If 'A' retains possession, though property is in B's name, B is presumably a benamidar)
- (3) Relationship of Parties
- (4) Pecuniary circumstances of transferee (If 'B' is financially unable to buy the property, he is presumably a benamidar)
- (5) Motive of transaction (Eg to put the property beyond the reach of creditors)
- (6) Custody of title-deeds (If 'B' is benamidar, usually 'A' keeps the title)
- (7) Previous & subsequent conduct of parties

### SEC 43 DOCTRINE OF "FEEDING THE ESTOPPEL"

Sec 43 of the Transfer of property Act deals with the transfer by unauthorized person who subsequently acquires interest in property transferred

#### Principle.

If a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property in which he has no present title, and professes to transfer such property for consideration, he cannot derogate from his own grant when he subsequently become entitled to the property

#### Illustration

'X' – a Hindu separated from his father 'Y', sells to Z three fields A, B and C, representing that 'X' is authorized to transfer the same. Of these three fields 'C' does not belong to X, it having been retained by Y on partition. But on Y's death 'X' as heir obtains property C. 'Z' not having rescinded the contract of sale, may require 'X' to deliver 'C' to him.

#### Conditions.

The following conditions to be satisfied to invoke the doctrine are

- (i) The transferor should have made a fraudulent or erroneous representation
- (ii) The transferee should have acted on the representation
- (iii) The transfer should not have been for bidden by law
- (iv) Subsequent to the transfer and while the contract of transfer subsists, the transferor should have acquired an interest in the property

#### Whether illustration to S 43 is good law.

If the transfer is forbidden by law then this doctrine cannot be invoked for curing infirmity in the title. This is because there can be no estoppels against a statute.

In illustration, father Y is the owner of the field 'C'. But in the lifetime of Y, his son X sells this field to Z. Y subsequently died and X who till then had only a spes successionis becomes the owner. According to the illustration, Z can claim field C under the doctrine of feeding the grant.

(Doubts were expressed as to the soundness of the illustration) (Sec 6 of the TP Act has forbidden the transfer of Spes Successionis) X has transferred only a spes successionis How can he be stopped from claiming the property when the transfer is forbidden u/s 6 of the Act?

This doubt has been set at rest by the decision of the Supreme Court in Musjid Mercard-Vs-Devaiah AIR (1962) S C stating that, X represented that he was the owner and not that he was spes successionis So he is stopped from saying now that he was successionis is transferred as spes successionis and not when it is transferred as transferable property So the doctrine of feeding the grant was applied and the illustration to S 43 was held to be good law

Suppose 'X' had recited in the transfer deed that I will succeed to this property 'C' when my father Y dies I am receiving money now from you and I will deliver possession as soon as I become owner of on my father's death' In such case Z cannot rely upon the doctrine of feeding the grant When Y dies, X can retain the property for himself

But suppose 'X' had recited in the deed of transfer 'I am now the owner of the property I am transferring my ownership to you' Then when he becomes the owner on Y's death, Z can claim the property by relying upon the doctrine of feeding the grant

This doctrine is a rescue only when Z has acted in good faith There is no estoppel when the person to whom a representation is made knows it to be false and has not relied upon it in entering into the transaction

## SEC 52. DOCTRINE OF LIS PENDENS

Lis pendens means pendency of suit or legal proceeding The doctrine of lis pendens may be stated as "Pendent elite neither party to litigation can alienate the property in dispute to as to affect his opponent"

Illustration If right of property 'A' is in dispute between X and Y, then Neither X nor Y can alienate property to anyone till the dispute in property is settled

### Reason behind the Doctrine:

If 'X' alienated the property in favour of one Z and the suit is decreed in favour of his opponent V, again Y has to file a suit to recover the property from Z To avoid such situations, S-52 is clear that no alienation can be made during lis pendens

### Pendency of a suit. (Explanation u/s 52).

For the purpose of S-52, the pendency of a suit or proceeding shall be deemed to commence from the "date of presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction and it continues until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation, prescribed for execution thereof by any law for the time being in force

### ESSENTIALS -

For the doctrine of 'lis pendens' to apply the following conditions should be satisfied

- (i) The transfer should take place during the pendency of suit or proceedings
- (ii) The suit or proceeding should be pending in a court of competent jurisdiction
- (iii) The suit or proceeding should not be collusive

(iv) A right to immovable property should be directly and specifically in question in the suit or proceedings

(v) The transfer shall be made by one of the parties to the litigation without the authority of the court

\*Bellamy –vs- Sabine

### FRADULENT TRANSFER (SEC.53)

Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. But the right of a transferee shall not be impaired if he acted in good faith and bought the property for consideration

Any transfer made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with intent as to defraud, defeat or delay any creditor, good consideration does not suffice, if it be not also bonafide

### Conditions for setting aside fraudulent transfers.

If the transferee participated in the transferor's fraudulent design or intention to defeat and delay creditors, the transfer can be set aside even if it is supported by consideration. i.e. if the transferor had no such intention, it cannot be set aside even if the transfer is gratuitous

To claim the protection, the transferee should be able to show that

(i) He has acted in good faith and

(ii) He had paid consideration

When the consideration is not paid in full, the transfer is liable to be set aside (in total). It cannot be treated as voidable only to the extent to which it is unsupported by consideration

### Preference to one creditor –voidable.

S-53 does not apply if entire property of the debtor is transferred in favour of only one creditor for discharging his debt. So long as the debt of even one creditor is satisfied, there is no question of defeating all the creditors. Hence the creditor can invoke this section if the transfer is intended to take away the property from whole body of creditors and is made to a non-creditor them alone u/s-53

If the transaction is only benami or Sham or fictitious, a creditor can ignore it and need not set it aside. He can attach the property as that of his judgment debtor

### DOCTRINE OF PART PERFORMANCE (SEC 53-A)

In England, all contracts relating to land are to be in writing. Under the Statute of Frauds no action could be brought upon a contract for sale unless the contract or memorandum thereof was in writing. But the court of equity does not allow any party to effectuate a fraud by taking advantage of the contract not being in conformity to statutory requirements

Suppose 'A' orally agreed to sell his land Blackacre to B, received the price and put B in possession in pursuance of the agreement. Nevertheless he could not eject 'B' reduced to writing as required by Statute of Frauds. The reason for this position is a person cannot take advantage of the agreement not being in written form and having performed part of the Contract. This principle is known as doctrine of Part Performance

Under Sec 53-a, introduced by the amending Act of 1929, the following conditions should be satisfied

- (i) The contract should be in writing and signed by the parties. In England, even an oral contract is sufficient for the application of Part Performance.
- (ii) The transferee should take possession in furtherance of the contract.
- (iii) If the transferor was in possession even prior to the contract, he should continue in possession, and also do some other act in furtherance of the contract.

When the above conditions are satisfied, the transferor will not be allowed to evict the transferee from the property.

### Object of the Doctrine

We know well, "Sale Deed" and "Agreement to Sell" are two different kinds of instruments. In "Sale Deed", transfer of legal title is absolute. But in "Agreement to Sell", the legal title is still vested with the transferor. So an agreement for a transfer does not by itself create title, which can be done only by a separate instrument of transfer i.e. Sale Deed.

### Specific performance.

If two persons entered into a contract and one person performed his part of the contract, or willing to perform his part, he may require the other party to perform his part of the contract, which is enforceable through court of law.

### Application of Doctrine:

Suppose the proposed transferee has an agreement for a transfer in his favour, but the agreement is not admissible in evidence, that the right to specific performance is barred by time. Since the legal title is still with the transferor he can evict him in spite of agreement to transfer the property.

In this situation, doctrine of part performance comes to rescue the proposed transferee.

Sec 53-A of the act enables the transferee to sue for specific performance only if he can prove that he has "performed or willing to perform-his part of the contract".

### SPECIFIC TRANSFERS

Under specific transfers we shall discuss about various important transfers, which are very essential to know for documentation. The specific transfers discussed in the transfer of property act are

- i) Sale
- ii) Mortgage
- iii) Lease
- iv) Exchange
- v) Gift and
- vi) Actionable claims

## SALE SECS 54-57

Section 54 of the Transfer of Property Act defines the transaction of sale and lays down the formalities required for effecting a sale

### Definition

'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised' In other words the transaction of sale involves a transfer of ownership in consideration of a price

### Mode of effecting a sale.

There are two modes of transfer by sale-

- (a) Registered instrument
- (b) Delivery of property

### Registered instrument.

Under Section 54, the following transfers can be made only by registered instrument viz ,

- i) Tangible immovable property of value more than Rs 100/-
- ii) Intangible thing
- iii) Reversion

### Delivery of property

Sales of immovable property of small value are exempted from the requirement of registration In the case of tangible immovable property of a value less than one hundred rupees, a sale may be either by a registered instrument or by delivery of property Delivery of the tangible immovable property takes place when the seller places the buyer or such other person as the directions the possession of the property

### Contract for Sale

A contract for sale of immovable property is a contract that a sale of such property shall take place on terms settle between the parties It does not create any interest in or charge n such property by itself

In case of contract of sale, the ownership of property transfers to the buyer immediately when the sale takes effect But in contract for sale, the ownership will be transferred only when the terms entered into by the parties are satisfied

### Illustration

If 'A' agreed with 'B' to sell his land and entered into a 'Contract for sale' and later on has sold the property to C 'B' can challenge the sale through court of law and specifically enforce A to sell the property, provided, 'C' has purchased the property from 'A' for consideration and without the notice for as earlier contract for sale with B

Lord Hatherley observes in Shaw-vs-Foster (1872) The moment that contract for sale and purchase is entered into and the relation of vendor (seller) and vendee (Buyer) is constituted, the vendor becomes the equitable owner from the date of contract itself

### Effect of stipulations/conditions in a sale deed:

The transfer of ownership in a sale of immovable property is regulated by the contract between parties. If there is a contract between the parties that ownership shall pass only on payment of price and not earlier, the contract is valid. But when ownership has been transferred, the seller is only entitled to a charge for unpaid purchase money and the ownership cannot be made to revert to the seller when price is unpaid.

### Illustration:

If 'X' has entered into a 'contract for sale' with 'Y' of his property with a condition that 'X' transfers ownership to Y, on payment of half of the purchase money and the remaining amount of Rs 2 Lakhs shall be payable after a period of two months.

In this case, if 'Y' cannot be able to pay the balance amount the ownership cannot be made to revert to the seller. The seller 'X' is only entitled to a charge for unpaid purchase.

### RIGHTS AND LIABILITIES OF SELLER AND BUYER:

In the absence of contract to the contrary, the seller and buyer of the immovable property are subject to the following rights and liabilities.

#### SELLER: Rights

The seller is entitled to the rents and profits of the property till the ownership thereof passes to the buyer.

Where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hand of the buyer.

#### Duties.

Seller is bound to

- 1) Disclose any material defect in the property which the buyer is not aware of and which the buyer could not discover with ordinary care.
- 2) To produce all the documents of title relating to the property on the request of the buyer for examination. Which are in the seller's possession or power.
- 3) To pay all public charges and rent accrued due in respect of the property upto the date of the sale.
- 4) Between the date of the contract of sale and delivery of sale and delivery of the property, to take much care of the property and all documents of title relating thereto.

#### BUYER. Rights:

The buyer is entitled

- (i) To the benefit of any improvement in or increase in value of the property and to the rents and profits.

#### Duties

Buyers is bound to

- (i) Disclose to the seller any fact as to the nature and extent of the seller's interest in the property.
- (ii) Where the ownership has passed to him, to pay all public charges and rent become payable in respect of the property.

## Doctrine of Caveat emptor

The maxim 'caveat emptor' means "let the buyer beware" This is applicable to sale of goods. The meaning of the maxim is that "It is not the duty of the seller to point out the defects in the goods but he is liable only when the buyer totally relies upon the seller."

When we discuss about the applicability of the maxim for immovable property, it is applicable only to patent defects and not to latent material defects.

"Patent defect" is a defect, which is visible to the eye.

'Latent material defects, is internal defect or defects in the property which interferes with the enjoyment of the property.

But the maxim has no application to the defects in title.

### Unpaid vendor's Lien -

Under Sec 55 (4) (b) the vendor acquires a charge over the property in respect of the unpaid purchase money.

A → sells his property worth Rs 10 lakhs → B (paid only 8 lakhs to A)

Now charge will be created in favour of A, on the property for the unpaid 2 lakh rupees.

Refer Webb -v- Macpherson

### Vendee's lien on pre-paid purchase money.-

Sec 55 (6) (b) provides similar protection to the vendee for the pre-paid purchase money.

Refer Chiranjit -vs- Har Swarup

## MORTGAGES OF IMMOVABLE PROPERTY

The provisions relating to Mortgage and Charges are contained in Sec 58 to Sec 104 of the TP Act. It is dealt within Chapter IV.

Mortgage is a transaction which can be simply understood as "transfer of an interest in immovable property as security for a loan."

### Nature & Object.

When a person lends money to another without any security or under a contract and if the borrower fails to pay the same, the lender will have a right to sue for the money. But if the borrower becomes insolvent, he may lose part or all of his money. However, when some security of value is given for the loan, the lender will be protected and he can realize money from the property given by way of security.

### Mortgage & Pledge

Pledge is transfer of interest in movable property as security.

Mortgage is related to immovable property.

## Definition of Mortgage Sec 58.

“A mortgage is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or performance of an engagement which may give rise to pecuniary liability”

## Element of Mortgage.

The essential characteristics of a mortgage are

- 1 There must be a transfer of an interest
- 2 There must be specific immovable property intended to be mortgaged
- 3 The transfer must be made to secure the payment of a loan or to secure the performance of a contract

“Mortgagor” is the person who transfers property, ‘Mortgagee’ is the person to whom property is transferred. The principal money and interest of which payment is secured are called ‘mortgage money’. The instrument by which the transfer is effected is called “Mortgage deed”

## Essentials

### Transfer of an interest

The term ‘Transfer of an interest’ signifies that the interest that passes to the mortgagee is not ownership or dominion. If ownership is transferred it comes under sale and not mortgage.

Mortgage is simply a transfer of interest in the immovable property while the ownership still remains with the mortgagor. A mortgage creates a ‘right in rem’, in the sense such right is available against all subsequent transferees of the mortgaged property irrespective of the notice.

### Specific immovable property

The second requisite of a mortgage is that “immovable property” must be distinctly specified. The word ‘specific’ is to be distinguished from the term ‘general’. For instance, the term “my house or my land” is general which includes all the properties owned by a person. On the other hand, the words “a house situated in Chennai at Adyar owned by me” specific.

### Consideration of Mortgage

The third essential of a mortgage is that it must be supported by consideration. It may be either (i) money advanced or to be advanced by way of loan (ii) an existing or future debt or (iii) the performance of an engagement giving rise to pecuniary liability.

A mortgage is created for the purpose of securing a debt or other obligation. It should be noted that a transfer, which is made by way of discharging a debt, is not a mortgage.

A mortgage may be given not only for an existing debt or money advanced by also as a security against advances to be made in future.

The words “money advanced” includes existing debt and as well as a debt which has become barred by limitation.

‘Future debt’ means a debt, which may be incurred at any time after the mortgage. The following illustration may be helpful to understand the term pecuniary liability.

## Illustration

'A' borrows paddy from another cultivator 'B' and mortgages his field to secure repayment of the paddy and the payment of further add by way of interest. The engagement to return paddy is one that may give rise to a pecuniary liability and the transaction is also a mortgage.

## Effect of failure of mortgagee to advance amount undertaken:

Mortgage is not a mere contract. Therefore, sooner a valid mortgage deed is registered, and interest in the property mortgaged vests in the mortgagee, in the absence of contract to the contrary, though the mortgagee has not paid the mortgage money to the mortgagor. Once a document transferring immovable property has been registered, the transaction passes out of the domain of a mere contract and falls into one of a conveyance. Therefore, transaction of mortgage formally executed does not become void or ineffective merely because the mortgagee fails to advance the amount of money which he undertook to be advanced by him.

A mortgage must be distinguished from certain other transactions which resemble it. They are pledge, charge, lien and lease.

## Mortgage and Pledge:

A 'pledge' consists of a loan of money in return for the delivery of possession of chattels (movables) to the lender. In pledge, although the lender has certain powers of sale, the general property in goods remains in the borrower. The lender has immediate possession of the property pledged.

In a mortgage, the whole legal title in the property passes conditionally to the mortgagee and if the property is not redeemed (get back) at the time stipulated, the title becomes absolute.

In mortgage usually the possession is still vested with the mortgagor except in case of certain kinds.

## Mortgage & Charges:

For practical purpose, charge is regarded as a species of mortgage.

A mortgage is a conveyance of property subject to a right of redemption.

A charge conveys nothing but only gives certain rights to the charge holder, over the property concerned as security for the loan.

## Distinction:

1. Charge only gives a right to payment out of a particular immovable property without transferring any interest in it. But a mortgage conveys an interest in specific immovable property.
2. In a charge no right in rem is created. In mortgage, it is created.
3. Mortgage can be enforced against a bonafide purchaser for value with or without notice whereas charge cannot be enforced.

## Mortgage and lien.

A lien is the right to retain the possession of another's property until a debt is paid. Lien is a mere passive right of retention, giving no right to sell or otherwise deal with the property.

In simple, if any person 'X' in possession of 'Y's' property, he exercises the right of lien as if Y had been indebted to him. Possessory right is essential to exercise right of lien.

A mortgage confers an interest of legal character in the mortgagee and it is not always necessary that the mortgagee should have possession of the property.

### Mortgage and Lease:

Chapter V of the TP Act deals with the provisions of lease of immovable property, under section 105 to Sec 107

Sec 105 defines "Lease of immovable property is a transfer of a right to enjoy such property, made for certain time, express or implied, or in property, in consideration of price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transfer by the transferee, who accepts the transfer on such terms. It is clear from the definition that lease is a transfer of right to enjoy the property. It has nothing to deal about the title of the property. The transferor is the 'lessor' and the transferee is the 'lessee'. In lease property is not transferred by way of security for the payment of money borrowed.

The distinction or test to determine whether a document is a lease or mortgage is that whether the purpose of transaction is enjoyment of the property by the transferee or whether it is intended to secure the repayment of debt by the transferor. In the former case it is a 'lease' and in the latter it is a 'mortgage'.

### KINDS OF MORTGAGE.

Sec 58, Enumerates six forms of mortgage. They are

- (i) Simple mortgage [Sec 58(b)]
- (ii) Mortgage by conditional sale [Sec 58(c)]
- (iii) Usufructuary mortgage [Sec 58(d)]
- (iv) English Mortgage [Sec 58(e)]
- (v) Mortgage by deposit of title deeds [Sec 58(f)]
- (vi) Anomalous mortgage [Sec 58(g)]

### Simple Mortgage Sec. 58 (b)

"Where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage – money and expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage – money, the transaction is called a simple mortgage and the mortgagee is a simple mortgagee"

### Elements of Simple Mortgage

- (i) The mortgagor does not deliver possession of the mortgaged property to the mortgagee
- (ii) Expressly or impliedly the mortgagor agrees that in case of his failure to pay the mortgage money, the mortgagee shall have a right to sell the mortgaged property
- (iii) And the money so obtained shall be applied in payment of the mortgage money so far as may be necessary and if any amount is left unused, it will be returned to the mortgagor

In simple

- (i) No delivery of possession
- (ii) Personal undertaking
- (iii) Right to have the mortgaged property

It is to be noted that in a simple mortgage the power of sale cannot be exercised suit for recover of money must be filed within the limitation period of 12 years from the date when the money sued for becomes due

#### Mortgage By conditional Sale [Sec 58 (c)]

Where the mortgagor ostensibly sells the mortgaged property-

On condition that in default of payment of the mortgage-money on a certain date the sale shall become absolute or

On condition that on such payment being made the sale shall become void or

On condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee is called as a mortgagee by conditional sale

Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect a sale

#### Essentials of a mortgage by conditional sale:

In a mortgage by conditional sale, there must be a ostensible sale of immovable property, (it has an appearance of sale but it is really not a sale) with the condition that on the repayment of money on a certain date, the sale shall become void or the buyer shall retransfer the property to the seller or on the default of payment on that date the sale shall become absolute and that the condition should be embodied in the document

If a sale and an agreement to repurchase are embodied in separate documents, the transaction cannot be a mortgage, even though the two documents may be contemporaneously executed

Like a simple mortgage, in this case the mortgagor does not take a personal liability to pay loan The remedy of mortgagee by conditional sale is to sue for foreclosure only

Whether a deed is a mortgage by conditional sale or is a sale with condition or repurchase will be determined by the intention of the parties

#### Distinction:

| S No | Mortgage by Conditional sale   | Sale with a condition or repurchase   |
|------|--|---|
| 1    | Debt subsists and the right to redeem ie To pay off mortgage (Right to get back the property on payment of debt) remains with the debtor | No debt subsists and there is no right to redeem But simply a personal right of repurchase is reserved for the seller |
| 2    | A failure to fulfill the strict terms of the agreement is not immediately followed by a forfeiture of the mortgaged property             | The power must be excised strictly in accordance with the terms of the agreement                                      |
| 3    | The sale is only ostensible  | It is a real sale   |

## USUFRUCTUARY MORTGAGE [SEC 58(d)]

Where the mortgagor delivers possession expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest (or) partly in payment of the mortgage money the transaction is called an usufructuary mortgage and the mortgagee is called as a usufructuary mortgagee

The characteristics of the usufructuary mortgage are -

- (i) The possession of the property is delivered to the mortgagee
- (ii) The Mortgagee is to get rents and profits in lieu of interest or principal or both
- (iii) No personal liability is incurred by the mortgagor and
- (iv) The mortgagee cannot foreclose or sue for sale

Thus, in a usufructuary mortgage, the mortgagor hands over physical possession of the property to the mortgagee and does not take any kind of personal responsibility regarding the payment of mortgage money and interest. The mortgagee himself has to utilize rents and profits accruing from the property for the satisfaction of his mortgage entitled to remain in possession of property

In usufructuary mortgage, no time limit is fixed during which the mortgage is to subsist, because it is difficult to predict within what time the debt will be satisfied

The mortgagee is supposed to maintain an account of rents and profits obtained by him

Where the mortgagor fails to deliver possession of property, the mortgagee, can sue for possession or for recovery of money advanced. But if he has got possession, his remedy is to retain property till his debts are satisfied and he does not have remedy of foreclosure

## ZURIPESHGI LEASE

Zuripeshgi Lease bears a close resemblance to usufructuary mortgage

A Zuripeshgi lease means a lease for a lump sum of money paid in advance

The points distinction between the two are as follows -

- (1) In a usufructuary mortgage the relationship of debtor and creditor subsists where in Zuripeshgi lease this relationship does not exist
- (2) In usufructuary mortgage, the mortgagee is entitled to retain possession of the mortgaged property until the mortgage money is satisfied. While in Zuripeshgi lease, the lessee remains in possession for a fixed time
- (3) The delivery of possession essential in both the case but in usufructuary mortgage, the mortgagee sometimes executes a lease in favour of the mortgagor who retains possession and agrees to pay rents generally equivalent to the interest of the amount advanced. This is not so in Zuripeshgi lease

## English Mortgage [Sec 58 (c) ]

“Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called English Mortgage”

Elements of English Mortgage are -

- 1 The mortgagor takes a personal liability to repay the mortgage – money
- 2 He promises to pay the mortgage money on a certain date
- 3 He transfers the mortgage property absolutely to the mortgagee and
- 4 When the mortgagor pays back the mortgaged – money to the mortgagee, he (mortgagee) re –transfers the property to him (mortgagor).

Illustration.

‘X’ borrowed certain amount on the basis of an undertaking that he will repay the mortgage money on a stipulated time and transfers his property situated in Chennai to Y. He entered into an agreement to the effect that the transfer is absolute and on his default in payment the mortgagee Y has to reconvey the property upon payment made by X on the appointed day

Distinction between English Mortgage and Mortgage by conditional sale:

An English Mortgage resembles a mortgage by conditional sale in so far as in both cases the ownership of the property mortgaged is liable to be transferred from the mortgagor to the mortgagee on default of payment

| S No | English Mortgage   | Mortgage by conditional sale   |
|------|--|--|
| 1    | Mortgagor is personally liable to pay the debt                                     | No personal liability. The mortgagee has his remedy against the mortgaged property alone |
| 2    | The ownership in the mortgaged property is absolutely transferred to the mortgagee | The mortgagee acquired only a qualified ownership  |
| 3    | Decree for foreclosure under section 67 is not possible                            | Foreclosure is the only remedy   |

MORTGAGE BY DEPOSIT OF TITLE DEEDS: [SEC.58 (f)]

(Equitable Mortgage)

“Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and any other town which the State Government concerned may, by notification in the official Gazette, specify in this behalf, delivers to a creditor or his agent, document of title of immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds”

In English law, this form of mortgage is known as ‘Equitable Mortgage’. Because in this type of mortgage, there is simply a deposit of document of title without anything more i.e. without writing and other formalities

This form of mortgage is vogue in big commercial cities. The object is to provide a special and easy mode to facilitate mercantile transactions in cases ‘where it becomes necessary all of a sudden to raise money and there is no enough time to observe required formalities for other kind of mortgages. A deposit of title deeds outside the towns specified will create neither a mortgage nor a charge

Under the definition of a mortgage by deposit of title deeds by Sec 58 (f), the essential requisites of this type are

- (i) A debt
- (ii) Deposit of title deeds
- (iii) An intention that the deeds shall be security for the debt
- (iv) Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit also

### Essential Elements

Like any other mortgage, the debt, in a mortgage by deposit by deposit of title deeds may be an existing a future one

### Deposit of title deeds:

The next element is that the debtor should deliver documents of title to immovable property on which the security is intended to be created to the creditor or his agent. A question may arise in this type i.e., whether it is necessary that the property to which the mortgage relates should be situate within one of the towns mentioned in the Section? The answer is that the property may be situated outside the town mentioned in the clause but it is enough if he hands over the title-deeds to the creditor in the town eg Mortgage of property outside Madras can be deposited in Madras to avail loan

### Intention to create security.

The very important element is that the deposit of title deeds must be made with distinct intention of creating a security for the debt. If the intention is otherwise, it shall not operate as security and the transaction will not be a mortgage

### Registration:

As a mortgage by deposit of title deeds is created by the deposit of title deeds it is not necessary that the transaction should be recorded. But it is usual for the deposit of title-deeds to be accompanied by a memorandum of writing. If this writing must be the contract of mortgage creating the 'mortgage', it must be registered

### ANOMALOUS MORTGAGE. [SEC 58(g)]

#### DEFINITION.

"A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section called an anomalous mortgage"

The classification of mortgages contained in Sec 58 is not exhaustive. It only describes certain forms of mortgages which are in common use in India. However several other kinds of mortgages are also in use in various parts of India. Such mortgages, which does not fall within any of the categories mentioned under Sec 58 is anomalous mortgage

An anomalous mortgage includes-

- (i) A simple mortgage & usufructuary Mortgage combined and
- (ii) A usufructuary & mortgage by conditional sale combined

A simple mortgage & usufructuary is a combination of a simple mortgage and usufructuary mortgage and consequently an 'anomalous mortgage' In this case, the mortgagee obtains possession of the mortgaged property and recovers money advanced by him out of the rents and profits of property and there is also personal undertaking as well as a right to cause the property to be sold on the expiry of the date fixed for payment

- 1 A mortgage usufructuary & by conditional sale is another instance of an anomalous mortgage In this case the mortgagee is in possession as in a usufructuary mortgage for a fixed period and if the debt is not paid (discharged) at the expiry of that period, he gets all the rights of a mortgagee by conditional sale i e , the mortgagee gets the right for foreclosure, depriving the mortgagor's right of redemption
- 2 Where the mortgage in question was neither purely simple nor usufruct exclusively but a mixture of the two, it was an anomalous mortgage within the meaning of Section 58 An anomalous mortgage deed requires attestation

### Customary Mortgages.

There are mortgages to which special incidents are attached by local usage For example 'Otti' and 'Kanom' mortgages prevalent in Malabar area cannot be redeemed before the expiry of 12 years in the absence of a special agreement in the contrary The 'Kanom' acquired the character of a mortgage and a lease The 'Otti' holder has a right of pre-emption A 'peruarthan' mortgage is redeemable for the market value of the land at the time of redemption

### Mortgagor:

The transferor of a property under mortgage is known as 'Mortgagor' It includes heirs, executors and administrators who derive their title from the mortgagor

### Mortgagee

payment of the debt This includes a person deriving title under original mortgagee A security bond given to a court cannot be enforced as a mortgage because the court is not a judicial person

### Mortgage Money:

It includes principal money and the interest, the payment of which is secured for the time being

### Sub - Mortgage:

The Mortgage executes a sub - mortgage In other words, it is a mortgage of a mortgage

### Illustration:

'A' mortgaged his property for a certain amount of loan to B 'B' transfers that property to one 'C' under a mortgage, then the mortgage executed by 'B' is sub-mortgage

A                      B                      C

### Puisne Mortgage

A puisne mortgage is a second or later mortgage executed by the same mortgagor

Suppose for first time 'A' mortgaged his property 'X' of worth Rs 10 lakhs with 'B' for Rs Lakhs and for the 2<sup>nd</sup> time mortgaged the same 'X', with 'C' for Rs 2 lakhs mortgage between 'A' and 'C' is called as Puisne mortgage

### Original mortgagor's right to redeem mortgage when there is a sub-mortgage:

Unless and until notice of the sub mortgage is given to the original mortgagor, the mortgagor has every right to redeem his mortgage by paying his mortgagee i e , the sub-mortgagor If notice is given to the original mortgagor, he is bound to pay the debt of the sub-mortgagee and the later can hold the property till it is redeemed

A sub-mortgagee is entitled to relief by way of sale of the property comprised in the original mortgage

### Illustration

If 'A' mortgaged his specific immovable property 'X' of value 10 lakhs to B for a loan of amount 3 lakhs and again he mortgaged the same property 'X' to 'C' then the 2<sup>nd</sup> mortgage with 'C' is known as puisne

### Comparison of Hypothecation and Pledge of Movables

In a pledge of movables the goods are in the possession of the creditor In hypothecation they are left in the possession of the debtor himself

### Illustration:

- (a) If 'A' pledge his 'Jewel' to get a loan from 'B', the possession of Property will be transferred to the creditor 'B'
- (b) When 'A' borrows some amount from 'B' by hypothecating his Motorcycle, the possession is still vested with 'A' only and not with 'B'

### MODE OF EFFECTING A MORTGAGE [SEC.59]

"Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by atleast two witness

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested, as aforesaid, or (except in the case of a simple mortgage) by delivery of the property

There are three ways in which property may be transferred by way of mortgage

- (i) By registered instrument
- (ii) By deliver of possession
- (iii) By deposit of title deeds

### Registered Instrument

Where the principal money secured is one hundred rupees or more, a mortgage can be effected only by a registered instrument. The instrument of transfer must be signed by the Mortgagor and be attested at least by two witnesses. A combined reading of Sec 59 of TP Act and Sec 17(1)(b) of the Indian Registration Act, make it absolutely clear that the value of Rs 100 contemplated must be reference only to the principal amount secured under the mortgage and not to the interest that may accrue.

### By Delivery of Possession

If the principal money secured is less than one hundred rupees, the transaction can be effected even without a registered and attested instrument. But there is an exception to the rule relating to simple mortgage. Since in the case of a simple mortgage, possession of property is not delivered to the mortgagee and the mortgagor himself retains possession, a valid transaction in this case can be effected only by a registered instrument although the principal money secured is less than one hundred rupees.

### By deposit of title-deeds

In a mortgage by Deposit of Title Deed no writing and registration is essential. Whatever be the amount of principal sum secured, it can be effected simply by deposit of title deed. But this type of mortgage is effected only in certain towns specified in Sec 58 (f).

### No validity of unregistered mortgage deed

If a mortgage deed is not registered it cannot be used in evidence and the transaction itself cannot be proved by oral evidence.

## RIGHTS AND LIABILITIES OF MORTGAGOR

Sec 60 to 66 of TP Act deals with the rights and liabilities of mortgagor.

### Mortgagor's Right of Redemption (s-60)

The most important right possessed by the Mortgagor is the right to redeem the mortgaged property.

Redemption= right to get back

**Sec 60:** at any time after the principal money has become due, the Mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the Mortgagee (a) to deliver, to the Mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the Mortgagee, (b) where the Mortgagee is in possession of the mortgaged property, to deliver possession thereof to the Mortgagor and (c) at the cost of the Mortgagor either to transfer the mortgaged property to him or to such third person as he may direct, or to execute and where the mortgage has been effected by a registered instrument to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

Provided that the right conferred by this Section has not been extinguished by act of the parties or by Decree of a court.

The right conferred by this section is called 'a right to redeem' and a suit to enforce is called a suit for redemption.

Nothing in this Section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the Mortgagee shall be entitled to reasonable notice before payment or tender of such money.

### Redemption of Portion of Mortgaged Property.( Partial Redemption)

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share Only, a payment of a proportionate part of the amount remaining due on the mortgage except (only) where a Mortgage or if there are more Mortgagees than one, all such Mortgagees, has or have acquired, in whole or in part the share of the mortgagor

The Doctrine of Equity of redemption is expressed in the maxim “once a mortgage always a mortgage and nothing but a mortgage”

The right of redemption means the right of Mortgagor to get back his property or documents of title relating to property from the Mortgagee on payment of debt on or before a specified date In English law, this right is known Equity of Redemption In India the right of redemption is a legal right as it is incorporated in the statute i e , the Transfer of Property Act

### Principle of Redemption.

Under Sec 60 of the TP Act, at any time after principal money has become due, the Mortgagor has a right on the payment of mortgage money with interest to require the mortgagee to deliver at proper time and place, the mortgagee-deed and all documents relating to the mortgaged property, which are in possession or power to the Mortgagee

However this remedy is available to the Mortgagor only before the Mortgagee has filed a suit for enforcement of the mortgage Subsequent to the filing of the suit, this remedy is not available

### Clog on Redemption.

The right of redemption is a statutory right and it cannot be fettered by any condition which impedes or prevents redemption Any stipulation or condition forming part of the mortgage transaction and inconsistent with its position is a clog on redemption and is void The Doctrine of Clog on Redemption is expressed in the maxim “Once a mortgage is always a mortgagee and nothing but a mortgage”

### No clog or fetters on the right of Redemption

Since the object of a mortgage is to secure repayment of a debt, it is desirable that the right to repay debt and obtain back property must remain alive Where the Mortgagor deprived of his right to redeem his property either by contract or otherwise, it is said that a clog or fetter has been imposed on the right of the mortgagor to redeem The doctrine that there should be no clog on the equity of redemption is rule of justice, equity and good conscience

The mortgagor is entitled to redeem the property even before the stipulated period mentioned in the deed

### Illustration

If a clause in a mortgage making it irredeemable after a period is clearly repugnant to the Mortgagor's equity of redemption and such as covenant is ignored as it is a clog

'A' executes usufructuary mortgage in favour of 'B' with a condition that if 'A' does not redeem within 10 years, the mortgage shall become sale

In the above case, the condition is a clog as it seeks to make a mortgage irredeemable by converting it into a sale It is void

### Termination of Right of Redemption:

The right of redemption is extinguished either by an act of the parties or by operation of law i.e., a decree of the court. The following are the methods by which the right of redemption is extinguished -

- 1 By foreclosure
- 2 By sale or
- 3 By lapse of time or
- 4 By release in favour of the mortgagee
- 5 By redemption

### Partial Redemption

A Mortgage is an indivisible security for the debt and, therefore it cannot be divided into pieces. A mortgage cannot be redeemed into pieces or fragments. The person who wants to redeem must redeem the whole or not at all.

If one out of several mortgagors has redeemed the whole, he has right of contribution against the rest. So far as the property is concerned the steps into the shoes of the mortgagees and the other mortgagors can redeem, from him.

The rule is that all interested person must be made party to the redemption. But this rule does not apply in the following situations

- (i) Where the co-mortgagors have distinct and separate interests
- (ii) Where the mortgagee recognizes a portion of the mortgaged property among the co-mortgagors
- (iii) Where the mortgagee himself acquires a portion of mortgaged property
- (iv) Where however only a partition is affected with the consent of the mortgagee, partial redemption is possible

### Right of Mortgagor.

The following are the rights of mortgagor

- 1 Right of redemption
- 2 Right to inspection and production of document, which are in the custody, or power of the mortgagee
- 3 Right to redeem separately or simultaneously i.e. if a mortgagor has executed two or more mortgages in favour of the same mortgagee then unless a contract to the contrary is shown, he can redeem any such mortgage separately or two more mortgages together
- 4 Right of usufructuary mortgagor to recover possession
- 5 Accession to mortgaged property (Increase in value)
- 6 Entitled to improvements to mortgaged property
- 7 Renewal of mortgaged lease
- 8 Waste by mortgagor in possession of mortgaged property. However he must not commit any act that is destructive or permanently injures thereto and render the security insufficient

## Right and Liabilities of Mortgagee

In Chapter-IV, Rights and liabilities of Mortgagee are dealt under Sec 67 to 77, Secs 67 to 73 deals with Mortgagee's Rights and Secs 67A, 76 & 77 refer to his Liabilities

### Right to Foreclosure or Sale (Sec 67)

Foreclosure is the process whereby mortgagor's right to redeem is extinguished and the Mortgagee becomes the owner of the mortgaged property. In the absence of contract to the contrary, at time after the mortgage money has become due and before a decree has been made for the redemption of the mortgaged property or the mortgage money has been paid or deposited, the mortgagee can obtain a decree from the court absolutely barring the Mortgagor's right to redeem the property or a decree to sell the property

### Remedies available to the Mortgagee:

1 Right of foreclosure 2 Right of sale

'Foreclose' - oxford dictionary meaning – "take possession of a mortgaged property as a result of defaults in mortgage payments"

### Analysis of Remedies under different forms of the Mortgage

A simple mortgagee cannot foreclose as the real right transferred is a right of sale the right of sale can be exercised only with the prior permission of the court. A suit for sale must be filed within 12 years from the date on which the mortgage money becomes due. If the income from sale is not sufficient to satisfy the mortgage money, a personal decree will be passed against the Mortgagor for the balance if the mortgagor is personally liable and if the personal claim is not barred by limitation

### Usufructuary Mortgage.

An usufructuary mortgagee is a transferee of a right of possession only and he retains possession until the debt is discharged. Therefore, he can neither sue for foreclosure nor for sale

### Mortgage by Conditional sale:

In this kind, the mortgagee has a right of foreclosure only. He cannot get a decree for sale. In other words, the conditional sale becomes absolute if the amounts are not returned on the fixed date. If the mortgagee was not already in possession of the same when he obtains a decree for foreclosure and if the mortgagor fails to deliver the possession the mortgagee can sue for it within 12 years from the date on which he becomes entitled to possession

### English Mortgage

In an English mortgage, the mortgagee's remedy is by way of sale of the mortgaged property and foreclosure is not possible

### Mortgage by deposit of title deeds:

The remedy under this kind is a suit for sale of the mortgaged property

### Anomalous Mortgage

In an anomalous mortgage, the right of the mortgagee depends upon the terms of the deed. A suit for foreclosure can be instituted by him only if the deed specially empowers him. If not so empowered, he can institute a suit for sale

### Where Mortgagor is trustee for the Mortgagee:

If the Mortgagor is a trustee or legal representative of the mortgage, he cannot foreclose. He can only institute a suit for sale.

### Public Property:

A mortgage of a public property like mortgage of a railway, canal or other work cannot institute a suit either for foreclosure or sale. The remedy in such case is the appointment of a Receiver.

### Partial foreclosure

The principle laid down in section 67 is based on the maxim "Mortgage debt is single and indivisible". Partial foreclosure is not allowed except by a person interested only in part of the mortgaged property. However, a mortgagee has several interests. Under the mortgage he can use with the consent of other mortgagees. If he fails to obtain the consent of other mortgagees to the suit, he has to join them as co-defendants and can sue to realize the whole mortgage debt.

### Rights of the Mortgagee:

- 1 Right to foreclosure or sale (S-67)
- 2 Right to sue for mortgage money (S-68)
- 3 Right to Accession to the mortgaged property (S-69)
- 4 Right to have received appointed etc

### Liabilities:

1. When a mortgagee who holds two or more mortgages executed by the same mortgagor he is bound to bring one suit on several mortgages (S-67A)
2. Sec 76 Liabilities of mortgagee in possession
  - (i) He must manage the property as a man of ordinary prudence
  - (ii) He must try his best endeavours to collect the rents and profits
  - (iii) He is bound to pay thereof the Government revenue and all other charges of a public nature, in the absence of a contract to the contrary
  - (iv) He must make such necessary repairs of the property as he can pay out of the rents & profits
  - (v) He must not commit any act which is destructive or permanently injurious to the property
  - (vi) He must to keep proper accounts etc

### MARSHALLING AND CONTRIBUTION

#### ShhEC 81- Marshalling Securities – Definition

"if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of contract to the contrary, entitled to have the prior mortgage deed satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties"

“Marshalling” means arranging or settling the claims of two persons in respect of certain common property

For example, suppose ‘A’ mortgages properties ‘X’ and ‘Y’ to B and then property Y alone to C. If B seeks to realize his mortgage out of Y, C can compel B to proceed first against X and realize the debt from it. And in case B is unable to realize the whole amount due to him from X, he is entitled to recover the balance from Y.

Under Sec 81, the subsequent mortgagee is empowered to regulate or Marshall the order in which and from which property the prior mortgagee will realize his claim

#### Limitation of the Rule

The claim to marshalling must not be allowed to prejudice the rights of the first mortgagee or of other who have acquired an interest for consideration

#### Illustration

If two estates X and Y belonging to ‘A’, are first mortgaged to B, then X is mortgaged to C and Y is mortgaged to D, C would not be permitted to compel B to marshal in his favour, which would prejudice the interest of D. Similarly, D could not compel B to resort in the first instance to the estate X. The right of Marshalling may be excluded by a contract between the parties

#### Doctrine of Contribution (Sec 82)

##### Principle

“As between persons liable in respect of the same debt, their liability is to be in proportion to the quantum of their interest in the property”

While the mortgagor’s right of redemption is a right exercisable against the mortgagee, the right of contribution is one that arises between mortgagors

##### Inter Se:

The doctrine of contribution rests upon the principle that “a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone

##### Illustration:

A, B and C three brothers mortgaged their joint property to D for Rs10,000/- Thereafter they partitioned the property into three shares. For realizing his mortgaged money if D instituted a suit for sale of the property and realized his money by the sale of A’s share then ‘A’ is entitled for contribution against the shares of B and C each 3,333 Rs

#### Marshalling Supersedes Contribution

Where marshalling and contribution might conflict with each other, marshalling is to prevail

#### Subrogation: Sec 92

The term ‘Subrogation’ simply means “Substitution”, this term originates from Roman law “When one person takes the place of another person he is said to have substituted or taken the place of the former one”

In Roman Law, a creditor who lent money to the debtor for the purpose of payment of a mortgage on condition that he was to be substituted in the place of the mortgagee, was entitled to claim the benefit of the security discharged with his money. This rule of Roman Law has not been recognized by many legal systems of the world

## Kinds of Subrogation

- (1) Legal Subrogation i.e., by operation of law
- (2) Conventional subrogation i.e., by agreement

### Legal Subrogation.

When the mortgage debt is paid off by a person who has some interest to protect, legal subrogation comes into existence. Eg. Where a subsequent mortgagee pays off a prior mortgagee, he shall acquire the right of the prior mortgagee and thus subrogate to him.

A legal subrogation takes place when

- (i) A puisne (subsequent) mortgagee comes into existence
- (ii) A co-mortgagor exists
- (iii) A person standing as a surety and
- (iv) A person purchases the right of redemption

### Redemption by Puisne Mortgagee:

A puisne mortgagee who redeems a prior mortgage, has a right to be subrogated to the position of the prior mortgagee, if

'A' mortgages his property X to B for Rs 10,000/-

'A' mortgages his property X to C for Rs 9,000/-

'A' mortgages his property X to D for Rs 8,000/-

And if 'D' pay 'B' Rs 10,000 he will take the place of B. He will acquire all the rights, which 'B' has against 'A' and 'D' will stand in better position against C.

### Redemption by Co-Mortgagor.

A co-mortgagor by redeeming a mortgage steps into the shoes of the mortgagee.

### Illustration

A and B, mortgaged their joint property X to C for Rs 10,000/-, if B pays off 'C' entire amount, he stands in the mortgagees' shoes to the extent of the amount paid in excess i.e. to the amount of Rs 5000/-

### Redemption by Surety:

Redeeming the mortgaged property subrogates a surety of the mortgagor by redeeming the mortgaged property to the rights of the creditor.

### Redemption by Purchaser of Right of Redemption

Where a purchaser of right of redemption pays off a mortgage, he acquires the right of the mortgagee.

### Illustration:

'A' mortgages his property X to B and then B mortgages X to C. 'A' sells his right of redemption in respect of X to D. D pays off B and takes the place of B. D shall be subrogated to the rights of B as against C.

## CHARGE SEC 100 -

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

For practical purpose a charge is regarded as a species of Mortgage. The essential difference between two is, a mortgage is a conveyance of a property subject to a right of redemption. Whereas a charge conveys nothing more except by giving the person having the charge i.e. charges rights over the property concerned as security for the loan.

### Kinds of Charges

- (i) Charges created by acts of parties
- (ii) Charges arising by operation of law

### Charges created by act of parties

An agreement, which gives immovable property as security for satisfaction of a debt without transferring any interest in the property, constitutes charge by act of parties.

### Illustration

- (a) 'A' inherited an estate from his maternal grand – mother and executed an agreement to pay his sister 'B' a fixed annual sum out of rents of the estate. B has charge on the estate.
- (b) 'A' sued B on a promissory note. The compromise Decree directed the payment of the money and further directed that B shall not dispose of his share in a factory until satisfaction of the decretal amount. It was held that 'A' had a charge on the property specified.

### Charges by operation of law:

A charge by operation of law is one, which arises irrespective of the agreement of the parties. Such charges are known as equitable liens in English Law. They are as follows:

- (i) A trustee is entitled u/s 32 of the Trust Act to a charge on the income as well as the corpus of the trust estate for all moneys properly expended in performing the obligations of the trust.
- (ii) Vendor's charge for unpaid purchase money u/s 55(4)
- (iii) Vendee's charge for prepaid purchase money u/s 6(6)
- (iv) Charge in favour of a person entitled to contribution u/s 82

## LEASE

Sec 105 to 117 of TP Act, 1882 deals with provisions relating to lease. Sec 105 defines lease as “transfer of right to use or enjoyment of an immovable property, made for a specific or indefinite period in consideration for some benefit in cash, kind or in service paid or promised to be paid in lump sum or periodically or on specific occasions as per terms and the same is accepted” The transferor is called the lessor and the transferee is called the lessee

According to Mulla, “a lease is a contract between the lessor and the lessee for the possession and profits of land, etc., on one side and the recompense by rent or other consideration on the other”

Mosley defines lease as “demise or letting of lands or tenements, right of common, rent or any hereditament, into another for a term of years or life, or at will, usually for a rent reserved. The interest created by the lease must be less than the lessor hath in the premises, or lessee it is not a lease, but an assignment”

Salmond in observed lease as “A lease, in generic sense, is that form of encumbrance which consists, in a right to the possession and use of property owned by some other person. It is the outcome of the rightful separation of ownership and possession

Kinds of lease -

Sec 105 recognises three kinds of leases viz ,

- (i) Lease for a fixed period or certain period
- (ii) Periodic leases (leases from year to year and from month to month)
- (iii) Lease in perpetuity

**Section 106:- Duration of certain leases in absence of written contract of local usage -**

Unless contract or local usage to the contrary

- (i) Lease for agricultural or manufacturing purpose shall be deemed to be from year to year, terminable on the part of either the lessor or the lessee by giving six months notice expiring with the end of a year of the tenancy

[‘agriculture’ includes farming, horticulture, fisheries, forestry, rearing and management of live-stock husbandry, tillage together with such subjects as butter and cheese making and sugar making etc

‘Manufacturing’ includes mechanical industry or commerce and production of goods or making of articles of trade and commerce by means of machinery]

- (ii) Lease for any other purpose shall be deemed to be from month to month terminable on the part of either of the party by giving 15 days notice expiring with the end of a month of the tenancy

**Lease for manufacturing purpose -**

In *Allenbury Engineers Pvt Ltd -vs- Shri Ram Krishna Dalmia and others* [AIR 1973 SC 425], it has been stated that the expression ‘manufacturing purposes’ for making or fabricating articles or materials by physical labour, or skill, or by mechanical power, vendible and useful as such. Such making or fabricating does not mean merely a change in an already existing article or material, but transforming it into a different article or material having a distinctive name, character or use of fabricating a previous known article by a novel process

In order to determine whether a particular purpose is manufacturing, the following tests were laid down by the Supreme Court in *Idandas -vs- Anant Ramachandra* AIR (1982) S C 1271 e ,

- (a) It must be proved that a certain commodity was produced
- (b) The process of production must involve either labour or machinery
- (c) The end-product should be complete and have a different name and should be put to a different use

In the above case, the raw material is wheat while the end product is flour. All the tests were satisfied. So the purpose is manufacturing purpose.

#### **Sec 107.- Leases how made -**

A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease is made by a registered instrument shall be executed by both the lessor and the lessee. In *Ram Sewak -vs- Abdul Majeed*, AIR 1980, SC 78, it has been held that a rent note which has been executed by a tenant alone is not a lease within the meaning of section 107 of the TP Act.

**Note:- a lease is void if unregistered in cases where the registration is compulsory**

However, a document containing an unregistered lease can be used for the purpose of finding out the nature of agreement executed between the parties. And the lessee, who is in possession of the land under an unregistered lease, is not a trespasser but merely a tenancy at will. The lessor is entitled to claim compensation from such lessee for the use and occupation of the land. Further, both the lessor and the lessee can sue for specific performance on the basis of unregistered under Section 27-A of the Specific Relief Act. Under Section 53-A of the TP Act, the lessee in possession under an unregistered instrument is protected from ejection provided the conditions laid down in the section are fulfilled.

#### **Section 110:- exclusion of day on which term commences -**

Section 110 lays down rule for reckoning of the duration of leases. And the section is not applicable to a tenancy at holding over and it applies to periodic lease with specific date of commencement.

Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, time so limited begins from the making of the lease.

**Illustration -** suppose a lease is made for 10 years and is expressed "to commence from 10 02 2005". 10<sup>th</sup> February is excluded from computation and so the lease ends at midnight of 10 02 2015.

#### **Rights and liabilities of lessor and the lessee:- Section 108 and 109**

The rights and liabilities of the lessor and the lessee are settled by (i) contract, (ii) local usage and by Section 108 of the TP Act.

Under sec 108, the term 'local usage' means local establishment practices, customary mode of action on the part of a number of persons, an establishment or recognized mode or procedure, action or conduct. The local usage may not be universal or immemorial. It need not be ancient, uniform or have the notoriety of custom. It may still be in the cause of growth, but it is sufficient if it appears to be well-known and settled.

## Rights of the lessor -

There is no express provision in section 108 of the TP Act or in any part of the chapter dealing with lease as to rights of the lessor. However, the liabilities of the lessee would imply identical rights of the lessor.

The only right of the lessor appeared by the terms of clause (c) of section 108 is to receive rents.

## Liabilities of the lessor -

### (1) Duty to disclose defects – sec 108 (a)

Sec 108 (a) provides about the duty of the lessor to disclose to the lessee material defects in the property with reference to its intended use and of which he is aware and the lessee could not be aware with ordinary care discover. But the use of words “of which he is aware” clearly indicates that this duty is not absolute. It extends only to those defects of which the lessor is aware. Patent defects are not within the ambit of sec 108 (a). Unlike section 55, section 108 does not declare that the omission to disclose material defects must be fraudulent. But it still seems the omission may be good ground for avoiding the lease on the basis of ‘constructive fraud’. The lessee may also sue for damages sustained by him as a result of the omission.

### (2) Duty to give possession- sec 108 (b)

Sec 108 (b) imposes a statutory duty on the lessor to deliver possession to the lessee, on his request. What amounts to delivery of possession in any particular case depends upon the nature of the property leased. In *Narayanaswami –vs- Yerramilli*, 33Mad 499, it was held that if the lessee fails to request the lessor to put him in possession or fails to take possession of the property, he cannot resist a suit for rent.

In England, failure to put the lessee in possession of a part of the land demised entails a suspension of the entire rent. But this doctrine does not apply to India. In *Katyayani Devi –vs- Uday Kumar* 52 Cal 417 (P C), the Privy Council observed that “the doctrine of suspension of payment of rent when the tenant has not been put in possession of part of the subject leased, has no application to a case where stipulated rent is so much per acre”.

### (3) Implied covenant for quiet enjoyment- Sec 108 (c)

Section 108 (c) provides that the lessor shall be deemed to contract with the lessee that, if the latter pays the rent and performs the contract, he may hold the property during the time limited by the lease without interruption. This is known as ‘covenant for quiet enjoyment’.

This clause protects the lessee against the disturbance caused by the lessor or by persons claiming under the lessor but not against disturbances caused by trespassers or against unlawful or tortious eviction by third parties. The reason being that against such acts, the lessee has his proper remedy against the wrong-doers. In *Katyayani Devi –vs- Uday Kumar*, the Privy Council held that it was the duty of the tenant to protect himself against illegal encroachments by another.

## Title paramount.-

Eviction by title paramount means an eviction due to the fact that the lessor has no title to grant the term and the paramount title is the title paramount to the lessor’s which destroys the effect of the grant and with it the corresponding liability for payment of rent.

In *Gajadhar –vs- Romphaee*, (1938) Nag 439, the sub-lessee of a theatre was prevented by the proprietor, the original lessor, from using the theatre on the ground that notice has been served on the lessee determining the lease. Therefore, the sub-lessee had to take lease from the proprietor on payment of an additional sum.

It was held that there was a breach of the covenant and that sub-lessee could sue his lessor (the original lessee) for damages

### No protection against acts done under compulsion of law

The Indian covenant affords no protection against act done under compulsion of law In Merwarji -vs- Alkhan, 52 Cal 417 P C the lessee was evicted under the Epidemic Diseases Act and Minto -vs- Kalicharan, 23 Bom 510, the eviction was under Land Acquisition Act It was held that there was no cause of action in either case against the lessor

## RIGHTS OF THE LESSEE

### (1) Right To Accession

As per sec 108 (d) any accession made to the property during lease is deemed to be complied in the lease Accessions include additions artificially made as well as accretions by alluvial or natural process A lessee has a right to retain possession over accretions and on the termination of the lease he must surrender the accession to the lessor in the same way as he is bound to surrender the property originally leased to him However adjoining waste land brought under cultivation is not an accession

When some land is added to the leased property by change of the course of the river, the lessee has a right to sue and enjoy the increased area of land together with the main property and he has to leave it when the lease is terminated

Refer Secretary of State -vs- Raja of vizianagaram 45 Mad 207

### (2) Right to repudiate the leases- section 108 (e)

Sec 108 (e) provides that the lessee is entitled to avoid the lease if the subject matter is destroyed wholly or in part, by fire, tempest, flood, violence of army or mob, or other irresistible force However, in a lease of a land with buildings upon it, the destruction of even the entirety of buildings does not affect the continuance of the lease or of the lessee's liability under it, unless so provided by express contract

In Vannattankandy Ibrayi -vs- Kunhabdulla Hajee AIR 2003 SC 4453 it has been held that the tenanted shop has been completely destroyed by fire, the tenancy right stands extinguished as the demise must have a subject matter and if the same is no longer in existence, there is an end of tenancy The landlord is under no legal obligation to restore the destroyed building to its original form to the tenant

### (3) Right to deduct cost of repairs- sec 108 (f)

Clause (f) of section 108 does not speak of any implied covenant by the lessor to make repairs, but when he has expressly covenanted to carry out the repairs and fails to do so, he commits a breach of covenant and this enable the lessee, after giving reasonable notice to the lessor to do the repairs

Where under the terms of the lease the tenant is himself bound to make the repairs at his own expense he cannot claim anything from the lessor on that account or deduct the value of the repairs from the rent due The lessee is not entitled to recover any compensation for loss suffered by him due to lessor's failure to repair

### (4) Right to deduct payment of tax etc – Sec 108 (g)

If the lessor neglects to make any payment which he is bound to make and is recoverable from the lessee or against the property, the lessee may make such payment himself and deduct it with interest from the rent

This principle is based on the provisions of Sec 69 of the Contract Act, 1872 which says "a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other"

**(5) Right to remove fixtures- sec 108 (h)**

The general rule is that fixtures cannot be removed by the holder of a limited interest. Tenant's fixture constituted an exception to that rule. The lessee has the right to remove the 'fixtures' made by him during continuance of the lease. But, while removing the fixtures, he must see that the property is left in the same condition in which he has received it. Once the possession is handed over to the lessor, lessee cannot enter into the premises to remove the fixtures.

**(6) Right to remove crops (right to usufructs)- sec 108 (i)**

Where the lease is of an uncertain duration and the lessee's interest is determined by any means other than the fault of the lessee, he or his legal representatives is entitled to the benefit of all tree or crops growing on the land planted or sown by him for which he is given right to ingress and egress to gather and carry away the growing crops. The right is not available to the lessee in case the termination of the tenancy is brought about by the lessee's negligence or misconduct.

**(7) Right to alienate his interest – sec 108 (j)**

Sec 108 (j) provides that the lessee may transfer absolutely or by way of mortgage or sublease the whole or any part of his interest in the property and any transfer of such interest or part may again transfer it. There is no prohibition of sub-letting. But there is no privity of estate between the lessor and the sub-lessee, and as such the lessor cannot sue the sub-lessee for rent, and his remedy is only against the lessee with whom he entered into the contract.

**LIABILITIES OR DUTIES OF LESSEE -**

Section 108 clause (k) to clause (q) deal with liabilities of lessee.

**1. Duty to disclose- Sec 108 (k)**

The lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take of which the lessor is not aware, and which materially increases the value of such interest. Under sec 108 (k) non-disclosure does not amount to fraud and hence the lessor cannot sue to set aside the lease. The only remedy is claim for damages. The lessee's duty to disclose is different from the duty of the lessor, while the lessor is bound to disclose all material defects which affect the intended use of the property whereas the lessee is bound to disclose facts regards the lessor's interest which may increase the value of the lease and of which the lessor is not aware.

**2. Duty to pay rent – 108 (l)**

The lessee is bound to pay or tender the premium or rent to the lessor or his agent in this behalf at proper time and place as directed by the lessor.

**3. Duty to maintain the property (not to commit waste)- 108 (m)**

Sec 108 (m) provides that the lessee is bound to maintain in as a good condition as he found it, and restore the property in the condition in which it was let to him. The lessee is liable for permissive waste i.e., omission or default in carrying out necessary repairs.

However, the lessee is not liable for any loss occasioned to the property by irresistible force like storm, flood, earthquake, cyclone, accidental fire etc. The liability of the lessee to maintain the property in good condition continues even after creation of sub-tenancy.

#### 4 Duty to inform about encroachment- sec 108 (n)

If the lessee becomes aware of any proceedings to recover the property or any part thereof, or of any encroachment made upon or any interference with the lessor's right concerning such property, he is bound to give notice to the lessor with reasonable diligence.

#### 5 Duty to use the property reasonably- sec 108 (o)

Section 108 (o) of the TP Act provides that the lessee is to use the property and its product (if any) as a person of ordinary prudence would use them if they were his own. As per the section he should not do the following while using the property viz (1) Use or permit another to use the property for a purpose other than that for which it was leased or (2) fell or sell timber or (3) pull down or damage buildings belonging to the lessor or (4) work mines or quarries not open when the lease was granted or (5) commit any other act which is destructive or permanently injurious thereto.

#### 6. Duty not to erect permanent structure – Sec 108 (p)

The lessee shall not erect permanent structure on the property except for agricultural purposes. But if he erects, he is entitled to remove them provided he leaves the property in the state in which he received it.

In deciding whether a construction is permanent or temporary, two factors are primary viz nature of the structure and the intention with which it is made of. In judging whether the structures were permanent or not the following factors would be taken in to consideration.

- a Intention of the party who put up the structure
- b This intention is to be gathered from the mode and degree of annexation
- c If the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the circumstances to be considered while deciding the question of intention
- d The durability of structure

If the lessee has raised an unauthorized structure, he is liable for eviction.

#### 7 Duty to restore possession - sec 108 (q)

on expiration of the lease, the lessee is bound to put the lessor into possession of the property.

#### Section 109 - Rights of lessor's transferee -

If the lessor transfers the property leased or any part thereof, the transferee shall possess all the rights as the lessor unless the contract to the contrary. The liabilities of the lessee continue towards the transferee. However, the transferee is not entitled to the arrears or rent due before the transfer.

#### Sec 110 Exclusion of day on which the term commences -

Where the time limited by a lease of immovable property is expressed as commencing from a particular day such day shall be excluded in computing the time. Where no day of commencement is named, time so limited begins from the making of the lease.

## TERMINATION OF LEASE OF IMMOVABLE PROPERTY – SEC 111

### SEC 111- determination of lease

A lease of immovable property determines

- (a) By efflux of time
- (b) Where such time is limited conditionally on the happening of some event- by the happening of such event
- (c) Where the interest of the lessor in the property terminates or his power to dispose of the same extends only to the happening of any event, by the happening of such event
- (d) In case the interest of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right
- (e) By express surrender i.e. the lessee yields up his interest under the lease to the lessor by mutual agreement between them
- (f) By implied surrender
- (g) By forfeiture
- (h) On expiration of notice to determine the lease or to quit given by one party to the other

#### 1. By efflux of time – sec 111 (a)

A lease of immovable property determines by lapse of the time limited thereby. On expiry of the period, the lessor has right to ask ejectment by simple demand for possession. This condition need not be incorporated in the lease deed.

In *Tezchand –vs- Srikanth Ghose* it was held that a lease created for a certain time does not terminate if any of the parties dies during the term. The reason being that the interest transferred in a lease is heritable interest.

In *K M Mohan –vs- Dist Collector, Nellore Dist* [AIR 2006 Mad 65] has been held that the lessee has no statutory right to insist upon the renewal of lease in his favour nor the lessor has got statutory duty to do so.

#### 2 By happening of certain event- Sec 111 (b)

Where the expiry of the time is limited conditionally on the happening of some event, by happening of such event the lease is determined.

Illustration - if the lessor imposes a condition that the lease comes to an end when his son, who is working in a foreign country comes down to the place. On the happening of arrival of his son, the lease comes to an end.

#### 3. By termination of lessor's interest- Sec 111 (c)

Section 111(c) provides that a lease of immovable property determines where the interest of the lessor in the property terminates or his power to dispose of the same extends only to the happening of any event, by the happening of such event.

Illustration 1 - if the lessor is the usufructuary mortgagee, the lease comes to an end when the mortgagor redeems his property since the right of the mortgagee over the property comes to an end on redemption.

Illustration 2-- if the lessee let the property under sub-lease. The subsequent lease comes to an end on the expiration of the original lease.

4 By merger- Sec 111 (d)

A lease is determined if the interest of the lessor and the lessee become vested at the same time in one person. This happens if the lessee purchases the property and thereby the right is vested with the same person. No right of lease exists.

5. By express surrender- Sec 111 (e)

Surrender is the counterpart of merger. The giving up of tenancy is known as surrender. Express surrender consists in the lessee yielding up his interest in the lease to the lessor by mutual agreement between them. Thus a sub-lessee cannot surrender to the original lessor.

6. By implied surrender- Sec 111 (f)

Surrender may also be implied. For example, a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines there upon. But such implied surrender must not be due to some fraud or concealment of some material fact or information by the lessor. An implied surrender can be inferred from an unequivocal conduct of both parties.

7 By forfeiture- sec 111 (g)

A lease of immovable property determines by forfeiture under the following circumstances

In case

- a the lessee breaches an express condition or
- b The lessee renounces his characters such by setting up a title in a third person or by claiming title in himself or
- c The lessee is adjudicated insolvent and the lease provides that the lessor may re-enter on the happening of such event

8 On the expiration of Notice to quit- Sec 111 (h)

The periodic leases like leases from year to year or from month to month are terminated by notice to quit under section 106 of the TP Act. The notice must specify the date on which the tenancy should expire. It must be unconditional and must be in writing and signed by or on behalf of the party giving it and must be served effectively.

If it is monthly lease 15 days notice must be given, which should expire on the expiration of the month. And for lease from year to year, 6 months notice must be given which should expire on the expiration of year.

### SECTION 116- EFFECT OF HOLDING OVER

The essentials to consider the tenant as a tenant of holding over are as follows

- (a) lessee or under-lessee of property must remain in possession
- (b) after the determination of lease
- (c) lessor or the legal representatives accept the rent
- (d) or assents to his continuing possession
- (e) in the absence of contract to the contrary [Ram Prasad Kurni –vs- Suraj Nath]

In \*Sundershan Trading Co Ltd –v-s LD D’Souza

It was held that the tenancy by holding over is a creature of a bilateral, consensual act between the erstwhile landlord and the erstwhile tenant, and does not come into existence by a mere unilateral intendment or declaration of one of the parties

A tenant continues in possession after the determination of lease, without the landlord’s consent is a tenant at sufferance and his possession is also juridical, and he can get an injunction against eviction by the landlord otherwise than in due course of law. A person in illegal occupation of the premises without the consent of the landlord is a trespasser and cannot avail the benefits of this provision

#### **SEC 117 EXEMPTION OF LEASES FOR AGRICULTURAL PURPOSES -**

The provisions of lease under this chapter shall not apply to leases for agricultural purposes, except it is notified by the State Government in the Official Gazette

#### **GIFT (SEC 122 TO SEC 129)**

##### **Gift – definition – Sec 122 -**

“Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person called ‘donor’, to another, called the ‘donee’, and accepted by or on behalf of the donee”

##### **Essentials of Gift**

- 1 Parties are ‘donor’ & ‘donee’
- 2 Voluntary transfer
- 3 Without consideration
- 4 Acceptance by donee or any other person on his behalf
- 5 Gift is a transfer of ownership in a property
- 6 The property must be in existence
- 7 The property may be movable or immovable
- 8 The transfer must be made voluntarily and without consideration
- 9 The property must be accepted by the donee or by any person on behalf of him.
- 10 The transfer must be effected in a manner prescribed by law

##### **Transfer of ownership:**

A gift is a transfer of ownership in a property. It ordinarily involves renunciation of whole of the interest of the transferor called ‘donor’, in favour of the transferee called the ‘donee’

##### **Gift of immovable property.-**

U/s 123 of the TP Act, a gift of an immovable property irrespective of its value must be made through a registered deed. Thus, the gifts of immovable, whether corporeal or incorporeal and valuing more than Rs 100 or less, must be signed by or on behalf of the Donor, attested by at least two competent witnesses and must also be registered. Any oral gift of immovable property cannot be made in view of the provisions of S 123. Mere delivery of possession without written instrument cannot confer any title

### Gift of movable property:-

In a gift of a movable property, the registration is optional. It can be made either by a registered instrument signed as aforesaid or by delivery of possession.

### Mohammedan Gift:-

Provisions of the Transfer of Property Act pertaining to gift do not apply to Muslims. The procedure of Hiba (gift) is adopted and governed under Muslim law.

Under Muslim law, a valid gift requires three stages viz

- (i) Declaration of the gift by the donor
- (ii) Acceptance by the donee
- (iii) Delivery of possession

According to Muslim Law, no writing or registration is necessary for gift. The provisions of Indian stamps Act and Registration Act do not apply to the gifts of Muslim.

### Suspension or Revocation of Gift (S-126)

A gift may be suspended or revoked in certain cases by agreement and in certain circumstances without any previous agreement.

#### By agreement:

The general rule is that there is no valid gift at all when the person purports to give but retains the liberty of revoking the gift at his pleasure. But the principle is qualified by the rule that a power of revocation would be valid if the event on the happening of which a gift can be revoked does not depend upon the will of the donor. The suspension or revocation may take place on the happening of an event and not on the will of the donor. If the happening of the event is dependent on the will of the donor, suspension or revocation of gift will be void. But it is necessary that the condition imposed must be a valid condition and must not be illegal or impossible or opposed to public policy.

### ONEROUS GIFTS SEC.127

“Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully”

The principle of this kind of Gift is that “he who receives advantage must also bear the burden”. A gift is said to be an onerous gift if it is accompanied with the burden or obligation.

#### Elements necessary for the application for the Rule:-

- (a) Gift must be in the form of a single transfer
- (b) To the same person
- (c) Of several properties i.e. more than one property should be conveyed
- (d) Out of several properties one should be subject to a burden or obligation

## UNIVERSAL DONEE SEC 128

Where the gift consists of the donor's whole property, the donee is personally liable for all the debts and liabilities of the donor at the time of the gift to the extent of the property comprised therein. A universal donee is a person who gets all the properties of the donor by gift.

### Donatio – mortis cause - (Death bed gifts)

Gifts of movable property made in contemplation of death are known as donatio - mortis causa and they are regulated by Sec 191 of the Indian Succession Act 1925.

## REVOCAION OF GIFT

As a general rule, the valid gift once made cannot be revoked. However there is a controversy of opinions in the different schools of Muslim law.

A revocation of gift may be done by two ways namely

- (1) Before delivery of possession or
- (2) After delivery of possession

In fact the delivery of possession is the essential characteristic feature of a valid gift. The donor may revoke the gift before the delivery of possession of the property to the donee. Even though the donor might have declared that he intends to gift he can revoke before the delivery of possession. No court order is necessary for such a revocation.

### After the delivery of possession also the donor can revoke the gift under two circumstances -

- (1) With the consent of the donee
- (2) With the decree of the court

But under the following circumstances, the gift becomes irrevocable

- (1) When the donor is dead

Since the gift is given by the donor, the right of revocation is confined with only and not on his heirs

- (2) When the donee is dead
- (3) When the property is extinguished, lost, destroyed etc
- (4) When the property has been alienated by the donee by means of sale, gift, exchange etc

### Death bed gifts (Marz -UI-Maut)

A gift is called death – bed – gift when the donor is suffering with death illness. The crucial test of Marz-UI-Maut is the subjective apprehension of death in the mind of the donor. It has all essential elements of the gift. Such gift may be revoked if the donor recovers from ill-health.

\*\*\*\*\*

## DEFINITION OF "EASEMENT"/KINDS OF EASEMENTS

Section 4 of the Indian Easements Act, 1882 defines "Easement"

"Easement" defined – An easement is right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own

Dominant Servient Heritages and Owners - the land for the beneficial enjoyment of which the right exists is called the dominant heritage, and owner or occupier thereof the dominant owner, the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner

In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth, the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity, and the expression "to do something" includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon

### Illustrations

- (a) A, as the owner of a certain house, has a right of way over his neighbour B's land for purposes connected with the beneficial enjoyment of the house This is an easement
- (b) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein This is an easement
- (c) A, as the owner of a certain house, has the right to draw water from B's stream to supply the fountains in the garden attached to the house This is an easement
- (d) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take for the purpose of being used in the house, himself, his family, guests, lodgers and servants water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land These are easements
- (e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and repassing This right is not an easement
- (f) A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner This is not an easement

Gale, Jurisprudent defines an easement "an easement to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of them several tenements, by the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner

### Peacock, Jurisprudent defines

"An easement is a privilege without profit, acquired in respect of one tenement by the owner thereof, whereby the owner of the other tenement is restricted in the full enjoyment of the rights thereto to the extent of being obliged to suffer, or not to do something thereon, for the advantage or benefit of the former treatment

## Meaning

The law of easements is a branch of the law of property. The law of property recognizes the ordinary rights of a property of a man determined by the boundaries. The law of easements recognizes certain other rights which may be exercised beyond his boundaries and over the property of a neighbour, and which impose a burden upon the neighbour. These rights are called in Roman as "Jura in re aliena" (rights in the property of another). These rights are also called as "servitudes".

An easement is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it, for example, a right of way, a right to the passage of light, a right of water, etc.

Halsbury's Laws of England gives the meaning of an easement as follows

- (a) Meaning of easement - An easement is a right annexed to land to utilize other than of different ownership in a particular manner (not involving the taking of any part of the natural produce of that land or any part of its soil) or to prevent the owner of the other and for utilizing his land in a particular manner
- (b) Meaning of "dominant" and servient tenement:- The piece of land in respect of which an easement is enjoyed is called "the dominant tenement", and that over which the right is exercised is called "the servient tenement", and the expressions "dominant owner" and "servient owner" bear corresponding meaning
- (c) Meaning of "servitude" - An easement is a servitude, but servitude is a wider term and includes both easements and 'profits a prendre'
- (d) Incorporeal rights:- An easement, although for long ordinarily described as an incorporeal right, has been said not to be in strictness in incorporeal hereditament as an easement does not descend apart from the ownership of the land constituting the dominant tenement to which it is annexed
- (e) Meaning of "legal easement" - A legal easement is an easement capable of subsisting at law which has been validly created at law namely by statute, deed or prescription. An easement which does not take effect as a legal easement takes effect as an equitable interest and is called an equitable easement
- (f) Meaning of "equitable easement" - An equitable easement is a proprietary interest in land. It does not take effect as a legal easement, but takes effect as an equitable interest, therefore it is named as "equitable easement"

## ESSENTIAL CHARACTERISTICS OF AN EASEMENT

- 1 It is incorporeal
- 2 It is imposed on corporeal property and not on the owner of it
- 3 It confers no right to share on the profits arising from such property
- 4 There must be a dominant and servient tenement. It involves two distinct tenements, out of which one is "dominant tenement" or "dominant estate". The other tenement on which the easement rests or is imposed, called "the servient tenement" or "servient estate"
- 5 It must accommodate the dominant tenement
- 6 The dominant and servient owners must be different persons. For, the lessee and lessor – two different persons, but the ownership is vested with only lessor. Therefore, the easementary rights cannot arise in case of a lease

- 7 Easements can exist only as appurtenants but not in gross. The term "appurtenant" means "pertaining to" or "belonging to". However, it does not mean that the two heritages must adjoin each other. The concept of this ingredient is that the servient tenement must be more beneficial enjoyment for the dominant tenement. Example - A land being just in front of the plaintiff's house though across a narrow land could still be land appurtenant to the plaintiff's house, if it was shown that it was being used for the beneficial enjoyment of the plaintiff's.

#### DISTINCTION BETWEEN EASEMENT AND LEASE

| S No | EASEMENT   | LEASE  |
|------|--|--|
| 1    | Easement defined and is explained by the Indian Easements Act, 1882  | Lease is defined in Sec 105 of the Transfer of Property Act, 1882. The law of lease is explained from Sec 105 to 117                           |
| 2    | An easement over land is the rightful use without either the ownership or the possession of it   | A lease of land is the rightful possession and use without the ownership of it   |
| 3    | An easement may be acquired positively or negatively. It may be acquired with the grant of the owner of the property (servient owner) or it may be acquired by prescription without active grant   | The lessee can get lease only with the positive consent of the lessor  |
| 4    | The easements are acquired by prescription, custom, grant, etc. It is not necessary that an easement must be registered. However, if the parties agree, it may be registered along with the transfer of servient tenement or dominant tenement | Subject to certain restrictions, generally, lease shall have to be registered under the Indian Registration Act, 1908                          |
| 5    | As the period grows, the easementary right strengthens   | As the period grows, the life of the lease lessens, and after the completion of the lease period, the lessee shall have to vacate the premises |

## DISTINCTION BETWEEN EASEMENT AND NATURAL RIGHT

“Natural Right” is the creation of the nature. Natural rights are those incidents and advantages which are provided by nature for the use and enjoyment of a certain property. These rights are the ordinary incidents of the ownership of property and annexed to land wherever land exists. They are regarded by law as incident to the ownership of land, and they are inherent in land.

Examples:- Right of support of soil, natural stream of water, etc

| S No | NATURAL RIGHTS  | EASEMENTS   |
|------|---|---|
| 1    | Natural rights are created by nature and environment  | Easements may be created by grant express or implied  |
| 2    | They are rights in rem, i.e., enforceable against all the world   | Easements are rights in personam, i.e., enforceable against the defendant   |
| 3    | They are to benefit and advantages which arise naturally from one's own land or from its environments in the due course of nature, or from a natural cause. There are no artificial restrictions on the right of property of others | The artificial restrictions are imposed upon the other's land for enjoyment of one's land   |
| 4    | They are wholly independent of any conveyance or grant by one owner to another either express or implied  | They exist by virtue of by any conveyance or grant by one owner to another either express or implied, or by custom, etc                                   |
| 5    | The incidents of the natural rights are completely enjoyed by the owner of the land   | The dominant owner can enjoy the particular easement only, i.e., right of way right of well water, etc  |
| 6    | Natural rights are not capable of extinction so long as the subject of them continues to exist. However, sometimes they may be suspended  | Easements may be extinguished   |
| 7    | Natural rights are themselves part of the complete rights of property   | Easements are themselves not part of the complete rights of property  |
| 8    | An easement is a restriction of a natural right   | Easement is a specific right subtracted from the general rights constituting ownership of one property and attached to the ownership of another property. |

## EASEMENTS AND PROFITS A PRENDRE

**MEANING** A “profit a prendre” is a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil. It is a right to take a part of the soil or produce of the land in which there is a supposable value.

A customary right of tenants in the locality, to cut wood for fuel, plough-handles, door-posts etc., is a right of customary easement attaching to the locality and not to any collection of individuals, such a right is known in case of free pasturage or a fishery, in England, as “profit a prendre”

### DEFINITION -

**Halsbury’s Laws of England defines.**- “profits a prendre appurtenant are against common right. They are attached to the ownership of particular piece of land attached thereto by grant, prescription or extraneous means. They cannot be served or enjoyed apart from the dominant tenement and they pass with the dominant tenement into the hands of each successive owner. Where a profit a prendre exists as a right in gross, it may be assigned and dealt with as a valuable interest according to the ordinary rules of property and the same can be disposed of by deed or will. A profit a prendre may be created for an estate in perpetuity, or for any less period. A profit which is appurtenant to land runs with dominant tenement into the hands of successive owner of the land. The owner of a profit a prendre has possessory right and can bring an action for trespass”

An easement and profit a prendre are similar in several aspects. But there are a few distinctions between them.

| S No | EASEMENT   | PROFIT A PRENDRE  |
|------|--|---|
| 1    | The dominant owner is not entitled to take anything from the land of the servient owner, for his own use or benefit  | The dominant owner is entitled to take something from the land of the servient owner, for his own use or benefit  |
| 2    | An easement entitles the dominant owner to enter his neighbour’s land and make some use of it, but without taking any tangible profit from the soil, or to prevent his neighbour doing something on his land, as for instance, building, for benefit of the dominant owner | A profit a prendre entitles the dominant owner not only to enter the land, but to take something from it for his own use                                      |
| 3    | One of the essential features of an easement is the absence of all rights to participate in the profits of the soil charged with it, and it must therefore clearly be distinguished from profits a prendre   | The right to profits denominated profit a prendre consists of a right to take a part of the soil or product of the land, in which there is a supposable value |
| 4    | It cannot exist independently without connection with or being appurtenant to other property   | It may exist independently without connection   |
| 5    | It is not a possessory right   | It is a possessory right  |

## Kinds of Easements

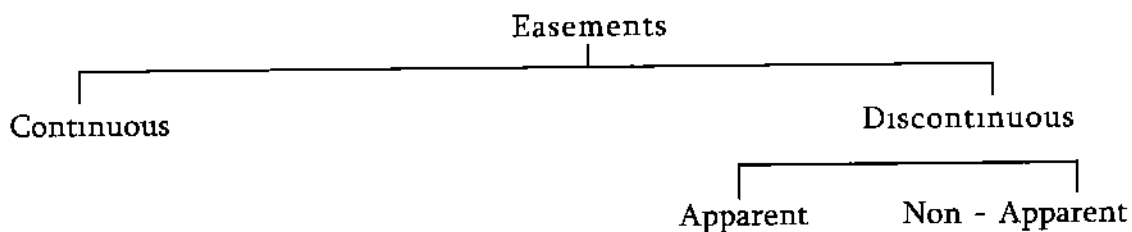
Primarily easements are classified into two heads They are -

- 1 Public easements, and
- 2 Private easements

1. **PUBLIC EASEMENTS:-** These easements are entertained by public at large Example - the right to a public thoroughfare

2 **PRIVATE EASEMENTS:-** Private easements are those in which the persons of inherence is some private individual, or class of individuals, and not the public at large Example -a right to a private street

Section 5 the Indian Easements Act, 1882 classifies the easements into continuous and discontinuous, apparent and non – apparent easements



Sec-6 Continuous and Discontinuous, apparent and non- apparent easements Easements are either continuous or discontinuous, apparent or non-apparent

A continuous easement is one whole enjoyment is, or may be, continued without the act of man,

A discontinuous easement is one that needs the act of man for its enjoyment

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him

A non-apparent easement is one that as no such sign

### Illustrations

- (a) A right annexed to B's house to receive light by a window without obstruction by his neighbour A This is a continuous easement
- (b) A right of way annexed to A,s house over a B's land This is a discontinuous easement
- (c) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain The drain would be discovered upon careful inspection by a person conversant with such matters These are apparent easements
- (d) A right annexed to A's house to prevent B from building on his own land This is a non-apparent easement

1 **CONTINUOUS EASEMENT-** A continuous easement is a right to do some act of a continuous and constant nature, of which the enjoyment may be continued without the necessity of any act of man The test of continuousness is that there must be an alteration in the quality or disposition of the tenement, which is intended to be, and is, in its nature, permanent and gives the tenement peculiar qualities, and

results in making one part dependent in a measure upon the other. If there is a permanent adaptation of the two tenements to the exercise of the easement, it is "continuous"

**Example** - The right to discharge foul-water through drain for domestic purposes is a continuous easement

**2. DISCONTINUOUS EASEMENT:-** Where an easement is enjoyed by a dominant servient, which easement needs the act of man for its enjoyment, is a discontinuous easement

**Examples:** - (1) Right of way, (2) right of access for repairs, etc. These rights can be used only intermittently and which requires an act of man to be beneficially enjoyed

**3. APPARENT EASEMENT:-** An apparent easement is one the existence of which is shown by some permanent sign. It can be seen upon careful inspection by a competent person. A competent person means who is ordinarily conversant with the subject. A permanent sign means it must necessarily be seen or be apparent to every man

**Example** - drainage, way, etc. These easements are visible to a competent person on inspection. These are permanent signs

**4. NON-APPARENT EASEMENT** - A non-apparent easement is one that has no such sign

**Example:-** A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement

Rights of easements are classified into different classes due to their peculiar nature. Section 5 classifies easements continuous, discontinuous, apparent and disapparent easements as above, stated. There is also another classification. They are -

- 1 Positive easements, and
- 2 Negative easements

### POSITIVE AND NEGATIVE EASEMENT

#### POSITIVE EASEMENTS:-

**MEANING** - A positive easement is also called as "affirmative easement" or "assertive easement". A positive easement confers a right on the dominant owner to do some act upon the servient tenement, which, in the absence of an easement, would be a nuisance or a trespass. This act of dominant owner for the benefit of the servient owner. This act of dominant owner makes active use of the servient tenement. The servient owner is obliged to permit, or suffer something to be done on his land by the owner of the dominant herbage

**Examples** -

The following are some of the examples of positive easements -

- (a) Rights of way,
- (b) Right in working in mines, or quarries, to make spoil banks on surface,
- (c) Right to move a timber traveler through and over neighbouring land,
- (d) Right to fix a signboard on a neighbour's house,
- (e) Right to use a lavatory,

- (f) Right to use water of a well,
- (g) Right to place stones on the foreshore for protection of adjoining land,
- (h) Right to go on neighbour's land and draw water from a spring there or from a pump,
- (i) Right to pew in a church,
- (j) Right to enter on adjoining land to repair and outside wall, etc

### NEGATIVE EASEMENTS -

**MEANING**- A negative easement is a right residing in the owner of the dominant tenement merely to prohibit the commission of certain acts upon the servient tenement which the servient owner would otherwise have been entitled to do. This right restricts the owner of the servient tenement, in respect of his tenement in the exercise of certain general and natural rights of property. It does not bind him to permit something to be done on his property by the dominant owner, but merely restricts him from making a certain use of his property which would impair the easement enjoyed by the dominant owner for the beneficial use of the dominant heritage.

**Examples** - The following are some of the examples of negative easements -

- (a) Right to receive light for a building,
- (b) Right to receive air by defined channel,
- (c) Right to support of buildings from land,
- (d) Right to support of buildings from buildings,
- (e) Right to receive a flow of water in an artificial stream,

## NATURAL RIGHT

**SCOPE** -Section 7 of the Indian Easements Act, 1882 explains that easements are restrictions on natural rights. It also gives 10 illustrations and two explanations. A plain reading of the section gives clear understanding.

**Easements restrictive of certain rights** - Easements are restrictions of one or other of the following rights (namely)

- (a) **Exclusive right to enjoy** - The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accretions thereto
- (b) **Rights to advantages arising from situation** - The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation

**Illustrations of the rights above referred to**

- (a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force
- (b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons
- (c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person
- (d) The right of every owner of land to so much light and air as pass vertically thereto
- (e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person

**Explanation** - Land is in its natural condition when it is not excavated and not subjected to artificial pressure, and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition

- (f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons
- (g) The right of every owner of land to collect and dispose of within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel
- (h) The rights of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature, the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature
- (i) The right of every owner of land of upper land that water naturally rising in or falling on, such land, and not passing in defined channels, shall be allowed by owner of adjacent lower land to run naturally thereto

- (j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep, and the right of every such owner to use and consume the water for irrigating such land and for the purposes of any manufacture situate thereon, provided that he does not thereby cause material injury to other like owners

Example - A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in natural and known course

### DISTINCTION BETWEEN EASEMENT AND NATURAL RIGHT

“Natural rights” are the creation of the nature. Natural rights are those incidents and advantages which are provided by nature for the use and enjoyment of a certain property. These rights are the ordinary incidents of the ownership of property and annexed to land wherever land exists. They are regarded by law as incident to the ownership of land, and they are inherent in land.

Examples - Right of support of soil, natural stream of water, etc

| S No | NATURAL RIGHTS   | EASEMENTS  |
|------|--|--|
| 1    | Natural rights are created by nature and environments  | Easements may be created by grant express or implied   |
| 2    | They are rights in rem, i.e., enforceable against all the world  | Easements are rights in personam, i.e., enforceable against the dependant  |
| 3    | They are to benefit and advantages which arise naturally from one's own land, or from its environments in the due course of nature, or from a natural cause. There are no artificial restrictions on the right of property of others | The artificial restrictions may be imposed upon the other's land for the enjoyment of one's land   |
| 4    | They are wholly independent of any conveyance or grant by one owner to another either express or implied   | They exist by virtue of by any conveyance or grant by one owner to another either express or implied, or by custom, etc                                  |
| 5    | The incidents of the natural rights are completely enjoyed by the owner of the land  | The dominant owner can enjoy the particular easement only, i.e., right of way, right of well water, etc  |
| 6    | Natural rights are not capable of extinction so long as the subject of them continues to exist. However, sometimes they may be suspended   | Easements may be extinguished  |
| 7    | Natural rights are themselves part of the complete rights of property  | Easements are themselves not part of the complete rights of property   |
| 8    | An easement is a restriction of a natural right  | Easement is a specific right subtracted from the general rights constituting ownership of one property and attached to the ownership of another property |

## RIGHT TO LIGHT

Light, like air, is the common property of all, or to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. Some of the opinions of eminent Justices and Jurisprudents on the right of the light have been reproduced hereunder for clear understanding

Lord McNaughton explains the right of light as follows "The right of a person who is owner or occupier of a building with windows, privileged as ancient lights, in regard to the protection of light coming to those windows, is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement

"It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits"

Lord Macnaghten - "In some cases, of course an injunction is necessary if, for instance the injury cannot be fairly compensated by money if defendant has acted in a highhanded manner - if he has endeavoured to steal a march over plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money"

"The common form of injunction which has been in use since the case of Yates vs Jack, is not altogether free from objection. I think it would be better that the order, when expressed in general terms should restrain defendant from erecting any building so as to cause a nuisance or illegal obstruction to plaintiff's ancient windows, as same existed previously to the taking down of the house which formerly stood on the site of defendant's new buildings. If the action is brought to a hearing before defendant's new buildings are completed, and there seems to be goods grounds for plaintiff's apprehensions, an order, I think, might be conveniently made in that form with costs up to the hearing and liberty to plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised"

Lord Davey -

"It is impossible to assert that any man has a right to a fixed amount of light ascertainable by metes and bounds" "The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measurement of which is what is required for the ordinary purposes of mankind"

Lord Lindley.-

"There is no rule of law if a person has forty-five degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window. Experience shows that it is, generally speaking a fair working rule to consider that no substantial injury is done to him where an angle of forty-five degree is left to him, especially if there is good light from other direction as well"

“The general principle deducible appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance”

ALLEN vs GREEN WOOD (1979)

The plaintiff had a house and garden. The plaintiff was enjoying light for his garden for more than 20 years continuously. The defendant-neighbour erected a high-level construction obstructing the sun rays to the half of the garden, thus the growth of the plants had been effected. The defendant contended that the right of the light was limited to the illumination and domestic purposes, and not to sun's direct rays. The Court held that the plaintiff was entitled to right of light without obstruction.

THEED vs DEBENDAM (1876)

The plaintiff was sculptor. He used to work his artistic works in his house. The defendant-neighbour erected a high level construction obstructing the light to the plaintiff's work-place. The Court held that the plaintiff-sculptor was entitled to right of light without interference.

IMPORTANT POINTS -

- A Section 7 of the Indian Easements Act, 1882 says that easements are restrictions of one or other of the following rights, namely - (a) exclusive right to enjoy and (b) right to advantage arising from situation. The illustration (d) appended to the Section runs “The right of every owner of land to so much light and air as pass vertically thereto”. The right to receive light falls “vertically” on a tenement as a natural right. The right to the reception of light in a lateral direction without obstruction is an easement that may be acquired by prescription or under negative covenant entered into with adjoining owners.
- B An easement of light and air cannot be acquired in respect of a joint wall.
- C Courts will not interfere to protect ancient lights unless there is such an obstruction of the light as to interfere with comfortable use and enjoyment of the building according to the ordinary notions of mankind, i.e., unless a nuisance is caused.
- D To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before. There must be a substantial deprivation of light enough to render the occupation of a house uncomfortable according to the ordinary notions of mankind.
- E Man does not lose or restrict his right to light by non-user of his, or not using it to full measure.
- F In suit for damages for obstruction of easement of light and air the dominant owner must prove that there has been diminution in the quantity of light and air which used to enter his house during the whole of the prescriptive period and that such diminution has been made the occupation of the house uncomfortable or unsuitable for carrying on his business as beneficially as he was doing before. Mere diminution in the quantity of light and air does not give cause for action.

## IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENT

### SCOPE

Easements are additional rights to the ordinary natural incidents of the ownership of a dominant tenement, and which connote a corresponding burden on servient tenement against common right. Easements may be acquired in any of the following ways -

- (a) Easements may be created by deed, that is by grant, reservation or covenant,
- (b) Easements may be acquired by prescription
- (c) Easements may be created by operation of law, viz, by estoppels, or by statute, or by special statutory proceedings providing for the acquisition of a private road or right of way over the lands of another.
- (d) Easements may be created or recognized by a judgment or decree,
- (e) Easements may be acquired by necessity,
- (f) Easements may be acquired as quasi-easements,
- (g) Easements may be created by custom,
- (h) Easements may be created by imposition,
- (i) Easements may be acquired by transfer

CHAPTER II of the Indian Easements Act, 1882 explains about "The Imposition, Acquisition and Transfer of Easements". Sections 8 to 19 are contained in this Chapter. Sections 8 to 19 are contained in this chapter. Sections 8 and Section 9 to 11 refer to the creation of easement by an express grant. Section 13 implies a grant by one of the parties to transfer or will or partition as the case may be. The easements explained in Sections 13 and 14 are Easements of necessity and Quasi - Easements. Section 15 refers to prescriptive easements on the fiction of a lost grant, which is presumed from long user. Section 18 refers to customary easements.

### WHO MAY IMPOSE (CREATE) EASEMENTS

**Sec-8** Who may impose easements? An easement may be imposed by anyone in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

#### Illustrations

- (a) A is a tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that lease exists or for any shorter period.
- (b) A is a tenant for life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life interest.
- (c) A, B, and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or any part thereof.
- (d) A and B are lessees of the same lessor - A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable, B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

## IMPORTANT POINTS -

- A Every owner of land, having a transferable interest in it, can impose over it an easement to the extent of his own right
- B There is no necessary for creating an easement It may be created by acquiescence or mere silent, or orally
- C Difference between "imposition" and "transfer" -  
"Imposition" means the creation of an easement by the owner of the land on which it is to be exercised  
"Transfer" means the transfer of an existing right by the dominant owner "Imposition" is a voluntary creation of a right Transfer is only a voluntary conveyance of the existing right Imposition of an easement means it is a new easement, which was not in existence prior to its creation Whereas transfer of an easement means there is already an easement in existence A transfer of an easement cannot be effected apart from the dominant heritage to which it appertains, while imposition always means creation of an easement on certain land without the transfer of any interest in such land itself
- D Section 9 of the Indian Easements Act, 1882 lays down that, subject to the provisions of Section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility

## Illustrations

- (a) A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream, B may grant to C the right to divert the water of the stream from noon to sunset provided that A's supply is not thereby diminished
- (b) A has, in respect of his house, a right of way over B's land B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way Provided that A's right way is not thereby obstructed
- E Lessor and Mortgagor -

Section 10 of the Act provides that, subject to the provision of Section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, an easement that does not render the security insufficient But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be taken effect on the termination of the lease or the redemption of the mortgage

## F LESSEE -

Section 11 provides that no lessee or other person having a "derivative interest" may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor

## WHO MAY ACQUIRE EASEMENTS?

Section 12 explains as to who can acquire an easement

**S 12 Who may acquire easements.** - An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created or, on his behalf by any person in possession of the same

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property

No lessee of immovable property acquires, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease

### INGREDIENTS OF THE SECTION

- (1) The owner of the immovable property may acquire an easement,-
- (2) Such easement must be for the beneficial enjoyment of which the right is created,
- (3) The owner or other person on his behalf in possession of the land may acquire an easement,
- (4) In the case of a joint property, one of the two or more co-owners may acquire an easement, for the beneficial enjoyment of such property, with or without the consent of the other or others (Co-owners)
- (5) A tenant cannot by prescription acquire an easement over land belonging to the land lord Because for the existence of an easement two tenements owned by two different persons are necessary However, one tenant can claim right of easement against another tenant, for which the basis may be express or implied grant

### MODES OF ACQUIRING EASEMENTS

Easements are superadded rights to the ordinary natural incidents of the ownership of a dominant tenement, and which connote a corresponding burden on a servient tenement against common right

(1) **GRANTS** - Theoretically all easements have their origin in some sort of grant by the servient owner The grant may be express, or it may be implied from the circumstances and conduct of the parties to the easement or it may be presumed from long user or it may be inferred from some usage prevailing in the locality Easements may be acquired by express grant The limit depends on the words used and the parties intention Where no express grant exists, the right of easement must be limited and defined by the user proved Section 8 provides that every person who possesses any transferable interest in land can impose an easement on such land in the circumstances and to the extent in or to which he can transfer such interest Section 8 gives the power of creating an easement by grant to the owner or occupier of any immovable property His power of making a grant of an easement is co-extensive with his power of transferring his own interest in the servient heritage He cannot grant an easement which extends beyond his own interest in the servient heritage He cannot grant an easement which extends beyond his own interest and affects the rights of other persons The grantor's right should be greater or co-extensive with interest for which the easement is granted

(2) **Prescription** - Easements may be acquired by way or acquisition Section 15 explains about "acquisition by prescription" Section 16 explains about "exclusion in favour of reversionary of servient heritage" Section 17 says as to which easements cannot be acquired by prescription

(3) **Operation of Law** - Easements may be created by operation of law, viz, by estoppels, or by statute, or by special statutory proceedings providing for the acquisition of a private road or right of way over the lands of another. Ashhurst, J. observes "It is the general rule that every prescription is good if by any possibility it can be supposed to have a legal commencement." The easements created by operation of law with reasonable reference to public convenience, general good and also public policy. Implication of law, which raises easement, is founded upon the principle that man must do all he can to make his grant effective. Easement, is founded upon the principle that man must do all he can to make his grant effective.

(4) **JUDGMENT** - The easements may be created or recognized by a judgment or decree.

(5) **Easements of necessity** - Section 13 and 14 of the Act explain about the easements of necessity (Refer topic No. 6 Easements of necessity and write the important points here)

(6) **Quasi-Easements** - (Discussed below in detail)

(7) **Customary Easements** - (Discussed below in detail)

(8) **Imposition** - Easements may be created by imposition. Every owner of land, having a transferable interest in it, can impose over it an easement to the extent of his own right. Section 8 of the Act explains as to who may impose easements.

(9) **Transfer** - Easements may be acquired by transfer. Section 19 of the Indian Easements Act, 1882 provides as to transfer of dominant heritage passes easement. It lays down that where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

#### **Illustration**

'A' has certain land to which a right of way is annexed. 'A' lets the land to 'B' for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

The object of the rule is that an easement exists for the beneficial enjoyment of a certain house or land, it cannot be separated from it. Section 19 covers all cases of transfer or devolution of property.

As the benefit of an easement passes with the dominant tenement into the hands of every subsequent owner of that tenement, similarly the burden of it passes with the servient tenement to every person into whose occupation the servient tenement comes and in the latter case even though a contrary intention appears.

## QUASI EASEMENT AND EASEMENT OF NECESSITY

The term "quasi" is used in legal phraseology to indicate that one subject resembles another, with which it is compared in certain characteristics, but that there are also intrinsic difference between them

QUASI – Easements = Apparent and continuous easements which are necessary for the enjoyment of the dominant tenement in the state in which it was enjoyed at the time when it was severed from the servient tenement are called quasi-easements. Before such severance they are only the ordinary rights of property and assume the character of rights of easement on such severance only provided they fulfil certain specified conditions, i.e.

- (a) They are apparent,
- (b) They are continuous, and
- (c) They are necessary for the enjoyment of the tenement for which they are claimed in the same state in which it was enjoyed before severance from the tenement on which their liability is thrown

GALE, the famous Jurisprudent describes quasi-easements as follows "The meaning of the term 'quasi-easement' which occurs in many modern authorities is as follows. Where Black acre and White acre, both belong to A, the common owner, and during his ownership an accommodation or privilege is enjoyed by Black acre over White acre, and A subsequently parts with Black acre to B but retains White acre, there passes to B in certain cases a right to the above accommodation. This accommodation, as it existed during the common ownership, cannot in the strict sense be described as an 'easement', but is usually described as a 'quasi-easement'. Black acre is sometimes described as the quasi-dominant tenement and White acre as the quasi-servient tenement

Easement of necessity = Easement of necessity means an easement without which the property cannot be enjoyed at all. It does not mean an easement which is merely necessary to reasonable enjoyment of the property

SCOPE -

Clauses (a), (c) and (e) of Section 13 of the Indian Easements Act, 1882 deal with "Easements of necessity". Clauses (b), (d) and (f) of Section 13 of the Act deal with "Quasi – Easements". Section 14 of the Act deals particularly about "Direction of way of necessity". Section 13 also gives the illustrations about "Quasi-Easements" and "Easements of necessity"

### SECTION-13

S 13 Easements of necessity and Quasi – Easements - Where one person transfers or bequeaths immovable property to another-

- (a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement, or
- (b) If such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement,
- (c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator the transferor or the legal representative of the testator shall be entitled to such easement,

- (d) If such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement

Where a partition is made of the joint property of several persons,-

- (e) If an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or
- (f) If such an easement is apparent and continuous and necessary for enjoying the share of the latter and it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement

The easements mentioned in this section, Clauses (a), (c) and (e) are called "Easements of necessity" Whether immovable property passes by operation of law, the persons from and to whom it so passes are for the purpose of this section, to be deemed, respectively, the transferor and transferee

#### Illustrations

- (a) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only over A's adjoining land to the field sold.
- (b) A the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purpose only, and is inaccessible except by passing over the field sold to B, A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.
- (c) A sells B a house with windows overlooking A's land which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.
- (d) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.
- (e) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right, and B cannot build on the land so as to obstruct such light.
- (f) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house sells the land to B without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.
- (g) A, the owner of a house, sells B a factory built on adjoining land, B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.
- (h) A, the owner of two adjoining houses, Y and X sells, Y to B, and retains Z. B is entitled to the benefits of all the gutter and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

- (i) A, the owner of two adjoining buildings, sells one to B and the other to C. C is entitled to lateral support from B's building and B is entitled to lateral support from B's building.
- (j) A, the owner of two adjoining buildings, sells one to B and the other to C. C is entitled to lateral support from B's building and B is entitled to lateral support from B's building.
- (k) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.
- (l) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The company is entitled to such amount essential for the safety of the siding.
- (m) Owing to the partition of joint property, 'A' becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. 'A' is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.
- (n) 'A' lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

### IMPORTANT POINTS:-

A A person cannot have an easement in his own property. When the property is divided into parts by way of sale, or bequeaths an easementary right is created for the new person, which is essential to enjoy the portion of that property. For example - a person has constructed a two-portioned house having a well a centre. He sells one portion to B. B shall have an easementary right of using the water in the well. Thus, the quasi-easement arises. This type of easement is acquired by grant, either expressly or by necessary implication.

B Right of support -

#### FIDA ALI HULLA vs AKBAR ALI KADARBHAI (1939)

The ancestral building was partitioned between two brothers - A and B. A was enjoying the ground floor and B was enjoying the first floor. Ground needed repairs. Without which the first floor would be collapsed. B asked A to repair the ground floor. A refused to repair. The court held that B had right of support as a quasi-easement, but it was not necessary to A to get it repaired for B. The Court also held that B was entitled to enter the ground floor and to repair it with his own expenditure.

C Easement of necessity arises in case of a transfer, bequest or partition. An easement of necessity is an easement needed absolutely for the enjoyment of property. It is not merely for convenient or reasonable enjoyment. For example - A has 400 square yards house-site. He sold 200 square yards to B. There is no way to B from all the sides, except through 200 square yards of A. A has to give right of path (Easement of necessity) from his remaining house-site. If B has any other way in other sides, he has no right to claim the right of path for his convenience. The plaintiff has to establish the 'absolute necessity'.

Innes J Describes easement of necessity as follows:- "During unity of possession no easement strictly so called exists, but a man, may, by general right of property, make one part of his property dependent on another and grant it with this dependence to another person. Where property is conveyed which is so situated relatively to that from which it has been severed, that it cannot be enjoyed without a particular privilege in or over the land of grantor, the privilege is what is called an easement of necessity and the grant of it is implied and passes even without any express words. It is, as it were, brought into existence by the severance of tenements on the principle that, together with the property sold, the vendor grants everything without which it could not be beneficially used"

## D RIGHT OF WATER FOR AGRICULTURAL PURPOSE -

### Ramlal vs Rakhdu Pundu (1941)

An agricultural had ten acres of land, the water was spreading through small channels, which came from tank. After his death, his two sons A and B shared the property five acres each. The irrigating channels were in the land of A. There was no other way or channel of getting tank water to the land of B. B sold his land to C, who obstructed the water, so that no water would flow into the field of C. The sale deed was silent about water supply. The Court held that even though the sale deed was silent, it was necessary to C to enjoy his land from the channels of A. A had no right of obstruction.

Gale, Describes it - "Another class of easements, acquired by implied grant or reservation are those which are usually termed 'easements of necessity', though they might with more correctness be called easements incident to some act of the owners of the dominant and servient tenement without which the intention of the parties to the severance cannot be carried into effect. Easements called easements of necessity are thus described in Rolle's Abridgment—'If I have a field enclosed by my own land on all sides and I alien this close to another, he shall have a way to this close over my land as incident to the grant, for otherwise he cannot have any benefit by the grant. And the grantor shall assign the way where he can best spare it. So too, if the close aligned be not entirely enclosed by my land, but partly by the land of strangers, for he cannot go over the land of strangers'"

### E. Right of Drainage-

Just like a right of path, right of drainage is also an easement of necessity, if there is no other way of going to the used water. However, right to drain must be a continuous, and apparent. Example - A has two houses Y and Z. Z was situated in a corner place, situated other neighbours from three sides and Y on the fourth side. While A was living, the water of Z was flowing through Y. After A's death, A's sons B and C partitioned Y and Z. B received Y and C received Z. B obstructed the flow of drainage. The Court held that B had no right to obstruct, and C had right of drainage through Y.

### F. Right of light and air.-

Illustrations (c) to (f) appended to Section 13 explain about the right of light and air as quasi-easements and easements of necessity. Easement respecting light and air are both apparent and continuous and furnish very common forms of quasi-easements.

### G. Rain water-

While disposing the case, "Bai Champa vs Dwaraka Das Mohanlal (1969 Gujarat)", the Supreme Court held that an easement, in respect of rain water is continuous one and can fall in line with an easement of light and air.

### H. Direction of way necessary-

Section 14 of the Indian Easements Act, 1882 explains about direction of way of necessity. The section lays down that when a right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way, but it must be reasonably convenient for the dominant owner. When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

(I) Quasi - Easements and easements of necessity must be apparent and continuous

## EASEMENT BY PRESCRIPTION

Blackstone, J defines:-

“Prescription is a mode of acquiring property, when a man could show no other title to what he claimed than that he, and under whom he claimed had immemorially used to enjoy it. When a man claims anything because he, his ancestors or predecessors, or they whose estate he hath have had, used it all the time whereof no memory runnet to the contrary, he is said to claim such thing by prescription. The reason, why the law encouraged this mode of acquiring rights, is that if a man, after a long and continued user uninterrupted by any other man, were required in every case to prove the origin of his title especially to the olden times when writing was not so much in vogue, it would result in great hardship and injustice to him. So the law, in order to safeguard the interests of persons claiming title by long and immemorial user, invested them with the person, questioning, could not legally dispute at an earlier date when the evidence of such origin might be forthcoming, for no man could be presumed to his own property to be used by any other man for such a long time without title. Besides, if a contrary course were adopted, no man’s title to any property would ever be safe, for there would have been no guarantee at any time, that a man with a better title would not appear on some future occasion and defeat the right of the person who was hitherto regarded as entitled to it. So, the law always favours quieting of titles and the termination of strife”

Salmond defines:- “Prescription is a title effect of lapse of time in creating and destroying rights, If I possess an easement for twenty years without owning it, I begin at the end of that period to own as well as to possess it. The rational basis of prescription is to be found in the presumption of the coincidence of possession and ownership, of fact and of right. Owners are usually possessors, and possessors are usually owners. Fact and right are normally coincident, therefore the former is evidence of the latter. The longer the possession or want of possession has continued, the greater is its evidential value. That I have occupied land for a day raises a very slight presumption that I am the owner of it, but if I continue to occupy it for years, the presumption becomes indefinitely stronger”

### SCOPE -

Section 15 of the Indian Easements Act, 1882 explains about the mode of acquisition of prescriptive easements

### SECTION 15 -

Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption and for twenty years

and where support from one person’s land or things affixed thereto, has been peaceably received by another person’s land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

The right to such access and use of light or air, support or other easement shall be absolute

Each of the said periods of twenty years shall be taken to be period ending within two years next before the institution of the suit where the claim to such period relates is contested

**Explanation – I** Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an

easement that it has been granted for a limited period, or subject to a condition of the fulfillment of which it is to cease

**Explanation – II** Nothing is an interruption within the meaning of this section, unless there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made

**Explanation – III.** Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section

**Explanation – IV** In the case of an easement to pollute water the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage

When the property over which a right is claimed under this section belongs to Government, this Section shall be read as if for the words “twenty years” the words “thirty years” were substituted

#### **Illustrations**

- (a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1<sup>st</sup> January, 1862 to 1<sup>st</sup> January, 1882. The plaintiff is entitled to easement.
- (b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time, the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed “as an easement” for twenty years.
- (c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the use was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed “as of right” for twenty years.

#### **IMPORTANT POINTS -**

**A. CONDITIONS TO ENJOY PRESCRIPTIVE EASEMENTS** - Section 15 explains about the mode of acquisition of prescriptive easement. According to this section, the following conditions shall be fulfilled -

- 1 The right claimed must be certain
- 2 The right claimed must have been enjoyed by the claimant
- 3 It must have been enjoyed independently of any agreement with the owner or occupier of the land over which the right is claimed
- 4 It must have been enjoyed-
  - (a) Peaceably,
  - (b) Openly,
  - (c) As of right,

- (d) As an easement,
- (e) Without interruption,
- (f) For twenty years in case the right is claimed against civilians, and \_\_\_\_\_
- (g) For thirty years in case the right is claimed against the Government

**B Use must be adverse to the servient tenement.**- Where a person enjoys a thing with the will of the servient owner, it is not a prescriptive enjoyment. The enjoyment should be adverse to the servient owner. The right must have been enjoyed independently of any agreement with the owner. The right must be used adverse to the servient owner.

**C. Without interruption.**- The right claimed must have been enjoyed without interruption. Explanation – II to section explains what is interruption. It is an actual cessation of enjoyment by reason of an obstruction by the act of some person other than the claimant, such obstruction being submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.

**D Twenty years** - To claim a prescriptive easement, it is a condition precedent that it must be enjoyed for "full twenty years without interruption." This period alters, if the right is claimed against Government, where it is thirty years. The object of imposing the period of twenty years has been explained by Blackstone (See above). The period of twenty years must end within two years next before the institution of the suit in which the claim is contested. The period of twenty years prescribed by Sec 15 commences when the right first begins to be enjoyed in accordance with the terms of this section. It continues only so long as the right continues to be so enjoyed and ceases as soon as the enjoyment becomes otherwise than in accordance with the terms of this section.

**E "As of right"** - The term "as of right" is a well known legal expression which is not synonymous with "rightfully". The term "as of right" signifies "enjoyment by a person in the assertion of a right". "Enjoyment as of right" means enjoyment had, not secretly or by stealth, or by leave or favour, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right. Long, uninterrupted and peaceful enjoyment of a right of easement is presumed to be as of right. But there is no presumption that such enjoyment is by license.

**F Open** - The enjoyment must be open. To claim a prescriptive easement, the enjoyment must be open, peaceable, and uninterrupted. It must be secret or surreptitious.

**G. Burden of proof** - The burden of proof lies on the person who asserts the right of easement and thereby invades the natural right of the occupier of the land on which the right is claimed.

**H. Injurious to public health** - If the enjoyment is injurious to public health, the dominant owner cannot claim such enjoyment as of a right under prescriptive easement. E.g. Pollution, nuisance.

I Distinction between Prescriptive easements and customary Easements -

| S No | Prescriptive Easements  | Customary Easements   |
|------|---|---|
| 1    | The mode of acquisition of Prescriptive Easements is explained in Section 15 of the Indian Easements Act, 1882  | The mode of Acquisition of customary easements is explained in Section 18 of the Indian Easements Act, 1882   |
| 2    | A prescriptive easement may be acquired by virtue of a long standing period, i.e., 20 years,  | A customary easement may be acquired by virtue of a local custom  |
| 3    | Prescriptive easements can be claimed as of right on proof of peaceable enjoyment for 20 years  | No fixed period of enjoyment is necessary for customary easements   |
| 4    | A prescriptive easement is not limited to a particular locality. It can be enjoyed wherever land can be found   | A customary easement belongs to those land owners of an ascertained class, caste or community who for the time being happen to own lands within that particular area or locality where such custom prevails |
| 5    | A prescriptive easement must satisfy the following conditions viz., it must be certain, adverse to the owner, but peaceably, openly, as of right, as an easement, without interruption for 20 years. However, it need not be reasonable | A customary easement must satisfy all the essentials of a custom, viz., it must be ancient, reasonable, continuous and certain  |

J. Rights which cannot be acquired by prescription - Section 17 imposes certain restrictions upon the acquisition of prescriptive rights. The section provides that none of the following rights can be so acquired

- (a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed,
- (b) a right to the free passage of light or air to an open space of ground,
- (c) a right to surface-water not flowing in stream and not permanently collected in a pool, tank or otherwise,
- (d) a right to underground water not passing in a defined channel

K Lessee:- section 12 of the Act imposes that no lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease. A tenant cannot by prescription acquire a right of way over land belonging to the land lord. The reason is this for the existence of an easement, two tenements owned by two different persons are necessary

## 8. CUSTOMARY EASEMENTS

SCOPE - Section 18 of the Indian Easements Act, 1882 explains about the mode of acquisition of an easement by way of custom

Section - 18-

18 Customary easements - An easement may be acquired by virtue of a local custom. Such easements are called customary easements

Illustrations

- (a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.
- (b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and a like easement with respect to A's house.

### MEANING OF THE CUSTOM -

Custom is the parent of personal law in each country. Custom is based on unrecorded revelation and its observance is insisted on by the ancient writers. It is a source of law, because the customs are observed by those which are good and are approved by the public.

Custom in its legal sense means a rule exceptional to the general law. A rule which in a particular family, class or district has from long usage obtained the force of law. It must be ancient, certain, reasonable and continuous and, being in derogation of the general rules of law must be strictly construed. Customs cannot be extended by analogy, nor one custom deduced from another. Much less can a custom be enlarged by a parity of reasoning since it is the usage that makes the law and not the reason of the thing.

### ESSENTIALS OF A CUSTOM

The following are the essentials of a custom

- 1 Reasonableness,
- 2 Conformity with statute law,
- 3 Observance as of right,
- 4 Immemorial antiquity,
- 5 Peaceable enjoyment,
- 6 Obligatory force,
- 7 Certainty,
- 8 Consistency

## KINDS OF CUSTOMARY EASEMENTS -

The customary easement may be acquired by local customs. There are four kinds of customary easements. They are -

- 1 Easements of pasturage,
- 2 Easements of religious observances,
- 3 Easements of privacy, and
- 4 Easements of sports and recreation

## DISTINCTION BETWEEN CUSTOMARY EASEMENTS AND EASEMENTS OF NECESSITY

| S No | CUSTOMARY EASEMENTS   | EASEMENTS OF NECESSITY   |
|------|---|--|
| 1    | Section 18 explains about customary easements   | Sections 13 & 14 explain about easements of necessity  |
| 2    | Customary easements are public rights annexed to the place in general   | Easements of necessity are private rights annexed to the place in private  |
| 3    | A customary easement must be ancient, continuous, reasonable, certain, and compulsory   | Easements of necessity arise due to necessity of splitting of one parent property, or by an agreement. It need not be ancient, continuous  |
| 4    | There is no necessary to see about the origin of the customary easements  | There is necessary to see about the origin of the easements of necessity   |
| 5    | A customary easement exists independent of any dominant heritage, and is vested in a defined class, or community of a particular locality | An easement of necessity exists with any dominant heritage, and is vested with an individual for his sole benefit  |
| 6    | A customary easement must be reasonable   | There are two rules regarding reasonableness in non-customary easements. One is that a private easement must be an incident of a known and usual kind, and second is that a private easement (non-customary easement) cannot confer the exclusive use of a servient tenement. Beyond these two limitations, no question of reasonableness can arise where the title to an easement is based on express grant |
| 7    | There is no express or implied grant  | There may be express or implied grant  |

Distinction between Prescriptive easements and customary easements:

| S No | Prescriptive Easements  | Customary Easements   |
|------|---|---|
| 1    | The mode of acquisition of Prescriptive Easements is explained in Section 15 of the Indian Easements Act, 1882  | The mode of acquisition of customary easements is explained in Section 18 of the Indian Easements Act, 1882   |
| 2    | A prescriptive easement may be acquired by virtue of a long standing period, i e , 20 years   | A customary easement may be acquired by virtue of a local custom  |
| 3    | Prescriptive easements can be claimed as of right on proof of peaceable enjoyment for 20 years  | No fixed period of enjoyment is necessary for customary easements   |
| 4    | A prescriptive easement is not limited to a particular locality It can be enjoyed wherever land can be found  | A customary easement belongs to those land owners of an ascertained class, caste or community who for the time being happen to own lands within that particular area or locality where such custom prevails |
| 5    | A prescriptive easement must satisfy the following conditions viz , it must be certain, adverse to the owner, but peaceably, openly as of right, as an easement, without interruption for 20 years However, it need not be reasonable | A customary easement must satisfy all the essentials of a custom, viz , it must be ancient, reasonable, continuous and certain  |

## 9. THE INCIDENTS OF EASEMENTS & THE DISTURBANCE OF EASEMENTS

### SCOPE:-

Chapter-III of the Indian Easements Act, 1882 explain about the incidents of easements This Chapter contains Sections 20 to 31 Chapter – IV of the Act explains about the disturbance of easements Chapter – IV contains Sections 32 to 36 A fair perusal of these sections give clear understanding about the incidents of easements and the disturbance of easements

### The Incident of Easements

**20 Rules Controlled by Contract or title** - The rules contained in this Chapter are controlled by any contract between the dominant and servient owners relating the servient heritage and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed

**21 Bar to use unconnected with enjoyment**, - an easement must not be used for any purpose not connected with enjoyment of the dominant heritage

#### Illustrations

- (a) A, as owner of a farm Y, has a right of way over B's land to Y Lying beyond, A has another farm S, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of He must not use the easement for the purpose of passing to and from Z
- (b) A, as owner of a certain house, has a right of way to and from it For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers, for this is a purpose connected with the enjoyment of the dominant heritage So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair

**22 Exercise of easement Confinement of exercise of easement** - The dominant owner must exercise his right in the mode which is least onerous to the servient owner, and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined

#### Illustrations

- (a) A as right of way over B's field, a must enter the way at either end and not at any intermediate point
- (b) A has a right annexed to his house to cut thatching grass in B's swamp, a, when exercising his easement, must cut the grass so that the plants may not be destroyed

**23 Right to alter mode of enjoyment:-** Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage

**Exception** - The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose an additional burden on the servient heritage

## Illustrations

- (a) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw mill into a corn-mill, provided that it can be worked by the same amount of water.
- (b) A has right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.
- (c) A, as the owner of a paper-mill acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produce by making in the mill paper by a new process from new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, the pollution.
- (d) A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. Thus does not entitle A to pollute the stream by discharging into it poisonous liquor.

**24 Right to do acts to secure enjoyment** - The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement, but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible, and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

**Accessory rights**- Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

## Illustrations

- (a) A has easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.
- (b) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adopt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.
- (c) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown and falls across it. A may enter on B's land and repair the way or remove the tree from it.
- (d) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.
- (e) A, as owner of a certain house, has right of way over B's field. A may remove rocks to make the way.
- (f) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.
- (g) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away an inundation. A may enter upon B's land repair the dam.

**25 Liability for expenses necessary for preservation of easement**- The expenses incurred in constructing works, of making repairs, or doing any other act necessary for the use or preservation of the easement, must be defrayed by the dominant owner.

**26 Liability for damage from want of repair** - Where an easement is enjoyed by means of an artificial work the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

27 **Servient owner not bound to do anything**- The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement, but he must not do anything tending to restrict the easement or to render its exercise less convenient

**Illustrations,**

- (a) A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound, as servient owner, to clear the watercourse or sour the sewer
- (b) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed, but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he make the way narrow so as to render the exercise of the right less easy than it was at the date of the grant
- (c) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound, as servient owner, to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support
- (d) A, in respect of his mill, is entitled to a watercourse through B's land, B must not drive stakes so as to obstruct the watercourse
- (e) A in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light

28 **Extent of easements** - With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect

**Easement of necessity**- An easement of necessity is co-extensive with the necessity as existed when the easement was imposed

**Other easements**- The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired

In the absence of evidence as to such intention and purpose-

- (a) **Right of way**- a right of way of one kind does not include a right of any other kind,
- (b) **Right to air acquired by grant**- The extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator dies or the non-testamentary instrument was made
- (c) **Prescriptive right to light or air** - The extent of the prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used,
- (d) **Prescriptive right to pollute air or water**- The extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose, and

- (e) **Other prescriptive right** - The extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right

**29 Increase of easement.** - The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement - - - - -

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by allusion, the easement is proportionately increased, and, if the dominant heritage is diminished by diluvian, the easement is proportionately diminished

#### Illustrations

- (a) A, the owner of a mill, has acquired a prescriptive right to divert to his mill, part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.
- (b) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is the responsible to the lower riparian owners for injury done by such increase.
- (c) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on A's land. A buys a field and unites it to his farm. A is not thereby entitled to take leave to manure this field.

**30. Partition of dominant heritage** - Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage. Provided that such annexation is consistent with the terms of the instrument, decree or revenue proceedings (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

#### Illustrations

- (a) A house to which a right to way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to right of way by the same path.
- (b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into distinct heritages, one of which is granted to A, the other to B. A and B are each entitled in respect of his heritage, to draw from the well fifty buckets a day, but the amount drawn by both must not exceed fifty buckets a day.
- (c) A, having in respect of house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

**31 Obstruction in case of excessive user** - In the case of excessive use of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage provided that the user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

#### Illustration

A, having a right to the free passage over B's land of light to four windows, six feet by four, increase their and number. It is impossible that the passage of light to the new window without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive use.

## THE DISTURBANCE OF EASEMENTS

**32 Right to enjoyment without disturbance** - The owner or occupier of the dominant heritage is entitled to enjoyment without disturbance any other person

### **Illustration**

A, as owner of a house, has a right of way over B's land, unlawfully enters on B's land, and obstructs A in his right of way A may sue compensation, not for the entry, but for the obstruction

**33 Suit for disturbance of easement:** - The owner of any interest in dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto provided that the disturbance has actually caused substantial damage to the plaintiff

**Explanation I:-** The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 24

**Explanation II** - Where the easement disturbed is a right to the free passage of light passing the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit

**Explanation III** - Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health

### **Illustrations.**

- (a) Places a permanent obstruction in a path over which B, as tenant of C's house by has a right of way This is substantial damages to C, for it may affect evidence of his reversionary to the easement
- (b) A, as owner of a house, has a right to walk along one side of B's house B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot passengers using the way This is not substantial damages to A

**34 When cause of action arises for removal of support** - The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained

**35 Injunction to retain disturbance.-** Subject the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to retain the disturbance of an easement-

- (a) If the easement is actually disturbed – When compensation for such disturbance might be recovered under this Chapter,
- (b) If the disturbance is only threatened or intended – when the act threatened or intended must necessarily, if performed, disturb the easement

**36 Abatement of obstruction of easement** - Notwithstanding the provisions section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement

## 10. THE EXTINCTION, SUSPENSION & REVIVAL OF EASEMENTS

**SCOPE.** - Chapter -V of the Indian Easements Act, 1882 explains about "the extinction, suspension and revival of easements" Chapter - V contains sections from 37 to 51

An easement may be extinguished-

- (a) By dissolution of the right of the servient owner from a cause which preceded the imposition of the easement (section 37),
- (b) By release, whether express or implied (Section 38),
- (c) By revocation in exercise of a power reserved in this behalf by the servient owner (section 39),
- (d) If imposed for a limited period, by the expiry of the period, and if acquired on condition that it shall become void on the performance or non-performance of a specified act, by the fulfillment of the condition (Section 40),
- (e) If it is an easement of necessity, by the coming to an end of the necessity (Section 41),
- (f) If it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner (Section 42),
- (g) By permanent change in dominant heritage (heritage 43),
- (h) By permanent alternation of servient heritage by superior force (section 44)
- (i) By destruction of either heritage (section 45),
- (j) By unity of ownership (section 46),
- (k) By non-enjoyment for an unbroken period of twenty years (section 47)

**Section 37** Extinction by dissolution or right of servient owner - When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished

**Exception** - Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10

**Illustrations**

- (a) A transfers Sultanpur to B on condition that he does not marry C B imposes an easement on Sultanpur The B marries C B's interest in Sultanpur ends, and with it the easement is extinguished
- (b) A, in 1860, let Sultanpur to B for thirty years from the of the lease B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty nine year B's interest in Sultanpur then ends, and with it C's easement
- (c) A and B, tenants of C, have permanent transferable interests in their respective holdings A impose on his holding an easement to draw water from a tank irrigating B's land, B enjoys the easement for twenty years Then A's rent falls into arrears and his interest is sold B's easement is extinguished
- (d) A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section 10 The land is sold to D in satisfaction of the mortgage-debt The easement is not thereby extinguished

**Section 38** Extinction by release - An easement is extinguished when the dominant owner releases it expressly or impliedly, to the servient owner

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage

**Explanation I** - An easement, is impliedly released-

- (a) Where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority,
- (b) Where any permanent alternation is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future

**Explanation II** - Mere non-user of an easement is not an implied release within the meaning of this section

**Illustrations:**

- (a) A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representatives
- (b) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual
- (c) A, having the right to discharge his eavesdropping into B's yard, expressly authorizes B to build over this yard to a height which will interfere with the discharge. A builds accordingly. A's easement is extinguished to the extent of the interference
- (d) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released
- (e) A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land, permanently alters the roof so as to direct the rainwater into a different channel and discharge it on C's land. The easement is impliedly released

**Section 39.** Extinction by revocation - An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement

**Section 40** Extinction on expiration of limited period or happening dissolving condition.- An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled

**Section 41** Extinction on termination of necessity - An easement of necessity is extinguished when the necessity comes to an end

**Illustrations**

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished

**Section 42** Extinction of useless easement - An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner

**43** Extinction by permanent change in dominant heritage.- Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced

by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless-

- (a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used, or
- (b) The injury caused to the servient owner by the change is so slight that no reasonable person would complain of it, or

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support the dominant heritage

**Section 44 Extinction on permanent alteration of servient heritage by superior force** An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement, Provided that where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage, and the provisions of section 14 apply to such way

#### Illustrations

A grant to B, as the owner of a certain house, a right to fish in river running through A's land. The river change its course permanently and runs through C's land. B's easement is extinguished.

- a Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished

**Section 45. Extinction by destruction of either heritage** - an easement is extinguished when either the dominant or the servient heritage is completely destroyed

#### Illustrations

A, has right of way over a road running along the foot of a sea cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished

**46. Extinction by unity of ownership** - An easement is extinguished where the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages

#### Illustrations

- (a) A, as the owner of a house, has a right of way over B's field. A mortgages his house and B mortgages his field to C. Then C forces both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished
- (b) The dominant owner acquires only part of the servient heritage, the easement is not extinguished, except in the case illustrated in section 41
- (c) The servient owner acquires the dominant heritage in connection with a third person, the easement is not extinguished
- (d) The separate owner of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages, the easements are not extinguished
- (e) The joint owners of the dominant heritage jointly acquire the servient heritage, the easement is extinguished
- (f) A single right of way exists over two servient heritages. The easement is not extinguished

The dominant owner acquires one only of the servient heritages for the beneficial enjoyment of a single dominant heritage

- (g) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished

**Section 47 Extinction by non-enjoyment** - A continuous easement is extinguished when it total ceases to be enjoyed as such for an unbroken period of twenty years

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such

Such period shall be reckoned, in the case of a continuous easement, from the day on which enjoyment was obtained by the servient owners, or rendered impossible by the dominant owner, and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner

Provided that if, in the case of a discontinuous easement the dominant owner, within such period, registers, under the Indian Registration Act, 1908, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration

Where an easement can be legally enjoyed only at a certain place, or at certain place, or at certain times or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed, it in ignorance of his right to do so, does not prevent its extinction under this section

An easement is not extinguished under this section-

- (a) Where the cessation is in pursuance of a contract between the dominant and servient owners,
- (b) Where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or
- (c) Where the easement is a necessary easement

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purpose of this section, be deemed to be a single easement

#### **Illustrations**

A has, as annexed to his house, rights of way from his road thither over the heritages X and Z and the intervening heritage Before the twenty years expire, A exercises his right of way over X His rights of way over Y and Z are not extinguished

**Section 48 Extinction of accessory rights:-** When an easements is extinguished the rights (if any) accessory thereto are also extinguished

#### **Illustration**

A has an easement to draw water from B's well As accessory thereto, he has a right of way over B's land to and from the well The easement to draw water is extinguished under section 47 The right of way is also extinguished

**Section 49. Suspension of easement.-** An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein

**Section 50. Servient owner not entitled to require continuance:-** The servient owner has no right to require that an easement be continued, and notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage

### Illustration

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

**Section 51 Revival of easement** - An easement extinguished under section 45 revives (a) when the destroyed heritage is, before twenty years have expired, restored by the deposit of allusion, (b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site, and (c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

### Illustration

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

## LICENCE

**SCOPE**- Section 52 of the Easements Act, 1882 defines "Licence" Chapter VI of the Indian Easements Act, 1882 explains about licences This Chapter contains sections from 52 to 64

### **DEFINITION:-**

Sec 52 of the Easements Act, 1882 - "Licence" defined Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence

Vaughan, Chief Justice defines licence as follows "A licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful As licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to carrying away of the deer killed and tree, cut down, they are grants So, to licence a man to eat my meat or fire the wood in my chimney to warm him by, as to action of eating, firing my wood and warming him, they are licences, but it is consequent necessity to those actions that my property may be destroyed in the meat eaten and wood burnt So, as in some cases, by consequences and not directly, and as its effect, a dispensation or licence may destroy and alter property.

### **IMPORTANT POINTS:-**

- A A licence does not pass any interest in immovable property to the licensee It makes only an action lawful which without it would have been unlawful
- B A licence is not connected with the ownership or possession of the land It is only a personal right It is only permissive it legislises a certain act which would otherwise be unlawful
- C A licence may be revoked Licence is a privilege to do something on the premises which otherwise would be unlawful It is a personal privilege
- D Licence cannot question title of the licensor (Sec 116 of the Indian Evidence Act, 1872)
- E Licence and Grant - When the licence permits any person to do something on immovable property and also includes permission to take away movable property, the licence may operate not only as a licence but also as a grant for movable property

Mr Justice S.K. Ray, while disposing the case **Biswanath Panda Vs. Gadadhar Panda (1971)** observed -

"A licence may be created by deed or by parole and in either case a mere licence is revocable, but were it is coupled with a grant it becomes irrevocable In case of a licence by parole coupled with a grant of interest which is incapable of being granted otherwise than by deed, such a licence operates as a mere licence because of the invalidity of the grant and is revocable A mere licence does not create any estate or interest in the property to which it relates It only confers legality on an act which would otherwise become unlawful A licence may be purely personal, gratuitous or contractual The first two classes of mere licences are revocable, the third class is revocable or not revocable according to the express or implied terms of the contract between the parties A licence coupled with grant of an interest in nature of property is not revocable"

F **Licensee** - A licensee is a person to whom the licence has been given by the licensor. Licensee is not the agent of another. He exercises of the rights conferred by the licence on his own account. He has no right or action against another person.

G A licence cannot be assigned, as it is not connected with the ownership of any kind. It creates only a personal right or obligation. It is generally revocable at the will of the licensor.

H. **Licence when transferable.**- Section 56 of the Indian Easements Act, 1882 explains about the transferability of a licence. It lays down that unless a different intention is expressed or necessity implied, a licence to attend a place of public entertainment may be transferred by the licensee, but, save as aforesaid, a licence cannot be transferred by the licensee or exercised by his servants or agents.

**Examples.-**

- (a) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immovable property of B. The right cannot be transferred.
- (b) The Government grants B a licence to erect and use temporary grain sheds on Government land. In the absence of express provisions to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

The general principle is that a licence cannot be transferred. There are the following exceptions to this general exception -

1. **Public entertainment** - Where the licence is given in case of public entertainment, viz, cinema, circus, drama, etc., such licence may be transferred. The licensor is free to make, by the terms of his grant, a licence to attend a place of public entertainment non-transferable.
2. **Profits a prendre**.- Where it is coupled with a grant of immovable property or of an interest in the immovable property such as a profits a prendre either of which is assignable and can be exercised by the licensee's servants or agents. But the licensor is free to make, by the terms of his grant, a licence to attend a place of public entertainment non-transferable.
3. Where a licence is expressly made assignable and exercisable by servants or agents, such licence may be transferable.
4. Where a licence is by its very nature, such that it cannot be exercised by the licensee himself, such type of licences may be transferred.

I. **LICENCE WHEN REVOCABLE**- Section 60 of the Indian Easements Act, 1882 explains about revocability of a licence.

A licence may be revoked by the grantor, unless-

- (a) It is coupled with a transfer of property and such transfer is in force,
- (b) The licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution.

It is a general principle that a licence is revocable by the will of the grantor, unless the case falls under clause (a) or (b) of Section 60. Under Clause e(a) if the licence is coupled with a transfer of property and such transfer is in force the licence would not be revocable. Under Clause (b) If the licensee, acting upon the licence, had executed a work permanent character and incurred expenses in the execution then also the licence will not be revocable.

**J Irrevocable licence-** A right under irrevocable licence is generally heritable, but unless such licence is coupled with the transfer of an assignable interest in property, it is generally not transferable. But a licence coupled with a transfer of an assignable interest in some property is always transferable.

**K Legal Remedy -** a licence is generally revocable. However, the licensor should give reasonable notice to the licensee, before he revokes licence. If the obstruction caused by third person, the licensee is not entitled to sue that third person on his own name. It is the licensor, to sue that third person. Where the licence is given to the licensee upon receiving a valuable consideration under express or implied contract, the licensor has no right to interfere or revoke the licence. If the licensor interferes or revokes the licence, the licensee can bring an action for damages for breach of contract or implied covenant not to revoke.

A licence is deemed to be revoked—

- (a) When, from a cause preceding the grant or if the grantor ceases to have any interest in the property affected by the licence
- (b) When the licensee releases it expressly or by implication,
- (c) When the period for which it was granted expires,
- (d) When the condition on which it was to cease is fulfilled,
- (e) When the property on which it was exercised is destroyed rendering its exercise impossible,
- (f) When such property is so permanently altered by superior force that it can no longer be exercised,
- (g) When ownership of the property affected by the licence becomes vested in the licensee,
- (h) When the purpose for which it was granted is altered or abandoned or becomes impracticable,
- (i) When the particular office, employment or character for which it was granted to the licensee, ceases to exist,
- (j) By non-user for twenty years, not due to a contract between the parties,
- (k) When the interest or right to which it is accessory ceases to exist

M DISTINCTION BETWEEN LICENCE AND EASEMENT -

| S No | LICENCE   | EASEMENT   |
|------|---|--|
| 1    | Licence is defined in Section 52 of Indian Easements Act, 1882                                | Easement is defined in Sec 4 of the Indian Easements Act, 1882   |
| 2    | A licence is only a personal right  | An easement is a right appertaining to property  |
| 3    | A licence is only a right in personam. It is not enforceable against third person             | An easement is a right in rem. It is enforceable by all and against all into whose hands the servient and the dominant tenements respectively may come |
| 4    | A licence may be revocable by the licensor at his will  | An easement cannot be revoked at the will of the grantor   |
| 5    | A licence, generally, shall not become heritable  | An easement may be heritable   |
| 6    | A licence is permissive right   | An easement is acquired either by assertive enjoyment by the dominant owner or by a negative covenant between the parties or by grant or by statute    |
| 7    | A licence is always positive in character   | An easement may be positive or negative in character   |
| 8    | A licensee cannot sue the trespasser on his own name. The grantor can only sue the trespasser | The person enjoying easement can sue the trespasser on his own name  |
| 9    | A licence, generally, is not transferable   | An easement may be transferred   |
| 10   | A licence cannot be assigned  | An easement can be assigned, with property to which it is annexed  |

## M DISTINCTION BETWEEN LICENCE AND LEASE -

Section 105 of the Transfer of property Act, 1882 defines "Lease"

**S 105 Lease defined.**- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined – The transferor is called the "Lessor", the transferee is called the "Lessee", the price is called the "premium", and the money, share or other thing to be rendered is called the "Rent"

### DISTINCTION BETWEEN LICENCE AND LEASE:

| S No | LICENCE  | LEASE   |
|------|--|---|
| 1    | Licence is defined in S 52 of the Indian Easements Act, 1882   | Lease is defined of Sec 105 of the Transfer of Property.  |
| 2    | Licence is explained from section 52 to 64 of the Indian Easement Act, 1882  | Lease is explained from Sec 105 to 117  |
| 3    | A licence does not pass any interest in the property   | A lease creates an interest in the property   |
| 4    | A licence makes an action lawful which without it would have been unlawful   | A lease creates right in the transferee for a fixed period  |
| 5    | A licence is not transfereable   | A lease may be transferable   |
| 6    | A licence may easily be revocable  | A lease generally is not revocable  |
| 7    | The licensee has no exclusive power of possession over the property, for which the licenc is granted to him  | The lessee has exclusive possession over the property leased  |
| 8    | The licensee cannot bring any action against the trespassers   | A lessee can bring an action against trespassers  |
| 9    | The licence need not be registered   | Subject to certain restrictions generall, lease shall have to be registered under the Indian Registration Act, 1908 |
| 10   | A licence is not heritable   | A lease is heritable  |
| 11   | A licence can be determined by the death of the grantor or grantee   | A lease cannot be determined by the death of the lessor, or lessee  |
| 12   | Illustration - A person who is granted accommodation in a cattle shed, at his request, on the condition of payment or repair charges, is a licence | Illustration - A house-owner gives his house to B on a monthly rent of Rs 500/- It is a lease                       |

| S No | LICENCE  | LEASE   |
|------|--|---|
| 13   | In the bank premises, some rooms are vacant. The Bank Manager occupied and, resided in them. He did not pay anything to the bank. It is called licence.              | A has rice mill. B has taken it on lease on monthly rental for one year. A has the right to inspect the plant and machinery and premises, whenever he wishes. It is a lease.        |
| 14   | Giving a room in a hotel/lodge to the traveler is a licence.   | Giving an apartment on rent is a lease.   |
| 15   | Advertisements affixed on a wall, agreement to let hoarding for advertisements, automatic machines on a railway station platforms, etc are the examples of licences. | Taking the premises on lease, taking the cinema talkies on lease for a fixed period, taking the agricultural land for cultivation for a fixed period etc are the examples of lease. |

### ACCESSORY LICENCE

It is a creation of law, when its exercise is necessary for the enjoyment of any interest or the exercise of any right, and such cases, it is implied in the constitution of such interest or right and is known as "Accessory licence".

"Rights to do act necessary to secure the full enjoyment of an easement are called accessory rights".

**SCOPE.-**

Section 55 of the Indian Easement Act, 1882 explains about "accessory licences". Accessory licence is co-extensive with the interest or the right.

**SECTION 55-** Accessory licence annexed by law. All licenses necessary for the enjoyment of any interest or the exercise of any right, are implied in the constitution of such interest or right, such licences are called accessory licences.

**EXAMPLES:-**

- (a) A-the owner of the building has given a portion of the building to B-a tenant. The primary purpose of lease is the residence. However, the tenant has the right of access to the roof of the premises for the limited purpose of replacing or repairing the television antenna. This access to television antenna is an accessory licence.
- (b) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.
- (c) A, as owner of a certain house, has right of way over B's land. The way is out of repair, or a tree is blown and falls across it. A may enter on B's land and repair the way or remove the tree from it.
- (d) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land repair the wall.

