

## **Basic Principles**

When a person acquires or owns an immovable property, the law also give him the right to use, lease, sell, rent or transfer/gift of the land. The owner also has a right to mortgage his immovable property as a security for loans. However, there are some laws which restrict the type of use a land can be put to, e.g., a land may be used only for residential or commercial purposes to prevent haphazard/unorganised growth of cities and towns. Laws in some of the States prevent/restrict outsiders from acquiring property within the State. Restrictions are also placed on non-agriculturists from acquiring agricultural land. There are also other laws which prescribe rules and regulations for protection of environment or which provide for approval of building plans/designs so as to protect people from natural or manmade hazards. Some laws like the Registration Act, 1908, also lay down provisions governing registration of property transactions so as to keep proper records of ownership of property in the public domain. Some laws relating to taxation like the Income Tax Act, 1956 lay down certain provisions and procedures to be observed while undertaking property transactions so as to ensure tax compliance of an owner before disbursal of property.

In India, transactions for purchasing/selling/transferring/creating an interest in immovable property and transmission of title in respect of a property are governed by several laws, rules and regulations. As matters relating to land fall within the legislative powers of State Governments under the Constitution of India, these may differ from state to state. The Transfer of Property between any two parties is governed by the Transfer of Property Act, 1882.

The Transfer of Property Act came into force on the first day of July 1882. Prior to this enactment, the law with regard to transfer of property was governed by the principles of English law and equity. A few points were also covered by the regulations and the Acts passed by the Governor General in Council. The English law, so far as it was suitable to the local conditions in India, was introduced into the Presidency Towns of Madras, Bombay and Calcutta by the Charter granted in 1826 by King George I to the East India Company. In the Mufassil, there was no law of property as such and suits involving questions of property law were being decided according to justice, equity and good conscience. This state of affairs was quite unsatisfactory, as the law was wanting in uniformity and certainty. To consider the practicality of laying down a territorial law uniformity applicable to all the inhabitants of British India, the Third Law Commission

appointed in 1861 prepared a draft Bill of Rules that with modifications were ultimately embodied in the Transfer of Property Act (IV of 1882).

In 1921, an exhaustive examination was made of the case law bearing on the Act of 1882 and with a view to remedying the defects and anomalies revealed by the judicial decisions, the Legislative Department prepared a draft bill for amending the Act. This Bill was further revised by a Select Committee and was finally passed into law as from 1st April, 1930.

### **Transfer of Property Act, 1882**

With the exception of certain instances, the Act does not govern the transfer of property by operation of law, such as sale by the order of court, auction or forfeiture as well as transmission of title under other laws like Hindu Succession Act. As such, transfers by will and inheritance are not governed by the Act.

The object of the Transfer of Property Act is to define and amend law relating to Transfer of Property by act of parties and not to transfer by operation of law. A Transfer of Property is a contract and hence all necessary requirements to constitute valid contract are to be satisfied.

### **Essentials of valid transfer**

#### **A) Transfer must be between two or more living Persons (Section.5) –**

Transfer of Property means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more or other living persons, and to transfer property is to perform such act.

The Transfer must be *inter vivos*. Therefore there cannot be a transfer to person not in existence at the time of transfer. In case of transfer of a property of a deceased person, Succession Laws as per the religion of the deceased will be applicable. The living person including company or association or body of individuals whether incorporated or not.

#### **B) The property must be transferable (Section. 6) -**

Property of any kind of may be transferred except as provided by this Act or any other law for the time being in force. Properties mentioned in Section 6 (a) to (i) cannot be transferred. These are restrictions on the Transfer of Property and any transfer in contravention of any of the clauses is null and void.

**C. The Transfer must not be -**

1. opposed to the nature of interest affected thereby Section 6 (h);
2. for unlawful object and consideration as per provision of Section 23 of the Indian Contract Act 1872, which provides a consideration or object is unlawful if -
  - a) It is forbidden by law, or
  - b) It is of such a nature that if allowed it will defeat the provision of any law, or
  - c) is fraudulent, or
  - d) it involves or implies injury to the person or property of another or
  - e) the court regards it as immoral or opposed to public policy.
- 3) To a person legally disqualified to be a transferee. As per Section 136. of Transfer of Property Act, a Judge, a legal practitioner or an officer connected with Court of Justice are disqualified from purchasing an actionable claim. This prohibition is only with respect to actionable claim. It does not apply to any other kind of property.

**D) Persons competent to transfer (Section.7) -**

Every person competent to contract and entitled to transferable property, or authorised to dispose off transferable property not his own, is competent to transfer such a property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

**Who is competent to transfer? The transferor must be -**

**1) Competent to contract -**

According to Section 11 of the Indian Contract Act, “every person is competent to contract who is of the age of majority...”Under section.3 of the Indian majority Act,1875 a person attains majority at the age of 18 years and if a Guardian is appointed, he would attain majority at the age of 21.

**2) Sound mind -**

Under section 12 of the Indian Contract Act, a person is of sound mind for the purpose of making contract if he is capable of understandings it and of forming a rational judgment as to its effect upon his interest. A contract made by a person of unsound mind is void.

### **3) Disqualified person -**

An insolvent and alien enemy are disqualified from contracting. A transfer by a *de facto* Guardian of minor's property is invalid and will be hit by section 11 of Hindu minority and guardianship Act, 1956.

**4) Transferor must be entitled to transferable property** - or authorised to dispose off transferable property not his own. One who is absolute owner of the property which is free from encumbrances is capable to transfer the same. An owner of the property may authorise his power of attorney holder to transfer the property for him and on his behalf.

### **The Transfer must be made in the mode prescribed by the Act, under section 9 -**

Section 9 of Transfer of property provides for oral transfer. A Transfer of Property may be made without writing in every case in which a writing is not expressly required by law.

Writing is necessary in case of following instruments -

- 1) sale of immovable property of the value of rupees hundred or upwards (S.54),
- 2) leases of immovable property from year to year or for a term exceeding one year or reserving a yearly rent (Section 107)
- 3) simple mortgage irrespective of amount secured (Section 59 ),
- 4) All other mortgages securing Rs100 or upwards (section 59)
- 5) Exchange ( section 108)
- 6) Gift of immovable property (section 123)
- 7) Transfer of actionable claim (section 130)