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Preamble.—Whereas it is expedient to define and amend certain parts of the law relating to the Transfer of Property by act of parties; It is hereby enacted as follows :

SYNOPSIS

- Object of the Act.
- Scope of the Act.
 - Not Exhaustive.
 - Transfers by Operation of Law Excluded.
 - Transfers Mainly of Immovable Properties.
 - Muslim Law.
 - Saving of certain Incidents and Rights.
 - Territorial Limitations.
- Amendments to the Act.

INTRODUCTION

Object of the Act.—The object of the Transfer of Property Act, 1882, is given in its preamble. In the beginning of almost every Act, there is a 'preamble' which briefly gives the objects or purposes of the enactment. The preamble to the Transfer of Property Act, 1882, lays down that the Act has been enacted because it was 'expedient to define and amend certain parts of the law relating to the transfer of property by act of parties.' This Act was, therefore, enacted because it was necessary to give a definite meaning and make changes in some of the rules which at that time regulated the transfer of properties by act of parties. Transfer 'by act of parties' is a transfer which takes place between two living persons. Such transfers are also called 'transfer inter vivos.' For example, sale or gift is a transfer of property by act of parties because transferor and transferee both must be living persons on the date of sale or gift. Transfer of Property under will, inheritance or by an order of the Court is a transfer by 'operation of law'. It is not a transfer by act of parties because in such transfers



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THE TRANSFER OF PROPERTY ACT, 1882

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the transferor is not a living person and the transfer takes place automatically
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The object of the Transfer of Property Act may be summarised as under:—

- (i) The Transfer of Property Act, 1882 provides a definite, clear and uniform law for transfer of immovable property by act of parties i.e., transfer between living persons.¹
- (ii) The Act has modified and made changes in some of the rules which existed before its enactment. The changes were made so that the laws may be made suitable to the socio-economic conditions of India.²
- (iii) The Transfer of Property Act completed the Code of Law of Contract. Before this Act, although there was Code (enacted law) for Contracts, but there was no enacted law for transfers which used to take place in furtherance of a contract.³
- (iv) By making provisions for *inter vivos* transfers, the Transfer of Property Act has enacted a law parallel to the already existing

laws of testamentary and intestate transfers i.e., transfer of property under wills and under the law of inheritance.

Scope of the Act.—The scope of the Transfer of Property Act is limited. It is not a complete code of transfer of property. The limitations to the applicability of this Act are there in many respects. It covers only a specific mode, namely, transfer of property between living persons. The limitation is also with regard to the territorial jurisdiction of the Act; it has no uniform application in all the parts of the country. Moreover, certain rights and incidents of property have specifically been saved from the operation of this enactment. The scope of the Transfer of Property Act may briefly be stated as under.

1. **Not Exhaustive.**—The Act is not exhaustive. It does not contain complete law for all kinds of transfers in India. There are several modes or methods of transfer. There are also several kinds of properties. The Act does not incorporate rules for all the modes of transfers of property of every kind. The Preamble to the Act itself makes it clear that the main purpose of the Act is to 'define and amend parts' of the pre-existing law of transfer of property by 'act of parties.' The Act does not say that its object is to collect and consolidate all the laws of transfer of properties in India. Even with regard to transfers by act of parties, the Act is not exhaustive because in this kind of transfer too, there are several allied or correlated matters for which there is only a passing reference; detailed rules on such allied matters are not available.¹ For example, the Act deals with mortgages and charges but with respect to these transactions, the Act has not been regarded to be exhaustive.² Similarly, although the easementary rights are proprietary rights but the Transfer of Property Act is not applicable to easements.³

2. **Transfers by Operation of Law Excluded.**—The Act does not apply to transfers by operation of law. Transfer of properties may take place either by act of parties or, by operation of law. Transfer by act of parties is a transfer between living persons which takes place by express or implied agreement between such living persons. On the other hand, in the transfer by operation of law the property is transferred even though the transferor is not a living person on the date of the transfer. In such transfers, the property is transferred automatically by the process of law; the transferor has to do nothing. For example, in the case of inheritance or under wills the devolution of property upon the legal heirs or legatees, is a transfer by operation of law. These transfers take place by operation or working of the law of inheritance or the law of wills. The propositus (deceased) or the legator has to do nothing after his death; the transmission of property is automatically done under the law of inheritance or law of wills. Similarly, transfers by orders of Court are also transfers by operation of law because they are made not by owners of the

property but by Court of law. Transfers by operation of law have been held to include action sales confirmed by the court.¹ Thus, transmission of property in the cases of insolvency, forfeiture or sale in execution of Court's decree, are transfers by operation of law. The Transfer of Property Act is applicable only to transfers by act of parties; it does not apply to transfers under Court orders.

3. Transfers Mainly of Immovable Properties.—The Act deals mainly with transfer of immovable properties. Transfers of movable properties are regulated by the Sales of Goods Act, 1930. However, it may be noted that Transfer of Property Act, 1882 incorporates certain basic rules of transfer of properties irrespective of their kind. These fundamental principles relate to the nature of transfers in general. The provisions of the Transfer of Property Act which deals with such principles, are applicable also to transfer of movable properties. Sections 5 to 37 of Chapter II are applicable also to the transfer of both kinds of property, movable as well as immovable. The remaining Sections (38 to 53-A) of this Chapter contain rules for the transfer of only immovable properties. In so far as specific transfers are concerned, the definitions of gifts and exchange in the Act are not limited to immovable properties; they include the gift and exchange also of the movables. On the other hand, provisions regarding sale, lease, mortgage and charges are applicable to transfers of only immovable properties.

4. Muslim Law.—According to Section 2 of the Act, provisions of Chapter II of this Act do not affect any inconsistent rule of Muslim Personal Law. Chapter II of this Act deals with concept and principles of transfers generally. Accordingly, if there is any provision in the Transfer of Property Act which is against any rule of Muslim Law, the rule of Muslim Law would prevail over the conflicting provisions of this Act. For example, provision of Section 14 dealing with the rule against perpetuity would not be applicable to family-waqfs (Waqf-alal-aulad) created by Muslims because rules of the family-waqfs under Muslim Law are inconsistent with the provisions of Section 14. Moreover, gifts made by Muslims are governed by the Muslim Law of *Hiba*. Section 129 of the Transfer of Property Act specifically provides that provisions of Chapter VII (on Gifts) would not be made applicable to gifts made by Muslims. However, it may be noted that exemption from the operation of this Act is with respect to only such rules of Muslim Law which are in conflict with any provision of the Act dealing the transfers in general (given in Chapter II of this Act). Except gifts, provisions of the Act dealing with specific transfers such as, sale, lease, mortgage etc., are applicable to transfers made by any person, including Muslim, irrespective of religion, caste and creed.

5. Saving of certain Incidents and Rights.—Section 2 of the Act exempts certain incidents of a contract or Constitution of property from the operation of this Act. Constitution of property means essential nature of property. Thus, the provisions of this Act cannot be applied so as to change or affect the basic nature of the property itself. The Act also saves certain property rights from the mischief of this enactment. For example, right of partition of immovable

1. *Arvind Kumar v. Govt. of India*, (2007) 5 SCC 745.

properties is an incident of property, but this right is not affected by the provisions of the Act and a valid partition may be made orally.¹

✓ **6. Territorial Limitations.**—The Transfer of Property Act has territorial limitations as well. The Act is not applicable to certain territories included in the State of Punjab. In other parts of the country where the Act is now applicable, it was not enforced at one stretch. The Act was made applicable to different territories in India on different occasions.²

It may be stated, therefore, that the scope of the Act is limited in many respects. Its applicability is limited from the point of view of the mode of transfer, the kind of property and also with regard to its territorial jurisdiction.

3. Interpretation Clause.—In this Act, unless there is something repugnant in the subject or context,

"immovable property" does not include standing timber, growing crops or grass ;

"instrument" means a non-testamentary instrument ;

"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 executant, 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 executant; 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;

"registered" means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents;

"attached to the earth" means—

- (a) rooted in the earth, as in the case of trees or 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 ;

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any

part of, or share or interest in, such property, shall be deemed to have notice of such instrument as from the date of registration or, where the property is not at all situated in one sub-district, or where the registered instrument has been registered under subsection (2) of Section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or the property wherein a share or interest is being acquired, is situated :

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

IMMOVABLE PROPERTY

In Section 3, the definition of immovable property is neither clear nor complete. It simply says that immovable property *excludes* standing timber, growing crops or grass. It is not clear as to what it includes. In any Act, if the meaning of any word is not given clearly, the meaning of that word may be found in the General Clauses Act, 1897, if given there. According to Section 4 of the General Clauses Act, immovable property includes land, benefits to arise out of land and, things attached to the earth. The definition of immovable property given in the General Clauses Act is applicable to the Transfer of Property Act.¹ But this definition is also not complete. Moreover, the expression 'things attached to the earth' which is not defined in the General Clauses Act has been defined separately in Section 3 of the Transfer of Property Act. Thus in order to get a clear and complete meaning of 'immovable property', it is necessary to consider the definitions given in Section 3 of the Transfer of Property Act as well as the definition given in the General Clauses Act. On the basis of the definition given in both these Acts, the expression 'immovable property' may be defined properly in the following words—

✓ Immovable property includes—

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

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

¹ Babulal v. Bhawani, (1912) 9 ALJ 776.

under the land. Therefore, they are included in the term 'land'. Moreover, not only the things on the land and under the land are immovable properties, but the 'space' which is above the land is also part of land and is an immovable property. Looking closely, we see that space begins just from the surface of land and goes upto sky, as if it has been placed on the land. Thus, being part and parcel of the land, the space above the land is also immovable property.¹ It may be concluded therefore, that immovable property includes land and land means and includes everything upon the surface of earth, under it and also above it.

Benefits to arise out of Land.—Besides land, the 'benefit' which a person gets from land, is also an immovable property. One may get a benefit from a land under some right. A right by the exercise of which a person gets certain benefits is called beneficial right or beneficial interest of that person. 'Beneficial interest' in a property is called intangible or incorporeal property². Thus, any right which is exercised over a land (or any other immovable property) and by the exercise of which a person gets certain profit or gain, would be his intangible immovable property. For example a piece of land is immovable property, therefore, if any right is exercised by a person upon that land, that right becomes intangible immovable property of that person. As discussed earlier, word 'land' is here used in wider sense. It means and includes everything upon its surface such as house, pond or river. It also includes everything beneath the land such as minerals or mines etc. Thus, right of way exercised on the land or a right to use a land under lease or tenancy is an immovable property. Therefore 'right of a tenant' to live in the house of his landlord is an immovable property of the tenant. Similarly, right of fishery i.e. right to catch fish from a pond or river, is also an immovable property. It may be noted that the water in the pond or river is an immovable property, therefore, everything in this water including fish shall also be immovable property. And since the right of fishery is exercised on 'fish in the water', which is an immovable property, therefore, this right is an immovable property. Right of ferry means right of transportation on rivers or lakes by boats or steamer. Since river or lake-water is an immovable property and boats or steamers are used on such waters, therefore 'right of ferry' has been held to be an immovable property. Similarly, since land also includes everything beneath its surface such as mines, therefore, the right to extract coal or gold or minerals etc. from the mines is also an immovable property.

Things attached to the Earth.—The expression 'things attached to the earth' has been defined separately in Section 3 of the Transfer of Property Act. Things attached to the earth means (i) things embedded in the earth (ii) thing attached to what is so embedded in the earth, and (iii) thing rooted in the earth.

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

(A machinery which is attached to a concrete base by nuts and bolts to fix it firmly, cannot be regarded as a thing embedded in the earth because machinery is not fixed or attached to the land with intention of any beneficial enjoyment of the land where it is installed.) As a matter of fact machineries or other installations of business are fixed to the land for commercial purpose only. They are, therefore, 'regarded as accessory to the business and not an annexation to the premises'² Large vessels were fixed in a distillery for brewing liquors. It was held by the Court that the vessels (vats) were movable properties because they were fixed in the land not with the intention of any beneficial enjoyment of the land as such; they were fixed for trade purposes.³

A hot mix plant and crusher plant were fixed in the soil to facilitate work. The Court did not regard it as something "attached to the earth". The plant itself was not intended to be permanent at a given place. It could be moved. It was indeed moved after the road construction or repair project for which it was set up was completed.⁴

(ii) *Things attached to what is so embedded in the earth.*—Where a thing is attached to something which is embedded in the earth for its permanent beneficial enjoyment, the thing so attached would also become immovable property. Doors, windows or shutters of a house are attached to its walls for permanent enjoyment of that house. Therefore, the doors, windows and shutters are regarded as immovable properties. Things imbedded in the earth are immovable properties because they become part of the land. Things permanently attached to what is so embedded would also be part of a thing which in itself is a part of land. Accordingly, doors or windows are regarded as part of the house which is part of the land. However, it may be noted that the thing attached must be (a) attached permanently and must also be (b) attached for the beneficial enjoyment of the house or building. Things attached without any intention of making them a part of the house or building would not be immovable properties. For example, electric bulbs, window-screens or the ornamental articles are movables because such things are attached to walls not for the permanent beneficial enjoyment of the house but only for the use and enjoyment of the 'things' itself.

(iii) *Things rooted in the earth.*—Trees, plants or shrubs which grow on land are rooted in the earth. With the help of their roots, they keep themselves fixed in the earth and become part of the land. Until cut down the trees are permanently attached to the land where they are grown. Therefore, a general rule in respect of all the trees, plants, herbs and shrubs is that they are immovable properties.¹ However, there is an exception to this general rule. Standing timber, growing crops and grass, though rooted in the earth, are movable properties.

Standing Timber.—Standing timber is movable property. A green tree rooted in the earth is called a 'standing timber' provided its woods are generally used for timber purposes i.e. for making houses or household furniture. If there is a tree, the woods of which are fit to be used for making doors, windows or furniture, the same tree which under general rule is an immovable property, shall be treated as 'standing timber' and as such a movable property. For example, the woods of Sheesham, neem, babool or teak trees are used for making houses, doors, tables or chairs, therefore these trees have been held to be movable properties although they are rooted in the earth.² Bamboos trees have no utility except that they may be used in making houses or as poles, therefore, bamboo trees have been held to be movable properties.³

Fruit-bearing trees are not standing timber. They are planted and grown for taking fruits etc. from them and not for taking their wood. Therefore, fruit-bearing trees are 'immovable property'.⁴ Mahua tree has been held as an

immovable property.¹ Similarly, palm or date-trees which are used exclusively for taking their fruits or drawing toddy from them, have been held immovable property.²

There are certain trees, for example, a mango-tree, which give us fruits but their wood is also used for timber purposes. Whether such trees are standing timber (i.e. movables) or not depends upon the intention of its owner. If its owner intends to keep the tree growing and green for ever, the tree is not standing timber even if its woods are fit to be used for furniture etc. On the other hand, if the owner intends that the tree is to be cut down soon for utilising its wood, the green tree would be standing timber.³ In *Shanti Bai v. State of Bombay*,⁴ the Supreme Court held that if the owner of a tree is interested in the further vegetative growth of the tree (i.e. intends to keep the tree alive) it is a 'tree' (immovable); but if it is intended that the tree is to be cut reasonably early, the tree is a standing timber (movable).⁵

Growing Crops and Grass.—Growing crops and growing grass are movable properties. Growing crops means crops standing in the field. Although the crops, say of wheat and barley, are nothing but a collection of plants rooted in the field yet, they are not immovable property because every crop is bound to be cut in the near future when it becomes ripe. The crops in the field have no use except their produce. The crops of wheat or paddy etc. and also the vegetable crops of potato etc. are, therefore, movable properties. Sugarcane crops⁶ and the crops of indigo (*neel*)⁷ have been held movable property. Crops include creepers. Crops of grapes and the crops of betel leaf (*pan*) etc. are also movable properties.

Like crops, the growing grass rooted in the earth is also a movable property. Grass in the field has no other utility except that it could be used as fodder for the cattle. For this reason it is bound to be cut down or be grazed by some animals. No further vegetative growth may be intended by the owner of the land upon which the grass is grown. (However, since the right to cut grass is a right exercised upon the land, this right is a 'beneficial' interest in the land' and as such an immovable (incorporeal) property.)⁸

Examples of Immovable Property

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

1. *Chandi v. Sat Narain*, AIR 1925 Oudh 108.
2. *Sheik Jan Mohammad v. Umanath Mishra*, AIR 1962 Pat. 441.
3. Where A sells a mango-tree to B and B purchases it so that he and his children may enjoy its fruits, the sale is the transfer of immovable property. But if B purchases the tree in order to cut and remove the tree for making house or furniture, the sale is transfer of movable property.
4. AIR 1958 SC 532.
5. *Kalka Prasad v. Chandan Singh*, (1888) 10 All 20.
6. *Bansidhar v. Sant Lal*, (1887) 10 All 133; *Misri Lal v. Mozhar Hossein*, (1886) 13 Cal. 262.
7. *Seeni Chettiar v. Santhnathan*, (1897) 20 Mad. 58 (FB).

- (1) Beneficial interests arising out of land, for example, right of way¹ or an easement.²
- (2) Rights under lease or tenancy.³
- (3) Rights to extract gold, silver, coal or other minerals from mines.⁴
- (4) Right of fishery i.e. right to catch and collect fish from a pond, tank, lake or river.⁵
- (5) Right of ferry i.e. right of transport through rivers.⁶
- (6) Right to collect dues from fair or *hat*.⁷
- (7) Right to hold exhibition or fair on one's land.⁸
- (8) Right to take forest produce e.g. *tendu* leaves etc. and soil for making bricks.⁹
- (9) Right to collect *Lac* from its trees.¹⁰
- (10) Mortgage-debt i.e. a loan secured by mortgaging an immovable property.¹¹
- (11) Equity of redemption.¹²
- (12) Office of the hereditary priest of a temple and also its emoluments.¹³
- (13) Right of a *Maha Brahmin* to receive dues at a funeral.¹⁴

INSTRUMENT

Instrument means a legal document. Where a property is transferred through any written document, that document is called 'instrument'. Section 3 of the Transfer of Property Act defines 'instrument' as a non-testamentary instrument. This clearly means that the term 'instrument' as used in this Act excludes testamentary document (*i.e.* a document of will). Transfer of property under testamentary instrument or will takes place only after the death of the testator (one who makes the will). Transfer of Property Act is applicable only to transfers taking place between living persons *i.e.* where transferor and transferee both are alive on the date of the transfer. It excludes transfer under wills. Accordingly, the term 'instrument' as used in this Act shall mean only that document which transfers a property between the living persons.

It may be noted that 'instrument' as used in the Act signifies the transfer of property as such ; it is not only a written proof or evidence of the transfer of property mentioned in it.¹ Thus, where a gift of an immovable property is made through a registered document, the registered document is called as the instrument of gift. Now, this instrument is not only the evidence or proof of the fact that a gift has been made but, because there is no other mode of making a gift of immovable property, this document would signify also the transaction of gift itself.

ATTESTED

A property may be transferred either orally *i.e.* by delivery of possession or, through a written document. Where a property is transferred through document, the transferor is said to execute the deed (or document) of transfer. Such transferor is called the executant.

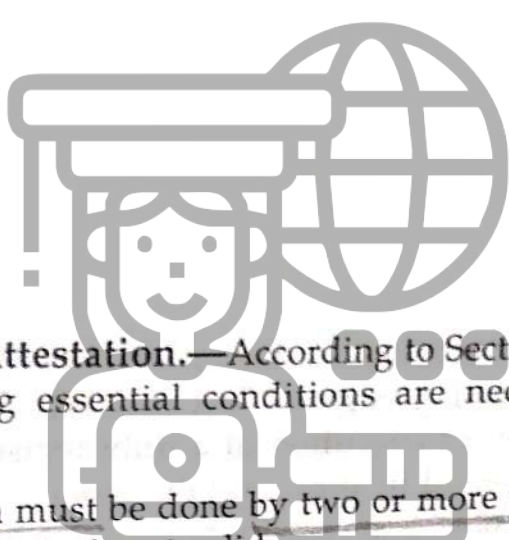
It is necessary under the law that two persons must affirm, or become witness to the fact that executant, and no body else, has written or signed the



deed of transfer. This act of giving evidence or becoming witness is called attestation and when these persons have done so, the deed is said to have been attested. The witnesses are called attesting witnesses.

✓ **Object of Attestation.**—Attestation of a document ensures the authenticity or truthfulness of its execution. The object of attestation is two fold. *First*, it confirms that executant and no one else has executed the document. *Secondly*, it also confirms that the executant has executed the document with free consent and there was no force, fraud or undue influence. There is no other purpose behind attestation. By attesting a document, the attesting witnesses do not confirm that they have knowledge of the contents of that document.¹ Nor they are supposed to have given consent to the transfer under the document.

1. Section 3 of the Act of majority and



Essentials of Valid Attestation.—According to Section 3 of the Transfer of Property Act, following essential conditions are necessary for a valid attestation—

- (1) The attestation must be done by two or more persons. Attestation by only one witness is not valid.
 - (2) Each attesting witness must (a) see the executant signing the instrument (document) or fixing his mark (thumb-impression) on it or (b) see some other person signing the instrument in presence of and under the direction of executant or (c) has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person.¹
 - (3) Each attesting witness has signed the instrument in the presence of the executant.
- the genuineness of the



ACTIONABLE CLAIMS

Tangible movables such as tables or cars have physical existence and can be possessed. But intangible movables being in the form of rights, have no physical existence and cannot be possessed. The existence of a tangible movable can be known simply by its physical presence, but the existence of intangible movable property may be known only when the person having such interest claims it by maintaining an action in a court of law. For example, if A has a table, it can be known by seeing the possession of table with A. But if A has right or claim to get back the money given by him to B, then A's claim can be known only when he files suit against B for the recovery of his money. In other words, A's claim against B can be known only when he maintains action in a Court of law. It may be stated, therefore, that beneficial interest of a person in some movable property is an actionable claim of that person.

The definition of actionable claim was included in Section 3 of the Transfer of Property Act in 1900. Before this, the Anglo-Indian Courts following English

law¹ used to give a wide meaning to this term and it included every kind of claim in a movable property which could be enforced through the courts. But such a wide meaning created confusion. For example, under this meaning all debts whether secured or unsecured were actionable claims whereas a debt secured by mortgage of immovable property is, strictly speaking, an 'interest in land'. Similarly, under this meaning any claim of money whether the amount was fixed amount or uncertain, was an actionable claim. Because of such confusions, there used to be conflicting decisions and the law was neither clear nor uniform. Accordingly, a clear and definite meaning of the term actionable claim was included in Section 3 of the Transfer of Property Act by the Amending Act II of 1900. The definition of actionable claim given in Section 3 now limits the scope of this term.

Definition of Actionable Claim.

According to Section 3, actionable claim means :

- (1) unsecured money debt, and
- (2) a claim to beneficial interest in movable property not in possession of the claimant.

(1) Unsecured money debt.—A debt may be secured or unsecured. Where the creditor (the person who gives loan) takes security from the debtor (the person who takes the loan) for repayment of his money, the debt is secured debt. If debtor gives the security of his immovable property, the debt is secured by way of mortgage. Where security is some movable property, it is pledge or hypothecation. On the other hand, if there is no security of any movable or immovable property, the debt is unsecured. When a person takes some loan and simply writes a promote, the debt is an unsecured debt. According to Section 3 only unsecured debt is an actionable claim. Debt secured by way of mortgage, pledge or hypothecation is not an actionable claim. It may be noted that 'debt' here does not mean only 'loan'. Any obligation to pay a certain or definite sum of money may be called a 'debt'. For example, claim of 'arrears of rent' is an actionable claim. 'Debt' may be *existent, accruing or conditional*.

Existent Debt.—Where a debt or sum of money has already become due and is payable (enforceable) at present, the debt is existent. For example, claim of arrears of maintenance allowance or the claim of arrears of salary is existent debt because a definite sum of money has already become due in the past and now it is payable.

Accruing debt.—Where a debt or sum of money is at present due but it is payable not now but on a future date, the debt is accruing. Accruing debt is due at present but becomes payable only on a future date. For example, if A promises to pay Rs. 100 to B as maintenance allowance on fifth of every month, the claim of B against A is an accruing debt before fifth of that month. Similarly, the claim

1. Under English law movable properties are classified as (1) 'choses in possession' or those properties which are capable of being possessed i.e. tangible and (2) 'choses in action' or, those properties which are in the nature of beneficial interest in movables (i.e. intangibles); these properties may be claimed only by an action in a court of law.

for salary to fall due in the next month is an accruing debt and as such an actionable claim.¹

An actionable claim may be existent in *praesenti*, accruing, conditional or contingent.²

Conditional or Contingent debt.—Where the claim for a sum of money exists but the payment depends upon the fulfilment of any condition, the debt is conditional. If A promises to give Rs. 1,000 to B provided he marries C within one year, then B's claim to Rs. 1,000 is conditional because it is subject to a condition to be fulfilled by him in future.

Similarly, where the claim of money is subject to some uncertain future event which may or may not happen, the claim is contingent. For example, where A promises to give Rs. 1000 to B provided B's first child is a son, the claim of B for Rs. 1000 is contingent claim (debt).

(2) Claim to beneficial interest not in possession of the claimant.—

Right of a person to take the possession of a movable property from the possession of another, is the actionable claim of that person provided claimant has beneficial interest (*i.e.* right of possession) in that property. Following requirements are necessary for constituting an actionable claim—

- (a) The claim is to some movable property.
- (b) The movable property is in possession of another person.
- (c) The beneficial interest or the right of possession of the claimant is recognised by the Court.

A person can claim possession of a movable property of which he has right to possess but it is not in his possession. If a property is already in his actual or constructive possession there is no question of claiming its possession. Therefore, if a movable property is proved to be in actual or constructive possession of the claimant, there is no actionable claim. Moreover, the claimant must also have right of possession *i.e.* the law recognises that he has beneficial interest in that movable property: If he has no legal right of possession, the claim is not actionable claim.

Illustrations

- (i) A has sold fifty bags of wheat to B. The bags of wheat are in the godown of A. B's right to take possession of the bags of wheat from the godown of A is his (B's) actionable claim.
- (ii) A has fifty bags of wheat in his godown. A has not sold these bags to B or the contract of sale is not valid. B has no beneficial interest in those bags of wheat. Claim of B, if made by him, is not his actionable claim.

1. *Poothekka v. Annamalai*, AIR 1926 Mad. 1173.

2. *Sunrise Associates v. Govt. of NCT of Delhi*, AIR 2006 SC 1908.

- (iii) A is owner of some elephants. Somehow these elephants are trapped on a land. The land is owned by A he has no actual knowledge of this fact, A's right to recover elephants trapped on that land is not his actionable claim because elephants (movables) are already in his constructive possession.¹

Transfer of actionable claims

Beneficial interest in movable property is intangible movable property. Therefore, actionable claim is regarded as property. It can be transferred. Provisions for the transfer of actionable claims are given in Chapter VIII of the Transfer of Property Act.

Instances of actionable claims.—Some of the claims recognised as actionable claims are :

- (i) Claim for arrears of rent.²
- (ii) Claim for money due under insurance policy.³
- (iii) Claim for return of earnest money.⁴
- (iv) Right to get back the purchase-money when the sale is set aside.⁵
- (v) Right of a partner to sue for an account of the dissolved partnership firm.⁶
- (vi) Muslim woman's claim for her unpaid dower.⁷
- (vii) Right to claim benefit under a contract for the purchase of goods.⁸
- (viii) Right to get the proceeds of a business.⁹

Claims or rights which are not actionable claims.—Some of the claims which are not recognised as actionable claims are given below:

- (i) Right to get damages (uncertain sum of money) under the law of torts or for the breach of a contract.¹⁰
- (ii) Claim for *mesne profits* (i.e. claim of produce of profit of a disputed property by decree holder who was not in possession of the property).¹¹

1. *Ram Krishna v. Kurukal*, (1888) 11 Mad. 445.

2. *Daya Debi v. Chapla Debi*, AIR 1960 Cal. 378.

3. *Varjivan Das v. Magan Lal*, AIR 1937 Bom. 382 ; *Sunrise Associates v. Govt. of NCT Delhi*, AIR 2006 SC 1908 : (2006) 5 SCC 603, includes insurance claims, partnership claims, right to sue for the benefit of a contract not coupled with any liability, arrears of rent, etc.

4. *Lalchand v. Hussainio*, (1927) 97 IC 257.

5. *Chinnappareddi v. Venkataramanappa*, AIR 1942 Mad. 209.

6. *Bharat Prasad v. Paras Singh*, AIR 1967 All. 15.

7. *Amir Hasan Khan v. Muhammad Nazir Hussain*, AIR 1932 All. 345.

8. *Zaffar Mehar Ali v. Budge-Budge Jute Mills*, (1907) 34 Cal. 289; *Shah Mulji v. Union of India*, AIR 1957 Nag. 31.

9. *Alkash Ali v. Nath Bank*, AIR 1951 Assam 56.

10. *Indar v. Raghubir Singh*, (1930) 5 Luck. 547.

- (iii) Copyright of a book or any other original work of skill e.g. invention is not actionable claim because it already vests in the person who has it.¹ Patents and trade marks are in the same category. They are intangible properties. They can be assigned in accordance with their own governing Acts. They are not transferable.
- (iv) Although a debt is an actionable claim but the debt passed into a judgment i.e. a decree or judgment of debt is not actionable claim because no further action is to be maintained for its recovery.²
- (v) Where a decree provides for a future decree, this future decree is also not actionable claim.³

NOTICE

Notice means knowledge or information of a fact. Where a person has knowledge of any fact or it could be proved that under the circumstances he must have knowledge of that fact, he is said to have notice of that fact. If it is established before the Court of law that a person has notice of some fact or transaction, the knowledge of that fact is binding on him. He cannot deny the knowledge of that fact if it goes against him. Notice may either be (i) actual i.e. express or (ii) constructive.

A UNIT OF

Actual or Express Notice

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Actual notice means direct or express knowledge or information about something. Actual notice is a matter of fact. That is to say, whether a person has actual notice of a fact or not can itself be proved or disproved on the basis of certain other facts. Express notice is binding on a person only under certain conditions. Following requisites are necessary for an express notice.

- (i) The knowledge or information must be definite. It must not be heresay or rumours. If a person comes to know about certain facts by way of rumours or through casual conversation between some persons, this knowledge is not legal because no person is bound to take notice of rumours. The knowledge of the fact must be of such a nature which a normal man would be expected to take seriously' so that he may do or may not do (abstain) something in future. Unless the mind of the person has in some way been brought to an intelligent appreciation of the nature of the thing, there is no notice.⁴ Every notice means knowledge of a fact but every knowledge is not treated as notice.

- (ii) Only the knowledge of the parties interested in the transaction is actual notice regarding that transaction. Knowledge or

information of any other person who is stranger to the transaction is no notice.

- (iii) The knowledge or information must be about or related to the transaction in question. Knowledge of something which is not relevant for a transaction cannot be taken to be actual notice for that transaction.

Constructive Notice

Doctrine of constructive notice is based on equity. Where a person actually does not know anything about a fact but the court treats that under the circumstances he must be deemed to have knowledge of that fact, the notice is constructive. There are certain circumstances in which the court presumes that under those circumstances a person should be taken to have knowledge of that fact.

The circumstances are of such a nature that the Courts of law would construe or presume that the person concerned is bound to know that fact. He cannot say that he has no express or actual notice of the fact. This is called presumption by the Courts or legal presumption. Legal presumptions cannot be denied or controverted. Constructive notice is a legal presumption and is like a provision of law the knowledge (notice) of which cannot be denied by any person. It is a matter of law which cannot be rebutted or disproved. In *Plumb v. Fluitt*,¹ Eyre C.B. observed thus:

chapter - 8 :-

s/130 - 137 (Actionable claims are transferable)

s/130 :- Transfer of Actionable claims

Any kind of transfer e.g. sale, gift, exchange
or mortgage of an actionable claim is possible.

Transfer of an actionable claim

with
without
consideration

shall be effected only by execution of instrument
↓
in writing signed by transferor
↓
duly authori-
sed Agent.

shall be complete and effected
upon execution of such instruments.
(No dual assignment of actionable claim)

s/131:- Notice to be in writing signed ← By transferor or
↓ Duly Authorised Agent
In case of transferor refused to sign, by the transferor or his agent.

s/132:- Liability of transferee of actionable claim
↓ Effect of Assignment
transferee is subject to all liabilities and equities to which the transferor was subject at the date of transfer.

s/133:- Warranty of solvency of debtor
↓
transferor warrants, at the date of transfer, and limited to amount or such value of such consideration

→ s/134:- Mortgage debt → ① first applicable in the payment of cost of recovery of mortgage debt
② Secondly, towards the satisfaction of amount for the time being in arrears secured by transfer
③ Residue ——— balance to transferor.

Assignee - To whom the property is transferred.



Date _____

Page _____

COMPANION

→ 18/135 - Assignment of rights under policy of insurance against fire

↓
Every assignee, of a policy of insurance against fire, in whom the property insured shall be absolutely vested at the date of assignment, shall have transferred and vested in him all rights of a suit as if the contract contained in the policy has been made by himself.

(This provision not applicable to marine policy).

→ 18/136 - Incapacity of officers connected with courts of justice :-

Judge, Legal practitioner, officer connected with court of justice

shall not

Buy traffic stipulate for agree to receive

Any share or interest in an actionable claim.

The object of this s/ is to prevent the legal practitioner from purchasing claim with the express purpose of pulling them in suit & thus oppress debtor & increasing litigation.

18/137 - Savings of Act, etc.

↓
Provisions Not applicable to stock, shares, debentures, law/ customs documents negotiable, or any mercantile documents or title deeds.