

Answer to Q.1

Section 10 of the Act says that when property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. Suppose, B gives property to A and his heirs adding a condition that if the property is alienated it should revert to B. This condition is invalid and the transferee can ignore such condition. The transfer takes effect and is valid, and the condition not to alienate the property is void.

Though absolute restraints are bad in law, partial restraints are valid. If there are conditions which restrain the transferee not to alienate the property outside the family, it has been held by the Courts that they are partial restraints. For example, whenever there are conditions in a family settlement whereby the members are not allowed to sell their shares to a stranger, such conditions are valid. But it is not permissible to restrict the alienation to a particular time. Such a restriction is not partial but an absolute restraint and as such invalid.

There are two exceptions to the rule that absolute restraints are void. Firstly, in the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such conditions are valid. The reason why such an exception is made in the case of a lease is that the lessor may have confidence in the lessee but may not have the same confidence in some other person. So, if the lessor puts a condition restraining the lessee from transferring the property to someone, the condition is valid. The second exception is made in respect of a woman who is not a Hindu, Buddhist or Muslim. In such a case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property.

Section 12 also makes the transfer void if a property is transferred to any person adding a condition that if such person becomes insolvent he ceases to hold that property. Such a condition is not recognised as valid in law. Again, this is subject to the exception that if a landlord leases his property he can impose a condition on the lessee that if the lessee becomes insolvent the lease should come to an end.

Answer to Q.2

When an interest is created on the transfer of property but is made to depend on the fulfillment of a condition by the transferee, the transfer is known as a conditional transfer. Such a transfer may be subject to a condition precedent or a condition subsequent. If the interest is made to accrue on the fulfilment of a condition, the condition is said to be condition precedent. For instance, A agrees to sell his land to B if B marries C. This is a condition precedent. The condition precedent will be allowed to operate only if it is not hit by the provisions of Section 25 of the Act. Section 25 in the first place, says that, the condition must not be impossible to fulfil. For example, A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void. Secondly, the condition must not be forbidden by law. Thirdly, it should not be of such a nature that if permitted it would defeat the provisions of any law. For instance, A transfers Rs. 500 to B on condition that he shall murder C. The transfer is void. Fourthly, it should not be fraudulent. For example, X gives a false receipt to Y on behalf of his principal in consideration of transfer of land. The transfer would be void. Fifthly, the condition should not be such as to cause injury to the person or property of another. And lastly the condition should not be immoral or opposed to public policy. Thus, an agreement to give a son or daughter in adoption for a consideration is opposed to public policy as trafficking in children is forbidden by law.

If the condition is not hit by any of the above provisions, it is valid. Still the law does not insist on its literal fulfilment. It is sufficient if it is substantially complied with. Thus, where A transfers, Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries with the consent of C and D only as E has died earlier. B is deemed to have fulfilled the condition.

A transfer may also be made subject to a contingency which may or may not occur. Thus, an interest may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event. For example, A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm. Similarly, if A transfers a farm to B provided that B shall not go to England within three years after the date of transfer, the interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Answer to Q.3

Section 35 of the Transfer of Property Act deals with what is called doctrine of election. Suppose, a property is given to you and in the same deed of gift you are asked to transfer something belonging to you to another person. If you want to take the property you should transfer your property to someone else, otherwise you cannot take the property which is transferred to you by some one. Election may be defined as “the choosing between two rights where there is a clear intention that both were not intended to be enjoyed”.

The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument. It is, therefore, a branch of a general rule that no one may approbate and reprobate (*Copper v. Copper* (1874) H.L. 53). However doctrine of election could not be applied to deprive a person of his statutory right to appear invoking extraordinary jurisdiction of the Supreme Court under Article 136, (*PR Deshpande v. MB Haribatti* (1995 (2) Scale 804 SC).

For e.g. A transfers to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C. Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election. You must elect either to take under the instrument, in which case you will have to fulfil the condition and bear the burden imposed upon you or you must elect against the instrument, in which case neither the benefit nor the burden will come to you. The doctrine is based on the principle that “a donee shall not be allowed to approbate and reprobate and that if he approbates, he shall do all in his power to confirm the instrument which he approbates” (*Cavendish v. Decre* 31 C.D. 466).

In case, the person upon whom benefit is conferred rejects it, the property which was attempted to be transferred to him will revert to the transferor and it is he who will compensate the disappointed person. If the transferor dies before the person upon whom the benefit is conferred and he rejects the transfer, then the representatives of the transferor will have to satisfy the disappointed person out of the property which was the subject of transfer.

Answer to Q.4

Definition and nature of mortgage:

According to Section 58 of the Transfer of Property Act, a "mortgage" is the 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 the performance of an engagement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee. The principal money and interest the payment of which is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called a mortgage deed.

Three outstanding characteristics of a mortgage:

(a) the mortgagee's interest in the property mortgaged terminates upon the performance of the obligation secured by the Mortgage.

- (b) the mortgagor has a right of foreclosure upon the mortgagor's failure to perform.
- (c) the mortgagor has a right to redeem or regain the property on repayment of the debt or performance of the obligation.

Kinds of mortgages:

There are in all six kinds of mortgages in immoveable property, namely

- (a) Simple mortgage.
- (b) Mortgage by conditional sale.
- (c) Usufructuary mortgage.
- (d) English mortgage.
- (e) Mortgage by deposit of title-deeds or equitable mortgage.
- (f) Anomalous mortgage.

Answer to Q.5

Section 6 of this Act contains some exceptions to the general rule that property of any kind may be transferred. Consequently, the following properties cannot be transferred, namely:

- (a) the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- (e) A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.
- (f) A mere right to sue cannot be transferred.
- (g) A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.
- (h) Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

Answer to Q.6

Followings are the essential conditions for the operation of the doctrine of part-performance according to Section 53A.

1. There must be a contract to transfer immoveable property.
2. It must be for consideration.
3. The contract should be in writing and signed by the transferor himself or on his behalf.
4. The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
5. The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
6. The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

Answer to Q.7

Section 17 does not allow accumulation of income from the land for an unlimited period without the income being enjoyed by owner of the property. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is :

- (a) the life of the transferor, or

(b) eighteen years from the date of transfer.

Any direction to accumulate the income beyond the period mentioned above is void except where it is for:

- (i) the payment of the debts of the transferor or any other person taking any interest under the transferor,
- (ii) portions for children or any other person taking any interest in the property under the transfer, and
- (iii) for the preservation and maintenance of the property transferred.

Answer to Q.8

Section 122 of the Transfer of Property Act defines "gift" as follows:

"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee.

Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Essentials of Gift

1. There must be a transfer of ownership.
2. The subject matter of gift must be a certain existing moveable or immoveable property.
3. The transfer must be made voluntarily.
4. It must be done without consideration.
5. There must be acceptance by or on behalf of the donee, and such acceptance must be made during the lifetime of the donor and while he is capable of giving.

Answer to Q.9

A floating charge becomes fixed or crystallises in the following cases:

1. When the money becomes payable under a condition in the debenture and the debenture holder, (i.e., the creditor) takes some steps to enforce the security;
2. When the company ceases to carry on business; and
3. When the company is being wound-up.

Answer to Q.10

Following are non-actionable claims

(i) Debentures are secured debts and therefore not regarded as actionable claims.

(ii) Copy right though a beneficial interest in immoveable property is not an actionable claim since the owner has actual or constructive possession of the same (*Savitri Devi v. Dwarka Bhatya*, (1939) All 305).

Again, an actionable claim includes a beneficial interest in the moveable property not in possession. Now, a benefit of a contract for the purchase of goods is a beneficial interest in moveable property.
