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TRANSFER OF PROPERTY AND EASEMENT LAWS

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INTRODUCTION OF TRANSFER OF PROPERTY LAW

HISTORICAL ASPECT OF TP LAW

- Ancient India-there was various types and method of transfer of property, no uniform and written law
- Medieval India-Hindu law and Muslim law but not uniform in whole India
- British India-
- Before 1882-English Law and equity
- After 1882-by transfer of Property law, Indian Contract Act, 1872 and Easement Act, 1882

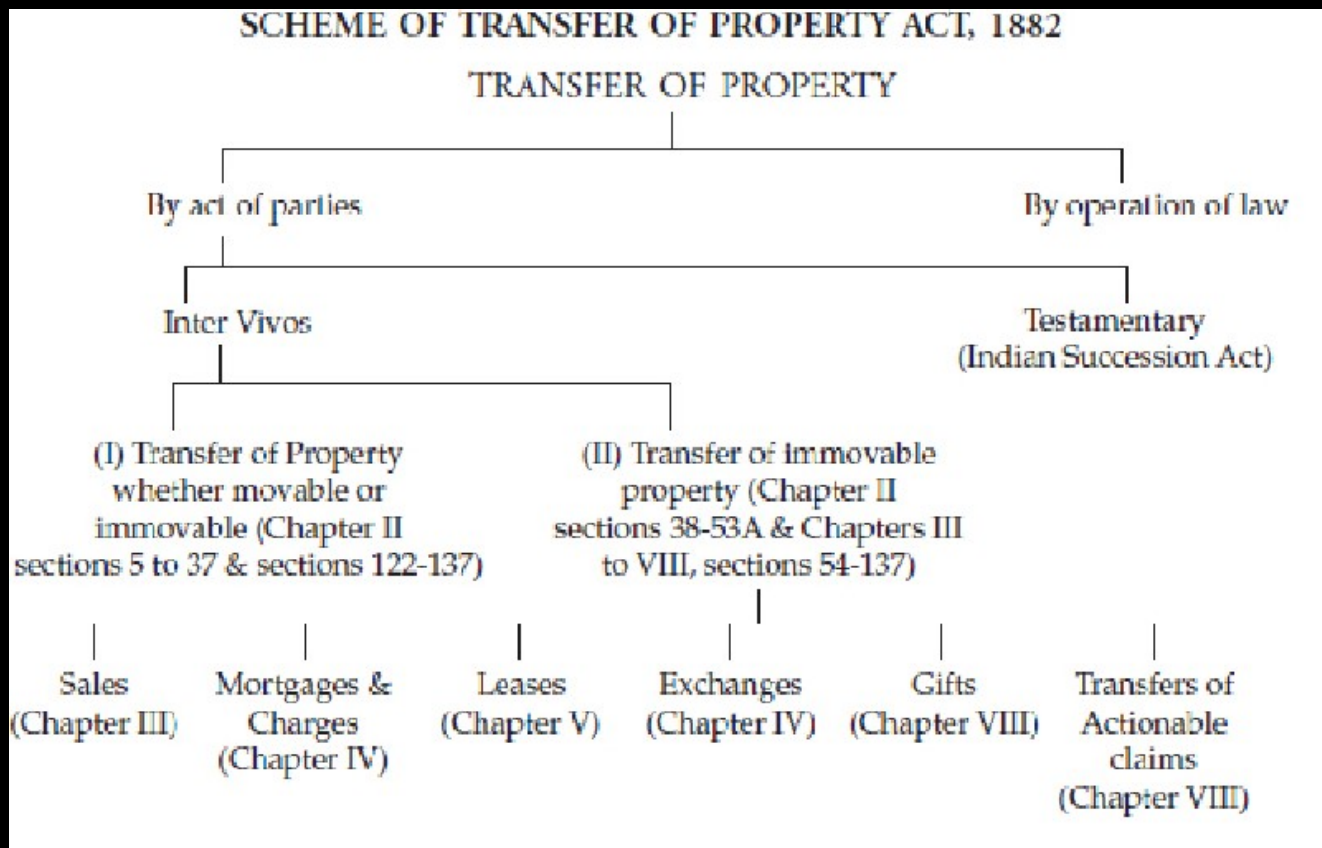
HISTORY OF TRANSFER OF PROPERTY ACT, 1882

- First Bill was Draft by Indian Law Commission constituted by Duke of Argy-II in 1870.
- The Drafted by Charles Turner(CJ of Madras)
- After facing various times amendment due to local government it reached for adoption in 1882 and adopted on 17th Feb. 1882
- Enforced from 1 July 1882

OBJECT OF THE ACT

- This Act applies only to transfers by living persons
- This Act mainly deals with the transfer of immovable properties
- General principles of transfer does not affect transfer by Muslims
- Act has not only defined the existing rules of transfers but also amended and modified some of them
- This Act not cover the testamentary and intestate transfers
- This Act was not made applicable to the whole of India in the first instance.
- This Act not cover the all types of transfer of property

OUT LINES OF TP ACT, 1882





UNIT I

- Meaning and Definition of Property,
- Movable and Immovable Property,
- Notice
- Attestation
- Actionable Claim

MEANING OF PROPERTY

- Property is any Physical and virtual entity that is owned by an individual or jointly by a group of persons.
- **Right relating to property**
 - ❖ To Control
 - ❖ To take
 - ❖ To transfer
 - ❖ To exclude others

DEFINITION OF PROPERTY BY SALMOND

The term property, observed that the term might be understood in one of the three senses mentioned below:

1. The term property includes all the legal rights of a person. That is to say that it includes complete ownership of a man on material as well as incorporeal things.
2. The term includes not a man's personal rights, but only his proprietary rights.
3. The term includes the rights of ownership in material things such as building etc

DEFINITION OF PROPERTY BY BENTHAM

“The term property includes ownership of material objects alone. He has, in a way, interpreted the term in a narrow sense. According to Austin, Property denotes the greatest right of enjoyment known to the law, including servitudes. The Property includes both proprietaries as well as the personal rights of a man”

DEFINITION OF PROPERTY

Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines property as:

“Property means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property”.

DEFINITION OF PROPERTY

Section 2 (11) of the Sale of Goods Act, 1930 defines property as:

“Property means the general property in goods, and not merely a special property”.

DEFINITION OF PROPERTY BY SUPREME COURT

R.C. Cooper vs. Union of India AIR 1970 SC 564,

“The term property includes both corporeal things such as land, furniture and incorporeal things such as copyrights and patents.”

DEFINITION OF IMMOVABLE PROPERTY

In Case of *Sukrey Kurdeppa v. Nagireddi* (6 Mad. HRC 71) By
Justice Holloway;-

“Immovability may be defined to be capacity in a thing of suffering alternation in the relation of place; Immovability is incapacity for such alteration. If, however, things cannot change its place without injury to the quality, it is immovable.”

DEFINITION OF IMMOVABLE PROPERTY

Section 3(25) of the General Clauses Act, 1897 defines the term “immovable property” as follows:

“Immovable property shall include land, benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.”

1. LAND

- ❖ A determinate portion of the earth's surface.
- ❖ Column of space above the surface.
- ❖ The ground beneath the surface.
- ❖ All objects either on or under the surface of land in their natural state, for example, minerals. Land also includes lakes, rivers and pond which are land covered by water.
- ❖ All objects placed by human agency either on or under the surface of land with the intention of permanent annexation.

2. BENEFITS ARISING OUT OF LAND

- Right to collect lac, Leaves, fruits and other things from trees,
- Right to collect revenue from agricultural land,
- right to take out minerals,
- Right to collect fish from ponds and river,
- Right to collect debt secured by mortgage of immovable property,
- Right to collect rent from tenanted property are all benefits arising out of land
- others.

3. THINGS ATTACHED TO THE EARTH

Section 3 of the Transfer of Property Act, 1882 says that “attached to the earth” means—

- Rooted in the earth, as in the case of trees and shrubs;
- Embedded in the earth, as in the case of wall or buildings; or
- Attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

PERSONS COMPETENT TO TRANSFER

S.7

- ❖ Must be competent to contract,
- ❖ Must have title to the property or authority to dispose of transferable property

PERSONS COMPETENT TO CONTRACT

- ❖ who is of the age of majority according to the law to which he is subject,
- ❖ who is of sound mind, and
- ❖ is not disqualified from contracting by any law to which he is subject

PERSONS AUTHORIZED TO DISPOSE OF PROPERTY

- ❑ *Karta* of Hindu joint family,
- ❑ a guardian, a trustee,
- ❑ an executor,
- ❑ Agent
- ❑ administrator, etc

CONDITION

- Transfer of immovable property
- the consent (express or implied) of the persons interested in immovable property,
- The Transfers for consideration
- The person is the ostensible owner of such property,
- the transfer shall not be voidable on the ground that the transferor was not authorized to make it,
- the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

CAIRA CROSS V. LORIMER 1860) 3 MACQ 837 (829).

House of Lord:-

“If a man either by words or by conduct, has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent and he thereby induces others to do that from which they might have abstained, he cannot question the legality of the act, he had so sanctioned to the prejudice of those who have so given to his words or to the fair inference to be drawn from his conduct.”

RAM COOMAR V MACQUEEN, 18 NR 166.

Privy Council :

“it is a principle of natural equity, which must be universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser, by showing either that he had direct notice or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.”

SURAJ RATAN THIRANI V AZAMABAD TEA CO LTD,
AIR 1965 SC 295

The Supreme Court held that;-

“for the **applicability** of this section it must be shown that the transferor was the ostensible owner of the property with the consent of the co-sharers where the property is the subject-matter of joint ownership and that **the transferee took reasonable care to ascertain that the transferor had power to make transfer**”.

THIS PRINCIPLE PROTECT THE TRANSFEREE

- The transferor should be the ostensible owner of the property.
- He must have held the property with the consent (express or implied) of the real owner.
- The transferee had purchased the property for value (consideration) and had acted in good faith and with reasonable care.
- The onus is on the transferee to show that he purchased the property for value and in good faith without the knowledge of the real state of the title.

JAYADAYAL PODDAR V. BIBI HAZRA, **AIR 1947 SC 171.**

Ground of test that transaction is benami or not

- Source of the purchase-money, i.e., who paid the price of the property?
- Nature of possession after the purchase, i.e., who had the possession of property?
- Motive of giving *benami* colour to the transaction, i.e., why the property was purchased in the name of other person?
- Relationship between the parties, i.e., whether the ostensible owner and the real owner were friends, strangers or relatives?
- Conduct of the parties in dealing with the property, i.e., the conduct who used to take care of the property and who had control over the property?
- Custody of the title deeds, i.e., who had the title-deeds?

BENAMI TRANSACTION

Benami transaction” means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

*In simple words, the person who purchases the property and pays the price for it, does not purchase the property in his own name but in the name of any other person. The other person whose name is used as the owner of the property is known as **benamidar (ostensible owner)**. In truth, he holds the property on behalf of the real owner because he is not the real owner.*

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LIS PENDENS S.52

**Transfer of property during
pendency of suit**

BASIS

Ut Lite Pendente Nihil Innovetur”

“Nothing new should be introduced into a pending litigation.”

MEANING

Transfer of property during the
litigation

Pedente Lite

person bound with decision of court

CONDITIONS

- Pendency of Suit or Proceeding
- In competent court.
- The suit or proceeding must not be **collusive**.
- A right to immovable property must be **directly and specifically in question** in that suit or proceeding.
- The disputed property **must be transferred** or otherwise dealt with by any party to the suit.
- The alienation must **affect the rights** of any other **party to the dispute**.

PENDENCY OF SUIT OR PROCEEDING

SUIT

means any proceeding by one or more persons against some other person or persons in a court of justice

PROCEEDING

means the form and manner of conducting juridical business before a court of juridical officer.

THE PENDENCY

the pendency of a suit or proceeding shall be taken to commence from the date of presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction and continue till final.

NAGUBAI V. B SHAM RAO.

1956

Venkatarama Aiyar J, was observed by that,

“in a **collusive** proceeding a claim put forward is fictitious, the contest over it is unreal, and the decree passed there is a mere mask having the similitude of a judicial determination and worn by the parties with the objects confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant that the claim made there in is untrue, but the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court.....while in a collusive proceeding the contest is a mere sham, in a fraudulent suit it is real and earnest”.

RADHAMADHUB HOLDAR
V.
MONOHUR MOOKERJI,
15 IA 97

It is held that s.52 does not apply on **involuntary** sale or transfer but apply on **voluntary** transfer

BALA RAMONADRA V DAULUI.

27 BOM LR 38.

- it was held that Transferor was **not party to the suit** of 1914 in her own right and the sale to defendants took place before she was brought on record, therefore, doctrine of *lis pendens* did not apply. It was further observed by the court that even if Transferor had sold the property after she was brought on record, the result would have been the same because the transfer was made in her own right as owner, and on record she was a representative of her father of Transferor only

SALE OF IMMOVABLE PROPERTY



Section-54-57

DEFINITION OF SALE S.54

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

-

ESSENTIALS OF SALE

- Parties
- Transfer of Ownership
- For consideration of **price**
- Subject matter of transfer

PARTIES

Seller

Buyer

MODE OF SALE

- **Tangible property** of the value of one hundred rupees and upwards, by a **registered instrument**.
- **Intangible** of the value of any amount only by a **registered instrument**.
- **Tangible property** of a value less than **one hundred** rupees by a registered instrument or by delivery of the property.



CONTRACT FOR SALE

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



RIGHT AND LIABILITY OF
SELLER
§.55

LIABILITY OF SELLER

- Disclose the material defect
- Produces all documents of title for examination to buyer
- Answer the best of his information
- Convey the deed of sale to buyer
- Care of property during the agreement and delivery
- Gives the possession of property
- Pay all public charges and dues related to property.

RIGHTS OF SELLER

- Right to receive of price (All amount)
- Rent and profit of property till ownership
- Right to retain possession of property till non payment of price.

LIABILITY OF BUYER

- Disclose all fact which might increase the value of property.
- To pay all price of property.
- To bear all loss caused to property after sale.
- Pay all public charges and dues after transfer of ownership.

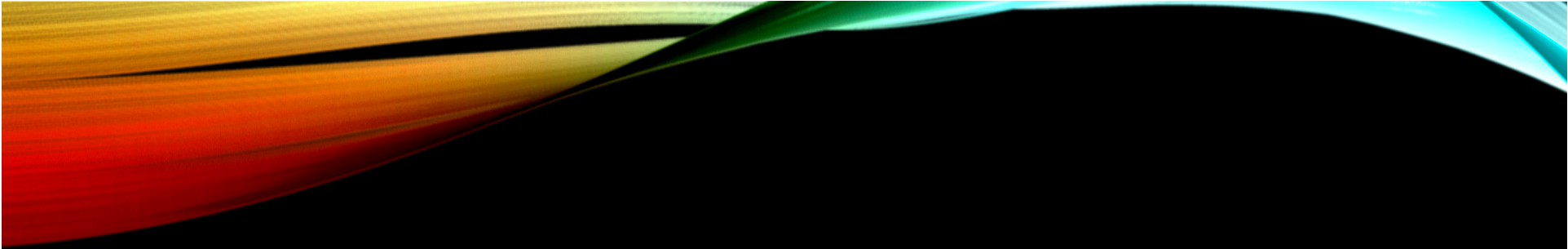
RIGHTS OF BUYER

- All benefit and rents
- Right of sale deed
- Right to possession of property

DOCTRINE OF MARSHALLING

§.56

If the owner of **two or more properties mortgages** them to one person and **then sells one or more of the properties to another person**, the buyer is, in the absence of a contract to the contrary, entitled to have the **mortgaged-debt satisfied out of the property or properties not sold** to him, so far as the same will extend, but not so as to prejudice **the rights of the mortgagee** or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

- 
- If the owner of **two or more properties**,
 - **mortgages them to one** person and **then sells one or** more of the properties to another person,
 - the buyer **is entitled to have the mortgage-debt** satisfied out of the property or properties not sold to him (subject to the **contrary contract**) so far as the same will extend
 - But this will not **prejudice the rights of**
 - ❖ **the mortgagee, or**
 - ❖ **persons claiming under him, or**
 - ❖ **of any other person,**



MORTGAGE OF IMMOVEABLE PROPERTY

Section-58-99

DEFINITION OF MORTGAGE S.58

A mortgage is the transfer of **an interest** in **specific immoveable 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 a **pecuniary liability**.

•

ESSENTIALS OF MORTGAGE

- Parties
- Transfer of interest in any immovable property
- For security of repayment
 - ❖ money advanced to be advanced by way of loan,
 - ❖ an existing or future debt
 - ❖ the performance of any liability
- Specific property

TERMS OF MORTGAGE

- Transferor -mortgagor,
- Transferee -mortgagee;
- The Secured amount-the mortgage-money.
- the instrument --mortgage-deed.

KINDS OF MORTGAGE

1. Simple mortgage s. 58(b)
2. Mortgage by conditional sale s. 58(c)
3. Usufructuary mortgage s. 58(d)
4. English mortgage s. 58(e)
5. Mortgage by deposit of title deed. s. 58(f)
6. Anomalous mortgage s. 58(g)

1. SIMPLE MORTGAGE

§.58(b)

- Personal undertaking
- Without delivering possession,
- On failing to pay mortgaged property to be sold.
- No foreclosure
- Sale on decree of court.

2. MORTGAGE BY CONDITIONAL SALE

- Ostensible sale
- Sale become void on payment of loan.
- On default of payment the sale became absolute.
- Remedy only foreclosure
- Registration is compulsory.
- Two agreement in one document.

P. L. BAPUSWAMI V. N. PATTAYA GOUNDER (1966)

- In this case the court determine that the sale depend on intention of parties and other ground as following;
- Real value of property
- The future traction of property regarding property
- Default of payment of amount.

3. USUFRUCTUARY MORTGAGE

- Delivery of possession of mortgage property
- Mortgagee retain the possession until repayment of amount.
- Redemption on payment.
- No remedy of foreclosure or sale.
- Registration is compulsory.

RAGHUNATH V. COMPETENT OFFICER DELHI
1970

Custodian can claim and retain the
possession till mortgage debt.

TARA CHAND V SAGARBAI, AIR 2007 SC 2059

- Where the mortgagee was authorised to pay himself the amount of mortgage-money from the rents and profits of the property and the money is paid,
- Where the mortgagee is authorised to pay himself from rents and profits and the terms prescribed for the payment of the mortgage-money has expired and the mortgagor pays the mortgage-money or balance of it to the mortgagee or deposits it in the court.

4. ENGLISH MORTGAGE

- Where the mortgagor binds himself to repay the mortgage-money on a certain date.
- Absolute Transfer of the mortgaged property
- Delivery of possession.
- On the condition of re-transfer on payment of the mortgage-money.
- Remedy is sale not foreclosure

5. MORTGAGE BY DEPOSIT OF TITLE DEED.

- Transfer of title deed
- With intention
- Remedy is sale on decree of court
- All provision of simple mortgage shall apply
- Registration is not necessary

6. ANOMALOUS MORTGAGE

- Which is not all of the above mortgage



RIGHT AND LIABILITY OF MORTGAGER

LIABILITY OF MORTGAGER

1. Not destruct or injured the mortgaged Property **s.66**
2. Re payment of debt. **S.68**
3. Payment of all public charges and dues regarding mortgage property. **S.65(e)**
4. To give possession of property to mortgage according to contract. **S.58(d)**
5. Payment of rent. **S.65(e)**
6. Payment of interest on prior mortgage **S.65(e)**

RIGHTS OF MORTGAGER

1. Right to redeem S. 60, 60A, & 61
2. Right to inspection and production of document s. 60B
3. Right to recover the possession of property s.62
4. Right of accession in mortgage property s.63
5. Right of improvement in property s.63A
6. Right to lease the property s.64 & 65A

LIABILITY OF MORTGAGEE

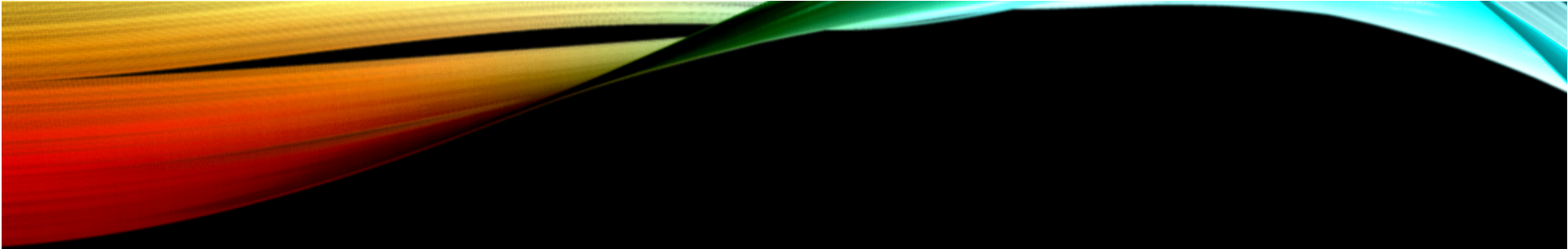
1. Duty of mortgagee in possession of property s.76
 - Manage the property
 - To collect the rent and profit
 - To pay all public charges and dues
 - To make necessary repairs
 - Not destruct or injured the property
 - Keep proper account
 - To take insurance against injury
 - To keep account about mortgage money
2. Duty of mortgagee not in possession of property.

RIGHT OF MORTGAGEE

1. Right to foreclosure and sale. **S.67**
2. Right to sue for mortgage money **s.68**
3. Right to exercise the power of sale **s.69**
4. Right to appoint receiver for execution of sale **s.69A**
5. Right to appropriate accession to mortgage property **s.70**
6. Right to get benefit of renewed lease **s.71**
7. Right to spent money for preservation of property **s.72**
8. Right to take the proceeds of revenue, sale or compensation on acquisition of mortgage property **s.73**

RIGHT OF REDEEM

s.60, s.60A & 61

- 
- to deliver the mortgage-deed and all documents
 - to deliver possession,
 - to re-transfer the property to the mortgagor or any third person.
 - Redeem of interest of property

ONCE A MORTGAGE, ALWAYS A MORTGAGE

- In case *Nookes & Co. v. Rice*
Lord Davey interpreted this maxim.
- A mortgage cannot make **irredeemable** and if it is make any provision
- *K. Vilasini v. Edwin Preiera 2009*. right to redeem is till final decree of sale or foreclose
- *Modh shair khan v. raja seth 1944*

S.91 RIGHT TO REDEEM OTHER THEN MORTGAGER

- Prior mortgagee
- Lessee
- Charge holder
- Sub mortgagee
- Purposer of equity of redeem
- Donee
- Any other person who have interest in property
- Co mortgager

RIGHT TO FORECLOSE AND SALE

s.67 s.69

RIGHT TO FORECLOSE

- Proper institution of suit
- Extinguishes the mortgager's right to redeem.
- Makes mortgagee as absolute owner.

SIMPLE MORTGAGEE

- simple **money decree**,
- File suit for **the decree of sale**

USUFRUCTUARY MORTGAGE

- He can neither sue for sale nor foreclose the mortgage.

MORTGAGE BY CONDITIONAL SALE

- The proper remedy is to **deprive the mortgagor of the right of redemption**
- Right to **foreclose offer default of payment**

ENGLISH MORTGAGE

- An English mortgagee can file a suit for the sale of the mortgaged property.



MORTGAGE BY DEPOSIT OF TITLE-DEEDS

ANOMALOUS MORTGAGE

- Any right can be used



RIGHT AND DUTIES OF LESSEE

S 108

RIGHTS OF LESSEE

- Right to peaceful enjoyment of property
- To avoid the lease
- To repair the property
- To pay such payment which are obligatory on leaser
- To remove the fixtures made by lessee
- Benefit of crops and plant on property after termination of lease
- To assign his interest in the leased property

DUTIES OF LESSEE

- Duty to disclose any information regarding property
- Duty to keep and restore the property in good condition
- Duty to payment of rent
- Duty to give information about any proceeding on property
- Reasonable use of property
- To not erect any permanent structure
- Duty to restore the property in good condition

TERMINATION OF LEASE

S.111

- By efflux of time
- On condition
- On termination of leaser's interest in property
- On merger
- On surrender of lease
- On forfeiture
- On notice

WAIVER OF FORFEITURE

S.-112

- By acceptance
- By distress for rent
- By any other act



EASEMENT

Indian Easement Act, 1882

DEFINITION OF EASEMENT S.4

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

DEFINITION BY **PEACOCK**

- Easement is a **privilege without profit acquired** in respect of **one tenement by the owner thereof**, where by the owner of the other **tenement is restricted in the full enjoyment** to the rights thereto to **extent of being obliged** to suffer, or not to do, something thereon, for the **advantage or benefit of the former tenement.**



SALMOND

As easement is a legal servitude imposed upon one piece of land for benefit of another piece of land.

DOMINANT HERITAGE

The land for the beneficial enjoyment of which the right of easement exists

DOMINANT OWNER :-

Owner or Occupier of such land is called dominant owner



SERVIENT HERITAGE

The land on which the right of
easement exists

NATURE OF EASEMENT

- Dominant and servient Heritage
- No easement in **grass**
- Dominant and servient Heritage **distinct**
- Beneficial Enjoyment
- Not personal right
- No right for the **servient owner**
- **Fractional right.**
- **An incorporeal right *in rem***

KINDS OF EASEMENT

- Affirmative and negative
- Continuous and discontinuous s.5
- Apparent and non apparent s.5
- Permanent and Limited s.6
- Subordinate s.9
- Accessory s.24
- Necessary s.13
- Quasi easement s.13
- Natural easement s.17
- customary



CREATION OF EASEMENT

- By grant
- By necessity
- By prescription
- By operation of law
- By custom
- By transfer of dominant heritage

REFERENCES;-

- Dr Awtar Singh, Transfer of property Laws