

# Competence of The Parties in A Transfer Under the Transfer of Property Act, 1882

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***Abstract---** The paper discusses the various aspects of The Transfer of Property Act, 1882, including the competence of the transferor and the transferee. The paper talks about the essential conditions that need to be fulfilled for a transfer to be valid such as inter vivos transfer, registration, etcetera. Conditions as regards to the competence of the transferor and transferee also have to be fulfilled. Minors, aliens, people of unsound minds and insolvents cannot make valid transfers. The paper concludes with discussing the need of the Act as regards to transfers and the provisions regarding the competence of the parties to a transfer.*

***Index Terms—** Competence, the transfer of property act, Transferee, Transferor.*

## I. INTRODUCTION

All the property related transactions, i.e. sale, purchase, lease, mortgage etc. are dealt with by the provisions of the Transfer of Property Act and thus it holds crucial importance in the law. The legislation was brought into force in order to fulfil the need of the citizens as regards to the transfer of their property. Section 5 of the Act lays down that the transfer of property has to be between two living persons. Whereas the transferor has to be a competent person, the transferee does not need to be and can be a minor, insane or child in a mother's womb.

The word "living person" includes corporations and other association of person.<sup>1</sup>

Section 5 of Transfer of Property Act is as follows:

"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 and one or more other living persons; and "to transfer property" is to perform such act."

"living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."<sup>2</sup>

Section 5 lays down the following requirements for fulfilment of a valid transfer:

- The transfer must be done by a living or a juristic person.

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<sup>1</sup> Abhinav Misra, The Transfer of Property Act 1882, Upkar Prakashan, 2010.

<sup>2</sup> Section 5, Transfer of Property Act, 1882.

- The transfer must be by way of conveyance.
- The transfer must be made in the name of a living or a juristic person.

In the Act, the word 'Property' conveys a rather wide meaning and it has within its ambit, both tangible and intangible properties, i.e. it covers lands, houses etc. on one side and right to repayment of a debt on the other side. The Act also makes use of the word 'transfer' in a very wide sense. The word may be used to mean the transfer of all the rights and interests in a property from one person to another or it may be used to mean the transfer of some of the interests in a property. It can hence be said that the expression transfer of property can mean one of multiple things. It can mean transfer of things, transfer of one or more of the rights in a thing or transfer of a debt.

## **II. ESSENTIAL CONDITIONS OF TRANSFER OF PROPERTY**

The transfer of property between two parties, the transferor and transferee, is contractual in nature. Thus, the parties need to fulfil the requirements of a contract for the transaction to be legally valid.

### **Transfer of property by act of parties:**

Transfer of property can either be inter vivos or testamentary. Inter vivos transfer means the transfer of property that takes place between two living persons, whereas testamentary transfer means transfer that takes place by way of will. The Transfer of Property Act only deals with transfer that is inter vivos in nature.

The term 'Living persons' is deemed to be inclusive of juristic persons, i.e. a company, or association or a body of individuals. Thus a transfer made to or by any of these is also covered by the Transfer of Property Act. There are some transfers that are between two persons but are not the subject matter of Transfer of Property Act such as, transfers by operation of law that is transfers such as intestate succession, forfeiture, court sales and insolvency. Other transfers not included in the Transfer of Property Act are partitions by war of family arrangements, a release of relinquishment of one's right in favour of another, a surrender or merger or when easement is created.

### **Property that cannot be transferred:**

Section 6 of the Transfer of Property Act gives out a list of the properties that are not transferrable in nature. These acts include a right to sue, having a restricted interest in the property i.e. when the interest in property is restricted in its enjoyment only, transfer of a public office or salary of a public officer, - stipends allowed to military, naval, air force and civil pensioners of the Government and political pensioners.

Transfer of a property cannot be made to a person who is legally disqualified to be a transferee, or for an unlawful object or consideration as mentioned in Section 23 of the Indian Contract Act, 1872.

A tenant who has a transferable right of occupancy cannot transfer his interest as such tenant. "The farmer of an estate in respect of which default has been made in paying revenue cannot transfer his interest as such farmer and the lessee of an estate under the management of the Court of Wards cannot assign his interest as such lessee to any other person".<sup>3</sup>

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<sup>3</sup> Vidya Bhaskar Singh Nandiyal, "Essential Conditions of Transfer of Property under Transfer of Property Act, 1882 (Act 4 of 1882).

## **Registration:**

The transfer of property has to be by way of registration. Section 3 of the Transfer of Property Act as regards to the word 'registered' says that "registered" means registered in any part of the territories to which the Act extends under the law for the time being in force regulating the registration of documents."<sup>4</sup>

*Transfer, either written or by delivery of possession:*

The following transfers must be made in writing:

- Sale of an immovable property
- Simple mortgage irrespective of the amount specifies
- Lease from year to year
- Exchange of immovable property which has a value of more than 100 rupees.
- Transfer of an immovable property by way of gift
- Transfer of actionable claims

Oral transfer of property can be made in certain circumstances. "A transfer of property may be made without writing in every case in which writing is not expressly required by law."<sup>5</sup> In such cases, the transfer has to be made by way of delivery of possession. Some of the transfers that can be made through delivery of possession are as follows:

- Movable properties
- Month to month tenancy
- Mortgage by deposit of title-deeds, exchange of immovable property value less than rupees one hundred, etc.

## **III. COMPETENCE OF THE TRANSFEROR**

Section 7 of the Transfer of Property Act reads that, "Every person competent to contract and entitled to transferable property or authorized to disclose of transferable property not absolute or conditionally in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force."<sup>6</sup>

Section 11 of the Transfer of property Act talks about the persons who are competent to contract. It says that "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject"

This Section talks about three kinds of people who are competent to contract.

- Persons who are of the age of majority are competent to make a transfer in the name of someone else. Section 3 of the Indian Majority Act, 1875 lays down the age of majority to be 18 years. The age of majority though in the case where a guardian has been appointed is 21 years.
- A person, in order to be able to execute a transfer has to be of sound mind. Section 12 of the Indian Contract Act lays down that "a person is of sound mind for the purpose of making contract if he is capable of

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<sup>4</sup> Section 3, Transfer of Property Act, 1882.

<sup>5</sup> Transfer of Property Act, 1882

<sup>6</sup> Section 7, Transfer of Property Act, 1882.

understanding it and forming rational judgement as to its effect upon his interest.” In the case of *Amina Bibi v. Saiyid Yusuf*<sup>7</sup> it was held that a contract made by a person who is of unsound mind is void.

As regards to the disqualification from contracting because of any law, insolvents and aliens are disqualified from contracting.

A person who is authorized to dispose of the property can transfer it as well. Property shall be free from any encumbrances in order to be transferable and the owner must have absolute interest over it. The power of attorney holder may be authorized by the owner to make transfer on his behalf.

#### **IV. COMPETENCE OF THE TRANSFEREE**

The transferee, unlike the transferor, does not need to be of a certain age or does not require to be solvent in order to be able to attain the property being transferred. The only requirement is that he shall be alive at the time of transfer. If the transfer is being made to an unborn person, there has to be a creation of prior interest. In the case of *Sadiq Ali Khan v. Jai Kishori*<sup>8</sup> it was held by the Privy Council that a minor although cannot transfer a property, he is competent to receive a property by way of transfer.

#### **V. OPERATION OF TRANSFER**

When a transfer of property takes place from the transferor to the transferee, all the interest passes from the former to the latter unless a different intention has been expressed by the parties. “Such incidents include, when the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth; and, where the property is machinery attached to the earth, the movable parts thereof; and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith; and, where the property is a debtor other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer; and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.”<sup>9</sup>

Section 8 defined what legal incidents of each particular class of property are passed along with the property when it is transferred-

- For land, the incidents are easements, rents, profits and all the things attached to earth;
- For house, the easements, rents after transfer, locks, keys, bars, doors etc., which are provided with the house for permanent use;
- For machinery, its movable parts;
- For debt, it is security; and
- For money, it is interest after transfer.

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<sup>7</sup> 70 Ind Cas 968 (1922)

<sup>8</sup> (1928) 30 BOMLR 1346

<sup>9</sup> Section 8, Transfer of Property Act, 1882.

Section 43 of the Act lays down the provision in case of an unauthorized person acting as the owner of a property and fraudulently making the transfer when eventually, while the contract of the transfer lasts, the fraudulent transferee does in fact gain ownership. In such a case, if the transferee wishes so, the transfer may be valid as much as the interest of the transferee in the property.

The Transfer of Property Act gives an illustration for a better understanding of the provision, which is as follows:

“A, a Hindu, who has separated from his father B, sells to C three fields, X,Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir, obtains Z.C, not having rescinded the contract of sale, may require A to deliver Z to him.”

There has been a confusion regarding Sections 6(a) and 43. Section 6(a) talks about Spes Succession. The Section lays down that “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”<sup>10</sup>

Regarding the confusion, it has been held in the case of *Jama Masjid v. K. Deviah*<sup>11</sup> that “there is no necessary conflict between them, Section 6 (a) would apply where there is a transfer of mere Spes successionis and the party knowing that the transferor has no more right than that of a mere expectant heir, Section 43 applies where an erroneous representation is made by the transferor to the transferee that he is the owner of the property and is authorized to make the transfer.”

## VI. CONCLUSION

The transfer of Property Act is the legislation by which a property is conveyed from one living person to another. For a transfer to be valid, the provisions of the Act must be complied with. Due to the fact that the Act is the sole legislation for the transfer of property, it holds an important place in the judicial system.

Transfers can be of many kinds and the rules for different kinds of transfers are also different. The transfer of Property Act contains the same and thus is crucial from the implementation point of view.

The Act lays down the requirements for competency of a transferor which is a very crucial exercise as legal validity cannot be given to the transfers made by minors or insolvents, owing to the legally binding nature of transfers and the inability of the people not competent to make the transfer to bear the consequences of a transfer of property of which they are the owners.

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<sup>10</sup> Section 6 (a), Transfer of Property Act, 1832.

<sup>11</sup> AIR 1962 SC 847

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