

**MODE'S OF TRANSFER**  
**OF PROPERTY:**

**SALE AND GIFT**

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## **Transfer of Immovable Property**

### **Introduction**

Property is any physical or virtual entity that is owned by an individual or jointly by a group of individuals. Depending on the nature of the property, an owner of property has the right to consume, sell, rent, mortgage, transfer, exchange or destroy their property, and/or to exclude others from doing these things.

According to **Section 3 of the Transfer of Property Act, 1882** "Immovable Property" does not include standing timber, growing crops or grass. It is also defined under **General Clauses Act** as "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Land is a subject falling within the powers of the State Governments under the Constitution of India<sup>1</sup> and hence, property laws in India may differ from State to State. Besides the local laws, several laws enacted by the Central Government also govern acquisition and ownership of property (including an interest in property) through purchase/sale, transfer, mortgage, inheritance or gift. Transfer of property other than agricultural land, registration of deeds and document fall in the Concurrent List.

When a person acquires or owns an immovable property, the law also give him/her the right to use, lease, sell, rent or transfer/gift of the land. The owner also has a right to mortgage his immovable property as a security for loans. However, there are some laws which restrict the type of use a land can be put to, e.g., a land may be used only for residential or commercial purposes to prevent haphazard/unorganized growth of cities and towns. Laws in some of the States prevent/restrict outsiders from acquiring property within the State. Restrictions are also placed on non-agriculturists from acquiring agricultural land.

There are also other laws which prescribe rules and regulations for protection of environment or which provide for approval of building plans/designs so as to protect people from natural or man made hazards. Some laws like the Registration Act, 1908, also lay down provisions governing registration of property transactions so as to keep proper records of ownership of property in the public domain. Some laws relating to taxation like the Income Tax Act, 1956 lay down certain provisions and procedures to be observed while undertaking property transactions so as to ensure tax compliance of an owner before disbursal of property. In India,

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<sup>1</sup> Constitution of India, Seventh Schedule, List II, Entry 18 and Article 246 (3)

transactions for purchasing/selling/transferring/creating an interest in immovable property and transmission of title in respect of a property are governed by several laws, rules and regulations.

As matters relating to land fall within the legislative powers of State Governments under the Constitution of India, these may differ from state to state. The Transfer of Property between any two parties is governed by the Transfer of Property Act, 1882. Both these parties need to be alive for transfer under the Act. In case of transfer of a property of a deceased person, Succession Laws as per the religion of the deceased will be applicable.

## **Modes of Transfer of Immovable Property**

There are different modes by virtue of which immovable property can be transferred. Property can be transferred by different modes or ways viz. Sale, mortgage, lease, gift, exchange etc. Transfer of immovable property by each of the aforesaid modes has its own significance, advantages and disadvantages.

### **I). SALE**

**Section 54 of the Transfer of Property Act, 1982** defines sale as under :

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

- **Sale How Made :**

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

**Contract for Sale :**

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

It does not, of itself, create any interest in or charge on such property.

**The essential elements of a sale are:**

- parties to a sale;
- subject matter of sale;
- price or consideration;
- mode of execution of sale.

**a) Parties to Sale**

The parties to a sale are—the transferor who is called a seller, and the transferee known as the buyer. A contract of sale must be based on a mutual agreement between the seller and the buyer<sup>2</sup>.

The transferor or the seller must be a person who is competent to enter into a contract i.e., he must be a major and of sound mind and should not be legally disqualified to transfer the property. A minor or a person of unsound mind is incompetent to transfer his own property despite being its owner, but a transfer by a mentally challenged person during lucid intervals is valid.

Statutory incompetency refers to an, incompetency imposed under law or a statute. When a person is declared as an insolvent, his property vests in the official receiver and he is incompetent to transfer the same. Similarly, a judgment debtor is not capable sell his property that is to be sold in execution under the order of the court.

The transferor should either be the owner of the property or should have an authority to dispose of it. For example, the karta of a joint family property is authorized to transfer the property under certain specified circumstances<sup>3</sup>.

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<sup>2</sup> Misabul Emterprises v. Vijaya Srivastava, AIR 2003 Del. 15

<sup>3</sup> Biswanath Sahu v. Tribeni Mohan, AIR 2003 Ori 189

Similarly, the guardian of the property of a minor is empowered to sell it with the permission of the court, and without such permission the sale would be invalid<sup>4</sup>. An agent having a power of attorney to sell the property can also sell it without being the owner of the property.

Where the sale is executed after getting a general power of attorney; without obtaining the requisite permission of the court, the sale deed is invalid and would not confer any title on the transferee, but if the Power of Attorney executed in favour of the holder expressly authorizes him to transfer the property he would be a competent seller<sup>5</sup>.

The *transferee* must be a person competent to receive a transfer in his favour and he should not be subject to a legal disqualification. A minor is a competent transferee in a transaction of a sale. Similarly, a mortgage or a lease can be executed in favour of a minor, but a minor cannot take a lease in his favour, as a lease has to be executed by both the parties. A lease in favour of a minor is therefore, void<sup>6</sup>.

### **b).Subject Matter of a Sale**

**Section 54, Transfer of Property Act** only governs the sale of immovable property. Immovable property can be tangible or intangible. Tangible property is one that can be touched, such as a house, a tree etc., while intangible property refers to property that cannot be touched such as a right of fishery, a right of way etc.

The property must be properly and sufficiently identified. In a suit for declaration of title of the property, the controversy was with respect to the identity of the property<sup>7</sup>.

There was a mistake in the plot number. The court held that as both boundaries and plot number were given in the sale certificate a mistake in the plot number must be treated as a misdescription which did not affect the identity of the property sold. Rather, it is intrinsic evidence in proving that seller wanted to convey the right and title in the suit property to the buyer

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<sup>4</sup> Sarup Chand v. Surjit Kaur, AIR 2002 P & H 54

<sup>5</sup> Lakhwinder Singh v. Paramjit Kaur, AIR 2004 P & H 6.

<sup>6</sup> Sec. 107, Transfer of Property Act

<sup>7</sup> Ram Jiwan Rai v. Deoki Nandan Rai, AIR 2005 Pat 23

**(c) Price or Consideration**

Price<sup>8</sup>, in the ordinary sense connotes money consideration for the sale of property<sup>9</sup>. Where the consideration is money but is not specific, the transaction would still be a sale.

A compromise, a descretal amount, an advance made by one person to another, or an agreement to protect and defend the property at the purchaser's cost, is a good consideration for sale. Likewise, a family settlement is a valid consideration for an agreement to sell. Where a son-in-law executed an agreement for sale in favour of his mother-in-law in consideration of a family settlement, it was held that it amounted to a valid consideration for the sale<sup>10</sup>.

The ordinary rule governing sale is that payment of consideration is simultaneous with the time when the conveyance is executed by the seller. This rule can be deviated from in case of an agreement to the contrary by the parties. For example, A agrees to sell the land to B, and executes a sale deed for the same. Ordinarily, the buyer would pay the consideration on the same day.

However, if they agree to pay the entire consideration or part of it at the time of the registration of the document, and partly at the time of the execution or even subsequent to registration, this would be a valid sale. Price is the essence of the contract of sale but the time for payment of it is not the essence of the sale, unless the contract stipulates so<sup>11</sup>.

Therefore, it is not mandatory that payment of the price should beat the time of the execution of the sale. Price can be paid even before, at the time or even subsequent to the completion of the sale. It is also not necessary that the whole of the consideration or price should be paid at one time. This would depend purely on the terms and conditions agreed upon as between the parties. If the recitals are indecisive, surrounding circumstances or conduct of parties are the relevant factors to decide the validity of sale.

**d) Conditions of a Valid Sale**

**Section 54, Transfer of Property Act** lays down a specific method for the execution of a sale deed with respect to immovable property and completion of sale. Generally speaking, in a sale, the three requirements of law are that transfer of property by sale must take place with

<sup>8</sup> The term price has not been defined in The Transfer of Property Act, 1882, but is used in the same sense as in the Indian Contract Act, 1872. *Arjuna Reddy v. Arjuna C. Thanga*, (2006)7 SCC 756

<sup>9</sup> *Comm. of Income Tax v. Motor and General Stores*, AIR 1967 SC 200

<sup>10</sup> *K. Lakshaman Rao v. G. Ratna Manikyamba.*, AIR 2003 AP 241

<sup>11</sup> *Nalamathu Venkaiya v. B.S. Neelkanta*, AIR 2005 AP 535

the help of a *validly executed sale deed, by the transferor in writing, is properly attested, and registered.*

Unless, the all three conditions are complied with, no right passes from the seller to the buyer or in other words, there can be no sale. However, in case where the property is of *nominal value, the sale of property can be completed by a simple delivery of possession of such property.* In such cases, due to the small value of property, the formality of writing, attestation and registration is dispensed away with, but this does not mean, that immovable property whose *value is less than Rs. 100* cannot be transferred by adhering to above mentioned these three requirements. It is only that writing, attestation and registration in such cases is optional<sup>12</sup>. The test is the value of the property and nor the amount of consideration or the price.

### **Ownership Transfer and Registration:**

Writing, attestation and registration are the essential requirements for the completion of a valid sale of property, whose value is more than Rs. 100. Transfer of ownership cannot take place without registration, and it concludes on registration unless there is a clause contrary in the contract. Therefore, a suit for preemption that can be filed only after the conclusion of the sale, if filed before registration, will be premature.

The general rule of passing of ownership on registration is subject to the intention of the parties (i.e. buyer and seller) explicitly expressed in the contract. Where the intention can not be gathered from the document or appears ambiguous, extraneous evidence is admissible for clarity.

### **Contract of Sale :**

There can be an agreement of sale before the execution of a sale deed. A contract, for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties terms settled between the parties.

A contract of sale is different from a sale, as it does not require registration. However, it does not create a charge or an interest in the property. It is merely a document or an agreement that gives a right to obtain another document, i.e., a sale deed. Therefore, it does not require registration.

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<sup>12</sup> Arjuna Reddy v. Arjuna C Thanga, (2006) 7 SCC 756.

However, some equities do arise in favour of the transferee. For instance: where, despite an agreement of sale, the property is transferred to another person, the subsequent transferee with notice of the earlier transaction holds the property in trust for the prior agreement holder<sup>13</sup>.

A suit for specific performance can be granted on the basis of an agreement of sale. But if the contract of sale is subject to future negotiations for finalization of more terms of contract for sale, such a suit cannot be granted<sup>14</sup>.

Supreme Court in the case of **Ramesh Chand Ardavatiya v. Anil Pangwani**<sup>15</sup> held that,

*“A contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties; it does not of itself create any interest in or charge on such immovable property. However, still if a person who entered into possession over immovable property under a contract for sale and is in peaceful and settled possession of the property with the consent of the person in whom the title vests, he is entitled to protect his possession against the whole world, excepting a person having a title better than what he or his vendor possesses. If he is in possession of the property in part performance of the contract for sale and the requirements of Section 53 A are satisfied, he may protect his possession even against the true owner”.*

The Apex Court in the case of **Aloka Boase v. Parmatma Devi**<sup>16</sup>, held that,

*“A contract of sale can be completed and would be valid upon execution by the seller and it is not necessary that the agreement to sell must have been signed by the purchaser”.*

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<sup>13</sup> Kondapalli Satyanarayan v. Kondapalli mayullu, AIR 1999 AP 170.

<sup>14</sup> Ram Swarup Gour v. Rati Ram, AIR 1984 All 369, Also Sec 10, Specific Relief Act, 1963

<sup>15</sup> (2003) 7 SCC 350

<sup>16</sup> (2009) 2 SCC 582



## **II. GIFT:**

**Section 122 of the Transfer of Property Act** defines "Gift" as under :

*"Gift" is the transfer of certain existing movable or immovable 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.*

### **Acceptance when to be made :**

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

Therefore, from the perusal of the aforementioned definition of gift, as per Section 122, TPA the following condition should be satisfied for a valid "Gift" :

1. Gift is transfer of ownership without consideration. Gift must be made of existing movable or immovable property capable of being transferred. Therefore, the share of the coparcener property jointly hold by the coparceners cannot be transpired unless the share has been obtained after the partition of the said joint family coparcenery property as in that case the interest of the coparceners would be fluctuating. Meaning thereby, the property obtained after partition of the Joint Family property can only be gifted. Similarly, a gift of the property obtained after a preliminary decree of partition is passed by the court is valid<sup>17</sup>.

2. "Gift" is valid only when the transfer of property is voluntarily and without consideration on the part of the donor. Voluntarily means that the transfer should be free and should not be obtained by force, fraud or undue influence. The offer to make the gift must be voluntary. A gift should be executed with free consent of the donor which should not be obtained by force, fraud or undue influence<sup>18</sup>.

3. Gift must be made of existing movable or immovable property and the same should be capable of being transferred. The property which is to be acquired by the donor in future cannot be transferred therefore the donor can transfer only that property of which he is the absolute owner and the property which is in existence on the day of transfer by way of gift by the donor to the donee.

<sup>17</sup> Renu Devi v. Mahendra Singh, AIR 2003 SC 1608.

<sup>18</sup> Subhas Chandra v. Ganga Prosad, AIR 1967 SC 878

4. There are two parties to the transfer of property by the mode of Gift. The person who makes the gift is called "donor" and the person in whose favour the gift is made is called the "donee". Moreover, the donor should be competent to make a gift. A person who is not competent to contract cannot gift his property. It has been further held that a guardian of the property of a minor cannot make a transfer of the property without the permission of the court and if he exceeds his power by executing a gift of the property of minor then the same would be void. *The donor must be either the owner of the property or be should be authorized by the owner to execute a valid gift of the property, otherwise the gift would be invalid.*

Hon'ble Supreme Court has held that donee can even be a minor<sup>19</sup>.

5. The another essential and important condition of a gift to be valid is that the gift must be accepted by the donee himself. Acceptance of the gift should be made by the donee during the life time of the donor and while the donor is capable of giving. As per **Section 122**, if the donee dies before acceptance, the gift is void. Though law does not specifies any specific mode of acceptance of a gift, yet, it should be clear and not ambiguous.

### **Modes of Making a Gift:**

***Section 123 of the Transfer of property Act provides for the requirements that are essential for completion of a gift.*** Unless and until these legal requirements are not met with, the donee has no legal title as regards property gifted by donor and consequently the gift is not enforceable by law. This section provides for two modes for making a gift, depending upon the nature of the property. In case of gift of movable property, the gift can be effected by delivery of possession of the same, whereas in case of immovable property, registration is essential for transfer of an immovable property by way of a gift.

Immovable property must be transferred by way of gift only through a **registered document**.

The registration for the gift of an immovable property is essential irrespective of its valuation. The Supreme Court has held that in the absence of written instrument executed by donor, attestation by two witnesses, registration of the same and acceptance thereof by the donee, the gift of immovable property is not complete.

In case of gift of movable properties, registration is not compulsory rather the same is optional. The gift of movable property is completed by delivery of the possession of the gifted property.

<sup>19</sup> K. Balakrishnan v. K. Kamalam, AIR 2004 SC 1257

As per *Section 33 of the sale of Goods Act, 1930* the mode of delivering the property to the donee depends upon the nature of the property. The only requirement is that the donee should get the title as well as the possession of the gifted property in case of movable property.

### **Revocation or Suspension of Gifts:**

According to *Section 126 Transfer of Property Act, a gift may be suspended or revoked.*

Section 126 further provides for two modes of revocation of gift which are as under :

- Revocation of gift by mutual consent of the donor and the donee.
- Revocation by rescission as in the case of contracts. Prima Facie gift is a contract between both the parties and if they agree that it would be revoked on the happening of an event, the gift will be revoked on the happening of such an event.

Similarly, since gift is voluntary transfer of ownership of property in favour of donee by the donor, therefore, if it could be proved that the gift was not made voluntarily by the donor, then the gift must be revoked. Gift is always preceded by an express implied contract i.e. offer by the donor and acceptance by the donee. Therefore, if the preceding contract itself is rescinded then there is no question of taking place of gift under it.

### **Conclusion:**

When a person acquires or owns an immovable property, the law also give him/her the right to use, lease, sell, rent or transfer/gift of the land. The owner also has a right to mortgage his immovable property as a security for loans. However, there are some laws which restrict the type of use a land can be put to, e.g., a land may be used only for residential or commercial purposes to prevent haphazard/unorganized growth of cities and towns. Laws in some of the States prevent/restrict outsiders from acquiring property within the State. Restrictions are also placed on non-agriculturists from acquiring agricultural land.