

Q1. Define immovable property. Who can transfer immovable property?

Ans 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. 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 now 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.

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-1

COMPETENCY OF THE TRANSFEROR

Section 7 of the Transfer of Property Act provides for the competency of a transferor. Under this section a person is competent to transfer a property if he is (1) competent to contract and (2) entitled to transfer or is authorized to transfer if not his Own.

(1) Competent to Contract.-According to Section 11 of the Indian Contract Act, 1872, a person is competent to contract if he is (i) of the age of majority (ii) of sound mind and (iii) is not otherwise

disqualified from contracting by any law. A person who is competent to contract is competent transfer a property.

(i) Age of majority. When the transfer is being made, the transferor must be an adult person i.e. must have attained the age of majority. Under Section 3 of the Indian Majority Act 1875, a person attains majority at the age of eighteen years. But, if a guardian has been appointed under the Guardian & Wards Act, 1890, the minor attains majority at the age of twenty-one years. A person who is below the age of eighteen years (or twenty-one years, as the case may be), is a minor. Transfer of property by a minor is void and cannot be validated by his subsequent ratification on attaining his age of majority.

(ii) Soundness of mind.-Transfer must possess a sound mind at the time of the transfer i.e. he must not be of unsound mind. Unsoundness of mind is of two kinds, idiocy and lunacy. Idiocy is incurable and permanent. Transfer of property by idiot or insane person is void. Lunacy is not permanent and a lunatic may sometimes possesses a sound mind. Such period is called 'lucid interval'. Transfer of property by a lunatic during 'lucid interval' is valid. However, if a person has been adjudged lunatic by a Court, he is incompetent to make transfer even during lucid interval.

(iii) Not otherwise disqualified.-The transferor must be free from any legal disqualification. Disqualification means legal inability. Minority and insanity are legal disabilities. But, besides these, there might be other legal disabilities or disqualifications. Here, 'not otherwise legally disqualified' means that the transferor should not be legally prohibited to transfer the property by any other law to which he is subject. For example, a judgment debtor whose property is being sold in execution of decree, is legally disqualified to transfer his own properties. Similarly, where a person's properties are under the management of Court of Wards, he is legally disqualified to transfer any interest in his property or create a charge over it.

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-1

(2) Entitled to Transfer: Authority for Transfer.-The transferor must be entitled to transfer the property concerned. He is entitled to transfer the property if he has title of the property or if he has no such title, has got the authority to transfer it. No person is entitled to transfer any interest which he himself does not have at the time of the transfer. If a person is transferring absolute interest he must have ownership in the property. If he is transferring partial interest the transferor should have partial interest in the property. For example, where a person makes a sale or gift of a property he must have ownership (absolute interest) in the property. If a person makes a sub-lease of certain property he must be lessee of that property. Without having title or interest in the property, the transferor has no right to transfer it. But a person who is not owner of a property may have right to transfer that property under an authority given to him by the owner of such property. Thus, an agent who is authorized by the principal to transfer certain property, has right to transfer that property.

Other instances where a person is authorised to transfer property not his own are the manager of a joint Hindu Family in the case of legal necessity, a guardian of any minor appointed under the Guardian & Wards Act, an executor or administrator having authority to transfer the property of a deceased under the Indian Succession Act. It may be noted that in these cases, the transferor's right of disposal has been defined and limited by the personal laws or the statutory Laws.

Q2 Explain vested interest and distinguish it with contingent interest.

Ans VESTED INTERESTS

In a transfer of property, there is transfer of interests. From the point of view of the quantum (quantity) the interest may be either absolute or partial. From the point of view of the time of accruing (i.e. when transferee gets the interest) the interest may either be vested or contingent. In a transfer of property, when the interest transferred is vested, the transferee gets that interest immediately. In other words, as soon as the transfer is complete, the interest accrues to the transferee with immediate effect and the transferee's title is complete. Where the interest is contingent, the transferee gets the interest only upon the happening of an uncertain future event specified in the transfer. In a transfer of property if the interest transferred is contingent the title of the transferee is not complete unless the specified event happens. Section 19 defines vested interest and Section 21 defines contingent interest.

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-1

According to Sec.19 In a transfer of property the interest created in favour of the transferee is vested where

- (a) no time has been specified as to when it shall take effect, or
- (b) it is specified that it shall take effect immediately, or
- (c) it is to take effect upon the happening of an event which must happen.

Normally, when a property is transferred the transferor simply effects it according to procedure prescribed for the same. He may not mention the date as to when the interest shall pass on to transferee. In such cases, the intention of the transferor is that the transferee shall get the interest forthwith. Such intention is presumed by law if the transferor does not specify as to when the interest shall accrue to transferee. On the other hand, in order to be more specific, the transferor may express his intention that interest shall accrue to transferee with immediate effect. In both the cases the interest transferred is a vested interest.

Explanation - Explanation to Section 19 makes it clear that vested interest is not affected by the fact that right of enjoyment has been postponed. The vested interest remains unaffected also when the title is to pass on to another person on the happening of a particular event in future.

Nature of Vested Interest

(a) Present fixed right.-Vested interest is a present fixed right to property. In a transfer of property where a vested interest is created in favour of the transferee, the transferee gets a present fixed right to property.

(b) Transferable and heritable interest.-Vested interest is transferable and heritable. Being a present fixed right and also since the title of the transferee is complete, a vested interest is divisible and transferable interest.

Time of vesting of interest.-On a transfer of property, ordinarily the interest created in favour of the transferee vests immediately. Section 19 provides that the interest created is vested when no time of its vesting is specified or it is to vest immediately or where though enjoyment is postponed but it is intended to vest with immediate effect. However, the transferor may specify particular time of vesting of the interest.

Contingent Interest

Contingency means uncertain future event. In a transfer of property where the vesting of interest depends on any contingency i.e. uncertain future event, the interest is contingent. In a transfer of property where the vesting of estate is dependent upon an event that may or may not happen the interest is contingent. A contingent interest is an interest which is created to take effect only when (i) some specified uncertain future event happens or (ii) specified uncertain event does not happen. Where the creation of interest is made dependent on the happening or not happening of any uncertain future event, it does not vest in the transferee immediately. It vests only upon the happening or not happening, as the case may be, of that event. For example, where A makes a gift to B provided X survives (i.e. lives upto) the age of 20 years, the interest of B is contingent. Similarly, where A makes a gift to B provided X does not survive (i.e. dies before) the age of 20 years, here too the interest of B is contingent. In both the examples, the vesting of interest in favour of B depends on an event which is uncertain.

Nature of Contingent interest

(a) Future possible interest.-Contingent interest is a future possible interest. In a transfer of property where the transferee's interest is contingent, he has only a future possible right in respect of property transferred to him. It is neither a present right nor a certain right. Since the happening or not happening of the event, is uncertain, the interest dependent on it is also uncertain]

(b) Not heritable- A contingent interest is not a heritable interest. Where a person having contingent interest dies (i.e. dies before vesting) his legal heirs do not get anything, not even the contingent interest. After the death of person his legal heirs are entitled to inherit only those properties in which he had a vested interest at the time of his death.

In Rajesh Kanta Roy v. Smt. Shanti Devi the Supreme Court observed thus :

"In the case a contingent interest, one of the features is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such person do not get the benefit of the gift (transfer)."

(b) Transferable interest.-Contingent interest is a transferable interest. However, since a contingent interest is itself, an uncertain interest in the property and transferor's own title is not perfect, the transferee too gets an imperfect title.

Distinction between Vested and Contingent Interest

(1) When accrues?.-On a transfer of property, a vested interest accrues immediately to the transferee. A contingent interest does not accrue to the transferee until the specified uncertain event happens or does not happen.

(2) Nature of the title.-A vested interest confers complete and perfect title. In contingent interest the title is dependent on uncertain future event which may or may not occur; the title is therefore imperfect. Vested interest is owned absolutely, whereas, contingent interest is owned conditionally.

(3) Transferee's right in property.-In a vested interest the transferee has present fixed right in property. In contingent interest the transferee has merely a future possible right in the property. A vested interest confers a present right to property even if the enjoyment is postponed or suspended whereas in a contingent interest all the rights of property, including the enjoyment, are dependent on an event which may or may not occur.

(4) Transferability.-Vested and contingent interests both are transferable. But, in a vested interest the transferee gets complete title whereas, in contingent interest the transferee takes an interest which may be defeated by non-fulfilment of condition precedent or non-happening of the event.

(5) Attachment & sale in execution of decreed.-A vested interest is capable of being attached or sold in execution of a decree whereas, a contingent interest cannot be sold in execution of any decree. A merely contingent or possible interest is not liable to attachment and sale in execution of a decree.

(6) Heritability.-A vested interest is property of the transferee, therefore, it may be inherited by his heirs even though he could not obtain possession at the time of his death. A contingent interest confers no title, therefore, it is not heritable.

Q3. What is the Rule against Perpetuity? Is there any exception to this rule?

Ans **RULE AGAINST PERPETUITY**

Transfer in Perpetuity.-Perpetuity means indefinite period. Rule against perpetuity is the rule which is against a transfer making the property inalienable for an indefinite period or for ever. Where a property is transferred in such a way that it becomes non-transferable in future for an indefinite period, the property is tied up for ever. This disposition would be a transfer in perpetuity. In any disposition, perpetuity may arise in two ways: (a) by taking away from the transferee his power of alienation and, (b) by creating future remote interest. Section 10, , makes provision that a condition restraining the transferee's power of alienation is void. A disposition which tends to create future remote interest has been prohibited under Section 14 which incorporates the 'rule against perpetuity. However, a better name of the rule may be the rule against remoteness of vesting.

Object of Rule against Perpetuity.-The object of the rule against perpetuity is to ensure free and active circulation of property both for purposes of trade and commerce as well as for the betterment of the property itself. Frequent disposition of property is in the interest of the society and also necessary for its more beneficial enjoyment. A transfer which renders property inalienable for an indefinite period is detrimental to the interests of its owners who are unable to dispose it of even in urgent needs or for any higher value. It is also a loss to society because when property is tied up from one generation to another in one family, the society as such would be deprived of any benefit out of it. Free and frequent disposal ensures wholesome circulation of properties in society. Rule against perpetuity is, therefore, based also on broad principles of public policy.

Stating the object of rule against perpetuity, Jekyll M.R. in Stanley v. Leigh 31 has observed that if the rule were otherwise then:

"a great mischief would arise to the public from estates remaining for ever or for a long time inalienable or in transferable from one hand to another, being a damp to industry and a prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered."

Rule against Perpetuity under Section 14

Section 14 of the Transfer of Property Act provides that in a transfer of property, vesting of interest cannot be postponed beyond the life of last preceding interest in the living person (or persons) and the minority of the ultimate beneficiary. The essential elements of the rule against perpetuity as given in this section may be stated as under:

1. There is a transfer of property.
2. The transfer is for the ultimate benefit of an unborn person who is given absolute interest.

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-1

3. The vesting of interest in favour of ultimate beneficiary is preceded by life or limited interests of living person (s).

4. The ultimate beneficiary must come into existence before the death of the last preceding living person.

5. Vesting of interest in favour of ultimate beneficiary may be postponed only up to the life or lives of living persons plus minority of ultimate beneficiary; but not beyond that.

Maximum remoteness of vesting.-Under Section 14, the maximum permissible remoteness of vesting is the life of the last preceding interest plus minority of the ultimate beneficiary. Accordingly, property may be transferred to A for life and then to B for life and then to the Unborn when he attains the age of majority

Ultimate beneficiary in mother's womb.-Where the ultimate beneficiary is in the mother's womb i.e. it is a child en ventre sa mere, the latest period up to which vesting may be postponed, (after the preceding interest) is the minority plus the period during which the child remains in mother's womb. It may be noted that minority is counted from the date of worldly birth whereas for purposes of being a transferee, a child in mother's womb is a competent person. Where the ultimate beneficiary is in mother's womb when the last person dies, the property vests immediately in him while he is still in mother's womb.

Exceptions to the Rule against Perpetuity.-The rule against perpetuity is not applicable in the following cases:

(a) Transfer for the benefit of public.-Where a property is transferred for the benefit of public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind, the transfer is not void under the rule against perpetuity.³⁸ This exemption is necessary because transfers of property for the benefit of public generally are made through the medium of religious or charitable trusts.

b) Personal agreement. Personal agreements which do not create any interest in property are exempted from the rule against perpetuity. Rule against perpetuity is applicable only to a transfer of property. If there is no transfer of property i.e. no transfer of interest, the rule cannot be applied. Contracts are personal agreements even though the contracts relate to rights and obligations in some property. ⁴⁰ In Ram Baran v. Ram Mohit⁴¹ the Supreme Court has held that a mere contract for sale of an immovable property does not create any interest in immovable property and, therefore, the rule cannot apply to such contracts e.g. it cannot apply to a covenant of pre-emption.

Rule Against Perpetuity Under Hindu & Muslim Law -

(a)Hindu law Transfer of Property Act was made applicable also to Hindus by the Amending Act of 1929. Now, the provisions of this Act including Section 14 are applicable to Hindus. But, even before this amendment, the rule against perpetuity was applicable to transfers made by Hindus by local enactments

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-1

e.g. Hindu Disposition of Property Act, 1916 and Madras Act 1914. However, apart from these statutory provisions, a transfer of property in perpetuity was held void under Hindu law except gifts for religious or charitable purposes.

(b) Muslim Law Although Chapter II of the Transfer of Property Act is not applicable to Muslims but a gift to remote and unborn generations was held void although acceptance has been made in case of wakfs.

Difference between English and Indian Law of perpetuity.-Under English law, vesting of interest may be postponed upto the life or lives of last person plus a period of 21 years irrespective of the age of minority of ultimate beneficiary. By an amendment, the rule in England has now been modified by Section 163 of the Law of Property Act, 1925 which provides that a transfer shall not be void even if the vesting has been postponed beyond 21 years but it shall take effect as if the age of 21 had been substituted for the age specified in the instrument, (which may be any fixed period longer than 21 years).

In India, Section 14 provides that vesting can be postponed upto the life or lives of the last person plus the minority of the ultimate beneficiary. Minority in India terminates at the age of 18 years. After the existing life or lives, vesting cannot be postponed in India beyond 18 years in any circumstance.