

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-3

Q1. Once a mortgage always a mortgage. Explain with special reference to equity of redemption illustrate your answer.

Ans Definition of Mortgage.-Section 58(a) defines mortgage in the following words:

"Mortgage is the transfer of an interest in specific immovable property for the purpose of securing 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".

Mortgage as defined in this section is transfer of an interest in some immovable property. It is not transfer of all the interests but only of some interest in the property. The purpose of this transfer of interest is to give security for repayment of loan. Therefore, where a person mortgages his property, the legal effect is that there is a transfer of an 'interest of that property in consideration of money advanced to him by the money-lender. In case the loan could not be repaid, the money-lender can recover his money on the basis of that interest. The loan may either be present or might have been taken in the past. It may also be in the form of any pecuniary liability of the mortgagor towards mortgagee.

The person who takes loan under a mortgage i.e. transfers the interest in his immovable property, is called mortgagor. The person in whose favour, the property is mortgaged i.e. who advances loan, is called mortgagee. The sum of money taken as loan under mortgage is called mortgage-money and the instrument or deed of transfer is called mortgage-deed.

Essential Elements of Mortgage.-Following essential elements are necessary in mortgage:

1. There must be transfer of an interest.
2. The interest transferred must be of some specific immovable Property
3. The purpose of transfer of interest must be to secure payment of any debt or, performance of an engagement which may give rise to a pecuniary liability.

What is Right of Redemption?-Right to redeem is the right to recover something by making certain payments. Mortgagor's right of redemption means mortgagor's right to recover or get back the property after making payment of loan.

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Equity of Redemption.-In England, the mortgagor's right of redemption was introduced by the Chancery Courts. Chancery Courts were the Courts of Equity. Therefore, mortgagor's right to redeem the mortgage by making payments even after the due date is known as equity of redemption. The Equity Courts introduced this right in order to do justice with cases on mortgage decided under the common law.

Once a mortgage always a mortgage.-Equity of redemption was introduced by the Chancery Courts in England to give relief to those mortgagors who could not repay the loan within stipulated time. The main purpose of developing the doctrine of redemption was to protect the interests of mortgagors who in default of repayment of loan had to lose all rights in their properties. But, the mortgagee (money-lender) by taking advantage of the depressed position of debtor at the time of taking loan could very easily make an agreement that he (mortgagor) would not exercise the right of redemption after expiry of the due date. Thus, by an express contract entered into between mortgagor and mortgagee, the mortgagor could be deprived of his right of redemption which equity provided him against the strict provisions of common law. To overcome such situations, the equity had to go a step further by declaring that once a mortgage, always a mortgage and nothing but a mortgage. In essence it provided that mortgagor's right of redemption would not be defeated by any agreement to the contrary even though mortgagor himself had agreed to it. The maxim 'once a mortgage always a mortgage' simply means that a transaction which at one time is mortgage could not cease to be so by having any stipulation in the mortgage-deed calculated to prevent the right of redemption. In other words, the well-known rule that agreement of the parties overrides the law, does not apply to mortgages.⁵⁴ Accordingly, it was established in equity that no contract between mortgagor and mortgagee which was entered into at the time of mortgage was valid if it prevented mortgagor's right of calling back his property on repayment of the loan. The underlying principle of this maxim that once a mortgage always a mortgage was stated by Lord Henley in the following words:

"This Court as Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance made absolute. And there is great reason and justice in this rule for necessitous men are not, truly speaking, free men, but to answer present exigency, will submit to any terms that the crafty may impose upon them".

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The maxim, "once a mortgage, always a mortgage" may be applied to explain following two situations:

(i) *First*, where a transaction is intended by the parties to be a borrowing transaction under a mortgage, though it is carried out in the form of a sale, equity will not allow the mortgagor to be deprived of his right of redemption. That is to say, where in essence a transaction is mortgage but may be given the form of sale, its nature of mortgage cannot be converted to that of a sale merely because of any stipulation in the mortgage-deed that after expiry of due date mortgagor has no right to redeem and the property shall belong to mortgagee. A mortgage is always considered as redeemable even though there is an express agreement between the parties that it cannot be redeemed after the due date.

(ii) *Secondly*, equity does not permit any clog on redemption. A clog on redemption means any stipulation or provision in the mortgage deed which restricts the mortgagor's right of redemption. Any contract or agreement or provision incorporated in the mortgage to prevent mortgagor's right of calling back the property on payment of loan is a 'clog' on the equity of redemption. A 'clog' on redemption is void. A stipulation which amounts to a 'clog' on redemption is void and cannot be enforced as being contrary to the very nature of mortgage.

Q2. Define gift. Discuss the essential element of gift. Can a gift be revoked ?

Ans Gift is transfer of ownership without consideration. Transfer without consideration is called a gratuitous transfer. A gratuitous transfer may take place between two living persons or, it may take place only after the death of the transferor. Gift may, therefore, be either inter vivos or, testamentary. Gift inter vivos is gratuitous transfer of ownership between two living persons and is a transfer of property within the meaning of Section 5 of this Act. Gift testamentary is called a will which is transfer by operation of law and is out side the scope of this Act. A gift made during apprehension of death is called a gift mortis causa. Such gifts are also excluded from the Chapter. The provisions of this Act are applicable only to gifts inter vivos.

Definition of Gift.-Section 122 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".

Gift, as defined in this section, is gratuitous transfer of ownership in some existing property made voluntarily. The definition includes gift of both movable as well as immovable property. The transferor is called donor and the transferee is called donee.

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Donor.-Donor must be a competent person. For competency, the donor must have capacity as well as right to make the gift. If the donor has capacity to contract he is deemed to have capacity to make gift. Thus, at the time of gift, the donor must be of the age of majority and must have a sound mind. Gift by minor or insane person is void.

Donee.-Donee need not be competent to contract. Donee may be any person in existence at the date of making of gift. A gift made to minor or insane person or even in favour of a child in mother's womb is valid provided it lawfully accepted by a competent person on his (her) behalf. Donee too may be a juristic person. Juristic persons, such as, firms, companies or institutions are deemed to be competent donee and gift made to them is valid. However, donee must be ascertainable person. Gift made to public in general is void.

Essential Elements of Gift.-The essentials of valid gift are given below :

- (1) There must be transfer of ownership.
- (2) The property must be existing property.
- (3) Transfer is without consideration.
- (4) The transfer is made voluntarily i.e. with free consent.
- (5) Gift must be accepted by transferee.

1. **Transfer of Ownership.**-Gift is transfer of ownership i.e. absolute interest. The transferor (donor) must divest himself of the absolute interest in the property and vest it in the transferee (donee). The donor must intend to pass on all the rights and liabilities in respect of property to donee. Nothing less than ownership may be transferred by way of gift.

2. **Existing Property.** The property, which is the subject matter of gift, may either be movable or immovable. It may be tangible or intangible. Actionable claims or mortgages are intangible properties and may be gifted. Property may be of any kind but two conditions are necessary. Firstly, the property must be in existence at the date of making of the gift. Gift of future property is void.

Secondly, the property must be transferable within the meaning of Section 5 of this Act Gift of spes successions or mere chance of inheriting property or mere right to sue, is void.

3. **No Consideration-** An essential feature of a gift is that it must be gratuitous. Ownership must be transferred without any consideration. The value of consideration is immaterial. Even a negligible property or, very small sum of money given by transferee in consideration of a transfer of ownership in a big property would make the transaction either a sale or exchange.

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4. **Voluntarily.** The donor must make the gift voluntarily. 'Voluntarily' here means that donor has made the gift in exercise of his own free will and his consent is a free consent. His consent is free when he has complete freedom of making the gift without any force, fraud, coercion or undue influence.

5. **Acceptance of Gift.**-Gift must be accepted by the donee. Property cannot be given to a person even in gift against his (her) consent. The donee may refuse the gift e.g. when it is non-beneficial property or, onerous gift.

SUSPENSION OR REVOCATION OF GIFTS

Gift is transfer of ownership without consideration. Like other transfers, gift too can be made subject to certain conditions. Donor may make a gift subject to a condition of its being suspended or revoked. But, such gifts would then be governed by those provisions of this Act which regulate conditional transfers. Accordingly, if a gift is made subject to condition of its being revoked in future the condition must be valid and enforceable under those provisions. Section 126 provides as to how a gift may be suspended or revoked. It lays down two modes of revocation of gift: (i) revocation by mutual agreement of donor and donee and, (ii) revocation by rescission as in the case of contracts.

Revocation by Mutual Agreement.-Donor and donee may agree that the gift shall be suspended or revoked upon the happening of an event not on the will of the donor. The condition revoking the gift must be express; it should not be merely in the form of a wish or desire. In other words, dependent the condition on the non-fulfilment of which the donor may revoke the gift must be expressly laid down in the deed.

Thakur Raghunathjee Maharaj v. Ramesh Chandra, the facts were that the donor executed a gift-deed of a piece of land for the purpose of construction of a college on this land. The gift-deed was without any condition. But on the same day an agreement (between donor and donee) was executed to the effect that college on the gifted-land should be constructed within six-months from the date of execution of gift failing which the donor would have the right over the gifted land i.e. gift would be deemed to have been revoked Agreement stated further that the possession of land will be of the donor till the college is not built and in case the college is not built within said period, the donor will be entitled to take appropriate action in a Court of law and in the event the said college is constructed, the donor will have no right over the land. The Supreme Court held that from these terms as stated in this agreement it is clear that the gift was not absolute or unconditional; it is a gift subject to conditions for its revocation.

Revocation by Rescission as Contracts -

Gift is gratuitous transfer of ownership made voluntarily. If it could be proved that the gift was not made voluntarily i.e. the consent of the donor was not free, the gift must be revoked. Gift is always preceded

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by an express or implied contract; offer by donor and acceptance by donee. If the preceding contract itself is rescinded or revoked there is no question of taking place of transfer (gift) made under it. Accordingly, under Section 126 a gift is revoked also on any of the grounds on which it might be rescinded has it been a contract. Section 19 of the Indian Contract Act provides that "Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained. Thus, where the gift is not made voluntarily because of any of the factors mentioned above, the gift may be revoked by the donor.

period of limitation for the revocation of gifts on the ground of fraud, The coercion, misrepresentation or undue influence is three years from the date on which such facts are known to the plaintiff (donor). The right to revoke the gift on the above-mentioned grounds is lost when the donor ratifies the gift either expressly or by his conduct.

No revocation on any other ground.-Except on the ground of (a) condition subsequent not depending on the pleasure of donor and (b) on the grounds justifying of a contract, a gift cannot be revoked on any other ground.

Q3 What do you understand by exchange? What is difference between exchange and sale ?

Ans Exchange is transfer of ownership in a property for consideration of ownership of another property. Transfer of ownership for consideration of money or price is sale. Transfer of ownership without consideration is gift. Transfer of ownership for consideration of ownership of another property is exchange. Exchange is, therefore, a transfer where a property is 'changed' with another property. Transfer of ownership of a house in consideration of transfer of ownership in an agricultural land is exchange. Similarly, transfer of ownership of a house in return of transfer of ownership of a motor-car is the transfer by way of exchange. Thus, where two persons (transferor and transferee) mutually transfer the ownership of one property for the transfer of ownership of another property, the transaction is exchange.

Exchange, as defined in Section 118 includes change of a movable property with another movable property or change of movable with immovable property.

Definition of Exchange.-Section 118 defines exchange in the following words:

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exchange."

The Characteristic features of exchange are as under:

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1. Transfer of ownership.-Exchange is a transfer of ownership in some existing property. The ownership of one party must be exclusive of the ownership of the other; therefore, when partition is effected it is not an exchange. But, where A and B are co-owners of a property X and B is exclusive owner of a property Y and A transfers his share in X to B in consideration of B transferring Y to A, the transfer is exchange.

2. Properties need not be immovable.-Both properties which are the subject-matter of exchange, need not be immovable. Ownership in immovable property may be transferred in return of ownership in movable property. Transfer of immovable with another immovable plus some movable, is also an exchange.

3. Exchange includes barter.-Transfer of ownership in some movable property in consideration of transfer of ownership in another movable property is technically called barter. Definition of exchange given in this section includes barter.

4. Mode of Transfer.-Second paragraph of Section 118 provides that an exchange can be made only in the manner in which a sale is effected. Thus, the transfer by way of exchange must be completed with the same formalities as are required for completion of sale under Section 54 of this Act. Where both properties are movable, exchange may be effected by delivery of possession; registration is not compulsory. If properties are immovable and are of the value exceeding Rs. 100, registration of the document is compulsory. Where immovable properties are valued less than Rs. 100, registration is optional; it is not compulsory and the delivery of possession is sufficient to complete the transfer.

Distinction between Sale and Exchange.-Sale is transfer of ownership in a property in exchange of price which is the money consideration. On the other hand, exchange is transfer of ownership in a property in exchange of ownership of another property.

Both are transfer of absolute interest in the property but, in sale the consideration is money whereas in exchange, it is another property or, anything of value. Section 118 of this Act defines exchange in the following words:

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange."

Note. It is significant to note that transfer of ownership of money in return of money is called exchange. It is not sale. For instance, transfer of one ten rupee note in exchange of ten notes of one rupee is an exchange.