

Q1. Define Lease of immovable property. Discuss the rights and liabilities of a lease of immovable property.

Ans Definition of Lease.-Section 105 defines lease. Lease is a transfer of 'right of enjoyment' of an immovable property made for a certain period, in consideration of a price paid or promised to be paid or, money, share of crops, service or any other thing of value to be given periodically or on specified occasions to the transferor by transferee.

As is evident from the definition, lease is not a transfer of ownership in property, it is transfer of an interest in an immovable property. The interest is the right to use or enjoy the immovable property. Since 'interest' in an immovable property is considered as property, lease is a transfer of property. However, lease is a transfer of only a partial interest. It is not a transfer of absolute interest Lease contemplates separation of right of possession from the ownership. The interest which is transferred is the right of enjoyment of property for fixed period on payment of some consideration in cash or kind. The transferor is called lessor and the transferee is called lessee. In common language the lessor is usually called landlord and the lessee is known as tenant. Price is called premium and the money, share, service or other things so given is called the rent.

Essential Elements of Lease.-The essential elements of lease are as under:

1. The parties i.e. transferor and the transferee.
2. The demise i.e. right to enjoy immovable property.
3. The term i.e. the duration.
4. The consideration i.e. premium or rent.

1. The Parties : Lessor and Lessee.-In a lease two contracting parties are necessary. The parties are lessor and lessee. Every lease is based on an agreement between two persons competent to contract. Since one cannot contract with himself therefore one cannot also grant any lease to himself.

Lessor. The lessor, who transfers the right of enjoyment of his property must be a person competent to contract and must also have right to transfer the possession of property. The lessor must have attained the age of majority and must possess a sound mind at the time of granting the lease. The lessor must not be only competent to contract but he must have also

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the authority to effect lease. Lessor has authority if he is either owner of the property or, has possession of the property.

Lessee.-Lessee too must be competent to contract at the date of execution. Lessee must be of the age of majority and must be of sound mind. Lease in favour of a minor is void because the transfer by way of lease contemplates agreement by minor to pay rent and other obligations. Lessee may be a juristic person e.g. a company or, a registered firm. But, an unregistered firm is not juristic person. Therefore it cannot be a competent lessee.

2. The Demise: Right to Enjoy Immovable Property.-Lease is a transfer of right of enjoyment in an immovable property. It is not a transfer of ownership; it is transfer of partial interest. Ownership or absolute interest is aggregate of several interest. In a sale, gift or exchange absolute interest is transferred. In mortgage only partial or limited interest is transferred for securing the debts. In a lease too partial or limited interest namely, the right of enjoyment of immovable property, is transferred, Lease is, therefore, transfer of limited estate. This limited estate which is right of enjoyment of property, is called demise. In a lease this right of enjoyment or demise is the subject matter of transfer.

3. The Term: Duration of Lease.-The right of enjoyment must be given to the lessee for a certain period of time. The period for which the right to use the property is transferred is called 'term' of the lease. The term may be any period of time, longer or shorter, even for perpetuity. But it must be specified in the deed. The time from which the right of enjoyment begins and the time when it ends must be fixed and ascertainable. The lease may commence immediately after execution of deed or, may commence with effect from a specified future date. The date of commencement may also depend on some future event. The specific mention of the day or date is not necessary. All that is required is that duration of lease is ascertainable; it should not be uncertain or ambiguous.

Leases in Perpetuity.-Leases in perpetuity are also called as permanent leases. Term is a necessary element of every lease. Therefore, where the term of a lease is neither fixed nor ascertainable by any other method, the lease may be valid only if it is a permanent lease. Permanent leases are not known in England. In India the leases in perpetuity is permissible and have been in practice since long. Such leases may be created either by express words or by necessary implication.

4. Consideration : Premium or Rent.-The contract of lease must be supported with some consideration. Consideration in a lease may be premium or rent. Where the whole amount to

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be recovered as consideration from the lessee is paid by him in lump sum, (at one time) the consideration is called premium. For example, where A executes a lease of his land to B for one year and takes Rs. 1200/- from B before transferring the right of enjoyment to B for the said period, Rs. 1200/- is the premium.

MODES OF CREATING LEASES

Section 107 provides for the modes of making leases. Like other transfers, certain formalities are necessary also for completing a lease. This section provides for two modes of creation of leases.

A. Leases which can be made only by registration

- (a) Leases from year to year.
- (b) Leases for a term exceeding one year
- (c) Leases reserving an yearly rent.
- (d) Permanent leases.

B. Leases in which registration is optional:

- (a) Leases from month to month.
- (b) Leases for a term of one year.
- (c) Leases for a term of less than one year.

Rights of Lessee.-In the absence of any contract or local usage to the contrary, the rights of a lessee as given under Section 108 clauses (d) to (j) are given below:

(1) Right to Accretions.-Accretions means additions made to the property either by human being or by operation of natural forces. If during the continuance of lease some accretion is made to the property, it is presumed to be a part of the property. Where the accretions are made by operation of natural forces e.g. accretions by alluvion, the lessee can enjoy it during the subsistence of the lease.

(2) Right to avoid lease on Destruction of Property. Where the property is rendered substantially and permanently unfit for use due to fire, flood, violence, mob or other

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uncontrollable reasons, the lessee has a right to get the lease terminated before expiry to the term.

(3) Right to deduct Cost of Repairs.-Under this Act the lessor has no obligation to repair the property. But, under an express agreement, the lessor may undertake the obligation of making necessary repairs in the tenanted property. Lessor's duty to repair the property may arise also under some local law (e.g. Rent Control Acts) or custom.

(4) Right to deduct Outgoings.-it is the duty of lessor to pay the outgoings e.g. municipal taxes revenue and other public charges. But, since the lessee is interested in holding the possession of property, he is entitled to pay such public charges to avoid its sale in default of payment of these public charges. Where a lessee makes payment of the public charge in respect of tenanted property, he has right to deduct the amount from the rents.

5) Right to remove Fixtures.-After termination of lease, the lessee has right to remove the 'fixtures' made by him during continuance of the lease. 'Fixtures' means all the things fixed or attached to earth by him in the tenanted premises and includes trees, buildings and machinery. The lessee can remove and take out these fixtures even after the determination of the lease.

(6) Right to remove Crops.-After termination of lease, the lessee is entitled to remove the crops sown by him during subsistence of the lease. For removing and collecting all the crops growing on the land, the lessee or his representatives are entitled to enter into the property after determination of the lease. This right is exercisable where the leases are of uncertain duration.

(7) Right to assign his Interest.-In the absence of any contract to the contrary, a lessee has right to assign or transfer his right of enjoyment in the property. Right of enjoyment of an immovable property is a 'property owned by lessee. He can transfer it to any other person provided there is no prohibition imposed by lessor. However, a lessee's right to assign his demise (right to use the land) cannot extend beyond the term of his own lease,

Liabilities of the Lessee.-Section 108 clauses (k) to (q) lays down the liabilities of lessee. The duties or liabilities of a lessee are given below:

(1) Duty to disclose Facts.-Just as lessor has duty to disclose a latent material defect to lessee, the lessee too is bound to disclose to the lessor any fact known to him which increases the value of property.

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(2) Duty to Pay Rent.-The lessee is bound to pay the rent or premium as stipulated in the lease-deed. It is obligatory on the tenant to pay or tender the rent at proper time and place. But, the tenant's liability to pay rent begins from the date on which he takes possession and not from the date on which the landlord signs the deed.

(3) Duty to maintain the Property.-The lessee is bound to keep and maintain the property in the same condition in which it was given to him. He has, therefore, to take reasonable care in keeping the property in good condition.

(4) Duty to give notice of Encroachment.-If the lessee comes to know encroachment has been made on the property in his possession, it is his duty to inform the lessor so that he may take proper action.

(5) Duty to use the property Reasonably.-The lessee has a duty to use and enjoy the tenanted property as a person of ordinary prudence would use his own property.

6) Duty not to erect Permanent Structure.-The lessee cannot erect any permanent structure on the leased property without the consent of lessor. Whether the construction made by lessee is permanent or not depends on the nature of construction and intention of the lessee.

(7) Duty to Restore Possession.-Lease is a transfer of right of enjoyment (possession) in immovable property to lessee for specified period and during the subsistence of the lease. Accordingly, upon the expiry of the term or determination of lease before its expiry the lessee must re-transfer the possession to the lessor. It is the duty of the lessee to vacate the possession and restore it to the lessor after expiry of the term.

Q2 Define Mortgage. What are the various kind of Mortgage give the salient features of each of the mortgage.

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

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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.

Section 58 provides following kinds of mortgage :

1. Simple Mortgage : S. 58 (b).-Where the mortgagor promises to pay the mortgage-money (loan) without delivering possession of the mortgage property and agrees expressly or impliedly that in case of non-payment of loan, the mortgagee shall have the right to cause the mortgage-property to be sold, the mortgage is a simple mortgage.

The characteristics of a simple mortgage are as under:

- (a) The mortgagor takes a personal undertaking to pay the loan.
- (b) The possession of the mortgage-property is not given to the mortgagee.
- (c) In the case of non-payment of loan the mortgagee has right to have the mortgage-property sold.

Mortgage by Conditional Sale: S. 58 (c).-Mortgage by conditional sale is an apparent sale with a condition that upon repayment of the consideration amount, the purchaser shall retransfer the property to the seller. Although, the whole transaction looks into like a conditional sale yet, in

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essence the intention of the parties is to secure the money which the seller takes as loan from the purchaser. Mortgage by conditional sale was very well known in this country. Among the Muslims it was a common mode of securing a debt. In a simple mortgage, the mortgagee generally gets also interest. Since taking interest was considered against the principles of Islam, simple mortgage could not be common among them and they introduced bye-bil-wafa which was mortgage by conditional sale. In this form of mortgage, the Muslim creditor got his principal money and interest in the shape of an enhanced price on repayment. At the same time, recovery of loan and his religious belief both were safe. It was common also among the Hindus as a mortgage which became a sale on non-payment of debt. The Transfer of Property Act has now recognised this form of mortgage with modifications.

Essential element of mortgage by conditional sale. According to Section 58 (c) the mortgage by conditional sale has following essential elements :

- (1) There is an ostensible sale of an immovable property.
- (2) The sale is subject to any of the following conditions :
 - (a) On non-payment of mortgage-money (price) the sale would become absolute or,
 - (b) On payment of mortgage-money, the sale shall become void or the buyer shall retransfer the said property to the seller.
- (3) The condition must be embodied in the same document.

Usufructuary Mortgage: S. 58 (d).-Mortgage is usufructuary where the mortgagor gives possession of the property to mortgagee. Since possession is with mortgagee, he gets the usufruct i.e. produce, benefits, rents or profits of the mortgage-property. In a usufructuary mortgage, the mortgagee is entitled to enjoy the benefits of mortgage-property in lieu of interest on the principal money (debt) advanced by him. So, on payment of debt (principal money) the mortgagee has no right of possession. Where the property is capable of giving good produce or benefits, the parties may also agree that mortgagee is entitled to get the usufruct of property not only in lieu of interest but also in part payment of the money advanced. This form of mortgage is also common throughout the country and is called by its different local names. For example, in Madras it is known by the name of *Diggu Bhogyam* or *Swadhin Adamanam*. In Bengal it is called as *Bhoga Bandhaki* or *Khai Khalasi* and in Uttar Pradesh it is known as *Bhog Bandhak*. In Punjab this form of mortgage is called *Lekha Mukhi* mortgage.

Essential elements of usufructuary mortgage.-The essential elements of usufructuary mortgage are as under:

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(i) Delivery of possession of the mortgage-property or, an express or implied undertaking by mortgagor to deliver such possession.

(ii) Enjoyment or use of the property by mortgagee until his dues are paid off.

(iii) No personal liability of the mortgagor.

(iv) Mortgagee cannot foreclose or sue for sale of mortgage-property.

4. English Mortgage: S. 58 (e).-In English mortgage there is absolute transfer of property to mortgagee with a condition that when the debt is paid off on a certain date, he (mortgagee) shall re-transfer the property to mortgagor. According to Section 58 (e) of this Act, where mortgagor binds himself to repay the money (debt) on a certain date and transfers the mortgage property absolutely subject to proviso that mortgagee will re-transfer it to mortgagor on payment of debt as agreed, the mortgage is English mortgage. Essential elements of English mortgage are as under:

(i) The mortgagor binds himself to repay the mortgage-money (debt) on a certain date.

(ii) The mortgage-property is transferred absolutely to mortgagee.

(iii) The absolute transfer is subject to a proviso that mortgagee will re transfer the property to mortgagor on payment of mortgage-money on the said date.

5. Mortgage by Deposit of Title-Deeds: S. 58 (f).-Mortgage by deposit of title-deeds is a peculiar kind of mortgage. It is peculiar in the sense that in this mortgage, execution of mortgage-deed by mortgagor is not necessary. Mere deposit of title-deeds of an immovable property by mortgagor to mortgagee is sufficient. Title deeds are those documents which are legal proof that a person owns a particular property. For instance, if A has purchased a house, the sale-deed in his favour is the title-deed establishing ownership of A in that house. Now, if A wants to take loan from B. A may execute either simple mortgage or usufructuary mortgage or any other kind of mortgage. But, in these kinds of mortgages execution of mortgage-deed and its registration may take some time because of the legal formalities. So, if A is in urgent need of money, it may not be possible for him to get the money immediately. Mortgage by deposit of title-deeds does not require formalities of execution or registration etc. Therefore, just by depositing the title-deeds to B, A may get the money immediately. Possession of title-deeds by B (money-lender) is the security for repayment of loan. In this form, the mortgage is created by mere deposit of title deeds with intent to create security thereon without any legal formality.

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The object of this kind of mortgage is to provide easy mode of taking loans in urgent need especially by trading community of the commercial towns. The borrowing transaction is a matter of faith or equity, justice and good conscience that money-lender advances loan only by having possession of certain papers (title deeds) without any writing or legal formality.

Essential elements of mortgage by deposit of title-deeds. According to Section 58 (f), where a person in any of the Specified towns, delivers to a creditor or his agent documents of title to immovable property, with intent to create to security thereon, the transaction is called a mortgage by deposit of title-deeds. Under this definition, the essential elements of a mortgage by deposit of title-deeds are:

- (i) Existence of a debt,
- (ii) Deposit of title-deeds,
- (iii) Intention to create security, and
- (iv) Territorial Restrictions; application of this form of mortgage only in specified towns.

6. Anomalous Mortgage : Section 58 (g).-Section 58 has laid down several kinds of mortgage. But the classification of mortgage given in this section is not exhaustive. Besides these forms of mortgage, there are other methods of taking loans on the security of immovable property. These methods, although not included in Section 58, but are in practice in India. Such modes of taking loans fulfil the essential requirements of a mortgage but do not come under any category of mortgage given in this section. These transactions are in their very nature a mortgage without any specific name. Since most of such mortgages are either customary or combinations of two or more forms of mortgages and thereby causing anomaly (inconsistency) they are called anomalous mortgage.

Instances of anomalous mortgage.-Some well known examples of anomalous mortgage are given below:

(a) Simple mortgage usufructuary.-Where terms of mortgage are mixture of a simple mortgage and an usufructuary mortgage, the transaction is simple mortgage usufructuary. This is a special category and is called anomalous mortgage. Where there is a personal covenant with an express or implied right of sale and the mortgagee is given also possession of the property so that he may adjust his loan from the rents and profits of the property or the interest thereof, the mortgage is neither a simple mortgage nor usufructuary mortgage. It is a combination of the two.

(b) Mortgage usufructuary by conditional sale.-In this form of mortgage, the mortgagee is first entitled to take possession and enjoyment of property but there is also a condition that in default of repayment within a specified period, the mortgagee shall have the right to cause the sale of property. Thus, where the mortgage is usufructuary mortgage for a fixed term and there is also a condition that on expiry of

the due date, it shall operate as mortgage by conditional sale, the whole transaction is mixture of usufructuary mortgage and mortgage by conditional sale. It is therefore anomalous mortgage.

c) Customary forms of anomalous mortgage.-Customary mortgages are mortgages to which special incidents are attached by local usage¹⁵ certain peculiar mortgages are in practice in the form of local customs. They have the essential features of a mortgage but their terms and conditions are governed by local customary practices. Such customary mortgages are included in the category of anomalous mortgage For example, Kanom and Otti mortgages of Malabar are peculiar forms of mortgage because they are not redeemable before expiry of twelve years. Kanom mortgage operates as lease as well as usufructuary mortgage. Paruartham mortgage of Malabar is also in the category of anomalous mortgage.

Q3. What do you understand by charge? Discuss the difference between charge and mortgage?

Ans Definition and Nature of Charge -. Where immovable property of a person is made security for the payment of money to another, and the transaction is not a mortgage there is creation of charge. The charge is created in favour of the person who is entitled to such payment. Section 100 of the Act defines charge in the following words:

"Where immovable property of one person is, by act of parties or by operation of law, made security for the payment of money to another and the transaction does not amount to mortgage, the latter person is said to have a charge on the property....."

Charge on an immovable property is created to secure payment of money. If payment is not made by the person who is liable for such payment, it is made out of the property charged for this purpose. Charge is, therefore, created for securing the recovery of some money e.g. maintenance allowance, from the person whose property is so charged. Mortgage is also made to secure a certain sum of money (debt). But, in its very nature a charge is different from mortgage. Mortgage is transfer of an interest in favour of mortgagee; it is, therefore, transfer of property. Charge does not amount to transfer of any interest. When a property is charged, there is no transfer of any interest in favour of the charge holder. The concept is that such charge-holder is simply entitled to recover his money from that property. In other words, an

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'interest in the property charged is created in favour of the charge-holder The person in whose favour a charge is created is called a charge-holder.

Section 100 while defining a charge provides, "and the transaction does not amount to mortgage". This means that charge is almost like a mortgage but, in essence it is not mortgage. Mortgage is wider than a charge. In every mortgage there is a charge, but every charge is not a mortgage. In **Raja Shri Shiv Prasad v. Beni Madhab**, distinguishing the nature of charge from that of mortgage, the Patna High Court, observed;

"the broad distinction between a mortgage and a charge is this that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property.

It may be noted that there is very little difference between charge and mortgage in so far as the nature of these two transactions is concerned. Practical differences apart, the nature of charge differs from mortgage in the sense that unlike mortgage, charge is not transfer of interest Accordingly, an agreement which gives an immovable property as security for the satisfaction of a debt or for the payment of a maintenance allowance without transferring any interest in the property constitutes a charge on the property and is not a mortgage

Distinction Between Charge and Mortgage.-Charge may be distinguished from a mortgage as under:

(1) In a charge there is no creation of any interest in favour of the charge holder, therefore, charge is not a transfer of property. Mortgage is a transfer of interest i.e. transfer of property. In other words, in a mortgage there is transfer of interest in the property mortgaged while in a charge no interest is created in the property charged do as to reduce the full ownership to limited ownership

(2) In a charge there is jus ad rem i.e. creation of right of payment out of specified property. Charge is therefore, creation of something more than a personal obligation but not a right in rem. In mortgage there is a right in rem.

(3) Charge may be created either by act of parties or, by operation of law. Mortgage is created only by act of parties.

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(4) Charge cannot be enforced against a bona fide transferee for value without notice of the charge. Mortgage can be enforced against any transferee with or without notice of the charge.

(5) Except a charge created by operation of law, the charges created by act of parties must be effected through a registered document. Except mortgage by deposit of title-deeds, a mortgage must be completed by registered deed or delivery of possession as prescribed by Section 59 of this Act.

Kinds of Charges.-Charges are of two kinds: (i) Charges created by act of parties and, (ii) Charges arising by operation of law.

(i) Charges created by act of parties.-A charge is created by act of parties when it takes place between two living persons. A charge by act of parties is constituted by an agreement between two or more persons. Under such agreement some immovable property is specified as security for repayment of a certain sum of money, without transfer of any interest of that property. No particular mode of creating a charge has been provided in this Act. Therefore, the general rule as laid down in Section 9 may apply under which a charge may also be created orally. But where the agreement creating charge is in writing, it must be registered if the charge is valued Rs. 100 or upwards.

It is not necessary to use any particular words for creating a charge. It is sufficient that the document shows an intention to make the property as security for payment of the money mentioned therein. But, the document must create the charge immediately on its execution without operating as a charge at some future date. Charge must not be created on a future contingency.

(ii) Charge arising by operation of law.-Where a charge is created without reference to any agreement or stipulation between the parties, the charge is said to be created by law. Charge by operation of law results due to some legal obligation. In other words, such charges arise under some provision of law irrespective of any agreement between the parties. For example, charge is created by operation of law under Section 55(4) (b) of this Act in the case of unpaid vendor. Similarly, such charge is created in favour of a mortgagee on surplus sale proceeds of revenue sale under Section 73 of this Act. Charge created by a decree based upon an award made on agreement out of Court or otherwise is also charge created by operation of law. A charge created by operation of law need not be registered.

Illustrations

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(i) A inherits certain properties from his maternal grandmother. He executes an instrument in which he agreed to pay a certain sum of money every year to his sister B out of the rents and profits of the inherited property. Charge by act of parties is created in favour of B.

(2) A who is co-sharer, pays the entire arrears of rent as required under some provision of law (e.g. Madras Estates Land Act). A has a charge by operation of law, on the other co-sharer's portion of property.

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