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## Chapter 16

### Transfer of Property Act, 1882



#### Introduction

Today, you're a real estate attorney! Sunny Leone and her three sisters are selling their family home. It's been in their family for almost a century and changed hands within their family many times. They've hired you to help them because this will be the first time it will be owned by someone outside of the Leone family, and there's a lot involved to make sure this conveyance, or property transfer, goes smoothly.

The sale of real estate is one form of **voluntary property transfer**, or property conveyance. Property is also voluntarily transferred when it's gifted or left through a will. Voluntary transactions may seem straightforward, since they're transactions that are purposeful and intended by both parties. But, the act of transferring real property can sometimes be complicated.

This is because there are several different legal steps that must be achieved before a property is considered to be properly, and therefore legally, transferred. As the attorney, this will be your job. You will determine which steps the family must take, and then help the family take those steps in order to secure a legal transfer of the property. You'll oversee the signing, sealing and delivery of this entire legal process for Sunny and her sisters. Let's take a look at the process.

The law relating to transfer of property is governed by the Transfer of Property Act, 1882. Before this Act came into force there was practically no law as to real property in India. Barring few points which were covered by certain Regulations and Acts, the Courts in India in the absence of any statutory provisions, applied rules of English law as the rule of justice, equity and good conscience.

The Act was enacted with the object to amend the law relating to the transfer of property by act of parties. The Act excludes from its purview the transfers by operation of law, i.e. by sale in execution, forfeiture, insolvency or intestate succession. The scope of the Act is limited, as it is confined to transfers inter vivos and excludes testamentary succession, i.e. transfers by will.

### Definition

#### 1. Instrument

"Instrument" means a non-testamentary instrument.

#### 2. Attachment to earth

- Attach to the earth means:

(a) Rooted in the earth (Example: trees and shrubs)

(b) Imbedded in the earth (Example: walls or buildings)

(c) Attached in such a way which gives permanent beneficial enjoyment.

#### 3. Absolute Interest

- It means ownership which consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property.
- Example –  
If A is the owner of a land, he has an absolute interest in the land. If A sells his land to B, then B becomes the owner and he acquires an absolute interest in the land he has purchased from A. Likewise if A makes a gift of his property to B, there again B gets an absolute interest in the property which is gifted to him. These are instances where persons may have an absolute interest.

#### 4. Reversion

- The residue of an original interest which is left after the grantor has granted the lessee a small estate.
- Example  
If a property has been given on lease for 5 years, after the period of 5 years, the property which reverts back to him is called the reversion or revisionary interest.

#### 5. Remainder



- When the owner of the property grants limited interest in favor of other person (1<sup>st</sup> mentioned person) and gives remaining to other (2<sup>nd</sup> person) it is called remainder.

#### 6. Attested

- Attested in relation to an instrument, means attested by two or more witnesses each of whom has:
  1. Seen the executants sign or affix his mark to the instruments
  2. Seen some other person sign the instrument in the presence of and by the direction of executants
  3. Received from executants a person acknowledge of his signature or of the signature of such other person
  4. Signed the instrument in the presence of the executants
- It is not necessary that all the witnesses should be present at the same time. Also no particular form of attestation is necessary.

### Vested and Contingent Interest

#### Vested Interest - Section 19

- The word vested can be used in two references:
  1. Vested in possession
  2. Vested in Interest
- Vested in possession means the right to present possession of property.
- Vested in interest means present right to future possession of property.
- Vested interest means interest created in favor of person which is not subject to happening of an event or if subject to the happening of an event then such event is bound to happen.
- Example - A property is given to A for life with a remainder to B, A's right is vested in possession; B's right is vested in interest.
- Vested Interest is transferable and heritable.
- If transferee dies before taking possession of property then such property passes to his legal heir.

#### Contingent Interest - Section 21

- Contingent Interest means an interest created in favor of some person which takes effect on happening of certain pre-condition.
- Example - A transfer's property to B until B marries and after marriage of B to C.C has contingent interest in the property.
- Contingent interest is not heritable but is transferable.

Vested Interest	Contingent Interest
It does not depend on the fulfillment of any condition.	It depends upon the fulfillment of condition.

It present immediate rights but its enjoyment may be postponed to future date.	Right of enjoyment accrues on happening of an event which is uncertain.
A vested interest cannot be defeated by the death of the transferee before he obtains possession.	A contingent interest may fail in case of the death of transferee before the fulfillment of condition.
It is transferable and heritable.	It is not transferable when the transferee of contingent interest dies before obtaining possession, the interest fails and does not pass to the heir.

## Movable and immovable Property

### Movable Property

- The Transfer of Property Act, 1882 does not define movable property. It is defined with the help of other statutes.
- As per General Clauses Act, 1897 movable property means “property of every description except immovable property”.
- The Registration Act defines "moveable property" to include property of every description excluding immovable property but including standing timber, growing crops and grass.
- Examples -
  1. Machine fixed on land temporary.
  2. Government Promissory note
  3. Intellectual Property Right
  4. Standing timber and trees
  5. Right to recover maintenance allowance.
  6. Royalty
  7. Right to worship
  8. Copyright
  9. A decree for sale on a mortgage deed.
  10. Standing timber, growing crops and grass

### Immovable Property

- The term “immovable property” is also not defined under the Act. However a negative reference is given in the Act which says that immovable property does not include standing timber, growing crop and grass.
- According to General Clauses Act, 1897 -  
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.

- The Indian Registration Act expressly includes under to immovable property the benefit to arise out of land, hereditary allowance, right of way, light, ferries and fisheries.
- **Examples -**
  1. Chattel embedded to earth
  2. Easement
  3. Right to ferry
  4. Right to way
  5. Right to enjoyment of property under lease
  6. A right to fishery
  7. A right to collect rent of immovable property
  8. Interest in mortgage
  9. Hereditary offices
  10. Right to collect lac from trees
  11. Reversion in property leased.
  12. A factory

<b>Movable Property</b>	<b>Immovable Property</b>
The movable property can be easily transported from one place to another.	The immovable property cannot be easily transported from one place to another.
Example - Books , Timber , Vehicles etc.	<b>Example</b> - House ,land, tree attached to the ground
Mango tree if cut and sold for timber purpose are deemed as movable property.	Mango tree if sold for nourishment of fruits, they are deemed as immovable property.
It is optional to register movable property under the Indian Registration Act, 1908.	Whenever there is a transfer of any immovable property, it must be compulsorily registered under the Indian Registration Act, 1908.
Mere delivery with intention to transfer the movable property completes the transfer.	Mere delivery is not sufficient for a valid transfer,

## Transfer of Property

### Meaning of Transfer of Property - Section 5

- "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.
- "Living person" includes a company or association or body of individuals whether incorporated or not.

### Essential elements of valid transfer

- It is necessary to fulfill the following conditions to make a valid transfer of an immovable property :
  1. Property must be transferable.
  2. Transferor and transferee must be competent.
  3. Consideration and object of transfer must be lawful.
  4. Transfer must take place as per method prescribed under the Act.

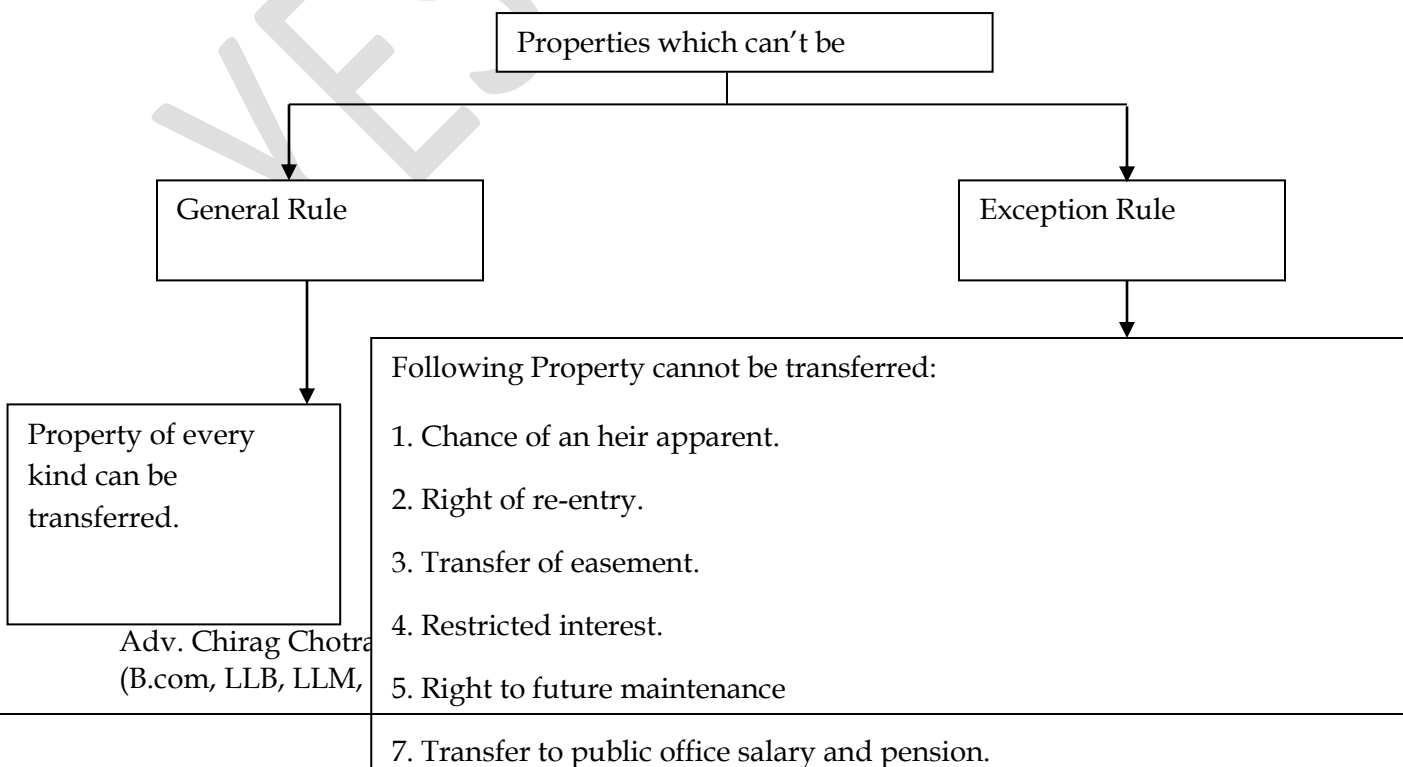
### Who can transfer the property?

- Every person who is competent to contract and entitled to transferable property, or authorized to dispose of property is competent to transfer such property.
- Hence, every person competent to contract and having ownership can transfer property.
- According to Indian Contract Act, a person is competent to contract when he is a major and of sound mind and is not disqualified from contracting by any law to which he is subject.

### Properties which can be transferred

Every kind of property can be transferred. But this section has a few exceptions. They are -

1. Chance of an heir apparent.
2. Right of re-entry.
3. Transfer of easement.
4. Restricted interest.
5. Right to future maintenance.
6. Right to sue.
7. Transfer to public office salary and pension.





### 1. Chance of an heir apparent

- This is also known as spes successionis.
- Heir apparent means the bare chance of person to get property on death of relative.
- This bare chance cannot be transferred.
- Example –
  - 1) Suppose A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has only a hope expectancy that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

### 2. Right of re-entry

- The right which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may re-enter is called the right of re-entry.
- Right of re-entry is a personal benefit which can't be transferred.
- Example
- A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person. Thus, right of re-entry being a right for the personal benefit of any party cannot exist for the benefit of a person who has no personal interest in the land.

### 3. Transfer of easement

- An easement is a right enjoyed by the owner or the occupier of land over the land of another for beneficial enjoyment of his land and such as right of way, right of light, right of support etc.
- Easement requires the existence of a dominant heritage and servient heritage.

### 4. Restricted interest or personal interest

- There are certain rights which are reserved for certain person. These are known as restricted interest.
- Restricted interest cannot be transferred to another person.
- 'Religious office' are also included in the restricted interest
- Example  
The right of the priest to worship and right to receive offerings made at temple.

### 5. Right to future Maintenance

- Right to future maintenance is personal benefit to whom it is granted.
- Right to future maintenance cannot be transferred.
- However arrears of future maintenance can be transferred.

- Example  
The right of Hindu widow to maintenance is a personal right which cannot be transferred.

#### 6. Right to sue

- A mere right to sue cannot be transferred.
- The right refers to a right to damages arising both out of contracts as well as torts.
- **Example**  
A commits assault on B. B can file a suit to obtain damages but he cannot assign the right to C and allow him to obtain damages.

#### 7. Transfer of public officer

- It is against public policy to transfer public offices, salary and pension.
- Pension and salary are given on personal basis it can't be transferred.

#### Formalities of transfer

- Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration.
- In case of immovable property of value of more than 100, then it can be transferred only by registered instrument.
- There are 3 formalities that are required to complete a transfer and they are :
  1. Attestation
  2. Registration
  3. Notice

#### Restraint on transfer of property

##### 1. Restrain on alienation

- If any property is transferred subject to a condition or limitation which absolutely restricts the transferee from parting with or disposing of his interest in the property such as condition or limitation and not the transfer itself is void. (The transfer takes effect and is valid, and the condition not to alienate the property is void.)
- Restraint on alienation of property may be either absolute or partial.
- Absolute restraint is void but transfer is valid, while partial restraint as regard to time place or person is valid.
- Example on absolute restraint:  
If A transfers property to B and his heirs with a condition that if property is alienated it should revert back to A. Such condition is void.
- Example on partial restraint:  
A transfers property to B with condition that he should not alienate it in favor of D who is a trade competitor. It contains partial restraint and hence is valid.
- Exceptions to rule of restraint on alienation:

1. In the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest.
2. In case of a married woman, a condition that she shall not have power during her marriage to transfer the property is valid.

## 2. Restrain on enjoyment

- When property is transferred absolutely, transferee has the right to enjoy property as he likes it.
- When transferor place restriction on the enjoyment of property which is transferred, such condition shall be void.
- Example -
  1. A has properties X and Y. He sells property Y to B and puts a condition that B should not construct on property Y more than one storey so that A's property X which he retains should have good light and free air.
  2. A sold his house to B with condition that he can reside in this house, his family members cannot. This condition is invalid.

## 3. Condition as to insolvency

- If person transfer property to another person with condition that property will be revert to transferor if transferee becomes insolvent then such condition shall be invalid.
- If lessor reserve right to get back property on declaration of lessee as insolvent, it is a valid condition.

## 4. Illegal or impractical condition

- Interest created in the property under transfer, which depend on a condition the performance of which is either illegal or impractical under law or harmful to the person or property of another, is invalid.

## Transfer for benefit of unborn child- Section 13

- Property can be transferred to living person as on date of transfer.
- It means property cannot be transferred to unborn person.
- However property can be transferred to unborn person through medium of trust.

## Provisions

- Property can be transferred to unborn person if following conditions are satisfied :
  1. Transfer cannot be made directly to unborn person.
  2. Interest of the unborn person must be preceded by a prior interest.
  3. When the prior interest comes to an end, the unborn person must be in existence and he must have the interest at the latest, when he attains majority.

#### 4. The unborn person must be exclusive owner of whole of property.

#### Example

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

#### Rule against perpetuity

- Perpetuity means continuing forever.
- According to this rule, property can be transferred to person for his one lifetime existing at date of transfer and to the minority of some person who shall be in existence at the expiration of that period, and to whom, the interest created is to belong if he attains the age of majority.
- Elements of rule against perpetuity :
  1. Property can be transferred to different living persons for their successive lives before property is transferred to unborn person.
  2. Transfer must be absolute.
- Example

A transfers a piece of land to his friend B for life, and afterwards to his friend C for life, then to his friend D for life, and then to the son that may be born to B, for his son's life, then the son that may be born to C for his life, and then ultimately to the son that may be born to D forever.
- In case of such disposition of the land, B cannot alienate the property, because he has only a life interest therein. For the same reason neither C nor D, nor the sons of B and C can alienate the property. When the property finally vested in D's son, only he will be entitled to alienate the property.
- This would certainly be a restraint on free alienation of the piece of land for a considerable long period. This section lays down that one can tie up property and stop its free alienation only for one generation, because all friends of A, now living must die within the same time.
- Exceptions:
  1. When land is purchased or held by corporation.
  2. When property is transferred by way of gift for benefit of public.
  3. Personal agreement
  4. Agreement for perpetual lease.

#### Conditional Transfer



- When transfer of property is subject to fulfillment of condition by the transferee the transfer is known as conditional transfer.
- The condition can be either precedent or subsequent.

### 1. Condition precedent

- Where the terms of a transfer of property impose a condition which must be fulfilled before a person can take an interest in the property, that condition is called condition precedent.
- Transferee's interest in property is only contingent until the condition is fulfilled.
- Example -  
A transfers 5000 to B on condition that he shall marry with the consent of C, D and E. But E dies and B marries with the consent of C and D. B is deemed to have fulfilled the condition. This is called a condition precedent.
- A condition precedent shall be allowed if :
  1. The condition imposed must not be impossible to fulfill.
  2. It is not forbidden by law.
  3. It should not be of such nature that if permitted, it would defeat provision of law.
  4. It should not be fraudulent.
  5. Condition should not be immoral or opposed to public policy.

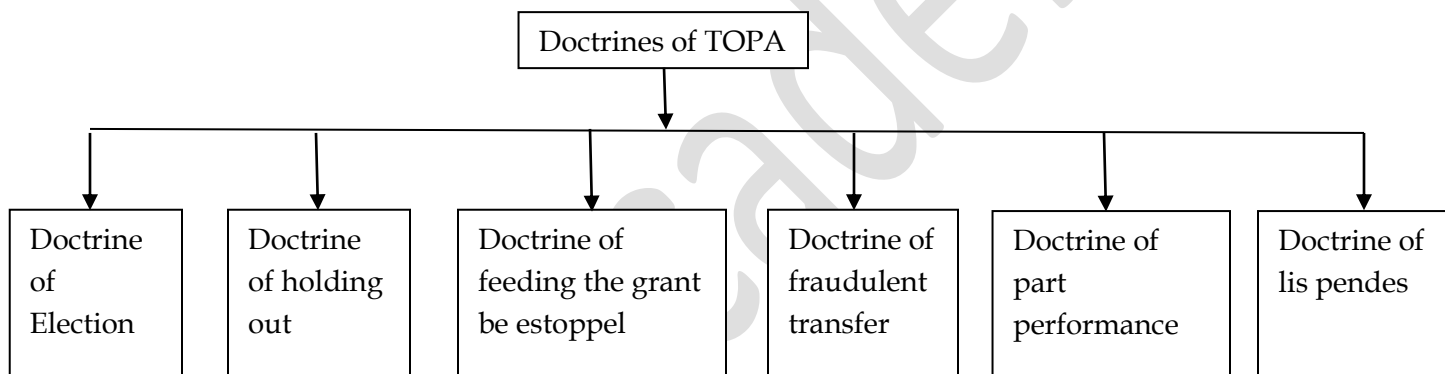
### 2. Condition subsequent

- When property is immediately vested but can be destroyed or divested because of non-fulfillment of condition it is called as subsequent condition.
- Example  
A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

Condition Precedent	Condition Subsequent
A condition precedent should happen before the estate commence.	A condition subsequent is one by the happening of which an existing estate will be defeated.
The condition comes before the interest.	The interest is created before the condition.
Vesting on interest is postponed till the condition is performed.	Vesting is immediately completed and not postponed.
Once the interest is vested it can never be divested on the ground on non-	Though the interest is vested it is liable to be divested on the ground of non-

fulfillment of the condition.	fulfillment
Acquisition of an estate is affected by the condition precedent.	Retention of estate is affected in the condition subsequent.
In case of condition precedent, the transfer is void if the condition is : 1. Impossible of performance 2. Immoral and 3. Opposed to public policy.	In case of condition subsequent, the transfer is valid if the condition is : 1. Impossible of performance 2. Immoral and 3. Opposed to public policy.
The condition precedent must be valid in the eyes of law.	The condition's invalidity will be ignored.
The condition precedent may be subsequently complied with. The doctrine of Cy-press applies.	The condition subsequent must be strictly complied with. The doctrine of cy-press does not apply.

### Doctrines of Transfer or Property



#### 1. Doctrine of Election - Section 35

- This doctrine is based on the principle of equity.
- The principle of doctrine of election was explained in the leading case **Cooper vs Cooper**.
- Election here basically means "choice"
- The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument. In other words a person can't accept part of agreement which is beneficial and reject other part which is burdensome to him. He can either accept or reject the agreement.
- Person taking the benefit of instrument must also bear the burden.
- Example -
  1. A transfer to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his

paddy field on the condition that you give your house to C. Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election.

- Conditions necessary for the application of this doctrine :
  1. The transferor must not be the owner of the property he transfers.
  2. The transferor must transfer the property of other person to third person.
  3. The transferor at the same time must grant some property of his own to the owner of the property through the same instrument. If the transferor makes a gift of property by one deed and by another asks the donee to part with his own property then there is no question of election.
  4. The two transfer i.e transfer of property of owner to transferee and transferee's property to third person must be in the same transaction. Doctrine of election won't arise if there are two separate transactions.
  5. Election may be express or implied by conduct.
  6. The doctrine of election is applicable if the benefit is given directly. A person taking no benefit directly under a transaction but deriving a benefit under it indirectly need not elect.

## 2. Doctrine of holding out- Section 41

- This doctrine is also known as transfer by ostensible owner.
- Where owner of property permits (expressly or impliedly) another person who is not owner of property to hold himself as the owner of the property and third party to deal in good faith with person so permitted such third party acquire good title as against true owner.
- Ostensible owner is not the real owner but one who can represent himself as the real owner to the third parties for such dealings. Ostensible ownership means apparent ownership which is derived from conduct or words. Therefore, in this doctrine a transfer can be made by a person even if he is not a real owner.
- This doctrine is an exception to the rule that a person cannot confer a better title than what he has
- Conditions to be fulfilled for application of this doctrine:
  1. Transferor is the ostensible owner.
  2. He is ostensible owner by way of express or implied consent of true owner of property.
  3. Transfer is for condition.
  4. The transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer
- Example -
  1. A made a gift of property to B but continued in possession of the gifted property. He purported to exercise a power of revocation and then transferred the property to the

- defendant. The gift, however, was not revocable as it was an unconditional gift. B seeks to recover possession from the defendant. The defendant invoked protection under Section 41. In the given example, the donor is not an “ostensible owner” holding the property with the consent of the real owner. The defendant cannot, therefore, invoke the protection of Section 41.
2. The manager of a joint Hindu family consisting of some minor members alienated the ancestral house to P without any necessity and the alienee transferred it to the defendants. The minors challenged the alienation. The defendants sought protection under Section 41. Here Section 41 has no application for “P was not the ostensible owner of the ancestral family house with the consent, express or, implied, of the persons interested in the said ancestral house in as much as the plaintiff, who had an interest in the said house, did not and could not by reason of the disability of infancy give their consent”.

### 3. Doctrine of feeding the grant by estoppel-Section 43

- Where, a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
- In other words, where person who purports to grant interest in property, which he did not at the time possession but subsequently acquires, benefit of subsequent acquisition goes automatically to earlier grantee. It is known as feeds estoppel.
- Example -  
A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition, but on Bs dying, A as heir obtains Z. C, not having rescinded the contract of sale may require A to deliver Z to him.
- Conditions to be fulfilled to apply this doctrine:
  1. There was fraudulent or erroneous presentation of ownership of transferor.
  2. The transferee must have acted on the fraudulent or erroneous representation of the transferor.
  3. The transferor should not have transferable title on the property transferred.
  4. The transfer should be for consideration.
  5. The transferor must subsequently acquire title upon property transferred on the basis of fraudulent or erroneous representation of ownership.
  6. The transferee has not cancelled contract.
  7. The transferee acted in good faith for consideration and without notice of the rights under the prior transfer.



- In the following cases the doctrine is not applicable:
  1. If the transfer is not for consideration.
  2. If the transfer is invalid for being forbidden by law or contrary to public policy.
  3. If the contract comes to an end before acquisition of property by the transferor.
  4. This section is not applicable to court sales.
  5. This right is not available against bona-fide purchasers for value without notice.

#### 4. Doctrine of lis pendens-Section 52

- Lis means dispute, Lis pendens means a pending suit, action, petition before the court.
- During the pendency of suit or petition before any court, property which is subject matter of litigation can't be transferred by any person, except with consent of court.
- If any party has transferred property under litigation in suit, transferee is bound by judgment of court.
- Conditions to be fulfilled:
  1. There must be a suit or proceeding in a court of competent jurisdiction.
  2. The suit or proceeding should not be collusive.
  3. The litigation must be one in which immovable property is directly and specifically in question.
  4. There must be transfer of or otherwise dealing with the property in dispute by any party to litigation.
  5. Such transfer must affect the rights of the other party that may ultimately accrue under order or decree.
- Example:

A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favor. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.
- Doctrine of lis pendens is not applicable when the property has been transferred by stranger (i.e. a person who is not party to litigation)

#### 5. Doctrine of fraudulent transfer - Section 53

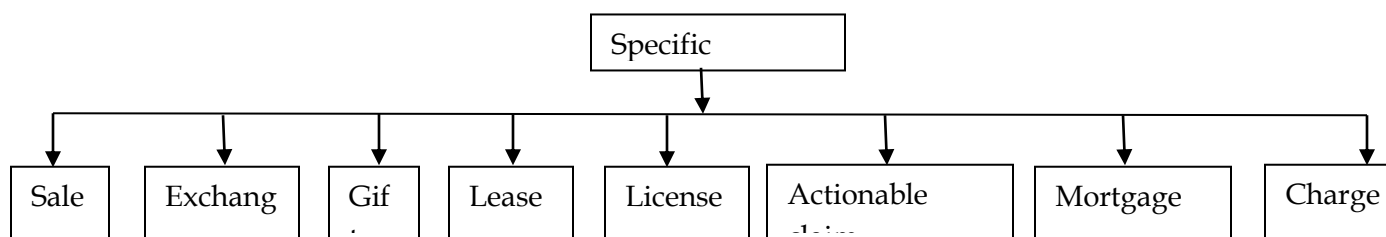
- Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor in order to defeat or delay the rights of a creditor may transfer his property to some person, who may be his relative or a friend.
- When debtor transfers immovable property with intent to defeat or delay his creditors, transfer of property shall be voidable at option of any creditor so defeated or delayed.
- This doctrine is basically made to discourage fraudulent transfer of property.

- This doctrine gives right to defraud creditor to challenge transfer of property in court and get order from court that transfer is invalid.
- Conditions essential for this doctrine:
  1. Creditor needs to prove fraudulent intention on part of debtor. If he can't prove fraudulent intention, transfer of property will be valid.
  2. Transfer of property is valid if it is not challenged by defeated creditor before court.
  3. Preference of one creditor over another is not fraudulent as per provision of any act.
- Example -  
Chirag takes loan from Vikas and fail to pay the loan. Vikas sues him court to get back his debt. Aman knows that his property will be applied by court for repayment of his loan. Meantime he transfers his property to his friend Harish who simply holds the property on behalf of the transferor. Here the property is transferred with a fraudulent intention.

#### 6. Doctrine of Part performance - Section 53A

- Transferor cannot take back the property only on the ground of non-registration of documents, if the transferee has performed his part of the contract and has also take possession of the property or part of it.
- Doctrine basically prohibits transferor from taking back property.
- Conditions necessary to apply the doctrine:
  1. There must be a contract to transfer immovable property.
  2. It must be for consideration.
  3. The contract should be in writing and signed by the transferor himself or on his behalf.
  4. The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
  5. The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
  6. The transferee must have fulfilled or be ready to fulfill his part of the obligation under the contract.

#### Provisions relating to specific transfer



**Sale -Section 54**

- Sale means the transfer of ownership in consideration of price. Price is paid or promised to be paid.
- **Essentials**
  1. The subject matter is transferable property.
  2. There must be two parties (i.e. seller and buyer)
  3. The seller and the buyer must have capacity to enter into a contract.
  4. There must be monetary consideration.
  5. The property must be transferred absolutely.
  6. Stamp duty and other compliances should be done.
- **Mode of transfer of sale**

Sale of an immovable property can be affected,

  - (a) Where such property is tangible
    - (i) By a registered instrument if it is of the value of Rs. 100 and upwards, and
    - (ii) By a registered instrument or by delivery of property when it is less than Rs. 100 in value, and
  - (b) Where the property is intangible or a reversion, only by a registered instrument.

**Exchange - Section 118 - 121**

- 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".
- **Essentials:**
  1. The person making the exchange must be competent to contract.
  2. There must be mutual consent.
  3. There is a mutual transfer of ownership though things and interests may not be identical.
  4. Neither party must have paid money only.
- **Mode of exchange**
  1. An exchange can be possible for movable as well as immovable property.
  2. An exchange is governed by provision of Transfer of Property Act.
  3. An exchange of movable property is called barter and it is governed by the provision of Indian Contract Act.

**Gift - Section 122 - 128**

- According to Section 122,

“Gift” is the transfer of certain existing moveable 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 must 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.

In simple words,

- Gift means the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person to another.
- Person who transfers is known as donor.
- Person in whose favor property is transferred is known as donee.

### Essentials

- There must be a transfer of ownership from donor to donee.
- The subject matter of gift must be a certain existing moveable or immovable property.
- The transfer must be made voluntarily and without consideration.
- There must be acceptance by or on behalf of the donee, and such acceptance must be made during the lifetime of the donor and while he is capable of giving.

### Method

A gift of immovable property must effect by:

- A registered instrument signed by or on behalf of the donor.
- And attested by at least two witnesses.

In the event of gift of movable property it may be effected by:

- Either by a registered instrument signed and attested as above or
- By delivery of the property, such delivery may be made in the same way as goods sold may be delivered.

### Lease-Section 105

According to Section 105

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined – The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

In simple words,

- Transfer of a right to enjoy an immovable property.
- It is for a specified time or for perpetuity.
- It is made for consideration which is either premium or rent or both.
- Transfer must be accepted by transferee.
- The person who transfers right in property is known as lessor.
- The person in whose favor right in property is transferred is known as lessee.

- **Duties of the lessor**

Following are some of the duties of the lessor: -

1. The lessor is bound to disclose to the lessee any material physical defect in the property.
2. The lessor is to put the lessee in possession of the property.
3. It is the duty of the lessor to let the lessee enjoy the property continuously till he pays the rent.

- **Duties of the lessee:**

The lessee has the following duties: -

1. The lessee is bound to disclose to the lessor nature or extent of the interest that lessee will take.
2. The lessee is bound to pay the premium or rent to the lessor timely.
3. He should use the property as a person of ordinary prudence would make use of. But he shall not permit another person to use the property for purposes other than that for which it was leased.
4. He should not do any act which is destructive of or permanently injurious to the property.
5. The lessee must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purpose.
6. Before the termination of the lease, he can remove all the things attached to the earth.
7. If permanent fixtures are to be made, the lessee must obtain the consent of the landlord.
8. The lessee should hand over the property at the end of the lease.

- **Rights of the lessee:**

The lessee enjoys the following rights: -

1. The lessee has a right to enjoy the accretions of the leased property.
2. The lessee has right to deduct the expenses of repairs incurred by him on behalf of landlord from the rent if the contract permits so.
3. The lessee has right to deduct municipal expenses and interest incurred by him on behalf of

landlord from the rent.

4. The lessee has a right to remove the fixtures he has erected during the term of the lease.
5. The lessee may avoid the lease, if property is wholly or partly destroyed by tempest, flood, or fire.
6. The lessee has right to transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property.

### License

License means right granted in respect of immovable property to do or to enter on land and use it in some way or other while it remains in the possession and control of owner.

Subject Matter	Lease	License
<b>Transfer</b>	Lease involves transfer of interest.	License does not transfer any interest in property.
<b>Possession</b>	Lessee gets the exclusive possession of the property for specified period.	License gets the right to use the property for specified period.
<b>Assignment</b>	Lease can be assigned or transferred.	License can't be assigned or transferred being personal right.

### Actionable Claims - Section 130-137

- "Actionable claim" is defined in Section 3 of the Transfer of Property Act as follows:  
A claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.
- In simple words,  
Actionable claim means a claim to unsecured debt. Here debt not secured by mortgage of immovable property or by pledge of immovable property.
- **Examples of actionable claim**
  1. Arrears of rent
  2. Provident fund amount standing to credit of member's provident fund account
  3. Money due from insurance policy
  4. Claim for rent to fall due in future
- **Examples of non-actionable claim**



- 1 Secured debenture
- 2 A claim which is decreed.
- 3 Copy right though a beneficial interest in immovable property is not an actionable claim since the owner has actual or constructive possession of the same
- 4 "Right to sue" though it is a right but not an actionable claim.

### Mortgages- Section 58-104

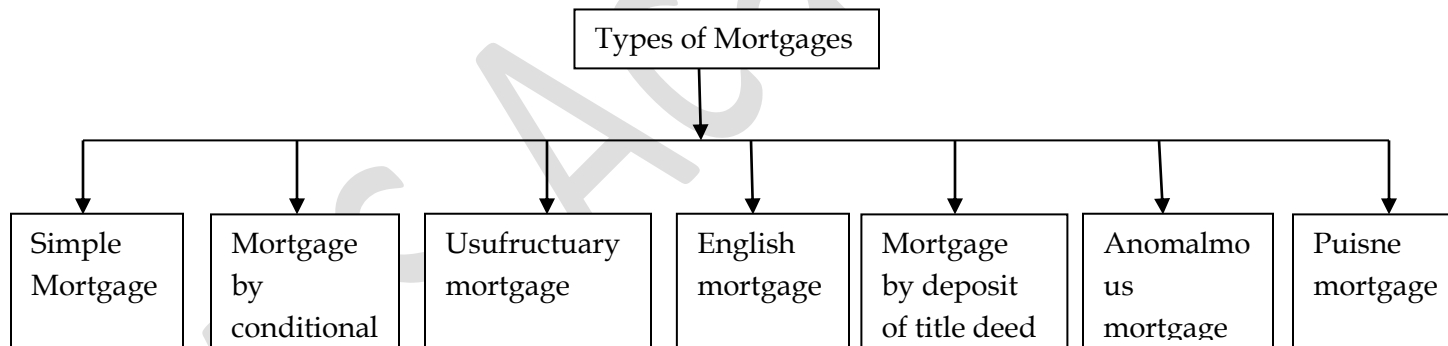
- **Meaning**

Mortgage is the transfer of an interest in a specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan or performance of an engagement which may give rise to pecuniary liability.

- **Essentials of Mortgage**

1. There must be transfer of interest in immovable property.
2. Property must be specified.
3. Transfer is for purpose of securing payment of loan or debt.

### Types of Mortgage



#### 1. Simple Mortgage

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

In simple words,

- The mortgagor takes personal liability for repayment.
- The mortgaged property is not required to be delivered to the mortgagee.
- On mortgagor's default in making payment mortgagee is entitled to cause mortgaged property to be sold after obtaining decree from the court.
- There is no foreclosure (the action of taking possession of a mortgaged property when the mortgagor fails to keep up their mortgage payments.) of the property.
- There is no transfer of ownership.

## 2. Mortgage by conditional sale – Section 58 (c)

Where, the mortgagor ostensibly sells the mortgaged property – on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale]

In simple words,

- The mortgagor ostensibly (apparently) sells the mortgaged property to the mortgagee.
- The sale becomes void if the loan is repaid.
- The sale becomes absolute and binding if the loan is not repaid at a specific time.
- The mortgaged property is re-transferred to the mortgagor if the loan or debt is paid within the specified time.
- The possession of the property is transferred here.
- The remedy to the mortgagee here is by foreclosure and not by way of sale.

## 3. Usufructuary mortgage – Section 58 (d)

Where the mortgagor delivers possession 1[or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property 2[or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest 3[or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

In simple words,

- Possession of property must be delivered to the mortgagee.

- There is no personal liability on the part of the mortgagor to pay.
- The mortgagee is entitled to rents and profits in lieu of interest or principal or both. (The profit of the property is appropriated by the mortgagee towards discharge of principal or interest.)
- The mortgagee however is not entitled to foreclose the mortgagor or to sue for sale.
- It is also called mortgage with possession.

#### 4. English Mortgage - Section 58(e)

Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

In simple words,

- The mortgaged property is transferred absolutely by the mortgagor to the mortgagee.
- There is a personal undertaking to pay the amount.
- There is an absolute transfer of property with a provision of retransfer of property in case of amount due.
- The remedy to the mortgagee is by way of sale and not by way of foreclosure.

#### 5. Mortgage by deposit of title deed - Section 58 (f)

Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

In simple words,

- It is also called equitable mortgage.
- It is created in specific towns by deposit of title deeds even though the property is situated outside those towns.
- It is affected by material title deeds.
- Delivery of possession of property does not take place.
- This mortgage is made to secure a debt or advances or to cover future advances.
- Registration is not necessary even if there is a writing recording deposit under Section 59.

- This mortgage prevails against a subsequent transferee who takes under a registered instrument.
- This mortgage prevails against all who are not bona fide purchasers for value without notice.

#### 6. Anomalous Mortgage - Section 58(g)

A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage

In simple words,

- A mortgage which does not belong to any of above categories is known as anomalous mortgage.
- It is a combination of two or more mortgages.
- Possession may or may not be delivered.
- The remedy may be by foreclosure or by sale depending on the term of agreement.

#### 7. Puisne Mortgage

- Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a puisne mortgage.
- For example, where A mortgages his house worth `one lakh to B for `40,000 and mortgages the same house to C for a further sum of `30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of `40,000 plus interest

#### 8. Sub-Mortgage

- Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage.
- For example, where A mortgages his house to B for Rs. 10,000 and B mortgage his mortgagee right to C for Rs. 8,000. B creates a sub-mortgage.

### Rights related to mortgaged property

#### 1. Right of redemption

- Mortgagor has the right to redeem property provided as security.

- Redemption means to take back the mortgaged property by paying the mortgage money at any time after stipulated date for repayment.
- According to Section 60 of Transfer of Property Act, any time after the principle amount become due, the mortgagor has a right to redeem the property.
- Mortgagor can exercise this right:
  - (i) Before the right is extinguished by the Act of parties or by a decree of Court, or
  - (ii) Before it is barred by the Limitation Act
- According to Limitation Act, mortgagor can redeem the property within 60 years after the money has become due.
- This right to redeem the property even after the time of payment has elapsed is called the Right of Equity or Redemption. But the mortgagor is not entitled to redeem before the mortgage money becomes due on the date fixed for repayment of the loan. His right to redeem arises only when mortgage money becomes due and not before.
- Example -  
Chirag borrows money on a mortgage and agree to pay back after 10 years. Chirag has obtained gift of money from his relative at end of 5<sup>th</sup> year from date on which he borrowed money. Now, Chirag wants to pay the loan and redeem his property. He can't do so, because the right to redeem arises only when the money has become due at the end of 10 years.

## 2. Doctrine on clog of equity redemption

- Mortgagor has right to redemption by virtue of mortgage deed.
- This right is considered to be inalienable and cannot be taken away from a mortgagor by any means of any contract to its contrary.
- Redemption means the act of the vendor of property in buying it back again from the purchaser at the same or an enhanced price.
- According to Section 60 of Transfer of Property Act, 1882 mortgagor can get his property back from the mortgagee on the paying the amount borrowed from him.
- Clog on a right means the insertion of any clause or any provision under the mortgaged deed which would alienate mortgagor of his property under certain circumstances.
- Any such provision would not be able to alienate the mortgagor of his 'right to redemption' and such provision is void-ab-initio.
- Right to redemption shall remain effective unless the property is sold off under any statutory provision.
- Even if mortgagee has went to the court for the foreclosure of the property mortgaged, mortgagor can redeem his property by paying off the full amount in the court.

## 3. Doctrine of marshalling

- If the owner of two or more properties mortgaged them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee in

absence of contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the right of the prior mortgage. This is doctrine of marshalling.

### **Implied contract by mortgagor:**

- The parties are free to enter into any terms they like. Where, however, the contract does not contain all the terms, Section 65 provides for implied terms as follows: In the absence of a contract to the contrary, the mortgagor shall be deemed to have contracted with the mortgagee that the:
  - (a) Mortgagor is entitled to transfer the interest (covenant for title);
  - (b) Mortgagor will assist the mortgagee to enjoy quiet possession;
  - (c) Mortgagor will pay public charges in respect of the mortgaged property;
  - (d) Mortgagor covenants as to payment of the rent due on lease where, the mortgaged property is leased;
  - (e) Mortgagor covenants as to payment of interest and principal on prior encumbrances, where the mortgage is a second or subsequent encumbrance on the property.

### **Rights of mortgagee and his remedies:**

- If the mortgagor does not pay the mortgage money, the mortgagee may proceed to recover
  - (i) From the mortgaged property, or
  - (ii) Sue for recovery from the mortgagor personally.
- Thus the mortgagor has two remedies: one against the property and the other against the mortgagor personally.

### **Charge - Section 100**

#### **Meaning**

- Where immovable property of one person is by the act of parties or by operation of law made security for repayment of money of other and transaction is not mortgage it is called charge.
- All provisions that are applicable to simple mortgage shall be applicable to such charge.

#### **Creation of charge**



- **Charge by act of parties:**

When in a transaction for value, both the parties (debtor and creditor) intend that the property existing or future shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge.

- **Charge by Operation of Law:**

Charges created by law are those which arise on account of some statutory provisions. They are not created by the voluntary action of parties but arise as a result of some legal obligation.

### Types of charge

(i) **Fixed charge**

- A fixed charge is a charge created on a specified property.
- Example - Charge created on office building situated in particular area.
- A fixed charge cannot be converted into floating charge.

(ii) **Floating charge**

- When charge not created on a specified property but a class of property it is known as floating charge.
- It is charge on class of assets both present and future. The assets of the company are constantly undergoing a change but the creditors will not normally interfere with the assets of the company unless there is breach of some condition.
- Example - Charge created on the plant and machinery of the factory.
- Floating charge can be converted into fixed charge.

### Crystallization of charge

- Conversion of floating charge into fixed charge is known as crystallization.
- Floating charge is converted into fixed charge in following situations:
  - 1) When person ceases to carry on business.
  - 2) When person or company is being wound up.
  - 3) When any event in charge deed or agreement creating charge has taken place.
  - 4) When charge is created in favor of debenture holders and they take some steps to enforce their security.

Matter	Charge	Mortgage
Transfer	It is not transfer of any interest in any property.	It is transfer of interest in property.
Creation	Charge is created by act of parties or operation of law.	Mortgage is created by act of parties.
Registration	Charge created by operation of law	Mortgage deed is required to be

	is not required to be registered.	registered and attested by two witnesses.
Right of foreclosure	Charge holder can't foreclose.	Mortgagor can foreclose mortgaged property in certain types of mortgages.
Right in rem	In charge, no right of rem is created.	In mortgage, right in rem is created.
Effect on subsequent transfer	Charge is good only against subsequent transferee with notice	A mortgage is good against subsequent transferees and may be enforced against a bona fide purchaser for value with or without notice.
Liability	In a charge created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the charge-holder is against the property only.	In a mortgage, there can be security as well as personal liability. In fact, the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage.

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Address: Office 27, 1<sup>st</sup> Floor, Kumar Prestige Point,  
Behind BSNL Office, Bajirao Road, Shukrawar Peth,  
Pune - 411 002

Mob.: **8888 235 235, 8888 545 545**

Email: [yesacademypune@gmail.com](mailto:yesacademypune@gmail.com) | Website: [www.yesacademy.co.in](http://www.yesacademy.co.in)