

WHAT MAY BE TRANSFERRED? -UNDER THE TRANSFER OF PROPERTY ACT, 1882

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I. INTRODUCTION

“As soon as the land of any country has all become private property, the landlords, like all other men love to reap where they never sowed, and demand a rent even for its natural produce.”¹

Adam Smith, one of the classical economists rightly points out the rudimentary nature of property rights. Smith’s vision of property rights fits today’s idea of capitalism. It is where one tries to increase their ‘stock of capital’ keeping in mind the implications of the said stock. Mr. David E.R. Gay, in his article² address the three important questions pertaining property rights. The questions revolve around the aspects of: the identification of the existing structure of property rights, its social consequences, and the evolution of such rights.³ The Transfer of Property Act, 1882 has been designed to align the said social arrangements bestowed upon its subjects. This essay will deal with Smith’s theory of property rights and its drawbacks. It will analyze the Section 6 of the Transfer of Property Act, 1882 and comment on its implications. It will also explain the purpose of the said section with reference to different judicial pronouncements. It will thereby analyze the existing structure of the act with reference to Section 6.

Property rights, according to Smith, is closely related to the ‘theory of value’.⁴ When a person puts in a said amount of labor into a piece of land or an object, it becomes his property. The amount of labor is directly proportional to the value of the given property. This showcases the evolution of private property in today’s age. The transfer of such property, is based on the

¹ ADAM SMITH, AN INQUIRY IN THE NATURE AND CAUSE OF THE WEALTH OF NATIONS, 541-555.

² David E.R. Gay, Adam Smith and Property Rights Analysis, R.S.E, 177, 177-179 (1975).

³ Ibid.

⁴ David E.R. Gay, Adam Smith and Property Rights Analysis, R.S.E, 177, 177-179 (1975).

discretion of the owner. The owner of the property has necessarily invested his time and amount for the growth and protection of the property. Subsequently, with the given market conditions, the value of such property is defined. When it comes to the question of rights, Smith is very much clear: he who works for it, most definitely owns it. It is to be observed that with the evolution of mankind and the passage of time, laws have become adaptive in nature. It is highly imperative to outline the structure of property rights. It has been argued by economists such as Ronald Coase,⁵ that externalities and transaction costs that arises out of the formulation of a market, can be mitigated if there are well defined property rights. In the age of digitalization and technological progress, it becomes necessary to understand the intricacies of property rights. Especially, in the Indian context. The Indian legislation pertaining to property rights has been given under the Transfer of Property Act, 1882.

The Transfer of Property Act 1882 is a British made legislation. Before the Act came into picture, property disputes were dealt according to the concepts of justice, equity and good conscience.⁶ There was no specific rule or law that the courts could look up to. With the advent of the said Act, the institutionalization of property rights in India took place. This legislation deals with transfer between two parties and does not interfere with transfers conducted by the operation of law. The Indian Contract law is quite similar to the Transfer of Property Act, 1882. It deals with the *rights in personem*. However, the outlook towards the law of contract is different from that of property law. With given developments in the area of contracts, standardization of contracts has become absolutely necessary.⁷ This creates a whole another array of discussions and deliberations. Property law in the Indian context is far more technical in nature unlike the law of contracts. Thus, when it comes to highlighting the nature of property rights, a very dynamic approach is required. Laws governing India, especially the Transfer of Property Act, 1882 is said to be technical yet dynamic in nature. This can be inferred from the preliminary rule of interpretation of the said statute. It follows the *golden rule* of interpretation. Nonetheless, the construction of it should advance remedy and reduce mischief.⁸ The Act was created with the object of conducting *transfer inter vivos*.⁹ This indicates that the act does not

⁵ Ronald H. Coase, *The Problem of Social Cost: The Citations*, Chicago Unbound, 809-812 (1996).

⁶ H.R. KHANNA & P.M. BAKSHI, *MULLA ON TRANSFER OF PROPERTY ACT*, 62-76 (5th ed. 1985).

⁷ Srinidhi Muralidharan, *Standard form Contracts: A necessary Evil or an Exaggerated Medium*, J.L.S.R., 168, 167-179 (2018).

⁸ H.R. KHANNA & P.M. BAKSHI, *MULLA ON TRANSFER OF PROPERTY ACT*, 62-76 (5th ed. 1985).

⁹ D. AVTAR SINGH, *TEXTBOOK ON THE TRANSFER OF PROPERTY ACT*, 35-40 (4th ed. 2014).

cover transfers which occur by the operation of law. Section 6 of the given Act deals with what may or may not be transferred. It lays down clear exemptions and applications towards the transfer of any property. The nature and intent of this particular sections entails '*transfer of property*'. Therefore, it becomes highly pivotal to examine the same with reference to the existing judicial decisions.

II. WHAT MAY BE TRANSFERRED AND ITS IMPLICATIONS

'Alienatio rei prae fertur juri accrescendi'

This maxim describes the general principle of transfer of property. It translates to alienation of property being favored over the accumulation of it. The general notion of policy in this regard, must be the free circulation of property rather than agglomeration. Here one can observe Smith's theory of private property being visualized. Section 6 of the Transfer of Property Act, 1882 deals with the above given contention. The general rule of property is transferability. Non-transferability of any said property falls as an exception to the existing rule. Section 6 is structured according to the latter.¹⁰ On a general note valid transfer of property is has the following conditions: It should be transferable in nature, must have a lawful object with a competent transferee and transferor, the transfer is not opposed to the nature of interest, and is done in a prescribed manner or form.¹¹ Clauses (a) to (i) deal with the exceptions to the transferability of property. This ranges from the transfer Spec Successionis to the concept of Tenancy Rights. The given exceptions will be covered subsequently. It is necessary to note that the transfer of property can only be 'forbidden' by law. The judiciary has minimal or no role to play towards the prohibition of transfer of property. Section 6 in this regard lays down the prohibition to the transfer of property. Section 6(a) deals with the transfer of property when there is an expectation of a succession.¹² This essentially means that when a person is an owner of a property, he has the right to transfer the said property. However, if the property is non-existent and in the possession of aa person, it cannot be transferred. This, in turn deals with revisionary rights, obtaining legacy and any other possibility of a like nature. The concept of heir apparent refers to a person who is apparently an heir. He would become the heir if the

¹⁰ H.R. KHANNA & P.M. BAKSHI, MULLA ON TRANSFER OF PROPERTY ACT, 62-76 (5th ed. 1985).

¹¹ D. AVTAR SINGH, TEXTBOOK ON THE TRANSFER OF PROPERTY ACT, 35-40 (4th ed. 2014).

¹² Ibid.

propositus dies interstate, and if he survives the propositus.¹³ Revisionary rights under the Indian law also fall under this ambit. Under the Hindu law, it has been established that the revisioner has no right to the praesenti in the property which the female holds for her life.¹⁴ Under the Muhammadan law, the chances of a heir falls under the same ambit. Legacy and the relation as a result of it on the death of a kinsman is not transferable. Legacy lies towards expectancy. If a person is making more than one will, his last will is applicable. The person who is the legatee of the last will only attain the legacy. This lies on the chain of possibilities of the testator surviving, and the legatee actually attaining the aid property. Therefore, it is not transferable under the Act. The issue of “any other possibility of a Like nature” deals with the aspect of contingency. It referred to as the property of a future event, which is uncertain in nature. In the case *Sheshammal v Hasan Khani Rawther*¹⁵, it was held by the Supreme Court that the transfer of a future right to property is not acceptable and the heir apparent was estopped from doing so. In this regard, the right to receive future offerings is also considered to be a mere prospect and it cannot be transferred.¹⁶

Section 6(b) and 6(c) deals with the right to re-entre and easement. The right to re-enter is with reference to a lessee agreement. The right to re-enter is vests only with the lessor in case of breach of any subsequent conditions. This right cannot be transferred to another individual during the time of the lessee agreement. In the case of *Jenkins V Jones*¹⁷, it was given that such a right under the English law is known as the ‘bare possibility of the reverter’. It means that the owner of the estate can only transfer his right to re-enter upon the exhaustion of the existing contract, and upon subsequent breach of the given contract no such right can be transferred. Right to easement is known as the right of passage. It falls under Section 4 of the Easements Act., 1882.¹⁸ It exists for the beneficial enjoyment of land. The right to easement is attached with the property and it cannot exist independently. Section 6(d) and section 6(dd) deals with restricted interest and the right to future maintenance. Restricted interest is similar to easement

¹³ H.R. KHANNA & P.M. BAKSHI, MULLA ON TRANSFER OF PROPERTY ACT, 62-76 (5th ed. 1985).

¹⁴ *Amrit Narayan V Gaya Singh*, A.I.R. 1917 P.C. 95.

¹⁵ A.I.R. 2011 S.C. 3609.

¹⁶ H.R. KHANNA & P.M. BAKSHI, MULLA ON TRANSFER OF PROPERTY ACT, 62-76 (5th ed. 1985).

¹⁷ (1882) 9 Q.B.D 128 135

¹⁸ “Easement” defined. -An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. Dominant and servient heritages and owners. -The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.”

rights as it draws from the beneficial enjoyment of a person. In the case of *B. Rajegowda V. H.R. Shankere Gowda*¹⁹ it was held that the person's right vests solely for his enjoyment and any such right cannot be transferred. Even if there is a transfer by the means of a gift deed, a reservation could be made for the use of any such restricted interest. The right to future maintenance is also not transferable, the arrears on the other hand is transferable in nature.²⁰ Section 6(e) states that the right to sue is not transferable. The right to sue for an indefinite amount is not transferable. On the other hand, the right to sue for a definite amount becomes an actionable claim and is therefore transferable. This is different from the right to forbearance under the Indian Contract law. The right 'not to sue' is entitled to a person by the virtue of a contract. Nevertheless, the transfer of right to sue per se for an indefinite amount of money defeats the right to seek remedy and prevent mischief. In absence, would result in champerty and social policy violation. Section 6(f) and 6 (g) states that there cannot be a transfer of public office and stipends and pensions arising out of government offices. These sections although the same, deal with different facets of government officials. The first clause refers to the dignity and preservation of it²¹, and the latter refers to the outcome of such office.

Section 6(h) can be fragmented into three parts. The first one being the nature of interest. If the nature of the property itself is transferable, transferability of such property ceases to exist. If the property like air and water known as '*res communes*' is prevalent. No person can possess such property. No person can therefore, transfer such property.²² The second facet is the unlawful object or consideration that is attributed to it. This is derived from Section 23 of the Indian Contract Act of 1872.²³ To sum it up: it shouldn't be forbidden by law, defeat any provisions of the law, fraudulent, immoral or opposed to public policy. In the case of *Deivanayaga Padayachi v. Muttu Reddi*²⁴ immorality was considered as a ground for non-transferability of property. Section 6(i) deals with the concept of an untransferable interest. If

¹⁹ A.I.R. 2006 Kant 48.

²⁰ H.R. KHANNA & P.M. BAKSHI, MULLA ON TRANSFER OF PROPERTY ACT, 62-76 (5th ed. 1985).

²¹ *Liverpool V Wright*, 28 L.J. (Ch) 868.

²² D. AVTAR SINGH, TEXTBOOK ON THE TRANSFER OF PROPERTY ACT, 35-40 (4th ed. 2014).

²³ "The consideration or object of an agreement is lawful, unless –It is forbidden by law; or is of such nature that, if permitted it would defeat the provision of any law or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

²⁴ A.I.R. 1921 Mad 326 (2).

a tenant has an untransferable right to occupancy by the virtue of law or his position, such interest cannot be transferred. This ascertains the position of non-transferability of occupancy rights.²⁵

III. CONCLUSION

The Act has been designed in a way to mechanize and rationalize the transferability of property. The word rationalize indicates the technical nature of the Act. It clears gives out the do's and don'ts for the law to abide by. Under Section 6 of the act, the question of 'what may be transferred?' has been articulated in the sense of what could possibly not be transferred. Section 6 (a) and Sec 43 of the Act have often been read together, but however pose distinctive elements. The prior being subject to transfer, and the latter being subjected to fraudulency. In this regard, the Act address several questions that may be posed under the ambit of transfer *inter vivos*.

The question of beneficial interest has also been addressed. There is a certain demarcation towards the right of the person arising from the property and the mere right to property. This has been systematized and provided for under the Section 6 of the Act. Section 6 in its essence address Smith's area of thought. It provides for the alienation of private property rather than the accumulation of it. It engages towards the free flow of private property by establishing what could and what could not be transferred. It therefore brings in the concept of full-fledged property rights. It is necessary for an individual to breakdown this particular section to understand the implications of what may or may not be transferred. Thus, by the virtue of Section 6, the intricacies of property law can be understood in a rationalized manner.

²⁵ D. AVTAR SINGH, TEXTBOOK ON THE TRANSFER OF PROPERTY ACT, 35-40 (4th ed. 2014).