

ACTIONABLE CLAIMS: AN ANALYTICAL STUDY

Written by *Rohit Agarwal*

2nd Year BA LLB Student, Christ (Deemed To Be University)

INTRODUCTION

Actionable claim is defined in Section 3 of the Transfer of Property Act as a 'claim to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in the movable 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.'¹

Accordingly, this mean, it excludes not only a claim to any immovable property for a debt but also a debt secured or any movable property in possession of the claimant. It follows, therefore that it is a claim for a simple debt or liability and which can be realized by a legal action.

An actionable claim is called, in English Law, a chose in action or a thing in action as against a chose or money in possession. It denotes incorporeal personal property of all disciplines and an interest in corporeal personal property not in possession of the owner which accordingly can only be claimed or enforced in action. Therefore, while the different types of movable property governed by the Sale of Goods Act can be called as chose in possession, an actionable claim is also a type of movable property called chose in action. It is also a movable property because a debt is a property and anything which is not immovable property is movable property.

SECTION 3 OF THE TRANSFER OF PROPERTY ACT, 1882

In this Act, unless there is something repugnant in the subject or context,--

"Immoveable property" does not include standing timber, growing crops or grass:

¹ www.ipropertybook.com/bnm/actionable-claim

"Instrument" means a non-testamentary instrument:

3*["attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary:]

"Registered" means registered in 4*[5*[any part of the territories] to which this Act extends] under the 6*law for the time being in force regulating the registration of documents:

"Attached to the earth" means--

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

1*["actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable 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:]

2* "a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.--Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one

sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub- Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that--

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder,
- (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.--Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.--A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.]

The term 'property' has not been defined in the Act. When Section 6 of the Act says 'property of any kind' it implies every possible interest or right that can be possessed and is a subject of ownership. It can be tangible or intangible. It can be a physical object or something abstract. Property of different kinds is dealt with differently. The movable property is dealt with under the Sales of Goods Act, 1930 while the major chunk of the Transfer of Property Act, 1882 deals with immovable property. Section 3 of the Transfer of the Property Act, 1882 is called the Interpretation clause for it explains the following terms.

MOVABLE PROPERTY	IMMOVABLE PROPERTY
<p>It can be transferred from one place to another.</p> <p>Registration is optional as per the Indian Registration Act, 1908.</p> <p>The Sales and Central Sales taxes are applied,</p>	<p>It cannot be transferred without causing extensive damage to the property. The damage relates to the nature of the property</p> <p>Registration is compulsory under the Indian Registration Act, 1908 if the value of the property is more than Rs. 100.</p> <p>The property needs to be registered at the Sub-Registrar's office.</p> <p>The appropriate stamp duty and the registration fee have to be paid.</p>

DEFINITION OF IMMOVABLE PROPERTY

Immovable property is a species of property. Whenever we speak about immovable property, we always use the ready reference of 'attached to the earth'. Whether a thing is permanently attached to the earth, whether it is capable of separation or not and what is the intention behind the construction or promoted growth of the property are a few of the points that need to be looked into.

The definition of immovable property as per the Transfer of Property Act is a negative definition. The Section 3 reads that "immovable property" does not include standing timber, growing crops or grass". Standing timber refers to trees that are fit for usage in building or repairs. Growing crop includes all such vegetables, etc that are solely grown only for their produce. Grass is referred to as fodder.

Section 3(26) of the *GENERAL CLAUSES ACT, 1897* is not an exhaustive definition. It says that "Immovable property shall include land, benefits arising out of land and things attached to the earth, or permanently fastened to anything attached to the earth." It specifies the following as immovable property.

a) **LAND:** It encompasses the upper as well as the lower surface of the earth. Any interest in

the same will be treated as that of immovable property. It would include wells, streams etc.

b) **BENEFITS ARISING OUT OF LAND:** This category includes everything dealing with rights and interests in land as defined above. Right to collect rent or zamindari rights are two examples.

c) **THINGS ATTACHED TO EARTH:** The nature of attachment is important.

This clause is explained with reference to the following three points:

a) Things rooted in the earth like trees, shrubs but not including standing timber, growing crops and grass. Jamun trees are treated as immovable properties.

b) Things embedded in the earth like buildings, minerals etc. By 'embedded' we refer to things that have their foundations laid well below the surface of the earth. An anchor of a ship is not immovable property in its normal usage.

c) Things that have been permanently fastened to anything embedded in the earth for the purpose of permanent enjoyment. For example, ceiling fans, doors and windows. If the objects that have been attached are merely transitory or not permanent and do not contribute to the value and purpose of the thing attached to, they are not immovable properties.

To determine whether a fixture is permanent or not, the following points need to be considered:

a) **Mode of Annexation:** Temporary, standing on its own weight or dug in to the earth, etc.

b) **Purpose or Object of Annexation:** Trade fixtures are to be treated in association with the business and not the land as the fixtures are attached in connection with the business. Such fixtures are to be treated as accessory to the business and not as annexation. The position is different if the person attaching the fixtures in a business place is the owner himself. When it is a machinery in the factory, the court has to see the object and purpose of such installation. The beneficial enjoyment of the machinery itself, the degree and the manner of attachment or annexation on to the earth are other points for consideration.

The *Section 2(9) of the INDIAN REGISTRATION ACT, 1908* gives out the physical aspects of property in the definition present in the said Act. The definition under the Act is as follows, "Immovable Property includes land, buildings, hereditary allowances, rights of ways, lights, ferries, fisheries or any other benefit arising out of land and things attached to the earth but not standing timber, standing crops or grass."

VARIOUS DEFINITIONS OF IMMOVABLE PROPERTY

All the definitions read together can give us a clear idea what is included or excluded from being an immovable property. They do not define immovable property per Se. A clear idea can be obtained by creating a common definition by mixing these three.

Immovable Property means lands, benefits arising of the lands and the things attached to the earth or permanently fastened to anything attached to the earth. Other than the physical aspect, every benefit arising from and every interest in the property is also included in the definition. It excludes three things, namely, standing timber, growing crops and grass.

STANDING TIMBER, GROWING CROPS AND GRASS

Whether a tree is timber or not depends on the category of the tree and the common purpose of such category. All the statutory definitions have excluded standing timber, growing crops and grass from the purview of an immovable property. Here the intention is of great importance. If the transaction is the immediate, the objects will be movable. But if the contract regarding such objects extends to many a year or if the owner of the trees is interested in further vegetative growth, then they will be treated as immovable property. The transfer of trees standing on land does not amount to the transfer of the land also.

For example, mangoes are treated as movable property for the intention is to pluck them seasonally and sell them. On the other hand, when a person has a right to fish from a particular lake, it is a benefit arising of an immovable property, namely, the lake. Hence, it will be an immovable property.

MARSHALL vs. GREEN²- it was held that if only a right to cut and enjoy the tress as timber was sold, it is an interest in a movable property. If such a right is to extend over many years, it will be treated as an interest in immovable property.

² 942 F.2d 539 (1991)

WHAT IS INCLUDED IN IMMOVABLE PROPERTY	WHAT IS NOT INCLUDED IN IMMOVABLE PROPERTY
1) A right to collect rent from an immovable property; 2) A right to receive future rents and profits of land; 3) A tenancy right; 4) Coal mines; 5) A borewell that has been fastened in a permanent way to the earth; 6) Hereditary Offices; and 7) Right to use water of a perennial stream.	1) A right to worship; 2) A copyright; 3) The interest of a partner in a partnership firm; 4) A right to get maintenance; 5) A right to obtain the specific performance of an agreement to sell; 6) Government promissory notes; and 7) A machinery that is not permanently attached to the earth and can be shifted from one place to another.

The real test of whether a property is immovable or movable is the intention behind the transfer and the transferability of the property. For example, generally a mango tree will be treated as an immovable property but it will be treated as movable property if it is to be cut and used to build a house.

BACKGROUND OF ACTIONABLE CLAIMS

Prior to the amending Act 2 of 1900, actionable claim embraced all claims which civil court recognized as affording grounds for relief. Even a right to sue for damages for breach of contract and tort were held to be actionable claims even though such right was not attachable as such. But after this Act, the definition of actionable claim was restricted to unsecured debts and beneficial interests in movable property not in possession of the claimant. The effect of this amendment is that now a clear distinction lies between property (actionable claim) and a right to sue.

PROVISION OF LAW

Actionable claim as defined in Section 3 of the Transfer of Property Act, as a chose in action is different from two other such chooses in action namely the right or property by way of copyright, trade-mark, patent, or design, and also to stocks and shares or debentures of a limited Company or the negotiable instruments under the Negotiable Instruments Act, which also evidence a debt and which are recoverable by legal action.

Section 137 of the Transfer of Property Act clearly provides that sections 130 to 136 will not apply to stocks and shares or debentures or to instruments which are negotiable or to mercantile documents of title to goods. Marine Insurance claim is also excluded by Section 135 A of that Act and is dealt with in the Marine Insurance Act, XI of 1933. They are also governed by independent separate statutes passed in respect thereof and are not, therefore, governed by the Transfer of Property Act. That Act in Section 130 only provides for transfer of actionable claims as defined and circumscribed by the Transfer of Property Act. As to transfer of the earlier mentioned actionable claims separate provisions are made for transfer thereof by the statutes governing them. Actionable claims within the meaning of Section 3 of the Transfer of Property Act, therefore, it cover:

(i) claims to unsecured debts and

(ii) claims to beneficial interest in moveable property not in possession actual or constructive whether present or future., conditional or contingent. Such actionable claims could be:

- a right to claim maintenance
- a right to arrears of rent
- a right to annuities
- moneys payable under a contract for price or advance
- a right to claim benefit of a contract
- a partner's claim for accounts and his share therein
- insurance claim, other than marine insurance
- salary in arrears
- book debts

- a fixed deposit receipt, etc.

However, a mere right to sue is not assignable. Similarly, a decree is not assignable under this section, as no legal action is required to be taken to recover the claim. The decree itself can be executed. Similarly any other property which is not transferable, under Section 6 of the Transfer of Property Act is not assignable under Section 130 of the Transfer of Property Act. Marine Insurance Policy, negotiable instrument and documents of title to goods are specifically excluded by Section 135 A and Section 137 of the Transfer of Property Act as stated above.

LEGISLATIVE INTENT

Every actionable claim or chose in action is assignable except in four cases:

- (1) where the assignment is prohibited by law,
- (2) where the terms of the contract under which the claim accrues prohibit such assignment,
- (3) where the contract is of a personal nature, and
- (4) where the assignment would increase the burden on the other party.

An actionable claim can be recovered by a legal action by the person who is the claimant or creditor. Section 130 of the Transfer of Property Act provides that a transfer of an actionable claim shall be effected by execution of an instrument in writing, signed by the transferor or his duly authorized agent in favour of the transferee and in that case all the rights and remedies of the transferor, whether by way of damages or otherwise shall vest in the transferee, whether notice of such transfer is given to the debtor or not. But when no such notice of transfer is given to the debtor and the debtor in ignorance of such transfer repays the debt or claim to the original creditor or claimant, he would be discharged from the liability. On such transfer the Transferee would get all the rights of the creditor including the right independently to recover the debt without the original claimant's consent or co-operation. The deed of transfer need not be signed by the transferee and also does not require attestation or registration.

The written instrument assigning a debt can be in any form, if the intention to transfer is clear. A mere letter to the assignee by the claimant that he has assigned the debt to him is

sufficient. An assignment of a debt may be absolute or by way of security or even as a gift. The words with or without consideration in the definition of actionable claims are used to cover even a gift. An assignment becomes effective from the date of writing, unlike English Law under which it becomes effective from the date of notice to the debtor. The provision in the Transfer of Property Act regarding assignment of actionable claim does not apply to claims under Marine Insurance Policy or Fire Insurance Policy or affect any provisions of the Insurance Act, 1938.

Section 134 of the Transfer of Property Act also shows that assignment of the actionable claim by way of charge is also possible to secure the debt due by the transferor to the transferee and provides how the debt assigned when recovered is to be applied viz., first in payment of costs of recovery, secondly, in satisfaction of the amount secured and thirdly, in payment of the balance if any to the transferor or other person entitled thereto. Section 136 of the Transfer of Property Act above quoted does not apply to assignment by a charge or security, though such assignment is also recognized in English Law as equitable assignment.

An actionable claim would include:

- (a) any debt due to or moneys recoverable by the transferor (except the moneys payable under a negotiable instrument)
- (b) any movable property belonging to the transferor and not in his possession or power and which he has a right to recover or receive and
- (c) any claim or benefit under a contract belonging to the transferor but without any liability attached thereto.

An Assignment can be made either by a formal document or even by a letter to the debtor of the transferor but not orally. An irrevocable Power of Attorney to recover a debt and to adjust it towards the amount due to the donee is held as an assignment. An actionable claim can be assigned even as a gift that is without consideration as Section 130 of the Transfer of Property Act in terms so provides.

Apart from what is stated above, the following are held to be actionable claims:

- a debt due or to become due, or whether conditional or contingent

- future rents
- amounts payable under a deed
- amount due under a policy of life insurance
- a letter of credit
- right under a contract
- beneficial interest in movable property
- confirmed sale price
- earnest money becoming repayable
- deposit receipt
- dividend due on shares, etc.

But a mere right to sue or claim for damages or profits are not assignable. As regards transfer of shares, stock and debentures, the provision in respect thereof is made in the Companies Act.

As regards actionable claims in the nature of negotiable instruments, the Negotiable Instruments Act, makes special provision for the transfer thereof by endorsement. It may however be stated that a promissory note whether negotiable or not or other such instruments can be transferred by a separate instrument of transfer instead of by mere endorsement.

An assignment of an actionable claim is not required to be registered under the Registration Act. It is desirable that the document of assignment is executed both by the Assignor and the Assignee and in duplicate, one copy remaining with the Assignor and other with the Assignee.

LEVIABILITY OF SALES TAX TO ACTIONABLE CLAIM

SIGNIFICANCE

Section 3 of Transfer of Property 1882 defines “Actionable claim”. As per Mulla’s T.P. Act an actionable claim is a claim to any unsecured debt. Such a debt should be other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property (because these are not transfers of claim but of the property itself) or a claim to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant. The claim should be such as Civil Court would recognise as affording grounds

for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent; Such transfer of an actionable claim shall be effected only by execution of an instrument in writing by the assignor to the assignee. [Section 130 of Transfer of Property 1882].

DEFINITION OF ACTIONABLE CLAIM

Section 3 of Transfer of Property 1882 defines “Actionable claim”. As per Mulla’s T.P. Act an actionable claim is a claim to any unsecured debt. Such a debt should be other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property (because these are not transfers of claim but of the property itself) or a claim to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant. The claim should be such as Civil Court would recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent; Such transfer of an actionable claim shall be effected only by execution of an instrument in writing by the assignor to the assignee. [Section 130 of Transfer of Property 1882].

DEFINITION OF GOODS

- Definition of goods under *Sale of Goods Act 1930*- “Goods” means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. [Section 2(7)].
- Definition of goods under *Central Sales Tax Act 1956*- “Goods” includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities. [section 2 (d)]

ISSUE I & II: DETERMINATION OF WHETHER ACTIONABLE CLAIM ARE GOODS WITH THE HELP OF RELEVANT CASE LAWS

- ***H. Anraj v. State of Tamil Nadu***³

Issue: Whether sales tax can be levied by a State Legislature on the sale of the Lottery Tickets in the concerned State?

The Supreme Court held that the lottery tickets, to the extent they comprise an entitlement to participate in a draw, are "goods" as they constitute a dealer's (in lottery tickets) stock in trade which is capable of being bought and sold in the market (and that there is a transfer of property in goods in every sale of the same). Lottery tickets are goods and not actionable claims. Both were held to be beneficial interests in moveable property, the former in present, and the latter in future, depending on the contingency.

- ***Vikas Sales Corporation v Commissioner of Commercial Taxes***⁴

Issue: Whether transfer of import license (REP) by the holder to another person constitute sales of goods?

S.C examined if it does, it is exigible to sales tax, otherwise not. The features of REP licence include an innate value and freely transferable. These features make it a marketable commodity. Thus it held that it was a highly attractive and sought after instrument/means for importing goods. Infact, those licenses were being traded freely in the market and for that reason alone those were goods. Also, when they have a value of their own unrelated to the goods which can be imported there under, it is idle to contend that they are in the nature of actionable claims.

- ***Sunrise Associates vs. Govt. of NCT of Delhi & Ors***⁵

Issue: Whether decision in Anraj case that lottery tickets are goods for purposes of levying sales tax was correct?

³ (1986) 1 SCC 414

⁴ AIR 1996 SC 2082

⁵ 2006 (5) SCC 603

S.C. held that the lottery ticket has no value in itself as it is mere piece of paper. Its value lies in fact that it represents chance or right to conditional benefit of winning prize of greater value than consideration paid for transfer of that chance. It is nothing more than token or evidence of this right. Three ingredients in the sale of lottery tickets, namely, (i) prize; (ii) chance; and (iii) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket. The distinction drawn in H. Anraj case between the chance to win and the right to participate in the draw was held to be unwarranted and specious. Even if taken as a separate right, it would still be considered to be an actionable claim. A Constitutional Bench of the S.C. overturned the decision in the H Anraj case, holding that the sale of lottery tickets is, at best, an actionable claim.

- ***Yasha Overseas v. Commissioner of Sales Tax***⁶

Issue: Whether the decision in Vikas case can be said to be impliedly overruled by the Constitution Bench decision in Sunrise? If no, whether Vikas case is still a good law and apply to cases of DEPB?

S.C. held that It was indeed true that the Constitution Bench in Sunrise Associates' case (supra) did not approve the decision in Vikas Sales Corpn.'s case (supra) insofar as it gave their free transferability as an additional reason to hold that REP licences were not actionable claims but 'goods' properly so called. But there this question did not come for reference and hence no decision was given on this issue. Decision in Vikas sales still holds good and is applicable to DEPB as well.

- ***State of Kerala and Ors. v. Mini Shamsudin and Ors.***⁷

Issue: Whether decision in Sunrise case is correct?

H.C. upheld the decision of Sunrise case. It held that actionable claims are 'goods' and movable property but not for the purpose of the Sales Tax Acts. Consequently, an actionable claim is movable property and 'goods' in the wider sense of the term but a sale of an actionable claim would not be subject to the sales tax law.

⁶ 2008(8)SCC681

⁷ [2009] Insc 1 (2 January 2009)

RESULT:

Actionable claim can be considered as goods but not for the purpose of levying of sales tax.

ACTIONABLE CLAIMS IN GST

For defining actionable claim, CGST Act makes reference to section 3 of the Transfer of Property Act, 1882. ‘Actionable claim’ thus means a claim of any debt, or to any beneficial interest in movable property other than the debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, not in 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.”

A lottery ticket is actionable claim. Assignment of right of recovery of unsecured debt is actionable claim. Railway ticket is not actionable claim. Purchase of a railway ticket gives the right to a person to travel by railway. It is nothing other than a contract of carriage.

Actionable claims have been included in the definition of goods with a limited purpose of taxing ‘lottery, betting and gambling’. Schedule III provides that activities or transactions in actionable claims, other than lottery, betting and gambling shall be treated neither as a supply of goods nor a supply of services.