

ORAL TRANSFER OF PROPERTY UNDER TRANSFER OF PROPERTY ACT, 1882



Introduction:

Oral transfer was valid in India prior to the enactment of the Transfer of Property Act, 1882 considering that delivery of possession was the only valid transfer in the ancient times.²

The Indian Contract Act, 1872 accommodated the same through Section 10 of the Act, allowing for an Oral Agreement to be valid. On the same basis, The Transfer of Property Act, 1882 allowed for an Oral transfer of Property under Section 9 of the said act, which lays down that a transfer of property may be made without writing in every case in which writing is not expressly required by law.³Hence it functions as an enabling statute.⁴

Validity of Oral Transfers under the Act:

It is important to understand what is meant by 'transfer' of property. Section 5 of the Act defines the same as conveyance of the property between one to another living persons(s). When read with Section 9, oral transfer is conveyance of property *inter-vivos* orally when no compulsion is made for a written transfer. There are essentially five types of transfers recognised under the Act, namely sale, exchange, gift, mortgage and lease.

a) Sale :

Defined under Section 54 of the Act, it has a specific proviso that any tangible immovable property of market value above Rs. 100 may be

transferred through sale only through a registered document. This is further added to through Section 17 of the Registration Act, 1908 which mandates the registration of such documents.

Tangible immovable properties valued above Rs. 100 can be made only in writing⁵ and also registered thereafter.⁶In all cases in the act where such a condition exists, the test is of the market value of the property and not the price paid for the same.⁷

It is to be noted that Section 54 only deals with immovable property.⁸ Movable properties shall be governed by Sale of Goods Act. 1930 and hence out of the purview of this paper.

Where the transfer is done orally, the delivery is completed when the possession is delivered⁹ or price is paid.¹⁰ In the case of *Miodin v. Avaran*¹¹ it was held that if the possession is transferred, the sale is said to be completed even if the price has not been fully paid yet. In the case of *Ramchandra Majhi v. Hambhai Majhi*¹², where the original sale deed was lost, reliance was placed on proof of oral transfer.

b) Exchange:

Section 118 of the Act defines exchange as transfer of one property for another. It includes moveable as well as immovable for exchange in any property except money.¹³**Note that this section has not been extended to the State of Punjab and hence even oral transfer of property in exchange has been held to be valid by the High Court.**¹⁴

Similar rules are applicable to transfer by exchange as applicable in transfer by sale.¹⁵

c) Gift :

Proper means of transfer has been covered under Section 123 of the Act. Accordingly, the legitimacy of transfer of property is dependent on the type of property to be transferred:

i. Immovable Property: In this case, the transfer can only be effected through a registered deed.¹⁶ Where transfer of immovable property was effected without registered deed, the transfer was held invalid even when the possession was delivered.¹⁷ This requirement may however be dispensed with by statutory provisions.¹⁸

ii. Movable property: Property may be transferred by transferred orally as well. Where it has been transferred orally, delivery of such property is essential.¹⁹ Only then the transfer becomes irrevocable.²⁰

It is to be noted that Section 129 of the Act specifically mentions that the Chapter does not extend to Mohammedan rules. Accordingly, in the recent case of *Hafeeza Bibi & Ors v. Shaikh Farid (Dead) By Lrs. & Ors*²¹ where the question was of the validity of Hiba or Ariya transfers, the Supreme Court held that Oral gifts being permissible under Muslim Law, no writing is required to either create or complete them.

It is to be noted that Section 25 of the Indian Contract Act mandates a gift to be written.

a) Mortgage :

Section 58 of the Act defines mortgage while Section 59 covers the mode of transferability of the same. Simple mortgage must be written and registered irrespective of the value, whereas every other mortgage of value above Rs. 100 must be registered.²²

Mortgage by title deeds is the only form of mortgage in which an oral transfer of property is permissible. This is due to the delivery of title deeds which acts as evidence of the creation of equitable mortgage.²³ However, it may only be effected so in the presidency towns and where there is delivery from debtor or his agent to creditor or his agent with the proper intention.²⁴

In the case of *R.V. Subba Rao v. L.L. Chowdary*²⁵, where a mortgage by deposit of title deeds is reduced to writing, the Court held that then the writing itself constitutes a contract of mortgage, which essentially creates the mortgage, accordingly the memorandum has to be registered, notwithstanding Section 59 of the Transfer of Property Act, 1882.

b) Lease :

Section 107 provides that any lease exceeding one year or where rent for more than 12 months has been taken in advance must be done only through a registered (therefore written) document.

In the case of *Hari Shankar Mishra v. Vice-Chairman, Kanpur Development Authority*²⁶, the Kanpur Development Authority had, in its possession, an immovable property. Appellant claimed that the property was transferred to him through an oral lease. The High Court held that the case was firstly hit by Section 107 of the Transfer of Property Act. Further, it observed that Section 49 of the Indian Registration Act provides that no document required by Section 17 of the said Act or by any provision of the Transfer of Property Act to be registered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered.

c) Other transfers :

Transfer of actionable claims – under Section 130 and 131 can only be effected only by a written (and signed) instrument. Even the notice under Section 131 has to be properly written and signed,

with any defect leading to invalidity of the same.²⁷ An interest in an estate that reverts to the grantor or his heirs at the end of some period or other intangible thing, that is kept for testamentary purposes is also supposed to be written.

Essentially in cases where the transfer does not fall within the aforementioned categories, even oral transfer has been held to be permissible:

Family Arrangements – In the landmark judgement of *Kale v. Deputy Director of Consolidation*²⁸, the Supreme Court held that family arrangements are governed by a special equity and hence would be valid even if affected orally. Accordingly, no question of registration or stamp fee would then arise.

Partition – Since partition does not result in ‘transfer’ but only a division of property, the same may be effected orally. Hence, the change of status of a member from coparcenaries to a separate member may be brought about orally or through a document.²⁹ Where the mother orally relinquished her interest in a Hindu Joint Family property (exceeding value of Rs. 100), the Bombay High Court held the same to be ‘valid and effective’.³⁰

There are several other instances where oral transfers involving release, charge, dower and so on that have been held valid by the Judiciary.³¹

Analysis :

The author is of the view that whether an oral transfer is valid or not is dependent on the following tests (to be answered successively):

1. Whether the transfer is transfer under the meaning of Transfer of Property Act, 1882.

If the first question is answered positively, only then it is necessary to continue to the successive questions. There are several transfers which are so in general sense of the term but not transfers under the Act. This is evident in cases such as *Buta Singh v. Manju*³², where there took place a bona fide transfer of property by a widow in lieu of her maintenance. In the case of *Valli Pattabhima Rao v. Sri Ramanuja Ginning and Rice factory*³³ the promotor of a company (before its incorporation) declared that he is holding property for the company. The *ratio decidendi* in all of the above cases was that the transfers did not fall under Section 5 of the Act and hence outside the purview of the same. Oral transfers were accordingly held to be valid.

Pasupu Kumkuma transfers illustrate the above – in the case of *Bhubhaneshwar Naik v. Special Tehsildar*³⁴, a Pasupu Kumkuma transfer was ruled to not require registration/writing as it did not fall under the five types of transfers under Transfer of Property Act. The question was recently decided upon in *Anathula Sudhakar v. P. Buchi Reddy and Ors.*³⁵ where the said mode of transfer was held to require registration due to its final recognition as a ‘gift’ form of transfer.

Where the transfer has been effected in places where the Act is not in force, an oral transfer has obviously been held to be valid.³⁶

2. Whether the transfer is valid due to personal laws or customs. In cases such as *Hafeeza Bibi*³⁷ where an oral transfer was held to be permissible in accordance with Mohammedan Personal Laws. If this question is answered in the affirmative, the Courts have to decide the validity based on prevalence, legislative provisions, public policy, and validity of the custom and so on.

3. Whether the said transfer is mandated to be made in writing (or registered) by the said Act.

Registration of the transfer is, in a few cases specifically mandated by the Act. They have been previously dealt with under different types of transfers.

4. Whether it is mandated to be in writing (or registered) by any other Act.

It may be mandatory for it to be registered under another law. For instance, Section 25 of the Indian Contract Act, 1872 mandates a gift (without consideration and out of natural love and affection) to be in writing. Similarly, there are provisions of Indian Trusts Act, 1882 which mandate written documents for certain transfers.

There are several such legislations; however, the same is outside the purview of this paper which deals exclusively with oral transfer under Transfer of Property Act. It is to be noted that Registration Act does not mandate anything to be written. It only includes provisions for written documents to be registered.³⁸

Thus, the author is of the opinion that the above tests form the basis for validity and verification of oral transfers.

Conclusion :

Section 9 of Transfer of Property Act has been inserted in the act as *ex abundanti cautela*³⁹. The author is of the opinion that it is really unnecessary. The reasons are explained as follows - firstly, the act does not deal with all types of transfers. Had it dealt with all types of transfers as in the case of England's Property Law⁴⁰, the Section would have been of greater significance and value. Due to the above constraint, majority of transfers of property have to be transferred in India by writing.

Second, India being a culturally diverse nation, there are several customs such as such as 'Pasupu kumkuma', 'Hiba/Ariya' and 'Guzara'⁴¹ transfers which require special considerations.

Finally, the issue of primary issue in case of oral transfers is enforceability rather than permissibility. Even if permissible, it is difficult to prove the same, and there is heavy burden on the parties seeking to enforce such transfers.⁴²

However, it is also true that the provision offers a fighting chance to persons aggrieved in cases of fraud committed after oral transfer. In the very recent case of *Shyam Lal v. Deepa Dass*⁴³, the Supreme Court prevented eviction of farmer even after the end of lease. The ends of justice may therefore be served through various ways. To conclude, the author is of the opinion that Section 9, in the same way as part performance⁴⁴, acts a 'shield' and not as a 'sword'.

(Endnotes)

- 1 * 3rd Year, BBA.LLB (Hons.);Symbiosis Law School, Pune
- 2 A.C. Lakshmipathy And Anr. v. A.M. Chakrapani Reddiar,AIR 2001 Mad. 135
- 3 Section 9 – Transfer of Property Act, 1882.
- 4 Weavers Mills v. Balkis Ammal, AIR 1969 Mad 462; Sarandaya Pillai v. Shankaralinga Pillai, 1959 (2) MLJ 502
- 5 Narayana Swami v. Lakshmi, AIR 1939 Mad 1220
- 6 Tandobi Devi v. Kalamu Singha, AIR 2009 (NOC) 587; Dayal Fuel Industry v. Bihar State Financial Corporation, AIR 2009 (NOC) 592 (Pat)
- 7 Dr. Poonam Saxena, *Property Law* (2nd Edn. 2011)
- 8 Saheb Ram Surajmal v. Purushottam Lal, AIR 1950 Nag 89.
- 9 Ganga Narain v. Kali Churn, (1895) ILR 22 Cal 179
- 10 Sampatlal v. Poker, AIR 1955 Raj 70
- 11 (1888) ILR 11 Mad 263
- 12 AIR 1989 Ori. 27
- 13 Commissioner of Income Tax v. Motor and General Stores Private Limited AIR 1968 SC 200
- 14 Gurdev Singh v. Mukhtiar Singh 2016 (1) RCR(Civil) 860; Kishori Lal v. Babu Ram, (2003) 1 RCR (Civil) 807 (P&H)
- 15 Debi Prasad v. Jaldhar Chaube, AIR 1946 All 125

- 16 Gangadhara Rao v. Ganga Rao AIR 1968 AP 291; Horalal v. Gauri Shankar AIR 1928 Bom. 250
- 17 R.N. Dawar v. Ganga Saran Dhama, AIR 1993 Del 19
- 18 M. Singh v. Gram Panchayat, AIR 1974 Punj. 28
- 19 Rameshwar Narain Singh v. Biknath Koeri, AIR 1923 Pat 165.
- 20 Kasi Ammal v. Vellat Gounder (1980) 2 Mad LJ 232
- 21 AIR 2011 SC 1695
- 22 Mohammad v. Mohammad Hanif and anr.
- 23 The Motor and General Finance Ltd. v. Durga Builders Pvt. Ltd., AIR 2003 NOC 309 (Del).
- 24 Collector of Tiruchirapalli v. Trinity Bank Ltd. AIR 1962 Mad 59
- 25 AIR 1977 AP 123 (127)
- 26 AIR 2001 All 139
- 27 Hunsraj v. Nathoo, (1907) 9 Bom LR 838
- 28 AIR 1976 SC 807, at Pg. 816; see also A.C. Lakshmiopathy v. A.M. Chakrapani Reddiar, AIR 2001 Mad. 135
- 29 Nani Bai v. Gita Bai Gunge, 61 Bom. LR 523
- 30 1980 Mah, L.J 494 at p. 501.
- 31 Satya v. Kirpal (1909) 10 Cal LJ 503; Madam Pillai v. Badra Kali AIR 1922 Mad. 311
- 32 AIR 1930 Lah. 9
- 33 AIR 1984 AP 176; see also G. Palaniswami v. Sri Nadhi Transports (P) Ltd. (1967) ILR 3 Mad 80
- 34 1979 2 APLJ 421
- 35 AIR 2008 SC 2033; see also G. Reddy v. Mokka Padmavathamma and Ors. 2001 (5) ALT 130
- 36 Randhir Singh Chandok v. Vipin Bansal 135 (2006) DLT 56
- 37 See 'Gifts' – II. (c)
- 38 Justice K. Shanmukham, Shrinivas Gupta – Sanjiva Row's Transfer of Property Act – Vol. 1, Pg. 166 (8th Ed. 2013)
- 39 Justice P.S Narayana's – 'The Transfer of Property Act, 1882' (3rd Edition, 2007)
- 40 Definition of Conveyance, Section 205(1)(ii) - Law of Property, 1925. Note: Under English law a person cannot convey by words of mouth – Rye v. Rye (1960) 1 All ER 146 (HL)
- 41 Gajraja Kaur v. Indrapal Kaur 49 IC 406.
- 42 Brij Mohan and Ors. v. Sugra Begum and Ors. 1990 (4) SCC 147
- 43 (2015) 12 SCC 330
- 44 S. 53A, Transfer of Property Act, 1882.