
**TRANSFERS OF PROPERTY
ACT, SVT. 1977**

(Act No. XLII of Svt. 1977)

THE TRANSFERS OF PROPERTY ACT, 1977 (1920 A. D.)

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Amendments made (after 1971 edition) by Act Nos. :—

1. XX of 1973.
2. VII of 1974.
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4. VII of 1975.
5. IX of 1976.
6. XXXII of 1978.
7. XIII of 1981.
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10. XIII of 1987.
11. XXIII of 1987.
12. XI of 1989.

THE TRANSFERS OF PROPERTY ACT, 1977 (1920 A. D.)

(Act No. XLII of Svt. 1977)

[Sanctioned by His Highness the Maharaja Sahib Bahadur per Chief Minister's endorsement No. 8372, dated 11th September, 1920, read with State Council Resolution No. 1, dated 8th April, 1925. (Notification No. 14-L/81).]

An Act to amend the law relating to the transfer of property by act of parties.

Preamble.—Whereas it is expedient to define and amend certain parts of law relating to the transfer of property by act of parties ; it is hereby enacted as follow :—

CHAPTER I

Preliminary

1. *Short title, extent and commencement.*—(1) This Act may be called the Transfer of Property Act, 1977.

(2) It extends to the whole of Jammu and Kashmir State. It shall come into force on the 1st day of Baisakh, 1978.

2. *Saving of certain enactments, incidents, rights, liabilities, etc.*—Nothing herein contained shall be deemed to affect—

- (a) the provisions of any enactment not hereby expressly repealed ;
- (b) any terms or incidents of any contract or constitutions of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force ;
- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability ; or
- (d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction ;

and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Mohammadan, or Buddhist law, subject to the

limitation contained in sections 13, 14, 15, 16 and 20, no disposition of property made by a Hindu shall be invalid by reason only that the person for whose benefit it may have been made was not in existence at the date of such disposition.

3. *Interpretation clause.*—In this Act, unless there is something repugnant in the subject or context,—

“immovable property” does not include standing timber, growing crops or grass ;

“instrument” means a non-testamentary instrument ; ¹[attested, in relation to an instrument, means 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 the State under the 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 ;

“actionable claim” means 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 recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent ;

1. In section 3 definition of “attested” added by Act VI of Samvat 1996.

¹[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 immovable property is required by law to be and has been effected by 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, where instrument has been registered under sub-section (2) of section 30 of the Registration Act, 1977 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 where in a share or interest is being acquired, is situated.

Explanation II.—Any person acquiring any immoveable 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].

4. *Enactments relating to contracts to be taken as part of Contract Act.*—The chapters and section of this Act which relate to contracts shall be taken as part of the Contract Act, 1977.

And section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Registration Act, 1977.

1. In section 3 definition of “notice” substituted by Act VI of Samvat 1996.

CHAPTER II

Of Transfers of Property by Act of Parties

(A) *Transfer of Property, whether moveable or immovable.*

5. “*Transfer of Property*” defined.—In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more persons, whether living or unborn or to himself, ¹[or to himself] and one or more other such persons ; and “to transfer property” is to perform such act.

¹[In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

6. *What may be transferred.*—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

²[(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred].

(e) A mere right to sue cannot be transferred.

(f) A Public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military and civil pensioners of Government and Political pensions cannot be transferred.

1. In section 5, words “or to himself” inserted after the words “or to himself” and paragraph added by Act VI of Samvat 1996.

2. In section 6, clause (dd) added by Act VI of 1996.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Contract Act, 1977, or (3) to a person disqualified to be transferee.

(i) Nothing in this section be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of wards, to assign his interest as legally such tenant, farmer or lessee.

7. *Persons competent to transfer.*—Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

8. *Operation of transfer.*—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee, all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incident include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ; and

Where the property is machinery attached to the earth, the moveable parts thereof ; and

Where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ; and

Where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ; and

Where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. *Oral transfer.*—A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

10. *Condition restraining alienation.*—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him ; provided that property may be transferred to or for the benefit of a woman, so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. *Restriction repugnant to interest created.*—Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

¹[Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof].

12. *Condition making interest determinable on insolvency or attempted alienation.*—Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. *Transfer for benefit of unborn persons.*—Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

1. In section 11 second paragraph substituted by Act VI of Samvat 1996.

Illustration

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.

14. *Rule against perpetuity.*—No transfer of property can operate to create an interest which is to take effect after the life-time of one or more person living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

15. *Transfer to class some of whom come under sections 13 and 14.*—If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails ¹[in regard to those persons only and not in regard to the whole class.]

²[16. *Transfer to take effect on failure of prior interest.*—Where, by reason of any of the rules contained in sections 13 and 14, and interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails].

17. *Direction for accumulation.*—(1) Where the terms of a transfer of a property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

- (a) the life of the transferor, or
- (b) a period of eighteen years from the date of the transfer, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last mentioned period the property and the income thereof shall be disposed of as if the period

1. In section 15 last words substituted for “as regards the whole class” by Act VI of Samvat 1996.

2. Sections 16, 17 and 18 substituted by Act VI of Samvat 1996.

during which the accumulation has been directed to be made has elapsed.

(2) This section shall not effect any direction for accumulation for the purpose of—

- (i) the payment of the debts of the transferor or any other person taking any interest under the transfer ; or
- (ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer ; or
- (iii) the preservation or maintenance of the property transferred ; and such direction may be made accordingly.]

18. *Transfer in perpetuity for benefit of public.*—The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to human or other living being.

19. *Vested interest.*—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

20. *When unborn person acquires vested interest on transfer for his benefit.*—Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon

his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth

21. *Contingent interest.*—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. *Transfer to member of a class who attain a particular age.*—Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

23. *Transfer contingent on happening of specified uncertain event.*—Where, on a transfer of property, an interest therein is to acquire to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time, as the intermediate or precedent interest ceases to exist.

24. *Transfer to such of certain person as survive at some period not specified.*—Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies

during the life of B. D survives B. At B's death the property passes to D.

25. *Conditional transfer.*—An interest created on a transfer of property and dependent upon a condition fails if the fulfillment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions 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,—

- (a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.
- (b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.
- (c) A transfer Rs. 500 to B on condition that she shall murder C. The transfer is void.
- (d) A transfer Rs. 500 to his niece C if she will desert her husband. The transfer is void.

26. *Fulfillment of condition precedent.*—Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies B marries with the consent of C and D. B is deemed to have fulfilled the conditions.

(b) A transfer Rs. 5,000 to be on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E but obtains their consent after the marriage. B has not fulfilled the condition.

27. *Conditional transfer to one person coupled with transfer to another on failure of prior disposition.*—Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the

ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transfer.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b) A transfer property to his wife ; but, in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

28. *Ulterior transfer conditional on happening or not happening of specified event.*— On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain even shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

29. *Fulfilment of condition subsequent.*—An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

30. *Prior disposition not affected by invalidity of ulterior disposition.*—If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration

A transfers a farm to B for her life, and if she do not desert her husband to C. B is entitled to the farm during her life as if no condition had been inserted.

31. *Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.*—Subject to the provision of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in a case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations

(a) 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.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the terms prescribed. His interest in the farm ceases.

32. *Such conditions must not be invalid.*—In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. *Transfer conditional on performance of act, no time being specified for performance.*—Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

34. *Transfer conditional on performance of act, time being specified.*—Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfillment of which the interest is to pass from him to another person, and a time

is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Election.

35. *Election when necessary.*—Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it ; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustration.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election ; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

36. *Apportionment of periodical payments on determination of interest of person entitled.*—In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

37. *Apportionment of benefit of obligation on severance.*—When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property ; provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation ; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until ¹[the Government] by notification in the Government Gazette so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7 ½ to C and Rs. 7½ to D and must deliver the sheep according to the joint direction of B, C and D.

1. Substituted by Act VII of Samvat 2001 for “His Highness”.

(b) In the same case, each house in the village being bound to provide ten day's labour each year on a work to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D, severally require E to perform the ten day's work due on account of the house of each. E is not bound to do more than ten day's work in all, according to such directions as B, C and D may join in giving.

(B) Transfer of Immovable Property

38. *Transfer by person authorised only under certain circumstances to transfer.*—Where any person, authorised only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other person (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buy the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

39. *Transfer where third person is entitled to maintenance.*—Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred ¹[x x x x], the right may be enforced against the transferee, if he has notice ¹[thereof] or if the transfer is gratuitous ; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

¹[* * * * *]

1. In section 39 words "with the intention of defeating such right" omitted and for the words "of such intention" the word "thereof" substituted and illustration omitted by Act VI of Samvat 1996.

40. *Burden of obligation imposing restriction on use of land.*—Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment ¹[in a particular manner of interest or easement. the latter property], or where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

41. *Transfer by ostensible owner.*—Where, with the consent, express or implied, of the persons interested in immovable property a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make ; provided that the transferee after taking reasonable care to ascertain that the transferor, had power to make the transfer, has acted in good faith.

42. *Transfer by person having authority to revoke former transfer.*—Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental

1. In section 40 words in brackets substituted for the words “of the latter property or to compel its enjoyment in particular manner” by Act VI of Samvat 1996.

to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43. *Transfer by unauthorised person who subsequently acquires interest in property transferred.*—Where a person ¹[fraudulently or] erroneously represents that he is authorised 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.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration

A, a Hindu, who has separated from his father, B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition ; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

44. *Transfer by one co-owner.*—Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share of interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to join possession or other common or part enjoyment of the house.

45. *Joint transfer for consideration.*—Where immovable property is transferred for consideration to two or more persons, and such

1. In section 43 words in brackets inserted by Act VI of Samvat 1996.

consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund ; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. *Transfer for consideration by persons having distinct interests.*—Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations

(a) A, owning a moiety, and B and C each a quarter share, of mauza Sultanpur, exchange an eight share of the mauza for quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(b) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000 A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase money, B and C to receive Rs. 400.

47. *Transfer by co-owners of share in common property.*—Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and were they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an-eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

48. *Priority of rights created by transfer.*—Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously treated.

49. *Transferee's right under policy.*—Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

50. *Rent bona fide paid to holder under defective title.*—No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A, B is not chargeable with the rent so paid.

51. *Improvements made by bona fide holders under defective titles.*—When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the

property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

¹[52. *Transfer of property pending suit relating thereto.*—During the ¹[pendency] in any Court having authority in the State, of ¹[any] suit or proceeding ¹[which is not collusive and] in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

¹[*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and completes satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

²[53. *Fraudulent transfer.*—(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

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1. In section 52 word “pendency” and “any” substituted for “active prosecution” and “a contentious” respectively ; other words in brackets inserted and explanation added by Act VI of Samvat 1996.
 2. Section 53 substituted *ibid*.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

CHAPTER III

Of Sales of Immovable Property

54. *“Sale” defined.*— “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property or in *Sale how made* the case of a reversion or other intangible thing, can be made only by a registered instrument.

A contract for the sale of immovable property is contract that a *Contract for sale.* sale of such property shall take place on terms settled between the parties, but no such contract shall be valid, unless it is in writing, and signed by the parties.

It does not, of itself, create any interest in or charge on such property.

55. *Rights and liabilities of buyer and seller.*—In the absence of contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :—

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property ¹[or in the seller’s title thereto] of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover ;

1. In section 55 (1) (a) words in brackets inserted by the Act VI of 1996.

- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents ;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act where by the property is encumbered or whereby he is hindered from transferring it.

The benefit of contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of

title relating to the property which are in the seller's possession or power :

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer ;
- (b) where the ownership of the property has passed to the buyer before payments of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, ¹[any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part ¹[from the date on which possession has delivered.]

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increase the value of such interest ;
- (b) to pay or tender, at the time and place completing the sale ; the purchase-money to the seller or such person as he directs ; provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

1. In section 55 (4) (b) words in brackets inserted by the Act VI of Samvat 1996.

- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;
 - (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.
- (6) The buyer is entitled—
- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;
 - (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him ¹[xxxx], to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescissions.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a) is fraudulent.

²[56. *Marshalling by subsequent purchaser.*—If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgaged-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.]

1. Words “with notice of the payment” omitted by Act VI of Samvat 1996.
 2. Section 56 substituted *ibid*.

Discharge of Incumbrances on Sale.

57. *Provision by Court for incumbrances and sale freed therefrom.*—(a) Where immovable property subject to any incumbrances, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Government of India, or of the State, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge ; and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section “Court” means (1) the High Court in the exercise of extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which ¹[the Government] may, from time to time by notification in the Jammu and Kashmir Government Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV

Of Mortgages of Immovable Property and Charges

58. “*Mortgage*”, “*mortgagor*”, “*mortgagee*”, “*mortgage-money*” and “*mortgage-deed*” defined.—(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee ; the principal money and interest of which payment is secured for the time being are called the mortgage-money , and the instrument ²[**] by which the transfer is effected is called a mortgage-deed.

(b) *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 mortgage.

(c) *Mortgage by conditional sale*.—Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of 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

1. Substituted by Act VII of Samvat 2001 for “His Highness”.

2. In section 58 in clause (a) “(if any)” omitted, proviso to clause (c) added and in clause (d) first words in brackets inserted by Act VI of Samvat 1996.

on condition that on such payment being made the buyer shall transfer the property to the seller ;

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

¹[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.]

(d) *Usufructuary mortgage*.—Where the mortgagor delivers possession ¹[for expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises 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 ²[or] partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

³(e) *English mortgage*.—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfer 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.

(f) *Mortgage by deposit of title-deeds*.—Where a person in any of the ⁴[Municipal Corporation Limits of Jammu and Srinagar and other Municipalities/areas which the Government may by notification in the Government Gazette specify] and in any other town which the Government may by notification in the Government Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, which intent to create a security thereon, the transaction is called a mortgage by deposit of the title-deeds.

(g) *Anomalous mortgage*.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an

1. In section 58 in clause (a) “(if any)” omitted, proviso to clause (c) added and in clause (d) first words in brackets inserted by Act VI of Samvat 1996.
2. In section 58, clause (d) line seventh and eighth words in brackets substituted for the words “and to appropriate them” and in line ninth word “or substituted for” “and” by Act VI of Samvat 1996.
3. Clauses (e), (f) and (g) inserted by Act X of Samvat 1966.
4. Substituted by Act V of 2003, s. 2.

English mortgage or a mortgage by deposit of title-deeds within the meaning of this section, is called an anomalous mortgage.]

59. *Mortgage when to be by assurance.*—¹[A mortgage except the mortgage by deposit of title deeds in favour of financial institutions] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

A person is said to attest a document when he signs it as a witness after seeing the executant sign it, or on receiving from the executant or if the executant is a parda nashin female, from herself after proper identification and acknowledgment that the executant has signed the document.

²[*Explanation.*—For purposes of this section, the ‘financial institutions’, shall mean—

- (i) the Jammu and Kashmir Bank Ltd. ;
- (ii) the Industrial Development Bank of India ;
- (iii) a bank for the time being included in the Second Schedule of the Reserve Bank of India Act, 1934 and having an office for transacting the business of banking in the State ;
- (iv) the Industrial Credit and Investment Corporation of India ;
- (v) the Housing and Urban Development Corporation Limited, New Delhi ;
- (vi) the Jammu and Kashmir State Financial Corporation established under the State Financial Corporation Act, 1951 ;
- (vii) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 ;
- (viii) the General Insurance Corporation and its subsidiary Companies ;
- (ix) the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1946 ;
- (x) all Regional Rural Banks established under the Regional Rural Banks Act, 1976, and having an office for transacting business of banking in the State ;

1. Substituted by Act XXIX of 2002, s. 2.

2. Added *ibid.*

- (xi) the Jammu and Kashmir State Co-operative Bank ;
- (xii) The Jammu and Kashmir Central Co-operative Bank, Anantnag/Baramulla, Central Co-operative Banks and Jammu Citizens Co-operative Bank ;
- (xiii) the Jammu and Kashmir Land Development Bank ;
- (xiv) the National Bank for Agriculture and Rural Development (NABARD) ;
- (xv) the Jammu and Kashmir Scheduled Castes and other Backward Classes Development Corporation Ltd. ; and
- (xvi) the Jammu and Kashmir Womens Development Corporation Ltd.]

Rights and Liabilities of Mortgagor.

60. *Right of mortgagor to redeem.*—At any time after the principal money has become ¹[due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgaged money, to require the mortgagee (a) to deliver ¹[to the mortgagor the mortgage-deed and all documents relating to the mortgaged-property which are in possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged-property to him or to such third person as he may direct, or to execute and ¹[x x x] to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by the act of the parties or by ¹[decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the

1. In section 60 “due” substituted for “payable” , words in brackets in line five substituted for the words “the mortgage deed, if any, to the mortgage”, words (where the mortgage has been effected by a registered deed) omitted, word “decree” substituted for “under” and word “only” inserted by Act VI of Samvat 1996.

mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share *Redemption of portion of mortgaged property.* only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except ¹[only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part, the share of a mortgagor.

²[60-A. *Obligation to transfer to third party instead of retransferrence to mortgagor.*—(1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage debt and transfer of mortgaged property to such third person as the mortgagor may direct ; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance ; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.]

60-B. *Right to inspection and production of documents.*— A mortgagor, as long his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost and on payment of the mortgagee's costs, and expenses in his behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgage property which are in the custody or power of the mortgagee.

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1. In section 60 "due" substituted for "payable" , words in brackets in line five substituted for the words "the mortgage deed, if any, to the mortgage", words (where the mortgage has been effected by a registered deed) omitted, word "decree" substituted for "under" and word "only" inserted by Act VI of Samvat 1996.
 2. Section 60-A and 60-B added and section 61 substituted by Act VI of Samvat 1996.

61. *Right to redeem separately or simultaneously.*—A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

62. *Right of usufructuary mortgagor to recover possession.*—In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property ¹[together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],—

- (a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property, when such money is paid.
- (b) where the mortgagee is authorised to pay himself from such rents and profits ²[or any part thereof a part only of the mortgage-money, when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee ³[the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided.

63. *Accession to mortgaged property.*—Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagee desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property ; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

1. Inserted by Act VI of Samvat 1996.

2. Substituted for the words “the interest principal money” *ibid.*

3. Substituted for the words “the principal money” *ibid.*

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

¹[63-A. *Improvements to mortgaged property.*—(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon the redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement ; and the mortgagor shall not, save only in case provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor].

64. *Renewal of mortgaged lease.*—Where the mortgaged property is a lease ¹[x x], and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

65. *Implied contracts by mortgagor.*—In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;
- (b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;

1. Section 63-A added and in section 64 words "for a term of years" omitted by Act VI of Samvat 1996.

- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;
- (d) and, where the mortgaged property is a lease, ¹[x x x] that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;
- (e) and, where the mortgage is a second or subsequent incumbrance of the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

¹[x x]

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

²[65-A. *Mortgagor's power to lease.*—(1) Subject to the provision of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

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1. In section 65 clause (d) words “for a term of years” omitted and after clause (e) following words omitted “Nothing in clause (c) in clause (d) so far as it related to the payment of future rent, applies in the case of a usufructuary mortgage” by Act VI of Samvat 1996.
 2. Section 65-A added *ibid.*

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed ; and the provisions of sub-section (2) may be varied and extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]

66. *Waste by mortgagor in possession.*—A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate ; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of building, exceeds by one-half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

67. *Right to foreclosure or sale.*—In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become ¹[due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the Court ¹[a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property or, ¹[a decree] that the property be sold.

1. In section 67, word “due” substituted for “payable” and “a decree” substituted for “an order” in three places by Act VI of 1996.

A suit to obtain ¹[a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

²[(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or a usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale ; or]

(b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure ; or

(c) to authorise the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or

(d) to authorise a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

³[67-A. *Mortgagee when bound to bring one suit on several mortgages.*—A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

68. *Right to sue for mortgage-money.*—(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :—

- (a) where the mortgagor binds himself to repay the same ;
- (b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is

1. In section 67, word "due" substituted for "payable" and "a decree" substituted for "an order" in three places by Act VI of Samvat 1996.

2. Clause (a) substituted *ibid.*

3. Section 67-A added and section 68 substituted *ibid.*

wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

- (c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;
- (d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (a) or clause (b) of subsection (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.]

69. Omitted.

70. *Accession to mortgaged property.*—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purpose of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

71. *Renewal of mortgaged lease.*—When the mortgaged property is a lease ¹[x x x], and the mortgagor obtains renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security, be entitled to the new lease.

72. *Rights of mortgagee in possession.*—²[A mortgagee] may spend such money as is necessary—

²(a) Omitted].

(b) for ²[the preservation of the mortgaged property] from destruction, forfeiture or sale ;

(c) for supporting the mortgagor's title to the property ;

(d) for making his own title thereto good against the mortgagor ; and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease ;

and may, in the absence of contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent per annum :

²[Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.]

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property ; and the premiums paid for any such insurance shall be ²[added to the principal money with interest at the same rate as is payable on the principal money, or, where no such rate is fixed, at the

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1. In section 71 words “for a term of years” omitted by Act VI of Samvat 1996.
 2. In section 72 “A mortgagee” substituted for the words “When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he” ; clause (a) omitted ; in clause (b) words in brackets substituted for “its preservation” ; proviso added and words in brackets after the proviso substituted for the word “a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate” by Act VI of Samvat 1996.

rate of nine per cent per annum.] But amount of such insurance shall not exceed the amount specified in this behalf in the mortgage deed or (if no such amount is therein specified) two thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure.

¹[73. *Right to proceeds of revenue sale or compensation on acquisition.*—(1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor, as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.]

74. ¹[Omitted]

75. ¹[Omitted]

76. *Liabilities of mortgagee in possession.*—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own ;

1. Section 73 substituted and sections 74 and 75 omitted by Act VI of Samvat 1996.

- (b) he must use his best endeavours to collect the rents and profits thereof ;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature ¹[and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money.
- (e) he must not commit any act which is destructive or permanently injurious to the property ;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;
- (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after, deducting the expenses ²[properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest ²[***] and, so far as such receipts exceed any interest due, in reduction

1. Words in brackets in clause (c) inserted by Act VI of Samvat 1996.

2. In clause (h) words in brackets inserted, and words "on the mortgage money" deleted by Act VI of Samvat 1996.

or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;

- (i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his ¹[***] receipts for the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be, ¹[and shall not be entitle to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property].

If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken *Loss* in pursuance of a decree made under this Chapter, be *occasioned by* debited with the loss, if any, occasioned by such failure. *his default.*

77. *Receipts in lieu of interest.*—Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipt from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Priority.

78. *Postponement of prior mortgagee.*—Wherein through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

79. *Mortgagee to secure uncertain amount when maximum is expressed.*—If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advance or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

1. In clause (i) word "gross" omitted and words in brackets added by Act VI of Samvat 1996.

Illustration

A mortgages Sultanpur to his bankers, B and Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B and Co., and C gives notice to B and Co. of the second mortgage. At the date of the second mortgage, the balance due to B and Co., does not exceed Rs. 5,000 B and Co. subsequently advance to A sums making the balance of the account against him, exceed the sum of Rs. 10,000. B and Co. are entitled, to the extent of Rs. 10,000, to priority over C.

80. ¹[Omitted.]

Marshalling and Contribution.

²[81. *Marshalling securities.*—If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a 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 rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties].

82. *Contribution to mortgage-debt.*—³[Where property subject to a mortgage belongs to two or more person having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.]

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to

1. Section 80 omitted by Act VI of Samvat 1996.

2. Section 81 substituted *ibid.*

3. Section 82 paragraph within brackets substituted and in third paragraph word “subsequent” for “second” *ibid.*

contribute rateable to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the ¹[subsequent] mortgagee.

Deposit in Court.

83. *Power to deposit in Court money due on mortgage.*—At any time after the principal money ²[payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed ³[and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the mortgage-deed ⁴[and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

⁵[Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.]

1. Section 82 paragraph within brackets substituted and in third paragraph word "subsequent" for "second" by Act VI of Samvat 1996.

2. Word in brackets substituted for "has become payable" by Act VI of Samvat 1986.

3. Words in brackets substituted for "has become payable" *ibid.*

4. Words in brackets substituted for words "if then in his possession or power" by Act VI of Samvat 1996.

5. Words in brackets inserted *ibid.*

84. *Cessation of interest.*—When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or ¹[in the case of a deposit, where no previous tender of such amount has been made] as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, ²[and the notice required by section 83 has been served on the mortgagee :

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.]

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage money ³[and such notice has not been given before the making of the tender or deposit, as the case may be].

Suits of foreclosure, sale or Redemption.

85 to 90. Omitted.

Redemption.

⁴[91. *Person who may sue for redemption.*—Besides the mortgagor, and of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ; or
- (b) any surety for the payment of the mortgage debt or any part thereof ; or

1. Words in brackets added by Act VI of Samvat 1996.

2. Words in brackets inserted *ibid.*

3. Words in brackets substituted for the words “as the case may be” by Act VI of Samvat 1996.

4. Section 91 substituted *ibid.*

- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.]

¹[92. *Subrogation.*—Any of the person referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.]

¹[93. *Prohibition of tacking.*—No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security ; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor whether with or without notice of an intermediate mortgagor, shall thereby acquire any priority in respect of his security for such subsequent advance.]

²[94. *Rights of mesne mortgagee.*—Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.]

²[95. *Rights of redeeming co-mortgagor to expenses.*—Where one of the several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses, properly incurred in such redemption as is attributable to their share in the property.

1. Sections 92, 93 and 94 inserted and section 95 substituted by Act VI of Svt. 1996.

2. See foot note under section 92.

96. Omitted.

97. Omitted.

Anomalous Mortgages.

98. *Rights and liabilities of parties to anomalous mortgages.*—In the case of ¹[an anomalous mortgage], the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend by local usage.

99. Omitted.

Charges.

100. *Charges.*—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained ²[which apply to a simple mortgage shall, so far as may be, apply to such charge.]

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, ³[and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.]

⁴[101. *No merger in case of subsequent encumbrances.*—Any mortgage of, or person having a charge upon, immovable property, or any transferee from such mortgagee or chargeholder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property ; and no

1. In section 98 words in brackets substituted for the words “a mortgage not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage or a combination of the first and third or the second and third or such forms” by Act VI of Samvat 1996.

2. In section 100 words in 1st brackets substituted *ibid* for the words “as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall so far as may be, apply to the persons having such charge”.

3. Added by Act VI of 1996.

4. Section 101 substituted by Act VI of 1996.

such subsequent mortgagee or chargeholder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.]

Notice and Tender.

102. *Service or tender on or to agent.*—Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power of attorney from such person or otherwise duly authorised to accept such service or tender shall be deemed sufficient.

¹[Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

²[Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.]

³[Where no person or agent to whom such tender should be made can be found or is known] to the person desiring to make the tender, the latter person may deposit ⁴[in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. *Notice, etc., to or by person incompetent to contract.*—Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served ⁵[on or by] or tender or deposit made, accepted or taken, by the legal curator

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1. In section 102 words in brackets substitute for the words “Where the person or agent on whom such notice should be served cannot be found in the said district or is unknown” by Act VI of Samvat 1996.
 2. Words in brackets added as proviso by Act VI of Samvat 1996.
 3. Words in brackets substituted for the word “Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown” by Act VI of Samvat 1996.
 4. Words in brackets substituted for the words “in such Court as last aforesaid by Act VI of Samvat 1996.
 5. In section 103 words “on or by” inserted by Act VI of Samvat 1996.

of the property of such person ; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purposes of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract ; and the provisions of Order XXXII of the Code of Civil Procedure, shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

104. *Power to make rules.*—The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

CHAPTER V

Of Leases of Immovable Property

105. *Lease defined.*—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 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.

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

106. *Duration of certain leases in absence of written contract or local usage.*—In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purpose shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six month's notice expiring with the end of a year of the tenancy ; and lease of immovable property for any other purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen day's notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and ¹[either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party], or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. *Leases how made.*—A lease of immovable property for any term exceeding one year, and reserving a yearly rent, exceeding rupees fifty can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession :

Provided that ²[Government] may, from time to time, by notification in the Jammu and Kashmir Government Gazette, direct that leases of immovable property, other than leases for any term exceeding one year, and reserving a yearly rent, exceeding rupees fifty or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

108. *Rights and liabilities of lessor and lessee.*—In the absence of a contract or local usage to the contrary, the lessor and lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property leased :—

(A) *Rights and Liabilities of Lessor.*

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover ;

(b) the lessor is bound on the lessee's request to put them in possession of the property ;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

1. In section 106 words in brackets substituted for the words "tendered or delivered either personally to the party who is intended to be bound by it" by Act VI of Samvat 1996.

2. In section 107 word "Government" substituted "for His Highness" *ibid.*

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease ;

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provisions ;

(f) if the lessor neglects to make within a reasonable time after notice, any repairs which he is bound to make, to the property, the lessee may make the same himself, and deduct the expenses of such repairs with interest from the rent, or otherwise recover it from the lessor ;

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor ;

(h) the lessee may ¹[even after the determination of the lease] remove, at any time ²[whilst he is in possession of the property leased but not afterward] all things which he has attached to the earth : provided he leaves the property in the state in which he received it ;

(i) when a lease of uncertain duration determines by any means except the default of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the

1. Words inserted by Act VI of Samvat 1996.

2. Words substituted for the words "during the continuance of the lease" by Act VI of Samvat 1996.

property when the lease determines, and to free ingress and egress together and carry them ;

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease ;

Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, as to sign his interest as such tenant, farmer or lessee ;

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest ;

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf ;

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left ;

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor ;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell ¹[or sell] timber, pull down or damage buildings, ¹[belonging to the lessor, or] work mines

1. In case (o) words in brackets inserted by Act VI of Samvat 1996.

or queries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto ;

(p) he must not, without the lesser's consent, erect on the property any permanent structure, except for agricultural purposes ;

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. *Rights of lessor's transferee.*—If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

110. *Exclusion of day on which term commences.*—Where the time limited by a lease of immoveable property is expressed as commencing from a particular day in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

When the time so limited is a year or a number of years, in the *Duration of lease for a year.* absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its *Option to determine lease.* expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

111. *Determination of lease.*—A lease of immoveable property determines,—

- (a) by efflux of the time limited thereby ;
- (b) where such time is limited conditionally on the happening of some event-by the happening of such event ;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event– by the happening of such event ;
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right ;
- (e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them ;
- (f) by implied surrender ;
- (g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter ¹[* *] ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; ²[or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event ;] and in ³[any of these cases] the lessor or his transferee ⁴[gives notice in writing to the lessee of] his intention to determine the lease ;
- (h) on the expiration of notice to determine the lease, or to quite, or of intention to quite, the property leased, duly given by the one party to the other.

Illustration to clause (f)

A lessee accept from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

1. Words “or the lease shall become void “ omitted by Act VI of Samvat 1996.

2. Inserted by Act VI of Samvat 1996.

3. Words substituted for the words “either case” by *ibid.*

4. Words substituted for the words “does some act showing”, by *ibid.*

112. *Waiver of forfeiture.*—A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. *Waiver of notice to quit.*—A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased, the notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

114. *Relief against forfeiture for non-payment of rent.*—Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture ; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

¹[114-A. *Relief against forfeiture in certain other cases.*—Where a lease of immoveable property has determined by forfeiture for a

1. Section 114-A added by Act VI of Samvat 1996.

breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

- (a) specifying the particular breach complained of ; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach ; and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of nonpayment of rent.]

115. *Effect of surrender and forfeiture on under-leases.*—The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under lessees, except where such forfeiture has been proceed by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

116. *Effect of holding over.*—If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lessee is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

117. *Exemption of leases for agricultural purposes.*—None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as ¹[Government] may by notification published in the Jammu and Kashmir Government Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local laws, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI

Of Exchanges

118. *“Exchange” defined.*—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.”

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

²[119. *Right of party deprived of thing received in exchange.*—If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.]

120. *Rights and liabilities of parties.*—Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

1. Substituted for “His Highness” by Act VI of Svt. 1996.

2. Section 119 substituted by *ibid.*

121. *Exchange of money.*—On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII

Of Gifts

122. *“Gift” defined.*—“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.

Such acceptance must be made during the life-time of the donor
Acceptance when to be made. and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

123. *Transfer how effected.*—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Explanation.—The word “attest” has the same meaning in this section as in section 59.

124. *Gift of existing and future property.*—A gift comprising both existing and future property is void as to the latter.

125. *Gift to several of whom one does not accept.*—A gift of a thing to two more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

126. *When gift may be suspended or revoked.*—The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked ; but a gift which the parties agree shall be revocable wholly

or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to effect the rights of transferees for consideration without notice.

Illustrations

(a) A gives a field to B, reserving himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's life-time. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. *Onerous gifts.*—Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. *Universal donee*.—Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by ¹[and liabilities of] the donor at the time of the gift to the extent of the property comprised therein.

²[129. *Saving*.—Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect, save as provided by section 123, any rule of Hindu or Buddhist law, or to effect any rule of Mohammedan Law.]

CHAPTER VIII

Of Transferees of Actionable Claims

130. *Transfer of actionable claim*.—(1) The transfer of an actionable claim ³[whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

1. In section 128 words in brackets inserted by Act VI of Samvat 1996.

2. Section 129 substituted by Act V of Samvat 2003.

3. In section 130 words in brackets inserted by Act VI of Samvat 1996.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance ¹[or affects the provisions of section 37 of the Insurance Act.]

Illustrations

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

131. *Notice to be in writing, signed.*—Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorised in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

132. *Liability of transferee of actionable claim.*—The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by to A. In such suit B is entitled to set off the debt due by A to him ; although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

133. *Warranty of solvency of debtor.*—Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence

1. Added by section 81 of the Insurance Act XV of Samvat 1996.

of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

134. *Mortgaged debt.*—Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery ; secondly, in or towards satisfaction of the amount for the time being secured by that transfer; and the residue, if any belongs to the transferor or other person entitled to receive the same.

135. *Assignment of rights under marine or fire policy of insurance.*—Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

136. *Incapacity of officers connected with Courts of Justice.*—No judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims so dealt with by him as aforesaid.

137. *Saving of negotiable instruments, etc.*—Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom, negotiable or to any mercantile documents of title to goods.

Explanation.—The expression “mercantile documents of title to goods” includes a bill of lading, dock-warrant , warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods, any and other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the documents to transfer or receive goods thereby represented.

138. *Transfer of immovable property after due registration.—*

(1) No transfer of immovable property, except in a case governed by any special law to the country, shall be valid unless and until it is in writing registered and ¹[the registration thereof has been completed in accordance with sub-section (3) of section 61 of the Registration Act, 1977.]

(2) No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of sub-section (1).

(3) No person shall take possession of, or commence to build or build on, any land in the Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of sub-section (1).

(4) No person who has obtained a transfer of immovable property referred to in sub-section (1) shall apply for and obtain from any Revenue or Settlement Officer or Court any alteration in any existing entry in any Settlement Record or paper, unless such person produces before such officer or Court a duly executed registered instrument ¹[the registration whereof has been completed in the manner specified in sub-section (1)].

And no such officer or Court shall alter or cause to be altered any such entry except upon the production of an instrument registered ¹[in the aforesaid manner] :

Provided that nothing in this section applies to a lease of agricultural land for one year or to a lease of any other land for a period not exceeding seven years :

Provided also that nothing in sub-sections (3) and (4) shall be deemed to apply to transfers by will or by any rule of *intestate* succession or by the operation of the law of survivorship.

139. *Saving of certain Regulations, Hidayat, Resolution etc.—*

(1) Nothing in this Act shall affect any Regulation, *Hidayat*, Resolution, *Ailan*, Rule or valid custom now in force restricting and regulating transfer of immovable property in any part of the Jammu and Kashmir State or any right therein, or confer any right, or rights of transfer expressly taken away or restricted by any such enactment.

1. Words in brackets in section 138 substituted by Notification No. 2-1/83 published in the Government Gazette dated 5th Jeth, 1983 (Ext.) These amendments were to take effect from 20th Assuj, 1982 (5th October, 1925).

(2) In particular and without prejudice to the generality of the provisions of sub-section (1) the restrictions and rules contained in the following shall be observed :-

- (i) No. 104 of 1893.
- (ii) State Council Resolution No. 17 of 22nd June, 1895.
- (iii) State Council Resolution No. 9 of 12th October, 1895.
- (iv) State Council Resolution No. 52 of 9th October, 1897.
- (v) Ailan No. 18 of 3rd Poh, 1964.
- (vi) Hidayat under section 73 regarding alienation sanctioned by his Highness and conveyed under Chief Minister's letter No. 2301 of 21st July, 1916.
- (vii) Hidayat No. 185/298 of 24th Magh, 1973.
- (viii) State Council Resolution No. 37 of 24th August, 1896.
- (ix) Ailan No. 9 of 13th Assuj, 1963.
- (x) Ailan No. 4 of 18th Baisakh, 1975.
- (xi) State Council Resolution No. 2 of 29th October, 1903.
- (xii) State Council Resolution No. 18 of 21st August, 1905.
- (xiii) State Council Resolution No. 48 of 30th December, 1898.
- (xiv) Chief Minister's letter No. 9470 of 11th November, 1909 about transfers of land in Mirpur.
- (xv) Chief Minister's letter No. 280 of 26th April, 1915, about transfers of agricultural lands in the Tehsils of Mirpur, Bhimber and Sri Ranbirsingpura in the Province of Jammu ; (tentative)
- (xvi) S. C. R. No. 48 of 27th March, 1893.
- (xvii) S. C. R. No. 36 of 10th February, 1903.
- (xviii) Irshad dated 29th Maghar, 1943.

- (xix) Irshad dated 23rd Magh, 1962
- (xx) Irshad No. 742/613 dated 10th Phagan, 1958.
- (xxi) Irshad No. 276 dated 17th Chet, 1947.
- (xxii) Irshad No. 258/278 dated 22nd Maghar, 1957.
- (xxiii) Irshad dated 15th Baisakh, 1966.
- (xxiv) Irshad of 27th Poh, 1951.
- (xxv) Irshad No. 13 of 18th Chet, 1949.
- (xxvi) S.C.R. No 50 dated 7th September, 1900.
- (xxvii) Irshad No. 151/258 dated 27th Sawan, 1972.
- (xxviii) Irshad No. 760/2076 dated 4th Phagan, 1974.
- (xxix) Irshad No. 254/23 dated 24th Sawan, 1973.
- (xxx) Irshad of 19th Baisakh, 1966.
- (xxxi) Hidayat (Settlement Department) of 1966.
- (xxxii) Irshad of 2nd Bhadon, 1970.
- (xxxiii) Irshad of 30th Jeth, 1968.
- (xxxiv) Ailan No. 11 of 24th August, 1896.

¹[Nothing in any of the following provisions of this Act, namely:—
Saving clause. Sections 3, 4, 9, 10, 15, 18, 19, 27, 30, clause (c)
of section 31, sections 32, 33, 34, 35, 46, 52, 55, 57,
58, 59, 61 and 62 shall be deemed in any way to effect:—

(a) the terms or incidents of any transfer of property made or effected before the date of enforcement of the Transfer of Property (Amendment) Act, 1996.

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date ;

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date ; or

1. Saving clause to section 139 added by Act VI of Samvat 1996.

(d) any remedy or proceeding in respect of such right, title, obligation or liability ;

and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before such date as aforesaid in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be endorsed, instituted or continued , as the case may be, as if this Act had not been passed.]

THE SCHEDULE—Omitted.

¹[140. *Exemptions of certain instruments from restriction imposed on transfer of immovable property.*—Nothing contained in Irshad dated 29th Maghar, 1943 or any law rule, order, notification, regulation, hidayat, ailan, circular, robkar, yadasht, irshad, State Council resolution or any other instrument having the force of law prohibiting or restricting the transfer of immovable property in favour of a person who is not a permanent resident of the State shall apply to—

²[(a) a mortgage of immovable property other than land as defined in the Jammu and Kashmir Alienation of Land Act, Samvat 1995, in favour of—

- (i) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 (31 of 1956) and having an office for transacting the business in the State ; or
- (ii) the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948 ; or
- (iii) the Jammu and Kashmir State Financial Corporation established under the State Financial Corporation Act, 1951 ; or
- (iv) the Jammu and Kashmir Bank Ltd. or the Industrial Development Bank of India or a Bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and having an office for transacting the business of banking in the State ; or

1. Section 140 substituted by Act XXVI of 1961. It was inserted by Act XX of 1961 A. D.

2. Clauses (a) and (aa) of section 140 substituted by Act VII of 1975 A. D.

- (v) the Industrial Credit and Investment Corporation of India ; or
- (vi) the Housing and Urban Development Corporation Ltd., New Delhi ; or
- (vii) The Unit Trust of India :
- ¹[(viii) The Jammu and Kashmir Housing Board constituted under the Jammu and Kashmir Housing Board Act, 1976 :

Provided that in any suit based on such mortgage the mortgaged property shall be sold only to a permanent resident of the State] ; or

²[(ix)the Jammu and Kashmir Development Finance Corporation Limited] ;

³[(aa) a simple mortgage of land in favour of—

- (i) the Jammu and Kashmir Bank Ltd. or the Industrial Development Bank of India or a Bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and having an office for transacting the business of banking in the State ; or
- (ii) the Jammu and Kashmir State Financial Corporation established under the State Financial Corporation Act, 1951 ; or
- (iii) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 ; or
- (iv) the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948 ; or
- (v) the Industrial credit the Investment Corporation of India ; or
- (vi) the Housing and Urban Development Corporation Ltd., New Delhi ; or
- (vii) the Unit Trust of India ; or

1. Sub-clause (viii) to clause (a) inserted by Act XXII of 1985.

2. Sub-clause (ix) inserted by Act XII of 2013.

3. Clause (aa) substituted by Act VII of 1975.

¹[(viii) the Jammu and Kashmir Housing Board constituted under the Jammu and Kashmir Housing Board Act, 1976 ;]

²[(ix) The Housing Development Finance Corporation Limited
³[x x x]; or

⁴[(x) The Jammu and Kashmir Scheduled Castes and other Backward Classes Development Corporation Limited registered under the Companies Act, 1956] ;

⁵[(xi) The Jammu and Kashmir Police Housing Corporation Limited, Jammu/Srinagar ; or

⁶[(xii) The Jammu and Kashmir Development Finance Corporation Limited :

Provided that in any suit based on such mortgage the mortgaged land shall be sold only to a permanent resident of the State, who is a member of an agricultural class for purposes of the Jammu and Kashmir Alienation of Land Act, Svt. 1995] ;

(b) a transfer of immovable property situate and Katra and the village contiguous to it in favour of the Vishwayatan Yogashram, a Society registered under the Societies Registration Act, 1860 (Central Act No. 21 of 1860) effected in furtherance of the declared purpose of the Society.]

⁷[(c) A transfer of immovable property in favour of Sher-i-Kashmir National Medical Institute Trust, Srinagar.]

⁸[(d) a transfer of immovable property situate in District Udhampur acquired or requisitioned on behalf and at the expense of the Union, in favour of National Hydroelectric Power Corporation Limited for construction, commissioning, running and maintenance of the Salal Hydroelectric Project.]

⁹[(e) a transfer of immovable property by the Government in favour of—

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1. Sub-clause (viii) to clause (aa) inserted by Act XXII of 1985, s.2.
 2. Sub-clause (ix) to clause (aa) added by Act XI of 1989, s-2.
 3. Words “New Delhi omitted by Act VII of 2004, s. 2.
 4. Sub-clause (x) inserted by Act XXVII of 1977, (s-2.)
 5. Added by Act VII of 1999, s. 2.
 6. Sub-clause (xii) to clause (aa) inserted by Act XII of 2013, s. 2.
 7. Clause (c) added by Act IX of 1976, s-2.
 8. Clause (d) added by Act XXII of 1978, s. 2.
 9. Clause (e) added by Act XIII of 1981.

- (i) the Jammu and Kashmir Tourism Development Corporation Ltd. ;
- (ii) the Jammu and Kashmir Industries Ltd. ;
- (iii) the Jammu and Kashmir Minerals Ltd. ;
- (iv) the Jammu and Kashmir State Industrial Development Corporation Ltd. ;
- (v) the Jammu and Kashmir Handicrafts (State and Export) Corporation Ltd. ;
- (vi) the Jammu and Kashmir Road Transport Corporation Ltd. ;
- (vii) the Jammu and Kashmir Agro Industries Corporation Ltd. ;
- (viii) the Jammu and Kashmir Projects Construction Corporation Ltd. ; or
- (ix) the Jammu and Kashmir Bank Ltd. ;

¹[(x) the Jammu and Kashmir Energy Development Agency] ;

²[(f) a simple mortgage of immovable property in favour of—

- (i) Hindustan Machine Tools, Watch Factory, Zainakot, Srinagar ;
- (ii) Orient Insurance Company Limited, having an office for transacting the business in the State ;
- (iii) New India Assurance Company Limited having an office for transacting the business in the State ;
- (iv) National Insurance Company Limited having an office for transacting the business in the State ;
- (v) United India Insurance Company Limited having an office for transacting the business in the State ; or
- (vi) Indian Telephone Industries Limited, Hyderopora, Srinagar,

by their employees respectively, who are permanent residents of the State, for obtaining loan for construction or purchase of residential accommodation in the State :

Provided that in any suit based on such mortgage, the mortgaged property shall be sold only to a permanent resident of the State] ;

³[(g) a transfer of immovable property in favour of—

1. Sub-clause (ix) inserted by Act IX of 2018 w. e.f. 07-08-2017.

2. Clause (f) substituted by Act XIII of 1987.

3. Clause (g) added by Act XXIII of 1987, s.2.

(i) Sher-i-Kashmir University of Agricultural Sciences and Technology, established and incorporated under the Sher-i-Kashmir University of Agricultural Science and Technology Act, 1982, in furtherance of the objects of the University ;

(ii) Jammu and Kashmir Small Scale Industries Development Corporation Limited and Jammu and Kashmir State Industrial Development Corporation (State owned Corporations) for industrial development in the State.]

¹[(iii) the Jammu and Kashmir State Cable Car Corporation ;

²[(iv) the Jammu and Kashmir Bank Limited ;

³[(v) the Jammu and Kashmir State Power Development Corporation Limited] ;

⁴[(vi) the Jammu and Kashmir Energy Development Agency] ;

⁵[(h) A simple mortgage of immovable property executed or created in favour of a public financial institution, as specified in section 4-A of the Companies Act, 1956, a scheduled bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and the Trustees for the holders of debentures to secure the loans, guarantees, issue of debentures or other form of financial assistance provided for developmental projects in the State of Jammu and Kashmir like Baghliar Project of Jammu and Kashmir State Power Development Corporation Limited :

Provided that in any suit based on such mortgage the mortgaged property shall be sold or transferred only to ⁶[is permanent resident of the State or any financial institution or corporation managed and owned by the Government of India].

⁷[(i) a lease of immovable property in favour of-

1. Added by Act X of 1998 (s-2.)

2. Added by Act VII of 1999 (s-2)

3. Sub-clause (v) added by Act No. VII of 2004, s. 2.

4. Sub-clause (vi) inserted by Act IX of 2018, s. 3, w.e.f. 7th August, 2017.

5. Clause (h) inserted. by Act XX of 2002, s. 2.

6. Substituted for the words "permanent residents of the State" by Act VII of 2004.

7. Sub-clause (i) inserted by Act VII of 2004, s. 2.

- (i) Shri Mata Vaishno Devi University established under the Jammu and Kashmir Shri Mata Vaishno Devi University Act, 1999 ; and
- (ii) Baba Ghulam Shah Badshah University established under the Jammu and Kashmir Baba Ghulam Shah Badshah University Act, 2002,

for fulfilment of the objectives of the University] ;

- ¹[(j) a lease of immovable property in favour of the Jammu and Kashmir Chenab Valley Power Projects (Private) Limited for construction, commissioning, maintenance and running of three Hydro Electric Projects, viz. Pakaldul, Kiru and Kawar :

Provided that the maximum period of lease shall not exceed 40 years] ;

- ²[(k) a lease of immovable property in favour of the State Branch of the Indian Red Cross Society, a society registered under the Societies Registration Act, 1860 (Central Act No. 31 of 1860) for construction of its office required for fulfilment of objectives of the said society.]

1. Clause (j) inserted by Act VIII of 2012, s. 2.
2. Clause (k) added by Act XII of 2013, s. 2.