**TRANSFER OF PROPERTY Section 5,6,7**

Section 5 of the Act defines “Transfer of Property” as “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 other living person, or to himself, and one or more other living persons, and “to transfer property” is to perform such act.

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.”

The word “property” has not been defined in the Act, but it has a very wide meaning and includes properties of all descriptions. It includes movable properties such as case, books, etc., and includes immovable properties also such as lands or houses. It also includes intangible properties such as ownership, tenancy, copyrights, etc.

The word ‘transfer’ has also very wide meaning. It may be either transfer of all the right and interests in the property or transfer of one or more of subordinate right in the property.

The transfer of property may be made to take place with immediate effect or to take place         on a future date; however the property must be in existence at the date of transfer. There can be no transfer of future property. The expression ‘in present or in future’ governs the word ‘conveys’ and not the word ‘property’, e.g., A transfers his property to B for life and then to C. The transfer in favour of B is present (although he gets only life interest) but the transfer in favour of C is future transfer.

The transfer of property as defined under Section 5, is an act between two living persons. Thus the conveyance of the property must be from one living person to another living person. However transferee need not be a competent person like transferor. A transferee may be a minor, insane or child in mother’s womb.

The word “living person” includes corporations and other association of person. A transfer can be made by a person to himself, as for instance when a person vests property in trust and himself becomes the whole trustee.

**Kinds of Transfer**

The Act contemplates the following kinds of transfers: (1) Sale, (2) Mortgage, (3) Lease (4) Exchange, and (5) Gift. Sale is an out-and-out transfer of property. In mortgage, there is a transfer of limited interest in property. A lease is a transfer of a right to enjoy immovable property for a certain time or in perpetuity. Exchange is like a sale, but differs from it as regards the consideration. In sale, the consideration is money, while in exchange, the consideration is another thing. In a gift, there is no consideration.

In *Harish Chandra v. Chandra Shekhar,* AIR 1977 All 44 , it was held that a realease-deed is a conveyance, hence a transfer of property. If the release deed states that the releaser was the owner and it shows an intention to transfer his title and its operative word sufficiently was the conveyed the title it would amount to transfer.

**Transfer of Property Act, 1882 not amounting to Transfer of Property**

As the transfer of property’ means ‘conveying of property’, i.e., creation of new title or interest in the favour of the transferee, if new title or interest has not created in favour of transferee , the property cannot be said to be conveyed, thus no transfer of property.

1. Partition- As nothing new is obtained by a co-sharer on partition, it is not a transfer of property. His specific share, which vested in him earlier, is simply separated.
2. – The only right created in a charge is a right to payment out of the property subjected to charge, thus it is not a transfer. [*Gobind Chandra v. Dwarka Nath,* (1908) 35 Cal 837]
3. Relinquishment:—It is an extinction of a right and therefore, there is nothing left to transfer. Thus a relinquishment by a reversioner of his reversionary interest does not amount to      transfer (Barati Lal V. Salik Ram, 38 All 107). But if the person in whose favour the ‘release’ is executed, gets certain rights by virtue of such release, the transaction may amount to a transfer [Maniapp pillai v. Periasami, (1975) 1 MU 236].
4. Surrender.—It is not a transfer as it is the manager of a lesser estate with a greater one [Multhan Lal Saha v. Nagendra Nath Adhikari, (1933) 60 Cal 379].
5. Easement.—The creation of an easement does not amount to a transfer.
6. Will.—Because it operates from the death of the person making it, while the definition contemplates a transfer by a living person, does not fall within the definition of transfer.
7. Compromise.—It may or may not amount to transfer. It depends on the facts and circumstances of each case. In *Hussiaa Banu v. Shivanarayan*, AIR 1968 MP 307, it was held that where one of the parties to a settlement gives up a claim to receive a certain sum of money from the other, in consideration of the latter’s given up the right to certain property claimed by him, it would amount to a transfer.
8. Family arrangement/settlement.— A family settlement entered into by the parties for the purpose of putting an end to the disputes among family members does not amount to transfer, not being an alienation it does not amount to the creation of an interest.

**What may be Transferred**

Section 6—”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.”

This section enumerates different kinds of property which cannot be transferred (Exceptions to Section 6)—-

1. **Spes Successionis** [Section 6(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.”

A mere possibility/chance/expectancy of an, heir succeeding to an estate is excluded from the category of transferable property, e.g., A a Hindu, dies leaving a widow B and On two C. C has only a spes successionis, as his succession to the estate is dependant on 2 factors, i.e., his surviving the widow B, and B leaving the property intact.

1. **Right of Re-entry.** [Section 6(b)] “A mere right of a re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.

By a Mere given to right of re-entry meant a right to resume possession of-land which has been given to another person for a certain time. It is usually inserted in lease empowering the lessor to re-enter up a breach of covenants in the lease.

(a) A grants a lease of a plot of land for 5 years to B with the condition that B shall not dig a tank on the land. B digs the tank. A relates to transfer C the right of re-entry for the breach of the condition committed by B. The transfer is invalid.

(b) A grants a lease of plot for 5 years to B. Subsequently A transfers his right of  re-entry at the expiry of 5 years to C. The transfer  is valid as at the expiry of lease the right of reentry is transferred along with the land to   .

1. **Easement [Section 6(c)]— “** An easement cannot be transferred apart from the dominant heritage.”

An easement B a right to use, or restrict the use of land of another in some way, for example, right of way, right of water or light, etc. (Section 3 Easement Act). These right cannot be transferred without the property which has the benefit of it.

1. **Restricted Interest [Section 6(d)]**.—”An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him”

E.g., if a house is lent to a man for his personal use, he cannot transfer his right of enjoyment to another. Similarly a religious office like those of mutawali of a wakf or of mahant of a math and emoluments attached to priestly office cannot be transferred. ,

1. **Maintenance [Section 6(dd)].—”**A right to future maintenance, in whatsoever manner arising secured or determined, cannot be transferred.”

A right to future maintenance is only for the personal benefit of the person to whom it is granted, thus it cannot be transferred.

1. **Mere right to sue [Section 6(e)]** —”A mere right to sue cannot be transferred.”

A right to sue is personal to the party aggrieved, as for, e.g., damages for the breach of contract or for tort, claims for past mesne profit for suing an agent for accounts, for pre-emption, etc. These rights cannot be transferred. But where the right to sue has merged in a decree, the right under the decree is assignable. Thus, a right to mesne profit or damages under a decree is assignable.

1. **Public office [Section 6(f)]**.—”A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.”

Thus prohibition is based on the ground of public policy as the public office is held for qualities personal to incumbent.

If the office is not public, it would be transferable, even though the discharge of its duties should be indirectly beneficial to the public.

1. **Pensions [Section 6(**g)—"Stipends allowed to military, naval, air force and civil pensioners of the government and political pensions cannot be transferred, pension means a periodical allowances or stipend granted not in respect of any right of office but on account of part services of particular merits. Section 60 of CPC also exempts a pension from attachmet in execution of degree against the pension holder.
2. **Nature of Interests [Section 6(N)].** —”No transfer can be made (1) in so far as it opposed to the nature of the interest affected thereby, or (2) for an in so far unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be a transferee. “

This clause forbids the transfer of certain things which from their very nature are not transferable, e.g., *res communes* (things of which no one in particular is the owner and may be used by all men), *res nullius* (things belonging to nobody).Res extra commercium (things thrown out of commerce)

Again, any property otherwise transferable becomes non-transferable when the object or the consideration of the transfer is unlawful (within. the meaning of Section 23, Indian Contract Act).

Lastly, a transfer cannot be made in favour of a person who is disqualified to be a transferee.

1. **Un-transferable interests [S[Section 6(i)]��**Nothing in this section shall be deemed to authorise a tenant having an un transferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, on the lessee of an estate, under the management of a court of wards to assign his interest such as such tenant farmer or lessee.”

**Persons Competent to Transfer**

Section 7 of the Act provides that, “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.”

**Operation of Transfer**

Section 8 of the Transfer of Property Act provides transfer of different kinds of property and their legal incidents. It provides, “Unless different intention is expressed or necessarily implied, a transfer of property passes for with the transferee all the interest which the transferor is then capable of passing in the property and in the legal incident thereof.

Such incidents include where the property is land, the easement annexed thereto, the rent and profits thereof accruing after the transfer and all things attached to the earth;

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 the 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.”

**Transfer by Persons before they Acquire the Interest**

Section 6(a) of the Act provides certain things which are non-transferable (spes sucessionis). These are as follows—

* the chance of an heir-apparent succeeding to an estate,
* the chance of a relation obtaining a legacy on the death of a kinsman,
* any other mere possibility of a like nature.

**(i) Chance of an Heir Apparent**

Both Hindu and Muslim law forbids transfer of the expectancy. A mere possibility or expectancy of a heir succeeding to an estate is excluded from the category of transferable property. Thus a Hindu reversioner has no right or interest. In presents in the property which the female owner holds for her life, e.g.:

A dies leaving two widows and a reversionary heir B. The widows set-up a Will which authorised them to adopt a son. B filed a suit challenging the validity of the Will and in order to raise money for the litigation transferred his share to C. The court set-aside the Will. On the death of the widows B entered possession of A’s estate. C sued B but C’s suit was dismissed as B, at the time of transfer, had spes successionis in A’s estate and, therefore, could not transfer it.

**(ii) Chance of Legacy**

The chance of a relation receiving a legacy is a possibility even more remote then the chance of succession of an heir, and therefore, is not transferable.

**(iii)Other Possibilities of Like Nature**

Such possibilities which belongs to the same category as the chance of an heir apparent or the chance of a relation obtaining a legacy, e.g. The possibility of winning a lottery or a prize in a certain competition cannot be transferred. A good illustration of this category is the ‘next cast in a fisherman’s net’. No one can guarantee that any fish will be caught, and the fisherman himself has no interest in the fish until they are caught in his net.

**Transfer by Unauthorised Person (Doctrine of feeding empty grant by estoppel)**

A person who has no title or interest in an immovable property, cannot transfer that property. Transfer by such person is a transfer by unauthorised person. Section 43 of the Act provides the effect when such unauthorised person subsequently acquires interest in property transferred.

Section 43. Transfer by unauthorised persons who subsequently acquires interest property transferred-where a person 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 reported 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.

The general rule of n*emo dat quod non habet* (no one can give to another, what he himself does not have) has been relaxed through this section. The principle of this section is based partly on the English doctrine of estoppel by deed and partly on the equitable doctrine that a person who has promised more than he can perform must make good his promise when he acquires the power of performance.

For application of this section requisites must be satisfied—

* There must be fraudulent or erroneous representation of ownership by the transferor.
* Transfer must be by the wrong owner.
* Transferee must act on that false representation, in good faith.
* Transfer is for the consideration.
* Transfer subsequently acquires some interest in that property which he professed to transfer.
* The contract of transfer still subsists.

Subsequently acquired interest does not pass automatically to transferee but only when he claims the right in such property.

The exception to this section (Second paragraph of Section 43) protects the rights of the record transferee in good faith and for consideration who has no notice of the option in favour of the first transferee.

**Section 6(a) and Section 43 compared**

Section 6(a) and Section 43 seems to conflict each other. Where Section 6(a) deals with spes-successionis and sender mere possibility/expectancy of a heir succeeding to an estate as an un-transferable property, through Section 43, such transfer can be made effective if transferor subsequently acquires those property and other conditions satisfied.

In Jamma Masjid v. K. Deviah, AIR 1962 SC 847 Supreme Court explained the relationship between two sections. Court said that Section 6(a) and Section 43 relate to two different subjects and that there is no necessary conflict between them. Section 6(a) would apply where there is a transfer of a mere spes successionis and the party knowing that the transferor has no more right than that of a mere expectant heir Section 43 applies where an erroneous representation is made by the transferor to the transferee that he is the full owner of property and authorised to transfer it.

Supreme Court held that Section 6(a) enacts a rule of substantive law while Section 43 enacts a rule of estoppel which is one of evidence. Thus, these two provisions operate on different fields and under different conditions and there is no ground for reading a conflict between or cutting one b reference to the other. Each of them can be given full effect on their down the ambit of their own terms in their respective spheres.