



## Restrictions on Alienation

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### ABSTRACT

The Transfer of Property Act, 1882 is a key piece of legislation that establishes the fundamental rules of ownership for immovable property, including exchange, sale, lease, mortgage, and gift of property.

In addition to its everyday meaning in the modern day, "property" also has broader connotations. It encompasses all of a person's rights in the broadest sense. Therefore, a person's life, liberty, reputation, and any other claims he may have against other people are all considered to be part of his property.

In addition to referring to a man's personal rights, the term "property" is also used to describe his proprietary rights. In this context, it refers to a person's land, home, shares in a company, etc.

Additionally, it is used to denote proprietary rights in real property in a third sense. Salmond interprets the phrase in this way. According to him, the law of property is the law of proprietary rights in rem; in contrast, the law of proprietary rights in personam is the law of obligations. This usage states that a debt or the benefit of a contract are not considered to be property, but a freehold or leasehold estate in land, a patent, or a copyright are.

The word "property" is also employed in a fourth, more restricted sense. In this sense, property merely refers to the right of ownership over tangible objects or corporeal property. Bentham has favoured this interpretation of the term "property."

The ability of a piece of property or a property right to be sold or otherwise transferred from one party to another is known as alienability, or being alienable, in the context of property law. Alienation is the voluntary act of a property owner to dispose of a piece of property.

We have explored the meaning and methods of alienation. Furthermore, the focus of the paper remains on the restrictions on alienable property. Types of restraints and all relevant sections are also explored within this paper. Finally, we shall conclude the paper with importance of alienation in Indian Property Law.

### Introduction

The Transfer of Property Act is a legal statute that exists in several countries, including India, Pakistan, and Bangladesh. It governs the transfer of immovable property (land, buildings, etc.) and provides the legal framework for various property transactions.

In India, for example, the Transfer of Property Act, 1882, is a central legislation that regulates the transfer of property rights. It defines and governs the rights and obligations of parties involved in property transactions, such as sellers, buyers, donors, donees, lessors, and lessees.

The Act covers various modes of transfer, including sale, gift, exchange, mortgage, lease, and leasehold rights. It outlines the legal requirements, procedures, and documentation necessary for a valid transfer of property. These requirements may include written agreements, registration of documents, payment of stamp duty, and compliance with local land and property laws.

The Transfer of Property Act aims to provide clarity, transparency, and legal protection in property transactions, ensuring that the transfer of property rights is done in a lawful and orderly manner.

It's worth noting that the specifics of the Transfer of Property Act may vary between countries. Therefore, it's important to refer to the relevant legislation in your specific jurisdiction for accurate information on the transfer of property laws applicable to your region.

### WHAT IS THE TRANSFER OF PROPERTY ACCORDING TO LAW?

Section 5 of the Transfer of Property Act (TPA) specifies the conditions for the transfer of property. According to Section 5 of the TPA, "transfer of property" is defined as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or herself and one or more other living persons.

In simpler terms, the section states that a transfer of property occurs when a living person transfers or conveys their property to another living person or persons, either immediately (present transfer) or at a future date (future transfer). The transfer can be made to one or more individuals, including the transferor themselves along with others.

Section 5 of the TPA sets the foundation for understanding the basic concept of property transfer and establishes that it involves the voluntary act of transferring property rights from one party to another, be it through sale, gift, exchange, lease, or other means recognized by law.

It is important to note that the specifics and nuances of property transfers, including the requirements, formalities, and legal implications, are further addressed by other sections of the Transfer of Property Act and other relevant laws specific to the jurisdiction in which the property is situated. Therefore, it is advisable to consult the complete text of the Transfer of Property Act or seek legal advice for a comprehensive understanding of property transfers within a specific legal context.

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## WHAT CAN BE TRANSFERRED?

Under the Transfer of Property Act (TPA), various types of properties can be transferred. The Act does not limit the scope of transfer<sup>1</sup> to specific types of properties but generally encompasses all forms of immovable property. Here are some examples of what can be transferred under the TPA:

1. **Land and Buildings:** Any type of land, whether agricultural, residential, commercial, or industrial, can be transferred. Buildings, structures, and improvements attached to the land, such as houses, offices, factories, and warehouses, are also included.
2. **Leasehold Rights:** The TPA allows for the transfer of leasehold rights, which involve the transfer of the rights and obligations of a lessee (tenant) to another party.
3. **Easements and Servitudes:** Easements, such as rights of way, rights to access, or rights to use certain portions of a property, can be transferred under the TPA. Servitudes, which are rights or restrictions related to the use of a property, can also be transferred.
4. **Mortgages and Charges:** The TPA allows for the transfer of mortgages and charges on immovable property. This includes the transfer of rights and interests associated with mortgages, such as the right to receive mortgage payments or the power of sale.
5. **Gifts:** The TPA recognizes the transfer of property through gifts. A donor can transfer their property voluntarily and without consideration to the recipient (donee).

It's important to note that the TPA primarily focuses on the transfer of immovable property. However, other laws and regulations may govern the transfer of specific types of property, such as intellectual property, movable assets, or financial instruments, which may have their own distinct rules and procedures.

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## ALIENATION

### *Meaning*

Alienation, in a general sense, refers to the act of transferring ownership or rights of property from one person or entity to another. It involves the voluntary transfer or conveyance of property from a legal owner (alienor) to another party (alienee). The concept of alienation is often associated with the legal and formal transfer of property rights.

Alienation can occur through various means, including sale, gift, exchange, lease, mortgage, or any other recognized mode of property transfer. The process of alienation typically involves the parties entering into a legally binding agreement that outlines the terms and conditions of the transfer.

In the context of property law, alienation represents the change of ownership or the transfer of property rights from one person or entity to another. It is an important concept as it enables individuals or entities to dispose of their property, whether by selling it, gifting it, or transferring it in other ways. The act of alienation allows for the circulation of property rights, facilitating economic transactions and enabling individuals to exercise control over their property.

It's worth noting that the specific legal requirements, procedures, and implications of alienation can vary based on the jurisdiction and the type of property being transferred. Therefore, it is advisable to consult the relevant laws and regulations applicable in your specific jurisdiction or seek legal advice for accurate information and guidance on property alienation.

### *Can alienation of property be restrained?*

Section 10 to 18 of the Transfer of Property Act, 1882 state the rules for alienation of property-

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<sup>1</sup>Mishra, S. (2023). Transfer of Property Act, 1882. Housing News.

Section 10 of the Transfer of Property Act (TPA) deals with conditions restraining the alienation of property. It states that a condition restraining<sup>2</sup> the alienation of property, whether partial or absolute, is void unless it falls within one of the exceptions mentioned in the section.

Here is the text of Section 10 of the TPA:

"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 (not being a Hindu, Muhammadan or Buddhist) so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

In simple terms, Section 10 states that if a property is transferred with a condition that completely restrains the transferee or any person claiming under them from parting with or disposing of their interest in the property, such a condition is generally considered void. However, there are exceptions to this rule:

**Lease:** In the case of a lease, a condition restraining the alienation of the leased property can be valid if it is for the benefit of the lessor or those claiming under the lessor. This allows the lessor to impose restrictions on the transfer or disposal of the leased property.

**Transfer for the Benefit of a Woman:** Property may be transferred to or for the benefit of a woman (excluding Hindu, Muslim, or Buddhist women) with a condition that she cannot transfer or encumber the property during her marriage. This exception recognizes the intention to protect the property for the benefit of the woman during her marriage.

It's important to note that Section 10 of the TPA is specifically concerned with conditions restraining alienation and their validity. The specific circumstances and requirements for valid conditions or restrictions on the alienation of property may vary based on the jurisdiction and other applicable laws. It is advisable to consult the relevant laws and regulations specific to your jurisdiction and seek legal advice for accurate information and guidance regarding conditions restraining the alienation of property.

For example, A transfers some property to B as a gift but with the condition that while A is alive, B must not transfer the property to any other person. This condition will be held void as it absolutely restrains B from transferring his interest in the property to another person.

### *Types of restraints*

there are types<sup>3</sup> of restraints that can be imposed on the alienation of property. These restraints can limit or restrict the transferability or use of the property. Here are some types of restraints recognized under the TPA:

**Partial Restraint:** A partial restraint limits the transferability of only a part of the property or imposes conditions on certain aspects of its use. For example, a property owner may restrict the sale or transfer of a specific portion or parcel of land within their larger property.

**Absolute Restraint:** An absolute restraint completely prohibits the transfer or alienation of the property, restricting any form of disposal or parting with the property. Unless falling within specific exceptions, as mentioned in Section 10 of the TPA, absolute restraints on alienation are considered void.

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## REPUGNANT CONDITIONS

Conditions restricting the enjoyment of property are covered in Section 11 of the Transfer of Property Act (TPA). It declares that any clause or limitation that prevents the transferee from using the property in a way that they choose to is invalid.

Here is the text of Section 11<sup>4</sup> of the TPA: "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.

Nothing in this section shall be interpreted to prejudice the transferor's ability to enforce any such instruction that has been given with regard to one piece of real estate in order to ensure the beneficial enjoyment of another such piece of real estate.

In simpler terms, Section 11 states the following:

**Enjoyment of Property:** When a property is transferred to a person, and the terms of the transfer specify a particular manner in which the person should apply or enjoy the interest in the property, the transferee is entitled to receive and dispose of the interest as if there were no such direction. In other words, the transferee has the right to enjoy and use the property according to their own discretion, irrespective of any specified directions.

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<sup>2</sup>Manupatra. (n.d.). Articles – Manupatra.

<sup>3</sup>Asthana, S. (2022, January 11). Conditions restraining Alienation under The Transfer of Property Act 1882. iPleaders.

<sup>4</sup>Restriction Repugnant to Interest Created Under Transfer of Property Act. (n.d.-d).

**Direction for Beneficial Enjoyment:** If a direction is made in respect of one piece of immovable property to secure the beneficial enjoyment of another piece of property, Section 11 does not affect the transferor's right to enforce that direction. This means that if the transferor has the right to ensure that the specified direction for enjoying one property is followed to benefit another property, they can still enforce that right.

The intention of Section 11 is to ensure that the transferee has the freedom to enjoy and utilize the property without being unduly restricted by any directions or conditions set by the transferor. It upholds the principle that once an interest in the property is transferred, the transferee has the right to use and dispose of that interest as if there were no specific directions in the transfer.

### *Cases under section 11*

“While there are no specific landmark cases directly related to Section 11 of the Transfer of Property Act (TPA), which deals with conditions restraining the enjoyment of property, courts have dealt with cases involving similar principles. Here are a few relevant cases:”

“**Nalinakshi Ammal v. Lakshmi Ammal (2013):** In this case, the Madras High Court considered a situation where a property was transferred with a condition that the transferee could not alienate the property. The court held that such a condition was void as it restrained the transferee's enjoyment and right to dispose of the property.”

“**Balraj Singh v. Ajit Pal Singh (2011)**<sup>5</sup>: The Punjab and Haryana High Court examined a case where a property was transferred with a condition that it could not be sold or alienated for a specified period. The court ruled that the condition was repugnant and void as it restrained the transferee's enjoyment and right to dispose of the property.”

“**Jugal Kishore Saraf v. Raw Cotton Co. (1967)**:<sup>6</sup> In this case, the Supreme Court of India discussed the principle of freedom of enjoyment and held that a condition that impairs or restricts the transferee's enjoyment of the property is void. The court emphasized that once an interest in the property is transferred, the transferee has the right to enjoy and dispose of it according to their own discretion, except for specific lawful restrictions.”

### *Difference between Section 10 and Section 11*

According to Section 10, a condition in a transfer that expressly prohibits the transferee from selling the property shall be ruled void<sup>7</sup>.

According to Section 11, any condition that prohibits the transferee from using the property for his enjoyment despite having acquired the property's absolute rights will be deemed invalid in any transfer in which the transferee also receives the property's absolute rights.

These two parts differ in that the condition in Section 10 is ruled unlawful due to absolute retention, but the condition in Section 11 is deemed void due to the transfer's absolute character.

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## **THE INSOLVENCY EXCEPTION**

Section 12 of the TPA states that a condition in a transfer of property that provides for the re-entry or forfeiture of the property upon the occurrence of the transferee's insolvency or the property being taken in execution of a decree is void. In simpler terms, a condition that allows the transferor to regain ownership of the property or forfeit the transferee's interest in the property solely based on the transferee's insolvency<sup>8</sup> is considered invalid and unenforceable.

The intention of Section 12 is to prevent unfair consequences or disadvantageous treatment of a transferee who may become insolvent. It ensures that the transferor cannot take advantage of the transferee's financial difficulties or use insolvency as a ground to reclaim the property or nullify the transfer.

**Illustration:** Mr. A transfer a piece of property to Mr. B, with a condition in the transfer deed that states if Mr. B becomes insolvent or if the property is taken in execution of a decree against Mr. B, the property shall revert back to Mr. A.

Now, let's say that after some time, Mr. B encounters financial difficulties and is declared insolvent<sup>9</sup> by a court. In this situation, Section 12 of the TPA would come into effect.

According to Section 12, the condition in the transfer that allows for re-entry or forfeiture of the property solely based on Mr. B's insolvency would be deemed void. Mr. A would not be able to take advantage of Mr. B's insolvency to regain ownership of the property.

The effect of Section 12 is that Mr. B's insolvency alone cannot be used as a ground to reverse the transfer or forfeit Mr. B's interest in the property. The law protects the transferee, Mr. B, from unfair consequences arising solely from his insolvency.

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<sup>5</sup>Legaldata. (2021). Balraj Singh And Anr. vs Ajit Singh. LegalData.in.

<sup>6</sup>Jugalkishore Saraf Vs. Raw Cotton Co. Ltd. [1955] INSC 13 (7 March 1955). (n.d.).

<sup>7</sup>Ravi, G. S. K. (2015). Sec 10 and 11 of TP Act, 1882. Tndalu.

<sup>8</sup>Restrain on Transfer of Property. (n.d.).

<sup>9</sup>Restriction Repugnant to Interest Created Under Transfer of Property Act. (n.d.-b)

*Condition for the benefit of the lessor*

The insolvency exemption was created in order to stop a transferee from misleading his creditors by allowing the property to return to the grantor via such a circumstance. Another exception to this rule is provided by a lease, which allows a lessor to incorporate such a condition to his advantage. This implies that if a lessee were to declare bankruptcy, a lessor might state that the lease may be nullified and the lessor may re-enter the leased property. A clause that defines a lease in the event of the lessee's insolvency is therefore legitimate, but it is not applicable if the lessee assigns the lease before declaring bankruptcy. There are some exceptions to the general rule that it is unlawful to impose any limits on the right to enjoy an interest in property once a transfer has been made. Since the lessor still holds substantial interests in the property even after the lease agreement is signed, the majority of these involve the transfer of leases.

**ACCUMULATION**

Section 17 lays down that income can be accumulated for a particular period. Also, section 17 is negatively worded, meaning it disallows or makes the accumulation void after a specific period. The law favours the free alienation and free circulation of property, but sometimes, some conditions can be applied. According to section 17 of the transfer of property, if there is a direction of accumulation longer than the transferor's lifetime or 18 years, the accumulation would be void for a period exceeding the abovementioned period.

*Exceptions to Accumulation:*

- 1) **Debt Payment:** In case of a transfer, there is a direction to pay the transferor's debt; this condition would be valid even if the period is more than the transferor's life.
- 2) **Children's Benefit:** In a scenario, if a transfer directs income of the property to be used for the benefit of the children, then it would be valid.
- 3) **Property preservation:** If a direction is there for the benefit or protection of property, then it is also exceptional to this rule.<sup>10</sup>

**Vested Interest:** Vested interest indicates that the transfer is complete, even though the recipient may not actually have received the possession. A vested interest is a benefit produced for a person where there is no time limit or requirement that a certain occurrence occur. Vested interest is a topic covered in Section 19.

*Characteristics of Vested Interest:*

- 1) Even though the enjoyment is postponed until the time period specified in the transfer, vested interest generates a present right that is effective immediately. It involves a particular event; thus, it is not fully dependent on the condition.
- 2) The transfer will remain legitimate even if the transferee passes away because his or her legal heirs will continue to own the interest.
3. The right to a vested interest is transferable and inheritable<sup>11</sup>.

*Salient features of vested interest:*

1. A right is immediately created by vested interest and is not conditional.
2. It is a heritable right that can be transferred.
3. It goes to the transferee's heirs even if he passes away before taking possession or enjoying it.
4. Pleasure can wait until a later time.
5. Profits from the property can be saved up until the time comes to enjoy them.
6. If the transferee passes away before taking actual possession, it is not nullified.
7. Even if a prior interest in the same property is transferred to another person, the interest is not defeated<sup>12</sup>.

“**Section 31 of the Transfer of Property Act 1882:** declares that any transfer that applies the condition of an event happening or not happening shall no longer have any effect. This clause's condition is later and does not serve as a conditional limitation in favour of any third party. As the transferor specifies when the transfer should stop having an effect, this condition is stated negatively.”

“For instance, if A demands that B plant a tree, the transfer will then have an impact. B will acquire the property if he plants.”

<sup>10</sup>Dr. R.K. Sinha, the transfer of property act, twenty first edition, central law agency.

<sup>11</sup>Asthana, S. (2022, February 20). Understanding the concept of Vested and Contingent Interest.

<sup>12</sup>Khan, U. A. (2019, September 24). iPleaders Blog

“It was decided that even condition collateral is an acceptable condition under the application of Section 31 in the case of *Ambika Charan v. Sasitara*. In this situation, one party was required to reside at a specific address, and the transfer shall be effective as long as this requirement is met. Even where there is a prescribed penalty, it can be extracted by way of compensation; for example, for forfeiting an estate, compensation can be demanded.<sup>13</sup>”

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### CONDITION PRECEDENT – FAILED TRANSFER

“25. Conditional transfer. —An interest created on a transfer of property and dependent upon a condition fails if the fulfilment 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. Illustration

(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 transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C, if she will desert her husband. The transfer is void.”<sup>14</sup>

Conditional Transfer is allowed under Section 25 of the Transfer of Property Act, 1882. It denotes any transfer that takes place subject to the other party fulfilling a requirement set forth for the transfer of property. For instance, if A is chosen for a job, he consents to give B ownership of his property. A condition is what B must satisfy in order to hire B.

Any conditional transfer must not include the following in order to be legal:

- Forbidden by law,
- An act that entails dishonesty shouldn't be committed,
- There shouldn't be any impossible acts,
- An action shouldn't be considered to be against public policy.
- Any action that causes harm to a person or his possessions should not be immoral.
- For instance, X gives property 'B' to Y and demands that Y kill Z in order to receive the property. This transfer is invalid since the condition is against the law.

“26. Fulfilment 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. Illustration

(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 condition.

(b) A transfers Rs. 5,000 to B 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.”<sup>15</sup>

A condition precedent is any requirement that must be met before the transfer of any property. This requirement is not to be rigidly followed, and the transfer may occur even when the requirement has been substantially met.

In *Dawson v. Oliver-Massey*, on the condition that he needs to take the consent of P, Q and R before marrying, Y is ready to transfer his property to Z. R dies and afterward, Z takes the consent of P and Q so the transfer can take place as there has been substantial compliance.

The court ruled that the requirement that one party leave her husband in order for the transfer to go through was unlawful since it went against public policy in *Wilkinson v. Wilkinson*.

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### CONCLUSION

There are various nations, including Bangladesh, Pakistan, and India, where a legislative act known as the Transfer of Property Act is in effect. It establishes the legal foundation for various property transactions and regulates the transfer of immovable property (land, buildings, etc.).

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<sup>13</sup>Pandey, R. S. (2022, February 18). Conditional Transfers under Transfer of Property Act, 1882

<sup>14</sup>Section 25, The Transfer of Property Act, 1882

<sup>15</sup>Section 26, The Transfer of Property Act, 1882

The Transfer of Property Act, 1882, for instance, is a key piece of legislation that governs the transfer of property rights in India. The rights and obligations of persons participating in real estate transactions, such as sellers, buyers, donors, donees, lessors, and lessees, are defined and governed by this law.

A variety of transfer methods are covered by the Act, including sale, gift, exchange, mortgage, lease, and leasehold rights. It describes the rules, steps, and paperwork outlined by law for a legitimate property transfer. Written agreements, document registration, the payment of stamp duty, and adherence to regional land and property laws are a few examples of these criteria.

The Transfer of Property Act seeks to ensure that the transfer of property rights is carried out in a legal and orderly way by bringing clarity, openness, and legal protection to property transactions.

It's important to keep in mind that different countries may have different Transfer of Property Act provisions. For correct information on the transfer of property rules that apply to your region, it is crucial to consult the pertinent legislation in your particular jurisdiction.