"Sale" & "Mortgage" - under the Transfer of Property Act (ToPA), 1882 – some salient aspects, etc.

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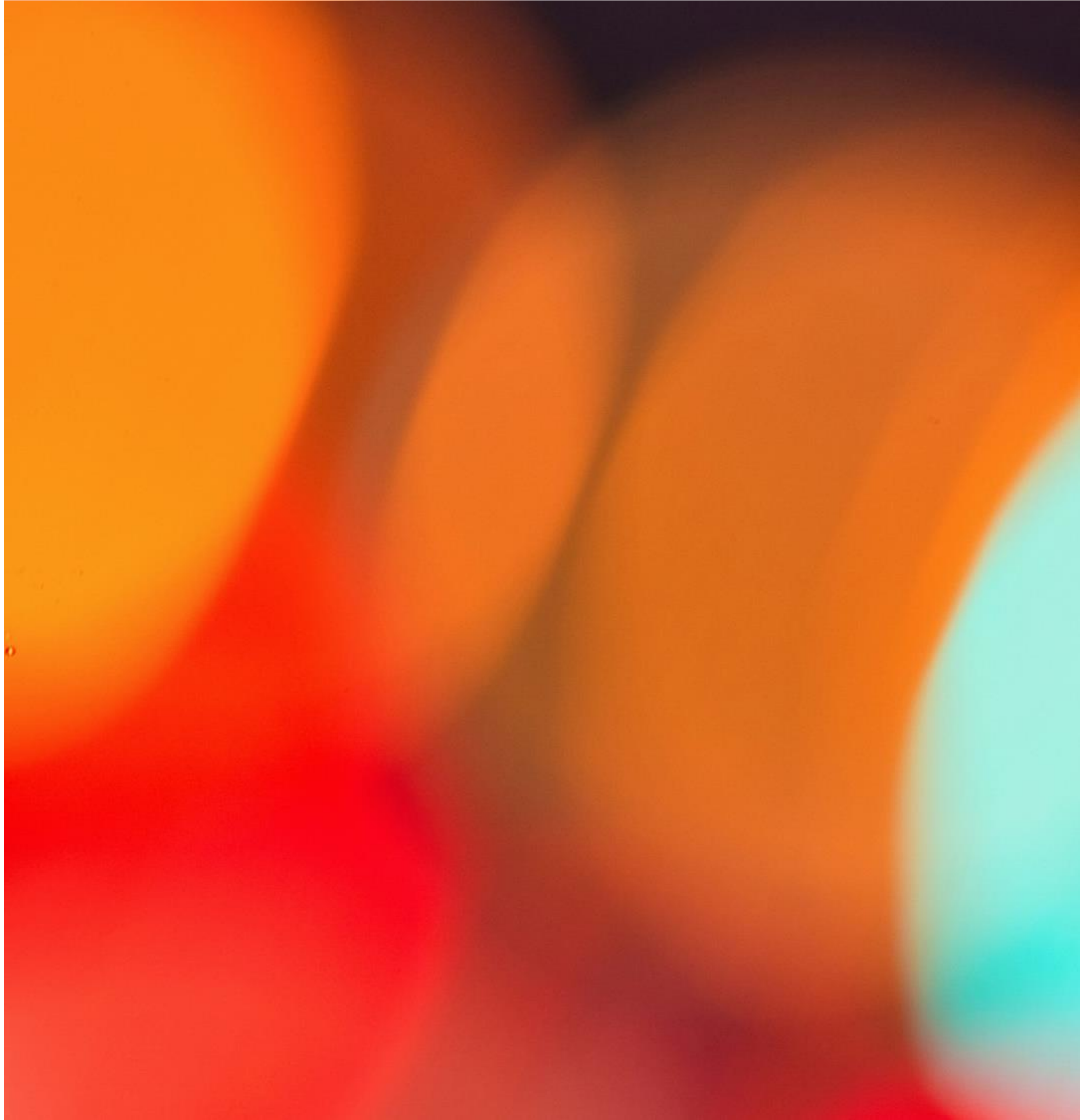

Chapter II – "Of Transfers of Property by Act of Parties"

- **SECTION 5:**
- **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 other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.
- **Section 6** governs what kind of property may be transferred;
- **Section 7** stipulates persons who are competent to transfer – competent of contract – entitled to transfer – authorised to dispose – prescribed by law, etc; **Section 8** governs modalities of operation of transfer in law.
- **Section 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.

Chapter III – "Of Sales of Immovable Property"

- **SECTION 54:**
- **54. “Sale” defined.**—“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
- **Sale how made.**—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
- In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
- Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
- **Contract for sale.**—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
- It does not, of itself, create any interest in or charge on such property.

Section 55: Liabilities of Seller

- **To disclose material defects in the property or title, if any, [Section 55(1) (a)]**
- **To produce the title-deeds for inspection [Section 55(1)(b)]**
- **To answer relevant questions as to title [Section 55(1) (c)]**
- **Duty to execute Conveyance [Section 55(1) (d)]**
- **Care of title deed and Property [Section 55(1) (e)**]
- **To give possession to the buyer [Section 55(1) (f)]**
- **Payment of the out goings [Section 55(1) (g**)] - Before completion of the sale, the seller continues to be the owner of the property. Therefore, the **government dues etc. are to be paid by him**. The seller's last duty before completion of the sale is to pay all the outgoings.
- **Implied covenant for title [Section 55(2)] –** In every sale, the seller impliedly undertakes a guarantee that the interest which he is transferring subsists and he has authority to transfer the same.
- **To deliver title-deeds on receipt of the price [Section 55(3)]**

Section 55: Rights of the Seller

- **Seller's Right Before Completion of Sale [Section 55(4) (a)]**
- Before completion of Sale, the seller is entitled to **all the rents, profits, or other beneficial interests of the property.**
- Until ownership is transferred, the seller continues to be owner and as such he has every right to enjoy the profits of the property.
- The contract of sale does **not create any proprietary interest in favour of the buyer.**
- **Seller's Right After Completion of Sale [Section 55(4)(b)]**
- After the completion of sale, if the price or any part of it remains unpaid, the seller **acquires a lien or charges on the property.**
- The completion of sale of an immovable property does not depend on the payment of price, the price or part of it may also be paid after the sale. Therefore, under Section 55(4) (b) the seller is given a right to recover the **unpaid purchase-money from out of the property**. This is called as a statutory charge of the seller for unpaid price.

Section 55: Liabilities vs Rights of the Buyer

- Before completion of sale, the duties (liabilities) of the buyer are as under:
- **To disclose facts which materially increases the value of property [Section 55(5) (a)]**
- **Payment of price [Section 55(5) (b)] -** The completion of sale in favour of buyer, the seller has the duty of execution of deed and buyer has corresponding duty of payment of price. But, the buyer is **not bound to pay the full amount** before transfer of ownership.
- After completion of sale, the buyer has following two liabilities:
- **To bear the loss to property, if any, [Section 55(5) (c)]**
- **To pay the out goings [Section 55(5) (d)] -** After completion of Sale, since the buyer becomes owner of the property, he is **liable to pay the outgoings** e.g., Government dues, rents, revenue or taxes.

- **RIGHTS**
- **Buyer's Right Before Completion of Sale [Sec. 55(6)]**
- This right occurs when the **seller refuses to sell**, and the buyer already paid some amount in advance. This situation creates buyers' charges, and the **buyer is entitled to get his money back with interest on it**, and interest will be paid from the date of transfer of money from the date of delivery of possession.
- **Buyer's Right After Completion of Sale [Section 55 (6) (a)]**
- the **buyer is entitled to get all the rights over the property inclusive of all rents, profits,** and also any other benefits over the property.

What constitutes a sale u/s. 54 of ToPA?

- Price constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. **Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete**.
- **The real test is the intention of the parties.** In order to constitute a "sale":
- Firstly, intention to transfer property must exist,
- Secondly, intention of when the price would be paid - either in praesenti or in future.
- Intention to be gathered from: the recital in sale deed, conduct of parties and evidence on record.
- ***Vidhyadhar v. Manikrao*, (1999) 3 SCC 573.**

Agreements of sale – how made u/s. 54

- An agreement of sale comes into existence when the vendor agrees to sell (**offer**) and the purchaser agrees to purchase (**acceptance**), for an agreed **consideration** on agreed terms.
- **CAN be**: oral; by exchange of communications –which may/may not be signed.
- Can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser.
- It may be by a single document signed by both parties.
- By the vendor executing the document and delivering it to the purchaser who accepts it.
- In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser.
- There is, however, no practice of purchaser alone signing an agreement of sale.
- ***Aloka Bose v. Parmatma Devi*, (2009) 2 SCC 582**

Sec. 54 read with Section 17 of the Registration Act

- "Section 54 of the Transfer of Property Act, 1882, defines a “sale”:
- the transfer of ownership in exchange for a price that is either paid, promised, or part-paid and part-promised.
- **The significance of term “only”** - signifies that, for tangible immovable property valued at one hundred rupees or more, a sale becomes lawful only when it is executed through a registered instrument.
- The registration of the sale deed for an immovable property is essential to complete and validate the transfer. Until registration is effected, ownership is not transferred."
- The Supreme Court held that the conveyance by way of sale would take place only at the time of registration of a sale deed in accordance with Section 17 of the Registration Act, 2008. Unless satisfied – there is NO conveyance.
- ***Sanjay Sharma vs. Kotak Mahindra Bank. Ltd.*, SLP © No. 330 of 2017.**
- **Relevance of Section 17 of Registration Act – Suraj Lamps & Industries Pvt. Ltd. V. State of Haryana, (2009) 7 SCC 363**

Revised interpretation – Sale without consideration is void – Section 54

- Sale of an immovable property has to be for a price. The price may be payable in future.
- It may be partly paid and the remaining part can be made payable in future.
- The payment of price is an essential part of a sale covered by Section 54 of the TP Act.
- If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eye of the law. It is of no legal effect.
- Therefore, such a sale will be void. It will not effect the transfer of the immovable property.
- Capacity to pay sale consideration is a relevant factor.
- *Kewal Krishan v. Rajesh Kumar*, (2022) 18 SCC 489, relied on in *Shanti Devi v. Jagan Devi* [2025] INSC 1105.

Participatory case study
Let's deliberate!

Exercise: Applying the principles of Section 54 in light of the Hon'ble Supreme Court judgments discussed in previous slides, adjudicate the following pending case.

Factual Matrix of Case – Section 54 (ToPA)

- Naveen Trump agreed to sell an agricultural land to Pramod Zelinsky for ₹80 lakh.
- The sale deed recited that the entire price had been paid, although, in fact, only ₹25 lakh was paid on the date of execution.
- The balance was to be paid within three months but was never paid.
- Despite repeated demands, Zelinksy neither paid the balance price nor returned the property.
- Trump filed a suit contending that the sale deed was void and conveyed no title because the price was never fully paid.
- Zelinksy argued that a registered sale deed had already transferred ownership and that non-payment merely gave rise to a monetary claim.
- No evidence was adduced by Zelinsky about the payment of the price mentioned in the sale deeds as well as the earning capacity at the relevant time. Zelinsky did not enter the witness box and neither did the attesting witnesses to the sale deed.

Issue for the Hon'ble Court?

- **Issue:** Whether a registered sale deed can be treated as void or ineffective solely because the entire sale consideration was not paid?
- Consider – Ingredients of Section 54 read with judgments discussed in the previous section:
- Intention to transfer property?
- Intention of when the price would be paid?
- Conduct of parties?
- Evidence on record?
- Capacity to pay the sale consideration?

Mortagage under TOPA

- Legal Mortgage, Equitable Mortgage, Mortgage by deposit of title deeds, Doctrine of Priority (Sec. 48), its exception (Section 78) and Redemption – how made.
- French origin of term – '*death pledge*' - pledge dies (ends) when obligation is fulfilled OR property foreclosed.

Mortgage by Deposit of Title Deeds

- A mortgage by deposit of title deeds is one of the forms of mortgages - there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan.
- **The three requisites for such a mortgage are, (*i*) debt, (*ii*) deposit of title deed; and (*iii*) an intention that the deeds shall be security for the debt.**
- Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence
- There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act.
- But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts.
- ***K.J. Nathan v. S.V. Maruthi Rao***, AIR 1965 SC 430.

Doctrine of Priority (S. 48), it's Exception (S. 78) & principle – "No one can convey better title than what he possess".

- Sec. 48 codifies doctrine of priority;
- Based on maxim - ***qui prior est tempore potior est jure***, which means that **one who is first in time is better in law.**
- The transferor (mortgagor) cannot prejudice the right of the transferee (mortgagee) by any subsequent dealing with the property.
- **Principles of Natural Justice** - that if the **rights are made in favour of two different people** at different times, then the **one who has the advantage in time will get the advantage in law** as well.
- This principle applies only within the cases where the conflicting equities of the parties involved are otherwise equal.
- This Section **lays down** a crucial principle that **no man can convey a better title apart from what he has – Reiterated by Hon'ble Supreme Court in *P. Kishore Kumar v. Vittal K. Patkar*, (2024) 13 SCC 553 – Para. 29.**

How does the Exception (S. 78) operate?

- **Postponement of prior mortgagee:**
  - **"78.** Where, 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."
- Fraud;
- Misrepresentation;
- Gross Neglect of a Prior Mortgagee.
- Subsequent Mortgagee – "has been induced" - to advance money - "security of mortgaged property"
- Subsequent Mortgagee prioritised over Prior Mortgagee.
- How does Equity play its role?

Legal Mortgage and Equitable Mortgage

- Hon'ble Supreme Court has considered legal and equitable mortgages threadbare in *Cosmos Co-operative Bank v. Central Bank of India & Ors.*, 2025 INSC 243.
- There may be instances where parties agree to mortgage a property as security, but no formal charge/conveyance/any proprietary interest in the said property has taken place **but still may be recognized as mortgage.**
- **Legal formalities (statutory requirement) creating a mortgage are absent but equity deems it to be a mortgage.**
- **Mere intention of the parties to create a mortgage is sufficient.**
- Two (2) ways in which it can be created – by deposit of original title deeds to the subject property with the lender, or creating a MoU/agreement simpliciter recording the intention of the parties to create a charge over the subject property.

Participatory case study
Let's deliberate!

Exercise: Bearing mortgage by deposit of title deeds and applying the principles of Section 48 and 78 of ToPA, in light of the discussion in previous slides, solve issues I and II that now stand formulated for adjudication before the Hon'ble Supreme Court.

Factual Matrix of Case – Section 48, 78 (ToPA)

- Bijay Ballya entered into an **unregistered agreement for sale** for a flat and subsequently obtained a loan from **Bank of Philanthropy Ltd.**, depositing only the agreement for sale as security.
- No registered sale deed or complete title documents were deposited.
- 5 years later, the scheming Ballya again obtained another loan from **Shylock Bank Pvt. Ltd** by depositing the **share certificate, occupancy certificate and other available property documents**, and **Shylock Bank,** treated the transaction as a **<u>mortgage by deposit of title deeds</u>.**
- Upon Ballya's default, both banks claimed a **first charge** over the flat. The DRT held that Bank of Philanthropy Ltd., had not proved a valid mortgage, but the DRAT and the Hon'ble High Court held that Bank of Philanthropy's claim had priority because its transaction was earlier in time.
- The share certificate and occupancy certificate of Bijay Ballya is on the record.

Issue for the Hon'ble Supreme Court?

- **Issue I:** Whether the deposit of an **unregistered agreement for sale** can create a valid mortgage by deposit of title deeds or any enforceable security interest?
- **Issue II:** Depending on how Issue I stands answered, which bank – **Bank of Philanthropy** or **Shylock Bank** has priority over the charge created on Ballya's flat?
- Consider –
- How mortgage is created by deposit of title deeds?
- Doctrine of priority?
- ***qui prior est tempore potior est jure (*****one who is first in time is better in law)?**
- Fraud?
- Misrepresentation?
- Gross Neglect of a Prior Mortgagee?
- Subsequent Mortgagee – "has been induced" - to advance money - "security of mortgaged property?

Right of Redemption of Mortgage – how made – read with Section 17 of the Registration Act

- A contract of sale does not of itself create any interest in, or charge on, the property. Expressly declared in Section 54.
- **The right of redemption (Sec. 60) is available to the mortgagor unless it has been extinguished by the act of parties. The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption.**
- In India, it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished.
- The conferment of power to sell without intervention of the Court in a mortgage deed by itself will not deprive the mortgagor of his right to redemption.
- The right of redemption is not extinguished at the expiry of the period.
- The equity of redemption is not extinguished by mere contract for sale.
- Until the sale is complete by registration, the mortgagor does not lose right of redemption.
- ***Narandas Karsondas v. S.A. Kamtam*, (1977) 3 SCC 247**.

Thank you for a patient hearing!