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Concept of transfer of movable properties in India: Legal discourse with reference to the transfer of property act 1882

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Abstract

The Transfer of Property Act provides provisions in respect of transfer of property in the form of lease, mortgage, sale, exchange, will or gift, etc. A standing timber, growing crops and grass are considered to be movable property irrespective of the fact that they are attached to the earth or form part of the earth in such a manner that if detached, it could lose its significance. However, law governs the different modes of transfer of these movable properties. This paper endeavours to distinguish movable property and immovable property under Section 3 of the Transfer of Property Act, 1882. It states the situation when the lease is lease of immovable property and when of movable property under law. The paper specifically provides the principles of law governing the transfer of these movable properties.

Keywords: Movable property, immovable property, growing crops, fixtures, land, transfer of property

Introduction

The law regarding transfer of movable and immovable property is mainly governed by the Transfer of Property Act, 1882 in India. Transfer of Property Act, 1882 came into force on 1st July, 1882. It extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States or in the States of Bombay, Punjab and Delhi ^[1].

Property can be classified into tangible and intangible, real and personal, corporeal and incorporeal, movable and immovable. The distinction of property into movable and immovable is only relevant under the Transfer of Property Act, 1882. There are three reasons which require distinction of movable and immovable property for the purposes of Transfer of Property act, 1882. They are:

1. This Act governs and lays down rules for the specific transfer of immovable properties only;
2. For the transfer of immovable property, three conditions must be satisfied, i.e. the document transferring the property must be (i) attested; (ii) registered; and (iii) executed by the transferor.

However, for the transfer of a movable property, mere delivery of possession, coupled with an intention to convey the title by the owner to the recipient is sufficient.

3. Limitation period to file a suit: in case of a movable property is three years while in case of an immovable property, it is twelve years.

An owner has three basic rights in the property: a right of ownership, an exclusive right to possess and enjoy it and an exclusive right to alienate the property in any manner that he likes.

Meaning of immovable property

“The literal meaning of the term ‘immovable’ is incapable of being moved, motionless, steadfast or firmly fixed. In contrast, movable is explained as something that can be moved in relation to a place ^[2].”

Section 3 of the Transfer of Property Act, 1882 provides the meaning of the term “immovable property” as under:

“‘Immovable property’ does not include standing timber, growing crops or grass.’

Section 3 (26) of the General Clauses Act, 1897 provides the meaning of immovable property as: “‘Immovable property’ shall include land, benefits to arise out of land, and things attached to the earth, as permanently fastened to anything attached to the earth.’”

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In *Suresh Chand v. Kundan* [3] Court held that “As there is no special definition of immovable property in the Transfer of Property Act, the general definition contained in the General Clauses Act would prevail [4]”.

The term “things attached to the earth” in sEction 3(26) of the General Clauses Act, 1897 has been interpreted in Section 3 of the Transfer of Property Act, 1882 as:

Attached to the earth means-

- a) Rooted in the earth, as in the case of trees and shrubs;
- b) Embedded in the earth, as in the case of walls or buildings; or
- c) Attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

The latter term “permanent beneficial enjoyment of that to which it is attached” in Section 3 of the Act has been termed as *profits a prendre or benefits arising out of land* by case laws. In *Bhola nath Nundi v. Midnapore Zamindari Co.* [5], Court held that “A profits a prendre is an incorporeal right clothing the possessor of it with an interest in the land. It is so called because the claimant is entitled to take the profit for himself.

In *Udaynarayan v. Badia Dasu* [6], Court held that “The right to collect rent from the tenants is a right to the benefits arising out of the lands. Therefore, a lease of such a right to collect rents is a lease of immovable property within the meaning of sEction 107 [7].”

“Benefits arising out of land or profits a prendre is immovable property. Where a person using his land makes a profit, the right will be a right in immovable property. For example, a person has a vacant piece of land. Every year, during the festival season, he uses the land for holding a fair, and for this purposes he charges Rs. 1000 from each stall-holder. This right to collect the charge from the stall – holders is *profits a prendre*, i.e. profits that he makes using his land, and therefore a right in immovable property [8].”

Thus “Land” is an immovable property within the interpretation of Things attached to earth in sEction 3 of the Transfer of Property Act, 1882.

Section 2(6) of the The Registration Act 1908 defines the term “immovable property” as:

“Immovable property” includes land, buildings, hereditary allowances, right to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth,, but not standing timber, growing crops, or grass.

Differences between “Standing timber” and “Tree”

According to section 3 of the Act, “standing timber” is not an immovable property.

“Timber is wood that is or can be used a s construction material, as distinguished from wood that is used for other purposes such as firewood, etc. Timber is defined in Webster’s Collegiate dictionary as a wood suitable for building houses, bridges, ships, etc. whether on the trees or cut and seasoned. In India, the popular timber trees are *shishum, babul, teak, bamboo, deodar, ail, rai*, etc. A document relating to transfer of standing timber does not require registration.

A timber plant or sapling needs to grow to a particular height or/ and age when the wood becomes suitable to be

used as timber. Thus, the moment they are planted till the time they are immature, they would be covered under the expression, ‘things rooted in earth’, and hence would be ‘immovable property’. When they reach a particular maturity level, when the wood can be used as timber then, what is important to be seen is, whether they are intended to be cut within a short period of time or not. If yes, then they would be called standing timber, and if not, they would still be categorized as timber trees, and hence would be immovable property.” For example:

- a) A, the owner of a forest enters into a contract with B, and grants to him a right to enter his forest and cut all kinds of plants and trees above the height of 10 feet, for a period of five years. The nature of right granted in his favour will be a right in immovable property.
- b) A, the owner of an estate enters into a contract with B, and grants to him a right to enter his estate and to cut standing timber, and the right tis spread over a period of twenty years. The right is in immovable property as timber trees that are immature presently would become mature during the tenure period, abd the rgrantee will be benefitted from the further growth of the trees. The right is in immovable property even though the intention is to cut them away within a short span of time, when their wood becomes ready to bbe used as timber.
- c) A. the owner of an estate enters into a contract with B, and grants to him a right to enter his estate and to cut only timber trees for a period of ten years. All timber trees in his forest are fully grown mature trees. The right is still in immovable property as the intention is not to cut them within a short reasonable time- period but is spread over a period of ten years.
- d) A, the owner of an estate enters into a contract with B, and grants to him a right to enter his estate and to cut only standing timber for a period of six months. The right would be in movable property.

Thus, the term standing timber connotes that in orde to be regarded as movable property

- i) It must be a timber tree;
- ii) It has reached a particular stage where its wood is ready to be used as timber and
- iii) It is intended to be cut reasonably early.

The definition given in Section 3 of the Act that immovable property does not include standing timber has been interpreted by the Courts in following case laws which conclude that if the standing timber is given on lease with the intention of severing it immediately, then it will be a lease of movable property, otherwise of immovable property.

In *Shantabai v. State of Bombay* [9], the facts are:

“A, the owner of a forest, executed an unregistered document styled as a lease in favour of his wife W, for a consideration of Rs. 26,000, for a period of 12 and a half years. As per the deed, the right was conferred upon her to enter the estate for cutting and taking out bamboo, fuel wood and teak. At the same time, she was prohibited from cutting teak plants that were under the height of one and half feet. but the moment the teak trees reached that girth they could be felled by her, but within 12 years [10].”

She enjoyed the right tocut the trees that were of the minimum prescribed height for two years but Madhya

Pradesh abolition of Proprietary rights (Estates, Mahals, alienated Lands) Act, 1950 was passed in 1950 which prohibited her from exercising her right. The aforesaid Act vested all proprietary rights in the land in the State.

“W claimed compensation from the Government from being ousted from the forest from 1951 to 1955, but gave up the claim initially on the understanding that she would be allowed to work the forests for the remaining period [11].” She applied for permission being granted to work on the forest land to the Divisional Forest Officer but he refused permission. She started cutting trees on her own. Then the Forest Officer stopped her from doing so. She filed a writ petition under Article 32 of the Constitution.

The issue before the Court was: Whether the right granted to her was a right in movable or immovable property?

If the right would be in immovable property and the document granting the right has been written, attested and registered according to law in her favour as a lease for 12 years, then irrespective of the change in ownership, she would be entitled to realize the right. But if the right is in movable property then due to change in ownership, the right to enjoy the land would cease but she will be entitled for compensation.

Since the lease was unregistered so W would never have succeeded, so she tried to prove that the grant was in standing timber and therefore, in movable property.

“Pointing out the distinction between timber trees and standing timber, the court held that the grant here was not merely of standing timber, but the grantee here was empowered to take the benefit of the soil. The court said: the duration of the grant is 12 years [12].” Thus W was granted no remedy.

“On a question whether a contract to cut standing timber would require registration or not, the court in *State of Himachal Pradesh v. Motilal Pratap Singhand Co.* [13], held that where deodar, kail and rai trees that are used for building purposes are earmarked after ascertaining the required growth, silviculturally and some of them were felled and other to be cut within a short period of time, the contract is for standing timber and not timber trees and therefore of immovable property. Hence the documents for sale of these trees do not require registration [14].”

In *Chhotabhai Jethabhai Patel & Co. v. State of Madhya Pradesh* [15], the petitioners had entered into contract with the proprietors of certain estate, under which they acquired the right to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos. The Court held that these contracts did not create any interest either in the land or in trees or in plants.

In *Bharat Sebaigras Ltd. Sebaigras Ltd. v. State of Madhya Pradesh* [16], bamboos were held to be immovable property and when they were sold as so attached, the transaction was treated as a sale of interest in land.

Section 3 of the Transfer Act interprets the term “immovable property” as: “immovable property does not include standing timber, growing crops and grass”. The exclusion of ‘standing timber’ from the definition of immovable property is justified on the ground that a standing timber do not derive any benefit from the soil and is thus an immovable property. However, growing crops and grass, both continuously derive benefits from the soil and cannot be detached from the soil but is not an ‘immovable

property’ within the interpretation of Section 3 of the Act. The reason is: Both growing crops and grass can be uprooted and re-planted at some other place. They require soil for their growth but they are movable; standing timber, even if uprooted, cannot grow further because once a tree or a plant which is a timber grows to its complete height/ girth and attains a particular age, then only it is termed “standing timber”. A standing timber can be cut at any time and transported from one place to another. So it is given the character of a movable property.

A standing timber do not derives any benefit from the soil whereas the growing crops and grass derive benefit from the soil. A standing timber is a timber of full age and girth whereas growing crops and grass may not be mature and do continuously grow. But both standing timber and growing crops, grass are movable objects, hence not contained in the interpretation under Section 3 of the Act.

In *Shantabai v. State of Bombay* [17], the Supreme Court explained the distinction between standing timber and trees as: “‘Trees’ or ‘growing trees’ are regarded as immovable property because they are attached to or rooted in the earth. When the tree is drawing sustenance from the soil, it is a growing tree and is an immovable property. But where the amount of sustenance which the tree draws from the soil is negligible and it is to be cut soon, it is then considered as a ‘standing timber’

It is noticed that that exclusion is only of ‘standing timber’ and not of ‘timber trees’. Before a tree can be regarded as ‘standing timber’ it must be in such a state that, if cut, it can be used as timber, in that state it must be cut reasonably early [18].”

Tests to distinguish movable property from immovable property

The test is whether the intention is to take the benefit from the further growth of the plant, i.e. whether the tree/ plant is drawing nourishment from the land for its sustenance, or uses the earth merely as a ware house or a go down for their convenience’s sake.

In *Banaras v. Ghuhri Rai* [19], the court said that the real test for judging whether a tree is immovable or movable property is not the nature of the tree alone, but the way in which it is intended to be dealt with. If the intention of the parties in respect of a particular transaction is that tree, whether that be a neem tree or mango tree, is to be cut by the purchaser and remove, it will become timber, but if the intention is that it will after the purchase, continue to grow and to yield fruit or shade, it may not be timber [20].

A transfer of a right to rear and pluck or take away fruit from trees relates to the sale of growing crops, but the right of sowing, cultivating and harvesting crops is a lease of the trees themselves and a right in immovable property.

In *Subaiah v. Govindrao* [21], Court held “In order to determine what is or what is not immovable property as a result of attachment or annexation to land, two tests have been laid down,

1. The degree or mode of annexation and
2. The object of annexation.

The judicial precedents have held following to be immovable property

1. A Hindu’s widow life-interest in the income of her husband’s immovable property;
2. Right of way
3. Right to collect dues from a fair on a piece of land

4. A profits a prendre;
5. Hereditary offices are regarded by Hindu law as immovable property;
6. Right to enter upon land and to carry way fish from a lake is a right to profit a prendre;
7. The interest of a mortgage is immovable property.

The judicial precedents have held following to be movable property

1. A decree for sale of immovable property on a mortgage;
2. A right of purchaser to have the lands registered in his name;
3. A machinery which is not permanently attached to the earth and which can be removed from one place to another.

Doctrine of Fixture

Doctrine of Fixture illustrates the circumstances under which a chattel (Movable) property becomes a fixture (Immovable). Under English law, the doctrine of fixtures, is explained by two maxims:

1. *Quicquid plantatur solo, solo credit*: This maxim means “whatever is planted in the earth, becomes part of the earth, and consequently whosoever owns that piece of earth will also own the thing planted.
2. *Quicquid inaedificatur solo, solo credit*: This maxim means whatsoever is built into or embedded into or attached to soil becomes part of the earth and consequently, whosoever is the owner of that piece of land will also become the owner of the thing attached or built in or embedded [22].”

The application of the se doctrines is subject to two exceptions:

1. They apply only when there is no contract to the contrary.
2. The second exception relates to trade fixtures fixed by the tenant. The trade fixtures refers to all those thing attached or fixed by a tenant on the land of the other, which are necessary for him for the purpose of carrying on this trade.

Indian law relating to fixtures

The English law applies in India but with some modifications. There are two rules that determine the entitlement issues, with respect to the things attached to or embedded in land by a person other than the owner. These rules apply only when this person was in lawful occupation of the property and was not a trespasser. The rules are:

1. The first rule is that he is entitled to remove the attachment if he vacates the premises provided he leaves the land in the same state as it was previous to the attachment.
2. The second rule is that if he allows the attachment to remain on the land of the owner, so that the owner derives a benefit from it, he entitled to compensation for the value of the attachment... This rule was approved by the Privy Council in the *Narayan Das Khettry v. Jatindranath* [23].

“This question, what is that sufficient attachment that will convert the character of a thing to make it a fixture from a chattel, has tremendous practical importance. For example,

A the owner of a house invites B for inspection for the purposes of sell to B. At the time of inspection, the house has iron gate at the front, show cases made of wood that were fixed in the walls, electrical fittings, etc.

Conclusion

Transfer of Property Act governs the law on lease, mortgage, sale, exchange, will, gift, etc. of the property. When an immovable property is given on lease in order to reap the benefits of the standing timber, the lessee must not cut the timber unless it reaches the specified girth. Similarly, if the lease provides for plantation of crops, the timber must grow irrespective of the termination or transfer of lease. These are vital aspects of law of contract of lease which regulates the environmental propriety and privity of contract on the touch stone of principles of law.

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