
A CRITICAL ANALYSIS OF SECTION 6 AND 7 OF THE TRANSFER OF PROPERTY ACT: WHAT MAY BE TRANSFERRED AND BY WHOM

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1. ABSTRACT

Property law in India is primarily administered through the Civil Procedure Code and the Transfer of Property Act. Property is a vital aspect of day to day civic life and it is important that people, in general students, professionals, everyone knows the basic nuances of the same. This paper is an attempt to explain one part of such an act- the Transfer of Property Act (TPA). This article explains the provision that governs which property can be transferred. This is controlled by Section 6 of the TPA. This section is negative in its phrasing as it explains what cannot be transferred rather than what can be transferred. The authors sought to explain this section by providing different pictures to help the reader relate it to the concept in backing of various judicial rulings. Furthermore, the authors explained section 7 of the TPA, which discusses who is authorised to transfer property under this act.

Keywords: property, TPA, Section6, Section7, Competency, transfer

2. INTRODUCTION

The Transfer of Property Act 1882 was first introduced under the rule the British legislation. Before this Act came into existence, the ideals of justice, equality, and good conscience were used to resolve property matters. There was no clear rule or law to which the judges might refer. The passage of the aforementioned Act resulted in the institutionalisation of property rights in India. This law exclusively pertains to transfers made between two parties; it has no effect on transfers made as a result of a legal requirement. Indian contract law is significantly identical to the Transfer of Property Act, 1882. It is concerned with “*rights in personam*”.

But, contract law is approached differently than property law. According to the recent advances in the realm of contracts, contract standardisation becomes essential. This prompts a completely new round of discussions and considerations. Property law is substantially more technical in character than contract law in the Indian context. As a consequence, picturing the property rights’ nature requires a particularly complex approach. The laws that govern India, particularly the Transfer of Property Act of 1882, are regarded to be complex yet dynamic in nature.¹ This could be deduced from the statute's primary rule of explanation. Here, a golden of interpretation is followed. However, its design must promote treatment and also prevent any kind of harm. The goal with which this Act was enacted was to conduct inter vivos transfers. What this means is that the act does not apply to transfers that occur by legal operations.

Generally speaking, "Property of any kind may be transferred". A property cannot be transferred unless a number of requirements are met. They consist of ones mentioned ahead: it must constitute a transfer; it must fall under the definition of immovable property; and it must not be one of the objects prohibited from transfer under Section 6 of the Transfer of Property Act.

The statute originally discusses how "property of any kind may be transferred," but Section 6 with the heading "what may be transferred" indicates that while all types of property can be transferred, there are still some exceptions. Section 5 is the rule, whereas Section 6 is the exception. The intention of this provision includes a "transfer of property." As a result, it is critical to assess the situation in light of current judicial rulings.

¹ H.R. KHANNA & P.M. BAKSHI, MULLA ON TRANSFER OF PROPERTY ACT, 62-76 (5th ed. 1985).

Any property/interest is founded on the fundamental precept "Alienation Rei Prefertur Juri Accrescendi" ["Law prefers alienation to accumulation"]. Any intervention with the right of owner to transfer his stake in the property is illegal. The transferor must have a genuine subsisting title to the property in order to alienate it. A transferor may not alienate property or interests over which he does not have valid title.² Any transfer of property/interest under the exclusion provisions is null and invalid under Section 6 (a).

Section 7 of the TPA goes on to describe the competency to transfer - that is, those who are legally authorised to make property transfers under this Act.

3. RESEARCH METHODOLOGY

This seminar paper is a thesis effort. With this in view, the researcher has relied on the traditional approach of using primary sources such as journals, papers and books. Sources such as property law textbooks and new media such as online journals and blogs to gather information and resources were used to understand and further present the topic.

4. LITERATURE REVIEW

From the book titled "*Mulla on Transfer of Property act*" by *HR Khanna and PM Bakshi*, the authors of the present paper read the sections 5-7 in order to get a basic understanding of the properties that can and cannot be transferred and persons who are competent to transfer them.

From the book titled "*Transfer of Property Act*" by *D Avtar Singh*, the authors, yet again, referred to the same sections to understand the topic with help of illustrations that the book had to offer. The author used the pattern and used illustrations in this paper too to help the readers understand the topic more conceptually.

From the book titled "*Property Law*" by *Dr. Poonam Pradhan Saxena*, the authors gathered case laws on all the sub sections under Section 6 of TPA and used them in the present paper, in order to make the paper more presentable and genuine. This helped the authors to grasp the topic even better.

² D. AVTAR SINGH, TEXTBOOK ON THE TRANSFER OF PROPERTY ACT, 35-40 (4th ed. 2014).

From the paper titled “*Property of 'any kind' may be transferred*” by Amrit Mishra, The authors used the pattern the paper followed as it discussed each clause of section one by one with illustrations and case laws for the same. The authors used the pattern by adopting it this present paper but framed their own illustrations with reference to those in the paper by Amrit Mishra.

From the paper titled “*What may be transferred under section 6, transfer of property act*” by Aryan Birewar, The authors gathered case laws on sub sections which did not give plenty of case laws for particular section like that of g-i. The authors used these to understand the topic and further use the same in their own paper.

From the paper titled “*What may be transferred under Section 6 under the Transfer of Property Act 1882?*” by M. Srinidhi the authors understood the part of evolution of TPA as an act

5. ANALYSIS

5.1 SECTION 6 – “*WHAT MAY BE TRANSFERRED*”

Property can be transferred, in general.³

While this is the rule, S. 6 acts like an exception to the same. It lays down certain exceptions in form of rights and properties that cannot be transferred. The reasoning behind putting these exceptions in place can be put further into three categories that is –

- a. Right is personal to the individual who exercises it,
- b. Public policy,
- c. Right is inherently linked to a broader right which cannot be transferred.

Section 6 of TPA says that property any kind of property can be transferred, except for –

5.1.A S. 6(a) *Transfer of spes-succession*

Spes succession, if interpreted, means a mere chance of a *heir-apparent* inheriting the property

³ H.R. KHANNA & P.M. BAKSHI, MULLA ON TRANSFER OF PROPERTY ACT, 62-76 (5th ed. 1985).

of a deceased individual. The heir, here is referred to a person who succeeds a person and acquires the property of the person who dies without having made a will. So, the chance of a heir apparent succeeding and acquiring the property of the deceased is non transferrable according to this clause. A person can only get the property that he actually owns, transferred. This is based on the principle of “*nemo est haeres viventis*” (no one is a heir apparent when the predecessor is alive)⁴.

Example – A is a hindu male who dies interstate leaving behind his two sons S1 and S2 and a daughter D1. S1, S2 and D1 here would be the heir apparents of A and their right to acquire A’s property cannot be transferred.

In the case of *Annanda Mohan Roy v Gour Mohan Mullick*⁵, The appellant went ahead to purchase certain rights over a property from the respondents. The respondents were expectants to those rights over the property on the death of their mother, a widow. The appellants, thereafter a suits is filed to recover the properties from the respondents but the Court held that:

“the transfer was a spes successions and since section 6(a) of Transfer of Property Act forbids such transfer of expectancies, the transfer was void”.

Another thing to be noted along with this sub section is that it is, it is often compared with Section 43 of TPA which is “*Feeding a grant by estoppel*”. This doctrine basically means that when an individual promises to deliver/transfer a particular property that he does not really possess, he is bound to transfer that as and when he acquires possession of the same.

When comparing S 6(a) and 43 –

S. 6(a)	S. 43
It is a substantive provision.	It is part of rule of evidence.

⁴ Dr. Poonam Pradhan Saxena (n 1)

⁵ (1923) 25 BOMLR 1269

It deals with particular kinds of interests.	It deals with consequences of misrepresentations.
There is no misrepresentation.	Existence of misrepresentation and consequent misleading is an essential.
Applies to all kinds of transactions – for considerations or gratuitous.	Transfer has to be for consideration.
It can be regarding movable or immovable property.	It applies only in cases where immovable property is involved.

S6(a) and s. 43 are to be read together to grab their essence. The apex Court held that wherever possible, the provisions of s.43 shall not be read to the exclusion of the provisions of s. 6(a).

In the case *Jumma Masjid Mercara v. Kodi Maniandra Devia*⁶, the heir apparent were two grandsons of their widowed grandmother, even before acquiring the property, mislead and transferred the rights of the same to a transferee claiming that they have the property with them. But then the widowed grandmother dies, and the property stood transferred to the grandsons. After this, a new party, Jumma Masjid entered and claimed that the property was transferred to them as a gift by the widow and one of the grandsons had also given half of his share to them.

The court in the present case, The SC dismissed the masjid's claim and upheld rights of the transferee as per rule of estoppel in s. 43.

5.1.B S. 6(b) – *Mere right of Re-Entry*

This is the right to regain possession of property that had previously been granted to some other individual for a set time period. A re-entry is commonly seen in leases, which allow the lessor

⁶ 1962 AIR 847, 1962 SCR Supl. (2) 554

to re-enter the premises if the rent is due for a particular period of time or there is a violation of terms in the lease.⁷

Example – Supposedly there is a lease agreement between the lessor P and the lessee Q. On breach of conditions of the contract by Q, for instance – indulging into unlawful activities like smuggling on the property, P can exercise his right to re-enter. This right cannot be transferred as per the provision of S.6(b). This right can be transferred only if the entire property is also transferred i.e in the event that P sells the property to R. Then even the right of re-entry gets automatically transferred to R.

In the case - *Re Davis & Co*⁸, X and Y agreed into a hiring and purchasing contract under which Y has the right to re-enter the property if X fails to pay the payments. The Court determined that the right to re-enter is a private right that must be obtained in an individual capacity.

5.1.C Easement

An easement is a right that the holder or owner of specific property has in his ownership for the enjoyment of that land, or it may be to do, persist to do, or prohibit something from being undertaken. This idea of easement incorporates the fundamental principle of 'profits a pendre,' which literally means "a right to enjoy the benefits originating from the land."

The easement right comes along with the property and not in absence of the same. It has no independent existence of its own and hence is non-transferrable.⁹

Example – A owns a land upon which he grows rice, sells it and earns money. This is part of his right to beneficially enjoy the property. This right cannot be transferred under S. 6(c) of TPA.

In the case *Ganesh Prakash v. Khandu Baksh*¹⁰, the court said that “the right to place the clothes over the flat and roofs of shops will be considered as the right of easement.”

⁷ Amrit Mishra, 'Property of 'any kind' May be transferred' 17 July 2019

⁸ (1947) 75 CLR 409

⁹ John Sprankling, Understanding Property Law 109-120, (3d ed. 2000).

¹⁰ AIR 1918 Oudh 296

5.1.D S 6(d) Restricted Interest

This clause deals with restricted interests. It states that any person cannot limit the enjoyment of property. If it is restricted in enjoyment to the owner, it deems to become non-transferrable.

Example- the lady inherited some property from her maternal father and gifted this property to her minor daughter after reserving right to enjoyment of the property with herself. This was held to be restricted interest of the property. the child was the absolute owner of the property once she turns major, no restrictions of such kind could act upon the same.

In the case of *Shoilojanund v. Peary Charon*¹¹, the right to accept voluntary and ambiguous donations during worship is a personal interest that is not transferable.

Interest of the following kind may be kept as non-transferable:

1. Services Duration
2. Theological Office
3. a pre-emption right
4. Emoluments that come with the priestly position. It should be observed, however, that the right to accept gifts made at a religious institution is distinct from the responsibility to render amenities that would call for qualifications of a personal kind, and that such rights are transferrable.

dd) Rights To Future Maintenance

within this clause on maintenance, it was determined that a right to future support is only provided for the enjoyment of the individual to whom it is awarded, and as a result, this right cannot be transferred to another party.¹² The reason for which this act was introduced was that under clause *d*), a right to receive maintenance was not was not transferable but certain courts held that if there was a fixed amount by any agreement or decree it could be assigned. Therefore they officially introduced this clause.

¹¹ *Shoilojanund v Peary Charon* (1902) ILR 29 Cal 470

¹² Dr. Poonam Pradhan Saxena (n 1)

Example- a widow suing her husband's coparceners for past and future maintenance may either get some money or a decree fixing the amount of future maintenance or charging the family properties. The widow can enter into an agreement with the coparceners fixing the future maintenance. Under this clause, right to future maintenance cannot be transferred.

According to the court's ruling in the case of *Dhupnath v. Ramacharit*¹³, an order granting a woman the right to support from her husband or a portion of his inheritance is a personal right inherited in a personal capacity. To provide help to someone who is unable to care for themselves independently is the sole goal of maintenance¹⁴.

5.1.E 6(e) Right to Sue

It clearly mentions that the right to sue any person is non-transferrable under any circumstance.

Example- an advocate assigns his right to the petitioner to sue the defendant for damages of defamation. Such rights cannot be transferred.

In *Manmatha Nath Mullick v. Hedait Ali*¹⁵, a banerji mortgaged his real estate to his appellant before leasing the properties to the respondent, who agreed to pay all taxes, cesses, and other fees due to the government. The respondent, the lessee, remained in possession of the properties until September 1924. The mortgagee, who was the case's appellant, had acquired them in accordance with the mortgage decree he had received in early 1924. He didn't pay the government income owed during 1923–1924. In order to reclaim their money, the appellant paid the sum and sued the respondent. The High Court granted a decree for the 1924 payment, but it ruled that the 1923 instalment was not recoverable under section 6(e) of the TPA since Banerjee had only given the appellant the right to claim for damages.

5.1.F s. 6(f) Public Office

This prohibition is based on public policy. First of all, it should be mentioned that a public officer cannot be moved. In a same vein, neither before nor after it becomes due, a police officer's wage cannot be transferred. "Public officer" refers to a individual who has been

¹³ Dhupnath v Ramacharit AIR 1832 All 662

¹⁴ Rukhman Singh, 'Properties and Rights which cannot be transferable under the Transfer of Property (NALSAR law Review) accessed 18 March 2022

¹⁵ 1931 SCC Online PC 81: (1931-32)

selected to carry out a public obligation and who as compensation gets paid in the form of a salary. Here, the pay is no longer something that is paid in exchange for a person's personal service, hence it is neither transferable nor attachable.

Example- a working as a civilian in army cannot transfer his post to his son, Y.

In the case of *Ananthayya v. Subba Rao*¹⁶ In this instance, a man promised to provide his brother, who was responsible for the concerned person's schooling, a set percentage of his salary. The court determined that this sub-section did not apply in this case since the person who was required to pay the money did so after the salary had arrived in his hands.

5.1.G S. 6(g) Pensions

Pensions are timely stipends or allowances which are fixed not with respect to any right of office but on the account of part services of certain merits. Apart from this Section 60) (1) of the Code of Civil Procedure, 1908 mentions the particulars which are not liable to attachment or sale in which the clause (g) specifies that gratuities or stipends allowed to pensions of government cannot be transferred¹⁷.

Example – A is an ex government employee who gets Rs. 10,000 per month as a pension and that amount is non transferrable as per S.6 (g) of the act.

In *Soundariya bai v. Union of India*¹⁸ it was held that pension cannot transfer as long as it is not paid which means it is in the hands of the government. Another crucial factor that needs to be taken into account is the fact that pensions differ from rewards and bonuses, which are instead transferrable.¹⁹

5.1.H S. 6.(h) Nature of Interest

If it opposing the nature of the interest – *inams* of service fall under this category. The emoluments of the *inams* are attached to the office. If the alienation is allowed then the Inamdar

¹⁶ *Ananthayya v Subba Rao* AIR 1960 Mad. 188

¹⁷ Chirag Basu, An Analysis of section 6 of the Transfer of Property Act, 1882, (2019).

¹⁸ AIR 2008 MP 227

¹⁹ Aryan Birewar, What May Be Transferred under Section 6, Transfer of Property Act, 1882, Journal of Legal Studies, 378 (2022).

will be left with the burden of service without the full enjoyment of the revenue which was offered to him in for his comfort which will able him to carry out his duties or services.

1. Unlawful objects within the scope of S. 23 of the Indian Contract Act, 1872²⁰
2. To an individual who is legally not allowed to transfer any property.

In case of *Dwarampudi Nagaratnamba v Kunuku Raayya*²¹ the Karta of a Hindu undivided property transferred the coparcenary property to the petitioner who was the Karta's concubine. The transfers were made considering the previous illicit cohabitation and though supposedly sale deeds, were actually gift deeds.

The issue raised was whether the transfers were void under section 6(h) of the Transfer of Property Act, 1882.

It was held that the transfers were made in the form of gifts and were made without payment. Because the presents were intended to reward the concubine for her prior services, they were exempt from Section 6(h) of the Transfer of Property Act.

However, this is true because even if there was a contract to give a gift on exchange for prior cohabitation, Section 23 of the Contract Act would not apply.

5.1.1. S.6(i) Statutory prohibitions

According to this clause, and as was decided in the case of *Shanti Prasad v. Bachchi Devi*²², a tenant with an non-transferable right of possession cannot in any way transfer his interest. However, this paragraph also contains a provision that deviates from the normal rule that all tenancies or leaseholds can be transferred. It gives effect to several statutes that prohibit the transfer of certain types of leasehold interests or tenancies. In a same vein, a farmer who owns an estate for which there has been a revenue payment default is not permitted to allot his interest in the holding.

²⁰ The object of the agreement is void, if the object is unlawful

²¹ AIR 1968 SC 253; (1968) 1 SCR 43

²² AIR 1948 Oudh 349.

In case of *Ramkali v State of U.P.*²³, a lease land was Bhumidhari and the rights over the land were non-transferable rights. It was held that in such land, interest can't be transferred to any another person. The property would be vacated and transferred to the state.

Both the provisions of section 6 i.e. (h) and (i) do not allows the transfer of particular items that by their very nature cannot be transferred, such as *res communes* which means, items that do not belong to anyone in particular as its owner and can be utilized by all people. And "*res nullius*" means such things that do not belong to anyone. "*res extra commercium*" which means that the items which are discarded from trade or commerce.

5.2 SECTION 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."

5.2.A Persons Who Are Competent to Contract

Competency to contract has laid down under section 11 of the Indian Contract Act which is read along with section 7 of TPA. Sec 11 lays down three grounds which render a person competency:

- a) is of sound mind;
- b) is of the age of majority; and
- c) is not barred from entering into a contract by any applicable legislation.

In *Mohori Bibee vs Dharmodas Ghose*²⁴, Respondent was underage Dharmodas Ghose. His immovable property was his alone. Calcutta High Court assigned Dharmodas Ghose's mother as his legal guardian. As a minor, he mortgaged his immovable property to Brahma Dutta (the appellant) for Rs. 20,000 at 12% per annum. Kedar Nath represented the moneylender-appellant. On the date the mortgage deed was started, the respondent's mother advised the

²³ Air 2009 NOC 190

²⁴ Ilr (1903) 30 Cal 539 (Pc)

appellant of his minority. On 10 September 1895, the respondent and his mother sued Brahma Dutta, alleging the mortgage was unlawful since the respondent signed it as a juvenile. This contract should be cancelled. The appellant died during the proceedings, and his executor dismissed the appeal. The appellant maintained that no relaxation or help should be offered because the defendant had deceitfully misunderstood his age.

It was held that A plaintiff-defendant mortgage deed or contract was invalid because it was signed by a minor. Brahma Dutta appealed the trial court's decision to the Calcutta High Court. The Court confirmed the lower court's ruling and rejected the appeal in *Mohori Bibee Vs Dharmodas Ghose*.

However, minority is not disqualified from being a transferee in certain cases-

1. a gift,
2. a conveyance for consideration, when no obligation is imposed on a minor
3. even if the consideration proceeded from a minor.

In circumstances where the minor has not yet given consideration or has an outstanding obligation, the conveyance in favour of the minor transferee cannot be upheld.

Example: a minor's lease with future rent due. A minor cannot be a lessor or lessee under section 107 since a lease must be signed by both parties.

A competent individual can transfer either themselves or by giving another person power of attorney. Only while the owner is alive. His power is also reversible. One can't offer someone a greater title than he has. The transferor must have good title or be authorised to transfer for a lawful transfer.

5.2.B Lunatics

A transfer made by a lunatic is invalid. If the transfer was done during a period of lucidity, it would be legitimate as long as no committee or manager has been constituted for his property.

When a conveyance is done in favour of a lunatic, the property vests in him but is handled by an Indian manager. It was discussed in the case of *Tarakeswar vs Mahesh*.²⁵

5.2. C People with Limited Alienation Power

Statutory corporations' powers are those authorised by statute, either directly or by necessary inference. When one of the co-owners didn't sign an agreement to sell an immovable property, the entire transfer was deemed invalid, including the co-owners' shares.

5.2.D Persons disqualified from being transferees

Class of sanyasis who have abandoned the world and are considered to be civilly dead; hence, they cannot receive property transfers. If his resignation or withdrawal from the world is partial, he will not be disqualified.

6. CONCLUSION

The motive to create this Act was to automate and streamline the transferability of property. In section 6 of the act, the question of 'what may be transferred?' is mentioned, in the sense of what cannot conceivably be transmitted. In this regard, the Act describes a variety of issues which we may come across in the context of inter vivos transfer. A few of the issues which have been addressed are the issue of re-entry, spes successions, pensions, salary easements, and beneficial interest, among other things.

There is a minute line between the right of the individual resulting from property and the mere right to property. This is regulated under Section 6 of the Act and has been structured. Instead of encouraging the increase of private property, it promotes its alienation. By outlining what can and cannot be exchanged, it encourages the free flow of private property. It thus establishes the idea of complete property rights. It is essential for a person to dissect this section in order to understand the direct consequences of what may or may not be exchanged. Thus, Section 6 aids us in rationally understanding the complexities of property law. Another vital point which needs to be understood is who can and cannot transfer the property, which is briefly mentioned

²⁵ Tarakeswar vs Mahesh, AIR 1981 Pat 348

in this paper in the chapter 3. This is important because if one needs to delve deeper into the concept of property as a legal object.

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