

Unit -1

Part - 2

Immovable property

The Immovable property define the section 3 (1) of transfer of property act 1882.

"**Immovable property**" does not include standing timber, growing crops or grass;

What are immovable property

Indian law has adopted the division of property into movable and immovable, and not the technical division into real and personal property recognized by the English Law. In **Futtehsang v. Kulliaraiji** , their Lordships of the Privy Council observed : "**The term immovable property' comprehends certainly all that would be real property according to English law and possibly more.**" Thus, a leasehold land would be personal property in England but would be immovable property in this country.

In India, the term is defined in

- (i) **T.P. Act.**
- (ii) **General Clauses Act.**
- (iii) **Indian Registration Act**

(i) T.P. Act.

The definition of immovable property is in two parts. Part I defines "immovable property". Part II is in definition of "attached to earth". Both have to be read together for knowing "immovable property".

The definition of immovable property includes three things namely—Land, benefits to arise out of land, and things attached to the earth. It excludes three things, namely—**standing timber, growing crops and grass**. The definition of the expression "immovable property" in this Act is a negative definition and is neither comprehensive nor exhaustive. It merely excludes "standing timber, growing crops and grass". The definition as given in the Act does not help the reader much more. It leaves him nowhere. It only says that three things, namely, standing timber, growing crops and grass are not immovable. What then is immovable? The absence of any positive definition probably leaves the readers free to travel beyond the Act for getting at as to what is included in the term "immovable property"? This includes probably the residue. What is not specifically declared to be movable property will normally be within the term "immovable" if it comes as such under it by any other law.

The judicial analysis of the issue was made in **Sukrey Kurdeppa v. Nagireddi**, wherein **Mr. Justice Holloway** said: "Movability may be defined to be a capacity in a thing of suffering alteration in the relation of place; immovability, incapacity for such alteration. If, however, thing cannot change its place without injury to the quality, it is immovable."

(ii) Immovable property in General Clauses Act

Section 3, sub-section (25) of the General Clauses Act, 1897, which applies to this Act, defines immovable property as including "land", "benefit arising out of land and things attached to the earth, which means rooted in the earth, or embedded in the earth, or permanently fastened to anything embedded for its permanent beneficial enjoyments." This definition has reference only to the

physical object and does not furnish an exhaustive test of what is, and what is not, immovable property.

In General Clause Act, the definition of immovable property is same as of "attached to earth" in T.P. Act. There are no exceptions in General Clauses Act as these are in T.P. Act (standing timber, growing crops and grass).

(iii) Indian Registration Act [Section 2(6)1

"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 nor grass."

The definition as given in Registration Act amalgamates the concepts as given in Transfer of Property Act and General Clauses Act. Despite it this definition too cannot be said to be exhaustive. It is still enumerative.

Complete meaning of immovable property read all three acts together. The term "immovable property" includes three things which are described as under.

(i) **"Land"** —This does not include only the upper surface of the earth- but is extensive enough to cover things below it, for example, minerals and sea, ocean and properties below in their bottom. These are all immovable property. Any interest in these or in respect of these or any other property in it are all immovable property. Besides, well, tube-well, rivers, ponds, tanks, stream, canal dug on surface whether natural or artificial and all interests in these would fall in enumeration of the term "land". As such all are immovable property.

(ii) **"Benefits arising out of land"** —These benefits are immovables.

The examples of benefits are rent from the house, shops and jagir, revenue

from agriculture, right to collect lac , leaf or other things from forest, trees, etc. Similarly right to collect tahbazari, Baithaki, from rural market, right to collect tax on ghats and bridges are all examples of benefits arising out of the land.

It has been held by the Supreme Court that a right to enter upon land and to carry away the fish from a lake is a right to profit de prendre and that it is immovable property in India as a benefit arising from the land. Thus, right to profit de prendre are benefits arising from land, and, therefore, immovable property unless they relate to standing timber, growing crops or grass, which are specifically excluded by section 3. Profit de prendre is included as easement in Indian Easement Act. It includes right to pluck flowers from the garden of any, right to take and carry water in bucket from well, canal or private personal tank of another, right to collect wood, twigs and leaf etc. These are benefits arising out of land; profit de prendre', 'immovable property rights in it.

(iii) 'Things attached to earth' —It means three things—

- (a) things rooted in the earth, for example, trees and shrubs;
- (b) things embedded in the earth, for example, walls and buildings, etc,
- (c) things fastened for the permanent beneficial enjoyment of anything so embedded, for example, doors, windows, ceiling fans, pegs etc.

Correct idea of immovable property

The negative definition in Transfer of Property Act and positive definition of General Clauses Act read with how it is described in Registration Act taken together succeed in giving an idea of the immovable property as follows :

The term immovable property includes three things—land, benefits to arise out of land and things attached to earth. It excludes three things—standing timber, growing crops and grass.

The definition may thus be, immovable property includes land, benefits arising out of land, and things attached to earth, except standing timber, growing crops and grass.

Exceptions.—Three

Growing crops are exception to thing rooted, these are not immovable

These are movables. It includes grain crops, like wheat, barley, gram, vegetable plants, flower plants, creepers and sugar cane.

Grass—Movable property; In no case, immovable property

Grass is movable property whether cut or not cut. Its main use is in the form of fodder. It makes no difference whether grass is in pastures or on fodder cutting machine. Both, in all forms are movable property for the purposes of Transfer of Property Act. Right to cut grass from pasture may not be immovable property.

In *Seeni Chettiar v. Santhanathan*,¹ the Madras High Court held that it has long been settled that an agreement for the sale and purchase of uncut grass, growing timber plant or wood, or growing fruit bearing tree, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, plants in nurseries is a contract for the sale of an interest in land. It is not movable property.

Followings are immovable property :

1. A jalkar right.
 2. The equity of redemption.
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3. A right of ferry.⁴ and right to catch fish and to carry it away.
4. Rights and interests of a grove-holder in a grove.
5. A right of way and in the of soil before separation from the earth.
6. A right of easement—right of way;
7. Advertisement hoardings fixed in the land.
8. A hereditary office under Hindu Law.
9. (9) A pension or periodical payment or allowance granted in permanence.
10. A right to vatan.
11. A right to jagir income.
12. A right to use water of stream.
13. A right to take produce of inam land free from assessment.
14. A right to collect rents and profits of land but the right of a person to arrears of rent of the land sold to him cannot be said to be a benefit arising out of land and cannot constitute immovable property.⁵ A contrary view has, however, been taken in Kamal Narayart's case.
15. A right to possession and management of sarjan land.⁷
16. A right to pluck and collect leaves of the tendu tree.⁸
17. A right to collect lac from the Parsa or Palas tree.⁹
18. Reversion in leased property
19. A factory building and the machineries annexed to land.
20. What are not immovable property

The following are not immovable property :

- (1) Right to worship.
- (2) Right of purchaser to have lands registered in his name.
- (3) A machinery which is not permanently attached to the earth and which can be shifted from one place to another.
- (4) A decree for sale of immovable property.
- (5) Royalty.
- (6) Right to recover maintenance allowance even though charged on immovable property.

- (7) Government promissory notes.
- (8) Standing timber, i.e., trees which are to be used in building and repairing houses and which have not been severed from the ground or which are not intended to be severed from the soil.
- (9) Growing crops.
- (10) Grassy

Movable property

The Act does not define "movable property" but Section 2(g) of the Registration Act, 1908 defines movable property as : which includes standing timber, growing crops and grass, fruit upon and juice in trees and property of every other description, except immovable property. Things attached to the land without any intention to make it a permanent part of the land, for example, a machinery attached to the land but capable of being shifted from that place is movable property. Similarly, royalty, right of worship, right to get maintenance allowance are the examples of movable property.

Difference between Movable property and Immovable property.

<u>Difference</u>	
Movable property	Immovable property
1. All interest which are interests in object other than land are called movable.	1. All interest which are interests in land are called movable.
2. It can be easily shifted or moved without any loss/damage.	2. It cannot be shifted or transported without any loss or damage and if transported, it will lose its original shape, capacity, quality or quantity.
3. It is liable for Sales Tax.	3. It is liable for Stamp duty.
4. Registration is optional.	4. Registration is mandatory.
5. Mere delivery with intention to Transfer completes the transfer.	5. Mere delivery is not enough. Transfer Must be registered.

Attestation

"**Attested** ", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant or has received from the executant a personal acknowledgment, of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;

Essential elements.—Essentials elements are as follows :

- (1) There should be signature of two or more witnesses on instrument in the presence of executant;
- (2) It is necessary to comply with anyone of the following conditions before the signature is made:
 - a) each of the witnesses has seen the transferor or executant sign or affix his mark to the instrument, or
 - b) each of the witnesses has seen some other person making sign on instrument in the presence and by the direction of the transferor or executant, or
 - c) each of the witnesses has received from the transferor or executant a personal acknowledgement of his signature or mark.

(3) It is not necessary that more than one of such witnesses shall have been present at the same time.

(4) No particular form of attestation is necessary.

Sub-Registrar or the Registering Officer who registers the document cannot be presumed to have acted also as attesting witness. *Abdul Jabbar v. Venkata Sastri*, AIR 1969 S.C. 1147.

Attestation.—Attesting witness deposed that he had seen executant signing the instrument and attesting witness had put his signature just below the executants signature. It is duly attested. *Roked Chand v. Smt. Rajeshwari Devi*, AIR 2009 NOC 3009 Rajasthan.

In a case of will, only one attesting witness was examined. Who typed the will was not known. The Will was produced from custody of one attesting witness. How he came in custody of will not explained. Execution of will was not proved. *Lalitaben Jayanti Ud Popat v. Pragnaben Jamnadas Kataria*, AIR 2009 S.C. 1389.

Actionable claim

"**Actionable claim**" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Essential elements.—There are following two essential elements of an actionable claim : unsecured debt, (2) any beneficial interest in a movable property which is not in

the possession.

Illustration on element No. 1 —A takes debt of Rs. 10,000 on a promissory note from B. Here, B's claim against A is an actionable claim.

Illustration on element No. 2 —(i) Right to demand account on dissolution of a firm, (ii) Right to obtain insured money from insurance company.

Examples of actionable claim —(i) Right to obtain insured amount from a life insurance company, (ii) Benefits received from the discharge of a contract, (iii) Sum of arrear and sum of rent payable in future, (iv) Right to claim benefits of contract made for buying goods, (v) Right to take share or account of a dissolved firm.

What are not actionable claim —(i) A decree passed by the Court for recovery of a debt, (ii) Right to obtain compensation for breach of contract, (iii) Copyright, (iv) Right to obtain gain from a co-sharer, (v) Mesne profits.

Where a decree provides for a future decree the future decree is not an actionable claim. *Jugal Kishore v. Raw Cotton Co. Ltd.*, AIR 1955 S.C. 376.

Notice

"A person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of or share or interest in, such property shall be deemed to have notice of such instrument, as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908 (XVI of 1908), from the earliest date on which any memorandum of such registered instalment has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired, is situated :

Provided that—

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (XVI of 1908), and the rules made thereunder,
- (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and -
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent, fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

NOTICE—MEANING AND NATURE

The explanations and the proviso substitutes the original provision. The Transfer of Property Act contemplates three kinds of notices, namely :

- (1) **Actual notice;**
- (2) **Constructive or Implied notice** (i.e., when but for wilful abstention from inquiry or search or for gross negligence, he would have 'known'); and
- (3) **Notice to agent or imputed notice.**

Actual notice

Actual notice, for having a binding force, must be definite information given by a person interested in the thing in respect of which the notice is issued. As it is a settled rule that a person is not bound to attend to vague rumours or statements by strangers, and that a notice to be binding must proceed from some person interested in the thing. A mere casual conversation in which knowledge of a certain thing is imparted, does not mean notice of it, unless the mind of a person has, in some way been brought to an intelligent apprehension of the nature of the thing, so that a reasonable man or any normal man of business would act upon the information, and would regulate his conduct accordingly. In other words, the party alleging notice must show that the other party had knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired. A vague or general report or the mere existence of suspicious circumstances is not in itself notice of the matter to which it relates.

A general claim is not sufficient to affect a purchaser with notice of a deed of which he does not appear to have knowledge. If a person knows that another has or claims an interest in the property for which he is negotiating, he is bound to inquire what his interest is, and if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars to the extent of such interest.

The notice must be given in the same transaction. A person is not bound by notice given in a previous transaction which he may have forgotten. Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing recitals are not necessary to his title. He is charged with notice constructively merely of that which affects the purchase of the property in the chain of title of which the paper forms the necessary link.

Constructive notice

Constructive notice is the knowledge which the courts impute to a party upon a presumption so strong that it cannot be allowed to be rebutted that knowledge must have been communicated.

"The doctrine of constructive notice" depends upon two considerations.

First, that certain things existing in relation of or the conduct of the parties, or in the case between them, begets a presumption so strong, of actual knowledge that the law holds the knowledge to exist, because, it is highly improbable, it should not, and

Second; that policy and safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant or so that he may keep himself ignorant and yet all the while let his agent know, and himself, perhaps, profit by that knowledge.

The broad principle underlying the doctrine of constructive notice is that a person who is bound to make an inquiry and fails to do it, should be held to have notice

of all facts, which would have come to his knowledge had he made the inquiry. Where, on the other hand, a person is not bound to make an inquiry, he cannot be charged with constructive notice of the facts that might have been ascertained on such inquiry. Again, where a fact, of which a person has notice, would not put him on inquiry as to the matters in question, it cannot be constructive notice of such matter. A note of caution for Indian Courts.—The courts in India should be very careful in applying the English decisions, on constructive notice, to this country, and should do so only when the circumstances are really similar. The cases of Daniels v. Davisons, and Barnhart v. Greenshields, as well as other cases are freely quoted and applied by Indian courts, and the result is that the doctrine of constructive notice is carried to unwarranted great lengths. When the Indian courts apply the principle that a man has notice because if he had made reasonable inquiries he would have ascertained the facts and if he has not ascertained the facts, he has been guilty of gross negligence—the court must carefully regard all the circumstances of the case and of the people to whom the courts are going to apply the principle.

Six Classes of constructive notice :

- (1) Wilful abstention from inquiry or search.
- (2) Gross negligence.
- (3) Registration.
- (4) Actual possession.
- (5) Notice to agent.
- (6) State of property amounts to notice.

Note :

(1) Principle of notice has been incorporated under Sections 39, 40, 41, 43, 53 and 53-A of the Transfer of Property Act. Apart from this, Section 27 of Specific Relief Act, 1872 and Section 91 of Trust Act, 1882 also provide this principle.

(2) Notice to an agent is based on a Latin maxim namely "quifacit per alium facit per se"

Registration, is a notice or not, is a question of fact and not a question of law which depends in the circumstances of each case. Tilakdhari v. Khedanlal, AIR 1921 P.C. 112.

Section - 4.

Enactments relating to contracts to be taken as part of Contract Act.—

The

chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (IX of 1872).

And Section 54, Paragraphs 2 and 3, Sections 59,107 and 123 shall be read as supple-mental to the Indian Registration Act, 1908 (XVI of 1908).
