

TOPIC 13

SALE OF IMMOVABLE PROPERTY : DEFINITION AND MODE OF SALE AND EXCHANGE (SECTION 54 AND 118 OF TPA)

Section 54 of Transfer of Property Act, 1882 defines the sale as “**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 immovable property of 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 immovable 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 immovable 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 immovable 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.

Mode of execution of Sale

For a sale of immovable property, e.g. a building, there will be a contract between the parties requiring the seller to transfer the ownership in the building for a price in cash. The contract will provide the terms of the sale, including the time of passing of the ownership, delivery of the property and payment by the buyer. In the performance of the contract, when seller transfers the ownership in the property, the sale is done. At some point of time, the seller will give possession of the property of the buyer. A sale of immovable property is done through a registered instrument.

Essentials of Sale

According to Section 54 of TPA, the following are the essentials of a valid sale:

- **Parties to sale :**

In a sale, there must be at least two parties. The person who transfers his / her property is known as the transferor / seller / vendor and the person to whom the property is transferred is known as the transferee / buyer / vendee.

- **Competency :**

For a valid sale both the buyer and seller have to be competent on the date of the sale.

- a. Seller**

- i. The seller must have the ownership of the property which he is going to sell.
 - ii. The seller must have a legal title to it only then he can sell the property.
 - iii. He must not be a minor.
 - iv. He must not be of unsound mind.
 - v. He must not be statutorily incompetent.
 - vi. The seller may be a natural person / juristic person, for example, corporations or another legal person

- b. Buyer**

- i. The buyer must be competent to receive the ownership of the property.
 - ii. The buyer should not be disqualified from buying the immovable property by any law in force at the time of the sale.
 - iii. The seller may be a natural person / juristic person, for example, corporations or another legal person

- c. Subject matter of sale**

Sale under Transfer of Property Act, 1882 specifically deals with sale of immovable property. Immovable property can be tangible or intangible. Tangible property is one that can be

touched, such as a land, a house, a tree, things attached to earth, etc., while intangible property refer to a property that cannot be touched such as a right of ferry, a right to mortgage, a right of fishery, etc.

▪ **Price or consideration :**

Price is an essential element of the sale. At the time of the contract of a sale, a price must be ascertained at which the property is going to be transferred. The price can be paid at the time of sale or before the sale in advance or after the sale. At the same time, it can be paid in a lump sum or in part.

▪ **Registration :**

According to the Section 54 of the Act, writing, attestation and registration are the essential requirements for the completion of a valid sale of the property, whose value is more than Rs. 100. For sale of property whose value is less than Rs. 100, the registration is optional.

▪ **Conveyance :**

Section 54 provides two modes for transfer of property –

- i. Delivery of possession
- ii. Registration of sale deed

SECTION 118 OF TRANSFER OF PROPERTY ACT, 1882 defines as “when two persons mutually transfer ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “Exchange”.

From above it can be understood that for being an “Exchange”;

- i. There must be two persons transferring ownership of one thing for the ownership of another;
- ii. Neither thing or both things being money only.

Transfer of any property against consideration is called “Sale”, and transfer without consideration is called “Gift”. Now when a property has been exchanged with another property it is called “Exchange”.

There may be both immovable or movable property, which can be transferred through exchange. In some cases where transfer of ownership of a property along with some money against some ownership of another property happens, it also comes under definition of exchange.

Example: Suppose Mr. A is transferring his residential property in Patna, valued Rs. 30.00 Lakhs against property of Mr. B in Gaya of Rs. 27.00 Lakhs. Now in this case Mr. B is transferring ownership of his property and giving cash of Rs. 3.00 Lakhs against ownership of property belonging to Mr. A. This case also falls under definition of “Exchange”, and not “Sale”.

Note: Oral exchange is not permissible in view of the amendment of Section 49 of the Registration Act, 1908 brought about by Act No. 21 of 1929, which by inserting in Section 49 of the Registration Act, 1908 the words “or by any provision of the Transfer of Property Act, 1882”, has made it clear that the documents of which registration is necessary under the Transfer of Property Act, 1882 but not under the Registration Act, 1908 fall within scope of Section 49 of the Registration Act, 1949. And if not registered they are not admissible as an evidence of any transaction

affecting any immovable property comprised therein and do not affect any such immovable property.

Transaction by Exchange which requires to be affected through registered instrument is if it was to affect any immovable property worth of Rs. 100 or more. [Satyvan Vs. Raghuvir, AIR 2002 P&H (2002) (3) ICC112(Punj)LR467].

FEATURES OF EXCHANGE;

- 1. Transfer of ownership;** Exchange involves transfer of ownership in some existing property. In transfer of ownership, absolute interest of the owner is transferred. A partition of immovable property is not considered as exchange.
- 2. Property need not be immovable property;** In Exchange properties may be immovable or movable. An immovable property can be transferred against a movable property and vice versa.
- 3. Exchange includes “Barter”;** Exchange of one immovable property with another immovable property is known as “Barter” and same in case of transfer of one movable property against another moveable property.
- 4. Mode of Transfer;**
 - i. Section 118 provides that a transfer of property in completion of an exchange can be made only in a manner prescribed for transfer of such property by “Sale”. The formalities of Section 54 (dealing with sale of properties) will be complied with;
 - ii. Where both properties are of movable, then exchange may be affected by delivery of properties and registration is not essential;
 - iii. Where properties are immovable, but value is less than Rs. 100, then registration is optional;
 - iv. Where the properties exchange are immovable properties and their value are more than Rs. 100/- then registration of exchange of ownership through instrument is necessary.

Note:

1. It is necessary that Deed of Exchange is a valid contract and not void under Contract Act. Suppose persons are exchanging ownership of their properties to hide act of crime or financial crime or benami properties then the instrument of exchange become void. [**Srihari Jena Vs. Khetramohan Jena, AIR (2002) Orissa 195; 2002 (4) Civ LJ 279**].
2. When in an exchange of properties one party did not get possession of the property he was entitled to receive in exchange, he was held entitled to return property transferred by him. **Hari Shankar Mishra Vs. Vice Chairman, Kanpur Development Authority, AIR 2001 All 139 ;2001(42) ALL LR 839.**
3. **Balakrishnan Bhagwanji Lodi Vs. Prakash Sheshrao Lodi, AIR 2005 NOC 89(Bombay)**; It was held that in case of partition of joint family property, once partition is affected, whether by way of family arrangement or deed of partition, there is severance of jointness of properties. Two brothers thereafter exchanged properties which were held by them separately. The properties being worth more than Rs. 100/- in value. They could exchange them only through registered instruments.

CHITRA KUNDAN
ASSITANT (GUEST) PROFESSOR
PATNA LAW COLLEGE