

The term "Transfer"

Transfer literally means passing.

In the case of Transfer of Property, "Transfer" takes place in following ways:

1. Sales
2. Mortgages
3. Charges
4. Leases
5. Exchange
6. Gifts

### **1. Sales :**

As per Section 54 of TOPA :

Sale:

"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. 1In 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.

(Reversion meaning the right, especially of the original owner or their heirs, to possess or succeed to property on the death of the present possessor or at the end of a lease OR in other words returning something to its previous owner)

Essentials of Sales: (As per TOPA)

Parties

A minor or lunatic cannot be a transferor / vendor as he is not competent to contract under Section 11 of the Indian Contract Act, 1872. However it has been held that a minor or a lunatic can be a transferee or purchaser in the case of transfer by way of sale or mortgage, represented by his Guardian.

## Subject Matter

Subject matter is the transferable immovable property.

## Price

Price is an essential ingredient for all transactions of sale and in the absence of the price or the consideration, the transfer is not regarded as a sale. The transfer by way of sale must be in exchange for a price. It has been held that price normally means money. The price can be paid fully in cash or it can be partly paid and partly promised to be paid in future. The price can be fixed by the agreement between the parties before the conveyance of the property. The price is to be fixed reasonably.

## Delivery of Property

Transfer by way of sale in the case of tangible property worth less than rupees One Hundred can be made either by a registered instrument or by delivery of property by putting the purchaser or the person directed by the purchaser, in possession of property. If the consideration for the sale is more than Rs.100/- then the instrument must be registered under the Registration Act, 1908.

## Rights and Duties of Seller and Buyer

The rights and duties of seller and buyer are subject to the contract. In the absence of any contract to the contrary, the rights and duties of seller and buyer are governed by section 55, Transfer of Property Act. The rights and duties of seller and buyer under the provisions of section 55 of Transfer of Property Act.

### 2. Mortgages:

The term "Mortgage" has been defined in Section 58 of TOPA:

58(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

### Essentials of Mortgage:

1) There must be a transfer of interest.

There is no transfer of ownership but transfer of interest only for the purpose of securing payment of money by way of loan. The right of mortgagee is only an accessory right, which is intended merely to

secure the due payment of Debt. Mortgage is simply a transfer of interest in the immovable property while the ownership still remains with the mortgagor.

2) There must be specific immovable property intended to be mortgaged.

The immovable property must be distinctly specified. The description of the property in the mortgage deed must be sufficient to identify the property.

3) The transfer must be made to secure the payment of a loan or to secure the performance of a contract. The consideration of mortgage may be either

A) Money advanced or to be advanced by way of loan.

B) An existing or future Debt,

C) Performance of an engagement giving rise to pecuniary liability.

(Separate notes to be given on Types of Mortgages)

### 3. Charges:

Meaning:

A charge is a right created by any person including a company referred to as “the borrower” on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as “the lender”, which has agreed to extend financial assistance.

Definition:

As per Section 100 of TOPA:

where an immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge.

Essentials of Charge:

1. There should be two parties to the transaction, the creator of the charge and the charge holder.

2. The subject-matter of charge, which may be current or future assets and other properties of the borrower.

3. The intention of the borrower to offer one or more of its specific assets or properties as security for repayment of the borrowed money together with payment of interest at the agreed rate should be manifested by an agreement entered into by him in favour of the lender, written or otherwise.

Charge and Mortgage definition:

There is a clear distinction between a mortgage and a charge, the former being a transfer of an interest in immovable property as a security for the loan whereas the latter is not a transfer, though it is nonetheless a security for the payment of an amount. A mortgage deed includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, one person transfers, or creates in favour of another, a right over a specified property.

#### 4. Leases:

As per section 105 of TOPA:

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Essentials of Lease:

##### 1. Competency-

The lessor (The transferor, who is able to make a lease) and the lessee (The transferee) must be competent. A lease to a minor is void.

2. Subject Matter- The subject matter of the lease must be immovable property.
3. The Immovable property must be transferable property.
4. There must be a transfer of right to enjoy such property
5. The lease must be made for the specific period (a certain time), express or implied or in perpetuity.
6. The consideration which may be premium or rent or both.
7. The lessee must accept the transfer.
8. In lessee, there is a separation of ownership and possession.
9. The lease must be created as per the provision prescribed in section 107 of the Transfer of Property Act, 1882.

Difference between Lease and Rent:

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|------------------------------------|---|--|
| Meaning                            | The contract where one party permits the right to use the asset belongs to him to the other party for a certain period, is known as | Renting is to let, the other party use your asset for a limited period and |

|                         | Leasing.  | fixed consideration.                                       |
|-------------------------|---|--|
| Accounting Standard     | AS - 19   | No specific Accounting Standard                            |
| Duration                | Long Term   | Short Term   |
| Parties                 | Lessor and Lessee   | Landlord and Tenant  |
| Consideration           | Lease Rentals   | Rent   |
| Repairs and Maintenance | Depends upon the type of lease  | Landlord   |
| Modifications           | The terms of the contract cannot be modified until it ceases to exist.                                      | The terms of the contract can be modified by the landlord. |
| Offer to buy            | At the end of the lease term, the lessee gets an offer to buy the leased asset by paying a residual amount. | No such offer.   |

1.

#### 5. Exchange:

Section 118 of TOPA:

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “exchange”. A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

#### 5. Gift:

Section 122 of TOPA:

“Gift” is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

