

THE TRANSFER OF PROPERTY ACT (NINTH EDITION, 1970) by Satyendra Mohan Lahiri, M.A.B.L., Senior Advocate, Supreme Court of India. Published by Eastern Law House (Private) Ltd., Calcutta. pp. xxv+792. Rs. 25 (£ or \$ 5).

THIS IS THE ninth edition of the book which was first published in 1930. It is a section by section Commentary on the Transfer of Property Act (Act IV), 1882 (hereinafter referred to in this review as 'the Act').

The actual textual matter runs to 792 pages, of which the Commentary on the Act takes 693 pages. The sections as amended are reproduced before commenting upon a particular section. The remaining 99 pages are devoted to Appendixes ('A' to 'I') detailing, with short notes and some relevant case law, certain relative provisions of the Code of Civil Procedure, 1908, *viz.*, Order 34 dealing with the Procedure in 'Suits relating to Mortgages of Immovable Property'; provisions of the Indian Registration Act, 1908 (as amended) dealing with 'registration of documents', *viz.*, section 17 and 18 and sections 47 to 50 and the provisions of some other minor acts like the Hindu Disposition of Property Act, 1916 and the Government Grants Act, 1895, etc., which still continue to be in force. These Appendixes have really added to its utility, especially to the practitioners of law. In addition there is the usual 'Subject Index'<sup>1</sup> and also an 'Addenda',<sup>2</sup> though the 'Addenda', one might say, virtually adds nothing at least in some cases, as for example that referring to page 644 of the book and the case of *Yeswant Singh v. Jagdish Singh*, A.I.R. 1968 S.C. 620 (wrongly printed as 1963 S.C. 620).<sup>3</sup>

The learned author, by the various important and high positions held by him in the judicial and legislative departments of the government of Assam<sup>4</sup> and also his experience, of late, as a Senior Advocate of the Supreme Court of India, is evidently well equipped to deal with an abstract subject like the law of transfer of property and one cannot fail to get the impression that he has acquitted himself tolerably well in the task. The work mirrors him as a matured and seasoned author. Of course, besides producing nine editions of this very same book, he has also other works on law to his credit. It is, therefore, no matter for surprise that he has generally evinced such clarity of thought and power of analysis while dealing with different hard and elusive problems of the law of property.

The author, in all modesty, had stated at the time of its first publication in 1930 that his book "did not pretend to be a complete digest

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1. Satyendra Mohan Lahiri, *The Transfer of Property Act 1882* (1970). Hereinafter cited as *Lahiri* only

2. *Id.* at 789 to 792.

3. *Id.* at 791.

4. The author was for some time Advocate General, Assam, and Legal Remembrancer and Secretary to the Legislative Department, Government of Assam.

of case law on the law of transfer of property, nor to compete with any existing comprehensive work on the subject.”<sup>5</sup> But the fact is that his book has remained all along as one of the well known works on the subject and has remained popular, both among the academicians, the teachers and the students of law ; and among the men of the profession, the practising lawyers and the judges. And one of the notable achievements of this book is that it has ever tried to be more or less exhaustive in the digest of all authoritative pronouncements of all the higher courts, viz., the Privy Council, the Federal Court, the Supreme Court of India and the various High Courts. It has also the added advantage that references to the cases are given along with the extracted texts themselves rather than in foot notes. Foot notes and the effort to refer to them, as one reads the text, are liable to cause strain and distraction. The system adopted here is much better and time saving.

But, however, it is not understood why there is only a ‘Table of Supreme Court and Federal Court Cases’<sup>6</sup> and not of all the cases cited. It has evidently reduced the utility of the table of cases. It has also to be pointed out that the manner of citing cases is also apt to be confusing, at least in the beginning. For it would not be clear to a reader, not to speak of an inexperienced reader for that matter, that 1968 S.C. 1024<sup>7</sup> really means A.I.R. (1968) S.C. 1024 and (1929) M. 79<sup>8</sup> really means A.I.R. (1929) Madras 79 without there being at least an indication to such a manner of citing the A.I.R. cases, because such a system is usually adopted, if at all, only while citing the official I.L.R. series. But in the case of the I.L.R. series as well as in respect of other unofficial journals and reports the abbreviations are always furnished. The confusion seems to be worst confounded when one finds also citations like A.I.R. 1967 S.C. 744.<sup>9</sup> The author could have taken care to avoid such a confusion especially when his book purports to be one digestive of the cases.

As exactly as in the case of the Act, the book is also divided into eight chapters. However, being a Commentary sectionwise of the Act may have its own advantages, in that any one wanting to have the entire case law under one particular section, can have it all together at one place, it has also its own weaknesses.

In the first place there would be unnecessary repetitions in the process of abstraction from the very same case for the different sections of the Act. Even contradictory statements appear when conflicting decisions are abstracted. It would then be confusing to one who uses the book for the

5. *Lahiri* at vii, ‘Preface to the first edition’.

6. *Id.* at xv to xx.

7. *Id.* at 569 (*Dhruv Deb v. Harmohinder*).

8. *Id.* at 5 (*Sayanarayan v. Lakshmayya*), It is perhaps relevant in this context to point out that some text-books, as for example Mulla, ‘the Transfer of Property Act’, etc., abbreviate A.I.R. to mere A. and A.I.R. (1929) Madras 79 to (‘29) A.M. 79; but nowhere it has been found cited as (1929) M. 79. A.I.R. (1929) Madras 79.

9. *Lahiri* at 87.

study of the subject unless there are relevant explanations and attempts at reconciliations or authoritative final conclusions. This is really the part of an able commentator. It has to be pointed out that there are several instances where the author has not played this part quite effectively.

For example there has all along been a judicial conflict on the question whether a covenant for pre-emption of land, if unlimited in point of time, would offend the rule against perpetuity.<sup>10</sup> This point has, however, been clearly and authoritatively decided by a recent ruling of the Supreme Court while answering it negatively.<sup>11</sup> This aspect of the matter, it is submitted, has not been brought out clearly and effectively in the midst of extraction of conflicting judicial decisions, all in an ill-arranged way.<sup>12</sup> Then again to give another example, while dealing with the topic of transfer of actionable claims<sup>13</sup> the question posed is : "Whether a part of a debt is assignable ?" The decisions for and against the proposition are merely abstracted from which it is difficult at least to anticipate effectively what would ultimately become the authoritative position, if occasion arises for laying it down. Certainly a Commentator ought to contribute in enabling a final Court of law to decide it in future and also ought to help one who seeks to study the law, by expressing his view unequivocally for whatever it is worth.

The book reads in a quite detached manner thus :<sup>14</sup>

The section covers transfers by way of security as well as absolute transfer. The second illustration to the section makes this clear : (Reference to cases).

An assignment of a debt to be valid must be of the whole debt. (References to cases); (Contra—Partial transfer of debt also is valid : references to cases).

Neither reasons are elaborated for the two view-points nor any conclusion is attempted.

To take another example, the decision of the Supreme Court in *Satyanarayana v. Yenaraju*<sup>15</sup> has in effect created a judicial conflict where perhaps there was non previously. The question related to the meaning of "effective attornment" by a tenant. The minority opinion propounded

10. For a detailed and illuminating discussion of the aspect, see Mulla, *Transfer of Property Act* 118 to 120 (5th edn. 1966). Of course this was published before the authoritative decision of the Supreme Court in *Ram Baran Prasad v. Ram Mohit*, A.I.R. 1967 S.C. 744.

11. *Ram Baran Prasad v. Ram Mohit*, *Ibid*,

12. *Lahiri* at 83 to 87. (Compare this part of the book with the above said portion of Mulla, *Supra*, note 10. It is evident that the law as finally laid down in the *Ram Baran* case has already been stated in the context by anticipation).

13. *Lahiri* at 672.

14. *Id.* at 672.

15. A.I.R. (1967) S.C. 174, *Lahiri* at 610 where it is cited as *Satyanarayanaraju v. Hanumayamma*.

by the dissenting judge<sup>16</sup> appears to be more sound as compared to that of the majority of three Judges.<sup>17</sup>

Here the position taken up by the author is quite the reverse. He has correctly anticipated that the dissenting opinion is in conformity with the accepted principles and just gives reference to the opinion.<sup>18</sup> And then it is meekly added that "the majority opinion is distinguishable on facts. It has not really taken a contrary view of the law." But the position is really otherwise, as it would have been clear if only that part was also extracted.<sup>19</sup>

Such instances are found at several places in the book. Not that he has not accurately extracted the cases but the extraction from too many cases do not give at times a clear picture unless the commentator on his own tries to give one.<sup>20</sup> Other Commentators of the same enactments as well as other enactments have succeeded in this task sometimes to a greater degree than in the instant case.<sup>21</sup>

Then again in so far as a sectionwise Commentary is concerned it is possible that it may suffer from lack of co-ordination and sequence unless the Commentator takes extra precaution. Want of such sufficient precaution has also been evident at times.

For example the two recent Supreme Court cases, viz., *Raja Dhruv Dev Chand v. Raja Harmohinder Singh*<sup>22</sup> and *State of Kerala v. The Cochin Chemical Refineries Ltd.*<sup>23</sup> both clarify a fundamental legal principle in relation to transfer of property. They establish the difference between a 'contract to convey property' and an 'executed conveyance' which really transfers an interest in property from one person to another with consequential legal consequences.

True, specific nature of the legal transaction involved in the two cases was different; one was a case of lease and the other of a mortgage.

16. *Per* Reghubar Dayal, J. A.I.R. (1967) S.C. 174, 180.

17. *Per* Wanchoo, J. (On behalf of himself and Das Gupta, J. and Shah J.) A.I.R. 1967 S.C. 174, 177.

18. *Lahiri* at 610: This part reads as follows: "And after such attornment the tenant is estopped from challenging the title of the new landlord (See *per* R. Dayal, J. in and then adds as stated above).

19. A.I.R. (1967) S.C. 174, 177. Possibly both the opinions are by way of *obiter* only and hence the giving rise to a judicial conflict which will have apparently to be resolved hereafter, and it could be suggested in what way it ought to be decided.

20. See for example *Lahiri* at 16 for statements like: 'A mortgage decree is immovable property' and 'A decree for sale of immovable property has been held to be movable property' and so on. *Id.* at 36, 'An entry regarding mortgage in the Registrar's books amounts to notice of the encumbrance to the purchaser' which would convey to the reader the purchaser would not be affected by the mortgage unless he has notice of it which is obviously wrong.

21. *E.G.* Mulla, *Op. cit.*, *Supra*, note 10, S.M. Shah, 'Company Law', etc.

22. A.I.R. (1968) S.C. 1024.

23. A.I.R. (1968) S.C. 1361.

24. *E.G.* the doctrine of frustration and the doctrine of consideration.

The author has referred to and abstracted both the cases in relation to the particular specific transaction<sup>25</sup> but has failed to give the fundamental common principles at the appropriate place, e.g., while dealing with section 4 or section 7.

To take another example, the author has tried to classify property into movables and immovables and tried to explain the difference at pages 12 to 16 (while dealing with section 3—the interpretation clause) but has postponed the definition of the concept of ‘Property’ itself to a later stage.<sup>26</sup>

A discussion on section 6 clause (a) dealing with the topic of ‘spes successionis’ would not, it is submitted, be complete and comprehensive unless there is reference at least to section 43 of the Act, especially in the face of the illustration given under the latter section.<sup>27</sup> This is also, perhaps, abundantly clear from the recent decision of the Supreme Court in *Jumma Masjid v. Kadimaniandra Dervish*<sup>28</sup> where also the Court had to take into consideration the effect, or rather the combined effect, of both the provisions. True, the author has given “Section 6(a) and section 43—a comparison” at the concluding part of the discussion on section 43 but what is suggested is that at least a reference ought to have been given in the earlier part of the book which certainly would have been more effective in the matter of co-ordination.<sup>29</sup> The absence of any reference to the Supreme Court decision referred to above under section 6(a) is rather understandable.

Similarly for a better co-ordination the definition and the elaboration of what is an “actionable claims”<sup>30</sup> could have been postponed to the last chapter where the topic of transfers of “actionable claims” is dealt with, after giving a suitable reference to that effect under section 3. Any way it would have been obviously helpful to indicate, and it would also have been necessary to do so, while discussing about “actionable claims” in section 3, that the law relating to the transfer of them is dealt with in chapter 8. Nothing of this sort has been done.

25. *Lahri* at 569 (Leases) at 335 (Mortgages).

26. *Id.* at 25 (While Commenting upon § 5 of the Act).

27. Illustration under § 43 of the Act is as follows :

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y, Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition : but on B's dying A as heir, obtains Z. C, not having rescinded the contract of sale, may require A deliver Z to him.

In fact there had been even a judicial conflict whether the illustration is repugnant to § 6(a) and, therefore, invalid or not which, however, seems to have been set at rest by the recent Supreme Court decision (see note 28 *infra*).

28. A.I.R. (1962) S.C. 847.

29. See, e.g., Mulla, *op. cit. Supra*, note 10 at 59.

30. Incidentally it is not clear how the author classifies such claims into three categories (*Ibid.* p. 30) like “a claim (1) to any debt...(2) or, to any beneficial interest in movables not in possession...(3) which the civil courts recognise as affording grounds for relief...”

It is not proposed, nor is it practicable, to point out in detail all such cases of lack of proper co-ordination. The idea in citing a few important instances is to stress the fact that if more attention had been given to this aspect the book could have been much more useful not only as a mere 'commentary and a digest' but also as a good 'text-book'.

Then again an academican and a teacher, rather than a practitioner of law, is apt to feel that a little more elaboration of the academical and historical aspects of the various principles of law discussed could have been made, while commenting upon the different sections of the Act and stating the law as it is by digesting the cases. If it were so it could, perhaps, have more useful and effective as a good academic text-book as well while serving its full purpose as an uptodate reference book of case-law.

From the above point of view it would appear rather incongruous that even while dealing with the "history of the legislation"<sup>31</sup> the historical evolution of the "Amending Act" of 1929 is elaborated in more detail than that of the "Parent Act" itself. The extraction and reference to a single passage like :

The function of the bill (relating to the Act) was to strip the English law of all that was local and hisotrical, and to mould the residue into a shape in which it would be suitable for an Indian population and could easily be administered by non-professional judges.

From the report of the Second Law Commission, who virtually gave the final shape to this piece of legislation, would, it is submitted, have gone a long way to give an insight to the reader of the main sources and the essential nature of the entire enactment. It could also have struck a warning to him as to how far the English statutes in 'pari materia' and the decisions thereon of the Courts in England could be resorted to while attempting to interpret the various provisions of our Act.

But nothing of this sort is found in the "history of the legislation" given in the "Introduction".

Then either while dealing with the "Preamble of the Act" or while referring to the aspect of "retrospectivity" of it, a brief reference to the pre-existing state of the law relating to the transfer of property would have been much helpful and statements" in respect of matters not dealt with by the Act the principles of the English common law, however, may be applied as rules of justice, equity and good conscience",<sup>32</sup> and

Though the Act (excepting some sections extended to municipalities and notified areas) in terms does not apply to the Punjab, the principles embodied therein have been applied in many cases as based on justice, equity and good conscience.<sup>33</sup>

31. *Lahiri* at xxi to xxiii.

32. *Id.* at 5.

33. *Id.* at 6 and 279.

The position is that before the Transfer of Property Act there was practically no law as to real property in India. A few points were covered by the Regulations and the Acts which have been repealed either wholly or in part by section 2 of the present Act. But for the rest of the law, the Courts in the absence of any statutory provisions, adopted the English law, as the rule of justice, equity and good conscience.<sup>34</sup>

To take another instance it is stated that "Para (2) of the original section (*viz.* sec. 53) has been altogether omitted as being unnecessary." It is also further stated in the context:<sup>35</sup> Para 2(2) has been added by way of abundant caution. The mere fact that transfer is gratuitous does not raise any presumption of fraud." It is also stated:<sup>36</sup> "The words 'when the effect of any transfer is to defeat or delay creditors' gave rise to considerable difficulty and the decisions were not uniform." But the historical reasons for enacting a provision like that in the old section and for the removal of the same by the amending Act have not been elaborated so as to enable an academic reader to appreciate and understand the whole course of the legislation.

To take another aspect, the recent decisions of the Supreme Court in *Delhi Motor Co. v. Basurkar*<sup>37</sup> has created an anomaly in the interpretation of Section 53A of the Act, in so far as it seems to have laid down an apparently wrong proposition not warranted either by the wording of the section itself or by previous authority. In that sense it is a legal landmark in reference to that section.<sup>38</sup> It would appear, if the interpretation put upon the section by the Supreme Court could be taken to be correct in all its implications, the original transferee could easily be deprived of his even limited statutory right by a designing and clever transferor who deprives him of his possession by deception, fraud, force or by whatever means he could. Such a disastrous situation, it is submitted, is not contemplated by the Legislature nor is it warranted by previous authority.

It cannot be that the present learned author would not have noticed this anomalous position brought about by the ruling of the highest tribunal of the land. But he has just given a reference to this case as well after stating the correct and undisputable proposition of the law, *viz.*, that the provisions of section 53A can be availed of only as a defence. He refrains from entering into any academic discussion regarding the implications of the particular case.<sup>39</sup>

In *Santhanakumar Nadar v. Indian Bank Ltd.*<sup>40</sup> the Supreme Court did not allow an interesting question relating to the validity of a provision

34. Mulla, *op. cit.*, *supra*, note 10 at xv.

35. *Lahiri* at 213 and 228.

36. *Id.* at 219.

37. A.I.R. (1968) S.C. 794.

38. In this context see the comments by the present reviewer on the case, published in *J.L.I.* 224 (1969).

39. *Lahiri* at 269. However, it is surprising that there is no reference to this case in the 'Table of Cases'.

contained in section 69 of the Act to be raised and argued, on technical grounds but a discussion of the point would have been academically interesting and beneficial. While citing the case and giving the exact ruling laid down by the Supreme Court<sup>41</sup> the learned author has not given reference to it even, though it happens to be one solitary case referred to in the context.

What has been stated so far is only to show that one cannot escape the feeling that the same sort of enthusiasm as evinced in stating the law 'as it is' has not been shown in explaining 'how it came to be so' or in entering into matters of purely academic interest.

Perhaps the author is having an eye on the professional lawyer rather than on the purely academic one. Even otherwise a 'Commentary' is not the best form of a text-book for any person who wants to study the law from the elements.

Besides the above there are some ambiguous statements of the law here and there and also at times printing mistakes which are obviously unavoidable in spite of the best efforts.

For example it is stated that the Act has not been extended to Pepsu or Punjab by any notification.<sup>42</sup> It is not quite correct because it appears that at least section 123 of the Act has been extended to the erstwhile territory known as Pepsu by notification with effect from the 15th May 1967.<sup>43</sup>

It is certainly doubtful when it is stated, obviously without any judicial authority in support, that an acknowledgment through an agent (of the fact of executing the document by the executant) is not sufficient (as a personal acknowledgment).<sup>44</sup>

The statement: "The section does not apply where there is no provision with regard to the benefit of a class" apparently does not convey what is intended even when read in the context.<sup>45</sup>

"The word 'transfer' is used in law in the most generic significations comprehending all the species of contract which pass real rights in property from one person to another"<sup>46</sup> would tend to convey the idea that a contract can by itself create interests in real property which is obviously wrong.<sup>47</sup>

"The tenant is not entitled to any compensation for removal of the fixtures or for improvement unless there was any contract (express or implied) to that effect."<sup>48</sup> It is not clear how a tenant can claim

40. A.I.R. (1967) S.C. 1296.

41. *Lahiri* at 408.

42. *Id.* at 5-6.

43. See *Indar Singh v. Nihal Kaur*, A.I.R. (1968) Punj. 495 where the Court had to deal with the effect on prior gift of the subsequent extension of the provisions of the Act.

44. *Lahiri* at 17.

45. *Id.* at 90.

46. *Id.* at 45.

47. *Id.* at 286 where the correct position is stated.

48. *Id.* at 572.

compensation for 'removal of the fixtures' by him.

No reference is found to the important ruling of the Supreme Court in *Soni Lalji Jetha v. Soni Kalidas*<sup>49</sup> and the enunciation of a fundamental principle in relation to the right of redemption of the mortgagor under section 60 of the Act and the right of the mortgagee to acquire absolute title to the hypotheca by adverse possession even as against the mortgagor; so also of some other important recent rulings of the same Court.<sup>50</sup>

However, the idea is not to catalogue 'errors and deficiencies' which might have inadvertently crept in in spite of the best efforts of the writer, but to state the fact that such defects might be detected by a very critical and discerning eye which are of no great consequence considering the bulk of the book and the vast mass of information it contains.

In conclusion it might confidently be said that whatever might be its peculiar characteristics and apparent drawbacks it is really a valuable contribution to legal knowledge, especially in a field where there are not very many good and reliable books by Indian authors to boast of.

The printing in general and the getup are attractive and the price is reasonable.

G.M. Sen\*

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49. A.I.R. (1967) S.C. 978.

50. For example *Raja Anand Brahma Shah v. State of Uttar Pradesh*; A.I.R. (1967) 1081; S.C. *Divisional Forest Officer v. Daut*, A.I.R. (1967) S.C. 612 relating to definition of 'land' and the effect of a 'transfer of land'. *Commissioner of Income-tax v. Motors and General Stores (Private) Ltd.*, A.I.R. (1968) S.C. 200 on the topic of what an 'exchange' means and some other cases.

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