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PROPERTY LAW

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I INTRODUCTION

THE TRANSFER of Property Act, 1882 (TPA) regulates all kinds of transfers, conveyances and assignments of rights in immovable property by living persons according to their choice and in terms of conditions agreed upon by them. It governs transactions such as sale, exchange, mortgage, lease and gift. While sale conveys absolute ownership, right, interest, title and possession, in lease the owner lets out merely the use, possession and temporary enjoyment of occupation of the property. A transaction of mortgage is conveying the possession of immovable property as a security for a sum borrowed for a limited period by mortgager to the mortgagee. The mortgager has a right to redeem on payment of sum borrowed. The mortgagee has a right to foreclose upon failure of mortgager to re-pay the loan by the date as agreed. Apart from the above, TPA deals with rule against perpetuity, doctrine of part-performance, doctrine of *lis pendens*, transfer by ostensible owner, transfer in favour of unborn persons, marshalling and subrogation, *etc.* The present survey aims to discuss decisions of the Supreme Court and High Courts as reported in the law reports during the year 2009.

II GENERAL PRINCIPLES

Operation of transfer

Chapter II of TPA containing sections 5 to 53A deal with principles concerning the law on transfer of immovable property by act of parties as opposed to transfer of property by operation of law. Section 8 concerns construction of deed and document. The court in such cases does not go only by the title of the document. It has to read the recital in the deed to gather intention of the parties. S.H. Kapadia J (as he then was) disposed of a batch of special leave petitions by municipal corporation of Delhi (MCD) wherein a question of interpretation of deeds was involved.

Perpetual sub-lease was executed by Union of India as lessor in favour of a cooperative society as lessee and a member of the society as a sub-

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lessee or allottee. Under the terms of the deed for industrial plot, the sub-lessee was required to pay a certain sum as premium in addition to rent. The deed was for purchase of leasehold rights and the lessor had retained the right to determine periodically the rent payable and the premium chargeable. The sub-lessees, being aggrieved by such views, had challenged the decision of the MCD¹ in Delhi High Court without any success and therefore they filed SLPs in the Supreme Court. Kapadia J, dismissing all SLPs, observed as under:

We are required to examine the Deed dated 7.5.99 to find out whether the case is that of letting or conferment of ownership of leasehold rights. On reading and analysing the said deed, we are of the view that it did not operate as conveyance of leasehold rights.

For the aforesaid reasons we find no infirmity in the impugned judgements of the Delhi High Court and accordingly all the appeals stand dismissed with no order as to costs.

This is the time tested method of interpretation of deeds and documents followed in several cases in the past.

III LEASE OR OUTRIGHT SALE

NOIDA authorities allotted plots in NOIDA to several cooperative societies by registered lease. The state of UP was lessor and the society was a lessee. The society then allotted individual plots to its members as sub-lessees. The members then transferred their plots by documents titled as sale and presented them for registration before the sub-registrar. There was dispute between the sub-lessees and his transferees on one hand and the sub-registrar on the other who wanted the price of land at market value to be the deciding factor on the question of stamp duty.

The residents' welfare association unsuccessfully took the matter to the High Court of Allahabad. In appeal, the Supreme Court considered the question as to whether the documents conveyed merely the right of assignment or an outright sale. The court, after considering all aspects of the matter, held the society as lessee of the government land and its members as sub-lessees through the documents presented for registration were conveying only lease-hold rights and not the ownership. The following observation by Tarun Chatterjee J is important:²

The demised land was merely an enjoyment of the land and not transfer of the ownership, the said document consists of a single deed of assignment of lease.

1 *Municipal Corp. of Delhi v. Shashank Steel Industries (P) Ltd.*, AIR 2009 SC 967.

2 *Residents Welfare Association v. State of U.P.* (2009) 14 SCC 716 at 717.



This is not very different from what is widely prevalent in Delhi co-operative societies where one sub-lessee transfers his leasehold rights to a new person by agreement of sale and power of attorney. In some cases after converting his leasehold rights into freehold rights, a sale deed is executed in favour of the transferee.

Conditional transfers

Section 10 of TPA deals with conditions restraining alienation and section 11 deals with restriction repugnant to the interest created. The Calcutta High Court decided a case³ falling under section 11 in which a donor gifted the entire building in favour of her daughter for life and thereafter to the sons of the said daughter absolutely. However, by the same gift deed, son of the donor was also conferred a conditional right to enjoy a portion of the said building. The question for consideration was whether creation of conditional right simultaneous with the absolute right in favour of the donee was violative of section 11 of the TPA. The court held that it was not violative as the condition did not affect the absolute transfer by the donor in favour of the donee.

**IV RESTRAINTS ON RIGHT TO TRANSFER LAND
BY SPECIAL LAW**

As it is well known, under the scheme of distribution of legislative powers in the seventh schedule of the Constitution of India, power to legislate on land has exclusively been assigned to the state legislatures but all the states have adopted a common policy under the national guidelines issued by the Union of India. Therefore, all the state laws on land prescribe that a tribal owner of land cannot sell his land to a non-tribal. But if a non-tribal somehow induces a tribal to transfer his land to him, the law will restore such property to a tribal.

The state of Kerala in 1975 enacted the Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975. The Act was included in the ninth schedule to the Constitution. The rules, under the Act were published in the *Gazette* on 18.10.1986. A writ petition was filed in the High Court by one NGO for directing the state to implement the Act. While this writ was pending, the legislature passed another Act in 1999. The Act of 1999 had repealed the Act of 1975 and was enforced retrospectively from 24.1.1986. The constitutional validity of the Act of 1999 was challenged in the High Court which upheld the challenge and held the law to be *ultra vires* article 14 of the Constitution. The matter came to the Supreme Court in appeal.⁴

3 *Subal Chandra Maity v. Usha Banerjee*, AIR 2009 Cal 210.

4 *State of Kerala v. Peoples Union for Civil Liberty* (2009) 8 SCC 46.



The Supreme Court held the statute to be constitutionally valid, and also upheld its enforcement from 24.1.1986. The Act of 1999 was more beneficial to the tribals. The question of restoration of land was considered on the touchstone of article 46 of the Constitution. The court noted that tribals were in great number in Kerala but literacy rate being high they were educated and employed. It took note of applications for restoration, the rate of disposal and the figure of restoration of lands. It lauded the policy and efforts made to realise. It did not agree with the High Court judgment and clarified that fairer points on constitutional law.

V TRANSFER OF PROPERTY BY UNAUTHORISED PERSON

'No one can convey or pass a better title than what he himself does not possess' is a well known legal principle. But section 43 of TPA provides that transfers by an unauthorised person who subsequently acquires interest in property transferred must feed the grant. The Orissa High Court applied and interpreted this section while deciding a writ petition⁵ wherein the petitioner had purchased property under a registered sale deed executed by an unauthorised person who subsequently became the owner of the property sold by him. Thus the vendee in this case wanted a declaration in his favour. The court allowed his petition but explained the legal position clearly.

In another case⁶ under section 43 of the TPA, a property was sold by a person who was not the owner but the purchaser was aware that the seller was not the owner. Holding that he was not entitled to get any relief because he was also a party to the fraudulent sale and purchase, the Supreme Court dismissed the appeal with the observation that fraud vitiates all solemn acts.

A landowner, where land had been acquired by the state, transferred the land in favour of another person. The Supreme Court⁷ held that the transferee did not acquire any title or ownership. The transfer was void as a person cannot pass better title than what he himself has. At best, the transferee could step into the shoes of the transferor and claim compensation for the acquisition.

Sale of an undivided share in the joint property

Mukundakam Sharma and B.S. Chauhan JJ considered the often raised and decided question whether a co-sharer was competent to sell his undivided share in a joint property without the knowledge and consent of the other co-sharer. The Bombay High Court holding that one co-sharer without the knowledge and consent of the other co-sharer could not sell his undivided share and put the vendee in possession of the property, dismissed

5 *Prem Nath Khanna v. State of Orissa*, AIR 2009 Ori 166.

6 *Jharu Ram Roy v. Kanijet Roy* (2009) 4 SCC 60.

7 *Shanti Sports Club v. Union of India* (2009) 15 SCC 705.



the suit of the vendee for partition of the share purchased by him and for recovery of possession by metes and bounds. The Supreme Court, on appeal, affirmed the above mentioned view of the High Court and dismissed the appeal.⁸

Doctrine of *lis pendens*

Section 52 of the TPA embodies the doctrine of *lis pendens* which means that if a person purchases immovable property with the knowledge that some litigation concerning that property is pending, he does not get a clear title to that property. The seller in that case cannot pass a good title. The purchaser is bound to abide by the outcome of the litigation. A property was subject to partition suit but one party transferred his share to the third party. The sale was hit by the doctrine of *lis pendens*.⁹

Doctrine of part-performance

Section 53A of TPA incorporates the equitable doctrine of part-performance. It is a beneficial provision which protects a purchaser of immovable property who has taken possession of the property after paying in full or part the price of the property and is willing to pay the balance and execute the sale deed. In an appeal decided by the High Court of Andhra Pradesh, it was held that the benefit of part-performance was available. In this case,¹⁰ there was a valid agreement to sell between the vender and the vendee. The plaintiff-vendee had paid part of the purchase price and was willing to pay the balance and execute the sale deed. The deed was not executed as the vendor had migrated to another state. But the vendor had put the vendee in possession of the property sold. The court, therefore, held that the vendee was entitled to invoke the doctrine of part-performance as a measure of protection of his possession.

Sale of immovable property

Section 54 of the TPA defines what is sale and how sale of immovable property is made and how a contract for sale is made and effected. It further provides that the contract for sale of an immovable property must be effected by a registered sale deed under the Indian Registration Act, 1908 duly stamped by revenue stamp under the provision of that Act. In order to avoid payment of stamp duty, people do not get the sale deed registered. Nowadays, people have devised a mode of effecting sale by executing an irrevocable power of attorney in favour of the purchaser.

This illegal practice of power of attorney sale is widely prevalent across the country. In *Suraj Lamp*,¹¹ division bench of the Supreme Court

8 *Ramdas v. Sitabai*, AIR 2005 SC 2735.

9 *Sumitra Devi v. Sita Sharan Bulna*, AIR 2009 Pat 83.

10 *Parini Vishnumurthy v. Vindavalli Durayya*, AIR 2009 AP 187.

11 *Suraj Lamp & Industries (P) Ltd. v. State of Haryana* (2009) 7 SCC 363.



comprising R.V. Raveendran and J.M. Panchal JJ adversely commented and strongly deprecated this practice. The court also directed a notice to the states of Panjab, Haryana, Delhi, Uttar Pradesh and Maharashtra to consider the gravity of the issues involved and devise measures to curb and prevent such illegal practice which causes financial loss to the revenue apart from flouting the law. Surprisingly, in this case, a limited company was involved in buying a property without a registered sale deed. The registrar of companies did not or could not detect this in his scrutiny of annual records nor the company auditor detected the illegality.

In another appeal¹² arising from the decision of the Madras High Court, the vendor had executed the sale deed, which was duly registered. The seller had received part consideration and the balance which was to be paid before the sub-registrar was not paid. There was a note on the registered sale deed by the sub-registrar that the balance consideration was not paid. The seller, therefore, did not hand over the possession. The purchaser filed a suit for recovery of possession which was decreed by the sub-judge. The seller went in appeal contending that though the sale deed was registered, the purchaser did not pay the balance consideration of Rs.40,000/- and thus the title to the property never passed to him. Therefore, his suit for declaration of title to the suit property and its possession was not maintainable. The High Court in second appeal agreed with him and held that the intention of the parties was that the title would not pass to the purchaser till full consideration was paid by him.

The Supreme Court in appeal agreed with the view taken by the High Court. The court read the sale deed in its entirety to gather the intention of the parties and observed that on the facts and circumstances of the case the intention of the parties was that the title of ownership would pass to the purchaser only after payment of full consideration by him to the vendor as a condition precedent. There was no such intention that there should be transfer of ownership merely on execution and registration of the deed. Accordingly, the court dismissed the appeal holding it as devoid of merit and misuse of the judicial process.

The Supreme Court in an appeal from the High Court of Patna considered the question as to when an agreement to sale was complete.¹³ The precise question for consideration was whether an agreement of sale executed only by the vendor and not by the purchaser was valid. The court answered the question in the affirmative. After the vendor agreed to sell and the vendee agreed to purchase, the former executed the agreement of sale and signed but the latter did not sign but was willing to purchase. He paid the earnest money and part payment of consideration. When he was ready to have the sale deed executed and pay the balance consideration, the vendor

¹² *Kaliaperumal v. Rajagopal*, AIR 2009 SC 2122.

¹³ *Aloka Bose v. Parmatima Devi* (2009) 2 SCC 582.



refused. The vendee filed a suit for specific performance and got a decree from the trial court. The vendor appealed to the High Court which reversed the decree. On appeal, the Supreme Court upheld the decree passed by the trial court and held that the agreement for sale signed by vendor and not by vendee was complete, valid, lawful and legally enforceable as it was witnessed by four witnesses and contained two endorsements by the vendor accepting earnest money and further payment. Besides, the vendee, who had not signed deed, had done all that was in her power to get the sale deed executed by the vendor. There was sufficient oral and documentary proof to support vendee's claim to get specific performance of the contract.

Rights and liabilities of buyer and seller

The town improvement trust, Ludhiana allotted a plot to one Shammi Varma who in turn sold it to Baljit Singh for consideration and handed over possession.¹⁴ It is a well settled law that a seller can pass to the buyer only those rights which he himself possessed. Subsequently, the trust cancelled the allotment because the allottee was not eligible. Thus the sale deed between them stood cancelled. Being aggrieved, the transferee challenged the matter before the trust unsuccessfully and then in a writ petition before the High Court which dismissed the petition on the ground that the seller was not eligible for allotment of the plot by the improvement trust.

On appeal before the Supreme Court, the matter came up before a bench comprising of Altamas Kabir and Markandey Katju JJ which took a considerate view and passed the following order:¹⁵

We direct the Trust to reconsider the case of the appellant in the light of the submissions made on his behalf that he was willing to pay such additional amount as may be levied for a fresh allotment of the plot in question in his favour after giving the appellant a reasonable opportunity of being heard, in the event the said plot has not been reallocated in the meantime.

Mortgage by conditional sale or sale with right to repurchase

In an appeal from the Kerala High Court to the Supreme Court the question for consideration was whether the document was intended to effect a mortgage by conditional sale or sale with a condition of repurchase.¹⁶ Sinha J observed that the document must be read in its entirety, irrespective of the heading of the document. Intention of the parties must be gathered from the document itself, however, the attending circumstances would also be relevant particularly when relationship between the parties was in question.

14 *Baljit Singh v. Improvement Trust Ludhiana*, AIR 2009 SC 1254.

15 *Id.* at 1256.

16 *C. Cheriathan v. P. Narayanan*, AIR 2009 SC 1502.



The deed in question is said to be a deed of sale. The source of title has been disclosed. What was sought to be conveyed thereby was the leasehold interest. Assignment was in respect of the vendor's one-half share of the property. Possession of the property was handed over. It was also mentioned that the vendor shall repurchase the same at his expense within a period of three years from the date of execution thereof. The court, therefore, reached the irresistible conclusion that it was a transaction of mortgage with a right to repurchase. The decree passed by the courts below was set aside and the appeal was allowed.

In an appeal decided by the A.P. High Court, the same question was decided in a different context.¹⁷ A person borrowed Rs.16,000/- for the marriage of his sister on surety of a big house worth many lakhs. The lender insisted that the borrower execute a mortgage deed, a lease deed and a sale deed. The borrower had no choice but to do his bidding and handed over possession of the house to the lender. The lender paid the monthly rent for some time and then stopped payment. When the debtor was ready to pay the sum borrowed and wanted the lender to hand over the possession, he refused. The borrower filed a suit for eviction and obtained a decree. He also filed a suit for redemption of mortgage and prayed for a direction that the mortgagee receive Rs.16,000/- being the loan amount and execute a reconveyance deed in respect of the suit property.

The question for consideration before the High Court in second appeal was whether the transaction was one of mortgage or an outright sale. The court, after an examination of the contents of the three documents, pleadings and arguments of the counsel, and the relevant case law, came to the conclusion that it was a mortgage and the mortgagor was entitled to redeem his property.

The fact situation in *Assam State Electricity Board*¹⁸ was strange but the court did full justice to a poor tenant of agricultural land. The landlord had borrowed money from the tenant and had executed an agreement to sell deed if he did not return the loan amount by a certain date. When he failed to repay the loan, the tenant filed a suit to execute the sale deed as agreed. The trial court decreed the suit of the tenant. The High Court dismissed the appeal of the landlord and confirmed the right of the tenant as owner of the land where he was in possession as *bargadar-raigat*.

The Patna High Court in a similar case held that having regard to the recitals in the documents, the transaction entered into was a mortgage by conditional sale and not an out and out sale.¹⁹

17 *C. Raghunandan v. K. Nageshwar Rao*, AIR 2009 AP 205.

18 *Assam State Electricity Board v. R.N. Datta*, AIR 2009 Gau 117.

19 *S.K. Md. Ilyas v. Narayan Sah*, AIR 2009 Pat. 17.



Notice to quit and termination of tenancy

A landlord in Calcutta gave a notice to quit under section 106 of the TPA to his tenant and terminated the relationship of landlord and tenant. He then filed a suit for eviction of his tenant on the ground of arrears of rent. The tenant at this stage put up an application under section 114 of the TPA for permission to deposit in court the entire amount of arrears of rent which was refused. He then filed an application for revision in the High Court which examined the propriety of the order of the trial court and observed as follows:²⁰

In a suit for eviction of a tenant under the TPA on termination of relationship of landlord and tenant by service of notice under Section 106 of the TPA upon the tenant, there is no provision under which a tenant can be permitted to deposit the arrear rent in such a suit. That apart, this is not a suit for eviction on termination of lease on the ground of forfeiture due to non payment of rent. In order to attract the provision under Section 114 of the TPA there must be a registered lease for a fixed period between the lessor and the lessee and if the suit is filed for recovery of possession by the lesser on the ground of forfeiture of the lease for non-payment of rent before expiry of the lease then only the tenant can be permitted to deposit the arrear rent in order to get the relief against forfeiture as per provision contained in Section 114 of the TPA.

In *Bandu Machinery*²¹ tenancy had come to an end by efflux of time and the landlord sent his nominee with a letter addressed to the tenant requesting him to hand over vacant possession of the premises. The tenant refused and contested the suit and lost. In appeal, he set up the plea of oral extension of the lease. The High Court dismissed the appeal quoting section 107 of the TPA, which specifically states that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument.

Lease or license

The Orissa High Court in a writ petition filed under article 226 of the Constitution was called upon to decide the question whether in the case in hand it was an agreement for lease or license. The agreement drafted by lawyers was between two companies. The terms and conditions were clear. The law was clear. Section 105 of the TPA defines a lease whereunder the lessor retains the ownership, title and interest with him and only allows the lessee use of the property on payment of rent for a specified period.

²⁰ *Gopinath Mukherja v. Uttam Bharti*, AIR 2009 Cal, 58.

²¹ *Bandu Machinery Pvt. Ltd v. Om Prakash Sikka*, AIR 2009 Del 33.



Section 62 defines what is license. The court examined the case in this perspective and held that the agreement in question was a license and not a lease.²²

In an appeal before the Kerala High Court,²³ the validity of notice to quit was challenged. It may also be recalled that on the recommendation of the Law Commission of India, section 106 of the TPA dealing with notice to quit was amended by the Transfer of Property (Amendment) Act, 2002.

There was a lease of immovable property for five years on a monthly rent for manufacturing purposes. On the expiry of this period, the landlord gave 15 days notice to quit. The tenant did not comply. The landlord filed a suit for eviction. The case was governed by the amended law as under the transitory provision, the amended law applied to pending suits and proceedings. The court interpreted the new law imaginatively and applied to the fact situation of the present case and disposed off the appeal. The lease was by an unregistered lease agreement while registration was compulsory. The tenancy by month to month cannot be created for manufacturing purposes. In spite of all these flaws, the lessee was treated as a tenant holding over, the tenancy was deemed to be a tenancy from month to month and the notice for 15 days was held to be valid.

The question whether the new law which received the assent of the President on 31.12.2002 would apply to this case was answered in the affirmative by the court as the amended law was expressly applicable to all pending proceedings. Thus, came to an end two decades old litigation.

Gift of immovable property

The validity of a gift deed executed by a widow of her share of immovable property in favour of her sons and daughters was challenged. The attesting witnesses had not appeared to prove the deed in spite of notices. The executant had admitted the execution. The scribe had appeared and proved. A plea was made before the court to draw an adverse inference due to non-appearance of the attesting witnesses which the court refused to entertain in view of the fact that the executant had admitted the execution duly supported by the scribe.²⁴

Validity of a gift by registered gift deed

A Muslim father gifted his house, let out to tenants, to his son by a registered gift deed. He got his son's name mutated in the land records and allowed him to collect rent from the tenants. The son was collecting the rent from the tenants even before the registration of the gift deed and the mutation proceedings. The donor father after some years changed his mind and filed a suit contending that the said gift deed did not pass the title and

²² *Paradeep Phespiates Ltd. v. Board of Trustees Paradeep Port Trust*, AIR 2009 Ori. 114.

²³ *Manathanath Kumhammet v. KTCT Unnimoideen Kutty*, AIR 2009 Ker. 143.

²⁴ *Radhika Devi v. Rajesh Kumar Niranjana*, AIR 2009 Pat. 109.



ownership and possession to the son. The suit was time-barred as it was filed after the lapse of three years which is the period prescribed for filing a suit for cancellation of a document. The question before the Supreme Court²⁵ was whether in the facts and circumstances of this case, the gift was valid or not. S.B. Sinha J held that, indisputably, the deed of gift was a registered one. It contained a clear and unambiguous declaration of total disinvestment of property. A registered document carried with it a presumption that it was validly executed. It was for the party questioning the genuineness of the transaction to show that in law the transaction was not valid. All the contentions of the donor to the contrary were rejected and the gift deed was held to be validly executed.

25 *Abdul Rahim v. S.K. Abdul Zabbar* (2009) 6 SCC 160.

