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PROPERTY LAW

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I INTRODUCTION

THE TRANSFER of Property Act, 1882 (TPA) regulates transfer of ownership of immovable property by sale, mortgage, lease and exchange by act of parties as opposed to operation of law such as inheritance and successorship. It contains conditions for a valid sale. Several equity principles of British real property law such as doctrine of *lis pendence*, doctrine of part performance, equity of redemption, foreclosure and subrogation are codified in this statute and frequently come up for interpretation by the Supreme Court which have been analysed in the following pages. There are cases involving sale of actionable claims which contribute to significantly the development of law on real property. This statute, however, excludes from its operation devolution of rights in agricultural land which are regulated by family law. The intellectual property law such as copyrights, patents, trademarks and other neighbouring rights areas other growing areas but cases relating to these areas do not fall within the purview of this survey.

II DEFINITION OF IMMOVABLE PROPERTY

The Supreme Court was called upon to consider as to what is immovable property under section 3 of TPA. The Act does not define exhaustively the expression immovable property. It simply says that unless there is something repugnant in subject or context, immovable property under the Act does not include standing timber, growing crops or grass. On the other hand, section 3(26) of the General Clauses Act, 1891 reads:

3. (26) Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

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Section 3 of the TPA defines the expression attached to the earth to mean things:

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings or
- (c) attached to what is so embedded for the permanent beneficial engagement of that to which it is attached.

In view of this statutory definition, the court took the view that the plant in question attached to the foundation not more than 1½ ft deep intended to provide stability to its working and prevent vibration and ensure valuable free operation does not qualify for being described as attached to the earth under any of the three clauses cited above. The plant is not comparable to trees or shrubs rooted in the earth. Nor it is comparable to walls and buildings for the reason that it is not imbedded in the earth. The plant is neither permanently attached nor attached for permanent beneficial enjoyment. Thus, it is moveable and can be moved from one place to another and can be attached on another foundation by nuts and bolts.¹

The court, therefore, concluded that the manufacture of the plants in question do not constitute immovable property for the following reasons:

- 1) The plant in question are not *per se* immovable property,
- 2) Such plants cannot be said to be attached to the earth under section 3 of the TPA

Once again, the court observed that an attachment of this kind without the necessary intent of making the same permanent cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. Thus, there could be no difficulty in holding that the plants in question were not immovable property and as such immune from levy of excise duty under the Central Excise Act, 1944, the court ruled.²

The case had come to the Supreme Court after availing all opportunities of quasi-judicial tribunals including the customs and excise appellate tribunal where a plant, temporary and movable, was held to be immovable property by administrative officers in their over enthusiasm to collect more and more revenue. Eventually, it was in the Supreme Court that T.S. Thakur J took the correct view and supported the same by decisions of previous cases.

1 *CLE v. Solid and Correct Engg. Works* (2010) 5 SCC 114, 130.

2 *Id.* at 135.

III RESTRAINTS ON ALIENATION AND RULE AGAINST PERPETUITY

Section 10 of the TPA provides that where property is transferred subject to absolute conditions or limitations on the power of transferee from further alienation such conditions or restraints are void. Section 14 of the TPA provides for the rule against perpetuity which states that no transfer of property can operate to create an interest which is to take effect after the life time of one or more living persons.

The Supreme Court considered the legality of a will under both these sections. The facts of the case in brief were as follows. A lady owner of property, by will, created life interest in favour of her two sisters with a stipulation that after their death their male heirs will acquire absolute rights in the said property subject to the condition that if either of them want to sell the property then they shall have to sell it to the other sharers only.

The restriction was not absolute in as much as the alienation was permitted among male heirs of the two sisters. The object of incorporating this restriction was to ensure that the property did not go out of two families of the two sisters. Hence, section 10 of the TPA was not violated.

On the rule against perpetuity, the Supreme Court observed:³

The two sisters of the testator were to enjoy house properties jointly during their life time without creating any encumbrance after their death, their male heirs were to get absolute rights in those properties. They could then sell their shares to other sharers.

It can thus be said that the testator had indirectly conferred a preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sister. This was in the nature of a right of pre-emption which should be enforced by the male heir of either sister in the event of sale of property by the male heir of the other sister. This did not in any way violate rule against perpetuity.

The pleadings in the case had raised complicated questions on the law relating to restriction on transfer and the rule against perpetuity but G.S. Singhvi J took pains to trace the origin of the rule against perpetuity and explained its development. He held that both the trial court and the High Court had rightly rejected the appeal. The learned judge upheld the judgement.⁴

IV VESTED INTEREST AND CONTINGENT INTEREST

Sections 19 and 21 of the TPA define the expressions 'vested interest' and 'contingent interests'. In an appeal from Madras High Court, the Supreme

³ *K. Naina Mohamed v. A.M. Vasudevan Chettiar* (2010) 7 SCC 603 at 624.

⁴ *Id.* at 625.

Court was required to interpret and construe whether a conveyance deed, titled and registered, was a settlement deed or will. The court explained the distinction between a vested interest and contingent interest with reference to a number of English books and decisions on real property and held that in this case, the interest in property conveyed for life interest was duly secured under section 8 of the TPA.

G.S. Singhvi J held that the document was not a will as it expressly stated that the executant shall have no power to cancel it. After citing and examining several High Court judgements, the court concluded that the deed was a settlement deed.⁵

V DOCTRINE OF *LIS PENDENCE*

Section 52 of the TPA incorporates the doctrine of *lis pendence* in the following words:

S.52 Transfer of property pending suit relating thereto.- During the pendency... of any suit or proceeding .. in which any right to immovable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to effect the rights of any other party thereto under any decree or order which may be made therein except the authority of the Court and on such terms as it may impose.

The Supreme Court considered the application of this doctrine in a special leave appeal from Delhi High Court which, as termed by R.V. Ravindran J was a hard case and the division bench in its anxiety had virtually laid down a bad law. The Supreme Court attempted to preserve and protect the rights of both the parties and stated the correct position of law.

A person claiming to be a builder and developer entered into an oral commercial collaboration agreement with another person to purchase his plot of land and construct a three storied building and paid to him Rs.50 lakhs as advance. The vendor did not comply with his part of the agreement. The builder filed a suit, but having failed to get any relief, went to the division bench appeal in the High Court and got a conditional *interim* order. Aggrieved by the conditions of the order, vendor filed the special leave petition appeal in the Supreme Court.

The Supreme Court examined the legal validity of the conditions as well as the applicability of the doctrine of *lis pendence* in this case. The court felt that the conditions imposed on the vendor were so excessive, unreasonable and unwanted that it decided to set them aside. Instead, the court permitted them to deal with their property in the manner they deemed fit in spite of the

⁵ *P.K. Mohan Ram v. B.N. Anantha Chary*, AIR 2010 SC 1725.

pendency of the suit by the builder subject to their furnishing security to the extent of Rs.3 lakhs to the satisfaction of the single judge of the High Court where the suit was initially filed.

The real import of the doctrine of *lis pendence* was very succinctly stated by the court as follows:⁶

The principle underlying section 52 of the TP Act is based on justice and equity. The operation of the Bar under Section 52 is however subject to the power of the Court to exempt the suit property from the operation of Section 52 subject to such conditions as it may impose. That means that the Court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject matter of the suit without being subjected to the rights of any party to the suit, by imposing such terms as it may deem fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of section 52 of the TP Act subject to a condition relating to reasonable security.

VI DUTIES OF A SELLER AND RIGHTS OF A BUYER

Section 55 of the TP Act states that in the absence of a contract to the contrary, the buyer and the seller of immovable property, respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold.

An appeal by way of a special leave petition was filed in the Supreme Court against the judgement and order of the Andhra Pradesh High Court wherein the seller was directed to refund to the buyer a sum of Rs.1,00,000 paid by him as advance money for an agreement to buy property of a charitable trust registered in Calcutta. The appellant had entered into a contract with the trust to purchase the trust property in Andhra Pradesh on condition that the buyer will obtain permission for the sale from competent authority under the Urban Land Ceiling and Regulation Act, 1976. The seller was required to extend necessary cooperation in this respect. Time was of the essence. The competent authority granted exemption from ceilings provided the land was used for the purposes of the trust.

At this stage, the sale deed could not be executed and registered and the seller terminated the contract. The buyer filed a suit for specific performance of the said contract. The trial court dismissed the suit but directed refund of Rs.1,00,000/- paid by the buyer as advance. The buyer filed the present appeal

6 *Vinod Seth v. Devinder Bajaj* (2011) 8 SCC 1 at 20.

in the Supreme Court. Tarun Chatterjee J formulated four issues for determination.

The court held that duties of the seller as mentioned in section 55 of the TPA were applicable only in the absence of a contract to the contrary. In this case, the parties had agreed to detailed condition in the contract. The buyer had agreed to obtain necessary permission and exemption from the authorities. The duty of the seller under section 55 was to disclose all documents of title relating to property.

To produce clearance or exemption from the endowment department was not a document of title. Section 55 of the TPA became applicable only in the absence of a contract to the contrary. In this case, there was a contract and as such provisions of section 55 were not applicable.⁷

The Supreme Court felt that the demand on the part of the appellants regarding the joining of all trustees in execution of the sale deed, asking the respondent to enter into indemnity bond for any loss due to defect in the title were justified and unreasonable. It was also held that the time was not of essence and on the forfeiture of advance of Rs.1,00,000 nothing was said. Hence, specific performance was refused.

Contrary to this, in an appeal⁸ from Punjab and Haryana High Court, Haryana financial corporation was held to be in breach of the statutory duties prescribed under section 55 of the TPA. The corporation invited bids for the sale of assets of Unique Oxygen (P) Ltd., Hind. One Rajesh Gupta of Hissar submitted a bid for Rs. 25 lakhs and, on subsequent negotiations, enhanced it to Rs.50 lakhs. He paid earnest money of Rs.2.5 lakhs. The bid documents disclosed that the plot had an independent passage. But on actual verification, there was no passage. Thus, there was no passage and hence conditions laid down under section 55 were violated and the buyer cancelled the contract. The seller forfeited the earnest money. The buyer filed a writ petition in the High Court claiming refund of Rs.2.5 lakhs with interest. The writ was allowed and the seller was directed to refund Rs.2.5 lakhs with interest at the rate 12 per cent. The seller filed an appeal in the Supreme Court.

Nijjar J dismissed the appeal approving the judgement and order of the High Court. Apart from directing the refund with 12 per cent interest from 1.2.1998 also awarded costs assessed at Rs.50,000/-.

In yet another case from Gauhati High Court, a builder of multi-storied complex constructed eight storied building against a five and a half storied sanctioned plan. The construction beyond five and half storied was illegal and liable to be demolished. The builder sold all the eight stories to individual occupiers assuming that all of them were legal and lawful. They complained of violation of principles of natural justice. The Supreme Court observed that there was a breach of section 55 of the TPA and the builder was liable to

7 *A.K. Laxmipathy v. Rai Sahli Pannalal H. Lahoti Charitable Trust* (2010) 1 SCC 287.

8 *Haryana Financial Corpn. v. Rajesh Gupta* (2010) 1 SCC 655.

indemnify the sufferers for unauthorised and illegal construction. The builder had not obtained and shown to the prospective purchasers the occupancy certificate or completion certificate nor had produced the same in the court.⁹

VII SUBROGATION

Sections 91 and 92 of the TPA provide for redemption of mortgaged property and subrogation. Section 91 deals with equity of redemption of a mortgager. Section 92 says that if a mortgaged property is redeemed by a person other than a mortgager, then he is liable to the mortgager in that behalf. This principle was applied by the constitution bench of the Supreme Court in a new fact situation.

A consigner of goods sent on 6.10.1995 a bundle of cotton yarn for transportation and delivery to his consignee in Calcutta. He took a policy of insurance covering the risk in respect of this consignment against theft, pilferage, non-delivery or damage. The goods vehicle carrying the said consignment met with an accident and the consignment was completely damaged. The insurer got the loss assessed by a surveyer and settled the claim of the assured and paid the damages. On receiving the payment, he executed a letter of subrogation-cum-special power of attorney in favour of the owner of the yarn.

Thereafter, the consigner and the insurer filed a complaint before the district consumer disputes redressal forum for deficiency in service as the damage to the consignment was due to the negligence on the part of the consignee or his servants. The letter of subrogation-cum-special power of attorney was used in support of the claim. The district forum by its order dated 8.11.1996 allowed the claim. Appeal to the state consumer disputes redressal commission was dismissed on 2.04.1998. The revision before the national consumer disputes redressal commission was also dismissed by its order dated 19.07.1999.

This order was challenged in the Supreme Court by a special leave petition.^{9a} This appeal was referred by a two-judges bench to a larger bench, being of the view that *New India Assurance Co. Ltd.*¹⁰ required reconsideration. In turn, the three-judge bench referred the matter to a constitution bench on 29.03.2005.¹¹ The difference of opinion between two judges bench and three judges bench in *Oberai Forwarding Agency*¹² case was on the following passage:¹³

9 *Priyanka Estates International (P) Ltd. v. State of Assam* (2010) 2 SCC 27.

9a *Economic Transportation Organisation v. Charan Spg. Mills Pvt. Ltd.* (2010) 4 SCC 114.

10 *Oberai Forwarding Agency v. New India Assurance Co. Ltd.* (2000) 2 SCC 407.

11 (2000) 2 SCC 407.

12 *Id.* at 414.

13 *Supra* note 9a at 126.

In its literal sense, subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent compensation for the loss, but it must do so in the name of the assured.

The Supreme Court examined the validity of this statement. The court came to the conclusion that “*Oberai* is not good law in so far as it construes a letter of subrogation-cum-assignment as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.”¹⁴

In this case, the complaint was filed by both the insurer as well as the assured as such the Supreme Court held that the district forum was justified in allowing the complaint brought by the assured represented by the insurer. The said order was affirmed by the state commission and the national commission. The court found no reason to interfere and dismissed the appeal.

VIII EMPLOYER'S CONTRIBUTION TO PF

In an appeal from Bombay High Court decision, the question for consideration by the Supreme Court was whether the payment of employers contribution has priority over the goods pledged by the employer to his creditor and thereby created a charge and encumbrance. The employer in this case was a co-operative sugar bank in Aurangabad, Maharashtra. The creditor was the Maharashtra State Cooperative Bank Ltd. which was the appellant before the Supreme Court. Section 11(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 provided that the contribution recovered by the employer from the salary of the employees and his own contribution is a first charge and its payment has priority over all his other obligations. The High Court, therefore, ordered the attachment of all his assets for payment. The Supreme Court saw no merit in the appeal and dismissed the same.¹⁵

A revision application was filed by the holder of land challenging acquisition on the ground that on the date of commencement of the 1976 Act i.e. 17.2.1976, the suit land was not within the limits of urban area. The said application was allowed relying on a decision of the Supreme Court reported in 1993,¹⁶ which had been overruled in 2002. The Pune municipal transport

14 *Id.* at 126.

15 *Maharashtra State Cooperative Bank v. Asstt. P.F. Commissioner*, AIR 2010 SC 868.

16 *Alia Mohammadi Begam v. State of U.P.* (1993) 2 SCC 546.

appealed to the Supreme Court against the government's decision.¹⁷

The Supreme Court, in view of the factual position and after hearing the parties, dismissed the appeal holding that:¹⁸

The aforesaid factual position makes it clear that the appellant is not entitled to any relief whatsoever as per the law as it exists today. The land once vested in the State cannot be divested.

IX EVICTION OF RENTED PREMISES IN GOA

A landlord in Goa filed a suit for eviction of his tenant on the ground of sub-letting. The tenant denied the fact of sub-letting and instead took the plea that the sub-tenant was his partner in business. The fact of sub-letting was proved and the court passed an order of eviction. The tenant filed a writ petition in the High Court against the order of eviction under article 227 of the Constitution of India. The High Court set aside the concurrent order of eviction of all courts below, namely the rent controller and the appellate tribunal. The landlord filed an appeal by special leave to the Supreme Court against this order. The Supreme Court allowed this appeal by observing that the High Court was not justified in interfering with the concurrent orders of eviction based on the ground of sub-letting in exercise of its power under article 227 of the Constitution. The power of the High Court under this provision was only supervisory and not that of a court of appeal. It was held that, "The power is required to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts and inferior tribunals within the limits of law."¹⁹

Similarly, in another appeal by special leave from Bombay High Court, the landlady raised a question for consideration whether she can file and maintain a suit for eviction of a trespasser who had dispossessed her tenant forcibly and without her consent. Was the tenant a necessary party in such a suit? The Supreme Court examined a number of conflicting judgements of High Courts and laid down the correct law.

The court observed that a landlord, after handing over the physical right of use and occupation in favour of the tenant, can reclaim the little and legal possession of the land. He was, therefore, competent to maintain a suit for eviction of trespasser and recovery of property from him. Besides, the tenant was not a necessary party.²⁰

An appeal from Andhra Pradesh High Court raised the question whether an earlier judgement of the High Court on an incidental question operated as

17 *State of APV N. Audikessava v. Reddy* (2002) 1 SCC 227.

18 *Eulecham Chandrakant Gobind v. Pune Municipal Transport* (2010) 8 SCC 467.

19 *Celina Coelno Pereira v. Mahabaleshwar Kholkar* (2010) 1 SCC 217 at 234.

20 *Sadashiv Shyama Sawant (Dead) v. Anita Anant Sawant* (2010) 3 SCC 385.

res judicata. The Supreme Court held that the decision of the High Court in 1973 would not bar any proceedings under the Tenancy Act as the issue decided by the court in that instance was merely the tenancy title in favour of the appellants, while the present case was for eviction of tenants.

On the question of landlord-tenant relationship, the court held the landlord-tenant relationship existed and the landlord had the right to evict the tenant. The Supreme Court did not see any reason to interfere with the judgement of the High Court and the appeal was dismissed.²¹

X GOVERNMENT GRANT

Lease and licence

In an appeal before the Supreme Court, an applicant for allotment of oil dealership challenged the decision of the High Court. The selection committee of the oil board rejected the application for non-compliance with the policy. The decision was challenged before the High Court. The single judge did not accept the contention of the appellant. But the division bench appreciated the same partly.

One of the requirements of eligibility from each applicant was that either he owns the land or had on lease or agreement to sell the land. The applicant in this case had an agreement of lease notarised and attested but not registered. The single judge of the High Court did not give importance to an unregistered lease agreement and took the view that the application was not complete. The division bench held that the unregistered lease agreement was a genuine document and differed from the single judge and held that the selection process was vitiated.

The Supreme Court held that the unregistered lease deed was valid in law, the single judge erred and the division bench took the correct view. Coming to the question whether the selection process adopted and followed by the oil selection board was vitiated or not, the court declined to answer this question either in affirmative or negative. It held that since the next eligible person had been operating the dealership for more than five years, it was not prepared to cancel the allotment in her favour. It observed:²²

Therefore, keeping in view the over all public interest, we decline to exercise the extraordinary jurisdiction of this Court under Article 136 of the Constitution of India for setting aside the selection made in favour of Respondent.

21 *Chittor Chegaiah v. Pedda Jeevanga Mutth* (2010) 3 SCC 776 at 785.

22 *Moumita Poddar v. Indian Oil Corpn. Ltd.* (2010) 9 SCC 291 at 311.

XI LEASE

Title on the leased property

In an appeal before the Supreme Court, the question for determination was as to how far a finding on the question of title recorded in a suit for eviction would be binding in a subsequent suit for eviction, declaration of title and recovery of possession between the same parties. Further, the court was also required to decide whether the question of title decided in earlier suit not challenged by way of appeal and allowed to become final will operate as *res judicata*. The court answered both the questions in the affirmative.²³

The trial court had formed several issues including the question of title. The plaintiff had successfully proved that he had a valid legal title on the suit property. The first appellate court held otherwise. The matter then went to the High Court which noted that the facts of the earlier title suit of 1973 and the present title suit of 1978 were same and between the same parties and the plea taken by both the parties in both the title suits were also same. Therefore, the judgment and decree regarding title operated as *res judicata* in the present case on the question of title. The Supreme Court did not see any reason to intervene and dismissed the appeal.

XII CONCLUSION

During the year under survey, the Supreme Court heard and decided about twenty appeals. In the very first case, immovable property was defined so as to not to include a plant raised on a firm formulation of cement concrete as the same was movable from one place to another, was capable of being fixed by nuts and bolts and as such it was movable property.

Another appeal by special leave was referred to the constitution bench to resolve a conflict of views between two benches of the Supreme Court. Ravindran J in his judgement on subrogation examined the correctness of an earlier judgement of the Supreme Court on subrogation and held that it was not correct to construe a letter of subrogation-cum-assignment as a pure and simple assignment. In that case, consignment sent for transport and duly insured was damaged in an accident but principle of subrogation was applied to do justice to the consigner insured.

In another appeal from Bombay High Court, after a prolonged hearing, the Supreme Court decided a difficult question by writing a very lucid judgement on the question of eviction of a trespasser of land. The landlord in this case filed a suit in respect of land on lease which was in the physical possession of his tenant who was forcibly dispossessed. The court held that the landlord had a legal possession on the land and he was competent to file and maintain

23 *Mohd. Nooman v. Mohd. Javed Alam* (2010) 9 SCC 560.

a suit and had a right to evict the trespasser and to impleadment of the tenant was not a necessary condition.

In other cases, the litigants/appellants filed appeals in the Supreme Court just to buy time to reap the benefits of the property when they had lost the cases in the High Courts. The Supreme Court in such cases decided not to interfere with the High Court's judgements. There should be a device and a mechanism to curb such litigation.