# 24
# PROPERTY LAW

*Annam Subrahmanyam**

## I INTRODUCTION

PROPERTY IN its wider sense constitutes all proprietary rights belonging to a person and does not include personal right. Proprietary right is defined as a right which constitutes the assets or estates of the individual and which has economic value. In this sense, it includes both corporeal property, e.g., right to land, right to building, etc. and incorporeal property which includes rights *in re aliena* such as easement right, rights of mortgagee and lessee. Transfer of Property Act (TPA) applies to the transfers of all these properties.The present survey on property law is an attempt to give a bird's eye view of the important judicial decisions relating to the subject on two specific headings, general principles of transfer of property and specific transfers.

## II GENERAL PRINCIPLES

**Family settlement**

Transfer of property is defined by section 5 of the Act. According to this section, transfer of property means an act by which one living person conveys property in present or in future to (a) one or more other living persons or (b) to himself or (c) to himself and one or more other living persons and to transfer property to perform such act. By virtue of the above definition, transfer of property is an act. Every act leads to some consequence. Here transfer also leads to a consequence, i.e., conveyance of rights in the property from one person to another person.

The Supreme Court in *Ganeshi (D) through L.Rs.* v. *Ashok*[1] has considered whether there could be transfer of property through family settlements by law. The court speaking through Markandey Katju J reiterated the first appellate court's decision that a family settlement is not a transfer of property. The first appellate court held that the land was not ancestral property of Ganeshi because there was no proof that the land had descended from the father of Ganeshi, the appellant. It was held that the land in question was held by Ganeshi along with some co-sharer's who acquired the same in whatever manner after the death of Bhim Kaur. The first appellate court relied upon the judgment of the apex court in *Kale* v. *Deputy Director of Consolidation*[2]

---

* Professor of Law, Dr. B.R. Ambedkar College of Law, Andhra University, Viskhapatnam.

1 AIR 2011 SC 1340.

2 AIR 1976 SC 807.

which held that in order to sustain a family settlement it is not necessary that there must be evidence of antecedent title of the parties. The court held that 'the family settlement was bonafide to avoid disputes in the family'. Accordingly, the decree in the civil suit was passed only in pursuance of that family settlement, and hence it could not be interfered with even by the Supreme Court. Thus, division of property by way of family settlements is not governed by transfer of property law.

***Spes successionis***

Transferability is a general rule to the property and it is the value of property. Right to property includes right to transfer property to another at the free will of the owner. Generally, the law also allows free transfer of property from one person to another. That is the main objective of the TPA. But this free alienation is restricted to some of the properties under section 6.[3]

Property includes any right or interest and this right or interest may be sometimes uncertain or unspecified. If these uncertain rights are transferred, there are many risks, problems and consequences attached to them. In order to protect the interest of the public at large, some properties are made inalienable under section 6. Since these properties are statutorily recognized as inalienable under section 6, the transferee of these properties will not enjoy any right over them.

In English law, a bare chance to succeed others property or mere hope to get the property of another cannot be transferred. In English Law, it is called *spes successionis,* i.e., mere hope to get others property. These rights are not allowed to transfer, because such transaction partakes characteristic of gambling which is generally not allowed by law. Any other possibility of like nature is also restricted from transfer.[4]

The Supreme Court in *Sheammal* v. *Hasan Khani Rawther*[5] was confronted with three questions of importance, namely, (i) whether in view of the doctrine of *spes successionis*, as embodied in section 6 of the TPA, and in paragraph 54 of Mulla's "Principles of Mahomedan Law", a deed of relinquishment executed by an expectant heir could operate as estoppel to a claim that may be set up by the executor of such deed after inheritance opens on the death of the owner of the property? (ii) Whether on execution of a deed of relinquishment after having received remuneration for such future share, the expectant heir could be estopped from claiming a share in the inheritance? (iii) Can a Mohammedan by means of a family settlement relinquish his right of *spes successionis* when he had still not acquired a right in the property?

The Mohammedan law enjoins in clear and unequivocal terms that a chance of a Mohammedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release. Section 6 (a) of the TPA was enacted in deference to the customary law and law of inheritance prevailing among Mohammedans.

---

3 S.6 states: "Property of any kind may be transferred except as otherwise provided by this Act or any other law for the time being enforce."

4 S.6 (a) states; 'A chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other possibility of like nature, cannot be transferred.'

5 AIR 2011 SC 3609: (2011) 9 SCC 223.

As opposed to the above, are the general principles of estoppel as contained in section 115 of the Evidence Act and the doctrine of relinquishment in respect of a future share in property. Both the said principles contemplated a situation where an expectant heir conducts himself and/or performs certain acts which make the two aforesaid principles applicable in spite of the clear concept of relinquishment as far as Mohammedan law is concerned.[6] Referring to *Gulam Abbas's* case,[7] the court held 'the binding force of the renunciation of a supposed right, would depend upon the attendant circumstances and the whole course of conduct of which it formed a part. In other words, the principle of an equitable estoppel far from being opposed to any principle of Mohammedan law, is really in complete harmony with it'. Finally, the court was not inclined to accept the agreement in the present case as a family arrangement. The court, speaking through Altamas Kabir J held 'a family arrangement would necessarily mean a decision arrived at jointly by the members of a family and not between two individuals belonging to the family'. The five deeds of relinquishment executed by the five sons and daughters of Meeralava Rawther in the instant case would constitute individual agreements entered into between Meeralava Rawther and the expectant heirs. However, the court opined that the doctrine of estoppel is attracted so as to prevent a person from receiving an advantage for giving up of his/her rights and yet claiming the same right subsequently. The court held that it was being opposed to public policy, the heir expectant would be estopped under the general law from claiming a share in the property of the deceased, as was held in *Gulam Abbas'*s case.

**Restriction repugnant to interest created**

A condition in a transfer, which restricts the enjoyment of an absolute interest, is void. Such a condition would be repugnant to the interest created and the transfer is deemed to have been made as if there were no condition at all. The principle enshrined here is that the right to enjoy the property is an incident of ownership and any condition fettering that right is repugnant to the nature of the owners interest and is void. This rule is similar to section 138 of Indian Succession Act. Section 11 of the TPA reads thus:

> Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

---

6 Reference may be made to Chapter-VI of Mulla's "Principles of Mahomedan Law" deals with general rules of inheritance under Mohammedan law. Paragraph 54 which falls within the said chapter relates to the concept of transfer of *spes successionis* which has also been termed as "renunciation of a chance of succession."

7 AIR 1973 SC 554.

In English Law this is known as rule in *Tulk* v. *Moxhay.*[8]

The High Court of Chahattishgarh in the case of *Umashankar Agrawal (D)* v. *Daulatram Sahu*[9] was to decide on the restrictions repugnant to interest created under section 11 of the TPA. It was mentioned in the sale deed that the purchaser shall not be entitled to construct any basement or any *Pakka* construction infornt of the shop. The court while disposing the appeal held so:[10]

> The direction contained in the sale deed was made for the purpose of securing the beneficial enjoyment of his another property. There was no such statement in his deposition also. The only plea of the plaintiff is that the subject for construction is putting him inconvenience and is adversely affecting him. The condition imposed in the sale deed is thus contrary to the mandate of law contained in section 11 of the TPA, therefore the suit preferred by the plaintiff/appellant has rightly been dismissed by the courts (below).

**Ostensible owner**

Section 41 of the TPA deals with 'ostensible owner'. An ostensible owner is one who exhibits all the indicia (qualities) of ownership without being the real owner. He is apparently the full and unqualified owner and he is not true owner because his name only appears in the records. He also possesses property but he never intended to own that property. The real test is, as to what is the source of purchase money and who is really enjoying the benefits of the property. A benamidar is a typical instance of an ostensible owner. Transfer from him is valid, if it is according to section 41 of the TPA. It is based on the principle, that when a real owner culpable stands by and allows other to hold himself out to the world as the owner of property and thereby to sell it to a 'bona fide' purchaser, he cannot afterwards assert his title against such purchaser. Because, the owner rendered the fraud possible by holding out the other person as owner of the property. Therefore, he has to suffer for it. This is called *doctrine of holding-out.* This principle is an exception to the rule of *nemo det quod non-habet* which means no person can convey a better title than he himself possesses. Section 41 is based on the principle of evidence, i.e., estoppel as enunciated in section 115 of the Evidence Act.

An ostensible owner is one who exhibits all the indicia (qualities) of ownership without being the real owner. He is apparently the full and unqualified owner and he is not true owner as his name only appears in the records. He also possesses property but he never intended to own that property. The real test is, as to what is the source of purchase money and who is really enjoying the benefits of the property. A benamidar is a typical instance of an ostensible owner. Transfer from him is valid, if it is according to section 41 of the Act.

In *Samittri Devi* v. *Sampuran Singh*[11] a case was filed challenging the provisions of section 3 of Benami Transactions (Prohibition) Act, 1988 for recovery of property

8 (1848) 2 Phil 774.
9 AIR 2011 Chh 72.
10 *Id.* at 73.
11 AIR 2011 SC 773

held in a benami. Notice was sent to the subsequent purchaser under certificate of posting. As soon as real owner came to know about clandestine sale, a copy of notice along with postal certificate was produced in evidence. Agreement of purchase was signed by the subsequent purchaser, five days after dispatch of notice. Herein the court held that notice was duly served on him before he signed agreement and he was thus not a *bona fide* purchaser for value without notice. Hence, the court decreed suit in favour of real owner.

In *Nirnjan Kaur* v. *The Financial Commissioner, Revenue and Secretary to Government, Punjab,*[12] Punjab and Haryana High Court made it clear that non-availability of protection under section 41 of the TPA would not be a bar to the subsequent vendee also being a proper party to contest the order of cancellation. The court reasoned that section 41 of the TPA, will have no application, as no estoppel, can be pleaded against the provisions of the statute. It would be within the right of the subsequent purchasers to challenge the order of cancellation on merits, but sale in their favour cannot be protected under section 41 of the TPA. The subsequent vendee can only claim refund or damages from his vendor.

**Priority of rights**

Section 48 of the TPA deals with 'priority of rights'. The rules enshrined under the section is based on the maxim '*qui porior est tempore potior est jure'* which means 'he who is prior in time is stronger in law'. The one who has the advantage in time should have precedence in law as well, is the basis of the rule where two successive transfers of the same property have been effected. The section lays down that the transfer effected later must submit to the earlier. In other words, the section embodies the rule of priority founded on law and justice.

In *M/s Karnataka State Financial Corporation, Banglore* v. *State Bank of India,*[13] some loan was taken by the borrower from bank creating first charge in favour of bank as one time settlement offer was made to the borrower by bank for the settlement of entire debt due to it and later the property was sold for higher amount. The court held that first charge holder is entitled to recover entire amount due to it and any amount remaining after recovery of amount by first charge holder can be realized by the second charge holder.

In *Xavier* v. *John,*[14] the Karnataka High Court was asked to decide priority of rights. The court observed that the determination of the rights of priority in the case of successive transferees over the same immovable property calls for a combined operation of section 48 of the TPA and sections 47 and 49 of the Registration Act.[15] However, where the document is registered, by virtue of section 47 of the Registration Act, it has to be noted that the documents take effect from the date of its execution, and as such, the determination of the right of priority of successive transferees will have to be determined in tune with the rule under section 48 of the TPA that the transfer created later shall be subjected to rights previously created.

12 AIR 2011 P&H 1.
13 AIR 2011 Kar 130.
14 AIR 2011 Ker 103.
15 S.47: Time from which the document operates and s.49: Effect of non-registration of documents required to be registered.

The court also held that interference made by the lower appellate court over the boundary fixation of the properties made by the trial court, cannot be justified.

***Lis pendense***

Section 52 deals with the doctrine of *lis pendens*. *Lis pendens* means pending suit or an action. It states that during pendency, in any Indian court of competent jurisdiction of any suit or proceeding, which is not collusive and in which any right to property is directly or specifically in question, the property cannot be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other party there to under any decree or order which may be made therein except under the authority of court or such terms as it may impose. The doctrine is based on the common law maxim *'pendente lite nihil innovetur'* which means during pendency of litigation nothing new should be introduced. Though it creates a hardship on an innocent purchaser, still it is based on public policy. To avoid this hardship registration of *lis* was recognised in England. It is an extension of the law of *res-judicata* and aims at prevention of multiplicity of suits.

In *A.V. Raju* v. *H. Phoolchand (by L.Rs.)*,[16] Madras High Court has got an opportunity to decide a case relating to *lis pendens*. In this case, an execution petition was filed for delivery of possession which was obstructed by *lis pendens* purchaser purchasing property from judgment-debtor. *Lis pendens* purchaser has claimed right under judgment debtor, claiming that he cannot call upon the court to decide his obstruction, like a suit-purchaser *pendent lite* cannot question legality of decree and propriety of court in passing such a decree. The court held that if at all there is any error in any judgment or decree, it is only the appellate forum or the higher forum concerned which could rectify it and a purchaser *pendente lite* cannot question the legality of the decree and the propriety of the court in passing such a decree.

In *S.N. Arora* v. *Brokers & Brokers Pvt. Ltd.*,[17] the Delhi High Court held that in cases where *lis pendens* is applicable, any transferee *pendente lite* should not be impleaded as a party by the courts as that would enlarge the scope of the litigation; and would, militate against the principle of *dominus litis*.[18] Courts should abjure allowing such a transferee to be impleaded in the suit. This is especially so, since the transferee *pendente lite* can always institute a separate suit impleading the titular owner defendant and request that the suit be tagged along with the earlier suit. Thus, his interests can be adequately protected without the necessity of his getting himself impleaded in the earlier suit.

Transferee *pendente lite* can be added as proper party if his interest in the subject matter of the suit is substantial but action of the parties dealing with the property during the pendency of suit should be *bonafide*. No property can be

16 AIR 2011 Mad 83.

17 AIR 2011 Del 89.

18 *Dominus litis* is the person to whom a suit belongs. This also means master of a suit. The person has real interest in the decision of a case. It is this person who will be affected by the decision in a case. This person derives benefits, if the judgment is in favor, or suffers the consequences of an adverse decision. A person can be *dominus litis* even if his/her name does not appear in a case proceedings as a petitioner or defendant. This person will be liable for the expenses incurred, if the person under cover of whom this person was litigating defaults in the payment.

transferred *pendente lite* against the order of status quo of the court.

In *Gurdev Singh* v. *Amrjit Singh,*[19] an assignee *pendente lite* claimed impleadment in a suit for declaration of ownership. The Punjab and Haryana High Court held that an assignee of a right during pendency of a suit has right to be impleaded as party by stepping into the shoes of his assignor.

**Part-performance**

Section 53A of the TPA deals with part-performance. It is an exception to the rule that every transfer of property should be registered, if required under law. It provides the rule of part-performance and it is depending mainly on the English equity doctrine of part-performance. This was added to the Act in 1929.

In English law the Statute of Frauds required all contracts relating to immovable property to be in writing and under section 4, no action or suit shall be maintained on an agreement relating to land which is not in writing and signed by the parties to be charged with. Its stringent provision could be utilised so as to make the statute as an instrument of fraud.

The English law equity maxims are the basis for the doctrine of part-performance. They are, (a) "he who seeks equity must do equity" (b) "equity treats that as done which ought to have done" and (c) "equity looks to the intent rather than the form". Principle provided here is, if a person made bargain with another and allows that other to act upon it, he will have created an equity against himself and he has to perform such act.

*Lakshmi* v. *Karuppathal alias Sadyammal*[20] is a case filed for declaration of title and recovery of possession. Here the defendants claimed perfection of title by adverse possession. The defendants failed to prove as to when their possession became adverse to the knowledge of the plaintiffs. Perfection of title by adverse possession was not established by the defendants. As per the court the mere fact that possession was handed over to the defendant in part performance of contract is not a sufficient evidence to prove adverse posession. In the instant case, the court also observed that in order to get protection under section 53A of TPA, one should prove three aspects: (a) There is an agreement for sale of immovable property in his/her favour; (b) he/she was put in possession in part performance of the agreement for sale; and (c) he/ She has performed or is ready and willing to perform his/her part of the contract under the agreement.

In *Ningappa Bharamappa Sogi* v. *Government of Karnataka*[21] there was a suit related to agreement of sale coupled with delivery of possession in part-performance of contract. In this transaction, rights are created under agreement and such document requires compulsory registration. The court held that agreement of sale partakes character of 'conveyance' amenable to stamp duty under sections 34 and 5 (e) of Stamp Act, not unconstitutional.

In *Rajpal* v. *Harswaroop,*[22] the court was of the view that essential ingredients of the doctrine of part-performance, as contained in section 53A of the TPA had

19 AIR 2011 P&H 77.
20 AIR 2011 Mad 192.
21 AIR 2011 Kar 115.
22 AIR 2011 Del 203.

been made out entitling the defendant to seek shelter and protection under the statutory provision. Admittedly in terms of the agreement the defendant was put in possession of the suit shop. This was specifically stated in the written statement to which there was no denial by the plaintiff. Even before the high court, learned counsel for the respondent has admitted that in terms of the agreement, the defendant had been given possession of the suit shop; it had also been proved on record that a sum of Rs. 2,15,000/- had been paid by the defendant to the plaintiff in part performance of the contract; he was also ready and willing to perform his part of the contract and in fact his case was that the balance consideration had also been paid by him to the plaintiff. The case of the plaintiff on the other hand was that this amount had been returned and a sum of Rs. 80,000/- had been paid vide Ex.PW-1/3. The court opined that the document was rightly disbelieved; it did not even bear the signatures of Mangat Ram, the father of the plaintiff. The court found the impugned judgment, a perverse finding because, (1) para 2 of the written statement had specifically averred that the suit shop had been given to the defendant in view of agreement dated 13.11.1992 to which there was no denial in the replication. (2) DW-2 had also specifically so stated this on oath for which there was not a whisper in the cross-examination. Therefore, the finding in the impugned judgment was held liable to be set aside.

The court also placed reliance upon the judgment reported in *Shrimant Shamrao Suryavanshi* v. *Pralhad Bhairoba Suryavanshi*[23] wherein the Supreme Court had noted that a defendant-transferee is entitled to protect his possession over the suit property taken in part performance of the contract, even if the period of limitation is to bring a suit for specific performance has expired; the Limitation Act does not extinguish the defence; it only bars the remedy.

In *Nanjegowda* v. *Gangamma*,[24] the Supreme Court was asked to decide whether the doctrine of part-performance would apply in cases of non-possession of property also. In the instant case, one Honnanna was in possession of the property and had allegedly given possession to the appellant's wife Jayamma pursuant to an agreement of sale. But, there was a power of attorney allegedly issued in the name of Jayamma due to the ban on registration. In the power of attorney Honnanna stated that he was in possession of the land. Therefore, the possession of the property to claim the part performance under section 53A of the Act got failed. The court opined that had defendant no.3 Jayamma got possession of the property in pursuance of the agreement to sale dated 27.11.1982, there was no occasion for Honnanna to recite in clear terms that he was in possession of the property. Therefore, the Supreme Court felt that the finding recorded by the trial court as affirmed by the high court that defendants did not get possession of the property, after execution of the sale deed was on correct appreciation of facts, which do not call for interference in this appeal. The court also mentioned that in view of this finding, the provision of section 53A of the TPA was not attracted and defendants could not take advantage of that.

23 AIR 2005 SC 960.
24 AIR 2011 SC 3774.

In a case[25] before the Andhra Pradesh High Court, the question was raised about adverse possession. The court held that one cannot claim adverse possession on ground that he remained in possession for more than 12 years and his possession can only be protected under section 53A of the TPA. However, by virtue of the doctrine of part-performance embodied in section 53A of the TPA, the plaintiff can protect his possession from defendants who sold the property to him under the simple sale deed, so also he can protect his possession from subsequent purchasers who had knowledge of the earlier sale transaction in his favour under sale deed.

The law is now well settled that when all conditions of the section are satisfied as in the present case, the possession of the person must be protected by the court whether he comes as a plaintiff or defendant. The only embargo is that section 53A cannot be taken in aid by the transferee to establish his right as owner of the property. But the transferee can protect his possession having recourse to section 53A either by instituting a suit for injunction as a plaintiff or by defending the suit filed by the transferor or subsequent purchasers as a defendant. It is also well settled that the transferee can very well file a suit for injunction to protect his possession even though his remedy to file a suit for specific performance of contract is barred by limitation.

In *Hardei* v. *Sh. Amin Chand,*[26] a case regarding part-performance of contract was filed for possession by owner while it was resisted by the proposed vendee, claiming benefit under section 53A of the Act. The plea raised that the owner could have filed suit for specific performance or for recovery of balance amount was not acceptable. When the right of true owner is challenged by proposed vendee, the vendee must establish that he has performed his part of contract. Performance of his part of contract or readiness and willingness to perform, was neither pleaded nor proved by the vendee. However, the court held that mere non mentioning of agreement of sale in the plaint, would not disentitle the owner to claim possession and burden lay on the vendee to plead and prove the essential ingredients of section 53A. Hence, benefit of part performance, could not be claimed and the owner was held entitled for possession.

## III SPECIFIC TRANSFERS

**Contract for sale of immovable property**

Sale generally means an act of selling or to give up or hand over something to another for money. In another way, it is the transfer of property voluntarily to buyer for price. Section 54 of the TPA gives the definition for sale as follows: "Sale is a transfer of ownership in exchange for price paid or price promised or part paid and part promised". Sale proceeds are out and out transfer of all the rights over immovable property with presence of consideration. Essentials of sale are; (a) there must be two parties, (b) there must be the subject matter, (c) there must be transfer or conveyance, and (d) the transfer must be for price.

A sale may be preceded by a contract for sale. The last part of section 54 deals with contract for sale as follows: "A contract for the sale of immovable property is

25 *M. Gopal* v. *K. Jangareddy*, AIR 2011 AP 185.
26 AIR 2011 HP 103.

a contract that sale of such property shall takes places on terms settled between the parties. It does not or itself create any interest in or charge on such property".

In view of the expressions used the section, the contract for sale does not create any interest in the property to the purchaser. The only use of the contract for sale is the purchaser can claim for specific performance of the contract and he can also evoke provision of section 53 A to certain extent.

In *Latif Estate Line India Ltd.* v. *Hadeeja Ammal*[27] Madras High Court was asked to decide a mater relating to registration of document and compulsory affixing of photograph etc. Finger prints and signatures were made compulsory to restrict or minimize forgery and fraud under section 32A of Registration Act. Section 32A was inserted to the Registration Act in 2001. By the said provision, affixing of passport size photographs and finger prints have been made compulsory. One more amendment brought in by the said Act is by inserting section 34A which provides that person claiming under the document for sale of the property shall also have to sign the document. From a reading of section 32 together with the amended provision, it is manifest that the purpose of amendment is to restrict or at least minimize the forgery and fraud committed by the parties to the document, and to give legal sanctity to the document.

Sale is transfer of all rights, title and interest in the properties which are possessed by the transferor to another person namely, the purchaser. In case of transfer by way of sale, the transferor cannot retain any part of his interest or right in that property. Such transfer of ownership must be for a price paid or promised or part paid and part promised. Even if the whole price is not paid if the document is executed and registered, the sale would be completed. The transfer is complete and effective upon the completion of the registration of the sale deed. Once the vendor is divested himself of his ownership of the property, then he retains no control or right over the said property. This was relied by the court on a recent decision in the case of *Kaliaperumal* v. *Rajgopal*.[28]

In *Raj Bahadur* v. *Babu Lal (Since Deceased),*[29] the Allahabad High Court was asked to decide whether registration is necessary or not when the value of property transferred is less than Rs.100/-. The court held that transferring immovable property of less than Rs. 100/- in value is not required to be registered.[30] TPA, 1882 being an age old document, needs to be revisited to avoid questions of this sort and the subsequent litigations.

In the instant case, the court also observed that following the decisions of division bench of the Hyderabad and Orissa High Courts and the view expressed by the single judges of the Allahabad, Rajasthan and Madras High Court, a sale deed transferring immoveable property of less than Rs.100/- in value is not required to be registered and the sale of such a property would be complete as soon as

27 AIR 2011 Mad 66.

28 (2009) 4 SCC 193.

29 AIR 2011 All. 48.

30 S.54 of the Act further provides that in the case of immoveable property of value of less than Rs. 100/-, sale can be made in two ways, namely; i) by registered instrument; or ii) by delivery of the property.

delivery of possession is proved either on the basis of a unregistered instrument of sale or otherwise and that where delivery of possession is established, the unregistered instrument of sale though executed would not be material.

The fixation of Rs. 100/- or above for registration of document is being criticized by many as the value of Rs. 100/- fixed long back has no relevance today. It has been suggested to raise this amount keeping present day value of rupee otherwise it remains as dead letter. The Parliament needs to amend sections 54 and 59 of TPA and sections 17 and 18 of the Indian Registration Act and suitably substitute the provisions of 'one hundred rupees' with the well thought figures reflecting the present value of the rupee, if the Parliament really intends to confer the implied benefit on transaction of immovable property of small value. Not only that, even after the amendment as suggested, it would be necessary to revise and update the figure every after 8 to 10 years commensurate with changing value of the rupee.

In *Ashok Kumar* v. *Chief Controlling Revenue Authority, U.P. Allahabad,*[31] the Allahabad High Court held that sale deed in question is only in respect of land and not the building which stands specifically excluded by virtue of section 8 of the TPA[32] and as such the authorities under the Stamp Act were not competent to add the value of the building in the value of land for assessing the market value of the property transferred under the above sale deed.

In *Saradamani Kandappan* v. *S. Rajalkshmi,*[33] the question before the Supreme Court was regarding execution of sale deed within specified period. The court held that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfill her obligation in regard to payment of price as provided in clause (4) and thereafter, vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. It was also held that the sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, section 52 of the Contract Act[34] does not help the appellant but actually supports the vendors respondents.

In *Kumaran* v. *Kumaran*,[35] the Kerala High Court was asked to decide when exactly transfer of title takes place. The court held that transfer of title occurs only with execution and registration of document. Thus, any charge or attachment created over property of seller, prior to contract of sale, would stand with priority over and above transfer of property.

In *Pankajakshy* v. *Devaki Remakrishnan,*[36] the Kerala High Court got an opportunity to decide on the effect of oral sale. In this case, a declaration of possession and injunction was claimed on basis of an oral sale. The court held that a declaration of possession is quite different from applying for an injunction on the

31 AIR 2011 All 142.
32 S.8 deals with transferring of interest and incidences of immoveable property.
33 AIR 2011 SC 3234.
34 S.52 deals with order of performance of reciprocal promises.
35 AIR 2011 Ker 75.
36 AIR 2011 Ker 30.

basis of settled possession. The law recognizes only two modes of transfer of sale, one by registered instrument and the other by delivery of possession, in respect of immovable properties.

The court added that section 54 of the TPA lays down the law with respect to sale of immovable properties. That section allows the simpler alternative of delivery of possession only in case of tangible immovable property of a value less than Rs. 100/-. In all other cases, sale of immovable property can be made only under a registered instrument. In the present suit, the appellant/plaintiff has set forth a claim over item no.1 property alleging that there was a transfer of that property in her favour by an oral sale for Rs. 3,000/-. She claimed her possession on the basis of an oral sale which can never be recognised under law. So much so, no such transfer by way of an oral sale over item no.1 property, the consideration of which admittedly exceeded Rs. 100/- even on the case of the plaintiff, can be recognised.

**Rights and liabilities of seller and buyer**

Certain rights and liabilities are provided to the seller as well as the buyer in section 55 of the Act. The section itself opens with the words, in the absence of a contract to the contrary and then proceeds to rights and liabilities of the seller and the buyer. So application of this section can be excluded by an agreement of a covenant. When the parties do not specify the terms and conditions but merely fix the price for which the property is to be sold, it is said to be an open contract for sale. So the rights and liabilities are implied in such an open contract. The right and liabilities of either party specified in section 55 can be grouped under separate headings, viz., those before completion of sale and those after completion of sale. Almost all the rights and liabilities before the completion of the sale are not contractual but incident of ownership that has been transferred to him. The latter is regulated by the rule that property having passed to the buyer the transaction can not be avoided.

*Janak Dulari Devi* v. *Kapildeo Rai*[37] is an interesting case pertaining to passing of title to vendee under section 55 (4) (b) of the Act. This case is an example to explain the nature of customary practice prevailing over law. The apex court has approved the well recognized practice prevalent in Bihar known as '*ta khubzul badlain*' (that is, title to the property passing to the purchaser only when there is "exchange of equivalents"). As per this practice, where a sale deed recites that entire sale consideration has been paid and possession has been delivered, except that the registration receipt is retained by the vendor and possession of the property is also retained by the vendor, as the agreed consideration (either full or a part) is not received, irrespective of the recitals in the sale deed, the title would not pass to the purchaser, till payment of the entire consideration to the vendor and the registration receipt is obtained by the purchaser in exchange. In such cases, on the sale deed being executed and registered, the registration receipt (which is issued by the sub-registrar) authorizing the holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the registration receipt will either receive the registered document and keep the original sale deed in his custody

37 AIR 2011 SC 2521.

or may keep the registration receipt without exchanging, it for the registered document from the sub-registrar, till payment of consideration is made. When the purchaser pays the price (that is the whole price or part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed, as also the possession. If the payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/registered document, as the case may be, which is in his custody, and proceed to deal with the property as he deems fit, by ignoring the rescinded sale. The prevalence of this practice in Bihar is noticed and recognized in several reported decisions. The apex court speaking through R V Raveendran J observed thus:[38]

> The trial court, the first appellate court and the High Court have concurrently found that though the sale deed recited that possession of the property was delivered to the purchasers, the possession was not in fact delivered and continued with the vendor (second respondent) and he had delivered the actual possession of the property to the first respondent when he subsequently, sold the property to the first respondent. Therefore, the recitals in the sale deed dated 22.2.1988, that the vendor had received the entire price of Rs.22000/- from the purchasers (that is Rs.17000 before execution of the sale deed and Rs.5000 at the time of exchange of registration receipt) and had transferred all his rights therein and that on such sale the vendor has not retained any title and that the vendor has relinquished and transferred the possession of the property to the purchasers, will not be of any assistance to the appellants to contend that the title has passed to them or part consideration was paid. It is an admitted fact that the registration receipt was retained by the vendor to be exchanged later in consideration of the sale price. It is also admitted that possession was not delivered though the deed recited that possession was delivered. The sale was categorically repudiated by the second respondent on 18.3.1988 by canceling the sale deed. There is no evidence that the appellants offered the sale price of Rs.22000/- to the second respondent before the repudiation. The only possible inference is that the intention of the parties was that title would not pass until the consideration was not paid; and as the consideration was not paid, the sale in favour of the appellants did not come into effect and the title remained with the vendor and the sale deed dated 22.2.1988 was a dead letter. Consequently, the subsequent sale in favour of the first respondent was valid…

**Mortgages**

Section 58 (a) gives the definition of mortgage. Mortgage is the transfer of an interest in some immovable property. It is given by way of security for a loan. A person who takes a loan and gives some security for repayment of the loan in the form of transfer of some interest in any immovable property, it is called a mortgage of property. The ownership of the property remains in the debtor but some of his

38 *Id.* at 2528.

interests in the property are transferred to the creditor who has given loan. In case the advanced money could not be recovered by the creditor, he can recover his money on the basis of his interest in that property. Therefore, it may be said that mortgage is for the security of the creditor.

In *Mishrilal* v. *Sukhram,*[39] a suit was originally filed for eviction on ground of arrears of rent. Plaintiff sold suit accommodation to defendant for loan wherein Rs. 30/- was to be paid as rent per month. Also repurchase agreement was executed on the same day whereby defendant agreed to resell suit accommodation on payment of loan amount and documents such as sale deed, rent note and agreement to repurchase executed on same day. The court held that such transaction is a mortgage and no land lord-tenant relationship created. In this case, reference was made to *Gulabchand* v. *Babulal,*[40] wherein the Supreme Court held that in the case where three documents, i.e., sale deed, rent note and agreement to repurchase executed on same day, the transaction is mortgage and no relationship of landlord and tenant created.

**Mortgage by conditional sale**

Mortgage by conditional sale is defined in section 58. Essentials for mortgage by conditional sale are as follows:

1) The mortgagor ostensibly sells the mortgaged property by sale. It is only ostensible but not real.
2) There is a condition attached to the sale which makes it only ostensible. The condition may assume only of the three incidents; a) that on default of payment of mortgage money the sale shall be absolute. b) that on such payment, the sale shall become void and c) that on such payment, the property shall be transferred
3) Delivery of possession is not necessary and 4) It can be redeemed at any time.

The conditions to convey and the transfer must be in the same document after the 1921 amendment. The only remedy of the mortgage is to obtain a decree for foreclosure, i.e., absolutely preventing the mortgagor from redeeming the property. Attestation and registration is necessary only when principal money is Rs.100 or upwards.

In *Raj Kishore (dead) by L.Rs.* v. *Prem Singh,*[41] the Supreme Court considered the conditions imposed in the mortgage by conditional sale. The court held that a condition regarding payment of mortgagee money as a condition for transfer of property to the seller must be embodied in sale deed itself and every sale accompanied by agreement for re-conveyance of property would not constitute mortgage by conditional sale.

While deciding the case, the Supreme Court opinioned that it is manifested from the judgment under appeal overlooked the proviso according to which the

39 AIR 2011 MP 143.
40 1998 (1) JLJ 1.
41 AIR 2011 SC 382.

condition regarding payment of the mortgage money as a condition for transfer of the property to the seller must be embodied in the sale deed itself. That is not so in the instant case. The sale-deed executed by the plaintiff in this case, does not embody any condition like the one referred to in clause (c) of section 58 extracted above. The broad statement of law made by the high court to the effect that every sale accompanied by an agreement for re-conveyance of the property will constitute a mortgage by conditional sale is not, therefore, correct. This was also the view taken by this court in *K. Simrathmull* v. *Nanjalingiah Gowder*,[42] where the plaintiff had borrowed certain amount from the defendant and in lieu thereof executed a deed of conveyance of certain land together with the house standing thereon in favour of the defendant.

In *Ram Chandra Yadav* v. *Sahid Alam,*[43] there was a mortgage by conditional sale or sale with a condition to re-purchase. The plaintiff had purchased suit property through three sale deeds from the defendant and fourth deed was in the form of agreement to re-convey property on repayment of consideration money. The plaintiff gave an opportunity to defendant to repay entire consideration money and the same was not paid. Admittedly, the fourth deed, which is in the form of an agreement for re-payment of loan money does not fulfill condition incorporated in according to section 58. The court held that transfer in question cannot be therefore said to be mortgage by conditional sale and it was a sale with a condition to repurchase and that became absolute.

**Mortgage by deposit of title deeds or equitable mortgage**

In England, the mortgage of deposit of title deeds is called an "equitable mortgage" as opposed to a "legal mortgage" because, in this type of mortgage, there is simply a deposit of title deeds, without any writing or any formalities. The object of the legislature to provide this kind of mortgage is to give facility to the mercantile community.

A mortgage by deposit of title deeds is a form of mortgage recognised by section 58(f) of the Act, which provides that it may be affected in certain major towns, where a person delivers to a creditor or his agent, the documents of title to immovable property with intent to create a security thereon.

In this mortgage, it is not necessary to deposit all the title deeds. Depositing one important title deed is enough. Property need not be situated in those major towns but depositing the deeds before the creditors who are residing in those towns is required.

In an appeal before Andhra Pradesh High Court in *Nirmala Baldwa* v. *Govt. of A.P*, [44] the court was asked to decide on mortgage by deposit of title deeds. In this case, there was a memorandum confirming deposit of title deeds as security for repayment of money proposed to be advanced. The court held that mere mentioning of word "mortgage" would not change the character of instrument inasmuch as even deposit of title deeds as security for repayment of money proposed to be advanced.

42 AIR 1963 SC 1182.
43 AIR 2011 Jhar 97.
44 AIR 2011 AP 26.

**Right of redemption**

Literally 'to redeem' means to repurchase and with regard to law of mortgage, it means paying off the mortgage money and buying back to the mortgaged property or to get back the estate which has passed to the mortgagee as security for debt. It is quiet natural that a mortgagor should get back his security on payment of principal money together with interest and cost. This right of the mortgagor is known as 'right of redemption or equity of redemption'.

In England, the above two expressions are not used synonymously under the common law. The right of the mortgagor to get back his property on payment of the debt was called right of redemption. This right is available to the mortgagor within the stipulated time and after that it will be lost. But the courts of equity looked upon the common law notion of forfeiture leniently and maintained that after default, though the mortgagor lost his remedy at common law, his right is known as 'the equity of redemption'.

But there is no such distinction in India, under section 60 of the Act. The mortgagor's right of redemption is not extinguished even after the expiry of the date fixed for payment. In India, it is not equitable remedy but a statutory right recognized by section 60. The general principles containing in section 60, is that the mortgagor retains the right to redeem the mortgaged property by paying the amount due at the proper time. By such payment he is entitled to recover the mortgaged property. A person having a share in the property mortgaged can only get his share redeemed, if the mortgagee/mortgagees consent to the same.

In *L.K Trust* v. *EDC Ltd.*[45] the Supreme Court held that the mortgagor under Indian law is the owner who had parted with some right of ownership and the right of redemption is the right which he exercises by virtue of his residuary ownership to resume what he has parted with. In India, this right of redemption, however, is statutory one. A right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. The right of redemption under a mortgage deed can come to an end only in a manner know to law. Such extinguishment of the right can take place by contract between the parties, by a merger or by statutory provision which debars the mortgagor from redeeming the mortgage. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper redemption is void. The court observed thus:[46]

> On analysis of arguments advanced at the Bar, this court finds that the proposition that in India it is only on execution of conveyance and the registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption stands extinguished is well settled. Further it is not the case of the appellant that a registered sale deed had been executed between the appellant-trust and the respondent No. 1 pursuant to the resolution passed by the respondent No. 1 and, therefore,

45 AIR 2011 SC 2060.

46 *Id.* at 2072.

> in terms of section 54 of the TPA 1882 no title relating to the disputed property had passed to the appellant at all…

The judicial trend indicates that dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists. This right cannot be extinguished except by the act of parties or by decree of a court. As explained by the apex court in *Jaya Singh D. Mhoprekar* v. *Krishna Balaji Patil,*[47] the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by contract between the parties, by a merger or by statutory provision which debars the mortgager from redeeming the mortgage. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper redemption is void.

Having regard to the facts of the instant case, the court observed that it was difficult to hold that the respondent no.3 had lost its right to redeem the mortgaged property or that by the acts of the appellant and the respondent no. 1, the right of the respondent no. 3 to redeem the property was extinguished.

In *Manjit Kaur* v. *Kaushaly Devi,*[48] the defendant was a tenant in suit shop. During execution of mortgage deed, it was agreed by the parties that at the time of redemption of mortgage, defendant will hand over possession of suit shop. But, he refused to accept money and also refused to hand over possession. The court held the defendant cannot be permitted to act contrary to terms and conditions of mortgage deed and decrees for redemption against defendant by directing him to take mortgage money of Rs. 14,000/- back and hand over possession of shop to plaintiff.

In *Haji Isufli Abdullabhai Jinia* v. *Fijabhai Fakhruddin Challawala*,[49] the Gujarat High Court was asked to decide on rights of priorities. In this case, mortgage was executed in favour of a tenant with a specific statement made by the plaintiff that defendants tenants have surrendered tenancy rights and became mortgagees of suit property. Here, the mortgage deed was established beyond doubt that the effect of deed was inconsistent with continuance or subsistence of lease. The court observed that on redemption of mortgage, respondent had right to recover possession, both on terms of mortgage deed and under section 62 of TPA[50] and finding by trial court that there was implied surrender of tenancy right of disputed property and plaintiff was entitled to take possession of property on redemption of mortgage was proper.

In *Gummuluru Snyasinaidu* v. *State Bank of India,*[51] the Andhra Pradesh High Court has got an opportunity to decide on maintainability of second suit for

47 (1985) 4 SCC 162.
48 AIR 2011 P&H 75.
49 AIR 2011 Guj 61.
50 S.62 of the Act deals with rights of usufructuary mortgagor to recover possession.
51 AIR 2011 AP 138.

redemption. In this case, a second suit was filed for redemption, after application for passing final decree in first suit and condoning delay was dismissed. Hence period of limitation started from the date of completion of period fixed for installments. The court held that the suit was within time and till mortgage debt is discharged and rights are determined and if transaction is within period of limitation, any number of suits can be filed. Therefore, even if execution petition is not filed or it is time barred, still second suit is maintainable. It is to be noted that the rights of the mortgagor and mortgagee are co-extensive with regard to redemption or for foreclosure and the principles does not differ.

**Marshalling**

Marshalling is defined under section 81 of the TPA. If the owner of two estates mortgaged both of them to one person and then one of them to another person without notice, the second mortgagee may insist under the doctrine of marshalling, but without interfering with the right of the former that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that shall extent. This right can be exercised subjected to certain conditions. Marshalling being a rule of equity will not be enforced so as to work injustice to the prior creditor. The prior mortgagee cannot be compelled to proceed against a security which may be insufficient or doubtful or which may involve him in litigation. This is intended to protect the rights of mortgagees *inter se*.

In *J.P Builders* v. *A. Ramadas Rao*[52] the Supreme Court, while deciding rights of the creditors *inter see* in a mortgage held that the doctrine of marshalling rests upon the principle that a creditor who has the means of satisfying his debt out of several funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of the funds. The court also observed that the doctrine of marshalling cannot be permitted to become a device for destroying the sanctity of contract.

The Supreme Court has analyzed the concept of marshalling under sections 56 and 81 of the Act and observed that section 56 deals with the right of subsequent purchaser to claim marshalling. It should be contrasted with section 81 which refers to marshalling by a subsequent mortgagee. The concept as in section 56 applies to sales in a manner similar to section 81 which applies to mortgages alone. The concept of marshalling by subsequent purchaser was explained by the following illustration by the apex court. Suppose A owns properties X and Y. Both these properties are mortgaged to C. Later, A sells property X to B. Now, B will be entitled to insist that his vendor A, shall satisfy his mortgage debt out of property Y (unsold) in the first instance, as far as possible. If after property Y is exhausted, there still remains balance of debt, only then property X will be drawn upon. The court explained that section 56 deals with the concept of marshalling in a transaction involved in subsequent sale, on the other hand, section 81 was applicable only to mortgages. The doctrine of marshalling rests upon the principle that a creditor who has the means of satisfying his debt out of several funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of the funds.

52 (2011) 1 SCC 429.

The apex court has confirmed the opinion of the high court that the plea of marshalling being pure question of law based upon the decree obtained for specific performance, cannot simply be thrown out merely because the same was not specifically pleaded. The court held that merely because for recovery of the loan secured by banks, a special Act, namely, Recovery of Debts due to Banks and Financial Institutions Act, 1993 has been enacted was not a bar for the civil court to apply to other relief such as section 56 of the TPA. The court further viewed that by issuing such direction on the application of section 56 of the TPA, the division bench has not modified or eroded the order passed by the Debt Recovery Tribunal.

The court also held that in view of the sale agreement which resulted into the decree for specific performance, the plaintiff was entitled to insist upon the defendants to have the mortgage debt satisfied out of the properties not sold to the plaintiff and in any case, if the sale proceeds were not sufficient then to proceed against the said suit properties. Thus, the application of the doctrine of marshalling was aptly upheld by the court.

**Lease**

The term lease and other items are defined in section 105, which says, "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, who accepts the transfer on such terms".

The transferor is called the '*lessor,*' the transferee is called the '*lessee,*' the price is called the '*premium*' and the money, share, service or other thing to be so rendered is called the '*rent'*. Lease is an outcome of the rightful separation of possession from ownership. So the fundamental conception of a lease is that, it is the separation of right of possession from ownership. Possession is a continuous exercise of right over the property. Generally this can be enjoyed by the owner; however some times, this right is being enjoyed by somebody else by transfer of rights. Then, it may be a lease.

Like other transfers, registration of lease deed is also necessary. In lease transactions, registration of document is necessary not on the basis of amount but on the basis of term of lease. Section 107 provides the mode in which leases may be made and for this purpose leases are divided into two classes. (a) Leases from year to year, leases for a term exceeding one year, leases reserving a yearly rent and permanent leases must be effected by registered document. (b) All other leases i.e. generally renewable from month to month or for a term of a year or less than a year may be made either by registered document or by oral agreement accompanied by delivery of possession.

*Indian Bank* v. *M/s. Nippon Enterprises South, Chennai*[53] is a case wherein a lease was claimed under section 1 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (TNRCA) which is not required to be registered. There is an inconsistency between TPA and TNRCA. TNRCA shall prevail over TPA and shall

53 AIR 2011 Mad 238.

have over riding effect as it was consented by the President under article 254 of Constitution of India.

In the instant case, the court held that requirement of registered instrument to create valid lease though necessary under section 107 of TPA and it is not necessary under TNRCA. Lease deed can be the basis to establish general relationship between owner and tenant in occupation and paid rents directly to bank was were accepted by bank. Hence tenant can therefore claim that he was a bonafide tenant in occupation irrespective of the fact the lease is not registered under TPA.

**Rights of sub-lessee**

Section 108 (j) of the TPA contains provisions regarding the sub-lessee. Sub-lessee can also enjoy rights over leased property, if it is allowed in the lease deed. In *Urban Amenities Pvt. Ltd.* v. *Mrityunjoy Seal*, the Calcutta High Court was asked to decide the rights of the sub-lessee. In this case, an appeal was filed by sub-lessee against eviction decree. Initially an agreement was entered between lessee and sub-lessee for management, maintenance of tenancy held by tenant and deed of lease has not been executed between them. The court held that mere agreement of maintenance does not confer any right upon sub-lessee to prefer an appeal as a co-lessee. He being not a co-lessee, he was neither necessary nor proper party and not entitled to challenge decree of eviction suffered by lessee.

**Termination of Lease**

Lease may be terminated according to provisions of sections 109 and 111 of the TPA.

*a) Termination by Efflux of Time*

Lease or tenancy may come to an end in many ways. Section 111 provides different circumstances in which a lease can be terminated. Although agricultural leases have been excluded from the purview of this Act by the express prohibition contained in section 117, and therefore, section 111 cannot apply in terms to such leases, still the principle of equity as contained in this section will be applied in agricultural leases.

A lease created for certain time naturally determines the lease on the lost of the term without any formality such as notice on either side. In this, the lease does not terminate, if any of the parties die during the term, because the lease-hold interest is transferable and heritable. The last mode in which a lease is determinate is when a notice to quit or to determine the lease is provided. Such notice is necessary in case of periodical tenancies. No notice is necessary in case of fixed period. Hence the lease terminated by afflux of time.

In *Hiroo Bisht* v. *District Judge, Almora*,[54] the Uttaranchal High Court got an occasion to decide on burden of proof in a suit for eviction. This is a case regarding burdon of proof under section 101 of Evidence Act. The tenant claimed that partnership business was run in shop with the consent of landlord and burden lay upon tenant to establish claimed fact. The court held that burden was wrongly shifted on landlady, for not admitting fact in plaint. In the instant case, the court

54 AIR 2011 Utr 82.

also held that tenant is under legal obligation to establish that partnership deed created by him to run business in a shop was with the consent of landlady and that he did not want to create interest of partner in tenancy alleged partnership would amount a sub-letting, where tenant failed to prove the consent of the land lady and the landlady cannot be stopped from claiming eviction of tenants.

In *Champakalata Mohanty* v. *Atmarajan Moahapatra,*[55] Orissa High Court while deciding the question regarding service of statutory notice on the defendants under section 111 of the TPA, held that as the lease in respect of the tenanted premises admittedly expired on 30.04.1999, no notice was necessary to determine such a lease. It is trite law that where a definite period is fixed as to the term of a lease, in such a case, the lease will automatically come to an end by efflux of time limited thereby, as provided under section 111(a) of the TPA and a notice will not be necessary to determine such a lease. After the expiration of the term fixed by the lease, the lessee continuing in possession, in the absence of an assent by the lessor, will only be a *tenant-by-sufferance* and can be sued for ejectment at any time without any previous notice or demand of possession. Being a trespasser and not a *tenant by holding-over*, no notice is necessary.

*b) Termination by notice to quit*

In *Mritunjoy Sett (D) by L.Rs.* v. *Jadunath Basak (D) by L.Rs*.,[56] the Supreme Court was deciding the validity of notice to quit. The dispute was whether tenancy was established as per English calendar month or Bengali calendar month. In this case, rent receipts issued by erstwhile land lady produced by the tenant assert that tenancy was as per Bengali calendar month. However, the landlady was not examined as witness during her lifetime. In such case, the court held that admission was made by tenant in an earlier title suit that rent was paid as per English calendar month would carry more evidentiary value. As per court, the notice held to quit issued as per English calendar month was valid and eviction of tenant was thus proper.

In *Nabina Chadha* v. *Usha Das,*[57] the High Court of Orissa has an occasion to decide the matter relating to requirement of notice to quit. In this case, a monthly tenancy was created on the basis of agreement specifying period of tenancy. Ordinarily, notice is not required to be served upon tenant prior to filing of suit. Court held that tenancy was created on the basis of an agreement specifying period of tenancy, tenancy automatically gets terminated by efflux of time. No notice under section 106 of the Act required to be served prior to filing of suit. The court also observed that notice was issued to tenant by registered post which was returned with endorsement "refused". Hence, it was held that mere receipt of rent even after expiry of period of tenancy will not bar filing suit for eviction.

In *Ahanmugam* v. *Hema*,[58] the Madras High Court was asked to decide on the issue of notice to quit and proper description of property in the notice. In this case a notice was issued specifying door number of the suit premises. The court held that even though boundaries were not properly specified, the defendant/tenant could

55 AIR 2011 Ori 136.
56 AIR 2011 SC 2496.
57 AIR 2011 Ori 5.
58 AIR 2011 Mad 177.

have understood that plaintiff has sought for eviction from very suit premises. Hence notice cannot be held bad for want of proper description of property and notice to quit was valid. At this juncture, the learned judge referred to the following maxim: *id certum est quod certum reddi potest* which means "that is certain which can be rendered certain". Here even though the boundaries may not have been property specified yet the door number of the structure has been specified clearly and by that the defendant could have very well understood that the plaintiff sought for eviction only from the said structure concerned. As such, the judge was of the view that both the courts were right in construing that the termination notice was valid and it was not bad for want of proper description of the suit property.

**Lease and licence**

The question whether a particular transaction amounts to a lease or licence is often mooted before the courts. Section 105 of TPA defines lease. Section 52 of the Indian Easements Act, 1882 defines the license. It says that "where one person grants to another or to definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license". Lease and licence have many similarities but still they differ in many aspects.

In *Pradeep Oil Corporation* v. *Municipal Corporation of Delhi*[59] the Supreme Court had an occasion to decide differences between lease and licence. The court held that by license no estate or interest in property is created and lease on other hand would amount to transfer of property. The court also mentioned that Government Grants Act being special statute would prevail over general statute, i.e., TPA. Rights and obligations of parties would be governed by terms of provisions of Government Grants Act, 1895 where government would be entitled to impose limitations and restrictions upon grants and other transfer made by it or under its authority. The court also held that a licence may be created on deal. However, when it is accompanied with grant it becomes irrevocable or parole and it would be revocable. A mere licence does not create an interest in the property to which it relates. A licence may be personal or contractual. A licence without the grant creates a right in the licensor to enter into a land and enjoy it.[60]

*Dnyaneshwar Ranganath Bhanandare* v. *Sadhu Dadu Shettigar (Shetty)*[61] is a case where the status and position of licensees were considered by the Supreme Court. The court held that the judgment of the first appellate court and high court on rights over property are unsustainable and the finding of the trail court that the respondents are gratuitous licensees was correct and justified.

**Lease and mortgage**

The *S.R. Sripathi* v. *Narayana Kanginaya,*[62] the Kerala High Court decided on the difference between lease and mortgage. The court observed thus:[63]

59 AIR 2011 SC 1869: (2011) 5 SCC 270.
60 (2011) 5 SCC 271.
61 (2011) 10 SCC 433.
62 AIR 2011 Kar 134.
63 *Id*. at 137.

> In the case of lease, the estate that is outstanding in the lessor is the reversion; in the case of mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Further, in the case of usufructuary mortgage, a tenant-mortgagee can be directed to deliver actual or physical possession of the mortgaged property to the lessor-mortgagor depending upon whether there is an implied surrender of the lessee's right when the usufructurary mortgage was executed in his favour by the mortgagor. The above ratio provides for surrendering of lease hold rights that merges with the mortgage. In the case on hand, since the respondent/tenant did not opt for any revival of the lease hold rights in respect of Ex. P1 mortgage deed, the trial court has rightly ordered for delivery of physical possession upon redemption.

**Gift of property**

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. For the purpose of making a gift to movable property, the transfer may be effected either by registered instrument signed as aforesaid or by delivery of possession. Such delivery may be made in the same way as the goods sold may be delivered. By observing the above section, we can conclude that registration of a gift is necessary, if it is immovable property and for movable property, it is only an option of the parties to the gift.

In *Manirajan Pillai* v. *K.K. Karunakaran Nair*,[64] the Kerala High Court got an opportunity to decide about the circumstances in which the consent of the donee cannot be obtained and its effect. In this case, there was an execution of a gift deed wherein a product of undue influence and fraud was alleged and it was pleaded against him under section 101 of the Evidence Act. Evidence showed that executant was a law graduate, who can understand the implications of the consent. The court held that merely because executant was old and was undergoing intermittent hospitalization during period of execution, it cannot be said that burden sifts on donee to prove that it was free from vitiating factors. Particularly when evidence of doctor showed that executants was capable of taking care of her at time of execution.

## IV CONCLUSION

In the year under survey, there are many Supreme Court and high court judgments of importance. The courts while deciding the cases have aptly interpreted and analysed various ambiguous issues relating to the property law. The apex court in *Janak Dulari Devi* case [65] has approved the customary practice prevalent in Bihar well recognized by the Patna High Court in a catena of cases known as '*ta khubzul badla in*' (that is, title to the property passing to the purchaser only when there is "exchange of equivalents)". However, such approval would vitiate the significance of codified law and the registration of land property transfers. It may very often lead to unjust and improper decisions. In *M/s. L.K Trust* v. *E.D.C. Ltd.,*[66]

64 AIR 2011 Ker 55.
65 AIR 2011 SC 2521.
66 AIR 2011 SC 2060.

the Supreme Court gave a clear explanation of subtle problems relating to the right of redemption available to the mortgagers. In *JP Builders* case,[67] the judgment of the Supreme Court speaking through P Sathasivam J has apt delineations of several intricate legal concepts *inter alia,* the concept of marshalling. The need for amending more than the century old TPA has been emphasized by the Allahabad High Court in *Raj Bahadur* case.[68] Sale of immovable property of the value of Rs. 100/- and more requires compulsory registration. There has been criticism that the value of Rs. 100/- prescribed in the Registration Act as well as the TPA needs to be suitably amended, lest it should remain dead letter and redundant. However it is desirable that more than century old enactments including the transfer of property law needs to be revisited reflecting the ratios of the Supreme Court and the high courts to update the law reflecting the modern social values and to avoid unnecessary litigation.

67 *J.P. Builders* v. *A. Ramadas Rao* (2011) 1 SCC 429.
68 *Raj Bahadur* v. *Babu Lal,* AIR 2011 All 48.