

## 23

**PROPERTY LAW***Annam Subrahmanyam\**

## I INTRODUCTION

THE TRANSFER of Property Act came into force on the first day of July, 1882. The important objects of the Transfer of Property Act are - a) to bring the rules which regulated the transfer of property between living persons into harmony with the rules affecting its devolution and b) to provide a complete code of law of contract so far as it related to immovable property.

The Transfer of Property Act mainly applies to the transfers of immovable properties and some of the sections also apply to movable properties as well. If we consider the scope and extent of the Act, we can deduce the following limitations: a) The Act applies to the transfers by act of parties and has no application to the transfers by operation of law. b) The Act deals with transfers *inter vivos* and has no application to the transfers under will or succession.<sup>1</sup> c) Though the Act contains some provisions, which also apply to movable property under sections 5 to 37 and sections 118 to 137 but all most all the provisions are applicable to immovable property. d) Section 2 of the Act saves the rules of Mohammedan Law which says that whenever any provision of Transfer of Property Act is inconsistent with the Mohammedan Law, the rules of Mohammedan Law will prevail, e) The Act applies only to the transfers which take place in India and has no extra-territorial operation, f) Sections 10 to 35 are taken from Indian Succession Act and rest of the sections from English Law which are based upon rules of Equity and g) When the Act makes no provision, the courts can apply the English Common Law on the grounds of '*justice, equity and good conscience*'.

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1 The Indian Succession Act, 1925.

The Act is not a comprehensive code to deal with all the transfers, as it is evident from the preamble which says that it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties. So it can only define and amend but not introduce any new principles.<sup>2</sup>

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 constitute 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. So Transfer of Property Act applies to the transfers of all the above mentioned 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

### ***Profit-a-prendre***

*Birachi Padhan v. Collector, Bolangir*<sup>3</sup> is a case where the court was asked to consider right to catch and carry away fish a type of immovable property. Orissa high court held that right to catch and carry away fish is *profit-a-prendre* and same to be construed as immovable property and sale of tank has to be made by registered instrument.

Here the dispute pertains to the plaintiffs' claim over the suit tank. The value of which by no stretch of imagination is less than Rs. 100/-. The Court observed that right to catch and carry away the fish is *profit-a-prendre*. The same is construed as immovable within the meaning and ambit of the Transfer of Property Act, 1982 and its sale has to be by means of a registered instrument in case its value exceeds Rs.100/-. The Court observed that since no registered instrument has been executed, the plaintiff has no rights over the tank in question.

### **Family settlement**

*Amrit Lal v. Savitri*<sup>4</sup> is a case regarding Family settlement of ancestral property. Here the Plaintiffs's legal heirs of deceased have claimed possession of ancestral property inherited by deceased from his father. Brother of deceased have claimed property on the ground that decree passed by Lower Court against deceased based on family settlement and that agreement of sale executed by deceased in his favor. No evidence to prove details of family settlement and any consideration paid to deceased

2 *Tajjo Bobi v. Bhagwat Prasad*, 1918 LR All 295.

3 AIR 2017 Ori 154.

4 AIR 2017 P & H 130.

in view of settlement. Held no agreement of sale can be entered by deceased when his wife and children having acquired right in ancestral property and such alien action would not confer any right or title in property.

As regards the agreement of sale on the basis of which also the appellant claimed his right to the property over and above the respondents- plaintiffs, I also see no error in what was held by the Additional Civil Judge, that a suit subsequently having been filed, seeking that the suit property be transferred to the appellant on the basis of a family settlement and not on the basis of a family settlement and not on the basis of any agreement of sale, the agreement of sale itself would be nullified unless it was also subject-matter of the suit between the appellant and the late Rohtash, with consideration proved to have been paid to Rohtash. Nothing to that effect has been argued before this Court on behalf of the appellant.<sup>5</sup>

Moreover, what holds good in respect of the family settlement, holds good even more so with regard to an agreement of sale, i.e. that an agreement of sale also could not have been entered into by Rohtash if the property was ancestral property in his hands, his son and the other two children having acquired a right in such property by birth.

In *Dr. Jose Floriana Cristovam Pinto v. Machel N. Phinto Sosuza*<sup>6</sup> a deed of family settlement was challenged on ground of invalidity. Parents of plaintiff and defendant have distributed their property during their lifetime by deed of settlement. Plea of plaintiff that family settlement not applicable during lifetime of parents in view of Goa Family Laws was the question here. Bombay high court held plaintiff enjoying benefits under family settlement, cannot challenge it and non-disclosure of Deed of family settlement at time of inventory proceedings, making plaintiff guilty of suppression of facts before Court and the Deed of family settlement, valid.

Besides it was completely lost on the trial court that was substantial delay and laches on the part of the respondents to approach the Court in seeking the repudiation of the Deed of Family Settlement of 2005 in suit of 2014 and on that premise too could not have secured the plaintiff with the relief of injunction. It was also lost on the trial court that between the Deed of Family Settlement in 2005 till the institution of the suit in 2014, the appellants could well have disposed of bother properties and in that context of apathy and inaction of the plaintiff did not entitle them to the relief of injunction. By one stroke of the pen, the learned trial court considered the Deed of Succession of 22.10.2012 and lost its sanctity as the Deed of settlement was not valid without considering the fact that the parties had to go to trail based on their case and the documents and the validity or otherwise of the Deed of Settlement had to be proved on merits.<sup>7</sup>

<sup>5</sup> *Id.* at para 36.

<sup>6</sup> AIR 2017 Bom 263.

<sup>7</sup> *Id.* at para 26.

*Smt. Samatha Venkatesh Nee Sur v. Susantha Kumar Sur*<sup>8</sup> where a deed of construction of settlement containing a clause that settlor's children from first marriage to be entitled to trust property upon his daughter from second marriage dying unmarried or marrying but dying without issue and interpreting clause of deed in the manner that "daughter dying after her child predeceased her" amounting to addition of words to clause is impermissible.

Rejection of plaint and plaintiff seeking injunction, restraining defendant from alienating suit property and transfer of suit property taking place on the basis of deed of settlement, transfer of property in favor of defendant daughter completed or deemed to have taken effect in accordance with mandate of settler, proper perusal of settlement deed establishing that no cause of action arise against defendant in respect of property. Held rejection of plaint is proper.

It is a cardinal principle in the construction of a deed that if an earlier clause is loded by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause would prevail. But the corollary to the principle is as important as the principle itself: that if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.<sup>9</sup> At any rate, if the deed of settlement of December 14, 1960 is regarded as a testamentary document, as it should be, it would be the later that would prevail over an earlier clause of varying import.

Even if the relevant condition in the deed that the opposite party emphasizes on is taken at its face value and is regarded as unqualified by the later clause that provides for the vesting of the trust property in the petitioner upon the petitioner attaining majority, upon it being evident that the petitioner is married and has a child, it can no longer be said that the petitioner would die without any issue. To interpret the relevant clause to imply that if the petitioner dies after her child has predeceased her would amount to adding words to the clause which would be impermissible. In any event, if the petitioner dies after the death of her daughter the rules of succession may find the property in the lap of the opposite party, but that would be under the laws of succession applying to a Hindu female and not by virtue of the deed of settlement. Again, a prospective heir cannot interfere with a person's right to deal with her property.<sup>10</sup>

*Hargurshan Singh v. Lt. Col. Hargobind Singh*<sup>11</sup> is a case where execution of family settlement, has to be established by plaintiff by clear all suspicious circumstance surrounding. Expert opinion is only an opinion which could only corroborate substantive evidence. Held that mere proof of signature, cannot establish due execution of document.

8 AIR 2017 Cal 98.

9 See, *Forbes v. Git*, (1922) 1 AC 256.

10 *Id.* at para 21.

11 AIR 2017 P & H 3.

Genuineness of family settlement, plaintiff claiming share in property, raised pleas that he has given Rs. 48,000/- to defendant for purchase of land. Alleged payment made prior to receipt of allotment of letter to defendant, particular date of giving said money, source from which such big amount was paid not mentioned, attesting witness that document was not signed in his presence, same was attested at petrol pump instead of a house of plaintiff. Though near relatives of plaintiff are available at house to sign settlement, same was signed by third person and held that family settlement shrouded with suspicious circumstances, not genuine.<sup>12</sup>

In *Dr. Jose Floriano Cristovam Pinto v. Dr. Michelle N. Pinto Souza*<sup>13</sup> a deed of family settlement challenged on the ground of invalidity and parents of plaintiff and defendant distributing their property during their lifetime by deed of settlement and the plea of plaintiff that family settlement not applicable during lifetime of parents in view of Goa Family Laws and plaintiff enjoying benefits under family settlement, cannot challenge as non-disclosure of deed of family settlement at time of inventory proceedings, making plaintiff guilty of suppression of facts before court. Held that deed of family settlement is valid.

#### **Transfer of property**

In *Saroj Kumar Bandhopadhyaya v. State of West Bengal*<sup>14</sup> the rights of members of cooperative society. Mother member of society has transferred property to petitioner's son and petitioner becoming member after acquisition of property by society. Notification dated 10-10-2014, stipulating condition that benefits in it not available to subsequent purchaser and requirement under section 92(2) fulfilled after petitioner becoming member, revealing that transferor not acquiring title prior there, transfer of share by mother to petitioner not by way of succession is transfer *inter vivos* not compulsorily registrable such assignment is not transfer for purpose of notification. Held that the petitioner not subsequent purchaser, entitled to benefits under notification.

#### **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. Principle enshrined here is right to enjoy the property is an incident of ownership and any condition fettering that right is repugnant to the nature of the owner's interest and is void. This rule is similar to section 138 of Indian Succession Act.

Section 11 of the Transfer of Property Act 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

<sup>12</sup> *Id.* at para 24.

<sup>13</sup> *Supra* note 6.

<sup>14</sup> AIR 2000 Cal 209.

particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

*Jayawant Baliramji Panchbhai v. Anusuyabai Vasant Rao Deshmukh*<sup>15</sup> is a case relating to imposition of restriction repugnant to interest created. Once absolute interest is created in favour of any person, no restriction can be placed as to manner in which such interest has to be enjoyed.

When restriction repugnant to interest created and participation repugnant to interest created – partition of property between coparceners, each coparcener would receive absolute share in property as full owner. Any clause in partition deed restricting right of coparcener over his share would be void and coparcener can execute will and bequeath his share of property.

In *Prabhakar Rajaramji Lambat*,<sup>16</sup> a similar recital in the Partition-Deed conferring life interest on a coparcener was the subject-matter of consideration. It was held that there was no concept in Hindu Law of a coparcener becoming a limited owner after getting his share in the partition. It was held that such condition in the Partition-Deed restricting the manner of enjoyment was void. In that case also, the subsequent disposition by a Will was upheld.

From the aforesaid provision, it can be seen that once an absolute interest is created in favour of any person, then there cannot be any restriction in the manner in which such interest has to be applied or enjoyed.

#### **Joint ownership and Transfer of property**

In *Baldev Raj Sharma v. Smt. Kanta Devi*<sup>17</sup> Punjab and Haryana high court held that suit for declaration of title on the basis of sale deed wherein property is in joint ownership, vendor, one of co-sharer selling portion of property belonging to other co-sharer considered as illegal and vendee cannot claim relief of declaration of title on basis of said sale deed. Since Smt. Melo Devi was entitled to inherit the estate of her brother Late Shri Dharmu alias Dharam Singh only to the extent of 1/3rd share, mutation in her name beyond that share would also be patently illegal. Such mutation sanctioned contrary to natural succession, would be of no consequence. It is the settled proposition of law that mutation does not confer any title. Similarly, any oral relinquishment in favour of Smt. Melo Devi allegedly by Deputi Ram and Buban Devi would be of no consequence. In fact, it seems that it was a made up story put forth, which could not have been proved. There was no material available on record to support such an alleged oral relinquishment. In this view of the matter, it can be safely concluded that the learned first appellate court was well within its jurisdiction to pass the impugned judgment and decree and the same deserve to be upheld, for this reason as well.<sup>18</sup>

15 AIR 2017 Bom 178.

16 2009 AIR Bom 52.

17 AIR 2017 P & H 119.

18 *Id.* at para 14.

**Feeding the grant by estoppel**

In *Aftaruddin (Dead) Rep. Thr. Lrs. v. Ramkrishna Datta Alias Babul*<sup>19</sup> decided by the Supreme Court on 8 December, 2017 one Sayed Jama Kazi was the raiyat (owner) of the suit land. Aftaruddin was under-raiyat (Kurfa rights similar to tenancy rights). On 11.01.71, Aftaruddin is alleged to have executed a sale deed transferring the entire suit land in favour of Mamataj Begam, daughter of the raiyat Sayed Jama Kazi. Thereafter, Mamataj Begam and Sayed Jama Kazi transferred the suit land to plaintiffs 1 and 2 by registered sale deed on 27.11.71. On 06.04.81 plaintiff no.2 sold and transferred a portion of his land to plaintiff no.3. In the Revenue Record the defendant Aftaruddin was shown to be in possession of the suit land. Therefore, the plaintiffs filed a suit for declaration of their title and prayed for injunction that defendant no.1 be restrained from interfering in the suit land. The suit was contested by Aftaruddin since dead represented by LRs. The trial court held that though the sale deed had been executed, Aftaruddin could not have transferred his rights in the suit land and, therefore, dismissed the suit. The First Appeal filed was also dismissed. In the Second Appeal this concurrent finding of fact was set aside on the ground that it was a perverse finding. It was held by the High Court that in the sale deed Aftaruddin has represented himself to be araiyat and not an under-raiyat. The High Court also found that in terms of section 43 of the Transfer of Property Act the subsequent vendee could not be denied their rights.

The Supreme Court observed:

A “raiyat” has been defined in section 2(s) of the Tripura Land Revenue and Land Reforms Act, 1960 to mean a person who owns land for purposes of agriculture, paying land revenue to the Government; and “under-raiyat” under section 2(v) means a person who cultivates or holds the land of raiyat under an agreement, express or implied, on condition of paying therefore rent in cash or in kind or delivering a share of the produce and includes a bargadar, i.e. a person who cultivates the land of any person on a condition of delivering a share of the produce to the land owner or raiyat.....The learned single Judge laid great emphasis on the fact that in the sale deed Aftaruddin is described to be a raiyat. This cannot in any manner validate the sale deed which is otherwise totally against law. Obviously, a Sub- Registrar could not have registered a sale deed where the seller has described himself as an under-raiyat. We may also add that the vendee Mamataj Begam was none other than the daughter of Sayed Jama Kazi, the raiyat. A few months after Aftaruddin executing the sale deed on 11.01.71, Mamataj Begam and her father Sayed Jama Kazi sold the entire land in favour of the plaintiffs/respondents on 27.11.71. It is obvious that the sale

deed dated 11.01.71 was got executed showing Aftaruddin as a raiyat to get over the bar of section 108. This is what section 108 prohibits. The plaintiffs who were subsequent purchasers cannot take benefit of the subterfuge and fraud committed by Sayed Jama Kazi and Mohd. Aftaruddin. Their remedy, if any, lay in taking action against Sayed Jama Kazi and Mamataj Begam, who were not even impleaded as parties in the suit. The High Court totally mis-interpreted the provisions of section 108.

In 1987 Aftaruddin was conferred the rights of the raiyat. It was contended on behalf of the plaintiffs that in view of section 43 of the Transfer of Property Act since Aftaruddin is now entitled to transfer his rights a sale deed in their favour becomes valid. This is not at all correct. No sale deed was executed by Aftaruddin in favour of the plaintiffs. The fraud was not committed by Aftaruddin but by Sayed Jama Kazi and Mamataj Begam. The protection under section 108 of the TLR&LR Act which is a statutory protection could not have been taken away by the subterfuge committed by the then raiyat. The apex court finally ruled that as no sale deed was executed by Aftaruddin in favour of the plaintiffs. The fraud was not committed by Aftaruddin but by Sayed Jama Kazi and Mamataj Begam. The Court opined that the protection under section 108 of the TLR&LR Act which is a statutory protection could not have been taken away by the subterfuge committed by the then raiyat.

### *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 innovator*' 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.

*Usmangani Abdulkadar Karbhaari v. Ajit Indravadan Thakkar*<sup>20</sup> is a case relating to doctrine of *lis pendens*. Here on transfer of ostensible owner when bona fide purchaser and various transactions of property taken place between different purchasers. Applicant has purchased property from vendors whose sale deed has been set aside. However, neither any entry regarding *lis pendens* nor revenue record regarding such transaction present. Held applicant, a bona-fide purchaser.

20 AIR 2017 Guj 81.



In this case the provision of section 52 of the Transfer of Property Act referred to by learned advocate, Shri Thakkar requires a closer scrutiny, which provides that the property cannot be transferred or dealt with so as to affect the right of any party. However as could be seen, it refers to the doctrine of *lis pendens*. The effect is to make the decree passed binding on all transferee and bind third party though it may not be a party to the original proceedings. However it is also to be read with concept of *lis pendens* which provides the manner in which it has to be entered into by entry in the record pending proceedings.<sup>21</sup>

In *Mukesh Kothari v. State Bank of India*<sup>22</sup> case on the basis of section 58 of TP Act, there has been a creation of requirements of equitable mortgage and court was asked existence of debt, deposit of title deeds to creditor and intention of parties that title deeds would be security for debt.

As has been recorded above, since Respondent No. 2 who has created equitable mortgage has not questioned the same, the transaction which is otherwise validly entered into cannot be nullified on the technical plea raised by the Petitioner who himself is staking claim on the basis of an illegal transaction. There are three requirements of the Mortgage Deed by deposit of Title Deed (i) Debt, (ii) Deposit of Title Deeds; and (iii) an intention that the Deeds shall be the security for the debt.<sup>23</sup> All the ingredients of the valid mortgage transaction do find place in the instant matter. Held the transaction is invalid.

In *Chandrapal Guruwani v. Smt. Saraswati Bai Guruwani*,<sup>24</sup> the court was asked to decide on alienation of property during pendency of suit would be subject to decision of suit.

In the case at hand, the view taken by the Appellate Court is a possible view. Even otherwise, if any alienation had taken place during pendency of the suit, it would always remain subject to decision of the suit considering the doctrine of *lis pendens* under section 52 of the Transfer of Property Act. The plaintiff can always pray that any alienation made by any of the defendants during pendency of the suit shall not bind him and the trial court can also pass orders to this effect at the time of disposal of the suit.

### **Section 52 and specific performance**

In *Mal Chand v. Shiv Kumar*<sup>25</sup> where a suit was filed for specific performance of contract for sale and impleadment of subsequent purchaser an effective decree can be passed in absence of subsequent purchaser. Subsequent purchaser neither necessary nor proper party and not entitled to join as defendant in suit.

21 *Id.* at para 14.

22 AIR 2017 Bom 131.

23 *K. J. Nathan v. S.V. Maruthi Rao*, AIR 1965 SC 430.

24 AIR 2017 Chh 57.

25 AIR 2017 Raj 86.

In this regard, judgment relied upon by learned counsel for the respondent Poonam Bansal in case of *Kasturi v. Iyyamperumal*,<sup>26</sup> seems relevant. In this case, Supreme Court has observed that in a suit for specific performance of contract for sale, the *lis* between the appellant purchaser and respondent vendor shall only be gone into and it is not open to the Court to decide whether third party has acquired any title or possession of the contracted property as that would not be germane for decision in the suit for specific performance. It has also been held that third party or strangers to the contract are not necessary party as effective decree could be passed even in their absence also. In light of these principles, it was never incumbent upon Poonam Bansal to implead the subsequent purchaser i.e., Anil Kumar in the suit filed for specific performance of contract as a subsequent purchaser of the stop. He was not a necessary party in the suit. Thus, when he was not at all a necessary party, the question whether the suit was filed against him within limitation or not, does not have any significant bearing, as even the suit could have been decided in his absence.

#### **Part-Performance**

Section 53A of the TP Act 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, 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 equity maxims are the basis for the English 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.

*Smt. Gita Devi v. Mrs. Sobha Agarwalla*,<sup>27</sup> is a case regarding protection from eviction and protection provided under section 53A deals with mixed question of facts as well as law. Here the suit was filed for declaration of title and possession of property and respondents seeking eviction of appellants. Possession of appellants/defendants over the suit property stood confirmed since year 1979 by previous owners, acknowledging possession of defendants, Agreement for sale was executed by them. Nothing on record to show that at any point of time, appellants/defendants were inducted either as a tenant or they were enjoying suit property having permissive

26 AIR 2005 SC 2813.

27 AIR 2017 Jhar 24.

possession. Although no suit for specific performance of contract to implement Agreement for sale was filed by defendants, document itself is the proof that they acquired possession by way of part performance of contract. Subsequent purchasers and plaintiffs have never come in possession over suit property. Appellants are entitled for the protection contained under section 53A. Held that the decree passed by trial court is liable to be set aside.

In the case at hand, the appellants have sought for protection under section 53A of the Transfer of Property Act and, accordingly, substantial question of law to this effect has also been framed. Protection contained under section 53A of the Transfer of Property Act deals with mixed question of facts as well as law. So far 'fact' part is concerned, the appellants have clearly pleaded that they have been enjoying peaceful possession over the suit property after they acquired the same from the year 1975 i.e. the date of execution of Sale Deed by Firangi Mahto in favour of Chandrakant Singh (father of defendant No. 1). If possession of the appellants is not considered from the year 1975, the admitted facts available on record is that possession of defendants have well been recognized since the year 1979 by Sitaram Agarwalla and Bajrang Agarwalla, the two brothers. Acknowledging possession of defendants, Agreement for Sale dated 13-2-1979 was executed by aforesaid two brothers. Sitaram Agarwalla and Bajrang Agarwalla in favour of defendant, it was contended by counsel for the plaintiffs that aforesaid Agreement dated 13-2-1979 lost its legal value when no suit for specific performance of contract was filed within the period of limitation.<sup>28</sup>

*Ghanshyambhai Dhirubhai Barvalia v. Rasikbhai Dhirubhai Ambaliya*,<sup>29</sup> is a case where the court held that Part-performance is a defense and can be used by transferee as shield, not only as defendant but also as plaintiff.

When necessary conditions for application of provisions of section 53A are fulfilled, transferor or any person claiming under him is debarred from enforcing against transferee or any person claiming under him any right in respect of property in question, even though, required to be registered, is not registered or where there is an instrument of transfer, transfer is not legally complete. Therefore, holding that transferee can use unregistered deed as shield only as defendant and not as plaintiff would defeat very spirit of section 53A for it will be possible for an over-powering transferor to forcibly dispossess transferee even against covenants in contract and compel him to go able to transferee as defendant, there is no justification that it would be denied to transferee even if by force of circumstances, he is compelled to approach court as plaintiff to use that shield.<sup>30</sup>

In *Smt. Gurmeet Kaur v. Harbhajan Singh*,<sup>31</sup> there was an agreement to sell property. Amendment was made in 2001 requiring documents to be stamped and

28 *Id.* at para 14.

29 AIR 2017 Guj 164.

30 *Id.* at para 10.

31 AIR 2017 Del 164.

registered so as to create right in terms of doctrine of part performance. Amendment was prospective in nature. Held that agreement entered in 1995 not required be stamping or registering.

It is only by the subsequent amendment of section 53A of the Transfer of Property Act w.e.f. 24.9.2001, that an agreement to sell would not confer any rights in terms of the doctrine of part performance if such an agreement to sell is not registered. Since the amendment is prospective in nature, therefore, the documents executed prior to 24.9.2001 being the documents dated 19.4.1995 did not require registration and stamping. This aspect has been dealt by this Court in detail in the judgment in the case of *Shri Ramesh Chand v. Suresh Chand*,<sup>32</sup> and in which judgment the Court has referred to the judgment of the Supreme Court in the case of *Suraj Lamps and Industries Pvt. Ltd. v. State of Haryana*,<sup>33</sup> and as per which Supreme Court judgment agreements to sell, general power of attorneys and Wills which are validly executed are protected and such documents will have rights flowing under the same in terms of section 53A of the Transfer of Property Act and section 202 of the Indian Contract Act and the relevant provisions of the Indian Succession Act pertaining to devolution of properties by a Will i.e., only such documents executed post 24.9.2001 will not have validity if they are not stamped and registered.<sup>34</sup>

#### **Part-Performance and Specific Relief**

In *Revansiddayayya v. Gangamma @ Shashikala*,<sup>35</sup> the respondents' father-Veerabasayya was the original owner of the suit land. He had entered into an agreement on 06.11.1986 to sell the suit land to the appellant for a total consideration of Rs.1,75,000/-. In terms of the agreement, the appellant paid a sum of Rs.1,00,000/- to Veerbasayya towards earnest money. The appellant was, accordingly, placed in possession of the suit land. The sale deed of the suit land was to be executed within 3 months. In the meantime, Veerbasayya died on 06.08.1988. The respondents being his legal representatives inherited the suit land and became its owners. On 14.09.1993, the respondents herein filed a suit against the appellant in the Court of IIIrd Additional Civil Judge, Dharwad for a declaration and possession in relation to the suit land. The trial court dismissed the suit. The trial court held that the respondents are the owners of the suit land but are not entitled to claim possession of the suit land. The appellant, filed a suit against the respondents seeking specific performance of the agreement. The appellant's suit and the appeal for specific performance were dismissed. On the other hand, the respondents, felt aggrieved of the judgment/decreed of the trial court, filed first appeal in the High Court of Karnataka. The High Court held that the respondents are entitled to claim possession of the suit land from the appellant. The appellant has filed the present appeal by way of special leave in the Supreme Court.

32 (2012) 188 DLT 438; 2012 AIR CC 2712 (Del).

33 (2011) 183 DLT 1 (SC); AIR 2012 SC 206.

34 *Id.* at para 10.

35 Decided on 5 December, 2017, available at: <https://indiankanoon.org/doc/140555561/>.

The Supreme Court further had considered a necessary question which had not been dealt with in two suits filed by the parties against each other in the interest of justice, to give quietus to the litigation which had been pending between the parties for the last 3 decades.

The Supreme Court observed:

.....it is not in dispute that the appellant had paid a sum of Rs.1,00,000/- to the respondents' late father by way of earnest money for purchasing the suit land. It is also not in dispute that the respondents' late father had placed the appellant in possession of the suit land in 1986. It is also not in dispute that since then the appellant continued to remain in possession of the suit land though, in the meantime, suffered impugned decree for dis-possession. In our opinion, in the light of such factual undisputed scenario emerging in the case, the appellant is held entitled to claim refund of earnest money of Rs.1,00,000/- from the respondents. One cannot dispute the legal position that once the bargain to sale/purchase of any land fails, the unsuccessful buyer becomes entitled in law to claim refund of earnest money from the seller under section 22 of the Indian Specific Relief Act. Similarly, the appellant is also, in turn, liable to restore the possession of the suit land pursuant to the impugned judgment/decreed suffered by him and which we have upheld.

### III SPECIFIC TRANSFERS

#### **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, we can say, transfer of property voluntarily to buyer for price. Section 54 of the Act 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.

#### **Outstanding dues of owner**

*M/S M.J. Steel Sales v. State of Punjab*<sup>36</sup> is a case regarding Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, under section 13(9) and Security Interest Enforcement Rules (2002), Rule 9(6). There was a sale of secured assets by e-auction. Purchaser has purchased property being the highest bidder, believing property to be free from all encumbrances and charges.

Bank issuing sale certificate stating that scheduled property free from all encumbrances and outstand free from all encumbrance regarding outstanding excise dues. Held that there is no obligation on part of purchaser to discharge liability of outstanding dues towards previous owner.

### ***Bona-fide purchaser***

In *Jagadambai v. Suresh Kumar*<sup>37</sup> a *bona-fide* purchaser purchasing suit property from defendant. Defendant claimed ownership on ground of Will executed by parents in his favour. Court held that failure of purchaser to ascertain documents relating to parentage of defendant purchaser is not *bona fide* purchaser.

As rightly pleaded by the council for the appellant, the defendants have not marked any document in support of their defence and in such event, the courts below ought to have taken an adverse interference especially the failure of the first defendant to produce the will purported to have been executed by the deceased B.M. Murugesan in his favour. When the lower appellant court wisely enough to say that though there is a court proceedings holding the plaintiff is the legally wedded wife of B.M. Murugesan, the failure to produce legal heirship certificate from Tashildar or succession certificate from the court will not disentitle her to right to make a claim over the suit property, instead, the courts below ought to have taken an adverse inference against the defendants for not producing any documents.<sup>38</sup>

### **Transfers of immovable property only by registration**

*The Greater Bombay Cooperative v. Nagaraj Ganeshmal Jain*,<sup>39</sup> the Supreme Court categorically ruled that immovable property could be transferred only by a registered document. There can be no transfer of any right, title or interest in any immovable property except by way of a registered document. The Court was reiterating the rule of law as was held in *Suraj Lamp & Industries (P) Ltd. v. State of Haryana*,<sup>40</sup> that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/will transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognised as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in municipal or revenue records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be

37 AIR 2017 Mad 224.

38 *Id.* at para 20.

39 2017 (7) SCJ 4.

40 (2012) 1 SCC 656.

validly transferred only under a registered assignment of lease. It is time that an end is put to the pernicious practice of SA/GPA/will transactions known as GPA sales.

The apex court clearly held that an agreement to sell which is not a registered deed of conveyance would not meet the requirements of section 54 and 55 of the Transfer of Property Act. With respect to section 53A of the Transfer of Property Act, it is well settled that the same can only be used as a defence in proceedings initiated by the transferor or by any person claiming under him.

#### **Agreement to Sell and Sale**

The Supreme Court in *Balwant Vithal Kadam v. Sunil Baburaoi Kadam*,<sup>41</sup> the respondent filed a suit being Civil Suit in the Court of 2nd Joint Civil Judge, Satara against the appellants for specific performance of the two agreements, dated 11.10.1982(Ex.48) and 11.04.1983(Ex.68) to purchase 1/12<sup>th</sup> share of the appellants in the land which belonged to them situated at Eastern portion of Gate. No.594/1 admeasuring 2 hectares 18 Acre situated at Malegaon Taluka and District Satara. The sale consideration was fixed at Rs.10,000/-. The respondent had paid Rs.3,000/- by way of earnest money to the appellants. The sale deed was to be executed within 6 months. Since the dispute arose between the parties and no sale deed was executed, the respondent filed a suit to seek specific performance of the said agreement against the appellants in relation to the suit land. The trial court dismissed the suit. The respondent (plaintiff) filed first appeal. The Court allowed the appeal, set aside the judgment/decree of the trial court. Then, the appellants (defendants) filed second appeal in the High Court which was dismissed. Hence, the appeal to the Supreme Court.

The Supreme Court was dealing with the plea relating to validity and enforceability of the agreement. The Court while concurring with the opinion of the High Court held that the agreement in question was not hit by section 48 of the Maharashtra Co-operative Society Act inasmuch as the agreement to sell in itself does not create any interest in the land nor does it amount to sale under section 54 of the TP Act. It only enables the intending buyer to claim specific performance of such agreement on proving its terms. In other words, there lies a distinction between an agreement to sell, and sale. The latter creates an interest in the land once accomplished as defined under section 54 of the TP Act. It was also rightly held on facts to which we concur that since the dues of the Land Development Bank were repaid, the question of applicability of section 48 did not arise.

#### **Sale deed**

In *Vasanthi v. Venugopal (D) Thr LRs*.<sup>42</sup> a suit was filed for declaration of title and performance where defendant in occupation of suit premises as *bona-fide* purchaser

41 Decided on 5 December, 2017, available at: <https://indiankanoon.org/doc/80591610/>.

42 AIR 2017 SC 1569.

without notice of sale agreement with plaintiff. Plaintiff had no notice of sale or fact that defendant was in occupation of suit property by way of part performance of contract and defendant was not showing to ready and willing to perform his part of contract nor readiness and willingness was pleaded in written statement. Held sale deed in favour of plaintiff valid and subsisting and defendants not entitled to benefit of protection.

Apropos, section 16 of the Act, 1963, specific performance of a contract cannot be enforced in favour of a person who *inter alia*, fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him unless prevented or waived by the other party thereto. As mentioned hereinabove, though there is an averment in the written statement that before the death of the predecessor in interest of the vendors of appellant/plaintiff, the original defendant had requested him to execute the sale deed and after his demise, he made similar demands with the, evidence is genuine to refutably establish the readiness and willingness of his, during his lifetime and after his death, of the respondents, to perform his/their part of the contract. It is also not the case of either the original defendant or the present respondents that his/their performance of the contract had been either prevented or waived by either the vendors of the appellant/plaintiff or their predecessor in interest at any point of time. Court observed that sale deed executed in favour of the appellant/plaintiff and proved in evidence has been annulled as on date and thus valid and subsisting.<sup>43</sup>

In *Champa Devi v. Sudama Dubey (Dead)*<sup>44</sup> case, there was a cancellation of sale deed validity in respect of land in question executed in favour of defendant. Loan availed by plaintiff not finding any place in sale deed. Finding that defendant got signature of plaintiffs on sale deed in grab of getting grants disbursed to patients suffering from disease of leprosy. Held that it is just and proper order decreeing suit for cancellation sale deed proper.

In *Jagannath Mallik v. Surendra Gartia*<sup>45</sup> case there was suit for specific performance for purchasers allegedly ready and willing to perform their part of contract. However, not sending written notice calling upon seller to execute sale deed. Purchaser not entitled to relief of specific performance.

This is suit for specific performance of contract. The assertions of the plaintiff are that he is ready and willing to perform his part contract. The plaintiff has to plead and approve the readiness and willingness before he succeeded. This is a condition precedent. Admittedly, no notice also with a draft sale deed was sent before institution of the suit on this ground. Held, the suit will fail.

In *Baruna Giri v. Rajakishoreo Giri*<sup>46</sup> the Division bench of Orissa high court held that no doubt the entire consideration has been paid, but the next step in the

43 *Id.* at para 30.

44 AIR 2017 SC 3433.

45 AIR 2917 Ori 128.

46 AIR 1983 Ori 107.



performance for the contract was the execution of sale deed. It was the duty of the defendants to propose a proper draft of the sale deed and submit it to the plaintiff as contemplated under section 55 (1) (d) of the TP Act. Under the provision of section 29 of Stamp Act the expenses for the sale deed were to be borne by the purchaser. Until the defendants paid the money for the stamp duty the sale deed could not be executed. By virtue of the combined effect of these sections, it was the duty of the defendants to propose a draft of the sale deed and to express their readiness and willingness to pay the money and to call upon the plaintiffs to execute the sale deed.

#### **No witnesses needed for sale deed**

A M Sapre J., in *Bayanabai Kaware v. Rajendra S/O Baburao Dhote*,<sup>47</sup> was dealing with issues pertaining to section 123 of the Transfer of Property Act, 1882; read with section 68 of the Evidence Act, 1872. The suit land originally belonged to Subhash Nagar Gruha Nirman Sahakari Sanstha Limited, Nagpur. The respondent purchased the suit land from the Society vide registered sale deed dated 29.12.1981 and was, accordingly, placed in possession of the suit land by the Society. In March 1985, it was noticed by the respondent that the appellant had encroached upon the suit land owned by him and erected a kacha hut on one portion of the suit land without any authority. This led the respondent to serve legal notice dated 22.04.1985 on the appellant asking her to remove the hut. Since the appellant did not remove the hut, the respondent filed a suit in the court. The trial court dismissed the respondent's suit. The respondent filed First Appeal before the 3rd Additional District Judge which was dismissed. The respondent (plaintiff) filed Second Appeal under section 100 of the Code of Civil Procedure Code, 1908 in the High Court (Nagpur Bench). The High Court allowed the Second Appeal and while setting aside of the judgments/decrees of the two courts below decreed the appellant's suit. The High Court held that the respondent has proved the sale deed as required in law and, therefore, he was entitled to claim decree for possession on the basis of the sale deed as an owner against the appellant. Felt aggrieved, the defendant filed the present appeal by way of special leave against the judgment of the High Court before the Supreme Court.

The Supreme Court agreed with the reasoning of the High Court. The Court opined that the respondent was able to prove the sale deed and was, therefore, rightly held entitled to claim decree for possession of the suit land on the strength of the sale deed dated. It was for the reasons that, firstly, the execution of the sale deed does not need any attesting witness like the gift deed, which requires at least two attesting witnesses at the time of its execution as per section 123 of the Transfer of Property Act, 1882; and Secondly, section 68 of the Evidence Act, 1872, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by section 54 of the Transfer of Property Act.

<sup>47</sup> A M Sapre J., in *Bayanabai Kaware v. Rajendra S/O Baburao Dhote*, decided on 23 November, 2017, available at: <https://indiankanoon.org/doc/185025402/>.

The Supreme Court found that the appellant (defendant) in this case did not dispute the respondent's vendor's (Housing Society) title. On the other hand, she, in clear terms, admitted their title in her written statement. It was also not in dispute that the respondent entered in witness box and proved its execution and further did not raise any objection when the sale deed was being exhibited in evidence and indeed, rightly for want of any legal basis. In the light of these admitted facts, the apex court was of the view that the sale deed dated December 29, 1981 was duly proved by the respondent and was, therefore, rightly relied on by the high court for passing a decree of possession against the appellant. It was opined that it was a clear case where the respondent had a better title of the suit land as against the appellant, who had no title to the suit land. All that the appellant had was a plea of adverse possession which was not held proved. Thus, the apex court had clarified that sale deed does not need any attesting witness like that of the gift deed.

### **Mortgages**

Section 58 (a) gives the definition of mortgage. Many have accepted that mortgage as understood in this country cannot be defined better than by the definition adopted by the legislature in section 58 (a) of the TP Act. 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 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.

### **Equitable Mortgage**

*T.S. Arumugan v. K. Madhusudhan Nair*<sup>48</sup> is a case pertaining to creation of equitable mortgage presumptions to for creation of valid mortgage, deposit of title deeds must be with intent of creating such mortgage. During subsistence of debt actions of debtor in handing over title deeds to creditor raising initial presumption of creating security debtor admitting execution of memorandum acknowledging deposit of title deeds as security for debts due presumption as to creation of equitable mortgage rightly can be raised by Court.

*Chabu Punja Gaikwad v. Vishnu Nana Chavan*<sup>49</sup> is a case where the court was asked to decide a particular sale an absolute sale or mortgage by conditional sale document executed by mortgagor as security for loan. Suit land not transferred absolutely or finally mortgagor having right to re-convey suit land at his own cost on

48 AIR 2017 Ker 237.

49 AIR 2017 Bom 232.

return of loan amount of Rs. 11500/- within a period of 10 years mortgagee entitled to enjoy property by taking crop on suit land for 10 years deed also stipulating sale to be absolute on failure of mortgagor to repay loan on failure of mortgagor to repay loan amount 10 years sale is mortgage by conditional sale and not absolute sale.

Adverse possession mortgage by conditional sale of suit property. Testimony of mortgagee as to mortgagor agreeing to pay additional amount in case of increase in land cost in addition to loan amount for re-conveyance of suit property on expiry of loan period. Mortgagee insisting on payment of additional cost for re-conveyancing of land to mortgagor negates plea of mortgagee as to be in adverse possession of suit property establishing continue jural relation between parties. Title of mortgagee not adverse to mortgagor.

This case is similar to a decision of Travancore high court in the case of *Ananthan Potti v. Krishna Pillai*.<sup>50</sup> In this case, there were conscious act on the part of mortgagor in a usufructuary mortgage of i) paying the mortgage amount, ii) getting possession of part of the mortgaged property, iii) obtaining all the deeds back from the mortgagee and iv) executing a registered receipt. The Court held that it was idle to contend in the face of all these facts, that the parties had any intention to continue the jural relationship of mortgagor and mortgagee after mortgaged property remained in the hands of the mortgagee, he could not be taken to have held it under the old relationship and his possession of that portion must be held to be adverse to the mortgagor and a suit filed after 12 years must be treated as barred by limitation. These facts are clearly distinguishable from the facts of ours. In our case, there is the defendants own evidence that he disputed the plaintiff's interpretation of the condition of the mortgage and retained the mortgaged property (presumably as a mortgagee) unless the condition was fulfilled accordingly to his interpretation. That shows continuation of the jural relationship of mortgagor and mortgagee and not an independent assertion of title adverse to the mortgagor.

#### **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

50 AIR 1957 Ker 145.

The conditions to convey and the transfer must be in the same document after the amendment in 1921. 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 *Srinivasaih v. H.R. Chennabasappa (since dead) by his LRs.*<sup>51</sup> the Supreme Court considered that transaction was mortgage by conditional sale or sale out and plaintiff to secure repayment of loan amount executed document and placed defendant in possession of suit property. Document and placed defendant in possession of suit property, the document styles as deed of conditional sale itself containing condition of repurchase on offering sale money without interest. Held that the document in question is a mortgage deed by conditional sale.

Court also held that application of Limitation Act suit for redemption of mortgage deed executed by way of security for repayment of loan and defendant placed in possession of suit property for period of 5 years, suit for redemption of mortgage filed within 30 days from date of expiry of period five years not barred by limitation.

In *Vithal Thukaram Kadam v. Vamanrao Sawalaram Bhosale*<sup>52</sup> the court observed that conditional sale or sale with option to repurchase determination plaintiff borrowing money from defendant and upon failure to pay amount plaintiff selling land for Rs. 3500/- as against borrowed amount of Rs.700/- Agreement for sale containing clause for re-conveyance defendant demanding Rs.3500/- with interest for re-conveyance reflecting relationship of creditor and debtor defendants/buyer aware of limited nature of right agreeing to sale with obligation return land if amount taken by plaintiff repaid agreement in question be conditional sale and not sale with option to repurchase.

*Suraj Narain Kapoor v. Pradeep Kumar*<sup>53</sup> is a case where the court again was asked to consider a particular transaction is mortgage with conditional sale or sale with option to repurchase determination sale deed executed by seller for sale of immovable property. Terms of sale deed indicting right of redemption if amount returned within five years. Sale deed not disclosing any creation of mortgage or debtor-creditor relationship between parties. Held document executed is sale deed with option to repurchase and not mortgage by conditional sale. In *Tamboli Ramanlal Motilal (Dead) by Lrs. v. Ghanchi Chimanlal Skesshavla (Dead) by Lrs.*,<sup>54</sup> the question was similar with regard to the nature of the document, in absence of any intention expressed with regard to creation of a debtor and creditor relationship. Holding that the document was not a mortgage by conditional sale but sale with an option to repurchase.

In the facts and circumstances of the case, and for reasons discussed, we find no reason to interfere with the order impugned holding that the document in question was a sale deed with an option to repurchase and not a mortgage conditional sale.

51 AIR 2017 SC 2141.

52 AIR 2017 SC 3853.

53 AIR 2017 SC 5046.

54 AIR 1992 SC 1236.

In *Bibi Fatima v. M. Ahamed Hussain*,<sup>55</sup> the Supreme Court observed that the impugned document was executed on 02.07.1964 which, according to the presumption postulated in section 58 (c) of the Transfer of Property Act, 1882 should be construed as a mortgage. Undisputedly, Ummar Saheb continued to be in possession from 02.07.1964 till the date of his death i.e. 17.07.1978. Evidence was adduced by the Plaintiff to show that notices from the Electricity Department, etc. were received in the name of Ummar Saheb. The mutation was also not affected by the first Defendant in his name till 17.07.1978. In light of the above, the Plaintiff's case that his father raised a loan of Rs. 5900/ to discharge his debts for which purpose he executed the mortgage dated 02.07.1964, merits acceptance. The Plaintiff is also right in submitting that there is no condition in the deed that the sale will become absolute after the expiry of five years' period. Ummar Saheb's continuance in possession until the time of his death, payment of statutory dues and absence of mutation by the first Defendant of the property during Ummar Saheb's lifetime would all point to the document being a mortgage by conditional sale. One of the conditions of sale was that the transferor would be entitled for the loss incurred, not exceeding Rs. 5,900/-, in the event of the first Defendant not re-transferring the property after the re-payment by the transferor. It is evident from this condition that Rs. 5,900/- is a debt and a relationship of debtor and creditor existed between the parties. In view of the above, the Court held that the document dated 02.07.1964 is a mortgage by conditional sale.

In *Vithal Tukaram Kadam v. Vamanrao Sawalaram Bhosale*<sup>56</sup> the appellants' suit for redemption of mortgage, decreed by two courts, has been reversed in second appeal by the High Court. The question of law for consideration was whether the deed was a mortgage by conditional sale, or a sale with an option to repurchase. The Supreme Court broadly summarized the essentials of an agreement, to qualify as a mortgage by conditional sale. An ostensible sale with transfer of possession and ownership, but containing a clause for re-conveyance in accordance with section 58 (c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agreement for re-conveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The valuation of the property, and the transaction value, along with the duration of time for re-conveyance, are important considerations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors, along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner.

The agreement, according to the apex court though styled as a sale deed, for a consideration of Rs.700/- is but an ostensible sale, containing a clause for re-conveyance. The Court quoted:

55 (2017) 11 SCC 832.

56 Decided on 9 August, 2017, available at: <https://indiankanoon.org/doc/184829028>.

The Supreme Court held that the significance of the words “repay”, “return” and “subject to this condition” cannot be overlooked. The Court opined that the expressions are not commensurate with a deed of absolute sale. Thus, the language used, conveys the distinct impression that the plaintiff did not intend to relinquish all rights, title and claims to his lands. It was found that the defendant was aware of the limited nature of right conveyed and had agreed to a conditional sale along with an obligation to return the lands if the amount was repaid.

The plaintiff initially filed Civil Suit for specific performance to transfer the lands back to him. It was withdrawn with liberty to file a fresh suit for redemption. The filing of the fresh suit in 1986, beyond the period of ten years is hardly relevant. The Court held that the limitation for the right to redeem, under section 60 of the Act as thirty years.

The apex court took cognizance of the fact that the parties were admittedly well known to each other since before. The plaintiff had been borrowing money from the defendant even earlier from time to time according to need, and even at the time of execution of the agreement he was in need of money. The value of the land was Rs. 3500/- far in excess of the amount of Rs.700/- mentioned in the agreement. The defendant in cross-examination did not deny the recital in Exhibit 66, dated 11.6.1975 in reply to notice, that he had demanded the sum of Rs.3500/-with interest for re-conveyance. The relationship of debtor and creditor cannot be faulted with. The respondent did not take any steps for mutation for three long years after the execution of the deed. The plaintiff had specifically objected to mutation in the name of the defendant. The period for re-conveyance provided in the agreement itself was inordinately long for ten years. The clause for re-conveyance was in requirement with section 58 (c) of the Act. The apex court held that the High Court failed to consider the aforesaid factors in totality and in a holistic manner, while arriving at the finding that there was no debtor and creditor relationship between the parties, and that the agreement was a sale deed with an option to repurchase. The findings were held clearly unsustainable.

The Supreme Court finally ruled that the agreement was a mortgage by conditional sale and not a sale with an option to repurchase. Consequently, the order of the High Court was held to be unsustainable and was set aside.

#### **Mortgage by Deposit of Title Deed**

*South Indian Bank Ltd., Thiruvananthapuram v. K.P. Ramachandran*<sup>57</sup> is a case pertaining to Mortgage by Deposit of Title Deeds wherein memorandum acknowledging creation of mortgage. The question as to registration of memorandum

creating rights and liabilities requires registration and not when prepared merely to acknowledge title deed.

Memorandum or letter merely acknowledging deposit of title deed, by itself, does not create mortgage. If any terms and conditions relating to mortgage are incorporated therein, then position is different. If document merely refers to handing over of title deeds or acknowledges that title deeds are deposited with creditor, without inclusion of any further term or condition, it is not a document that required registration. Mortgage created by here handing over of title deeds as security. No registered document is necessary for said purpose. However, if memorandum evidencing terms and condition with regard to deposit is executed, it shall require registration in terms of section 17 (1)(c) of the Act of 1908. It is not time of execution of memorandum but whether memorandum incorporates any term or condition is benchmark. If memorandum is prepared merely to conform deposit of title deeds, registration is not required irrespective of point of time at which it is executed.<sup>58</sup>

Mortgage by deposit of title deeds and defendants availing credit facility from petitioner bank by equitably mortgaging property. Bank has filed suit for recovery of amount and defendants denied liability on the ground that signatures on loan documents different from actual signatures. Possibility of signing of document in different manner by defendants and defendants not paying requisite fee nor making documents available to expert for verification of signatures. Held that defendants are liable to pay loan amount with interest.

The Court also opined that defendants denying liability on ground that a letter acknowledging mortgage was not registered and letter acknowledging creation of mortgage not imposing any rights and liabilities and does not require registration. Held that defendants denying liability on ground of non-registration of letter unsustainable.

### **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' will continue.

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'.

58 *Id.* at para 9.

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 contained 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.

#### **Right of Redemption and Auction Sale**

In *Allokam Peddabbayya v. Allahabad Bank*,<sup>59</sup> the Supreme Court speaking through Justice Naveen Sinha held that Mortgagor's right of redemption under section 60 can stand extinguished under proviso thereto by act of parties or decree of court. Right of purchaser of right of redemption under section 91 would also be subject to same limitation under proviso to section 60 and he cannot claim to have better right than his predecessor-in-interest. The Appellants' suit for redemption of mortgage was decreed by Principal Junior Civil Judge. The decree was reversed appeal preferred by auction purchaser, Defendant No. 2. The second appeal by the appellants was also dismissed. The defendant Nos. 3 and 4 created an equitable mortgage of their property for a loan of Rs. 10,000/- in favour of the Allahabad Bank, Defendant No. 1. The Bank instituted a suit for recovery of loan by sale of mortgaged property. Property was sold on auction sold on 05<sup>th</sup> September, 1993. The defendant No. 2 was the highest bidder at Rs. 50,000/-. The sale certificate was issued and he was put in possession on 2<sup>nd</sup> July, 1997.

The plaintiffs claim that they purchased the property by different sale deeds in year 1985. Asserting possession, they filed a suit in 1994, seeking permanent injunction restraining the defendant Nos. 2 to 4 only from interfering with their peaceful possession and enjoyment of the property. The suit and the appeal against same were dismissed. The execution appeal preferred by the plaintiffs was also dismissed. The plaintiffs thereafter filed suit in 1999 for redemption of mortgage under Order XXXIV Rule 1 of Code of Civil Procedure, impleading the Bank as Defendant. The suit was decreed but has been reversed in appeal by auction purchaser, the defendant No. 2. It was held that consequent to auction sale and issuance of sale certificate along with the possession delivered, the defendant Nos. 3 and 4 were no more the owners of property. Therefore, there could be no debt to be redeemed on the date of filing of the Suit. Thus, the plaintiffs were thus, not purchasers of equity of redemption. The High Court was moved in Second Appeal. The High Court held that, right to redemption in the plaintiffs, by stepping into shoes of Mortgagor under section 59A of Transfer of Property Act, 1882 stood extinguished in view of the final decree for foreclosure in O.S. No. 68 of 1987 filed by the Bank, Defendant No. 1, and consequent sale certificate issued in favour of the auction purchaser, the Defendant No. 2. Hence, the appeal.

59 (2017) 8 SCC 272.



It was held that the mortgagor's right of redemption under section 60 could be extinguished under the proviso thereto by the act of parties or decree of court. The right of the purchaser of right of redemption under section 91 would also be subject to the limitation under proviso to section 60 and he cannot claim to have better right than his predecessor-in-interest. The apex court found no reason to interfere with order of the High Court and dismissed the appeal.

#### **Definition of Lease explained**

In *Nasiruddin v. The State of Uttar Pradesh*,<sup>60</sup> Abhay Manohar Sapre, J., was dealing with the definition of lease and instrument. It was held the expression "Lease" defined in section 2(16) clause (c) of the Indian Stamp Act shows that it also includes therein "any instrument by which tolls of any description are let". The apex court opined that the expression "Lease" under the Stamp Act has a wider meaning as compared to its original meaning contained in section 105 of the Transfer of Property Act. The Court stated that "Lease" under section 2(16) of the Stamp Act includes therein four specified category of documents set out in clauses (a) to (d). The Supreme Court did not find any such inclusion in section 105 of the Transfer of Property Act. Therefore, the apex court was of the view that the definition of "Lease" for the purpose of Stamp Act was extensive in nature. It was also clear from the use of the expression "and includes also" in section 2 (16) of the Stamp Act.

Reading the contract in question the apex court held that it would show that it was meant to collect tolls (fees) called "Tehbazari" in local parlance from squatters, vendors, kiosks etc. and was for collecting parking fees. Such contract, according to the Court is regarded as an instrument by which tolls of any description are let. The Court clarified that by awarding such contract to the appellants, the Corporation had let their right to the appellants to collect the fees from a class of persons and for carrying on particular activity in the city. So by fiction, "any instrument by which tolls of any description are let" is considered as "Lease" for the purpose of payment of stamp duty under the Stamp Act. The Supreme Court made it clear that the contract in question also satisfied the definition of the expression "Instrument" as defined in section 2(14) of the Stamp Act because it created a right and liability and lastly, it also satisfied the definition of expression "executed" and "execution" as defined in section 2 (12) of the Stamp Act because it contained the signature of contracting parties. Thus, it was ruled that the contract in question is a "Lease" as defined in section 2(16)(c) of the Stamp Act and is accordingly chargeable to payment of stamp duty as per the rates prescribed in article 35 of Schedule I of the Stamp Act as "Lease".

#### **Protection of tenant's rights**

In *State Bank of India Mumbai v. Rajesh Khetan*<sup>61</sup> the Patna high court was asked to mention that Securitization and Reconstruction of Financial Assets and Enforcement

60 AIR 2018 SC 127.

61 AIR 2017 Pat 141.

of Security Interest Act, 2002 and enforcement of security interest protected tenant bank taking possession or mortgaged collateral flats of borrower. On publication of advertisement for auction of flats, applicant filing writ for protection as tenant rent agreement unregistered, created before agreement between borrower and Bank in disclosure of tenancy by borrower at the time of availing loan no proof of delivery of possession or payment of rent creating doubt about genuineness of rent agreement. Held that applicant cannot claim to be protected tenant.

*Harkesh Chand v. Krishna Gopal Mehta*,<sup>62</sup> is a case pertaining to tenancy rights. The tenancy was in respect to a small shop situated in the village of Daishwala, Doiwala Town, of Dehradun district in Uttarakhand. On the 19th of September, 1972, the landlord issued a notice terminating the tenancy of the shop under section 106 of the Transfer of Property Act, 1882, and demanded the possession of the shop. The landlord filed the present suit for eviction on the 1st of October 1972. The trial court dismissed Small Cause Case. The Additional District Judge, dismissed the revision petition filed by the landlord. The landlord approached the High Court. The High Court of Uttarakhand upheld the landlord's plea and hence the appeal. The Supreme Court held that the notification under the 1947 Act continued in spite of its repeal and the enactment of the 1972 Act. It cannot be said that in the hiatus between the repeal of the 1947 Act and the issuance of a notification applying the 1972 Act to the Doiwala area, the Legislature intended that the tenants had no protection from eviction and there was an unrestricted right to evict them. It was observed that a plain reading of the provision suggests that any statutory instrument (which a notification is) issued under the repealed enactment continues in force as if it were issued under the re-enacted provisions to the extent that it is not inconsistent with the re-enacted provisions. Such continuance exists till the statutory instrument is superseded by a statutory instrument issued under the re-enacted provisions. The Court referring to its precedents on the interpretation of the General Clauses Act, held that the notice issued by the respondent-landlord terminating the tenancy under section 106 of the Transfer of Property Act was not valid. Thus, obvious effect of the decision was that the protection available to the tenants by requiring the permission of the District Magistrate for eviction has been extended to the tenant.

#### **Eviction of Lease by Efflux of Time**

In *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*<sup>63</sup> is a suit for eviction and recovery of rent. Lease deed entered into between parties containing arbitration clause for resolving disputes arising out of lease deed tenants seeking resolution of disputes by referring them to arbitration lease period fixed as per lease deed, coming to end by efflux of time dispute relating to eviction and recovery of rent, being subject matter of civil suit cannot be referred to arbitrator.

62 (2017) 4 SCC 537.

63 AIR 2017 SC 5137.

The Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises, is a special Act. Though it contains a provision (section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does not mean that the Arbitration Act, ipso fact, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of property Act and the civil suit would be triable by the Civil Court and not by the arbitrator. In other words, though by virtue of section 3 of the Act, the provisions of the Act are not applicable to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable to such premises. In this view of the matter, it cannot be contended that the provisions of the Arbitration Act would therefore apply to such premises.<sup>64</sup>

*Bata India Ltd v. Sharavan Kumar*<sup>65</sup> is a case pertaining to determination of lease and forfeiture for non-payment of rent enhanced and rent to be paid by lessee within six months from date of its accrual and Lessee paying rent after lapse of six month termination not illegal. He claims waiver of forfeiture and Acceptance of rent and mere acceptance of cheque not extending any benefit to lessee, where rent accepted after institution of suit for ejection on ground of forfeiture.

Determination of lease and forfeiture for non-payment of rent plea of lessee of non-joinder of necessary party i.e., other two owners and acceptance of rent by other owner acts as impleadment of two co-landlords as pro-forma defendants by lessor landlord while accepting rent has not presented his version before the court and acceptance of rent by two co-landlords not making lessor non-suited.

The Court observed:

I think this precedent is not applicable in the present case because rest of the two co-landlords were impleaded as the pro-forma defendants by the plaintiff Mr. Sharvan Kumar Jain. Sharvan Kumar Jain who is said to be continuously receiving rent has not presented his version before the court below. So, I feel that mere acceptance of the rent by Sharvan Kumar Jain will not make the plaintiff non-suited.

Also held that, it is abundantly clear that one of the terms of such lease deed was that the lessor will have right to terminate such a lease, if the lessee fails to pay the rent within six months from the date of its accrual. The enhanced rate of rent accrued WEF 1-12-2013 so, the six months expired on 31-5-2013, but difference of such enhanced rate of rent was paid enclosing the cheques with the letter dated 9-7-2014. Therefore, prior to sending the letter or paying the enhanced rent, six months had already expired. So, that the termination of the tenancy did not suffer from any infirmity or illegality.

64 *Supra* para 26.

**Renewal of Lease**

In *Chandra Devi v. Union of India*<sup>66</sup> the Supreme Court held that renewal of lease allotment of shops on lease to ex-servicemen and dependents of deceased, defense personnel procedure/policy limiting maximum period of lease to 5 years, not arbitrary and no vested right of lessees to continue in possession even after 5 years leases holders not entitled to renewal of lease.

In this case, the learned single Judge was upheld by the Division Bench and also by this Court though in a petition filed by some other petitioner. Ongoing through the SOPs of 2001 and 2007, we do not find that the appellant had any vested right to continue in possession even after 5 years. Even, as per the SOP of 2001, the Station commander was to renew the lease from year to years and there was no inherent right to continue as a lessee in perpetuity. These leases have been determined in a non-discriminatory and non-arbitrary manner. We, therefore, find no merit in this appeal and dismissed accordingly.<sup>67</sup>

**No right to claim extension of lease**

In *Kundla Press & Oil Mill Pvt. Ltd v. State of Gujarat*,<sup>68</sup> land measuring 28,176 square meters in Savarkundla was given on lease to the appellant Company in the year 1922 for a period of 30 years for running an oil mill. The lease expired in the year 1952. Thereafter, fresh lease deed was executed in favour of the appellant by the Administrator of the Savarkundla Municipality on 18.09.1956. In this lease deed, it was mentioned that on this leased area, there are factories, residential units, warehouse (godown), press factory, expeller and office buildings etc. which were constructed by the appellant. The lease deed was granted for a further period of 30 years.

The Supreme Court clarified that the Municipality had no authority to grant a lease for a period exceeding 10 years without prior permission of the State Government. Moreover, the finding of the High Court that the appellant has been earning huge profits by way of rent was not denied. In the present case, the State Government had only granted permission to lease the land till the year 2012. It has also been stated that the land was required by the Municipality for educational purposes. Therefore, the appellant has no inherent right to claim that fresh lease be granted in its favour.

The apex court found that the original lease was granted for running an oil mill and as on date admittedly there is no oil mill situated on the land. The leased property is a public property leased out at a very meagre rent. It cannot be utilised for a purpose other than the purpose for which it was leased out. True it is that the appellant may have been permitted to raise construction on the leased land but it is obvious that the construction to be raised should have connection with the original business of the

65 AIR 2017 Utta 186.

66 AIR 2017 SC 4445.

67 *Id.* at para 13.

68 Deepak Gupta J., in *Kundla Press and Oil Mill Pvt. Ltd v. State of Gujarat*, on 28 March, 2017, available at: <https://indiankanoon.org/doc/65627779/>.

company i.e. running an oil mill. The appellant has raised a huge commercial complex earning cores of rupees but is paying only a few hundred rupees to the municipality. It was held the appellant was not entitled to claim that lease deed must be renewed in his favour. Further, the High Court of Gujarat was perfectly justified in holding that the appellant cannot claim that he was entitled to renewal of the lease deed as a matter of right.

#### **Sub-letting of tenancy**

In *Ram Murti Devi v. Pushpa Devi* decided on 11 July, 2017<sup>69</sup> the Supreme Court referring to the relevant precedents<sup>70</sup> culled out the following statement of law:

- (i) In a suit by the landlord for eviction of the tenant on the ground of sub-letting the landlord has to prove by leading evidence that
  - (a) A third party was found to be in exclusive possession of the whole or part of rented property.
  - (b) Parting of possession thereof was for monetary consideration.
- (ii) The onus to prove sub-letting is on the landlord and if he has established parting of possession in favour of a third party either wholly or partly, the onus would shift to the tenant to explain.
- (iii) In the event, possession of the tenant wholly or partly is proved and the particulars and the instances of the transactions are found acceptable, in particular facts and circumstances of the case, it is not impermissible for the Court to draw an inference that the transaction was entered with monetary consideration. It may not be possible always to give direct evidence of monetary consideration since such transaction of sub-letting are made between tenant and the sub-tenant behind the back of the landlord.

The Supreme Court had reiterated the view taken in *Associated Hotels of India Ltd. Delhi v. S.B. Sardar Ranjit Singh*. The apex court so noted the settled law as under: The onus of proving sub-letting is on the landlord. If the landlord prima facie shows that the occupant, who was in exclusive possession of the premises, let out for valuable consideration, it would then be for the tenant to rebut the evidence... Thus, in the case of sub-letting, the onus lying on the landlord would stand discharged by adducing prima facie proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of section 105 of the Transfer of Property Act, was holding right to enjoy such property. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.

69 Decided on 11 July, 2017, available at: <https://indiankanoon.org/doc/52329970/>.

70 *Mahendra Saree Emporium(II) v. G. V. Srinivasa Murthy*, (2005) 1 SCC 481, *Associated Hotels of India Ltd. Delhi v. S.B. Sardar Ranjit Singh*, AIR 1968 SC 293.

### Redemption of Anomalous Mortgage

*P. Pushaparajan v. Parambat Moidu*<sup>71</sup> is a case where a mortgage or lease intention of parties for suit for redemption of mortgage and plaintiff handing over suit shop to defendant on the transaction entered into through registered document containing specific recital that in event of failure of mortgagor to redeem mortgage by paying mortgage money, mortgagee can sue mortgagor and in such case, he can realize amount from suit shop and held that document thus is deed of mortgage.

It has been clearly mentioned that through a specific recital that in the event of failure of the mortgagor to redeem the mortgage by paying the mortgage money, the mortgagee can sue the mortgagor and in such case, he can realize the amount from the security, i.e., the shop room. When such a security is there and the security has been given in respect of amount whether the loan amount meager or not, it assumes the characteristic of a mortgage. As rightly found by the lower appellate court, the transaction in question cannot be treated as a usufructuary mortgage, when such a power has been given to the mortgagee. Necessarily, the transaction in question therefore, assumes the status of an anomalous mortgage.<sup>72</sup>

### Application of the TP Act vis a vis Arbitration

Abhay Manohar Sapre, J., in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*,<sup>73</sup> considered, whether the Courts were justified in rejecting the application filed by the appellant herein under section 8 of the Arbitration and Conciliation Act, 1996 in a pending civil suit filed by the respondent seeking appellant's eviction from the premises in question and for claiming some ancillary reliefs therein. After referring to several cases<sup>74</sup> the Court gave the following dictum:

The Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises, is a special Act. Though it contains a provision (section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does not mean that the Arbitration Act, *ipso facto*, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the Civil Court and not by the arbitrator. In other words, though by virtue of section 3 of the Act, the provisions of the Act are not applicable to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable to such premises. In this view of the matter, it cannot be contended that the provisions of the Arbitration Act would, therefore, apply to such premises.

71 AIR 2017 Ker 206.

72 *Id.* at para 18.

73 (2017) 10 SCC 706.

74 *Deccan Merchants Cooperative Bank Ltd. v. Dalichand Jugraj Jain*, AIR 1969 SC 1320, *Natraj Studios (P) Ltd. v. Navrang Studios*, 1981(1) SCC 523, *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532.

Thus, by virtue of section 3 of the Rent Control Act imposing a prohibition dealing with the eviction etc., the issue becomes non-arbitral and the Arbitrator cannot try the matter. The rights of the parties and the demised premises would be governed by the Transfer of Property Act tried by the Civil Court alone.

#### **Eviction Procedure**

The Supreme Court speaking through Justice S. Abdul Nazeer in *Pawan Kumar Gupta v. B.R. Gupta*<sup>75</sup> set out relevant provisions relating to the procedure for eviction under the Rent Control Act read with section 106 of the Transfer of Property Act, 1882. The Supreme Court observed:

Section 14(1) provides that no tenant can be evicted except an application made to the Controller for an order for the recovery of possession on one or more grounds specified in the section. Section 14(1)(a) provides for eviction of a tenant on the ground of default in payment of rent, if the tenant has neither paid nor tendered the whole of arrears of rent legally recoverable from him within two months of the date on which the notice of demand for arrears of rent has been served on him by the landlord in the manner provided in section 106 of the Transfer of Property Act, 1882. It is clear that if the tenant pays the arrears of rent within two months of service of notice, the landlord cannot get order for recovery of possession on the ground of default in payment of rent but if the tenant fails to pay the rent as required under section 14(1)(a), the proceedings are taken under section 15(1) of the Act. Under this provision the Controller shall, after giving the parties opportunity of being heard, make an order directing the tenant to pay the landlord or deposit with the Controller within one month of the date of the order, an amount calculated at the rate of rent at which it was last paid for the period for which the arrears of rent were legally recoverable from the tenant including the period subsequent thereto upto the end of the month previous to that in which payment or deposit is made and to continue to pay or deposit month by month by 15<sup>th</sup> of each succeeding month a sum equal to the rent at that rate.

In the instant case the tenant was found to be willful defaulter of rents. The tenant took a stand before the Rent Controller that he had paid the entire arrears of rent. The Rent Controller passed an order under section 15(1) of the Act directing him to pay or deposit the rent at the rate of Rs. 500/- per month with effect from 1.10.2004 and continue to pay the same at the aforesaid rate month by month. Admittedly, he had failed to pay the rent in terms of the Rent Controller's order. After conclusion of the trial, the Rent Controller allowed the petition under section 14(1)(a) of the Act. The Rent Controller held that the tenant failed to prove that he had tendered the rent to the landlord pursuant to the demand notice dated 19.1.2004. The Rent Controller directed the Nazir to submit a report for the purpose of consideration of entitlement of the tenant to the benefit under section 14(2) of the Act. The Nazir's report showed

that the tenant had not paid the rent regularly in compliance with the order passed under section 15(1) of the Act. There was a long delay in deposit of rents. The Supreme Court opined that condonation of delay could take place only when the defaulting tenants so plead with justifiable reasons which would show that he was prevented from compliance by circumstances beyond his control. The tenant in the instant case had not offered any explanation for the delay in deposit of rents. Therefore, apex court found no justification to interfere with the order of the High Court. The Supreme Court aptly granted the appellant three months' time from the date of judgment to vacate and deliver vacant possession of the premises to the respondent.

#### **Tenants estopped to question the title of the landlord**

In *Jaspal Kaur Cheema v. M/S. Industrial Trade Links*,<sup>76</sup> the appellants filed eviction petition against the respondents from their area under section 13 of the East Punjab Urban Rent Restriction Act, 1949 on the ground of personal necessity. The respondents opposed the eviction. They filed a petition for amending the written statement claiming that the appellants were not the real owners. The Rent Controller dismissed the application. The respondents challenged the order by a Revision Petition in the High Court. The High Court had set aside the order of the Additional Rent Controller. The appellants challenged the legality of order of the High Court in the appeal to the Supreme Court.

The Supreme Court held based on the principle of estoppels that the respondents cannot dispute the title of the land lord at a belated stage of the proceedings. In the instant case, it was not disputed by the respondents that they were put in possession of the premises as tenants thereof by the appellants. In the circumstances, it was held that they cannot dispute the title of the landlord. The said plea was not raised by them in the written statement. Therefore, they cannot be permitted to introduce the said plea by way of amendment, that too, at a belated stage. Thence, the apex court ruled that the Rent Controller has, right in rejecting their application for amendment.

#### **Tenancy-at-sufferance**

*Mamata Panigrhi alia Panigrahi v. Hemalata Dalai*<sup>77</sup> case pertaining to single tenancy termination and notice to quit single tenancy devolves on all payable takes place. Held notice terminating tenancy is mandatory. Also opined Notice of termination served on one of heirs acting on behalf of other capable of terminating tenancy.

Court observed that the expression of tenants at sufferance is merely fiction to distinguish their unlawful possession from that of trespassers. Possession of trespasser is lawful both in its inception and in its continuance, where possession of a tenant at sufferance is rightful in its inception. Distinction is drawn between tenant continuing in possession after termination of lease without consent of landlord, and tenant doing

76 (2017) 8 SCC 592.

77 AIR 2017 Ori 122.



so with landlord's consent. Former is called tenant-by-sufferance and latter class of tenants is called tenant-holding-over of tenant at will. Act of holding over in any event after expiration of term does not necessarily create tenancy of any kind; if lessee remains in possession after termination of term and for all practical purposes, he becomes tenant at sufferance.

Court also observed that Tenant-at-sufferance expiration of lease period plaintiff's heirs of original tenant permitted to continue in possession in suit land for some time and upon payment of rent default in payment of rent by plaintiffs and continuance in possession by plaintiffs deemed to be without consent of plaintiff. Held to be tenants-at-sufferance. Possession after expiry of lease is juridical and possession plaintiff in possession of suit house as tenants at sufferance and their possession to be protected by law until their eviction by due process of law.

In *Syed Sugara Zaidi v. Laeeq Ahmad (Dead) Thr. Lrs.*,<sup>78</sup> the suit property was let out by the original plaintiff/landlord (Nazar Mohammad Zaidi) to the original defendants (Abdul Qayyum and Hazi Anvaruul Haq) by way of registered rent agreement for a period of ten years at the rent of Rs.750/- per month. There was a specific term in the rent agreement which envisaged renewal of the rent agreement by execution of a separate registered agreement for a further period of five years at enhanced rent from Rs.750/- to Rs.800/- per month. After expiry of the original term of lease, landlord (Nazar Mohammad Zaidi) filed ejectment suit. Respondents-tenants contested the suit. The trial court dismissed the suit due to lack of the grounds for eviction. The High Court also dismissed the revision petition. Hence, the appeal. The question was whether after expiry of the lease period whether the respondents-tenants can continue in possession of the suit property, when the lease was not renewed. The Supreme Court held that after lapse of lease period, if a lessee continues in possession of the demised premises in absence of an assent by lessor, then he is a tenant by sufferance and exposes himself to be sued for ejectment at any time without any prior notice or demand of possession. It was held the term in the lease agreement for renewal of lease deed does not *ipso facto* extend the tenure or term of the lease. The apex court elaborated that yet another ground for eviction was construction of shops in the suit premises by the tenants and sub-letting the same in violation of terms of rent agreement. Though, there is a clause in the rent agreement enabling the tenants to put up construction, there is no clause in the lease agreement permitting the tenants to transfer his interest of tenancy to third party. The Supreme Court opined that, had the parties agreed to create or transfer of interest in the tenancy in favour of third party, they would have added a specific term in that regard in the rent agreement. Though, sub-letting of the premises for commercial purpose was agreed to by the original parties, transfer of interest in tenancy leading to creation of third party interest in the suit property could not have been done in the absence of a specific term in the rent agreement. Thus, it was held that the respondents-tenants were liable to be evicted on

78 Decided on 6 December, 2017, available at: <https://indiankanoon.org/doc/154773862/>.

the ground of violation of terms of rent agreement by transfer of interest in tenancy to respondent No. 3.

#### **Notice to quit**

In *Smt. Urmila Gupta v. Commissioner*,<sup>79</sup> there was a leased property belong to temple Execution of lease by Mohatmim or Manager permissible only if there is a legal necessity for benefit of temple. Held without authority of lease deed void *ab initio* no right over property can be claimed by person in whose favor property leased out and issuance of notice prior to order of cancellation of lease not necessary.

#### **Gift deed of Hindu Undivided Family**

In *Karsanbhai Dhyabhai Parmar v. Dhiben D/O Dahyabhai Dabhaibhai*<sup>80</sup> there was Hindu undivided family. Gift deed was executed in favour of daughter by widow of owner before partition and before ascertain her share in HUF. Held that it is not valid a Gift deed liable to be rejected on death of widow for uncertain and undisclosed share partition claim cannot be allowed on the basis of gift deed.

The court observed that, the gift deed April 28, 1972 could not have vested in the plaintiff, a right to claim partition inasmuch as the property being undivided the fit deed could not have been for an uncertain and undisclosed share of property. In fact, when the gift deed was executed the share of the plaintiff was yet to be ascertain and apportioned. This is a lacuna in the decree passed by the three courts which has come to our notice at this stage. The same, therefore, will have to be cured by an appropriate interference with the decreed passed in favour of plaintiffs which we accordingly do. The decree passed by the courts below is accordingly set aside and the appeal is allowed.<sup>81</sup>

#### **Oral Gift**

*Smt. Ayita Begum Chaudhury v. Kumar Kanti Sinha*<sup>82</sup> is a case where the validity of gift done relying upon oral gift by donor in his favour and without mention of presence of any person as witness at the time of oral gift in respect of suit property. Three essential ingredients to form valid gift presumed to be within the knowledge of donee himself and none other. Evidence on record establishing that no gift made during life time of donor and his successors failure of donee in proving his title over suit land on the basis of alleged gift title as to suit land cannot be granted in favour of donee.

79 AIR 2017 HP 183.

80 AIR 2017 SC 3857.

81 *Supra* note 5.

82 AIR 2017 Gau 131.

**Validity of gift deed**

In *Smt R Seethamma alias Seetha Lakshmi v. M. Timma Reddy*<sup>83</sup> the Court considered that validity of gift deed plea of donee that gift was made untrue and donee herself examining donor as witness and donor admitting execution of gift deed in cross examination. Held that evidence of donor found true and sufficient, gift deed valid.

## VI CONCLUSION

In the year under survey, there are many Supreme Court judgments which have been considered for the survey. Many high court judgments have also been scanned in the survey. The courts while deciding the cases have aptly interpreted and analysed various ambiguous issues relating to the property law.

