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PROPERTY LAW

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I INTRODUCTION

THE TRANSFER OF PROPERTY ACT, 1882 is akin to the land acquisition law[1] enacted during the British regime. But, the judiciary did not suggest for revisiting of the same unlike the land acquisition law. The Transfer of Property Act, 1882 (hereinafter TPA, 1882) deals with transfer of immovable property in general. The Act is not a complete code of transfer of property. The Act does not apply to all the transfers taking place in India. Its scope is limited. The Act applies to transfer by the act of parties and not by application of law. Thus, its operations are limited to transfers by act of parties only except in a few cases saved by section 2 of the Act. The TPA, 1882 is better understood not in isolation but when read with certain provisions of other enactments like Indian Contract Act, the Partition Act, General Clauses Act, Tenancy Act and the Registration Act, 1908. This year under survey, various issues of considerable significance on the property law have come up before the courts in India. The courts have scanned the Act, and other relevant laws to interpret and delineate the legal position. The apex court and the high courts in India have decided many cases in the year 2013 and they are analysed and reported in the present survey on the property law.

II GENERAL PRINCIPLES

Right to sue

Clause (e) of section 6 of TPA, 1882 containing the sixth exception which provides that a mere right to sue cannot be transferred. This means that bare right to sue cannot be transferred. Right to sue for a definite sum of money is an actionable claim and can be transferred, but right to sue for indefinite sum of money is not transferable. Right of action of damages in tort or breach of contract are bare rights to sue and therefore, cannot be transferred.

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1 The Land Acquisition Act, 1894 has been revisited replacing it with a comprehensive legislation namely, The *Right to Fair Compensation and* Transparency in *Land Acquisition, Rehabilitation* and *Resettlement Act,* 2013.

In *Sundar* v. *Ramdass,*[2] Madras High Court held that a mere running of the eye over the aforesaid provisions of law and the excerpts would unambiguously and unequivocally highlight and spotlight the fact that mere right to sue for damages concerning defamation cannot be transferred by one person in favour of another. As such, the right is a personal one attached to the person who claims to have such right to sue for damages for defamation. The court also reiterated that a mere reading of section 6 of the TPA, 1882, more specifically, clause (e) would make the point pellucidly and palpably, obviously and axiomatically clear that a mere right to sue cannot be transferred.

Coparcenary property

Earlier, only the male members of the ancestral property were eligible to transfer the property as females were not treated equally. Now, after the commencement of the Hindu Succession (Amendment) Act, 2005 and of course the recent decision of the Supreme Court, it is clear that there shall be transfers as the female by birth get interest in the ancestral property and the transfers take place essentially and at times independently, by the females. In *Rohit Chauhan* v. *Surinder Singh,*[3] it was observed that coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu Family[4] and before commencement of Hindu Succession (Amendment) Act, 2005 only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. The apex court opined that so long, on partition, an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

Sale by co-owner

Anjan Barman Choudhury v. *Ranjan Barman Choudhury*[5] is a case dealing with transfer by co-owner. The court held that in the absence of definite illustration

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2 AIR 2013 Mad 133.

3 (2013) 9 SCC 419.

4 The Hindu Undivided Family can best be defined as a family that consists of a common ancestor and all his lineal male descendants and their wives and unmarried daughters. The Hindu Undivided Family (HUF) cannot be created by acts of any party. The only exceptions are in the case of an adoption or a marriage when a stranger may become a HUF member. *Available at*: http://taxguru.in/income-tax/meaning-formation-taxation-membership-and-partition-of-huf.html. (last visited on Aug 11, 2014).

5 AIR 2013 Gau 42.

of perversity, this court is bound to hold this at the threshold. The question that has been projected by this court has been adequately replied for the respondents that the condition of sale clearly contains that the vendor was parting with his share of the land and not otherwise by the said deed of sale. This court holds that even if boundaries are given in view of this condition of sale, those are to be the insignificant part of the covenant of sale. Even the question of possession as recited in the said covenant of sale would have no value, if it is found that the property relates to the dwelling house belonging to an un- partitioned joint property for the reason that provisions of section 44 of the TP Act, 1882[6] shall govern the said transfer in supersession of anything contrary thereto.

Injunction

In *Jehal Tanti* v. *Nageshwar Singh (D) LRs.*[7]injunction was granted by a court before presentation of plaint to competent jurisdictional court and sale deed executed during its subsistence and in contravention of injunction then court held that it is unlawful and, therefore, void. In this case, Smt. Pariya Devi contested the suit on several grounds including the one that the sale deed was illegal and was not binding on her because the same had been executed in violation of the order of temporary injunction passed. The court held that a mere objection to jurisdiction does not instantly disable the court from passing any interim orders. It can yet pass appropriate orders. At the same time, it should also decide the question of jurisdiction at the earliest possible time. The interim orders so passed and made effective till the court decides that it has no jurisdiction to entertain the suit.

Doctrine of *lis pendens*

'*Lis*' means litigation or an action or a suit. '*Pendens*' means continuing or pending. *Lis pendens* means pending suit or an action. Section 52 deals with the doctrine of *lis pendens*. 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.

In *S. Malleshwarrao S/o.Venkata Subbarao* v. *Bokka Venkateshwarrao S/o. Naganna,*[8] while deciding on continuity of *lis* court explained about the explanation in the Act and said:[9]

Explanation to Section 52 of the Act and the main provision, make clear that the proceedings will continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge or such decree or

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6 S. 44 of the TP Act, 1882 deals with transfer by one co-owner.

7 AIR 2013 SC 2235.

8 AIR 2013 Kar 88.

9 *Id*. at 90.

order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof. In the matter on hand, the decree obtained by the petitioner is not discharged and it is not satisfied. Thus the proceedings are deemed to have been continued. If it is so, the transfer of the property made by the respondent in favour of his vendees is hit by the provisions of section 52 of the Act. Consequently, the principles of *lis pendents* will duly apply to the facts of this case. The court also observed that in view of the matter, the suit properties which are alienated by the respondent in favour of his brother and brother's son are liable to be attached.

In *Thomson Press (India) Ltd.* v. *Nanak Builders and Investors P. Ltd.*[10] it was held that section 52 of the TP Act, 1882 speaks about the doctrine of *lis pendens*. It is well settled that the doctrine of *lis pendens* is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title *pendente lite.* The provision of this section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to litigation. Discussing the principles of *lis pendens*, the Privy Council in the case of *Gouri Dutt Maharaj* v. *Sukur Mohammed* [11]observed as under:[12]

> The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of the enactment and in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of 8.6.1932, had not been registered.

In the case of *Kedar Nath Lal* v. *Ganesh Ram*[13] the Supreme Court referred the earlier decision[14] and observed:[15]

The purchaser *pendente lite* under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so it must bind the person driving his right, title and interest from or through him. This principle is well illustrated in *Radha madhub Holder* v. *Monohar* where the facts are almost similar to those in the instant case. It is true that section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well-established that the principle of *lis pendens* applies to such alienations.

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10 AIR 2013 SC 2389.

11 AIR 1948 PC 147.

12 *Ibid.*

13 AIR 1970 SC 1717.

14 1967 (2) SCR 18.

15 *Id*. at 28. Also See *Nilkant* v. *Suresh Chandra* and *Moti Lal* v. *Karrab-ul-Din* (1897) 25 Cal 179 (PC).

Section 52 of the TP Act, 1882 again came up for consideration before the court in the case of *Rajender Singh* v. *Santa Singh*[16]and reiterated:[17]

> The doctrine of *lis pendens* was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject matter of litigation from the ambit of the court's power to decide a pending dispute of frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of *lis pendens* is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property which are the subject matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated.

In another case, *Bhanumani Sahu* v. *State of Orissa,*[18] court held that it is trite law that justice requires a *pendente lite* purchaser should be given opportunity to protect his right. The transferee *pendente lite* can be added as a proper party, if his interest in the subject-matter of the suit which is substantial in nature. The p*endente lite* purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court.

In this context, the judge referred to a very recent pronouncement of the apex court in *A. Nawab John* v. *V.N. Subramaniyam,*[19] and another case *i.e., Smt. Saila Bala Dassi* v. *Nirmala Sundari Dassi,*[20] the apex court has observed that a *pendente lite* purchaser's application for impleadment should normally be allowed or considered liberally.The intervenor petitioner being a *pendente lite* purchaser is entitled to be heard and is entitled to be impleaded in the suit or other proceedings where his predecessor in interest is made a party at any stage of the proceedings if his presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit.

In K N *Aswathnarayana Setty (D)* v. *State of Karnataka*,[21] the apex court observed that at the time of purchase of the suit land by the present petitioners the matter was *sub-judice* before this court and if the order of de-notification dated 05.08.93 stood quashed, it would automatically revive the land acquisition proceedings meaning thereby, the notification under section 4 and declaration under section 6 resurfaced by operation of law. In such a fact-situation, it is not permissible

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16 AIR 1973 SC 2537

17 *Id.* at 2541.

18 AIR 2013 Orissa 52

19 2012 AIR SCW 4248.

20 AIR 1958 SC 394.

21 AIR 2014 SC 279.

for the present petitioners to argue that merely because there was no interim order in the appeal filed by the respondent petitioners had a right to purchase the land during the pendency of the litigation and would not be bound by the order of this court quashing the de-notification of acquisition proceedings.

Dharma Singh v. *Bhag Singh* [22]is case relating to *lis pendense.* In this case, a suit was filed for specific performance of contract because suit land was sold by vendor in favour of third party during pendency of restraint order. Since all the parties belonging to same village, it could safely be presumed that subsequent purchaser knew about pendency of case so that subsequent purchaser cannot be termed as *bona fide* purchaser. Hence the court held that plaintiff entitled to relief of specific performance of contract against subsequent purchaser.

What emerges from the facts enumerated herein above is that an agreement was entered into between the plaintiff and defendant. However, the defendant no.1 sold the suit land in favour of another defendant during the pendency of restraint order. Trial court has rightly decreed the suit for specific performance by taking into consideration the oral as well as documentary evidence led by the parties. However, in appeal which was preferred only by Ramesh Chand, the matter was remitted to the learned trial court.

The court observed that, the another defendant has been ordered to pay a sum of Rs.37, 500/- which was the sale price. The suit land could not be sold by defendant no. 1 to defendant no.2 during the pendency of the civil suit, more particularly, when there was an interim order, dated 05.04.91 which was confirmed on 28.10.94. The parties were directed to maintain *status quo* preferred by the plaintiff as per order, dated 07.08.98.

Adverse possession

In *Smt. Gurcharan Kaur* v. *Sukhwant Singh.*[23] The court was asked to consider about the nature of possession property *i.e*., adverse or not. The court observed that whole claim of the appellants is based on their plea of adverse possession, but according to their own pleadings and documents, their possession was permissive on account of alleged sale and not adverse. Appellants have failed to establish alleged sale in their favour. No registered sale deed was ever executed in favour of appellants or their predecessors and so the question of a valid sale in their favour did not arise and held that owners on the basis of their title entitle for possession of property.

Doctrine of part performance

Section 53-A deals with part-performance. This section seeks to protect prospective transferees, and allows them to retain the possession of the property,

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22 AIR 2013 HP 89.

23 AIR 2013 P&H 42.

as against the transferors, who after executing an incomplete instrument of transfer, fail to complete it in the manner specified by law, without there being any fault on part of the transferee. This protection also made application bona-fide transferors also by decisions of the courts. Section 53-A was inserted for the first time in the Act by Transfer of Property (Amendment) Act, 1929. While incorporating the said section in the Act, the English equitable doctrine of part performance was partially imported into India. The special committee constituted for suggesting the amendments into the Act.

It was observed under section 53A TP Act, 1882. The plaintiff no.1 is the absolute owner of the suit property consisting of a building which was purchased from defendant no.1 on a consideration. However, sale deed could not be registered as the registration was suspended by the government and the defendant-respondents could not get clearance from the Urban Land Ceiling Authority. Although the sale deed was not registered, the entire sale consideration was paid to defendant. The court held that plaintiff is entitled to the property.

In *Shantabenw/o. Darubhai Jibhai* v. *Hasmukhbhai Bhailalbhai Patel*[24] while deciding on constructive *res judicata*, considered about part performance of contract. The court held that in spite of having right to retain possession of suit property, predecessor of transferee had not taken such plea in earlier suit, meaning thereby, he being not willing to perform his part of contract, such plea was not taken, Thus, decree for recovery of possession passed in earlier proceeding having become final against predecessor, interest of transferee, proceedings filed for specific performance of contract of same agreement, barred by constructive *res judicata.*

Court also observed that in the case, even in the agreement dated 04.11.74, the time of execution of sale-deed, which is the date of removal of prohibition of transfer of fragmented land, is fixed. Such prohibition having been lifted on 25.08.92 the suit should have been filed within three years from that date. Undisputedly, the suit has been filed in the year 1999, long after the period of limitation and neither in the plaint nor in the evidence given by the plaintiffs, any circumstance providing for extension of time under the Limitation Act, 1963 has been either pleaded or explained. The plaintiffs issued even the notice of execution of sale-deed, after the expiry of three years. Thus, in the absence of pleading or evidence claiming the benefit of extension as contained in the Limitation Act, 1963 the suit is patently barred.

Doctrine of part performance when can be invoked?

Doctrine of part performance when can be invoked was considered in *Girija Shankar* v. *Smt. Sheela Devi.*[25] In the instant case, the suit filed by late Aditya Narayan Tiwari for specific performance of a contract has already been dismissed

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24 AIR 2013 Guj 193.

25 AIR 2013 Chh 30.

meaning thereby, the appellant failed to fulfill the pre-condition for application of doctrine of part-performance that he has performed or was willing to perform his part of the contract and the *ratio* of law laid down by the court in earlier case is of no help to the appellant.

In view of the aforesaid discussion, it is crystal clear that the ground raised by Shri B.P. Sharma that from the date of execution of agreement of the sale, the appellant is holding the suit accommodation as a prospective vendor and in part-performance of the agreement to purchase the property, which relationship has superseded the erstwhile tenancy relationship and altered the nature and character of the appellant Supreme Court possession over the suit accommodation from that of tenant to that of a purchaser-in-possession in part-performance of agreement to sell the property, is devoid of merit. Hence doctrine of part-performance cannot be invoked.

Whether part-performance is shield or not

In *Mahadeva Mandi Madashetty* v. *Smt. Rangamma*[26] the court touched upon equitable right of protection. Section 53-A of the TP Act, 1882 provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell to the transferee, if the proposed transferee satisfies other conditions of section 53-A.That protection is available as a shield, only against the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. The doctrine of part performance is an equitable doctrine. The right to protect possession under this provision cannot be pressed into service by a third party like the second defendant against the proposed vendor as there was no agreement between her and the owner proposed vendor in relation to the suit schedule property. Since proposed transferee had already transferred the land to the third party, whatever may be the nature of possession of the third party, she cannot protect the possession under this provision *i.e.*, part-performance.

Court also observed that the doctrine of part performance is rooted in equity and provides a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell to the transferee if the proposed transferee satisfies other conditions of section 53-A. It operates as an equitable *estoppel* against the original owner to seek possession of the property which was given to the proposed vendee in part performance of the contract. The appellant being a third party and not a *privity* to the transaction on which the *estoppel* rests can take no advantage of it.

III SPECIFIC TRANSFERS

Sale of immovable property

Sale generally means an act of selling or to give up property or hand over something to another for money. In another way we can say, transfer of property voluntarily to buyer for price. Section 54 defines the term sale: 'Sale is a transfer

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26 AIR 2013 Kar 56.

of ownership in exchange for price paid or price promised or paid and part promised.' Every owner has three basic rights over his property, a right of title, an exclusive right to possess and enjoy the property and an exclusive right to alienate it. In a sale all these rights are conveyed by the owner with his free consent in favour of the transferee who is called a buyer.

Agreement for sale

Satya Jain (D) Thr. LRs. v. *Anis Ahmed Rushdie (D) Thr. LRs* [27] is a case on agreement for sale. In this case in an agreement to sell, one of the conditions was that seller required to obtain Income Tax Clearance Certificate at his own cost. Purchaser asserting his readiness to pay money directly to income tax authorities. But refusing seller's request to pay certain amount to him for payment to Income Tax Authorities, the court held that the purchase's refusal cannot by invoking principle of business efficacy is construed as purchaser's default of agreement and purchaser is entitled to decree for specific performance.

Under the agreement for sale of immovable property, the obligation to obtain income tax clearance certificate was of the seller-defendant. He was to obtain the certificate at his own cost and intimate the fact to the plaintiff-purchaser not later than 12 months of agreement. One of the clauses of agreement stipulated that the purchaser was obliged to pay to the Income Tax authorities such amount as may be desired by the vendor in order to enable the vendor to get the required Wealth Tax Clearance Certificate.

The court also referred that principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen J in The Moorcock. This test requires that a term can only be implied, if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied and the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same.

In *Saraswati Devi (D) By L.R.* v. *Delhi Devt. Authority*[28] the Supreme Court was referred relating to property in compensation pool put to auction. In this, the highest bid approved and provisional possession was given to highest bidder. The title of property though remains with government property stands subject to possessory rights of highest bidder. Property so encumbered can be acquired and this was decided by the court.

27 AIR 2013 SC 434.

28 AIR 2013 SC 1717.

In the instance case, the legal position with regard to transfer of title in respect of the property forming part of the compensation pool put to public auction under Rule 90 of the 1955, Rules may be summarized thus: on approval of the highest bid by the competent authority, a binding contract for the sale of the property to the auction-purchaser comes into existence. Once the payment of the full purchase price is made, title in the property would pass to an auction purchaser. In other words, on the payment of the full purchase price, the ownership in the property sold in public auction would stand transferred but the transfer formally becomes complete on issuance of the certificate of sale. If in the sale certificate, any particular date is mentioned as provided in the pro forma appended to rule 90, such date mentioned in the sale certificate may be presumed to be the date on which the purchase has become effective but crucial date for transfer of ownership in the property in favour of auction-purchaser is the date when full purchase price has been paid by the auction purchaser. Hence court decided that property can be acquired by the highest bidder.

In *Sachida Nand Sharma* v. *State of Bihar*[29] there was a gift deed as to property in question in the name of father of respondents alone. However, sale deed of said property was executed by his brother as natural guardian during life-time of mother and natural guardian of respondents then minor, No evidence as to insanity of mother of respondents. There was sale deed was executed within four years of missing of father of respondents. There was no evidence that lands were sold for the benefit of minors. Court considered that the s ale deed was a void document.

The single judge in this case held that the sale deed was a void document as Siya Ram Pandey was not a named beneficiary of the gift deed. He could not act as the natural guardian of the minors and execute the sale deed on their behalf while the mother, the natural guardian, was alive. Eight years, as prescribed under section 108 of the Indian Evidence Act, 1872 had not elapsed from the disappearance of Jai Ram Pandey to create a presumption of death and the right to sell after four years only. Mere recital of legal necessity of sale for the benefit of the minors was not sufficient in the facts of the case in absence of necessary and material evidence in support of the same. There was no presumption that the gift deed in favour of Jai Ram Pandey could be treated as joint family property on the mere asking by his brother Siya Ram Pandey. It was open for the appellants to demonstrate before the competent civil court that the sale deed was executed for legal necessity and for benefit of the minors or that he was the natural guardian and that the sale deed was executed after taking the consent of the mother and that the appellants were in possession of the lands after the sale.

The single judge has aptly relied upon *Gorakh Nath Dube* v. *Hari Narain Singh*[30] to hold that an alienation or transfer made in excess of power to transfer would make the document invalid. It has also been noticed that the principle has been followed in *Smt. Dularia Devi* v. *Janardhan Singh* [31] that the consolidation

29 AIR 2013 Patna 89.

30 AIR 1973 SC 2451.

31 AIR 1990 SC 1173.

authorities had the jurisdiction to look into the gift deed if it had been obtained by misrepresentation. Relying on *Hari Satya* v. *Madhav,*[32] it was aptly held that recitals in the sale deed that it was executed for the benefit of the minors was not an absolute presumption and had to be proved. We are in agreement with the conclusion that there could be no presumption that a gift deed executed in the name of a particular person can still be treated as a joint family property in absence of any evidence. We find no reason to interfere with the conclusion of the single Judge that the gift deed being in name of Jai Ram Pandey alone, execution of the sale deed by Siya Ram Pandey as natural guardian during the lifetime of the mother and natural guardian of the minor, with no evidence for her insanity, within four years of the missing of Jai Ram Pandey coupled with the absence of any evidence that the lands were sold for the benefit of the minors the sale deed was a void document.

Sale deed

In *Anu Dutta* v. *Lolit Kalita*[33] a suit was filed for declaration of title. On basis of sale deed plaintiff could not prove that thumb impression appearing on sale-deed was that of his vendor, Property in question was self-acquired property of original owner. Incidentally successor-in-interest (vendor) would not derive any right, title and interest, by way of inheritance, during lifetime of original name. Consequently no right, title or interest can be passed on to plaintiff by virtue of sale-deed. Then the court held that suit cannot be decreed in favour of plaintiff.

In *K. Sivanandam* v. *Maragathammal*,[34] the suit property originally purchased by husband of vendor of plaintiff, vendor though on death of her husband had converted to Christian religion, same would not disentitle her from her right of inheritance of property, Thus, the court held that vendor having right and title to suit property to convey same in favour of plaintiff, sale deed would be proper.

The above issue where a Hindu by conversion foregoes, the right of inheritance is no longer considered as *res-integra* as the same is answered against the appellant by a division bench of this court in *E. Ramesh* v. *P. Rajini* [35] and the court held:[36]

> So far as the first question is concerned, the learned single Judge referred to Section 26 of the Hindu Succession Act (hereinafter referred to as the Act) and held that the bar for inheritance is only in respect of legal heirs of the convert. The individual, who convert himself to other religion from Hinduism, will not forgo the right of any inheritance.

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32 AIR 1983 Cal176.

33 AIR 2013 Gau178.

34 AIR 2013 Mad 30

35 (2002)1 MLJ 216.

36 *Id*., para 6.

He also relied upon the judgment of *Asoka Naidu* v. *Raymond S. Mulu,*[37] decided by the Patna High Court.

Letter of intent and rights of intending purchaser

Hansav Gandhi v. *Deep Shankar Roy*[38] is a case for specific performance of agreement to sell and purchaser of flats. Here, plaintiff is intending purchaser of flats. He claimed relief of specific performance on basis of conditional letter of intent issued by builder. Held that mere letter of intent does not give right to plaintiff to purchase flat and more so when letter of intent specifically provided that after full payment agreement of sale would be executed. In absence of registered agreement, subsequent purchaser of flat cannot be said to be purchaser with knowledge of earlier agreement. Hence the court held that plaintiff not entitled to relief of specific performance and the builder however was directed to refund purchase price with interest.

Court also observed that it is a fact that the plaintiffs had not entered into any formal agreement with regard to the purchase of the flats with the developer. The mere letter of intent, which was subject to several conditions, would not give any right to the plaintiff's for purchase of the flats in question till all the conditions incorporated in the letter of intent were fulfilled by the plaintiff *i.e.,* the proposed purchasers. It is also a fact that all the conditions, which were to be fulfilled, had not been fulfilled by the plaintiffs.

Court also opined that the letter of intent cannot be said to be an agreement to sell for the simple reason that according to the contents of the letter of intent, only upon payment of the entire purchase price, the developer and the plaintiffs were to enter into an agreement with regard to sale of the flats. This fact clearly denotes that no agreement to sell had been entered into between the plaintiffs and the developer and in absence of such agreements, in our opinion, there cannot be any right in favour of the plaintiffs with regard to specific performance of any contract. Thus, in our opinion, the high court did not commit any error while coming to the conclusion that there was no binding contract or agreement in existence between the plaintiffs and the developer and therefore, the trial court could not have decreed the suit for specific performance.

Cancellation of a sale deed

In *Hardwar Bhikha* v. *Kulwanta Banshi,*[39] court considered about cancellation of sale deed on the grounds of fraud and undue influence. Wife of deceased owner alleged that nephew, co-owner of deceased got sale deed registered in his favour by the deceased under undue influence as deceased was 100 years of

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37 AIR 1976 Cal 272.

38 AIR 2013 SC 2873.

39 AIR 2013 All. 129.

age and also indebted to third parties and could be said to be dominated /influenced by will of nephew on whom he was dependent. The transaction of sale was not in the knowledge of wife; Nephew was in position to dominate the will of the deceased. Now the onus is on the nephew to prove that the sale deed was exercised without exercising undue influence.

Court observed that a person of hundred years of age, indebted to third parties and for the purpose of managing his own livelihood, dependent upon another, can be said to be in a position to be influenced and dominated by the will of such person on whom he relies and depends and the cancellation of sale deed was proper.

Sale deed and statutory liability to pay tax

M/s. Rana Girders Ltd. v. *Union of India* [40] is a case relating to liability of purchaser of unit in the sale deed to pay the stipulated statutory liabilities arising out of land building and machinery which shall be borne by vendee. Excise duty is not liability arising out of land, building or machinery. Statutory liability is payable on manufacturing of excisable goods which is contemplated by stipulation in sale-deed does not cover excise dues. Hence court held that purchaser not liable to pay excise dues of vendor.

The court also held that it may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the sale-deed/ agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that "all these statutory liabilities arising out of the land shall be borne by purchaser in the sale-deed" and "all these statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible in the Agreement of Sale." As per the high court, these statutory liabilities would include excise dues. However the high court has missed the true intent and purport of this clause. The expressions in the sale-deed as well as in the agreement for purchase of plant and machinery talks of statutory liabilities "arising out of the said properties" (*i.e.* the machinery).

The court also opined that it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of *cess* relating to property *etc*. Likewise, statutory liability arising out of the plant and machinery could be the sales tax *etc*. payable on the said machinery. As far as dues of the Central Excise Department are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the excise department became payable on the

40 AIR 2013 SC 3422.

manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the high court.

Mortgage

While dealing with any aspect of mortgage in TP Act, 1882 it is necessary to understand the clear meaning of mortgage given in the Act.[41] 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 closure *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 *Smt. Fatma Bai (since deceased) now L.Rs.* v. *Yogendra Sharma*[42] the court was asked to decide a particular document is mortgage with conditional sale or outright sale. As per sale-deed and according to vendor, there was a document of mortgage by conditional sale which was sold by vendor to vendee for consideration of Rs.50, 000/-. In the document of sale, entire ownership, right, title and interest transferred. No condition of section 58 (c) in respect of mortgage by conditional sale found in document. Moreover, vendees were in possession of entire house except on ground floor in which vendor was tenant. Court held, transaction was not a mortgage and document of sale was never written as document of conditional sale and hence it is regarded as out- right sale.

A landmark decision on this point of the Supreme Court is *Chunchun Jha* v. *Ebadat Ali* and another,[43] wherein the court held that:[44]

> Under the Proviso to S. 58 (c). T.P. Act, if the sale deed and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend

41 See s. 58(a) for definition of 'Mortgage'. See also s.58 (c) 'Mortgage by conditional sale or out-right sale

42 AIR 2013 MP 82.

43 AIR 1954 SC 345.

44 *Id*. at 345.

> the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage.

If the possession of the house in question would have been of the plaintiff, then certainly this would be one of the elements to hold that the transaction between the parties was not of sale and the property was mortgaged by conditional sale. Since admittedly the defendants are in possession of the entire house except on the ground floor in which the plaintiff is the tenant, it further strengthens the case of the defendants that the document in question was outright sale and this important fact weakens the case of the plaintiff that the transaction was of mortgage by conditional sale.

In *Rajwati Devi* v. *Prem Nandani Sinha*[45]considered whether a particular transaction is mortgage by conditional sale or outright sale. Here the deed in question embodied a condition of repayment of consideration amount. Possession was delivered to mortgagee for 2 years during which mortgagor had to repay amount. No condition of re-conveyance, only because market price had been paid, it could not be inferred that parties had intention to execute out and out sale deed. Terms and conditions in deed were in agreement of section 58(c). Thus, there was a mortgage by conditional sale. Mortgagor did not exercise right of fore-closure under section 67 and a suit for redemption decreed in favour of mortgagor.

So far this decision relied upon by the counsel for the appellant is concerned; there is no dispute about the settled principles of law. In this decision, the apex court has given the differences between the *out and out sale and a mortgage by conditional sale*. In mortgage by conditional sale, a charge created in the property which impliedly creates relationship of mortgagor and mortgagee. In case of out and out sale a condition of re-conveyance is embodied. In the present case at our hand, there is no condition of re-conveyance. Only the condition is that on repayment the same shall be endorsed in the deed. The condition is that for these two years the defendants will be entitled to use the usufruct that is the income from the suit premises and he was put in possession. This condition implies that the defendant was put in possession as security of the loan and he was getting the income as interest of the loan.

The counsel for the appellants submitted that full consideration amount was paid which was the market price. In my opinion, only because the market price has been paid on that basis it cannot be inferred that the parties had the intention to execute the out and out sale deed particularly when in the present case the terms and condition mentioned in the deed are unambiguous and clear. The terms and conditions are in terms of section 58 (c) of the TP Act, 1882.

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45 AIR 2013 Patna 166.

In view of the above settled proposition of law laid down by the apex court as well as by this court and the circumstances and the evidence produced by the parties, the court is satisfied that the deed in question is a mortgage by conditional sale and not a deed of out and sale. Therefore, the finding of the trial court is hereby confirmed.

In *Vanchalabai RaghunathIthape (D) by LR.* v. *ShankarraoBaburaoBhilare (D) by LRs.*[46] Court considered about mortgage by conditional sale or sale with condition of repurchase. In this case, plaintiff transferring land to defendant by way of document. Defendant put in possession and used and enjoyed property as absolute owner. Sale of document containing stipulation that on receipt of sale amount, defendant shall return property to plaintiff vendor. Mere stipulation of return of property in document of sale does not make the transaction mortgage by conditional sale Suit for redemption filed long after period stipulated for return of sale amount has expired. Hence liable to be dismissed.

In the instant case, the alleged sale document was executed in the year 1967 transferring the suit property by way of sale subject to one stipulation/ condition that on receiving the sale amount of Rs.3, 000/- within five years the land was to be returned to the plaintiff vendor. It is also not in dispute that after transfer of the land, the defendant respondent no.1 came in possession and used & enjoyed the suit property as an absolute owner. It was only after 11 years that the plaintiff-appellant filed the suit alleging that the suit property was mortgaged in favour of the defendant/respondent no.1 herein with a condition to re-convey the land. The court expressed that in the aforesaid premises, we do not find any reason to interfere with the findings recorded by the first appellate court. As stated above, the high court has rightly not interfered with the findings of fact recorded by the first appellate court.

Usufructuary mortgage and suit for redemption

The essence of the transaction regarding usufructuary mortgage is that the mortgagor is bound to put the mortgagee in possession of property. If possession is not delivered, the mortgagee may sue for possession or for recovery of the mortgage money. The mortgagee is to get rents and profits in lieu of interest or principal or both. The mortgagee has no remedy except enjoyment of the property. But he has a personal remedy against the mortgagor like every mortgagee, if the property is destroyed for no fault of his own. The mortgagee has no remedy except enjoyment of the property. But he has a personal remedy against the mortgagor like every mortgagee, if the property is destroyed for no fault of his own.

In *Mohan Lal* v. *Mohan Lal*[47] applying the provisions of law and the law laid down by Supreme Court[48] to the case in hand, it is apparent that in the present

46 AIR 2013 SC 2924.

47 AIR 2013 Raj 187.

48 AIR 1999 SC 1047.

case, the mortgage deed was executed on 24.01.50 and the same did not stipulate any time for redemption of mortgage and therefore, the mortgage money became due to the mortgages and the right to redeem or recover possession to the mortgagor accrued on the date of execution of the mortgage deed itself *i.e.*, 24.1.50. The suit having been filed as late as on 14.11.02 is, therefore, apparently barred by limitation as provided in article 61(a) of the Limitation Act,1963.

Court finally opined that from what has been observed, considered and discussed hereinabove, it is apparent that the suit for redemption of mortgaged property comprised in mortgage deed dated 24.01.50 filed by the plaintiff Mohan Lal on 14.11.02, by bare reading of the plaint, is *ex facie* barred by limitation as provided in article 61(a) of the Limitation Act, 1963 and in view of judgment of Supreme Court in *Hardesh Ores (P) Ltd.* v. *Hede and Company*[49] the plaint is barred by law.

Undertaking to create a mortgage doesn't create interest

In *Haryana Financial Corporation* v. *Gurcharan Singh.*[50] Court held that mere undertaking that a person would not dispose of the properties mentioned, during the currency of the loan, would not confer any charge on the immovable properties mentioned therein. In other words, a mere undertaking to create a mortgage is not sufficient to create an interest in any immovable property.

Public sale of mortgaged property and extinguishment of right of redemption

Rukmini Amma v. *Rajeswary (Dead) through L.Rs.*[51] is case where Supreme Court mentioned that about agricultural income tax. Liability of *qua* owner of land is not attributable to property. For mortgagee, this is not under obligation to pay income tax dues and public sale of mortgaged property for recovery of income tax dues. Right of redemption gets extinguished. Agricultural income tax liability of mortgagor has excluded mortgagor right and consequently the suit was liable to be dismissed.

A tax on income whether agricultural or non-agricultural is unless otherwise stipulated in the Act itself will be a tax on monitory return whether actual or notional. Agricultural income tax payable by the mortgagor land owner cannot be held to be an assessment of tax made with reference to the extent of land mortgaged by him. What was assessed by way of agricultural income tax was based on the total agricultural income derived by the land holder from and out of the entirety of the land held by him which may also include the lands mortgaged. It cannot, therefore, be held that merely because, what was sought to be recovered was agricultural income tax, such liability should be held to be linked to the property mortgaged. The agricultural income tax is relatable to the assesses a owner of the

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49 (2007) 5 SCC 614.

50 2013 (15) SCALE 296.

51 AIR 2013 SC 2428.

land and from the income derived from the commodity or produce of the land owned by him, that by itself cannot be a circumstance to hold that such tax should be held to be part of government dues attributable to simple holding of such lands either by way of land tax or such other similar statutory liabilities on the land mortgaged.

A clear distinction, therefore, has to be drawn between a statutory tax liability pertaining to the land simpliciter *vis-à-vis* the land owner and the other liability by way of income tax on the agricultural income earned by him. The liability to pay income tax dues would not fall within expression "Government dues" liability of payment of which was on the mortgages. Even going by section 76(c) of the TPA,1882 it can be easily visualized that what is noted as government dues are charges of a public nature, rent accruing during the period of possession, of the land in question including arrears if any, default of which may result in bringing the property for sale. Certainly such liabilities noted and contemplated to be cleared by the mortgagee cannot and will not include the income tax liability of an assesses which is purely personal and not of a public nature. Therefore, section 76(c) can have limited application to the specific government dues of public nature as well as those which are referable to the land and not to the personal statutory dues of the owner of the land. The public sale of mortgaged land for recovery of income tax of mortgagor cannot be said to be fraud played by mortgagee. On such sale the right of mortgagor shall stand extinguished.

Right of redemption or right of partition

In *Becharji Bapujithakor, through Heirs* v. *Arjanji Saluji Thakor through Heirs*[52] the court was asked to decide between right of redemption and right of partition. In this case there was a mortgage of joint family property, Entire mortgaged property redeemed by one co-sharer/ co-mortgagor by paying full amount of mortgage money, Right of non-redeeming co-mortgagor by paying full amount of suit property to get his share in suit property, Property freed from clutches of mortgagee at instance of one of mortgagors does not remain mortgaged property, limitation for filling of suit for partition would be on basis of cause of action arising for filing such suit. Court opined.

The above view of the appellate judge runs counter to well settled law that even if one of the co-sharer of property who is co-mortgagor redeems entire mortgaged property by paying full amount of mortgage money, then also, right of non-re-deeming co-mortgagor remains for partition of the suit property to get his share in the suit property. Once the property is free from clutches of mortgagee at the instance of one of the mortgagors, it does not remain to be mortgaged property. In view of this position, right available to the non-redeeming co-mortgagor is for partition of the property and the limitation for filing of suit for partition would be on the basis of cause of action arising for filing such suit for partition. In the case on hand, plaintiffs have clearly established on admitted evidence that the plaintiffs

52 AIR 2013 Guj 37.

right of partition was denied by the defendants in the year 1978. Trial judge has recorded that the plaintiff's right of partition was denied in the year 1978 and has arrived at such finding of fact on the basis of evidence of plaintiff coupled with the evidence of the witnesses in support of the plaintiffs. Therefore, in my view, appellate judge ought not to have disturbed such finding of fact reached by the trial judge. In fact, very wisely the plaintiffs have prayed for partition of the suit property and not for redemption. It appears that the plaintiffs were aware about their right from the very beginning to ask for partition only and not for redemption of the suit property.

Redemption of mortgage and application of limitation act

In Sh. Palo Ram v. *Guari* case[53] there was a suit for redemption of mortgage. In this case land was mortgaged with plaintiff prior to year 1952 and limitation for redemption of 30 years would expire in year 1982. Limitation for filing suit by mortgagee for possession would start from year 1985 and would expire after 12 years *i.e.* in year 1994, even limitation period for filing suit for title would also expire in year 1994, and suit for possession filed on 11.01.95 thus would be beyond limitation. Held section 27 of Limitation Act, 1963 would apply to suit for possession of plaintiff and his right to claim possession would get extinguished. The limitation for redemption is 30 years under article 61(a) of the Act. In other words, the land could be redeemed by mortgagors before 1983. There is no denial that possession of the suit land is with the mortgagors. The limitation for plaintiff to file suit for possession under article 63(b) of the Act started prior to the year 1983, similarly limitation for filing a suit even under article 65 also started prior to the year 1983. In these circumstances, section 27 of the Act will apply to the suit for possession of the plaintiff. The defendants are not seeking possession of the suit land so as to apply section 27 to them. Therefore, is not applicable to the defendants.

Mortgage and *lis pendens*

In *Sunita Jugalkishore Gilda* v. *Ramanlal Udhoji Tanna,*[54] Gangabai, the grand mother-in-law of the appellant was a mortgagee in respect of a three storied building along with the suit premises and open space which was executed by one Vijaysingh Mohta, father of respondent.

The apex court observed that section 65-A of the TPA, 1963 deals with the mortgagee's powers to lease. However, in view of section 52, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of litigation and if the property is sold in execution of the decree, the lessee cannot resist a claim for possession by auction purchaser. It was further held that section 52 deals with cases of transfer of anything otherwise dealing with any immovable property after any suit or proceeding in which any

53 AIR 2013 HP 1.

54 (2013) 10 SCC 258.

right to such immovable property is directly and specifically in question has been filed. Section 65-A of the TPA, 1963 deals with the powers of the mortgagor to grant a lease of mortgaged property, while the mortgagor remains in lawful possession of the same. The apex court finally held that the appellant was entitled to get a decree, since the original first respondent was inducted illegally and to the prejudice of the original mortgagee. The Supreme Court observed that the rule of *lis pendens* applies to suit on mortgagee as well.[55]

Turner J had succinctly dealt with this principle in the leading case of *Bellamy* v. *Sabine*.[56] The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be decided in the suit and which might require a further party to be impleaded in order to make effectual the court's decree. According to the court, the 'law is well settled that a mortgagee, who has purchased a mortgaged property in execution of his mortgage decree is entitled to avoid a transfer on the ground that it was mortgaged by the mortgagor during the pendency of a mortgage suit. Section 52 of the TPA, 1963 prevents a mortgagor from creating any lease during the pendency of mortgaged suit so as to affect the right of a mortgagee or the purchaser.

Mining lease and Transfer of Property Act, 1963

In *Dalmia Cement (Bharat) Ltd.* v. *State of Tamil Nadu*[57] the petitioners were paying the levy of half rate of royalty and deed rent prescribed in the second and third schedules to the Mines and Minerals (Regulation and Development) Act, 1957 instead of the mandatory rate for mining patta lands claiming as ryotwaripattadar of several items of lands, comprising an extent of about 355 acres in and around Dalmiapuram. The audit report pointed out that there was heavy loss of revenue to the government to the tune of Rs.40.28 lakhs in the year 1974-76 due to omission to collect the full royalty. Consequently, the collectors called upon these cement companies to remit royalty and the dead rent at the rates prescribed under the Mines and Minerals (Development and Regulation) Act. The question was whether the state government has a discretion to collect royalty from any lessee at a concessional rate, other than the one prescribed under the Act in the absence of any specific provision under the Act and rules conferring such discretion.

According to the apex court, the answer to the question depends upon the answer to the following questions: What is true legal character of a mining lease *i.e.,* whether mining lease is a lease within the meaning of that expression as defined under the TPA, 1882 or it is only a permission to carry on mining activity?

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55 *Ibid* reiterated by K. S. Radhakrishnan, J. See Mulla '*The Transfer of Property Act*', (lexis nexis 11th end. 2013).

56 (1857) 1 De G J 566.

57 2013 (15) SCALE 351.

The pleadings in the writ petitions were hopelessly ambiguous, bald and imprecise to enable the court to examine any one of the above-mentioned issues. In the normal course, the court should have dismissed all the appeals on the ground of inadequate pleadings. But the third of the above-mentioned issues already stands referred to a larger bench of this court, arising out of appeals from other parts of the country. The court opined that 'dismissal of the appeals might eventually lead to an asymmetric application of law. In a manner which is not uniform throughout the country thereby impacting the coherent and uniform interpretation of the Constitution. The apex court called upon the appellants in the appeals to file affidavits disclosing the full facts necessary for adjudication of the issues raised and the State of Tamil Nadu to file a counter affidavit to such further affidavits filed by the appellants, in case the state disputes anyone of the facts to be newly brought on record. The important question 'Whether the said mining lease of 1945 was in fact a 'lease' as defined under the TPA,1882 or was a permission granted by the state to carry on mining activity in exercise of its executive authority under the Government of India Act, 1935 requires examination, on an appropriate pleading. But, the apex court lamented that 'an inquiry into such matters is not really called for in the absence of any specific pleading or issue. However, the apex court must have called for the specific pleadings to decide the matter as it relates to an important legal issue which has far reaching consequences under the transfer of property law.

Lease of immovable property

A lease is transaction with respect to immovable property and creates a right to enjoy such property for a certain term and for consideration on the conditions mentioned in the lease deed. The right to possess and enjoy the property is transferred in favour of the lessee and he acquires this interest through the conveyance of lease. This interest which lessee acquires is transferable interest and can further transfer this interest to sub-lessee and sub-tenant. It is not a bare permission that can be withdrawn by the lessor at his pleasure. The relationship of lease is created with the property and not merely with that of owner. After the creation interest to posses and enjoy the property, a tenant or sub-tenant remain in possession thereof until the lease is duly terminated and eviction takes place in accordance with law.

Bharat Petroleum Corp.Ltd. v. *Rama Chandrashkhar Vaidya*[58] the predecessor of the appellant, namely, Burmah Shell Oil Storage and Distributing Company of India Limited came in occupation of a piece of land. The court held that the renewal notice was in exercise of the renewal clause in the lease deed. That being so, the execution and registration of a fresh deed of lease was essential for the renewal of lease to take place. [59] Thus, as the renewal was claimed under a clause of the previous lease, the appellant had no case and the lessor cannot be

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58 2013 (5) SCALE 234.

59 See: *State of U.P.* v. *Lalji Tandon (dead) through Lrs.* (2004) 1 SCC 1 at 13 and 14:

faulted for terminating the tenancy by a notice under the TPA, 1882. The appellant therefore, could not claim any further renewal of lease beyond 28.02.05. Hence, the apex court found no merit in the appeal. Therefore, the appeal was, accordingly, dismissed with costs quantified at Rs.50,000/-.

Lease and License

Joao Necessidade Rooque Antonio by LRs v. *Dr. Vaman Govind Lotlikar*[60] is a case where court considered whether particular transaction is lease or license. In this, the intention of parties and whether document creates any interest in property are important considerations. Oral and documentary evidence clearly showing that intention of parties was to create licence and not lease in favour of defendant and agreement would be creating licence, consequently defendant would not be entitled to protection

The court opined that the evidence oral and documentary led by the parties clearly establishes that the intention of the parties in entering into an agreement dated 4.2.1986 was to create licence and not lease in favour of the defendant. The court also viewed, trial court upon appreciation of the evidence led by the parties had correctly come to the conclusion that the relationship between the parties was that of licensor and licensee.

In *Sardar Lakhbir Singh* v. *Swargashram Trust*.[61] Court again considered that whether particular transaction is lease or licence. Premises in question are belonging to a trust. The court observed that so far as the submission of counsel for the appellants that as per provision of section 105 of TPA, 1882 the exclusive possession can only be lease and not license, is concerned.[62] The court also held that it is quite clear that the lease may be express or implied in consideration of a price paid or promised for a certain time. In the case at hand, as has been mentioned earlier also no instrument was ever executed between the parties and no consideration or price was fixed. Trust in lieu of their occupation in the disputed property for which receipts were issued to them mentioning therein the amount as donation, no receipt was issued showing as rent, it can very well be concluded that the donation paid by the appellants is not covered under section 105 of the TPA,1882 to conclude that the appellants were lessee and the occupation of the appellants do not create any interest of the appellants over the disputed property and they can impliedly be treated as a licensee.

Anthony v. *K.C. Ittoop & Sons* (2000) 6 SCC 394, at 8 to 11 and *Hardesh Ores (P) Ltd. case* (2007) 5 SCC 614.

60 AIR 2013 Bom45.

61 AIR 2013 Uttar 25.

62 S. 105 defines lease: "A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in

Mortgage and Lease

Lease and mortgage are species of the same genus *viz*., the 'transfer of property. Both of them bring about transfer of property, but with a substantial change as to the nature of disposition. The principle objective of a mortgage is to provide security for repayment of amount, whereas the one under lease is that the owner of an item of immovable property permits another to use it on payment of rent. Except in the case of usufructuary mortgage and mortgage through conditional sale, the possession of the property. This was decided in *M/s. Gita Cotton Trading Company* v. *The Chief Controlling Revenue Authority & Commissioner & Inspector General of Registration & Stamps.*[63] Court also held that nomenclature of document suggested that it was lease deed and stamp duty and registration charges were paid on that premise. Specific provision existed in deed for conclusion of lease beyond 20 years and for further period of 10 years. Document thus being lease deed, demand of deficit stamp duty by treating it as deed of mortgage, improper.

Apart from the broad difference, referred to above, there are certain minute important aspects that differentiate the mortgage from leas. Once a transaction of mortgage is brought about, the mortgagor gets the right to redeem, and the mortgagee gets the corresponding right to foreclose the mortgage. The nature of decree to be passed in a suit for foreclosure of mortgage differs substantially from the one to be passed in a suit for recovery of possession of property from a lessee. A preliminary decree is to be passed and it is followed by final decree. Chapter IV of the TPA, 1882 confers rights and place obligations on the mortgagors, on the one hand, and mortgagees, on the other hand, which are typical and germatone to such transactions. Prescription of any fixed term is alien to mortgages.

Lease, on the other hand, involves, just the permission being accorded by an owner of property, to another, to use it. The consideration therefore is the rent fixed with the consent of the parties. In a given case, the lease may be nominal, or phenomenal. Further, law does not prohibit the rent being paid in the form of adjustment from the amount due from the lessor to the lessee. What becomes important is the objective underlying the transaction, namely use of the property belonging to the lessor by the lessee, on payment of rent and for a stipulated term. Chapter V of the TPA, 1882 enlists the rights, which a lessor has against the lessee and vice-versa. Termination of lease, on the one hand, and foreclosure/redemption of mortgage, on the other hand, has nothing in common. When such is the radical difference between the two transactions, it is not at all possible to take the one for the other.

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considering of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specific occasions to the transferor by the transferee, who accepts the transfer on such terms".

63 AIR 2013 AP 129.

Notice to quit

In *Alok Kumar Sharma* v. *Smt. T. Hemalath*a,[64] court considered about the important of service of notice. It was observed that the case on hand is an example as to how the appellant, who has entered into the residential premises of a landlady, is putting her of inconvenience and also not paid the rents for sufficiently longtime. The relationship of landlady and tenant is not denied. The counsel for the appellant tried to contend that there is no proper notice under section 106 of the Act and consequently the suit is not maintainable. As can be seen from the proceedings the notice under section 106 of the Act was sent to the defendant to his residential address and also the office address. The defendant does not dispute about the correctness of the address mentioned therein. It is difficult to believe that the appellant would not have present in the suit schedule premises, to which place the notice was sent and it was also returned as "not claimed". In this connection, it is useful to refer to a decision reported in *M.A. Ghani* v. *P.Rami Reddy* [65] where it was held as under:[66]

> Quit notice sent by a registered post to the correct address and it was returned with an endorsement that the addressee was continuously absent for week days. Held that it is a valid service.

Therefore, in view of the above circumstances, the courts below have rightly found that there was a proper service of notice and consequently it cannot be contended that the suit is bad for want of proper notice under section 106 of the Act.

In *Kanak Pramanik* v. *Indrajit Bandopadhyay*[67] court considered about deemed service of notice. In this case, tenant denied about serving of notice. In this is to be known that when notice is returned with endorsement of postal peon 'refused' then there is presumption of tender and refusal amounting to good service of notice and however presumption is rebuttable.

The court observed that section 106 of the TPA, 1882 requires that notice to quit has to be sent either by post to the party or be tendered or delivered personally to such party or to one of his family members or servants at his residence / place of business or if such tender or delivery is not practicable it be affixed to a conspicuous part of the property. In the case in hand, only one notice to quit was sent to the appellant tenant under registered post with A/D. It retuned with the endorsement of the postal peon "refused". The appellant tenant took specific plea not only in his written statement but also in his evidence that the postal peon did not tender any notice to him and accordingly there was no question of refusal on his part to accept the same. It also came out from evidence that the suit premises is a barber shop being run by appellant tenant through an employee Gour Chandra Pramanik.

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64 AIR 2013 AP 7.

65 2003 (3) ALT 120.

66 Ibid.

67 AIR 2013 Cal. 60.

As such even in absence of the appellant tenant if the postal peon tendered the notice to his employee Gour Chandra Pramanik to be refused to be accepted by Gour still it might amount to refusal on the part of the tenant treating it to be good service of notice. But there is no evidence to that effect also from the side of the respondent landlord. Rather the appellant tenant also examined said employee Gour Chandra Pramanik who categorically stated that on the relevant date *i.e.*, 17.10.1988 postal peon did not visit said barber shop for service of the notice not to speak of tendering the same to him. Said evidence remained unshaken in spite of cross-examination. In view of the aforesaid evidence on record it is palpable that the appellant tenant was able to rebut the presumption of due service in view of postal endorsement "refused" on the envelope of notice and that it was the duty of the respondent landlord to produce the postal peon on the dock to discharge the burden of proving the service of notice. Courts below unfortunately failed to take note of this evidence on record in the backdrop of the settled legal position as stated above and accordingly came to a palpable wrong conclusion that the postal endorsement "refused" amounted to good service in the facts and circumstances of the case.

The court finally held that proper service of notice to quit is the very backbone of a suit of ejectment filed under the TPA, 1882. In this case, the deemed service of notice in view of postal endorsement "refused" is found to be not acceptable. As such, the ejectment decrees passed by courts below banking on said deemed service of notice were not sustainable in law.

In *Smt. Vandana Gulati* v. *Gurmeet Singh alias Mangal Singh* [68] court held that in view of the above, it is concluded that a notice under section 106 of the Act can be sent in two ways *i.e.* by post or by tendering or delivering it personally. In tendering or delivering, it personally, it can be served upon a family member or a servant of the person concerned at his place of residence. In contrast, the notice sent by post can be addressed either at office or the residence. In the above situation, the notice sent to the tenant at her official /business address would not stand vitiated.

Section 114 of the Indian Evidence Act, 1872 provides that the court may presume existence of certain facts, namely, where a letter is shown to have been posted in the common course of business and in the manner provided it may be presumed to have been served in the usual course unless interrupted by disturbance.[69] The above provision of the Indian Evidence Act, 1872 raises a presumption of fact and that of section 27 of the General Clauses Act, 1897 a presumption of law. The cumulative effect of both the above provisions is that a letter/ notice sent by registered post to the person concerned at the proper address shall be deemed to be served upon him in the due course unless contrary is proved.

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68 AIR 2013 All 69.

69 S. 27 of the General Clauses Act, 1872 explains the meaning of services by post. It provides that where any document is required to be served by post, its service shall be deemed to be affected by properly addressing, prepaying and posting it to the person concerned by registered post unless- contrary is proved.

A full bench of this court in *Gangaram* v. *Phoolwati*,[70] *inter alia,* laid down that section 106 of the Act provides for modes of service of notice and one of the mode being sending of notice by post, the provisions of section 27 of the General Clauses Act, 1897 shall apply and if it is proved that a notice was sent by registered post in an envelope containing correct address of the tenant, a presumption of law can be made that the notice had been served on the addressee. The full bench further accepted the view as expressed by their of this court in an earlier decision to the effect that a notice sent by registered post and received back with the endorsement 'refused' would be presumed to be served in view of section 27 of the General Clauses Act, 1897 and that such a presumption though rebuttable, the postman need not be examined to prove the endorsement, rather it is the duty of the person rebutting the presumption, to lead evidence that the notice was not served upon him.

Right of lessor to get occupational charges

In *Murlimal Santram & Co.* v. *Bata India Limite*d,[71] there was tenancy in which payment of occupation charges, tenant had by letters agreed for increase of 10% in respect of all tenancies and additional increase of 15% for ground floor lobby, Tenant was not protected under tenancy laws and landlord entitled to get occupation charges month by month for use and occupation of premises. Hence tenant was liable to pay at enhanced rate that they agreed as reflected in two letters, being occupation charges. It is also undisputed, the appellant issued notice under section 106 of TPA, 1882. The respondent was also not protected under the tenancy law. Therefore, the landlord would be entitled to get occupation charges month by month for the use and occupation of the premises, being an amount equal to the monthly rent payable by the tenant.

In our considered opinion, the respondent is to pay at the enhanced rate that they agreed as reflected the aforementioned two letters, being occupation charges. However, we feel, the payment should be made to the Receiver month by month and the Receiver after payment of municipal taxes would pay the balance amount to the landlord appellant. So far *mesne* profit is concerned; this court cannot allow the same in favour of the plaintiff/appellant so long the suit is not decided.

Termination of tenancy

Renu Gupta v. *Kanti Devi,*[72] termination of tenancy, validity of notice, failure to make mention of any time or exact date determining tenancy would not invalidate it provided suit is instituted after expiry of notice period provided under Act, statutory period of 3 days would be period of notice in such case, validity of notice would depend upon date of service/ deemed service and date of institution of suit.

In view of the above specific provision that the mention of the shorter period in the notice than statutorily provided would not invalidate it, provided the suit is instituted after the expiry of the notice period provided under section 106 of the

70 AIR 1970 All 446.

71 AIR 2013 Cal 102.

72 AIR 2013 All 26.

Act leads to an inevitable conclusion that it would not affect the notice, even if no period is mentioned therein subject to the above condition. In the said event, the statutory period of notice. In the circumstances, where the notice fails to make mention of any time or the exact date determining tenancy, the only things relevant for consideration is to find out the date of service of notice and the expiry of the statutory period of notice as contemplated by section 106 of the Act and then to see if the suit is filed thereafter. In the absence of any period and date mentioned in the notice, the validity of the notice is dependent upon two factors; namely, the date of service/ deemed service, and the date of institution of the suit.

Forfeiture of lease-hold-interest

In *Kamini Kapoor* v. *Punjab National Bank,*[73] there was denial of title and interest of lessee over property by sub-lessee wherein he was stopped from denying title of his landlord (lessee) or lessor so long, he actually or ostensively enjoyed possession under landlord or lessor, and must deliver possession back only to him, even when head lease was expired. Sale of leased property by lessor to third party purchaser, sub-lessee entered into arrangement with purchaser and started occupying property under him and de-recognition of lessee, by sub-lessee was not proper on expiry of head lease, the sub lessee is liable to be evicted. This was considered by the court.

The court also held that a tenant or lessee or sub-lesse is stopped from denying the title of his landlord or lessor so long, he actually or ostensively enjoys possession under the landlord or lessor, and must deliver possession back only to him, even when the head lease has expired, was so eloquently put by the learned judge in his judgment.

The court also considered that relevant cases decided by the Supreme Court with all its authority elucidated on the subject in the case of *Vashu Deo* v. *balkishan*,[74] wherein is as follows: [75]

> ……[U]nder Section 108 clause (q) of the Transfer of Property Act, in the absence of contract or legal usage to the contrary, it is an obligation of the tenant to put his lessor into possession of the property on the termination of the lease. Section 116 of the Evidence Act, which codified the common law rule of estoppels between landlord and tenant, provides that no tenant of immovable property or person claiming through such tenant, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property. The rule of estoppels so enacted

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73 AIR 2013 Cal 206.

74 AIR 2002 SC 569

75 Privy Council opined in *Currimbhoy & Co, Ltd*. v. *L.A. Creet*, AIR 1933 PC 29 and *Bilas Kunwar* v. *Desraj Ranjit Singh*, AIR 1915 PC 96, the estoppels continues to operate so long as the tenant has not openly restored possession by surrender to his landlord.

> has three main features: (i) the tenant is stopped from disputing the title of his landlord over the tenancy premises at the beginning of the tenancy; (ii) such estoppels continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord; and (iii) Section 116 of the Evidence Act is not the whole law of estoppels between the landlord and tenant. The principles emerging from Section 116 can be extended in their application and also suitably adapted to suit the requirement of an individual case. Rule of estoppels which governs an owner of an immovable property and his tenant would also mutatis mutandis govern a tenant and his sub-tenant in their relationship *inter s*e.

Therefore, the defendant is entitled to no protection. There is no defence whatsoever to the claim of the plaintiff.

Absence of forfeiture clause and termination of tenancy

In *Smt. Bharathi Shetty* v. *B. Hanumanthappa,*[76] court considered about non payment of rent by lessee on breach of express condition of lease when there was no express forfeiture clause in lease agreement as regards non-payment of rent, lessor cannot have right to re-enter premises in absence of forfeiture clause and lessee not liable to be evicted. Only liable to pay arrears of rent along with costs and interest. This was decided by the court.

The court observed that terms of the lease did not stipulate that, if rent is not paid as agreed upon, the lessor would have right to re-enter the leased premises. Both parties while entering into the lease agreement have agreed, as regards the terms and conditions, stipulating that such of the conditions that are not specifically mentioned therein shall be governed by the principles of TPA, 1882 "as the case may be" as per section 108(c) & (1) of the Act, the lessor has the right for due payment of rent. The lessee without paying the rent cannot enjoy uninterrupted possession of the demised premises. But, this right which is introduced by the statute and which the lessor is deemed to possess in the absence of contract or local usage to the contrary cannot be brought within the four corners of the forfeiture clause spelt out under section 111(g) of the Act clothing the lessor with a right to re-enter, in case where the lease is for a fixed duration. The language of section 111 (g) admits of no other interpretation. Therefore, unless the lease provides that on breach of the condition regarding payment of rent, the lesser may re-enter, the parties cannot be said to have agreed for the forfeiture clause.

The court also observed that the conduct of the appellant-tenant in the instant case is unbecoming of a tenant. He has violated the terms and conditions agreed upon for payment of rent. Therefore, this has to result in imposition of cost, interest and such other consequences against him. But, it cannot be a ground to evict him as such a right can be claimed by the landlord only if there is forfeiture clause in the agreement of lease. There can be no forfeiture either by inference or by implication. The contract must contain an express condition that non-payment

76 AIR 2013 Kar 165.

of rent will enable the landlord to reenter the premises regardless of the duration of the lease. A lease is a contract where both parties *i.e.*, the lessor and the lessee will agree for certain conditions, covenants and stipulations. If they have not chosen to make breach of condition to pay the rent as an express stipulation entailing forfeiture of the lease with a right vested in the landlord to re-enter, this court cannot, apply the forfeiture clause to evict the tenants on the ground that the tenant has defaulted in paying rents.

It is a well established principle that there can be no forfeiture either by inference or by implication. The contract must contain an express condition that non-payment of rent will enable the landlord to re-enter the premises regardless of the duration of the lease.

Suit for recovery of possession

In *R.S. Iron Industries Pvt. Ltd.* v. *Calcutta Pinkjrapole Society*[77]a suit was filed for recovery of possession. On the expiration of term of lease, lease deed contained renewal clause, but lessee did not exercise option of renewal, Rent for period after expiration of lease by efflux of time was accepted by lessor in ignorance and he never assented for continuance in possession of lessee. Mere acceptance of rent after expiration of period reserved in lease deed does not create any right in lessee under section 116 in absence of assent of lessor. This was considered in this case. The court held that mere payment of a rent does not amount to an assent as contemplated under section 116 of the said Act, unless it is demonstrated that such payment has been made with clear stipulation and /or understanding or agreement of allowing the lessee to continue in possession.

On an analysis of the various authorities, it is quite evident that in order to attract the provision of section 116 of the TPA, 1882 there must be a bilateral agreement between the landlord and a tenant, that is, there must be an offer on the one side and acceptance on the other. It is further clear by the various authorities that the question whether the acceptance of rent was in token of a fresh contract of tenancy between the parties will be a question depending upon the facts and circumstances of each case.

Gift of property

Section 122 gives the definition of Gift as follows:

"A gift is the transfer of certain existing movable and immovable property made voluntary and without consideration by one person called the donor, to another person called the donee, and accepted by or on behalf of the done".

Acceptance when to be made: Such *Acceptance* must be made during the life time of the donor and still he is capable of giving. If donee dies before acceptance the gift is void.

The following are essentials ingredients of a Gift;

1) There must be transfer of ownership,
2) The ownership must relate to property in existing

77 AIR 2013 Cal 94.

3) It must have been made voluntarily
4) The transfer must be without consideration
5) There must be a donor
6) There must be a donee and
7) The donee must accept the Gift.

Section123 lays down the mode through which a gift may be made. For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. For the purpose of making a gift to movable property, the transfer may be effected either by registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as the goods sold may be delivered.

When registration of gift is necessary?

When registration of gift necessary is considered in *Asgar Ali* v. *Tahir Ali*[78] by the Madhya Pradesh High Court. Court held that gift of immovable property under Muslim Law requires no registration. The curtains are finally drawn on this aspect by a recent judgment of the Supreme Court reported in *Hafeeza Bibi* v. *Shaikh Farid* (dead) by LRs. and others.[79] He submits that the court below has relied on this judgment and rightly allowed the application under section 17 of the Registration Act, 1908.

In *Hafeeza Bib*i, the apex court has taken stock of various judicial pronouncements on the subject. Catenas of judgments of various high courts from 1922 were considered. The judgment of Calcutta High Court in the case of *Nasib Ali* v. *Wajed Ali,*[80] and judgment of Andhra Pradesh High Court in the case of *Inspector General of Registration and Stamps, Govt. of Hyderabad* v. *Smt. Tayyaba Begum,*[81] were also considered by the Supreme Court.

However, before dealing with this aspect, the court deems it appropriate to deal with certain important facets which were considered and decided by Supreme Court in *Hafeeza Bibi*. In no uncertain terms, it is made clear that in the Mohammedan Law, for the purpose of determining gift or *hiba*, three essential ingredients must be there. There are – (i) declaration of the gift by the donor, (ii) acceptance of the gift by the done, and (iii) delivery of possession. Pausing here for a moment, if this litmus test is applied on the instrument in question, it will be crystal clear that aforesaid three ingredients are present in the said document. The donor has given a specific declaration regarding gift, it is accepted by the done and the possession is handed over to the done. Thus, the said test is fully satisfied in the present matter. Now the basic question is whether in such situation the document/ instrument was required to be registered under the provisions of Registration Act,

78 AIR 2013 MP 151.

79 AIR 2011 SC 1695.

80 AIR 1927 Cal 197.

81 AIR 1962 AP 199.

1908 and whether in absence thereof it cannot be taken into account for any purpose including for the purpose of evidence.

It is mentioned that that section 129 of TP Act, 1882 preserves the rule of Mohammedan Law and excludes the applicability of section 123 of TPA, 1882 to a gift of an immoveable property by a Mohammedan. The Supreme Court approved the statement of law reproduced in the said judgment from Mulla.[82] In other words, it is held that it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under section 17 of the Registration Act, 1908. It is held that each case depends on its own facts.

Gift and will distinction

The difference between 'gift' and 'will' has been considered by the court in *Mathai Samuel* v. *Eapen Eapen (Dead) by LRs.*[83] Revocability of Will during life time of testator distinguishes will from gift.

Will is an instrument where under a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials.

(1) It must be a legal declaration of the testator's intention;

(2) That declaration must be with respect to his property; and

(3) The desire of the testator that the said declaration should be effectuated after his death.

A will is, therefore, revocable because no interest is intended to pass during the life-time of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in question is not decisive. A Will need not be necessarily registered. The mere registration of 'Will' will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in present in favour of the settles or it intended to transfer interest in favour of the settles only on the death of the settlers.

Document having characteristic of Will and gift, needs to be registered that however does not have effect of documents ceasing to be Will. In a composite document, which has the characteristics of a Will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to. Therefore, it is not unusual

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82 *Principles of Mohammedan Law* 120 (Lexis-Nexis, 19th edn. 1990).

83 AIR 2013 SC 532.

to register a composite document which has the characteristics of a gift as well as Will. Consequently, the mere registration of document cannot have any determining effect in arriving at a conclusion that it is not a Will. A 'Will' need not necessarily be registered. But the fact of registration of a 'Will' will not render the document a settlement.

IV CONCLUSION

As usual, the present year which is under survey, courts have decided many cases relating to the rights of parties to immovable property concerning different areas of the provisions of T.P. Act. In this regard, courts have played considerable role in settling rights of the disputed parties while interpreting provisions of the Act. In this regard, opinion expressed recently by Bhandari J in the case of *A. Shanmugam* v. *Ariya K.R.K.M.N.P. Sangam*[84] elaborated on the role of a judge in the Indian system is worth to emulate. He said the judge has to always keep in mind that "every trail is a voyage of discovery in which truth is the quest. In order to bring on record the relevant fact, he has to play an active role, no doubt within the bounds of the statutorily defined procedural law. In the administration of justice, judges and lawyers play equal roles. Like judges, lawyers also must ensure that truth triumphs in the administration of justice. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of leading and documents in order to ascertain the truth on the facts of the present case." This is exactly followed by the Supreme Court and the high courts in India while deciding in many cases came before them in the year, 2013.

84 AIR 2012 SC 2010