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PROPERTY LAW

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I INTRODUCTION

THE COURTS have scanned the provisions of Transfer of Property Act, 1882 (hereinafter TPA) 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 2014 and they are analysed and reported in the present survey on the property law.

II GENERAL PRINCIPLES

Transfer of property

In *Vikram Singh* v. *Ajit Inder Singh*,[1] the court considered application of the provisions of section 17 of Registration Act, 1908. Document not compulsorily registrable deed of family settlement, reduced into writing because it has already been acted upon by parties and parties acknowledged antecedent and court observed that the title deed does not require registration, to be admissible in evidence.

Oral transfer

In *V. Ethiraj* v. *S. Sridevi*,[2] the court held that registered settlement deed cannot be cancelled by executing cancellation deed, further settlor cannot unilaterally execute cancellation deed of settlement. Here the purchaser purchased entire property from defendant and was aware that defendant was only owner of half portion of the suit schedule property. The court held that the purchaser cannot claim to be the bona fide purchaser without notice of proceedings relating to said property and cannot claim absolute title to entire property.

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1 AIR 2014 Del 173.

2 AIR 2014 Kar 58.

Conditional transfers

Balachandran v. *S. Sujatha*,[3] is case of a suit for partition. In this, defendant sought that gift deed in favour of pre-decessor of defendants over property was void because, plaintiff unable to prove that gift deed executed by his mother in favour of his brother was fabricated deed created by his brother pre-decessor of defendant. Held that gift deed was registered document, and cannot be declared void and claim for partition, not tenable.

Ramswaroop (D) Th. L. Rs. v. *State of M.P*,[4] is a case where under the provisions of section 34 of TPA, a suit for declaration, was filled when property allegedly purchased vide unregistered sale deed, value of land mention as only Rs. 90/-, but sale deed required to be registration under section 54 to be admissible as evidence Title and possession were not proved. Court held that declaratory relief cannot be granted.

In this case, as per contention of the appellants' counsel, the disputed property was purchased which is not in registered document. Though the value of the land has been mentioned only as Rs.90/-, the said document was required to be registered as per section 54 of the TPA, under which, it has been stated that a document for sale of the immovable property having value less then Rs.100/- is written, it must be registered, failing which, the said document cannot be admitted in evidence as held in the judgment of the case of *Davendra Singh* v. *State of Rajasthan*[5]

Considering the aforesaid provision, it is concluded that the alleged sale deed does not have any legal property to prove the title and possession of the plaintiffs. Be it said, the plaintiffs have not mentioned any survey number, why it was not specifically stated in the in the plaint. The afore said facts give rise to suspicion regarding the story narrated by the plaintiffs. No such document has ever been produced on record to prove the ownership of the predecessor of the plaintiffs *i.e.*, vendor. As per the 'khasra' entries the survey number has been recorded as 'sadak' which indicates the ownership of the state government.

On perusal of the record, it has been found that the plaintiff had already filed a suit for declaration of title and permanent injunction against the Municipal Corporation, Gwalior. The said suit was dismissed by this court, wherein this court has held that the land in question is a government land. The said findings have become final. It is evident that the plaintiff had utterly failed to have proved his title and legal possession on the disputed land also in the earlier litigation.

Transfer by ostensible owner

In *Ms. Baby Rani* v. *Manik Dey*, [6] there was a transfer of land by ostensible owner and claimed protection under section 41. Claim for right, title in land by plaintiff on account of transfer of land by 'B' in favour of plaintiff by virtue of sale

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3 AIR 2014 Ker 80.

4 AIR 2014 MP 59

5 AIR 2002 Raj 66.

6 AIR 2014 Gau 56.

deed. Absence of any pleadings by plaintiff that 'B' was ostensible owner with consent of original owner of land. Failure of plaintiff to prove that he acted in good faith taking reasonable care to ascertain that 'B' had power to transfer land, plaintiff is not entitled to protection under section 41 of Act.

Section 41 of the said Act provides that where, with the consent, express of implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. 4 (four) conditions, therefore, are required to be pleaded and proved to constitute a valid transfer by ostensible owner, namely. (i) that the transferor is the ostensible owner, (ii) that he is so by the consent, express or implied, of the real owner, (iii) that the transfer is for consideration and (iv) that the transferee has acted in good faith and he took reasonable care to ascertain that the transferor had power to transfer.

In the instant case, the plaintiff claims the right, title and interest contending that as Brojendra, who had the title, has transferred the land in favour of the plaintiff by a sale deed, he has acquired the right, title and interest. Court held that there is absolutely no pleading, not even a whisper, that Brojendra was ostensible owner, that he is so by consent, express or implied, of the real owner; and that the plaintiff has acted in good faith, taking reasonable care to ascertain that Brojendra had power to transfer, so as to get the benefit of section 41 of the Act.

In *Manjari Devi* v. *Usha Devi*,[7] the court considered the validity of transfer by ostensible owner. In this case, property was jointly owned by three persons. There was no partition between them- consent of all owners necessary before transfer of property by one owner. Here neither consent taken nor transferee ascertained fact whether transferor had power to transfer property. Hence transferee was a not bona fide purchaser. The court held that the transferee is not entitled to benefit of section 41.

Doctrine of feeding the grant by estoppel

In *Agricultural Produce Marketing Committee* v. *Bannamma (D) by Lrs*,[8] the Supreme Court was confronted with the doctrine of feeding the grant by estoppels. The doctrine is based on the principle of law of estoppel. It simply provides that when a person by fraudulent or erroneous representation transfers certain immovable property, claiming himself to be the owner of such property, then such transfer will subsequently operate on any interest which the transferor may acquire in such property during which the contract of transfer subsists. This doctrine known in English law has form part of Roman Dutch law, according to which where a granter has purported to grant an interest in the land which he did

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7 AIR 2014 Chh 22.

8 *Agricultural Produce Marketing* v. *Bannamma (D) By Lrs* AIR 2014 SC 3000.

not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee. In other words, where a vendor sells without title in the property, but subsequently acquires title then a right accrues to the purchaser to claim interest in the said property and it automatical goes in favour of the transferor.

Lis-pendense

In *K.N. Aswathnarayana Setty (D) Tr. LRs* v. *State of Karnataka*, [9] court dealt with *lis pendens,* and equitable doctrine, and held that it is not bind on the party to suit from dealing with suit property, but makes transfer subject to rights of other party under decree that may be passed.

In this case, petitioner was purchaser of land while decision of release was under challenge and, subsequent by quashing of order of release under section 4 and notification gets revived. Purchaser being bound by decision of court cannot claim that he had right to purchase acquired land. It was held that dismissal of his application for release was proper. More so when possession of land had already being taken.

Before High Court of Karnataka in *Smt K Padma* v. *K. Ramachandra*,[10] The question was whether doctrine of *lis pendens* was applicable to the alleged sale agreement between respondent nos.4 and 1. In this case, the high court ruled that the principles of section 52 of the TPA are also on the foundation that one party to the proceeding cannot commit fraud on the other party during the pendency of the proceedings before the court. The alleged transaction of agreement for sale between respondent nos. 4 and 1 in respect of the very property, which was attached and purchased by the petitioner herein in auction sale, that was confirmed, makes it clear that it is only with intention to overcome the statutory provisions and to have the wrongful gain in the matter. When auction sale was confirmed and respondent no.2-bank realized its dues from the said sale, in the strict sense, the auction purchaser has stepped into the shoe of the creditor bank to enforce here rights in respect of the property purchased in the auction. Therefore, the high court negated the contention that the auction purchaser has no right to challenge the transaction of alleged agreement for sale between respondent nos. 4 and 1. Finally the high court has aptly allowed the petition approving the auction purchase. The impugned order of the Debt Recovery Appellate Tribunal at Chennai was set aside.

Haji Abdul Mateen (Decd) through his LRs. v. *Sheikh Haji Firozuddin*[11] is a case dealing with *lis pendense*. In this case, there was a suit for possession of property *pendent lite*, held it is void as against successful plaintiff and decree would bind transferee *pendent lite* as it binds parties to suit even if the transferee *pendent lite* cannot claim protection under section 52 of the TPA by raising objections under Order 21Rule 97of the Code of Civil Procedure, 1908.

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9 AIR 2014 SC 279.

10 AIR 2015 Ka 40.

11 AIR 2014 Del 111.

Part- performance

A. N. Nagarajaiah v. *B. Aravind* [12] is a case relating to temporary injunction and proof of possession in sale-deed containing recital that possession had been delivered to plaintiff purchaser on date of sale where *prima facie* case of lawful possession made out by plaintiff and grant of temporary injunction in favour of plaintiff, proper.

Section 54 of the TPA, categorically states that a contract for sale itself does not create any interest in or charge on such property. Section 53A of the Act provides protection to a transferee who in part performance of the contract had taken possession of the property, even if the limitation to bring suit for specific performance has expired. One of the essential conditions to be fulfilled for being entitled to the said protection is, the transferee must in part performance of the contract taken possession of the property or of any part thereof. Therefore, Section 53A of the Act confers a statutory right on the transferee. This provision has been abused in recent years. Taking note of the recent trends, especially under the guise of this agreement of sale containing a recital to the effect possession is delivered to the transferee, the transferors were dispossessed and protection was sought in a court of law, putting forth this statutory right. In those circumstances, the Parliament has stepped in and has amended the Registration Act, 1908 by the Amendment Act, 2001. The amended provision in section 17 makes it clear that, if the benefit of section 53A of the Act is to be available, then the contract for sale shall be registered. If not registered then they shall have no effects for the purpose of the said section 53A. However, this provision is made prospective and it applies to a contract for sale executed on or after the commencement of the Registration and other related Laws (Amendment) Act, 2001.

In the instant case, the agreement of sale is dated June 27, 2005. There is a recital to the effects that possession was delivered and the sale is not registered. Therefore, the said agreement of sale shall have no effects for the purpose of section 53A. The defendant cannot rely on the said document and contend that he was in possession of the schedule property on the date of sale in favour of the plaintiff. In the sale-deed in favour of the plaintiff, there is a recital that possession has been delivered to him on the date of sale. On proper appreciation of these facts, both the courts below have rightly come to the conclusion that the plaintiff has made out *prima facie* case of lawful possession and granted temporary injunction in his favour. Therefore, the court did not find any merit in the agreements canvassed on behalf of the petitioner. Hence, the write petition is dismissed.

Ashok Kumar Jaiswal v. *Ashim Kumar Kar,*[13] another case on part-performance section 54 of the TPA would suggest, a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. So an agreement for sale would *ipso facto* not create any

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12 AIR 2014 Ka 140.

13 AIR 2014 Cal 92.

charge or interest over the property. Hence, the nature of the contract has to be ascertained.

Section 53A of the said Act would suggest, if a proposed transferee of an immovable property under an agreement for sale is put in possession and continues in possession in part performance of the contract and does some act in furtherance of the contract and is willing to perform the balance part, his possession would be protected and the transferor would be debarred from dispossessing him other than under a right expressly provided by the terms of the contract. The development agreement is also an agreement for sale subject to certain conditions. In short, it is an agreement for conditional sale. If we accept *Vipin Bhimani* v. *Sundananda Das*[14] and deny a developer specific performance of such a contract, where he was put in to possession by the owner and he continued to act in furtherance of the contract, we would still not be in a possession him view of the express provision of section 53A of the TPA. At the end, if a developer files a suit for specific performance of a contract and the owner files a suite for recovery of possession, we would have to dismiss both on different logic, this would create a ridiculous situation. Court of law is duty bound to resolve the controversy as far as practicable that is brought before it. The court of law is not entitled to complicate the issue by making the controversy more complicated. The court held that analogy of *Vipin Bhimani*[15] must fail.

If the original contract creates an interest in favour of the developer, even if the Power of Attorney is revoked, such interest would not evaporate. Hence, the analogy under the Contract Act, 1872 would also lead to the conclusion. *Vipin Bhiman*i[16] did not speak of the correct proposition of law.

Manglu Mool Singh v. *Kunjlal* [17] is a case relating to adverse possession wherein plaintiff in possession of property on the basis of unregistered sale agreement and not sale deed. Notice issued by him calling upon vendors to execute sale deed else he would seek specific performance. No suit for specific performance however filed. Till issuance of notice, possession cannot be said to be adverse or hostile and no question of prescription of title by adverse possession.

The court held that contract for sale was not in writing vendee is not entitled to claim possession based on doctrine of part performance. *Bhavuti s/o Gorelal* v. *Alam*,[18] is case another case decided by Madhya Pradesh High Court on the benefit of availability of part performance. Defendant vendee took no steps for execution of sale deed or paid balance amount of sale price. Also, any suit for specific performance of contact despite expiry of period of limitation was not filed and the defendant was not ready and willing to perform his part of contract. Held the defendant is entitled to benefit of part performance under section 53-A of Act.

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14 AIR 2006 Cal 209.

15 *Ibid.*

16 *Supra* note 14.

17 AIR 2014 Chh 31.

18 AIR 2014 MP 14.

III SPECIFIC TRANSFERS

Mortgage by conditional sale

Jogendra Chandra Das v. *Smt. Kirtika Devi*[19] is a case decided by the High Court of Guahati regarding determination of sale or mortgage by conditional sale. Here they were two separate deeds of sale deed and unregistered reconveyance deed, and no condition of repurchase in sale deed. Condition of repurchase brought in by separate deed of reconveyance- condition of repurchase to be in same document for transaction to be mortgaged by conditional sale. Held when deeds not executed on the same day, even execution of reconveyance deed is doubtful as date of execution doubtful. Held transaction, is one of clear sale.

The court also observed that the language of the proviso referred to above is apparently plain and unambiguous. It is the established principle of interpretation that once the language of a statute is clear, there is no scope for further interpretation. Literal interpretation of the statute is the normal role. Taking plain meaning, of the proviso referred to above, necessarily connotes that unless the condition of repurchase is embodied in the same document effecting the sale, the transaction should not be deemed as mortgage at all. In case the condition of re-purchase is brought in by parties by a separate deed, the first deed effecting sale cannot be deemed to be a mortgage by virtue of proviso to section 58 (c) of the TPA. After 1929 amendment of the TPA, there is no necessity of making any probe to decipher the intention of the parties for the purpose of ascertaining as to whether the transaction was a mortgage with conditional sale or it is a sale with condition to repurchase.

This observation of the Supreme Court is in conformity with proviso to section 58 (c) of the TPA. This judgment was delivered by a bench constituting of three Honorable judges. It has been mentioned in the preceding paragraph of this judgment that the first appellate court relied on a two judges bench decision of *Santakumari* v. *Lakshmi Amma Janaki Amma* [20] wherein this earlier larger bench judgment was not considered a deed of sale and a deed of reconveyance executed separately on the same date and held that intention of the parties was to execute mortgage by conditional sale. It appears the proviso to section 58 (c) did not come up for consideration before the Supreme Court in *Santakumari* is distinguishable on facts. Rather the earlier three judges bench decision in the case of *K. Simrathmull* v. *Nanjalingiah Gowda*[21] is applicable to the case in hand. It is thus clear that sale deed and in view of proviso to section 58 (c) of the TPA cannot be construed to be a one as a mortgage deed by way of conditional sale. The first substantial question of law, therefore, is decided in the negative.

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19 AIR 2014 Gau 10.

20 AIR 2000 SC 3009.

21 AIR 1963 SC 1182.

Mortgage by deposit of title deeds

In *State of Haryana* v. *Navir Singh* with *State of Punjab* v. *Pagro Foods Ltd.,*[22] court considered mortgage by deposit of title deeds, Held mere deposit of title deed does not create or extinguish right or liability. Question of payment of registration fee and stamp duty does not arise. The high court considered the objection and negatives the same in the following words:[23]

> We are of the view that an equitable mortgage is created by deposit of title-deeds and not through any written instrument. Simple pledge of the title-deeds to the bank as security creates an equitable mortgage, therefore, there is never an instrument of deposit of title deed/equitable mortgage. The petitioner simply went to the bank and handed over the title-deeds of their respective properties. This act was enough to create a mortgage as envisaged under Section 58(f) of the Transfer of Property Act. Quite often a memorandum is simply a written record of the pledge. The memorandum itself is not an instrument of mortgage...

In *Maya Devi* v. *Lalta Prasad*[24] the Supreme Court held registered document has more probative value than unregistered document.

Allahabad Bank v. *M/s. Shivganga Tube Well,*[25] is case decided by High Court of Bombay where the court considered that mortgage by deposit of title deeds, requires no registration. However, if any document was executed to show that mortgagee under said document had mortgaged the property by deposit of title deeds then registration of said document is necessary. Court also asked to consider mortgage by deposit of title deeds and suit for payment of money secured by mortgage and the period of limitation from the date when money becomes due.

In case when loan is taken from the bank and the document on record shows that respondents had intention to create security for repayment of loan availed by principal borrower, then there is liability for guarantor. They have deposited title deeds with bank. Those facts clearly showing that they stood as guarantors and created mortgage of their property for repayment of loan advanced to principal borrower by depositing their title deeds and they would be jointly and severally liable to pay loan amount.

There is no need to refer any authority or case law to show that the mortgage by deposit of title-deeds requires no registration. However, if any document is executed, which would show that the mortgage has under the said document mortgaged the property by deposit of title-deeds, then only the registration of the said document is required. However, the contemporaneous document fortifying the "intention to create the security" executing the same is either an agreement to

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22 AIR 2014 SC 339.

23 *Id*. at 340.

24 AIR 2014 SC 1356.

25 AIR 2014 Bom 100.

mortgage or a mortgage. The deposit of title-deeds itself with intention in the mind of the person that the said title-deeds are being deposited with intention to create a security, thereon is sufficient to culminate the transaction into a mortgage by deposit of title-deeds. This mortgage by deposit of title-deeds is sometimes called as equitable mortgage, as was prevalent in England. However, the ingredients of the equitable mortgage and the mortgage as defined under section 58 (f) of the TPA are not identical.

Court observed that the documents on record would show that the respondent has intention to create the security for the repayment of loan availed by the principal borrower. Therefore, they showed their readiness to deposit the title-deeds by various agreements as affidavits and also by placing all the title verification certificates by the advocates, *etc*. and ultimately, they deposited the title-deeds with the appellant bank at Hyderabad branch. The judge of the trial court, however, differentiated between the "agreement to mortgage" and to actually "mortgage the immovable property".

Regarding application of limitation period, the court observed that once it is concluded that the respondent have created mortgage by deposit of title-deeds for the repayment of the loan amount, naturally the limitation in their case would be governed by the provisions of article 62 of the Limitation Act,1963 read with section 96 of the TPA.

Court also considered that there cannot be two opinions that the suit for enforcement of money secured by mortgage can be filed in case of a simple mortgage. Since the same provision would apply to a mortgage by deposit of title-deeds, the period of limitation would be twelve years from the date when the money becomes due. Therefore, no issue of limitation as such would arise in the present case.

Right of usufractury mortgagor

In *Singh Ram (D) Tr.Lr* v. *Sheo Ram*[26] the Supreme Court held that we are of the opinion that the matter should be heard by a larger bench. "Before adverting to the question of reconciling conflicting opinions in various decisions, including the two decisions referred to above, we consider it appropriate to mention that by the impugned judgment, the Full Bench of the High Court of Punjab and Haryana at Chandigarh, considered the question "whether there is any time limit for usufructuary mortgagor to seek redemption?" and decided the said question in the negative, in favour of the respondent-mortgagor as follows:[27]

> Therefore, we answer the questions framed to hold that in case of usufructuary mortgage, where no time limit is fixed to seek redemption, the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money

26 AIR 2014 SC 3447.

27 *Id*. at 3449.

> or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable.

The correctness of the above view is the subject matter of consideration before this court.

A three judge bench of the Supreme Court of India, speaking through Adarsh Kumar Goel J, in *Singh Ram (D) Tr.Lr*[28] gave clarification relating to the redemption of Usufructuary mortgage. The doctrine of redemption of mortgaged property was not recognised by the Indian courts as the essence of the doctrine of equity of redemption was unknown to the ancient law of India. The Privy Council in *Thumbaswamy Mudelly* v. *Mohd. Hossain Rowthen* [29]called upon the legislature to make a suitable amendment which was given a statutory recognition by reason of section 60 of the Transfer of Property Act. The apex court viewed the very conception of mortgage involves three principles. *First*, there is the maxim: 'once a mortgage, always a mortgage'. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). *Secondly*, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. *Thirdly*, as a corollary from the first, another principle may be deduced, namely, 'once a mortgage, always a mortgage, and nothing but a mortgage'. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

It is now well settled, according to the court that the right of the mortgagor, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage. The apex court explained that the right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to section 60 of the Act which is extinguished either by a decree or by act of parties. The Supreme Court has held the redeeming features of usufructuary mortgage. They were (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage- money, or partly in lieu of interest and partly in payment of mortgage- money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received, and (d) there is no remedy by sale or foreclosure.

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28 *Ibid.* See observations of Adarsh Kumar Goel J.

29 (1875) L.R. 2 I.A. 241.

Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties.

Right of redemption

Bishni Devi Shaw v. *The Federal Bank Ltd.*,[30] is a case where an application for mortgage intended to redeem mortgage by depositing amount fetched in auction sale of property, kept as collateral security with bank, after sale was conformed and made absolute by issuance of sale certificate. No suggestion was made that price fetched in auction sale was shockingly low. Rather better offer received for disputed property. Once sale is made absolute on issuance of sale certificate there is a right to mortgagor to redeem mortgage. Held rejection of application was proper.

The court expressed that there is no quarrel to the settled proposition of law that it is a bounded duty of the court to see that the best price is fetched at the auction as held in case of *Divya Manufacturing Company Pvt. Ltd.*[31] The aforesaid proposition of law in my considered opinion has no manner of relevance in the present context. What the petitioner intended is to allow him to redeem the mortgage by depositing the amount fetched in the auction sale, after the sale is conformed and made absolute upon issuance of the sale certificate. It is not even remotely suggested that the price fetched in the auction sale is shockingly low and a better offer is, in fact received for the disputed property. The right of the mortgager to redeem the mortgage is lost, once the sale is made absolute on issuance of that sale certificate. The aforesaid proposition can further be fortified from the recent judgment of the Supreme Court rendered in case of *Rama Kishun* [32]

In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is co-extensive with that of principal debtor. In case, there is more than one surety, the sureties for unpaid amount of loan. Once the sale has been confirmed, it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud.

The court further observed that the contingencies as laid down in the above referred judgment has not been made out and, therefore, this court has no hesitation to hold that the sale cannot be reopened at the instance of the petitioner after it is made absolute. Additionally, this court found that the tribunal has sufficiently protected the interest of the petitioner in directing the auction purchaser to pay the differential amount to meet the price quoted by the petitioner to be reasonable and the market price which, in fact have been deposited by the successful bidder.

Malika Rout v. *Gani Khan*. [33] applicability of section 60 was considered when mortgage transaction taking place in year 1924 in ex- State of Talcher, with

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30 AIR 2014 Cal 90.

31 AIR 2000 SC 2346.

32 AIR 2012 SC 2288.

33 AIR 2014 Ori 155.

permission of revenue officer in Rules and Regulations of State of Talcher (1937), there was nothing contrary to principle underlining section 60 of Act. Held that, it cannot be said that provisions contained in section 60 of Act or principle underlining that section were not applicable to mortgage in question. Order that holding Act to be in force in Talcher State prior to 1945-46 and that section 60 of Act was applicable to mortgage. Hence the transaction was proper.

Lease/tenancy of the building includes land

In *M/s. Shaha Ratansi Khimji & Sons* v. *Proposed Kumbhar Sons Hotel P. Ltd.*,[34] the Supreme Court observed that 'immovable property' means landed property and may include structures embedded in the earth such as walls or buildings for the permanent beneficial enjoyment. A lease of immovable property is a transfer of right to enjoy such property in consideration of price paid as per section 105 of the TPA.[35] By way of lease, a right and interest is created which stands transferred in favour of the lessee. The immovable property, thereafter, only can be reverted back on determination of such right and interest in accordance with the provisions of the TPA.[36] Therefore, once the right of lease is transferred in favour of the lessee, the destruction of a house/building constructed on the lease property does not determine the tenancy rights of occupant which is incidental to the contract of the lease which continues to exist between the parties. The Supreme Court in the instant case has overruled the decision rendered in *Vannattankandy Ibrayi* [37] and has reaffirmed its decision in *Lakshmipathi* v. *R.Nithyananda Reddy.*[38] In

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34 AIR 2014 SC 2895.

35 S.105 of the T.P. Act defines 'lease' and the said definition is as under: 105. Lease defined.-

> A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express Mor implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms…

36 The relevant provision is s. 108 of the TPA explains the rights & liabilities of lessor and lessee.

37 *Vannattankandy Ibrayi* v. *Kunhabdulla Hajee* (2001) 1 SCC 564 decided by V.N.Khare, and S.N.Phukan JJ.

38 (2003) 5 SCC 150, R.C. Lahoti, Arun KumarJJ., the apex court held that lease of a building includes, the land on which the building stands. So even if the building is destroyed or demolished, the lease is not determined as long as the land beneath it continues to exist. Doctrine of frustration cannot be invoked on destruction or demolition of a building under lease where not only privity of contract but privity of estate is also created. In T. Lakshmipathi's case, the Court referred to the observations made by a three-judge bench in *Raja Dhruv Dev Chand* v. *Harmohinder Singh*, AIR 1968 SC 1024 wherein it has been held that doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contract but a privity of estate has also been created inasmuch as lease is the transfer

T. Lakshmipathi case,[39] the court took note of the fact that the land and superstructure standing on it as a singular component for the purpose of tenancy. It is in tune with the statutory provision. Therefore, the Supreme Court agreed with the proposition stated in *Lakshmipathi* case[40] to the affect that "in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist".

Eviction of lease

In *Ratan Lal* v. *Gopal* [41] court considered the filing of suit by one co-owner. The suit in the present case has admittedly been filed by Gopal, who is one of the co-owners of the suit premises, which was owned by Fateh Lal Arora and besides him, at the time of filing of the suit, Subhash, Munna Devi and Radha Devi were the co-owners of the said premises. It is also an admitted fact that the appellant-defendant has been paying rent of the suit premises lastly to Gopal- plaintiff only, which was proved by rent receipts. Further, the appellant has also claimed in the written statement that when Gopal refused to accept rent, he has tendered the rent by money order to Gopal, which money order was refused by him as such there is no dispute about the relationship of landlord (lessor) and tenant (lessee) between the appellant and the plaintiff. Further, it is not the case of the appellant that other co-owners are opposed to such eviction.

From the above law laid down by Supreme Court, it is well settled that one co-owner can file the suit for eviction. The said principle has been laid down differs the fact whether suit was filed under a rent legislation or under TPA. The law laid down by the High Court of Gujarat in the case of *Nanalal Girdharlal* [42] has apparently lost its relevance in view of the subsequent judgment of the Supreme Court in the case of *Sri Ram pasricha*[43] as noticed by Supreme Court in the case of *Narpatchand A. Bhandari*.[44]

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of an interest in immovable property within the meaning of s. 5 of the TPA. In the said case, it has been further opined that under a lease of land there is a transfer of right to enjoy that land. If any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, flood, violence of an army or a mob, or other irresistible force, the lease may at the option of the lessee, be avoided and that is the rule incorporated in s.108 (e) of the TPA and applies to leases of land.

39 *Ibid.*

40 *Ibid.*

41 AIR 2014 Raj 53.

42 AIR 1973 Guj 131.

43 AIR 1976 SC 2325.

44 AIR 1993 SC 1712.

Shree Ram Urban Infrastructure Ltd.(Formerly Known as Shree Ram Mills Ltd.) v. *Court Receiver, High Court of Bombay*[45] wherein the Supreme Court held that when authority has been given to the receiver to preserve the estate, it empowers the receiver, *i.e.*, for preserving the estate, he has a right to institute the suit and, accordingly, in the light of the said judgment, we express our opinion and accept the reasoning given by the high court that the receiver had the authority to institute a suit for preserving the estate.

Lease deed and sale deed

Ashok Kumar Jain v. *Board of Revenue Gwalior*[46] is a case where the court was asked to discuss on whenever a purchaser demands a lease deed or sale deed and where ownership of land was not transferred. Rate of yearly ground rent and its terms mentioned in deed. The burden of discharging all types of taxes cast upon lessee. Conditions imposed that lessee shall not make any excavation upon any part of land or remove any stone, sand, gravel, clay or earth there from. Held that document in question is lease-deed and not sale deed. Stamp duty is payable in terms of article 35 of unamended schedule 1A.

Master Pieces Furniture Pvt. Ltd. v. *K. Lakshma Reddy* [47]is another case relating to suit for eviction of tenant. The court observed that where it is not barred by arbitration clause in lease deed, as with expiry of lease agreement, arbitration clause does not survive. A judge of this court in *Smt. Penumalli Sulochana* v. *Harish Rawtani*,[48] has also held that the subsistence of a lease under a lease deed would only be up to the period specified therein and once the lease deed became redundant, any clause such as an arbitration clause contained in it also ceases to apply and section 8 cannot be invoked by a defendant in a suit for recovery of possession filed against a tenant.

Court observed that in view of the above said facts and circumstances, this court is of the considered view that the arbitration clause referred to by the defendant in a prior lease deed, to by the defendant in a prior lease deed, which has already expired cannot be used to decide the rights of the parties after expiry of the lease tenure and under these circumstances, the rights being sought to be enforced do not relate to the said lease deed or tenure but to a period later in time.

In *Vinton Healthcare Ltd.*, v. *Balbir Kumar Malhotra*,[49] another case on similar facts, the High Court of Punjab and Haryana held that with the expiry of the lease period stipulated in the lease deed the agreement itself came to an end and thus arbitration clause also ceased to operate and, therefore, learned trial court was fully justified in rejecting the application. Though it is settled law that it

45 AIR 2014 SC 2286.

46 AIR 2014 MP 94.

47 AIR 2014 AP 56.

48 2013(5) ALD 573.

49 2009 (2) ArbLR 292 (P&H).

cannot be laid as abstract proposition that whenever the contract is completed all the rights and obligation of the parties under the contract *ipso facto* come to an end and the arbitration agreement also perishes with the contract. Each case is required to be considered on its own facts. The settled law, therefore, is that the arbitrator can decide the matter arising out of the contract even after expiry thereof, if reference is to be made to the said contract to determine the claim raised. However, in case no reference is required to be made to the contract and the plaintiff claims no right under the said contract with the expiry of lease in the present case arbitration clause also comes to an end and thus there exists no arbitration agreement between the parties.

These judgments apply on all fours to the present case. In view of the above, the court held that the dispute in the suit is not covered by the arbitration clause in the lease agreement as the lease agreements themselves did not survive after stop altered date. Therefore, the court held that there is no error of jurisdiction in the order passed by the trial court dismissing interim application. Consequently, the civil revision petition was dismissed.

In *Lakshmi Narayan Gupta* v. *Secretary, Khadi Gramodyog Vikas Mandal, Buddhanpur* [50] decided by High Court of Orissa , there was notice for tenant created by way of lease/ rent agreement executed between parties by unregistered document held document neither renewed nor registered, Also considered that three months prior notice for termination of tenancy not necessary in 30 days notice given under section 106 of Act is proper.

Feeling aggrieved by the judgment and order on August 17, 2010, the tenant/ respondent preferred a revision before the District Judge, Hardwar. The revisional court, after hearing the parties, came to the conclusion that a 30 days notice under section 106 of the TPA would be given only in absence of any agreement. However, in the present case there was a written agreement wherein a condition was stipulated according to which a three months' prior notice was required to be given for termination of tenancy. On this ground alone, the revisional court allowed the revision of the tenant/ respondent by judgment and order.

Lease of uncertain duration

Jayalakshmi Patra v. *Shyama Kanta Mohanty*,[51] relating to specific performance of contract where leased property belongs to state. Here agreement of sale entered into between vendee and lessee in respect of leasehold property belonging to state there was violation of covenants of lease deed by vendee. Owner of land would have got right of re-entry into suit premises as well as right to prevent use of suit land for purpose other than that specified in lease deed. As such, interest in leasehold being created in respect of suit land, Held that the state could not be directed to execute sale deed in favour of vendee and pro-forma

50 AIR 2014 Ori 162.

51 AIR 2014 Bom 143.

defendant and court considered that vendee was not entitled to relief of specific performance.

"Where under the terms of the lease deed, the lease was for a period of 90 years on payment of premium payable in 10 equal installments on or before stipulated dates, It was also subject to payment of rent as specified in the deed. Under the terms of the lease, the lessee was to hold and use the leasehold property only for commercial purpose which was none other than running of a cinema hall by raising structures in strict conformity with the plan annexed to the lease deed. The lease was also subject to the condition that the cinema hall within 36 months of within such time as would be extended by the lessor from time to time. It was also found from the lease deed that the lessor had reserved the right of re-entry for any breach of the covenants under (v) of (xiii) of clause 2 of the lease deed. But what the vendee had pleaded makes it clear that the term of the lease had been clearly violated after execution of the agreement for sale. The vendee claims to have developed the suit land making huge investment and presently the firm, running its wholesale distribution business from the building now standing over the suit land. Such use of the suit premises was in clear violation of covenant (xiii) of the lease deed which lays down that the lessee shall not, without the consent in writing of the lessor, use of permit the use of the land for any purpose other than that for which it is leased. It also contravenes the covenant (v) of the lease deed which lays down that the lessee shall not erect or build or permit to be erected or built on the demised premises any building other than that specified in a plan approved by the lessor, nor shall he make any addition to any existing building or structures at anytime except with the written approval of the lessor, For such contravention, the owner of the land has got right of re-entry into the suit premises as well as the right to prevent use what is specified in the lease deed. For these subsequent developments vendee cannot be said to have come to the civil court with a clean hand. So, as against state, no interim injunction could be granted preventing State to take any coercive action against the vendee and the pro forma defendants. That apart, since an interest in the leasehold had been created in respect of the suit land, the State could not be directed to execute a sale deed in favour of the vendee and the pro forma defendant which was the main prayer made in the plaint." As such no *prima facie* case being made against State, vendee was not entitled to relief of specific performance.

Denial of land lord title and forfeiting of lease-hold interest

Lahu s/o. Namdeo Ingale v. *Kailash Matasaran Gupta.*,[52] is case decided by High Court of Bombay where in transfer of ownership of property to landlady by sale of property to her and subsequently tenant denying title of landlady before rent controller, and failure by tenant to obtain declaration against her about her ownership. Denial of tile by tenant was not *bona fide*. Held determination of lease under section 111(g), was proper.

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52 AIR 2014 SC 2895.

Termination of lease

In *M/s Shaha Ratansi Khimji & Sons* v. *Proposed Kumbhar Sons Hotel P. Ltd* [53] the court held that destruction of house/building constructed on leasehold property–does not determine tenancy right of occupant.

As we notice from the aforesaid analysis it is founded on an interpretation of section 108 (B) (e) by assuming when a building or structure is leased out, it is the superstructure that is leased out in exclusivity. As we perceive, the language employed in section 108 (B) (e) does not allow such a construction. The singular exception that has been carved out is the wrongful act or default on the part of the lessee which results in the injury to the property that denies the benefit. In all other circumstances which find mention under section 111 of the Act, are the grounds for determination of the lease. This is the plainest construction of the provision and there is no other room for adding to or subtracting anything from it

Agricultural Produce Marketing Committee v. *Bannama (D) by LRs.*[54] is case on doctrine of grant by feeding the estoppel. Here transferor, son fraudulently transferred property owned by his mother which ever acquired by succession, inheritance or otherwise any interest during his lifetime. Held the doctrine of grant by feeding the estoppel under section 43 would not be attracted as against his heirs who succeeded.

The court opined that in a case where a transferor never acquired by succession, inheritance or otherwise any interest in the property during his life time then the provision of section 43 will not come into operation as against the heirs who succeeded the *stridhan* property of their grandmother.

Tenancy by holder - over

In *M/s. Panch Raghou Taank Ramnivas Sarda and Co.* v. *Hindustan Petroleum Corporation Ltd.*[55] the right of lessee to continue is considered after completion lease term. Here no written request for renewal made after expiry of lease period as per agreed terms. Held mere acceptance of rent would not amount to implied renewal. Lessee cannot claim status of 'holding over' and is liable to be evicted.

From the close reading of the provisions to subsection (2) of section 5 of the Esso Act, 1974, it would clear that the defendant-HPCL was entitled to renew the term of the lease on its expiry, is so desired by the Central Government on the same terms and conditions, on which the lease or tenancy was held by erstwhile M/s. Esso Standard Eastern Inc. immediately before the appointed day.

In order to find out whether there is an "agreement to the contrary" as employed in section 116 of the TPA, the terms of the lease agreement specifically in clause 3(d) would be necessary to be noticed. The terms of the renewal contained in clause 3(d) of the lease agreement required fulfillment of condition exercising the option of renewal by lessee before the expiry of original period of lease, two months prior to the aforesaid renewal clause, as contained in clause 3(d) in the

53 AIR 2014 SC 3000.

54 AIR 2014 Chh 178.

55 (2005) 5 SCC 543; AIR 2005 SC 2905.

agreement of lease would clearly falls within the meaning of expression "an agreement to the contrary" of section 116 of the TPA, by which, option to seek renewal was to be exercised before the expiry of the lease an specified condition and thus, there is renewal clause in the lease prescribing a particular period and mode of renewal, which was "an agreement to the contrary" within the meaning of section 116 of the TPA and in teeth of clause 3(d) of the lease agreement seeking renewal, there could be no implied renewal by "holding over" on mere acceptance of the rent offered by the lessee. Therefore, in the afore-stated circumstances, defendant-HPCL could not claim that he was 'holding over' as a lessee within the meaning of section 116 of the TPA. The supreme court in case of *Shanti Prasad Devi* v. *Shankar Mahto* [56] has considered the said question and held when there is a renewal clause in the contract prescribing a particular period and mode of renewal which was "an agreement to the contrary" within the meaning of section 116 of the TPA and held as under.

Court mentioned that what is that are we fully agree with the high court and the first appellate court below that on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying 'assent' to the continuance of the lessee even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in clause (7) read with clause (9) required fulfillment of two conditions; first the exercise of option of renewal by the lessee before the expiry of original period of lease and second fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local Mukhia or Panchas of the village. The aforesaid renewal clauses (7) & (9) in the agreement of lease clearly fell within the expression 'agreement to the contrary' used in section 116 of the TPA, under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions.

The lessor in the present case had neither expressly not impliedly agreed for renewal. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. In the instant case, there is a renewal clause in the contract prescribing a particular period and mode of renewal which was 'an agreement to the contrary' within the meaning of section 116 of the TPA. In the face of specific clauses (7) & (9) for seeking renewal there could be no implied renewal by 'holding over' on mere acceptance of the rent offered by the lessee. In the instant case, option of renewal was exercised not in accordance with the terms of renewal clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was 'holding over' as a lessee within the meaning of section 116 of the TPA.

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56 AIR 2005 SC 2905.

Thus, in the light of the provisions contained in section 116 of the TPA and in light of the provisions of clause 3(d) of the lease agreement and following the decision of the Supreme Court in *Shanti Prasad Devi*,[57] it has held that lease agreement provides for renewal clause prescribing particular mode of renewal and particular period, which is an "agreement to the contrary" therefore, the mere acceptance of the rent by the appellant/plaintiff, it cannot be held that the defendant-HPCL was 'holding over' as a lessee within the meaning of section 116 of the TPA.

Acceptance of gift by donee

Sudhangshu Kumar Das v. *Jagadish Chandra Das*[58] the court considered effect of acceptance of gift. Here acceptance of donees put into possession of property gifted to them, Land revenue shown to be paid by them, Final Khatians also issued in their favour. Acceptance of gift was proved.

There were two gift deeds, both on November 10, 1953, executed by Sashi Mohan Das in favour of Shyamala Sundari Das and Champa Rani Das, his daughters, Execution of such gift deeds by Sashi Mohan Das in favour of his aforesaid two daughters has been challenged in the present appeal. In this appeal, the only question which arose for consideration is whether there was acceptance of gift by the donee, namely, Shyamala Sundari Das and Champa Rani Das, prior to the death of Sashi Mohan Das, the donor. It appears from the recital that both Shyamala Sundari Das and Champa Rani Das were put into possession of the property gifted away. It is also evident from the deposition of witnesses and as found by the first appellate court that the land revenue was also paid in respect of the said property by or on behalf of Shyamala Sundari Das and Champa Rani Das. And the final khatians issued in favour of Shyamala Sundari Das and Champa Rani Das, respectively. These khatians were issued in the year 1961. Issuance of the khatians presupposes the possession of both Shyamala Sundari Das and Champa Rani Das, which also lends support to the case of the defendants relating to acceptance of the gift. It also appears from letter written by the donor to his wife, that he has executed the gift deeds in favour of his two daughters, namely, Shyamala Sundari Das and Champa Rani Das and they have been put to possession thereby indicating the acceptance of the gift.

The court held that having regard to the aforesaid position and the evidence as discussed above, court is of the view that the first appellate court has rightly held that the done have accepted the gift during the lifetime of the donor. Hence the judgment and decree passed by the first appellate court does not require any interference.

Gouranga Chandra Roy v. *Gobinda Ballab Roy*,[59] is a case decided by High Court of Tripura. Here gift deed executed by father did not contain word 'partition'. But, contents clearly demonstrated intention of partition. Gift deed was accepted

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57 AIR 2014 Gau 19.

58 AIR 2014 Tri 26.

59 AIR 2014 SC 3464.

by plaintiff son and not established that he misappropriated property in specific amount or abandoned claim in paternal property. Also deed does not contain condition for partition by son. The court held that the petitioner is liable to be allowed.

Gift is nothing but transfer of certain existing movable and immovable property made voluntarily without any consideration by one person to another and accepted by the person in whose favour it was transferred. In the instant case, the defendant – appellants in their written statement mo where stated that the plaintiff did not accept the gift during the lifetime of his father. Gift may be made absolutely or conditionally. When it is made conditionally, the property can be recovered back even by the donor. But in the instant case, on perusal of the gift deed it appears that the said is not a conditional one even if the donor father also was not in a position to recover back the gifted property far too revocation of the gift deed. Sometime a gift deed relating to transfer of the family property by the father of the sons can be considered as a whole also so that after the death of the father the legal heir sons may not fight each other. Unfortunately, in the instant case though the father gifted the land to his sons, but some of the sons like the defendant appellants being not happy with the gift deed tried to deny the share of the plaintiff even he approached for amicable settlement and ultimately he was forced to go to the court of law for partition of his ancestral property.

Viewing the gift deed, it appears that the same is executed by the father in favour of all his sons to fulfill his desire for the purpose of partition among themselves relating to 'C' Schedule land, though the word 'partition' is not there. Nomenclature of the document sometimes may conceal the real transaction. Nomenclature may be with or without any motive or under a wrong understanding of the parties or law applicable to them. The court has to examine the real purpose or the document.

It is also admitted position that the father of the plaintiff did not gift any property of the Khatian No. 2748 to his daughter. Thus, very rightly the trial court held that the defendant is not entitled to any share of the schedule land. The court observed that admittedly being the property owned by the parents of the plaintiff, late Srish Chandra Roy and plaintiff being their legal heirs, cannot be deprived of his share from the property of joint family as per law of inheritance and/or succession.

Here the court opined that in view of the above facts and circumstances, there is no doubt about in the mind of this court that the father of the plaintiff wanted that the 'C' Schedule land should go to all his sons equally, the said land being a special category of land than the land of Schedules A, B, D and E and other properties being ancestral properties. The defendant appellants and plaintiff are entitled to get the equal share and the trial court only gave his seal on those shares by way of allowing the partition. Thus, it cannot be said that the learned trial court failed to consider the evidence on record or committed any error by way of passing the impugned judgment and decree allowing the partition as sought for by the plaintiff and supported by the defendant nos. 1,3 and 5 and other brothers of the plaintiff. Unless any perversity or any wrong interpretation of law is there in the judgment of the trial court, an appellate court normally should not interfere with the said judgment and decree.

In *V. Sreeramachandra Avadhani (D) By L.Rs.* v. *Shaik Adbul Rahim*[60] there was a Muslim law gift of immovable property in favour of donee-wife contemplating transfer of corpus and not usufruct with a conditions curtailing its use or disposal. Sale of gifted immovable property by donee could no legal and valid.

While being the case, the court opined that the parameters for gifts (under Mohammedan Law) are clear and well defined gifts pertaining to the corpus of the property are absolute. Where a gift of corpus seeks to impose a limit, in point of time (as a life interest), the condition is void. Likewise, all other conditions, in a gift of the corpus are impermissible. In other words, the gift of the corpus has to be unconditional. Conditions are however permissible, if the gift is merely of a usufruct. Therefore, the gift of usufruct can validity imposes a limit, in point of time (as an interest, restricted to the life of the donee). The transfer of the corpus refers to a change in ownership, while the transfer of usufruct refers to a change in the right of its use/ enjoyment etc. Thus in a gift which contemplates the transfer of the corpus, there is no question of such transfer being conditional. The transfer is absolute. Conditions imposed in a gift of the corpus, are void.

Our court also observed in the present case, on examining contents of gift deed it could be said that the intention of the donor in the gift deed was to transfer the corpus of the immovable property to the donee, and not merely a usufruct therein. The conditions depicted in the gift deed, that the donee would not have any right to gift or sell the gifted property, or that the donee would be precluded from alienating the gifted immovable property during her lifetime, are void. Similarly, the depiction in the gift deed, that the gifted immovable property after the demise of the donee, would devolve upon her off spring and in the event of her not bearing any children, the same would return back to the donor or to his successors, would likewise be void. As the gift deed irrevocably vested all rights in the immovable property in donee it could be said that the sale of the gifted immovable property by donee to the appellant was legal and valid. Consequently, the claim of the legal representatives of donor to the gifted property, on demise of donee is not sustainable in law.

Gift accepted by the donee is irrevocable

The Supreme Court of India in *Renikuntla Rajamma* v. *K.Sarwanamma*[61] speaking through T.S.Thakur J (with V.Gopala Gowda and C.Naggapan JJ.) has dealt with an apparent conflict between two earlier precedents of the apex court *viz.*, *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker* [62] and *K. Balakrishnan* v. *K. Kamalam*[63] The reference to the larger bench was for an authoritative pronouncement as to the true and correct interpretation of sctions 122 and 123 of TPA. The plaintiff-respondent in the appeal for a declaration to

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60 AIR 2014 SC 3464; *Renikuntla Rajamma (D) By Lr* v. *K.Sarwanamma* (2014) 9 SCC 445.

61 (1997) 2 SCC 255.

62 (2004) 1 SCC 581.

63 *Supra* note 60.

the effect that revocation deed executed by the defendant-appellant purporting to revoke a gift deed earlier executed by her was null and void.

The trial court found that the defendant had failed to prove that the gift deed set up by the plaintiff was vitiated by fraud or undue influence or that it was a sham or nominal document. The gift, according to trial court, had been validly made and accepted by the plaintiff, hence, irrevocable in nature. It was also held that since the donor had taken no steps to assail the gift made by her for more than 12 years, the same was voluntary in nature and free from any undue influence, mis-representation or suspicion. The trial court, opined that the fact that the donor had reserved the right to enjoy the property during her life time would not affect the validity of the deed. The first appellate court affirmed the view taken by the trial court and held that the plaintiff had satisfactorily proved the execution of a valid gift in his favour and that the revocation of a validly made gift deed was legally impermissible. The first appellate court also affirmed that the gift deed was not a sham document, as alleged by the defendant and that its purported cancellation/revocation was totally ineffective. The high court had declined to interfere with the judgments and dismissed the second appeal of the appellant. Hence the appeal before the apex court by special leave. Before the Supreme Court, all that was contended on behalf of the appellant was that since the donor had retained to herself the right to use the property and to receive rents during her life time, such a reservation or retention would render the gift invalid.

The apex court has analysed the legal position of gifts. Chapter VII of the TPA deals with gifts generally and, *inter alia*, provides for the mode of making gifts. Section 122 of the Act defines 'gift' as a transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. In order to constitute a valid gift, acceptance must, according to this provision, be made during the life time of the donor and while he is still capable of giving. It stipulates that a gift is void if the donee dies before acceptance. Section 123 regulates mode of making a gift and, inter alia, provides that a gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. In the case of movable property, transfer either by a registered instrument signed as aforesaid or by delivery is valid under section 123.

The apex court observed the provisions of section 123 of the TPA is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered

instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property……"[64]

The Supreme Court has clarified that there was indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. Sections 124 to 129 which are the remaining provisions that comprise chapter VII deal with matters like gift of existing and future property, gift made to several persons of whom one does not accept, suspension and revocation of a gift, and onerous gifts including effect of non-acceptance by the donee of any obligation arising thereunder.

According to the apex court, a careful reading of section 123 leaves no manner of doubt that a gift of immovable property can be made by a registered instrument singed by or on behalf of the donor and attested by at least two witnesses. When read with section 122 of the Act, a gift made by a registered instrument duly signed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. That such acceptance must be given during the life time of the donor and while he is still capable of giving is evident from a plain reading of section 122 of the Act. A conjoint reading of sections 122 and 123 of the Act makes it abundantly clear that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a *sine qua non* for the making of a valid gift under the provisions of TPA. Judicial pronouncements as to the true and correct interpretation of section 123 of the TPA have for a fairly long period held that section 123 of the Act supersedes the rule of Hindu law if there was any making delivery of possession an essential condition for the completion of a valid gift. The apex court has clarified that the law today protects only rules of Muhammadan Law from the rigors of chapter -VII relating to gifts. This implies that the provisions of Hindu law and Buddhist law saved under section 129 (which saving did not extend to saving such rules from the provisions of section 123 of the

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64 (2004) 1 SCC 581. D.M. Dharmadhikari J[and Y.K.Sabharwal J], the only substantial question of law involved was whether the appellant, who was minor (aged 16 years) on the date of execution of the gift-deed could be held to have legally accepted the property in suit gifted to him and the said gift-deed was irrevocable. It was held that the trial court and the high court were wrong in coming to the conclusion that there was no valid acceptance of the gift by the minor donee. Consequently, conclusion has to follow that the gift having been duly accepted in law and thus being complete, it was irrevocable under s. 126 of the TPA. S. 126 prohibit revocation of a validly executed gift except in circumstances mentioned therein. The gift was executed in 1945. It remained in force for about 25 years during which time the donee had attained majority and had not repudiated the same. It was, therefore, not competent for the donor to have cancelled the gift and executed a Will in relation to the property.

TPA) prior to its amendment are no longer saved from the overriding effect of chapter -VII. The amendment has made the position more explicit by bringing all other rules of Hindu and Buddhist law also under the chapter VII and removing the protection earlier available to such rules from the operation of chapter- VII.

The court has endorsed the fact that the attention of the Supreme Court in *K. Balakrishnan's* case,[65] was not drawn to its precedent *viz., Naramadaben Maganlal Thakker* [66] where the apex court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. The Supreme Court in *Naramadaben Maganlal Thakker* [67] found that the donee had not accepted the gift thereby making the gift incomplete. The court had explained that the donor in that case had cancelled the gift within a month of the gift and subsequently executed a 'Will' in favour of the appellant. On a proper construction of the deed and the deed cancelling the same the court had held that the gift in favour of the donee was conditional and that there was no acceptance of the same by the donee. The gift deed had only conferred limited right upon the donee and was to become operative after the death of the donee. The apex court ruled that if the gift was conditional and there was no acceptance of the donee it could not operate as a gift. Absolute transfer of ownership in the gifted property in favour of the donee was absent in that case (*Naramadaben Maganlal Thakker*) which led the earlier court to hold that the gift was conditional and had to become operative only after the death of the donee. The judgment is in that view clearly distinguishable and cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for making a valid gift.

The Supreme Court has observed that in the case at hand[68] the execution of registered gift deed and its attestation by two witnesses was not in dispute. It has also been concurrently held by all the three courts below that the donee had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor.

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65 *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker* (1997) 2 SCC 255 a 3 judge bench order held that for a valid / complete gift, execution of a registered gift deed, acceptance of the gift and delivery of property is essential as per ss.122 and 123 of the TPA. On an interpretation of the recitals of the gift deed it was held that it was a conditional gift; there was no recital in the gift deed of acceptance nor was there any evidence in proof of acceptance; the stipulation in the gift deed that the property would remain in possession of the donor till his lifetime and that the property would become the property of the donee after the lifetime of the donor. it was held on the said interpretation of the gift deed that the gift was to become operative after the death of the donor, as the donee was to have a right to transfer the property absolutely and to collect its *mesne profits* only after the lifetime of the donor. It was further held that the donor having retained possession and enjoyment of the property during his lifetime was entitled to revoke / cancel the gift deed.

66 *Ibid.*

67 *Supra* note 62.