

Smt. Shantabai v. State of Bombay

AIR 1958 SC 532: (1959) SCR 265

VIVIAN BOSE, J. - 8. The petitioner's husband, Balirambhau Doye, was the Zamindar of Pandharpur. On April 26, 1948, he executed an unregistered document, that called itself a lease, in favour of his wife, the petitioner. The deed gives her the right to enter upon certain areas in the zamindari in order to cut and take out bamboos, fuel wood and teak. Certain restrictions are put on the cutting, and the felling of certain trees is prohibited. But in the main, that is the substance of the right. The term of the deed is from April 26, 1948, to December 26, 1960, and the consideration is Rs 26,000.

9. The petitioner says that she worked the forests till 1950. In that year the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, and Alienated Lands) Act, 1950, which came into force on January 26, 1951, was enacted.

10. Under Section 3 of that Act, all proprietary rights in the land vest in the State on and from the date fixed in a notification issued under sub-section (1). The date fixed for the vesting in this area was March 31, 1951. After that, the petitioner was stopped from cutting any more trees. She therefore applied to the Deputy Commissioner, Bhandara, under Section 6(2) of the Act for validating the lease. The Deputy Commissioner held, on August 16, 1955, that the section did not apply because it only applied to transfers made after March 16, 1950, whereas the petitioner's transfer was made on April 26, 1948. But, despite that, he went on to hold that the Act did not apply to transfers made before March 16, 1950, and so leases before that could not be questioned. He also held that the lease was genuine and ordered that the petitioner be allowed to work the forests subject to the conditions set out in her lease and to the Rules framed under Section 218(A) of the C.P. Land Revenue Act.

11. It seems that the petitioner claimed compensation from Government for being ousted from the forests from 1951 to 1955 but gave up the claim on the understanding that she would be allowed to work the forests for the remaining period of the term in accordance with the Deputy Commissioner's order dated August 16, 1955.

12. She thereupon went to the Divisional Forest Officer at Bhandara and asked for permission to work the forests in accordance with the above order. She applied twice and, as all the comfort she got was a letter saying that her claim was being examined, she seems to have taken the law into her own hands, entered the forests and started cutting the trees; or so the Divisional Forest Officer says.

13. The Divisional Forest Officer thereupon took action against her for unlawful cutting and directed that her name be cancelled and that the cut materials be forfeited. This was on March 19, 1956. Because of this, the petitioner went up to the Government of Madhya Pradesh and made an application dated September 27, 1956, asking that the Divisional Forest Officer be directed to give the petitioner immediate possession and not to interfere with her rights. Then, as nothing tangible happened, she made a petition to this Court under Article 32 of the Constitution on August 26, 1957.

14. The foundation of the petitioner's rights is the deed of April 26, 1948. The exact nature of this document was much canvassed before us in the arguments by both sides. It was

said at various times by one side or the other to be a contract conferring contractual rights, a transfer, a licence coupled with a grant, that it related to movable property and that, contra, it related to immovable property. It will be necessary, therefore, to ascertain its true nature before I proceed further.

15. As I have said, the document calls itself a "lease deed", but that is not conclusive because the true nature of a document cannot be disguised by labelling it something else.

16. Clause (1) of the deed runs -

"We executed this lease deed ... and which by this deed have been leased out to you in consideration of Rs 26,000 for taking out timber, fuel and bamboos etc."

At the end of clause (2), there is the following para:

"You No. 1 are the principal lessee, while Nos. 2 and 3 are the sub-lessees."

Clause (3) contains a reservation in favour of the proprietor. A certain portion of the cutting was reserved for the proprietor and the petitioner was only given rights in the remainder. The relevant passage runs:

"Pasas 16, 17, 18 are already leased out to you in your lease. The cutting of its wood be made by the estate itself. *Thereafter*, whatever stock shall remain standing; it shall be part of your lease. Of this stock, so cut, you shall have no claim whatsoever."

Clause (5) runs -

"Besides the above pasas the whole forest is leased out to you. *Only the lease of the forest woods is given to you.*"

Clause (7) states -

"The proprietorship of the estate and yourself are (in a way) co-related and you are *managing* the same and therefore in the lease itself and concerning it, you should conduct yourself *only as a lease holder explicitly*.... Only in the absence of the Malik, you should look after the estate as a Malik and only to that extent you should hold charge as such and conduct yourself as such with respect to sub-lessees."

The rest of this clause is -

"Without the signatures of the Malik, nothing would be held valid and acceptable, including even your own pasas transactions....The lease under reference shall not be alterable or alienable by anybody." The only other clause to which reference need be made is

clause (8). It runs -

"You should not be permitted to recut the wood in the area which was once subject to the operation of cutting, otherwise the area concerned will revert to the estate. The cutting of the forests should be right at the land surface and there should not be left any deep furrows or holes."

17. I will examine the seventh clause first. The question is whether it confers any proprietary rights or interest on the petitioner. I do not think it does. It is clumsily worded but I think that the real meaning is this. The petitioner is the proprietor's wife and it seems that

she was accustomed to do certain acts of management in his absence. The purpose of clause (7) is to ensure that when she acts in that capacity she is not to have the right to make any alteration in the deed. There are no words of transfer or conveyance and I do not think any part of the proprietary rights, or any interest in them, are conveyed by this clause. It does not even confer rights of management. It only recites the existing state of affairs and either curtails or clarifies powers as manager that are assumed to exist when the proprietor is away.

18. Although the document repeatedly calls itself a lease, it confers no rights of enjoyment in the land. Clause (5) makes that clear, because it says -

“Only the lease of the forest *woods* is given to you.”

In my opinion, the document only confers a right to enter on the lands in order to cut down certain kinds of trees and carry away the wood. To that extent the matter is covered by the decision in *Chhotabhai Jethabhai Patel & Co. v. State of Madhya Pradesh* [AIR 1953 SC 108 at 110] and by the later decision in *Ananda Behera v. State of Orissa* [AIR 1956 SC 17, 18 and 19] where it was held that a transaction of this kind amounts to a licence to enter on the land coupled with a grant to cut certain trees on it and carry away the wood. In England it is a profit a prendre because it is a grant of the produce of the soil “like grass, or turves or trees”. See 12 *Halsbury’s Laws of England* (Simonds Edn.) page 522. It is not a “transfer of a right to enjoy the immoveable property” itself (Section 105 of the Transfer of Property Act), but a grant of a right to enter upon the land and *take away* a part of the produce of the soil from it. In a lease, one enjoys the property but has no right to take it away. In a profit a prendre one has a licence to enter on the land, not for the purpose of enjoying it, but for removing something from it, namely, a part of the produce of the soil.

19. Much of the discussion before us centred round the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act of 1950. But I need not consider that because this, being a writ petition under Article 32, the petitioner must establish a fundamental right. For the reasons given in *Ananda Behera* case, I would hold that she has none. This runs counter to *Chhotabhai Jethabhai Patel* case, but, as that was a decision of three Judges and the other five, I feel that we are bound to follow the later case, that is to say, *Ananda Behera* case, especially as I think it lays down the law aright.

20. The learned counsel for the petitioner contended that his client’s rights flowed out of a contract and so, relying on *Chhotabhai Jethabhai Patel* case, he contended that he was entitled to a writ. As a matter of fact, the rights in the earlier case were held to flow from a licence and not from a contract simpliciter but it is true that the learned Judges held that a writ petition lay.

21. Insofar as the petitioner rests her claim in contract simpliciter, I think she has no case because of the reasons given in *Ananda Behera* case:

“If the petitioners’ rights are no more than the right to obtain future goods under the Sale of Goods Act, then that is a purely personal right arising out of a contract to which the State of Orissa is not a party and in any event a refusal to perform the contract that gives rise to that right may amount to a breach of contract but cannot be regarded as a breach of any fundamental right.”

To bring the claim under Article 19(1)(f) or Article 31(1) something more must be disclosed, namely, a right to property of which one is the owner or in which one has an interest apart from a purely contractual right. Therefore, the claim founded in contract simpliciter disappears. But, insofar as it is founded either on the licence, or on the grant, the question turns on whether this is a grant of movable or immoveable property. Following the decision in *Ananda Behera* case, I would hold that a right to enter on land for the purpose of cutting and carrying away timber standing on it is a benefit that arises out of land. There is no difference there between the English and the Indian law. The English law will be found in 12 **Halsbury's Laws of England** (Simonds Edn.) pp. 620-621. But that still leaves the question whether this is movable or immovable property.

22. Under Section 3(26) of the General Clauses Act, it would be regarded as "immoveable property" because it is a benefit that arises out of the land and also because trees are attached to the earth. On the other hand, the Transfer of Property Act says in Section 3 that standing timber is not immovable property for the purposes of that Act and so does Section 2(6) of the Registration Act. The question is which of these two definitions is to prevail.

23. Now it will be observed that "trees" are regarded as immoveable property because they are attached to or rooted in the earth. Section 2(6) of the Registration Act expressly says so and, though the Transfer of Property Act does not define immoveable property beyond saying that it does not include "standing timber growing crops or grass", trees attached to earth (except standing timber) are immoveable property, even under the Transfer of Property Act, because of Section 3(26) of the General Clauses Act. In the absence of a special definition, the general definition must prevail. Therefore, trees (except standing timber) are immoveable property.

24. Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of "immoveable property" and "attached to the earth"; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of "standing timber" and not of "timber trees".

Timber is well enough known to be -

"wood suitable for building houses, bridges, ships etc., whether on the tree or cut and seasoned." (*Webster's Collegiate Dictionary*).

Therefore, "standing timber" must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber *for all practical purposes* even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

25. Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live; and that physical fact of life cannot be altered by giving it another name and calling it "standing timber". But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the Rule, as I hold it to be, the law is

grounded, not so much on logical abstractions as on sound and practical common-sense. It grew empiracally from instance to instance and decision to decision until a recognisable and workable pattern emerged; and here, this is the shape it has taken.

26. The distinction, set out above, has been made in a series of Indian cases that are collected in **Mulla's *Transfer of Property Act***, 4th Edn. at pp. 16 and 21. At p. 16, the learned author says —

“Standing *timber* are trees fit for use for building or repairing houses. This is an exception to the general Rule that *growing trees* are immoveable property.”

At p. 21 he says -

“Trees and shrubs may be sold apart from the land, to be cut and removed as wood, and in that case they are moveable property. But if the transfer includes the right to fell the trees for a term of years, so that the transferee derives a benefit from further growth, the transfer is treated as one of immoveable property.”

The learned author also refers to the English law and says at page 21 -

“In English law an unconditional sale of growing trees to be cut by the purchaser, has been held to be a sale of an interest in land; but not so if it is stipulated that they are to be removed as soon as possible.”

27. In my opinion, the distinction is sound. Before a tree can be regarded as “standing timber” it must be in such a state that, if cut, it could be used as timber; and when in that state it must be cut reasonably early. The Rule is probably grounded on generations of experience in forestry and commerce and this part of the law may have grown out of that. It is easy to see that the tree might otherwise deteriorate and that its continuance in a forest after it has passed its prime might hamper the growth of younger wood and spoil the forest and eventually the timber market. But however that may be, the legal basis for the Rule is that trees that are not cut continue to draw nourishment from the soil and that the benefit of this goes to the grantee.

28. Now how does the document in question regard this? In the first place, the duration of the grant is twelve years. It is evident that trees that will be fit for cutting twelve years hence will not be fit for felling now. Therefore, it is not a mere sale of the trees as wood. It is more. It is not just a right to cut a tree but also to derive a profit from the soil itself, in the shape of the nourishment in the soil that goes into the tree and makes it grow till it is of a size and age fit for felling as timber; and, if already of that size, in order to enable it to continue to live till the petitioner chooses to fell it.

29. This aspect is emphasised in clause (5) of the deed where the cutting of teak trees under 1½ feet is prohibited. But, as soon as they reach that girth within the twelve years, they can be felled. And clause (4) speaks of a first cutting and a second cutting and a third cutting. As regards trees that could be cut at once, there is no obligation to do so. They can be left standing till such time as the petitioner chooses to fell them. That means that they are not to be converted into timber at a reasonably early date and that the intention is that they should continue to live and derive nourishment and benefit from the soil; in other words, they are to be regarded as *trees* and not as *timber* that is standing and is about to be cut and used for the purposes for which timber is meant. It follows that the grant is not only of standing timber but

also of trees that are *not* in a fit state to be felled at once but which are to be felled gradually as they attain the required girth in the course of the twelve years; and further, of trees that the petitioner is not required to fell and convert into timber at once even though they are of the required age and growth. Such trees cannot be regarded as timber that happens to be standing because timber, as such, does not draw nourishment from the soil. If, therefore, they can be left for an appreciable length of time, they must be regarded as trees and not as timber. The difference lies there.

30. The result is that, though such trees as can be regarded as standing timber at the date of the document, *both* because of their size and girth and *also* because of the intention to fell at an early date, would be moveable property for the purposes of the Transfer of Property and Registration Acts, the remaining trees that are also covered by the grant will be immoveable property, and as the total value is Rs 26,000, the deed requires registration. Being unregistered, it passes no title or interest and, therefore, as in *Ananda Behera* case the petitioner has no fundamental right which she can enforce.

31. My lord the Chief Justice and my learned Brothers prefer to leave the question whether the deed here is a lease or a licence coupled with a grant, open because, on either view the petitioner must fail. But we are all agreed that the petition be dismissed with costs.

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State of Orissa v. Titaghur Paper Mills Co. Ltd.

AIR 1985 SC 1293 : 1985 Supp SCC 280

MADON, J. - *Genesis of the Appeals*: 2. On May 23, 1977, the Government of Orissa in the Finance Department issued two notifications under the Orissa Sales Tax Act, 1947. We will hereinafter for the sake of brevity refer to this Act as “the Orissa Act”. These notifications were Notification S.R.O. No. 372 of 1977 and Notification S.R.O. No. 373 of 1977. Notification S.R.O. No. 372 of 1977 was made in exercise of the powers conferred by Section 3-B of the Orissa Act and Notification S.R.O. No. 373 of 1977 was made in exercise of the powers conferred by the first proviso to sub-section (1) of Section 5 of the Orissa Act. We will refer to these notifications in detail in the course of this judgment but for the present suffice it to say that Notification S.R.O. No. 372 of 1977 amended Notification No. 20209-CTA-14/76-F dated April 23, 1976, and made bamboos agreed to be severed and standing trees .agreed to be severed liable to tax on the turnover of purchase with effect from June 1, 1977, while Notification S.R.O. No. 373 of 1977 amended with effect from June 1, 1977, Notification No. 20212-GTA-14/76-F dated April 23, 1976, and directed that the tax payable by a dealer under the Orissa Act on account of the purchase of bamboos agreed to be severed and standing trees agreed to be severed would be at the rate of ten per cent. After the promulgation on December 29, 1977, of the Orissa Sales Tax (Amendment) Ordinance, 1977 (Orissa Ordinance 10 of 1977), which amended the Orissa Act, two other notifications were issued on December 29, 1977, by the Government of Orissa in the Finance Department, namely, Notification No. 67178-C.T.A. 135/77(Pt.)-F (S.R.O. No. 900 of 1977) and Notification No. 67181-C.T.A. 135/77-F (S.R.O. No; 901 of 1977). The first notification was expressed to be made in exercise of the powers conferred by Section 3-B of the Orissa Act and in supersession of all previous notifications issued on that subject. By the said notification the State Government declared that the goods set out in the Schedule to the said notification were liable to be taxed on the turnover of purchase with effect from January 1, 1978. Entries 2 and 17 in the Schedule to the said notification specified bamboos agreed to be severed and standing trees agreed to be severed respectively. The second notification was expressed to be made in exercise of the powers conferred by sub-section (1) of Section 5 of the Orissa Act and in supersession of all previous notifications in that regard. By the said notification the State Government directed that with effect from January 1, 1978, the tax payable by a dealer under the Orissa Act on account of the purchase of goods specified in column (2) of the Schedule to the said notification would be at the rate specified against it in column (3) thereof. In the said Schedule the rate of purchase tax for bamboos agreed to be severed and standing trees agreed to be severed was prescribed as ten per cent. The relevant entries in the Schedule in that behalf are Entries 2 and 17. The Orissa Sales Tax (Amendment) Ordinance, 1977, was repealed and replaced by the Orissa Sales Tax (Amendment) Act, 1978.

3. As many as 209 writ petitions under Article 226 of the Constitution of India were filed in the High Court of Orissa challenging the validity of the aforesaid two notifications dated May 23, 1977, and the said Entries 2 and 17 in each of the said two notifications dated December 29, 1977 (“the impugned provisions”). The petitioners before the High Court fell into two categories. The first category consisted of those who had entered into agreements

with the State of Orissa for the purpose of felling, cutting, obtaining and removing bamboos from forest areas “for the purpose of converting the bamboo into paper pulp or for purposes connected with the manufacture of paper or in any connection incidental therewith”. This agreement will be hereinafter referred to as “the Bamboo Contract”. The other group consisted of those who had entered into agreements for the purchase of standing trees. We will hereinafter refer to this agreement as “the Timber Contract”. All the Bamboo Contracts before the High Court were in the same terms except with respect to the contract area, the period of the agreement and the amount of royalty payable; and the same was the case with the Timber Contracts. By a common judgment delivered on September 19, 1979, reported as *Titaghur Paper Mills Company Ltd. v. State of Orissa* [(1980) Tax LR 1643], the High Court allowed all the said writ petitions and quashed the impugned provisions. The High Court made no order as to the costs of these petitions.

4. Each of the present two appeals has been filed by the State of Orissa, the Commissioner of Sales Tax, Orissa, and the Sales Tax Officer concerned in the matter, challenging the correctness of the said judgment of the High Court. The respondents in Civil Appeal 219 of 1982 are the Titaghur Paper Mills Company Limited (“the respondent Company”) and one Kanak Ghose, a shareholder and director of the respondent Company. The respondents in Civil Appeal 220 of 1982 are Mangaiji Mulji Khara, a partner of the firm of Messrs M.M. Khara, and the said firm. The Chief Conservator of Forests, Orissa, the Divisional Forest Officer, Raikhol Division, and the Divisional Forest Officer, Deogarh Division, have also been joined as pro forma respondents to the said appeal.

48. What now falls to be determined is the subject-matter of the impugned provisions. Relying upon the definition of the term “goods” in the Sale of Goods Act, 1930, and in the Orissa Act, it was submitted on behalf of the appellant State that the subject-matter of the impugned provisions is goods and that what is made exigible to tax under the impugned provisions is a completed purchase of goods. On behalf of the contesting respondents it was submitted that by impugned provisions a new class of goods not known to law was sought to be created and made exigible to purchase tax and that this attempt on the part of the State Government was unconstitutional as being beyond its legislative competence. The High Court held that the impugned provisions amounted to a tax on an agreement of sale and not on a sale or purchase of goods. It further held that in the case of Bamboo Contracts, the impugned provisions also amount to levying a tax on a profit a prendre.

49. The term ‘goods’ is defined in clause (7) of Section 2 of the Sale of Goods Act as follows:

(7) “goods” means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

We have already reproduced earlier the definition of ‘goods’ given in clause {d} of Section 2 of the Orissa Act. However, for the purposes of ready reference and comparison, we are reproducing the same here again. That definition is as follows:

(7) “Goods” means all kinds of movable property other than actionable claims, stocks, shares or securities, and includes all growing crops, grass and things attached to or forming part of the land which are agreed before sale or under the contract of sale to be severed.

What is pertinent to note, however, is that under both the definitions the term ‘goods’ means all kinds of moveable property (except the classes of movable property specifically excluded) and includes growing crops, grass and *things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale*. The Transfer of Property Act, 1882, does not give any definition of the term ‘moveable property’, but clause (36) of Section 3 of the General Clauses Act, 1897, clause (27) of the Orissa General Clauses Act, 1937 and clause (9) of Section 2 of the Registration Act, 1908. Section 3 of the General Clauses Act provides as follows:

(36) “movable property” shall mean property of every description, except immovable property.

The definition in the Orissa General Clauses Act is in identical terms. The definition in the Registration Act is as follows:

(9) “moveable property” includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property;

The Transfer of Property Act does not give any exhaustive definition of ‘immovable property’. The only definition given therein is in Section 3 which states:

“immovable property” does not include standing timber, growing crops or grass.

50. This is strictly speaking not a definition of the term ‘immovable property’ for it does not tell us what immovable property is but merely tells us what it does not include. We must, therefore, turn to other Acts where that term is defined. Clause (26) of Section 3 of the General Clauses Act defines ‘immovable property’* as follows:

(26) “immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to any thing attached to the earth.

The definition of immovable property in clause (21) of Section 2 of the Orissa General Clauses Act is in the same terms. A more elaborate definition is given in clause (6) of Section 2 of the Registration Act which states:

(6) “immovable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

What is pertinent to note about these definitions is that things attached to the earth are immovable property. The expression “attached to the earth” is defined in Section 3 of the Transfer of Property Act as follows:

“attached to the earth” means -

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

51. Thus, while trees rooted in the earth are immovable property as being things attached to the earth by reason of the definition of the term ‘immovable property’ given in the General Clauses Act, the Orissa General Clauses Act and the Registration Act, read with the definition of the expression “attached to the earth” given in the Transfer of Property Act, standing timber is moveable property by reason of it being excluded from the definition of ‘immovable property’ in the Transfer of Property Act and the Registration Act and by being expressly included within the meaning of the term ‘moveable property’ given in the Registration Act. The distinction between a tree and standing timber has been pointed out by Vivian Bose, J., in his separate but concurring judgment in the case of *Smt Shantabai v. State of Bombay* [AIR 1958 SC 532] as follows:

Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of “immovable property” and “attached to the earth”; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of “standing *timber*” and not of “timber *trees*”

Timber is well enough known to be-

“wood suitable for building houses, bridges, ships, etc., whether on the tree or cut and seasoned.” (*Webster’s Collegiate Dictionary*).

Therefore, “standing timber” must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber *for all practical purposes* even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live; and that physical fact of life cannot be altered by giving it another name and calling it “standing timber”. But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the rule, as I hold it to be, the law is grounded, not so much on logical abstractions as on sound and practical commonsense. It grew empirically from instance to instance and decision to decision until a recognisable and workable pattern emerged; and here, this is the shape it has taken.

Thus, trees which are ready to be felled would be standing timber and, therefore, moveable property. What is, however, material for our purpose is that while trees (including bamboos) rooted in the earth being things attached to the earth are immovable property and if they are standing timber are moveable property, trees (including bamboos) rooted in the earth

which are agreed to be severed before sale or under the contract of sale are not only moveable property but also goods.

52. In this connection it may be mentioned that in English law there exists (or rather existed) a difference between *fructus naturales* and *fructus industriales*. *Fructus naturales* are natural growth of the soil, such as, grass, timber and fruit on trees, which were regarded at common law as part of the soil. *Fructus industriales* are fruits or crops produced “in the year, by the labour of the year” in sowing and reaping, planting, and gathering, e.g., corn and potatoes. *Fructus industriales* are traditionally chattels being considered the ‘representative’ of the labour and expense of the occupier and thing independent of the land in which they are growing and were not treated as an interest in land. *Fructus naturales* are regarded until severance as part of the soil and an agreement conferring any right or interest in them upon a buyer before severance was a contract or sale of an interest in land and were, therefore, governed by Section 4 of the *Statute of Frauds* of 1677 (29 Car. II c. 3). If they were severed before sale, Section 17 of that statute applied. This distinction was, therefore, important in England for the purposes of the formalities required under the Statute of Frauds. Under the definition of goods given in Section 62(1) of the old English Sale of Goods Act of 1893, ‘goods’ included inter alia all industrial growing crops and things attached to or forming part of the land which were agreed to be severed before sale or under the contract of sale. The formalities required for a contract for the sale of goods of the value of £10 and upwards by Section 17 of the Statute of Frauds were re-enacted in Section 4 of the Sale of Goods Act, 1893. This section was repealed by the Law Reform (Enforcement of Contracts) Act, 1954. The definition of ‘goods’ in Section 61(1) of the new Sale of Goods Act, 1979, is the same as in the earlier Sale of Goods Act. Thus, the position now in English law is that crops and other produce whether *fructus naturales* or *fructus industriales* (except in the case of a sale without severance to a landlord, incoming tenant or purchaser of the land) will always be ‘goods’ for the purposes of a contract of sale since the agreement between the parties must be that they shall be severed either “before sale” or “under the contract of sale”.

53. As pointed out in *Mahadeo v. State of Bombay* [AIR 1959 SC 735] the distinction which prevailed in English law between *fructus naturales* and *fructus industriales* does not exist in Indian law, and the only question which would ‘fall to be considered in India is whether a transaction concerns ‘goods’ or ‘movable property’ or ‘immovable property’. The importance of this question is twofold: (1) in the case of immovable property, a document of the kind specified in Section 17 of the Registration Act requires to be compulsorily registered and if it is not so registered, the consequences mentioned in ‘Sections 49 and 50 of that Act follow, while a document relating to goods or moveable property is not required to be registered; and (2) by reason of the interpretation placed on Entry 54 in List II in the Seventh Schedule to the Constitution of India by this Court a State cannot levy a tax on the sale or purchase of any property other than ‘goods’.

59. The fallacy underlying the reasoning of the High Court is that it has confused the question of the interpretation of the impugned provisions with the interpretation of Timber Contracts and the Bamboo Contract. On the interpretation it placed upon the Timber Contracts it came to the conclusion that the property in the standing trees passed only after severance and after complying with the conditions of that contract and therefore, the

impugned provisions purported to levy a purchase tax on an agreement to sell. In the case of bamboos agreed to be severed, the High Court on an interpretation of the Bamboo Contract held that it was a grant of a profit a prendre and from that it further held that the impugned provisions were bad in law because they amounted to a levy of purchase tax on a profit a prendre. This approach adopted by the High Court was erroneous in law. The question of the validity of the impugned provisions had nothing to do with the legality of any action taken thereunder to make exigible to tax a particular transaction. If a notification is invalid, all actions taken under it would be invalid also. The converse, however, is not true. Where a notification is valid, an action purported to be taken thereunder contrary to the terms of that notification or going beyond the scope of that notification would be bad in law without affecting in any manner the validity of the notification. Were the interpretation placed by the High Court on the Bamboo Contract and the Timber Contracts correct, the transactions covered by them would not be liable to be taxed under the impugned provisions and any attempt or action by the State to do so would be illegal but the validity of the impugned provisions would not be affected thereby. The challenge to the validity of the impugned provisions on the ground of their unconstitutionality must, therefore, fail.

98. The meaning and nature of a profit a prendre have been thus described in **Halsbury's Laws of England**, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117:

"240. Meaning of 'profit a prendre'.- A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right.

241. Profit a prendre as an interest in land.- A profit a prendre is an interest in land, and for this reason any disposition of it must be in writing. A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce.

242. What may be taken as a profit a prendre. - The subject-matter of a profit a prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals *ferae naturae* while they are upon the soil belongs to the owner of the soil, who may grant to others as a profit a prendre a right to come and take them by a grant of hunting, shooting, fowling and so forth."

99. A profit a prendre is a servitude for it burdens the land or rather a person's ownership of land by separating from the rest certain portions or fragments of the right of ownership to

be enjoyed by persons other than the owner of the thing itself. “Servitude” is a wider term and includes both easements and profits a prendre (see **Halsbury’s Laws of England**, Fourth Edition, Volume 14, paragraph 3, page 4). The distinction between a profit a prendre and an easement has been thus stated in **Halsbury’s Laws of England**, Fourth Edition, paragraph 43 at pages 21 to 22:

“The chief distinction between an easement and a profit a prendre is that whereas an easement only confers a right to utilise the servient tenement in a particular manner or to prevent the commission of some act on that tenement, a profit a prendre confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some part of its natural produce or the animals *ferae naturae* existing upon it. What is taken must be capable of ownership, for otherwise the right amounts to a mere easement.”

In Indian law an easement is defined by Section 4 of the Indian Easement Act, 1882 as being “a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own”. A profit a prendre when granted in favour of the owner of a dominant heritage for the beneficial enjoyment of such heritage would, therefore, be an easement but it would not be so if the grant was not for the beneficial enjoyment of the grantee’s heritage.

100. Clause (26) of Section 3 of the General Clauses Act, 1897, defines “immovable property” as including inter alia “benefit to arise out of land”. The definition of “immovable property” in clause (f) of Section 2 of the Registration Act, 1908, illustrates a benefit to arise out of land by stating that immovable property “includes ... rights to ways, lights, ferries, fisheries or any other benefit to arise out of land”. As we have seen earlier, the Transfer of Property Act, 1882, does not give any definition of “immovable property” except negatively by stating that immovable property does not include standing timber, growing crops, or grass. The Transfer of Property Act was enacted about fifteen years prior to the General Clauses Act. However, by Section 4 of the General Clauses Act, the definitions of certain words and expressions, including “immovable property” and “movable property”, given in Section 3 of that Act are directed to apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after January 3, 1968, and the definitions of these two terms, therefore, apply when they occur in the Transfer of Property Act. In **Ananda Behera v. State of Orissa** [AIR 1956 SC 17] this Court has held that a profit a prendre is a benefit arising out of land and that in view of clause (26) of Section 3 of the General Clauses Act, it is immovable property within the meaning of the Transfer of Property Act.

101. The earlier decisions showing what constitutes benefits arising out of land have been summarized in **Mulla on the Transfer of Property Act, 1882**, and it would be pertinent to reproduce the whole of that passage. That passage (at pages 16-17 of the Fifth Edition) is as follows:

“A ‘benefit to arise out of land’ is an interest in land and therefore immovable property. The first Indian Law Commissioners in their report of 1879 said that they had ‘abstained from the almost impracticable task of defining the various kinds of

interests in immovable things which are considered immovable property'. The Registration Act, however, expressly includes as immovable property benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries. The definition of immovable property in the General Clauses Act applies to this Act. The following have been held to be immovable property: a *varashasan* or annual allowance charged on land, a right to collect dues at a fair held on a plot of land; a hat or market; a right to possession and management of a *saranjam*; a *malikana*; a right to collect rent or *jana*; a life interest in the income of immovable property; a right of way; a ferry; and a fishery; a lease of land."

102. Having seen what the distinctive features of a *profit a prendre* are, we will now turn to the Bamboo Contract to ascertain whether it can be described as a grant of a *profit a prendre* and thereafter to examine the authorities cited at the Bar in this connection. Though both the Bamboo Contract in some of its clauses and the Timber Contracts speak of "the forest produce sold and purchased under this Agreement", there are strong countervailing factors which go to show that the Bamboo Contract is not a contract of sale of goods. While each of the Timber Contracts is described in its body as "an agreement for the sale and purchase of forest produce", the Bamboo Contract is in express terms described as "a grant of exclusive right and licence to fell, cut, obtain and remove bamboos ... for the purpose of converting the bamboos into paper pulp or for purposes connected with the manufacture of paper. ...".

Unlike the Timber Contracts, the Bamboo Contract is not an agreement to sell bamboos standing in the contract areas with an accessory licence to enter upon such areas for the purpose of felling and removing the bamboos nor is it, unlike the Timber Contracts, in respect of a particular felling season only. It is an agreement for a long period extending to fourteen years, thirteen years and eleven years with respect to different contract areas with an option to the respondent Company to renew the contract for a further term of twelve years and it embraces not only bamboos which are in existence at the date of the contract but also bamboos which are to grow and come into existence thereafter. The payment of royalty under the Bamboo Contract has no relation to the actual quantity of bamboos cut and removed. Further, the respondent Company is bound to pay a minimum royalty and the amount of royalty to be paid by it is always to be in excess of the royalty due on the bamboos cut in the contract areas.

104. Under the Bamboo Contract, the respondent Company has the right to use all lands, roads and streams within as also outside the contract areas for the purpose of free ingress to and egress from the contract areas. It is also given the right to make dams across streams, cut canals, make water courses, irrigation works, roads, bridges, buildings, tramways and other work useful or necessary for the purpose of its business of felling, cutting and removing bamboos for the purpose of converting the same into paper pulp or for purposes connected with the manufacture of paper. For this purpose it has also the right to use timber and other forest produce to be paid for at the current schedule of rates. The respondent Company has the right to extract fuel from areas allotted for that purpose in order to meet the fuel requirements of the domestic consumption in the houses and offices of the persons employed by it and to pay a fixed royalty for this purpose. Further, the Government was bound, if required by the

respondent Company, to lease to it a suitable site or sites selected by it for the erection of storehouses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature.

105. We have highlighted above only the important terms and conditions which go to show that the Bamboo Contract is not and cannot be a contract of sale of goods. It confers upon the respondent Company a benefit to arise out of land, namely, the right to cut and remove bamboos which would grow from the soil coupled with several ancillary rights and is thus a grant of a profit a prendre. It is equally not possible to view it as a composite contract one, an agreement relating to standing bamboos agreed to be severed and the other, an agreement relating to bamboos to come into existence in the future. The terms of the Bamboo Contract make it clear that it is one, integral and indivisible contract which is not capable of being severed in the manner canvassed on behalf of the appellant. It is not a lease of the contract areas to the respondent Company for its terms clearly show that there is no demise by the State Government of any area to the respondent Company. The respondent Company has also no right to the exclusive possession of the contract areas but has only a right to enter upon the land to take a part of the produce thereof for its own benefit. Further, it is also pertinent that while this right to enter upon the contract areas is described as a “licence”, under Clause XXV of the Bamboo Contract the respondent Company has the right to take on lease a suitable site or sites of its choice within the contract areas for the erection of storehouses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature required for the purposes of its business. The terms and conditions of the Bamboo Contract leave no doubt that it confers upon the respondent company a benefit to arise out of land it would thus be an interest in immovable property. As the grant is of the value exceeding Rs 100, the Bamboo Contract is compulsorily registrable. It is, in fact, not registered. This is, however, immaterial because it is a grant by the Government of an interest in land and under Section 90 of the Registration Act it is exempt from registration. The High Court was, therefore, right in holding that the Bamboo Contract was a grant of a profit a prendre, though the grant of such right not being for the beneficial enjoyment of any land of the respondent Company, it would not be an easement. Being a profit a prendre or a benefit to arise out of land any attempt on the part of the State Government to tax the amounts payable under the Bamboo Contract would not only be ultra vires the Orissa Act but also unconstitutional as being beyond the State’s taxing power under Entry 54 in List II in the Seventh Schedule to the Constitution of India.

106. We will now turn to the authorities cited at the Bar. The cases which have come before the courts on this point have mainly involved the question whether the document before the court required registration. After the coming into force of the Constitution of India and the introduction of land reforms with consequent abolition of “Zamindari” and other proprietary interests in land, the question whether a particular document was a grant of a proprietary interest in land has also fallen for determination by various courts. It is unnecessary to refer to all the decisions which were cited before us and we propose to confine ourselves to considering only such of them as are directly relevant to the question which we have to decide. Of the High Court decisions the one most in point is that of a Full Bench of the Madras High Court in *Seeni Chettiar v. Santhanathan Chettiar* [(1897) ILR 20 Mad 58].

The question in that case was whether a document which granted to the defendant a right to enjoy the produce of all the trees on the bank and bed of a tank as also the grass and the reeds and further to cut and remove the trees for a period exceeding four years required registration. The Court held that the document was not a lease because it did not transfer to the defendant exclusive possession of the tank but conferred upon him merely a right of access to the place for the reasonable enjoyment of what he was entitled to under the contract. The Court, however, came to the conclusion that the document required registration as it transferred an interest in immovable property, and that it was not a sale of mere standing timber but it was contemplated by the document, as shown by the fact that a comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees, that “the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land”. The above words quoted in the judgment in that case were those of Sir Edward Vaughan Williams in the following passage cited with approval by Lord Coleridge, C.J., in *Marshall v. Green* [1875] 1 CPD 35.39]:

“The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should _derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods.”

107. So far as the decisions of this Court are concerned, the one which requires consideration first is *Firm Chhotabhai Jethabai Patel & Co. v. State of M.P.* [AIR 1953 SC 108]. This was one of the two cases strongly relied upon by the appellant, the other being *State of M.P. v. Orient Paper Mills Ltd.* [AIR 1977 SC 687] The facts in *Chhotabhai* case were that the petitioners had entered into contracts with the proprietors of certain estates and mahals in the State of Madhya Pradesh under which they acquired the right to pluck, collect and carry away tendu leaves; to cultivate, culture and acquire lac; and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos. On January 26, 1951, the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 came into force and on the very next day a notification was issued under the said Act putting an end to all proprietary rights in estates, mahals and alienated villages and vesting the same in the State for the purposes of the State free of all encumbrances with effect from March 31, 1952. The petitioners thereupon approached this Court under Article 32 of the Constitution of India praying for a writ prohibiting the State of Madhya Pradesh from interfering with the rights which they had acquired under the contracts with the former proprietors. It was averred in the petitions that not only had the petitioners paid the consideration under the said contracts but had also spent large sums of money in the exercise of their rights under the said contracts. This Court held that the contracts appeared to be in essence and effect licences granted to the petitioners to cut, gather and carry away the produce in the shape of tendu leaves, lac, timber or wood and did not create any interest either in the land or in the trees or plants. In arriving at this conclusion the Court relied upon a decision of

the Judicial Committee of the Privy Council in *Mohanlal Hargovind of Jubbulpore v. CIT, C.P. & Berar, Nagpur* [AIR 1949 PC 311]. In that case the assessee carried on business as manufacturers and vendors of bidis composed of tobacco contained or rolled in tendu leaves. The contracts entered into by the assessee were short term contracts under which in consideration of a sum payable by instalments the assessee was granted the exclusive right to collect and remove tendu leaves from specified areas. Some of the contracts also granted to the assessee a small ancillary right of cultivation. The Judicial Committee held that the amounts paid by the assessee under the said contracts constituted expenditure in order to secure raw materials for their business and, therefore, such expenditure was allowable as being on revenue account. In *Chhotabhai* case this Court took the view that the contracts before it were similar to the contracts before the Judicial Committee and quoted with approval the following passage from the judgment in *Mohanlal Hargovind* case:

The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which of course, implies the right to appropriate them as their own property. The small right of cultivation given in the first of the two contracts is merely ancillary and is of no more significance than would be, e.g., a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short-term contracts. The picking of the leaves under them has to start at once or practically at once and to proceed continuously.

According to this Court, the contracts entered into by the petitioners before it related to goods which had a potential existence and there was a sale of a right to such goods as soon as they came into existence, the question whether the title passed on the date of the contract itself or later depending upon the intention of the parties. This Court, therefore, came to the conclusion that the State had no right to interfere with the petitioners' rights under the said contracts.

108. As we will later point out, the authority of the decision in *Chhotabhai* case has been considerably shaken, if not wholly eroded, by subsequent pronouncements of this Court. For the present, it will be sufficient for us to point out that the reliance placed in *Chhotabhai* case on the decision of the Judicial Committee in *Mohanlal Hargovind* case does not appear to be justified for the contracts before the Judicial Committee and before this Court were different in their contents and this Court appears to have fallen into an error in assuming that they were similar. For instance, the contracts before the Privy Council were short term contracts while those before the Court in *Chhotabhai* case were for different periods including terms of five to even fifteen years. Apart from this, we have pointed out above the features which go to make the Bamboo Contract a benefit to arise out of land. These features were conspicuously absent in the contracts before the Court in *Chhotabhai* case.

109. The decision next in point of time on this aspect of the case is *Ananda Behera v. State of Orissa*. The petitioners in that case had obtained oral licences for catching and appropriating fish from specified sections of the Chilka Lake from its proprietor, the Raja of Parikud, on payment of large sums of money prior to the enactment of the Orissa Estates Abolition Act 1951. Under the said Act, the estates of the Raja of Parikud vested in the State of Orissa and the State refused to recognize the rights of the petitioners and was seeking to

reduction the rights of fishery in the said lake. The petitioners, contending that the State had infringed or was about to infringe their fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution of India, filed petitions in this Court under Article 32 of the Constitution. In their petition, the petitioners claimed that the transactions entered into by them were sales of future goods, namely, fish in the sections of the lake covered by the licences and that as fish was moveable property, the said Act was not attracted because it was confined to immovable property. The Court observed that if this contention of the petitioners was correct, then their petition under Article 32 was misconceived because until any fish was actually caught, the petitioners would not acquire any property in it. The Court held that what was sold to the petitioners was the right to catch and carry away fish in specific sections of the lake for a specified future period and that this amounted to a licence to enter on the land coupled with a grant to catch and carry away the fish which right was a profit a prendre and in England it would be regarded as an interest in land because it was a right to take some profit of the soil for the use of the owner of the right and in India it would be regarded as a benefit arising out of the land and as such would be immovable property. The Court then pointed out that fish did not come under the category of property excluded from the definition of “immovable property”. The Court further held that if a profit a prendre is regarded as tangible immovable property, then the “property” being over Rs 100 in value, the document creating such right would require to be registered, and if it was intangible immovable property, then a registered instrument would be necessary whatever the value; but as in the case before the Court the sales were all oral and therefore, there being neither writing nor registration, the transactions passed no title or interest and accordingly the petitioners had no fundamental rights which they could enforce. *Ananda Behera* case was the first decision in which *Chhotabhai* case was distinguished. The relevant passage in the judgment (at pages 923-4) is as follows:

“It is necessary to advert to *Firm Chhotabhai Jethabai Patel & Co. v. State of M.P.* and explain it because it was held there that a right to ‘pluck, collect and carry away’ tendu leaves does not give the owner of the right any proprietary interest in the land and so that sort of right was not an ‘encumbrance’ within the meaning of the Madhya Pradesh Abolition of Proprietary Rights Act. But the contract there was to ‘pluck, collect and carry away’ the leaves. The only kind of leaves that can be ‘plucked’ are those that are growing on trees and it is evident that there must be a fresh drop of leaves at periodic intervals. That would make it a growing crop and a growing crop is expressly exempted from the definition of ‘immovable property’ in the Transfer of Property Act. That case is distinguishable and does not apply here.”

110. The next decision which was cited and on which a considerable debate took place at the Bar was *Shantabai v. State of Bombay* [AIR 1958 SC 532]. The facts in that case were that by an unregistered document the petitioner’s husband had granted to her in consideration of a sum of Rs 20,000 the right to take and appropriate all kinds of wood from certain forests in his Zamindari. On the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, and Alienated Lands) Act, 1950, all proprietary rights in land vested in the State of Madhya Pradesh and the petitioner could no longer cut any wood. She thereupon applied to the Deputy Commissioner and obtained from him an order permitting her to work the forest and started cutting the trees. The Divisional Forest Officer took action

against her and passed an order directing that the cut materials be forfeited. She made representations to the Government and they proving fruitless, she filed in this Court a petition under Article 32 of the Constitution of India alleging breach of her fundamental rights under Article 19(1)(f) and (g) of the Constitution. Four of the five learned Judges who heard the case pointed out that the foundation of the petitioner's claim was an unregistered document and that it was not necessary to determine the true meaning and effect thereof for whatever construction be put on it, the petitioner could not complain of breach of any of her fundamental rights. The majority of the learned Judges held that if the document were considered as conveying to the petitioner any part or share in her husband's proprietary right, no such part or share was conveyed to her as the document was not registered and assuming that any such part or share was conveyed, it had become vested in the State under Section 3 of the said Act; if the document were considered as a licence coupled with a grant, then the right acquired by the petitioner would be either in the nature of a profit a prendre which being an interest in land was immovable property and would require registration and as the document was not registered, it did not operate to transmit to her any such profit a prendre as held in *Ananda Behera* case and if the document were construed as conferring a purely personal right under a contract, assuming without deciding that a contract was "property" within the meaning of Articles 19(1)(f) and 31(1) of the Constitution, she could not complain as the State had not acquired or taken possession of the contract which remained her property and as the State was not a party to the contract and claimed no benefit under it, the petitioner was free to sue the grantor upon that contract and recover damages by way of compensation; and assuming the State was also bound by the contract she could only seek to enforce the contract in the ordinary way and sue the State if so advised and claim whatever damages or compensation she might be entitled to for the alleged breach of it. After so holding the majority of the learned Judges observed (at page 269):

"This aspect of the matter does not appear to have been brought to the notice of this Court when it decided the case of *Chhotabhai Jethabai Patel and Co. v. State of M.P.* and had it been so done, we have no doubt that case would not have been decided in the way it was done."

Unlike the majority of the Judges, Vivian Bose, J., in his separate judgment considered in detail the nature of the document in that case. Vivian Bose, J. pointed out the distinction between standing timber and a tree. We have earlier extracted those passages from the learned Judge's judgment. The learned Judge then pointed out that the duration of the grant was for a period of twelve years and that it was evident that trees which would be fit for cutting twelve years later would not be fit for felling immediately and, therefore, the document was not a mere sale of trees as wood. Vivian Bose, J., held that the transaction was not just a right to cut a tree but also to derive a profit from the soil itself, in the shape of the nourishment in the soil that went into the tree and made it to grow till it was of a size and age fit for felling as timber and if already of that size, in order to enable it to continue to live till the petitioner chose to fell it. The learned Judge, therefore, held that though such trees as can be regarded as standing timber at the date of the document, both because of their size and girth and also because of the intention to fell at an early date would be moveable property for the purposes of the Transfer of Property Act and the Registration Act, the remaining trees that were covered by the grant

would be immovable property and as the total value was Rs 26,000, the deed required registration and being unregistered, it did not pass any title or interest and, therefore, as in *Ananda Behera* case the petitioner had no fundamental right which she could enforce.

111. According to learned counsel for the appellant, the judgment of Vivian Bose, J., in that case was not the judgment of the Court since the other learned Judges expressly refrained from expressing any opinion as to the actual nature of the transaction under the document in question. Learned counsel submitted that what the Court really held in that case was that there was no breach of any fundamental right of the petitioner which would entitle her to approach this Court under Article 32 of the Constitution, and this decision was, therefore, not an authority for the proposition that a document of the type before the Court was a grant of a profit a prendre as held by Vivian Bose, J. It is true as contended by learned counsel that the majority expressly refrained from deciding the nature of the document because, as it pointed out, in any view of the matter, the petition would fail and it would, therefore, be difficult to say that what Vivian Bose, J., held was the decision of the Court as such. However, the judgment of Vivian Bose, J., is a closely reasoned one which carries instant conviction and cannot, therefore, be lightly brushed aside as learned counsel has attempted to do. It is also pertinent to note that the majority in that case pointed out the principal errors into which the Court had fallen in *Chhotabhai* case and disapproved of what was decided in that case.

112. The decision to which we must now advert is *Mahadeo v. State of Bombay* [AIR 1959 SC 735]. The facts in that case were that some proprietors of Zamindaris situate in territories, then belonging to the State of Madhya Pradesh and on the reorganisation of States transferred to the erstwhile State of Bombay, granted to the petitioners rights to take forest produce, mainly tendu leaves, from forests included in their Zamindaris. The agreements conveyed to the petitioners in addition to the tendu leaves other forest produce like timber, bamboos, etc., the soil for making bricks, and the right to build on and occupy land for the purpose of their business. In a number of cases, these rights were spread over many years. Some of the agreements were registered and the others unregistered. After the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, and Alienated Lands) Act, 1950, the Government disclaimed the agreements and auctioned the rights afresh, acting under Section 3 of the said Act. The petitioners thereupon filed petitions under Article 32 of the Constitution of India challenging the legality of the action taken by the Government on the ground that it was an invasion of their fundamental rights. The main contention of the petitioners was that the agreements were in essence and effect licenses granted to them to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber or wood, and did not grant to them any “interest in land” or “benefit to arise out of land” and the object of the agreements could, therefore, only be described as sale of goods as defined in the Indian Sale of Goods Act. In support of that contention, the petitioners relied upon the decision in *Chhotabhai* case. The Court examined the terms of the agreements in question and concluded that under none of them was there a naked right to take the leaves of tendu trees together with a right of ingress and of egress from the land but there were further benefits including the right to occupy the land, to erect buildings and to take other forest produce not necessarily standing timber, growing crop or grass. The Court further held that whether the right to the leaves could be regarded as a right to a growing crop had to be examined with reference to all

the terms of the documents and all the rights conveyed thereunder and that if the right conveyed comprised more than the leaves of the trees, it would not be correct to refer to it as being in respect of growing crops *simpliciter*. On an examination of the terms of the documents and the rights conveyed thereunder the Court came to the conclusion that what was granted to the petitioners was an interest in immovable property which was a proprietary right within the meaning of the said Act and, therefore, it vested in the State. With reference to *Chhotabhai* case relied upon by the petitioners, Hidayatullah, J., as he then was, speaking for the Court, said (at page 346):

“It is clear from the foregoing analysis of the decision in *Chhotabhai* case that on a construction of the documents there under consideration and adopting a principle enunciated by the Privy Council in *Mohanlal Hargovind of Jabulpore v. CIT, Central Provinces and Berar* [AIR 1949 PC 311] and relying upon a passage each in *Benjamin on Sale* and the well-known treatise of Baden Powell, the Bench came to the conclusion that the documents there under consideration did not create any interest in land and did not constitute any grant of any proprietary interest in the estate but were merely contracts or licences given to the petitioners ‘to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber or wood’. But then, it necessarily followed that the Act did not purport to affect the petitioners’ rights under the contracts or licences. But what was the nature of those rights of the petitioners? It is plain, that if they were merely contractual rights, then as pointed out in the two later decisions, in *Ananda Behera v. State of Orissa*, *Shantabai* case, the State has not acquired or taken possession of those rights but has only declined to be bound by the agreements to which they were not a party. If, on the other hand, the petitioners were mere licensees, then also, as pointed out in the second of the two cases cited, the licences came to an end on the extinction of the title of the licensors. In either case there was no question of the breach of any fundamental right of the petitioners which could support the petitions which were presented under Article 32 of the Constitution. *It is this aspect of the matter which was not brought to the notice of the Court, and the resulting omission to advert to it has seriously impaired, if not completely nullified, the effect and weight of the decision in Chhotabhai case as a precedent.*”

We may also usefully reproduce the following passages (at page 354) from the concluding portion of the judgment;

“From this, it is quite clear that forests and trees belonged to the proprietors, and they were items of proprietary rights. ...

If then the forests and the trees belonged to the proprietors as items in their ‘proprietary rights’, it is quite clear that these items of proprietary rights have been transferred to the petitioners. ... being a ‘proprietary right’, it vests in the State under Sections 3 and 4 of the Act. *The decision in Chhotabhai case treated these rights as bare licences, and it was apparently given per incuriam, and cannot therefore be followed.*”

113. Faced with this decision, learned counsel for the appellant sought to distinguish it on the ground that the terms of the agreements in that case were different from the terms of the

Bamboo Contract. We are unable to accept this submission. It is unnecessary to set out in detail the terms of the agreements in *Mahadeo* case. The differences sought to be pointed out by learned counsel for the appellant are unsubstantial and make no difference. The essential and basic features are the same and the same interpretation as was placed upon the agreements in *Mahadeo* case must, therefore, apply to the Bamboo Contract.

114. In *State of M.P. v. Yakinuddin* [AIR 1962 SC 1916] the respondents had entered into agreements with the former proprietors of certain estates in the State of Madhya Pradesh acquiring the right to propagate lac, collect tendu leaves and gather fruits and flowers of Mahua leaves. Some of these documents were registered and others unregistered. On the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, the State of Madhya Pradesh took possession of all the villages comprised in the respective estates of the proprietors who had granted the aforesaid rights to the respondents and refused to recognize the respondents' rights. The respondents thereupon filed petitions under Article 226 of the Constitution in the High Court of Madhya Pradesh and the High Court relying upon the decision in *Chhotabhai* case, granted to the respondents the reliefs claimed by them. A Bench of five Judges of this Court allowed the appeals filed by the State of Madhya Pradesh. In its judgment, this Court considered its earlier decisions in *Shantabai v. State of Bombay* and *Mahadeo v. State of Bombay* and observed as follows:

“In view of these considerations, it must be held that these cases are equally governed by the decisions aforesaid of this Court, which have overruled the earliest decision in the case of *Chhotabhai Jethabai Patel and Co. v. State of M.P.*”

115. In *Board of Revenue v. A.M. Ansari* [AIR 1976 SC 1813] the respondents were the highest bidders at an auction of forest produce, namely, timber, fuel, bamboos, minor forest produce, bidi leaves, tanning barks, parks, mohwa, etc., held by the Forest Department of the Government of Andhra Pradesh. They were called upon to pay in terms of the conditions of sale stamp duty on the agreements to be executed by them as if these documents were leases of immovable property. The respondents thereupon filed petitions under Article 226 of Constitution in the High Court of Andhra Pradesh. In the said petitions, the State contended that under the agreements, the respondents had acquired an interest in immovable property. The High Court held in favour of the respondents. The State went in appeal to this Court. On a consideration of the terms of the agreements, this Court held that the agreements were licences and not leases. The Court laid emphasis upon three salient features of those agreements for reaching its conclusion, namely, (1) that these were agreements of short duration of nine to ten months, (2) that they did not create any estate or interest in the land, and (3) that they did not grant exclusive possession and control of the land to the respondents but merely granted to them the right to pluck, cut, carry away and appropriate the forest produce that might have been existing at the date of the agreement or which might have come into existence during the short period of the currency of the agreements, and that the right of the respondents to go on the land was only ancillary to the real purpose of the contract. The Court observed as follows:

“Thus the acquisition by the respondents not being an interest in the soil but merely a right to cut the *fructus naturales*, we were clearly of the view that the

agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31(c) of the Stamp Act.

The conclusion arrived at by us gains strength from the judgment of this Court in *Firm Chhotabhai Jethabai Patel and Co. v. State of M.P.* where contracts and agreements entered into by persons with the previous proprietors of certain estates and mahals in the State under which they acquired the right to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos were held in essence and effect to be licences.

There is, of course, a judgment of this Court in *Mahadeo v. State of Bombay* where seemingly a somewhat different view was expressed but the facts of that case were quite distinguishable. In that case apart from the bare right to take the leaves of tendu trees, there were further benefits including the right to occupy the land, to erect buildings and to take away other forest produce not necessarily standing timber, growing crop or grass and the rights were spread over many years.”

We fail to see how this authority in any way supports the case of the appellant before us or resuscitates the authority of *Chhotabhai* case. In *Ansari* case the Court seems to have assumed that *Chhotabhai* case dealt with short term contracts while, as we have seen above, most of the contracts in *Chhotabhai* case were of far greater duration extending even to fifteen years, nor was the Court’s attention drawn to the case of *State of M.P. v. Yakinuddin*. While the agreement in *Ansari* case was a mere right to enter upon the land and take away tendu leaves, etc., the right under the Bamboo Contract is of a wholly different nature. Further, the question whether the agreements were a grant of a profit a prendre or a benefit to arise out of land was not raised and, therefore, not considered in *Ansari* case and the only point which fell for decision by the Court was whether the agreements were licences or leases. In fact, another question which arose in that case was whether the respondents were liable to pay the amounts demanded from them as reimbursement of sales tax. Affirming the decision of the High Court on this point, the Court held that the Forest Department did not carry on any business by holding auctions of forest produce and was therefore, not a dealer within the meaning of that term as defined in the Andhra Pradesh General Sales Tax Act, 1957. The question whether the agreements were contracts of sale of goods was, however, not considered in that case.

116. We now come to the case of *State of M.P. v. Orient Paper Mills Ltd.* [AIR 1977 SC 687], the second of the two cases on which learned counsel for the appellant relied so strongly in support of his submission that the Bamboo Contract was a contract of sale of goods. The facts in that case as appearing from the judgment of the High Court reported as *Orient Paper Mills Ltd. v. State of M.P.* [(1971) Tax LR 1249] were that the President of India acting on behalf of the former Part C State of Vindhya Pradesh had entered into an agreement with the respondent. The said agreement was a registered instrument and was styled as a lease and under it the respondent acquired the right for a period of twenty years with an option of renewal for a further period of twenty years to enter upon “the leased area” to fell, cut or extract bamboos and and salai wood and to remove, store and utilize the same for meeting the fuel requirement of its paper mill. A copy of the said agreement has been produced before us.

Some of the terms of the said agreement were the same as those contained in the Bamboo Contract as also in the case of *Mahadeo v. State of Bombay*. The said agreement provided for payment of royalty including a minimum royalty. It also conferred upon the respondent the right to take on lease such suitable site or sites as were at the disposal of the State Government within “the leased area” for the erection of storehouses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature bona fide required for the purposes of its business connected with the said agreement as also a right to make dams across streams, cut canals, make water-course, irrigation works, construct roads, railways and tramways and do any other work useful or necessary for the purposes of its business connected with the said agreement in or upon “the leased area” in terms very similar to those in the Bamboo Contract. After the the States Reorganization Act, 1956, came into force, the territories comprised in the State of Vindhya Pradesh became part of the new State of Madhya Pradesh. At the date when the said agreement was entered into the C.P. and Berar Sales Tax Act, 1947, was in force in the State of Vindhya Pradesh and the definition of ‘goods’ contained in clause (g) of Section 2 of that Act as modified and in force in that State excluded from the purview of the said Act forest contracts that gave a right to collect timber or wood or forest produce. The C.P. and Berar Sales Tax Act was repealed by the Madhya Pradesh General Sales Tax Act, 1958, with effect from April 1, 1959, and the new Act did not contain any exclusion of forest contracts from the definitions of “goods”. Further, the term “dealer” as defined in the 1958 Act included the Central Government and the State Government or any of its departments. The Forest Department of the State Government was, however, exempted from the payment of sales tax for the period April 1, 1959, to November 2, 1962. After the period of the said exemption expired, the Forest Department got itself registered as a dealer and the Divisional Forest Officer called upon the respondent to reimburse to him the amount which, according to him, he was liable to pay as sales tax in respect of the transaction covered by the said agreement. Challenging his right to do so, the respondent filed in the High Court of Madhya Pradesh a writ petition under Article 226 of the Constitution. In the said writ petition the respondent contended that the transaction covered by the said agreement was not a sale of goods and accordingly, no sales tax was payable in respect of bamboos and salai wood extracted by the respondent thereunder that the said agreement did not provide for the recovery of the amount of sales tax from the respondent, and that neither the State Government nor the Forest Department of that Government was a “dealer” and that even if the sales tax was payable it was not recoverable as arrears of land revenue. The High Court held that the transaction was one of sale of goods and that if sales tax was payable it would be recoverable under Section 64-A of the Sale of Goods Act, 1930, but the State Government or the Forest Department could not merely by selling the forest produce grown on its own land be regarded as carrying on any business of buying, selling, supplying or distributing goods and, therefore, in respect of mere sales of forest produce neither the State Government nor the Forest Department was a “dealer” within the meaning of that term as defined in the 1958 Act. In coming to the conclusion that the said agreement was a contract of sale of goods, the High Court proceeded upon the basis that what it had to consider was “the stage when bamboo and salai wood have already been felled and appropriated”. By reason of the judgment of the High Court, the definition of the term ‘dealer’ was amended with retrospective effect by the Madhya Pradesh General Sales Tax (Amendment and Validation) Act, 1971, so as to nullify

the finding of the High Court that neither the State Government nor its Forest Department was a 'dealer'. The State of Madhya Pradesh as also the respondent came in appeal to the Supreme Court. The appeals were heard in the Court by a Division Bench of two learned Judges. At the hearing of the appeals, the respondent desired to challenge the vires of the amending Act, but in view of the Presidential Proclamation suspending the operation of Article 14, it could not do so and the Court held that after the proclamation lapsed, it was open to the respondent to take up the point but so far the appeals were concerned that challenge was not available and the appeals must be decided on the basis that the amendment was valid and constitutional. The main point before this Court, therefore, was whether the said agreement was a lease as it was styled or a simple sale of standing timber coupled with a licence to enter and do certain things on another's land. The Court held that the label given to a document was not conclusive of its real nature and that under the said agreement, possession of the land was not given to the respondent as it would have been had the said agreement been a lease and that as the terms of the said agreement showed, it conferred in substance a right to cut and carry away timber of specified species and till the trees were cut, they remained the property of the owner, namely, the State, and that once the trees were severed, the property in them passed to the respondent. The Court further observed that the term used in the said agreement, namely, "royalty", was "a feudalistic euphemism for the 'price' of the timber".

117. We are unable to agree with the interpretation placed by the Court on the document in the *Orient Paper Mills* case. We find that in that case this Court as also the High Court adopted a wrong approach in construing the said document. In *Mahadeo v. State of Bombay* a five-Judge Bench of this Court categorically held (at page 349) that "Whether the right to the leaves can be regarded as a right to a growing crop has, however, to be examined *with reference to all the terms of the documents and all the rights conveyed thereunder*". In spite of this clear and unequivocal pronouncement by a five-Judge Bench of this Court, the learned Judges of the High Court who decided the *Orient Paper Mills* case held (at page 538) that "we have to consider the stage when bamboos and salai wood have already been felled and appropriated", while a two-Judge Bench of this Court evolved for itself in the appeal from that judgment a rule of interpretation which was thus stated (at page 152) by Krishna Iyer, J., who spoke for the Court:

"The meat of the matter is the judicial determination of the true character of the transaction of 'lease' from the angle of the MGST Act and the Sale of Goods Act whose combined operation is pressed into service for making the tax exigible from the Forest Department and, in turn, from the respondent mills. It is the part of judicial prudence to decide an issue arising under a specific statute by confining the focus to that statutory compass as far as possible. Diffusion into wider jurisprudential areas is fraught with unwitting conflict or confusion. We, therefore, warn ourselves against venturing into the general law of real property except for minimum illumination thrown by rulings cited. In a large sense, there are no absolutes in legal propositions and human problems and so, in the jural cosmos of relativity, our observations here may not be good currency beyond the factual-legal boundaries of sales tax situations under a specific statute."

118. A little later the learned Judge stated as follows:

“We may also observe that the question before us is M not so much as to what nomenclature would aptly describe the deed but as to whether the deed results in sale of trees after they are cut. The answer to that question, as would appear from the above, has to be in the affirmative.”

The above rule enunciated by this Court in that case falls into two parts, namely, (1) a document should be so interpreted as to bring it within the ambit of a particular statute relevant for the purpose of the dispute before the Court, and (2) in order to do so, the Court can look at only such of the clauses of the document as also to just one or more of the consequences flowing from the document which would fit in with the interpretation which the court wants to put on the document to make that statute applicable. The above principle of interpretation cannot be accepted as correct in law. It is fraught with considerable danger and mischief as it may expose documents to the personal predilections and philosophies of individual judges depending upon whether according to them it would be desirable that documents of the type they have to construe should be made subject to a particular statute or not. The result would be that a document can be construed as amounting to a grant of a benefit to arise out of land when the question before the Court is whether proprietary rights and interests in estates have been abolished and the same document or a document having the same tenor could be construed as a contract of sale of goods when the question is whether the amounts payable thereunder are exigible to sales tax or purchase tax, making the interpretation of the document dependent upon the personal views of the judges with respect to the legislation in question. In the very case which we are considering, namely, the ***Orient Paper Mills*** case as shown by the very first sentence in the judgment, this Court obliquely expressed its disapproval of the transactions of the type represented by the document before it. That sentence is as follows (at page 688):

“The State of Madhya Pradesh, blessed with abundant forest wealth, whose exploitation, for reasons best known to that Government, was left in part to the private sector, viz., the respondent, Orient Paper Mills....”

We may point out here that in making this observation the Court overlooked three important aspects of the matter, namely, (1) it was a matter of policy for the State to decide whether such transactions should be entered into or not, (2) the transaction was entered into by the State so that a paper mill could be started in the State as shown by the various terms of the said agreement and thus was an encouragement to setting up of industries in the State, and (3) the transaction ensured employment for the people of the area because the said agreement expressly provided that the respondent was to engage minimum 50 per cent of the labour for the working of the contract area from the local source if available.

124. The authorities discussed above show that the case of ***Chhotabhai Jethabai Patel & Co. v. State of M.P.*** is not good law and has been overruled by decisions of larger benches of this Court. They equally show that the case of ***State of M.P. v. Orient Paper Mills Ltd*** is also not good law and that this decision was given per incuriam and laid down principles of interpretation which are wrong in law and cannot be assented to. The discussion of the above authorities also confirm us in our opinion that the Bamboo Contract is not a contract of sale of goods but is a grant of a profit a prendre, that is, of a benefit to arise out of land and that it is not possible to bifurcate the Bamboo Contract into two: one for the sale of bamboo existing at

the date of the contract and the other for the sale of future goods, that is, of bamboos to come into existence in the future. In order to ascertain the true nature and meaning of the Bamboo Contract, we have to examine the said contract as a whole with reference to all its terms and all the rights conferred by it and not with reference to only a few terms or with just one of the rights flowing therefrom. On a proper interpretation, the Bamboo Contract does not confer upon the respondent Company merely a right to enter upon the land and cut bamboos and take them away. In addition to the right to enter upon the land for the above purpose, there are other important rights flowing from the Bamboo Contract which we have already summarized earlier and which make it clear that what the Bamboo Contract granted was a benefit to arise out of land which is an interest in immovable property. The attempt on the part of the State Government and the officers of its Sales Tax Department to bring to tax the amounts payable under the Bamboo Contract was, therefore, not only unconstitutional but *ultra vires* the Orissa Act.

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Bamadev Panigrahi v. Monorama Raj

AIR 1974 AP 226

KONDAIAH J. - This appeal by the defendant is directed against the judgement and decree of the Additional Subordinate Judge, Srikakulam, in O.S. No. 76 of 1966 decreeing the plaintiff's suit for the recovery of a sum of Rupees 19,833/- towards the value of the equipment of a cinema concern known as 'Kumar Touring Talkies'.

2. The material facts leading to this appeal may briefly be stated: The plaintiff's husband, late Profulla Kumar Raj and the defendant were friends. According to the plaint allegations, the plaintiff's husband had obtained a possessory mortgage on 1-9-1957 from the Raja of Mandasa in respect of a site measuring about Ac. 3-51 cents known as 'Pula Thota' which contains a bungalow in it, for a sum of Rs.4,000/- with a view to run a touring cinema in that place. Profulla Kumar Raj, the plaintiff's husband advanced from the year 1952 till the end of 1959 various sums amounting to Rs.15, 000/- to the defendant to meet his obligations under forest contracts which he had entered into with the Raja Saheb of Mandasa. The plaintiff's husband built a temporary cinema structure and erected a temporary pandal in a portion of the plaint schedule site. For the purpose of the cinema, the plaintiff's husband purchased under a hire purchase agreement dated 17-2-1958 a cinema projector and its accessories under an agreement with the Commercial Credit Corporation, Madras, for a sum of Rs. 16,327/-. On the same day he purchased a diesel oil engine with its accessories for an amount of Rs. 3,506/-. The aforesaid cinema projector and the oil engine and their accessories have been imbedded and installed in the earth by constructing foundations for the purpose of running the cinema concern known as 'Kumar Touring Talkies'. Finding no time to manage the cinema concern he entrusted the management of the cinema concern to the defendant out of trust and confidence in him. The defendant taking advantage of his position, as being the person in management, colluded with the Raja Saheb of Mandasa and got an endorsement of discharge made on the mortgage bond dated 1-9-57 and subsequently obtained the mortgage in his name on 6-3-1961. The plaintiff's husband had issued a notice on 5-5-1961 calling upon the defendant to render a correct account of the management of the cinema concern and demanding from him the payment of Rs. 15,000/- previously advanced by him and to deliver possession of the entire cinema concern including the machinery, equipment, records, etc. and also the site. The defendant, by his reply dated 2-6-1961, denied his liability either to account for the management of Kumar Touring Talkies or to the return of Rs. 15,000/- alleged to have been advanced by the plaintiff's husband. Though the claim of the plaintiff's husband was denied categorically by the defendant as early as 2-6-1961, no suit had been filed by him during his life-time for the recovery of possession of the cinema equipment or for recovery of the amount advanced by him. However, the plaintiff's husband filed a suit. O.S. No. 124 of 1961 on the file of the District Munsif Sompeta, for the recovery of the mortgage amount of Rs. 4,000/- against the Raja of Mandasa and the defendant. That suit was decreed ex parte and the proceedings to set aside the ex parte decree are said to be pending in this High Court.

3. As the plaintiff's husband was sick in 1963 and continued to be so till 7-8-1965 when he died, the plaintiff filed the present suit for a declaration that she is the owner of the cinema equipment such as projector and diesel oil engine etc., embodied in the plaint schedule site

relating to the cinema concern known as Kumar Touring Talkies, and for directing the defendant to remove the said cinema equipment and deliver the same to the plaintiff, or in the alternative, for recovery of a sum of Rs. 19,833/- being the value of the machinery, with subsequent interest and for costs. The suit claim was resisted by the defendant contending inter alia that it was he, but not the plaintiff's husband, who is real owner of the Kumar Touring Talkies, that he had obtained the mortgage deed from the Raja of Mandasa though he got the deed executed benami in the name of the plaintiff's husband, that it was he who really obtained the hire purchase agreement from the Commercial Credit, Corporation, Madras in the name of the plaintiff's husband, that he had paid the instalments as per the agreement, that he did not borrow any amount from the plaintiff's husband and that the suit pertains to the recovery of possession of movable property and is, therefore, barred by limitation. It is further stated that the defendant removed the equipment, machinery, projector etc. in December, 1961 and January, 1962, that his attempt to obtain a licence in his name from the concerned authorities was unsuccessful on account of the attitude of the plaintiff's husband and that there is no merit in the suit.

5. The trial Court, on a consideration of the material on record, has found that the cinema equipment as well as the oil engine which were embedded in the earth are immovable property and therefore, the suit was within the period of limitation, that the suit property really belonged to the plaintiff's husband who had entrusted the management of the cinema concern and the suit premises to the defendant and that it was the plaintiff's husband that entered into the hire-purchase agreement with the Commercial Credit Corporation, Madras. In the result, declaring the plaintiff's husband and after his death, the plaintiff as the owner of the suit property, a decree for the recovery of Rs. 19,833/- was granted to the plaintiff. Hence this appeal.

6. The principal contention of Mr. S. Ramamurty the learned counsel appearing for the appellant, is that the cinema projector and the oil engine and their accessories are movable property and they do not become immovable property on their being embedded in or fastened to any property in the Kumar Touring Talkies as the intention and object of fixing the same was to have the beneficial enjoyment of the equipment and machinery but not to benefit the land. On such premise, it is argued that the suit claim being one related to movable property, should have been preferred within 3 years from the date of the refusal or denial of the plaintiff's claim by the defendant on 2-6-1961 and the present suit filed on July 20, 1966 is, therefore, barred by limitation. He also contended that it is the appellant, but not the plaintiff's husband, that was the real owner of the suit property and the plaintiff has no claim to the suit property.

7. Mr. Gangadhara Rao, the learned counsel appearing for the respondent, opposed the claim of the appellant contending inter alia that the suit for declaration of the plaintiff's title to the cinema concern is maintainable and is within the period of limitation, as the property whose possession is sought to be recovered, is immovable but not movable property and there is no justifiable ground for interference with the findings of fact arrived at by the trial Court relating to the ownership of the Cinema equipment and oil engine and the appeal merits dismissal.

8. Upon the respective contentions of the parties, the following questions arise for our decisions.

(1) Whether, on the facts and in the circumstances, the suit for the recovery of possession of the cinema equipment and the diesel oil engine and their accessories or, in the alternative, for recovery of their value, is barred by limitation as pleaded by the defendant?

(2) Whether the plaintiff's husband and after his death, the plaintiff is entitled to the cinema equipment and the diesel oil engine and their accessories?

9. It is well-settled that a suit for declaration of title to or for recovery of possession of immovable property can be filed within 12 years from the date of the refusal or denial of the plaintiff's right by the opposing party. However, in the case of movable property, such a suit must be filed within 3 years from the date of refusal or denial of the plaintiff's right. The answer to the point relating to limitation depends upon the nature and character of the property whose possession is sought to be recovered by the plaintiff. If the property in respect of which the declaration is sought for and of which delivery of possession is prayed for, or in lieu of which alternative claim for recovery of money is made, is found to be immovable but not movable property the present suit filed 5 years after the denial by the defendant of the plaintiff's right must be held to be within the period of limitation. But, on the other hand, if the reliefs sought for are construed to be in respect of movable property as contended by the appellant, the suit must be held to be barred by limitation as it is filed beyond the period of 3 years. The pertinent question that falls for decision is whether the reliefs sought for in the plaint relate to movable or immovable property.

10. Before advertng to the facts and circumstances of the case, for the purpose of determining whether the suit relates to movable or immovable property, it is not only profitable but relevant and necessary to briefly refer to the concept and content of the expressions "movable property" and 'immovable property' and the case law on that aspect. The expressions 'Movable Property' and 'Immovable Property' have not been defined under the Limitation Act whose provisions are applicable to decide the point of limitation. However, they have been defined under the General Clauses Act, Transfer of Property Act and the Registration Act which we shall presently indicate. The expression 'immovable property' has been defined under clause (26) of Section 3 of the General Clauses Act, 1897 as follows:

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

Clause (36) of Section 3 of the General Clauses Act, 1897, defines 'movable property' as 'property of every description, except immovable property'. The same definitions have been provided under clauses (14) and (19) of Section 3 of the Andhra Pradesh General Clauses Act, 1897. 'Movable property' is defined in clause (9) of Section 2 of the Registration Act as including.

"standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property".

‘Immovable property’ defined in clause (6) of Section 2 of the said Act, ‘includes land, buildings and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass’.

The definitions in the Transfer of Property Act, 1882 may now be noted, Section 3 of the Transfer of Property Act defines ‘immovable property’ thus:

“Immovable property does not include standing timber, growing crop or grass”.

The expression “attached to the earth” means

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

11. From a reading of the statutory definitions of the terms “movable property” and ‘immovable property’ referred to above, it is manifest that things attached to the earth or permanently fastened to anything attached to the earth are not movable but immovable property. The machinery in question, i.e., the cinema projector, diesel oil engine and their accessories does not fall within any of the categories of immovable property. Though it is really movable property, it may become immovable property if it is attached to the earth or permanently fastened to anything which is attached to the earth. The enquiry should be not whether the attachment is direct or indirect, but what is the nature and character of the attachment and the intendment and object of such attachment are.

12. The English law of fixtures has no strict application to the law in India relating to machinery attached to the earth or permanently fastened to anything attached to the earth, in view of the statutory definitions pointed out earlier. We may, however, notice some English decisions wherein certain tests or guidelines for determining whether any machinery is movable or immovable property, have been laid down.

13. In **Holland v. Hodgson** [(1872) 7 CP 328] at p. 334 looms attached to earth and floor of a worsted mill were held to be fixtures. Therein, it was observed by Blackburn. J. as follows:

“...the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention viz. The degree of annexation and the object of the annexation”.

14. In **Leigh v. Taylor** [(1902) AC 157, 161], the House of Lords held that certain valuable tapestries affixed by a tenant to the walls of a house for the purpose of ornament and for the better enjoyment of them as chattels, had not become part of the house, but formed part of the personal estate of the tenant for life. It was observed by the learned Lord Chancellor Halsbury that there were no real divergence of opinion, amongst different Judges except that “facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of

attachment which from time to time become necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to day as it was in early times, and the broad principle is that, unless it has become part of the house in any intelligible sense, is not a thing which passes to the heir". The same view was reiterated in *Spyer v. Phillipson* [1931-2 Ch 183].

15. The two guidelines evolved by the English Courts have been accepted by the Courts in India for being followed while considering the question whether any machinery imbedded in the earth or fastened to anything attached to the earth is movable or immovable property. In *Narayana Sa v. Balaguruswami* [AIR 1924 Mad 187], Kumaraswami Sastriar, J. held that copper Stills which were placed upon two iron rails in a distillery building and which could be removed by pulling down the brick and the mud wall put up on one side for the purpose of keeping them in position, were movables. The machinery fixed in a building for the purpose of baling cotton was held by the Allahabad High Court in *Meghraj v. Krishna Chandra* [AIR 1924 All 365], to be movable property. In *Subrahmaniam Firm v. Chindambaram*, [AIR 1940 Mad 527] at p. 529 the machinery installed by a tenant for running a cinema in the premises, taken by him on lease for his own profit, was held to be movable property within the meaning of Section 3 of the Transfer of Property Act, as it was not a permanent improvement to the premises. We may notice the following passage in the judgment of the learned Judge, Wadsworth, J.:

"If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question must in each case be decided according to the circumstances".

A Division Bench of the Madras High Court. In *Mohammed Ibrahim v. Northern Circars Fibre Trading Co. Coconada* [AIR 1944 Mad 492] was of the view that the machinery installed on a cement platform and held in position by being attached to iron pillars fixed in the ground, was immovable property, as the annexation was made by the person who owned the building as well as the machinery. The learned Judge, Krishnaswami Ayyanagar, J., who spoke for the Court, observed thus:

"It is obvious that his object was to become the owner of both for the purpose of carrying on the business and for his own and individual benefit. If the argument is correct, namely, that the same intention which the vendors had must be attributed to the purchaser, the only way of establishing a different intention would be by the purchaser removing the machinery from the ground to which it was annexed and again attaching it with the express intention of making it part of the land. We cannot imagine that the law requires any such procedure to be adopted for inferring an intention on the part of the purchaser to make the machinery part of the land".

In *Board of Revenue v. Venkataswami Naidu* [AIR 1955 Mad 620], a Full Bench of the Madras High Court held that a lease of the properties relating to a touring cinema is not chargeable to stamp duty as the equipment of the touring cinema which is capable of being

removed and collapsible does not fall within the category of immovable property. To the same effect is the decision of another Division Bench of the Madras High Court in **Perumal Naicker v. Ramaswami Kone** [AIR 1969 Mad 346], wherein a Petter engine mounted and fastened to a cement base was found to be immovable property on the ground that it was fixed to the earth for the beneficial enjoyment of the property during its lease. Where the machinery owned by one person was attached to the land belonging to another, it was held by a Division Bench of the Nagpur High Court in **J.H. Subbiah v. Govind Rao** [AIR 1953 Nag 224] that the machinery is movable property. However, a boiler engine and a decorticator fixed and imbedded in a ginning and decorticating factory building were held by a Division Bench of this Court in **Chetty & Co. v. Collector of Anantapur** [AIR 1965 AP 457] to be immovable property, as they had been fixed for the beneficial use of the building as a factory.

16. From the foregoing discussion, the following principles emerge: The question whether any machinery such as an oil engine imbedded in earth or permanently fastened to anything attached to the earth is mixed question of fact and law depending upon the facts and circumstances of each case. There is no statutory test or guideline having universal application, for the determination of the nature and character of the property, whether movable or immovable. Each factor or circumstance by itself may not be conclusive or decisive, but the cumulative effect or the totality of the material facts and circumstances must be taken as a fair and reasonable guide to determine the nature of the property in a given case. The English law of fixtures has no strict application to this aspect of the law in so far as our country is concerned, in view of the statutory definitions of the expressions immovable property and 'movable property' in the General Clauses Act, Transfer of Property Act and Registration Act.

17. The tests enunciated by the decided cases to determine the character and nature of the property are:

- (i) What is the intendment, object and purpose of installing the machinery – Whether it is the beneficial enjoyment of the building, land or structure, or the enjoyment of the very machinery?
- (ii) The degree and manner of attachment or annexation of the machinery to the earth.

Where the machinery and the building or land on which it is installed are owned by one and the same person, normally it should be inferred unless the contrary is proved, that the object and purpose of installing the machinery is to have beneficial enjoyment of the entire building or land, but not the sole enjoyment of the very machinery itself. However, where the machinery imbedded or installed and the building or land belong to two different persons, the intendment and object of the person who is in possession and enjoyment of the property in installing or annexing the machinery must normally be presumed, until the contrary is proved, to be to exploit the benefit of the machinery alone, as he is not interested in the building or the land. Where the building or land or factory is taken on lease for a term by a lease and he installs certain machinery on the property during the lease period, it has to be held that his object and purpose of installing the machinery was the beneficial enjoyment of the very machinery during the period of his lease. A tenant, who is in possession of land for a certain period, would not intend to make any permanent improvement to the land itself but try to

make use of any machine or oil engine during the period of his lease. In all probability he may remove the oil engine or machine from the land the moment his object of its beneficial enjoyment during his lease period is achieved. In such a case, the fixture on the land cannot be termed to be a permanent one so as to bring it within the meaning of immovable property. The nature of the property on which the machinery was installed is also taken into consideration in determining the character of the machinery. Where the building in which machinery such as an oil engine or a cinema projector has been installed by the owner, is not a pucca and permanent one, but is only a temporary shed or tent, his intention and purpose could only be the beneficial enjoyment of the very machinery but not the building. However, where a cinema projector and an oil engine have been installed in a permanent cinema theater, the purpose and object of installing the same must invariably be the beneficial employment of the very cinema theater. The intentment, object and purpose of the person who fastens or installs the machinery has to be inferred from the proved facts and admitted circumstances.

18. On the application of the aforesaid principles, we shall now proceed to examine the facts and circumstances of the case in hand for the purpose of determining whether the cinema equipment such as cinema projector and diesel oil engine in question is movable or immovable property. The cinema concern in a touring talkies. It is not a pucca cinema hall, but it is only a temporary shed built partly with zinc sheets and partly with oil cloth. The cabin portion is built with zinc sheets and the remaining tent is covered with oil cloth. The cinema concern, as its very name "Kumar Touring Talkies" indicates, is a temporary concern. The management of the concern obtained permission to exhibit shows temporarily during the period for which a temporary license has been granted by the concerned authorities. It admits of no doubt that a touring talkies would not be generally at one and the same place permanently but it will be moved freely from place depending upon the demand and the convenience of the proprietor. Indisputably, the land on which the said Kumar Touring Talkies has been raised really belongs to the Raja of Mandasa. The claimant of the touring talkies be it the appellant or the respondent's husband must be held to be a usufructuary mortgagee of the land belonging to the Raja of Mandasa. The lease obtained for running the Kumar Touring Talkies was only for a period of one year after the expiry of which there was no guarantee or assurance that the management of the concern would automatically get extension of period for running the shows. The management may or may not obtain such extension. In fact, on account of the disputes that cropped up between the appellant and the plaintiff's husband, no one could successfully obtain the requisite permission from the concerned authorities for running the cinema shows after the expiry of one year period originally granted. The cinema projector and the diesel oil engine etc. have, in fact, been removed from the land subsequently. The person, be he the appellant or the plaintiff husband, who installed the cinema equipment on the land owned by the Raja of Mandasa, during the lease period for the specific and limited purpose of exhibiting cinema shows, being the usufructuary mortgagee of the land but not the owner thereof must have intended to have only the beneficial enjoyment of the cinema equipment but would not have intended to benefit the very land which was not owned by him. The lessee or the usufructuary mortgage of the land, in installing the diesel oil engine, cinema projector etc., must invariably have intended to make use of the said equipment during the limited lease period and thereafter, separate the same from the land, as he was not interested in the improvement of the land belonging to

another. On a careful consideration of the entire facts and circumstances, we are of the firm view that the intendment, object and purpose of installing the cinema equipment in question, was only to have the beneficial enjoyment of the very equipment during the period of the lease or mortgage. That apart, the diesel oil engine and the cinema projector are not rooted in the earth as in the case of trees and shrubs, or imbedded in the earth as in the case of walls or buildings or attached to what is so imbedded for the permanent beneficial enjoyment of that to which they are attached. In the circumstances, the equipment or machinery must be held to have not been attached to the earth within the meaning of the expression "attached to the earth under Section 3 of the Transfer of Property Act. The machinery is not only not attached to the earth, but also not permanently fastened to anything attached to the earth. Hence, the machinery in question must be held to be movable property but not immovable property. On that premise, it must be held that the suit for the recovery of possession, or in the alternative, for recovery of the value of such movable property, beyond the period of three years after the denial by the defendant of the plaintiff's right, is barred by limitation.

19. The contention of Mr. Gangadhara Rao that the suit, as framed, is not barred by limitation and that the subsequent withdrawal by the plaintiff of her claim for declaration of her right to the cinema equipment, would not disentitle her to continue the suit in respect of the other reliefs cannot be acceded to. This submission of the counsel is based on the assumption that the prayer for declaration of the plaintiff's right to the cinema equipment relates to immovable property. We have earlier held that the cinema projector and the diesel oil engine etc. are movable property. That apart, the very declaration, as revealed from the plaint appears to be only in respect of the cinema equipment, but not the touring talkies. We are satisfied that the declaration sought for by the plaintiff is only in respect of movable property but not immovable property.

20. Hence this submission of the plaintiff has no legs to stand. The suit must have been filed within three years from the date of the refusal or denial by the defendant of the right of the plaintiff's husband to the suit property. We may also add that the conduct of the plaintiff in not filing the suit within three years after the denial of her right to the suit property by the defendant, is a material factor to be taken into consideration. For all the reasons stated, question No. 1 is answered in the affirmative and in favour the appellant.

21. In view of our finding that the suit is barred by limitation, we do not find it necessary to advert to question No. 2 relating to the ownership of the property.

22. In the result, the appeal is allowed setting aside the judgment and decree of the Court below, with costs throughout.

* * * * *

Duncans Industries Ltd. v. State of U.P.

(2000) 1 SCC 633

N. SANTOSH HEGDE, J.- A deed of conveyance dated 9-6-1994 executed by a company named ICI India Ltd. in favour of Chand Chhap Fertilizer and Chemicals Ltd. when presented for registration, the Registrar concerned referred the said document under Section 47-A(2) of the Stamp Act to the Collector complaining of non-compliance with Section 27 of the said Act and praying for proper valuation to be made and to collect the stamp duty and penalty payable on the said document. The Collector after inquiry levied a stamp duty of Rs 37, 01, 26,832.50 and a penalty of Rs 30, 53,167.50. The said order came to be challenged by the aggrieved party in a revision under Section 56 of the Stamp Act before the Chief Controlling Revenue Authority in Stamp Revision No. 36/95-96 and the said revisional authority as per his order dated 4-4-1995 partly allowed the challenge and so far as the imposition of penalty was concerned the same was set aside and slightly modified the stamp duty levied by the Collector. Consequent to the order of the revisional authority, the appellant herein became liable to pay stamp duty on the said deed of conveyance amounting to Rs 36, 68, 08,887.50. This order of the revisional authority came to be challenged before the High Court in Civil Miscellaneous Writ Petition No. 9170 of 1995 which came to be dismissed and as against this order of the High Court of Judicature at Allahabad dated 7-7-1997; the appellant has preferred the above civil appeal.

2. ICI India Ltd., a company registered under the Companies Act, 1956 executed an agreement of sale dated 11-11-1993 wherein it agreed to transfer on an “as is where is” basis and “as a going concern” its fertilizer business of manufacturing, marketing, distribution and sale of urea fertilizer in favour of Chand Chhap Fertilizer and Chemicals Ltd. (“CCFCL”), also a company incorporated under the Companies Act, 1956 which company has since been renamed as M/s Duncans Industries Limited, Fertilizer Division, Kanpur Nagar (the appellant herein) for a total sale consideration of Rs 70 crores which was termed as “slump price” in the agreement. The said agreement also stated that the vendor would on the “transfer date” transfer the fertilizer business by actual delivery of possession to CCFCL in respect of such of the estates and properties mentioned in the agreement as were capable of being transferred by actual and/or constructive delivery and in respect of the estates requiring transfer by execution of necessary documents vesting the title thereof in CCFCL, and it was further agreed and declared that the ownership in respect of the assets and properties comprised in the “fertilizer business” to be transferred as per the agreement, would be deemed to be vested in CCFCL on and from the “transfer date” which, according to the agreement means 1-12-1993 or such other date as may be agreed to by and between ICI India and CCFCL. The term “fertilizer business” was defined to mean and include the following other properties:

“(i) demised land being Plots Nos. 2-B and 5 and the sub-divided portion of Plot No. 2 demarcated and admeasuring in the aggregate an area of 243.4387 acres equivalent to 9, 85,159.50 sq m. Being the unshaded portion shown on the plan annexed hereto together with the buildings and structures thereon forming part of the fertilizer business as on the transfer date;

(ii) freehold land and residential building thereon with the name 'Chandralok', situate at Plot No. 4/284, Parbati Bangla Road, Kanpur comprising 94 residential flats;

(iii) freehold land and residential building thereon with the name 'Chandrakala', situate at Navsheel Apartments, 56 Cantonment, Kanpur comprising a guest house on the ground floor and 3 residential flats on the first floor;

(iv) plant and machinery relating to the fertilizer business including the ammonia-manufacturing plants, the captive power plant and all other moveable capital assets including vehicles, furniture, air conditioners, standby systems, pipelines, railway siding etc., as on the transfer date and wheresoever situate, all of which relate exclusively to the fertilizer business and are owned and in the possession of ICI or are owned by ICI but in the lawful possession of any third party for and on behalf of ICI;"

3. Pursuant to the said agreement, a deed of conveyance dated 9-6-1994 was executed by the said ICI in favour of CCFCL, on the presentation of the said conveyance deed for registration. The Sub-Registrar made a reference to the Collector under Section 47-A(2) of the Stamp Act, 1899 ("the Act") stating that in the document under reference all the details required under Section 27 of the Act had not been given by the parties, hence valuation and examination is essential and requested the Collector to determine the value as required under the Act and the rules and to take action to realise the deficit stamp duty and penalty. Consequent upon this reference made by the Sub-Registrar, the Collector after necessary inquiry as per his order dated 20-2-1995 referred to above levied stamp duty and penalty to which reference has already been made. Being aggrieved by the said order of the Collector, the appellant preferred a revision petition to the Chief Controlling Revenue Authority who, as already stated, by his order dated 9-6-1994 set aside the penalty and modified the duty payable to Rs 36,68,08,887.50 which order came to be challenged before the High Court unsuccessfully.

4. Before the High Court the appellant had challenged the authority of the Sub-Registrar to make a reference to the Collector on the ground that there was no material to entertain any "reason to believe" that the market value of the property which was the subject-matter of the conveyance deed had not been truly set forth in the instrument. The High Court negatived the said contention after considering the arguments of the appellant in detail, and before us no argument has been advanced on this score.

5. Mr M.L. Verma, learned Senior Counsel appearing for the appellant urged that the High Court committed an error in coming to the conclusion that the plant and machinery which were transferred by the vendor to the appellant, were immovable properties, attracting the provisions of the Stamp Act and at any rate under the conveyance deed dated 9-6-1994, the vendor had not conveyed any title to the appellant in regard to the plant and machinery. He also contended that the High Court erred in relying upon paras 10 and 11 of the conveyance deed to come to the conclusion that the plant and machinery were the subject-matter of the said deed. He contended that the said paragraphs merely made a reference to an earlier instrument and mere reference to some earlier transaction in a document does not amount to incorporation in that document of the terms and conditions relating thereto. It was

also contended that the High Court failed to look into the intention of the parties who by an agreement dated 11-11-1993 had treated the plant and machinery as moveables and have delivered possession of the said plant and machinery as moveables on 11-12-1993. Hence, the said plant and machinery is neither immovable property nor the property which has been transferred by virtue of the deed of conveyance dated 9-6-1994. Therefore, the value of the said plant and machinery could not have been taken into consideration for the purpose of arriving at the correct and true value of the property conveyed under the deed of conveyance. He also contended that the valuation in regard to the plant and machinery made by the authorities and as accepted by the High Court is incorrect and contrary to law.

6. Mr Gopal Subramaniam, learned Senior Counsel appearing on behalf of the State in reply contended that the document dated 11-11-1993 (agreement of sale and transfer of fertilizer business) by ICI in favour of CCFCL contemplated an agreement to transfer the business of manufacturing marketing, distribution and sale of urea fertilizer that is fertilizer business itself with a stipulation that the first stream, second stream and the third stream urea-manufacturing plants as well as the ammonia-manufacturing plants would also be transferred as a part of the transfer of fertilizer business of ICI as a going concern. He also contended that a reading of the document at para 1(c) (i) which defines “fertilizer business” clearly shows that the intention of the vendor was to transfer all properties that comprised the fertilizer business. He also drew our attention to the observations of the High Court which had in specific terms noted that the learned counsel representing the appellant before it had not seriously challenged the valuation made by the authorities, hence he contended that the challenge made to the valuation by the appellant before us should not be countenanced.

7. We have heard learned counsel for the parties and the question that arises for our consideration is: whether by the conveyance deed dated 9-6-1994, the plant and machinery were also transferred; and if so, whether the High Court was right in accepting the valuation as made by the authorities for the purpose of stamp duty payable.

8. Considering the question whether the plant and machinery in the instant case can be construed as immovable property or not, the High Court came to the conclusion that the machineries which formed the fertilizer plant, were permanently embedded in the earth with an intention of running the fertilizer factory and while embedding these machineries the intention of the party was not to remove the same for the purpose of any sale of the same either as a part of a machinery or scrap and in the very nature of the user of these machineries, it was necessary that these machineries be permanently fixed to the ground. Therefore, it came to the conclusion that these machineries were immovable property which were permanently attached to the land in question. While coming to this conclusion the learned Judge relied upon the observations found in the case of *Reynolds v. Ashby & Son* [1904 AC 466] and *Official Liquidator v. Sri Krishna Deo* [AIR 1959 All 247]. We are inclined to agree with the above finding of the High Court that the plant and machinery in the instant case are immovable properties. The question whether a machinery which is embedded in the earth is moveable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties (*sic* party) when it decided to embed the machinery, whether such embedment was intended to be temporary or permanent. A careful perusal of the agreement of

sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertilizer plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertilizer plant. The description of the machines as seen in the schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertilizer at various stages of its production. Hence, the contention that these machines should be treated as moveables cannot be accepted. Nor can it be said that the plant and machinery could have been transferred by delivery of possession on any date prior to the date of conveyance of the title to the land. Mr Verma, in support of his contention that the machineries in question are not immovable properties, relied on a judgment of this Court in *Sirpur Paper Mills Ltd. v. CCE* [(1998) 1 SCC 400]. In the said case, this Court while considering the leviability of excise duty on paper-making machines, based on the facts of that case, came to the conclusion that the machineries involved in that case did not constitute immovable property. As stated above, whether a machinery embedded in the earth can be treated as moveable or immovable property depends upon the facts and circumstances of each case. The Court considering the said question will have to take into consideration the intention of the parties which embedded the machinery and also the intention of the parties who intend alienating that machinery. In the case cited by Mr Verma, this Court in para 4 of the judgment had observed thus:

“In view of this finding of fact, it is not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to earth like a building or a tree. The Tribunal has pointed out that it was for the operational efficiency of the machine that it was attached to earth. If the appellant wanted to sell the paper-making machine it could always remove it from its base and sell it.”

9. From the above observations, it is clear that this Court has decided the issue in that case based on the facts and circumstances pertaining to that case hence the same will not help the appellant in supporting its contention in this case where after perusing the documents and other attending circumstances available in this case, we have come to the conclusion that the plant and machinery in this case cannot but be described as an immovable property. Hence, we agree with the High Court on this point.

10. The next question for consideration is whether the vendor did transfer the title of the plant and machinery in the instant case by the conveyance deed dated 9-6-1994. Here again, it is imperative to ascertain the intention of the parties from the material available on record. While ascertaining the intention of the parties, we cannot preclude the contents of the agreement pursuant to which the conveyance deed in question has come into existence. We have noticed that as per the agreement it is clear that what was agreed to be sold is the entire business of fertilizer on an “as is where is” basis including the land, building thereon, plant and machinery relating to fertilizer business - description of which is found in the definition

of the term “fertilizer business” in the agreement itself which has been extracted by us hereinabove. It is not the case of the appellant when it contends that the possession of plant and machinery was handed over separately to the appellant by the vendor, that these machineries were dismantled and given to the appellant, nor is it possible to visualise from the nature of the plant that is involved in the instant case that such a possession dehors the land could be given by the vendor to the appellant. It is obviously to reduce the market value of the property the document in question is attempted to be drafted as a conveyance deed regarding the land only. The appellant had embarked upon a methodology by which it purported to transfer the possession of the plant and machinery separately and is contending now that this handing over possession of the machinery is dehors the conveyance deed. We are not convinced with this argument. Apart from the recitals in the agreement of sale, it is clear from the recitals in the conveyance deed itself that what is conveyed under the deed dated 9-6-1994 is not only the land but the entire fertilizer business including plant and machinery. A perusal of clauses 10, 11 and 13 of the said deed shows that it is the fertilizer factory which the vendor had agreed to transfer along with its business as a going concern and to complete the same the conveyance deed in question was being executed. There is implicit reference to the sale of fertilizer factory as a going concern in the conveyance deed itself. That apart, the inclusion of Schedule III to the conveyance deed wherein a plan delineating the various machineries comprising of the fertilizer factory is appended shows that it is the land with standing fertilizer factory which is being conveyed under the deed, though an attempt to camouflage this part of the property sold is made in the recitals, in our opinion, the parties concerned have not been able to successfully do so. While considering this question of transfer of plant and machinery being part of the conveyance deed or not, reliance can also be placed on the application filed by the appellant before the appropriate authority of the Income Tax Department wherein while disclosing the market value of the immovable property sought to be transferred the appellant himself has mentioned the value of the property so transferred as Rs 70 crores which is the figure found in the agreement of sale which agreement includes the sale of plant and machinery along with the land.

A certificate issued by the appropriate authority under Section 269-UL (3) of the Income Tax Act evidences this fact. In the said application made by the appellant for obtaining the said certificate, the appellant has in specific terms at Serial No. (iv) of the schedule included plant and machinery, railway siding and other immovable properties as part of the fertilizer business undertaking. It is also found on record that by a supplementary affidavit dated 8-9-1993 filed before the Income Tax Department while filing Form 37-I prescribed under the Income Tax Rules the petitioner has again shown all these plant and machinery along with the plan which is now attached to the conveyance deed as part of the property that is being conveyed. Merely because in some of the relevant paragraphs of the conveyance deed the appellant has tried to highlight the fact that what is being sold under the conveyance deed is only the land and a reference is made in regard to the handing over of possession of the machinery on an earlier date does not ipso facto establish that the vendor did not convey the title of the plant and machinery under the conveyance deed dated 9-6-1994.

13. For the reasons stated above, we are of the considered opinion that the vendor as per the conveyance deed dated 9-6-1994 has conveyed the title it had not only in regard to the

land in question but also to the entire fertilizer business on “as is where is” condition including the plant and machinery standing on the said land. Therefore, the authorities below were totally justified in taking into consideration the value of these plant and machineries along with the value of the land for the purpose of the Act.

16. For the reasons stated above, this appeal fails and the same is dismissed with costs.

* * * * *

Kumar Harish Chandra Singh Deo v. Bansidhar Mohanty

(1966) 1 SCR 153: AIR 1965 SC 1738

J.R. MUDHOLKAR, J. - Two questions are raised before us in this appeal from the judgment of the Orissa High Court. One is whether the mortgage deed upon which the suit of Respondent 1 was based was validly attested. The other is whether Respondent 1 was entitled to institute the suit.

2. The mortgage deed in question was executed by the appellant in favour of Jagannath Debata, Respondent 2 on April 30, 1945, for a consideration of Rs 15,000. The appellant undertook to repay the amount advanced together with interest within one year from the execution of the deed. The appellant, however, failed to do so. Respondent 1 therefore instituted the suit out of which this appeal arises.

3. According to Respondent 1 though the money was advanced by him to the appellant he obtained the deed in the name of the second respondent Jagannath Debata because he himself and the appellant were close friends and he felt it embarrassing to ask the appellant to pay interest on the money advanced by him. As the consideration for the mortgage deed proceeded from him he claimed the right to sue upon the deed. He, however, joined Jagannath Debata as the third defendant to the suit. He also joined Dr Jyotsna Dei as second defendant because she is the transferee of the mortgaged property - which consists of a house, from the appellant whose wife she is. This lady however remained ex parte. The appellant denied the claim on various grounds but we are only concerned with two upon which arguments were addressed to us. Those are the grounds which we have set out at the beginning of the judgment. The third defendant Jagannath Debata disputed the right of Respondent 1 to institute the suit and claimed that it was he who had advanced the consideration. His claim was, however, rejected by the trial court and he has remained content with the decree passed by the trial court in favour of Respondent 1. The trial court decreed the suit of Respondent 1 with costs. Against that decree the appellant alone preferred an appeal before the High Court. The contention raised by the appellant before us were also raised by him before the High Court but were rejected by it.

4. In our opinion there is no substance in either of the contentions urged on behalf of the appellant. It is no doubt true that there were only two attesting witnesses to the mortgage deed, one of whom was Respondent 1, that is, the lender himself. Section 59 of the Transfer of Property Act, which, amongst other things, provides that a mortgage deed shall be attested by at least two witnesses does not in terms debar the lender of money from attesting the deed. The word "attested" has been defined thus in Section 3 of the Transfer of Property Act: This definition is similar to that contained in the Indian Succession Act. It will be seen that it also does not preclude in terms the lender of money from attesting a mortgage deed under which the money was lent. No other provision of law has been brought to our notice which debars the lender of money from attesting the deed which evidences the transaction where under the money was lent. Learned counsel, however, referred us to some decisions of the High Courts in India. These are *Peary Mohan Maiti v. Sreenath Chandra* [14 Cal WN 1046]; *Sarur Jigar Begum v. Barado Kanta* [ILR 37 Cal 525] and *Gomathi Ammal v. V.S.M. Krishna Iyer* [AIR 1954 Mad 126]. In all these cases it has been held that a party to a document which is

required by law to be attested is not competent to attest the document. In taking this view reliance has been placed upon the observations of Lord Selborne, LC, in *Seal v. Claridge* [(1881) 7 QBD 516].

“It (i.e. the attestation) implies the presence of some person, who stands by but is not a party to the transaction.”

The object of attestation is to protect the executant from being required to execute a document by the other party thereto by force, fraud or undue influence. No doubt, neither the definition of “attested” nor Section 59 of the Transfer of Property Act debars a party to a mortgage deed from attesting it. It must, however, be borne in mind that the law requires that the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness to prove the execution of the deed. Inferentially, therefore, it debars a party from attesting a document which is required by law to be attested. Where, however, a person is not a party to the deed there is no prohibition in law to the proof of the execution of the document by that person. It would follow, therefore, that the ground on which the rule laid down in English cases and followed in India would not be available against a person who has lent money for securing the payment of which a mortgage deed was executed by the mortgagor but who is not a party to that deed. Indeed it has been so held by the Bombay High Court in *Balu Ravii Gharat v. Gopal Gangadhar Dhabu* [12 Ind Cas 531 (Bom)] and by the late Chief Court of Oudh in *Durga Din. v. Suraj Bakhsh* [AIR 1931 Oudh 285]. In the first of these cases an argument similar to the one advanced before us was addressed before the Bombay High Court. Repelling it the court observed:

“In *Seal v. Claridge* much relied upon by the appellant’s pleader the old case of *Swire v. Bell* [(1793) 5 TR 371], in which the obsolete rule was pushed to its farthest extent, was cited to the Court but Lord Selborne in delivering judgment said: ‘What is the meaning of attestation, apart from the Bills of Sale Act, 1878? The word implies the presence of some person who stands by but is not a party to the transaction.’ He then referred to *Freshfield v. Reed* [(1842) 9 M. & W. 404] and said: ‘It follows from that case that the party to an instrument cannot attest it.’ Again in *Wickham v. Marquis of Bath* [(1865) LR 1 Eq. 17 at p. 25], the remarks of the Master of the Rolls imply that if the plaintiffs Dawe and Wickham had not executed the deed as parties but had only signed with the intention of attesting, the provision of the statute requiring two attesting witnesses would have been satisfied.”

A distinction was thus drawn in this case between a person who is a party to a deed and a person who, though not a party to the deed, is a party to the transaction and it was said that the latter was not incompetent to attest the deed. This decision was followed by the Chief Court of Oudh. We agree with the view taken by the Bombay High Court.

6. In this view we uphold the decree of the High Court and dismiss the appeal with costs.

* * * * *

M.L. Abdul Jabbar Sahib v. H. Venkata Sastri

AIR 1969 SC 1147: (1969) 1 SCC 573

BACHAWAT, J. - On February 23, 1953, the appellant instituted G. S, No. 56 of 1953 on the Original Side of the Madras High Court under the summary procedure of Order 7 of the Original Side Rules against Hajee Ahmed Batcha claiming a decree for Rs 40,556/1/2 and Rs 8,327/12/9 said to be due under two promissory notes executed by Haji Ahmed Batcha. On March 9, 1953, Hajee Ahmed Batcha obtained leave to defend the suit on condition of his furnishing the security for a sum of Rs 50,000/- to the satisfaction of the Registrar of the High Court. On March 26, 1953, Hajee Ahmed Batcha executed a security bond in favour of the Registrar of the Madras High Court charging several immovable properties for payment of Rs 50,000/-. The condition of the bond was that if he paid to the appellant the amount of any decree that might be passed in the aforesaid suit the bond would be void and of no effect and that otherwise it would remain in full force. The bond was attested by B. Somnath Rao. It was also signed by K. S. Narayana Iyer, advocate, who explained the document to Hajee Ahmed Batcha and identified him. All the properties charged by the bond are outside the local limits of the ordinary original jurisdiction of the Madras High Court. The document was presented for registration on March 29, 1953 and was registered by D. W. Kittoo, the Sub-Registrar of Madras-Chingleput District. Before the Sub-Registrar, Hajee Ahmed Batcha admitted execution of the document and was identified by Sankaranarayan and Kaki Abdul Aziz. The identifying witnesses as also the Sub-Registrar signed the document. Hajee Ahmed Batcha died on February 14, 1954 and his legal representatives were substituted in his place in G. S. No. 56 of 1953. On March 19, 1954, Ramaswami, J., passed a decree for Rs 49,891/13/- with interest and costs and directed payment of the decretal amount on or before April 20, 1954. While passing the decree, he observed:

“It is stated that the defendant has executed a security bond in respect of their immovable properties when they obtained leave to defend and this will stand ensured to the benefit of the decree-holder as a charge for the decree amount.”

2. Clauses 3 and 4 of the formal decree provided:

“(3) that the security bond executed in respect of their immovable properties by defendants 2 to 4 in pursuance of the order, dated 9th March, 1953, in application No. 797 of 1953, shall stand ensured to the benefit of the plaintiff as a charge for the amounts mentioned in Clause 1;

(4) that in default of defendants 2 to 4 paying the amount mentioned in Clause 1 supra on or before the date mentioned in Clause 2 supra the plaintiff shall be at liberty to apply for the appointment of Commissioners for sale of the aforesaid properties.”

3. The appellant filed an application for (a) making absolute the charge decree, dated March 31, 1954, and directing sale of the properties; and (6) appointment of Commissioners for selling them. On April 23, 1954, the Court allowed the application, appointed Commissioners for selling of the properties and directed that the relevant title deeds and security bond be handed over to the Commissioners. The Commissioners sold the properties

on May 29 and 30, 1954. The sales were confirmed and the sale-proceeds were deposited in court on July 2, 1954.

4. All the three respondents are simple money creditors of Hajee Ahmed Batcha. The respondents Venkata Sastri and Sons filed O. S. No. 13 of 1953, in the Sub-Court, Vellore and obtained a decree for Rs 5,500/- on March 27, 1953. Respondent H. R. Gowramma instituted O. S. No. 14 of 1953, in the same Court and obtained a money decree on April 14, 1953. The two decree-holders filed applications for execution of their respective decrees. One Rama Sastri predecessors of respondents H. R. Chidambara Sastri and H. R. Gopal Krishna Sastri obtained a money decree against Hajee Ahmed Batcha in O. S. No. 364 of 1951/52, in the Court of the District Munsiff, Shimoga, got the decree transferred for execution through the Court of the District Munsiff, Vellore and filed an application for execution in that court. On June 7, 1954, the aforesaid respondents filed applications in the Madras High Court for (t) transfer of their execution petitions pending in the Vellore courts to the file of the High Court and (it) an order for rateable distribution of the assets realized in execution of the decree passed in favour of the appellant in C. S. No. 56 of 1953. The appellant opposed the applications and contended that as the properties were charged for the payment of his decretal amount, the sale proceeds were not available for rateable distribution amongst simple money creditors. The respondents contended that the security bond was invalid as it was not attested by two witnesses and that the decree passed in C. S. No. 56 of 1953, did not create any charge. Balakrishna Ayyar, J., dismissed all the applications as also exemption petitions filed by the respondents. He held that the decree in C. S. No. 56 of 1953, did not create a charge on the properties. But following the decision in *Veerappa Chettiar v. Subramania* [AIR 1929 Mad 1] he held that the security bond was sufficiently attested by the Sub-Registrar and the identifying witnesses. The respondents filed appeals against the orders. On March 28, 1958, the Divisional Bench hearing the appeals referred to a Full Bench the following question:

“Whether the decision in *Veerappa Chettiar v. Subramania Iyyar* [AIR 1929 Mad. 1], requires reconsideration.”

The Full Bench held:

“In our opinion, such signatures of the registering officer and the identifying witnesses endorsed on a mortgage document can be treated as those of attesting witnesses as if (1) the signatories are those who have seen the execution or received a personal acknowledgment from the executant of his having executed the document, (2) they sign their names in the presence of the executant and (3) while so doing they had the *animus* to attest. The mere presence of the signatures of the registering officer or the identifying witnesses on the registration endorsements would not by themselves be sufficient to satisfy the requirements of a valid attestation; but it would be competent for the parties to show by evidence that any or all of these persons did in fact intend to and did sign as attesting witness as well.”

5. The Full Bench held that the decision in *Veerappa Chettiar* case can be held to be correct to this limited extent only and not otherwise. At the final hearing of the appeals, the Divisional Bench held that (1) a charge by act of parties could be created only by a document registered and attested by two witnesses; (2) the security bond was not attested by two

witnesses and was therefore invalid; (3) the decree in G. S. No. 56 of 1953, should be construed as containing nothing more than a recital of the fact of there having been a security bond in favour of the plaintiff; and the sale in execution of the decree must be regarded as a sale in execution of a money decree; and (4) the respondents were entitled to an order for rateable distribution. Accordingly, the Divisional Bench allowed the appeals, directed attachment of the sale-proceeds and declared that the respondents were entitled to rateable distribution along with the appellant. The present appeals have been filed after obtaining special leave from this court.

6. The following questions arise in these appeals: (1) Is the security bond attested by two witnesses; (2) if not, is it invalid? (3) does the decree in G. S. No. 56 of 1953, direct sale of the properties for the discharge of a charge thereon, and (4) are the respondents entitled to rateable distribution of the assets held by court? As to the first question, it is not the case of the appellant that K. S. Narayana Iyer is an attesting witness. The contention is that the Sub-Registrar D. W. Kittoo and the identifying, witnesses Sankaranarayana and Kaki Abdul Aziz attested the document. In our opinion, the High Court rightly rejected this contention.

7. It is to be noticed that the word “attested”, the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, *e. g.*, to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

8. “In every case the Court must be satisfied that the names were written *animo attestandi*”, see Jarman on Wills, 8th ed., p. 137. Evidence is admissible to show whether the witness had the intention to attest. “The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the intention or not,” see *Theobald on Wills*, 12th ed., p. 129. In *Girja Datt v. Gangotri* [AIR 1955 SC 346] the Court held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the sub-Registrar, were not attesting witnesses as their signatures were not put “*animo attestandi*”. In *Abinash Chandra Bidvanidhi Bhattacharya v. Dasarath Malo* [AIR 1929 Cal 123] it was held that a person who had put his name under the word “scribe” was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a “scribe”. In *Shiam Sunder Singh v. Jagannath Singh* [AIR 1927 PC 248] the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees.

9. The Indian Registration Act, 1908, lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to

the identity of the executant, [Section 34(3)]. He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution. [Section 35(1)]. The signatures of the executant and of every person examined with reference to the document are endorsed on the document (Section 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). *Prima facie*, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature.

10. The evidence does not show that the registering officer D. W. Kittoo put his signature on the document with the intention of attesting it. Nor is it proved that he signed the document in the presence of the executant. In these circumstances he cannot be regarded as an attesting witness, see **Sunder Bahadur Singh v. Thakur Behari Singh** [AIR 1939 PC 117]. Likewise the identifying witnesses Sankaranarayana and Kaki Abdul Aziz put their signatures on the document to authenticate the fact that they had identified the executant. It is not shown that they put their signatures for the purpose of attesting the document. They cannot, therefore, be regarded as attesting witnesses.

11. It is common case that B. Somnath Rao attested the document. It follows that the document was attested by one witness only.

12. As to the second question, the argument on behalf of the respondents is that Section 100 of the Transfer of Property Act attracts Section 59 and that a charge can be created only by a document signed, registered and attested by two witnesses in accordance with Sec. 59 where the principal money secured is Rs.100 or upwards. The High court accepted this contention following its earlier decisions in **Viswanadhan v. M.S. Menon** [AIR 1939 Mad. 202] and **Shiva Rao v. Shanmughasundaraswami** [AIR 1940 Mad 140] and held that the security bond was invalid, as it was attested by one witness only. We are unable to agree with this opinion.

13. If a non-testamentary instrument creates a charge of the value of Rs. 100 or upwards, the document must be registered under Section 17 (1)(b) of the Indian Registration Act. But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses.

14. Before Section 100 was amended by Act 20 of 1929 it was well settled that the section did not prescribe any particular mode of creating a charge. The amendment substituted the words "all the provisions hereinbefore contained which apply to a simple mortgage shall so far as may be, apply to such charge," for the words "all the provisions hereinbefore contained as to a mortgagor shall so far as may be, apply to the owner or such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the person having such charge." The object of the amendment was to make it clear that the rights and liabilities of the parties in case of a charge shall, so far as may be, the same as the rights and liabilities of the parties to a simple mortgage. The amendment was not intended to prescribe any particular mode for the creation of a charge. We find that the Nagpur High court came to a similar conclusion in **Bapurao v. Narayan** [AIR 1950 Nag 117]. It follows that the security bond was not required to be attested by witnesses. It was duly registered and was valid and operative.

15. As to the third question, we find that the decree dated March 19, 1954 declared that the security bond in respect of the immovable properties would enure for the benefit of the appellant as a charge for the decretal amount. This relief was granted on the oral prayer of the plaintiffs. We are unable to agree with the High Court that in view of the omission to amend the plaint by adding a prayer for enforcement of the charge, the decree should be construed as containing merely a recital of the fact that a security bond had been executed. In our opinion, the decree on its true construction declared that the security bond created a charge over the properties in favour of the plaintiffs for payment of the decretal amount and gave them the liberty to apply for sale of the properties for the discharge of the incumbrance. Pursuant to the decree the properties were sold and the assets are now held by the Court. The omission to ask for an amendment of the plaint was an irregularity, but that does not affect the construction of the decree.

16. As to the 4th question we find that the immovable properties have been sold in execution of a decree ordering sale for the discharge of the encumbrance thereon in favour of the appellant. Section 73 (1), proviso (c) therefore applies and the proceeds of sale after defraying the expenses of the sale must be applied in the first instance in discharging the amount due to the appellant. Only the balance left after discharging this amount can be distributed amongst the respondents. It follows that the High Court was in error in holding that the respondents were entitled to rateable distribution of the assets along with the appellant.

17. In the result, the appeals are allowed, and the orders passed by the learned Single Judge are restored.

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Padarath Halwai v. Ram Narain

AIR 1915 PC 21

SIR JOHN EDGE - These are consolidated appeals from decrees, dated respectively the 29th of March, 1909, of the High Court of Judicature at Allahabad. The two decrees appealed from were made in appeals in the same suit. The suit was brought in the Court of the Subordinate Judge of Jaunpur on the 29th of November, 1904, to enforce, by sale of the village Baragaon and other villages, the payment of Rs. 66,809 odd, due under a mortgage, dated the 25th of June, 1892. The Subordinate Judge decreed the claim in part, and in part dismissed it. Each side appealed to the High Court at Allahabad. The High Court dismissed the defendants' appeal, and in the plaintiffs' appeal gave them a decree for their claim.

When these consolidated appeals first came on for hearing before this Board it was contended on behalf of the appellants that the mortgage upon which this suit was brought had not been attested by at least two witnesses, and as the amount secured by it exceeded one hundred rupees the alleged mortgage was ineffective and could not be given in evidence. That point had not been raised in either of the Courts below. Under the circumstances this Board remanded the case to the High Court in order to enable the parties to produce evidence on the question of attestation. Evidence on that subject has been taken and has been returned to this Board. On behalf of the appellants it has now been contended that the evidence which was given on the remand in proof of the attestation was unreliable, and even if accepted as true, did not prove that the two attesting witnesses who gave evidence on remand had seen the mortgagors sign their names to the mortgage.

The mortgagors were two *pardahnashin* ladies who did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses. These two attesting witnesses were, however, well acquainted with the voices of the ladies, and their Lordships are satisfied that these two attesting witnesses did identify the mortgagors at the time when the deed was executed. The mortgagors were, on the occasion of the execution of the mortgage deed, brought from the *zenana* apartments of the house in which they were to an ante-room to execute the deed. In the ante-room the ladies seated themselves on the floor, and between them and these two attesting witnesses there was a *chick*, which was not lined with cloth, hanging in the doorway. These two attesting witnesses recognised the ladies by their voices, and they say that they saw each lady execute the deed with her own hand, although owing to the *chick* they were unable to see the face of either of the ladies. On the other side an attempt was made to prove that a *tat*, through which nothing could be seen, was hanging in the doorway. Their Lordships accept the evidence of these two attesting witnesses as true, and hold it proved that the mortgage deed on the 25th of June, 1892, was duly attested by at least two witnesses within the meaning of section 59 of the Transfer of Property Act, 1882. It is not disputed that the mortgage deed was in fact the deed of the two *pardahnashin* ladies, Musammat Niamat Bibi and Musammat Kamar-un-nisa Bibi, the mortgagors.

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Ahmedabad Municipal Corpn. v. Haji Abdul Gafur Haji Hussenhbai

AIR 1971 SC 1201: (1971) 1 SCC 757

DUA, J. - In this appeal on certificate granted by the High Court of Gujarat-under Article 133(l)(c) of the Constitution of India the questions raised related to the liability of auction purchaser of property at court sale for the arrears of municipal taxes due on the date of sale to the municipal corporation of the City of Ahmedabad which dues are a statutory charge on the property, sold and of which the purchaser had no actual notice. On the question of constructive notice there is a sharp conflict of judicial decisions in the various High Courts and in the Allahabad High Court itself there have been conflicting expressions of opinion. In this Court there being no presentation on behalf of the respondent the appeal was heard *ex parte*.

2. The property which is the subject-matter of controversy in this litigation originally belonged to one Haji Nur Muhammad Haji Abdulmian. He apparently ran into financial difficulties in February 1949 and insolvency proceedings were started against *him* in March, 1949. By an interim order receivers took charge of his estate and finally on October 14, 1950, he was adjudicated insolvent. The property in question accordingly vested in the receivers. This property had been mortgaged with a firm called Messrs. Hargovind Laxmichand. In execution of a mortgaged decree obtained by the mortgagee this property was auctioned and purchased at court sale by the plaintiff Haji Abdulgafur Haji Hussenhbai (respondent in this Court) for Rs 22,300/-. He was declared purchaser on November 28, 1954. At the time of this purchase there were municipal taxes in respect of this property in arrear for the years 1949-50 to 1953-54, which means that the receivers had not cared to pay the municipal taxes during all these years. The property was attached by the municipal corporation by means of an attachment notice, dated July 20, 1955, for the arrears of the municipal taxes amounting to Rs 543.79 P. As the municipal corporation threatened to sell the property pursuant to the attachment proceedings the purchaser instituted the suit (giving rise to this appeal) for a declaration that he was the owner of the property and that the arrears of municipal taxes due from Haji Nur Muhammad Haji Abdulmian were not recoverable by attachment of the suit property in the plaintiff's hands and that the warrant of attachment of the property issued by the municipal corporation was illegal and *ultra vires*. Permanent injunction restraining the municipal corporation from attaching the property for arrears of municipal taxes was also sought. The Trial Court declined the prayer for a declaration that the property was not liable to be attached for recovery of the arrears of municipal taxes. But the warrant of attachment actually issued in this case was held to be illegal and void with the result that an injunction was issued restraining the municipal corporation from enforcing the impugned warrant of attachment against the plaintiff in respect of the suit property. Both parties feeling aggrieved appealed to the District Court. The Assistant Judge who heard the appeals dismissed both of them. The plaintiff thereupon presented a second appeal to the Gujarat High Court which was summarily dismissed by a learned single Judge. Leave to appeal to a Division Bench under Clause 15 of the Letters Patent was however granted. The Division Bench hearing the Letters Patent appeal in a fairly lengthy order allowed the plaintiff's appeal and decreed his suit holding that the plaintiff is the owner of the suit property and the charge of the municipal

corporation for arrears of municipal tax is not enforceable against his property and also restraining the municipal corporation by a permanent injunction from proceeding to realise from this property the charge in respect of the arrears of Municipal taxes. On appeal in this Court three main questions were raised by Shri S. T. Desai, learned counsel for the appellant.

3. To begin with it was contended that there is no warranty of title in an auction sale. This general contention seems to us to be well-founded because it is axiomatic that the purchaser at auction sale takes the property subject to all the defects of title and the doctrine caveat emptor (let the purchaser beware) applies to such purchaser. The case of the judgment-debtor having no saleable interest at all in the property sold such as is contemplated by Order XXI, Rule 91, C. P. C. is, however, different and is not covered by this doctrine. The second point canvassed was that there is an express provision in Section 141(1) of the Bombay Provincial Municipal Corporation Act, 19-1-9 (hereinafter called the Bombay Municipal Act) for holding the present property to be liable for the recovery of municipal taxes and, therefore, though the property was subject only to charge not amounting to mortgage and, therefore, involving no transfer of interest in the property, the same could nevertheless be sold for realising the amount charged, even in the hands of a transferee for consideration without notice. Section 141 of the Bombay Municipal Act is an express saving provision as contemplated by Section 100 of Transfer of Property Act, contended Shri Desai. This submission has no merit as would be clear from a plain reading of Section 100 of the Transfer of Property Act, 1882 and Section 141 of the Bombay Municipal Act, the only relevant statutory provisions.

4. This section in unambiguous language lays down that no charge is enforceable against any property in the hands of a transferee for consideration without notice of the charge except where it is otherwise expressly provided by any law for the time being in force. The saving provision of law must expressly provide for enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge. We now turn to Section 141 of the Bombay Provincial Municipal Corporation Act, 1949, to see if it answers the requirements of Section 100 of Transfer of Property Act. This section reads:

“Section 141.- Property taxes to be a first charge on premises on which they are assessed - (1) Property taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land revenue, if any, due to the State Government thereupon, be a first charge, in the case of any building or land held immediately from the Government, upon the interest in such building or land of the person liable for such taxes and upon the movable property, if any found within or upon such building or land and belonging to such person; and, in the case of any other building or land, upon the said building or land and upon the movable property, if any, found within or upon such building or land and belonging to the person liable for such taxes.

Explanation. - The term ‘Property taxes’ in this section shall be deemed to include charges payable under Section 134 for water supplied to any premises and the costs of recovery of property taxes as specified in the rules.

(2) In any decree passed in a suit for the enforcement of the charge created by sub-section (1), the Court may order the payment to the Corporation of interest on the sum found to be due at such rate as the Court deems reasonable from the date of the institution of the suit until realisation, and such interest and the cost of enforcing the said charge, including the costs of the suit and the cost of bringing the premises or movable property in question to sale under the decree, shall, subject as aforesaid, be a fresh charge on such premises and movable property along with the amount found to be due, and the Court may direct payment thereof to be made to the Corporation out of the sale proceeds.”

Sub-section (1), as is obvious, merely creates a charge in express language. This charge is subject to prior payment of land revenue due to the State Government on such building or land. The section, apart from creating a statutory charge, does not further provide that this charge is enforceable against the property charged in the hands of a transferee for consideration without notice of the charge. It was contended that the saving provision, as contemplated by Section 100 of the Transfer of Property Act, may, without using express words, in effect provide that the property is liable to sale in enforcement of the charge and that if this liability is fixed by a provision expressly dealing with the subject, then the charge would be enforceable against the property even in the hands of a transferee for consideration without notice of the charge. According to the submission it is not necessary for the saving provision to expressly provide for the enforceability of the charge against the property in the hands of a transferee for consideration without notice of the charge. This submission is unacceptable because, as already observed what is enacted in the Second half of Section 100 of Transfer of Property Act is the general prohibition that no charge shall be enforced against any property in the hands of a transferee for consideration without notice of the charge and the exception to this general rule must be expressly provided by law. The real core of the saving provision of law must be not mere enforceability of the charge against the property charged but enforceability of the charge against the said property in the hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act is clearly not such a provision. The second contention fails and is repelled.

5. The third argument, and indeed this was the principal argument which was vehemently pressed with considerable force by Shri Desai, is that the plaintiff must be deemed to have constructive notice of the arrears of municipal taxes and as an auction purchaser of must be held liable to pay these taxes and the property purchased must also be held subject to this liability in his hands. In support of this submission he cited some decisions of our High Courts. The first decision relied upon by Shri Desai is reported as *Arumilli Surayya v. Pinisethi Venkataramanamma* [AIR 1940 Mad 701] in which relying on *Creel v. Ganga Ram Goal Rai* [AIR 1937 Cal 129] it was observed by Harwell, J. that Section 100 of the Transfer of Property Act does not apply to auction sales because the transfer within the meaning of the Transfer of Property Act does not include an auction sale. It was added that the position of a purchaser at an execution sale is the same as that of the judgment-debtor and his position is some what different from that of a purchaser at a private sale. Execution purchasers, according to this decision purchase the property subject to all the charges and encumbrances legal and equitable which would bind the debtors. “We do not agree with the

view taken in this decision. We, however, do not consider it necessary to go into the matter at length because we find that this decision was expressly overruled by this Court in **Laxmi Devi v. Mukand Kunwarand** [AIR 1965 SC 834] the High Court, relying on this Court's decision, had also repelled a similar contention pressed on behalf of the Municipal Corporation there. This Court pointed out in **Laxmi Devi** case that the provisions of Section 2(d) of the Transfer of Property Act prevail over Section 5 with the result that the provisions of Section 57 and those contained in Chapter IV of the Transfer of Property Act must apply to proceedings by operation of law. Section 100, it may be pointed out, falls in Chapter IV. Reliance was next placed on a Full Bench decision of the Allahabad High Court in **Nawal Kishore v. The Municipal Board, Agra** [AIR 1943 All 115 (FB)]. According to this decision the question of constructive notice is a question of fact which falls to be determined on the evidence and circumstances of each case. But that Court felt that there was a principle on which question of constructive notice could rest, that principle being that all intending purchasers of the property in municipal areas where the property is subject to a municipal tax which has been made a charge on the property by statute have a constructive knowledge of the tax and of the possibility of some arrears being due with the result that it becomes their duty before acquiring the property to make enquiries as to the amount of tax which is due or which may be due and if they fail to make this enquiry such failure amounts to a wilful abstention or gross negligence within the meaning of Section 3 of the Transfer of Property Act and notice must be imputed to them. The reference to the Full Bench in the reported case was necessitated because of conflict of judicial opinion between that Court and Oudh Chief Court. The earlier decision of a Division Bench in **Municipal Board, Cawnpore v. Roop Chand Jain** [AIR 1940 All 456] was overruled and the Bench decision of Oudh Chief Court in **Municipal Board Lucknow v. Ramjilal** [AIR 1941 Oudh 305] was approved. The next decision to which reference was made by Shri Desai is reported as **Akhoy Kumar Banerji v. Corporation of Calcutta** [AIR 1915 Cal 478] In this case, after distinguishing a mortgage from a charge, it was observed that the statutory charge in that case could not be enforced against the property in the hands of bona fide purchaser for value without notice. While dealing with the question whether the appellants in that case were purchasers for value without notice, it was observed that they had not pleaded in their written statement that they were purchasers for value without notice. Having not pleaded this defence they were held disentitled to avail of it. Having so observed the Court dealt with the case on the assumption that the defence though not expressly taken in the pleadings was available to the defendants. The court said:

“But even if we assume that the defence, though not expressly taken in their written statement, is available to the defendants, they are in a position of difficulty from which there is no escape. The appellants are private purchasers of the property and if they had enquired at the time of their purchase, they would have discovered that the rates were in arrears; as a matter of fact, they would be personally liable under Section 223 for the arrears of the year immediately prior to the date of their purchase, and they admit that they have satisfied such arrears, though they do not disclose whether by enquiry they had ascertained the existence of the arrears before they made the purchase”.

6. The Court then proceeded to deal with the position of the vendor from whom the appellants had purchased the property in order to see if he could raise the defence of being a purchaser for value without notice. The appellant's vendor was a mortgagee who had acquired title by foreclosure - an involuntary alienation by his mortgager - and it was held that to him constructive notice could not be imputed to the same extent as to a purchaser at a private sale. But had he made enquiries from the municipal authorities he could still have ascertained whether any arrears of consolidated rates were due. When he had taken the mortgage he was aware that if the rates were not paid the arrears would be first charge on the property with the result that before becoming full owner by foreclosure he should have ascertained the true state of affairs. On this reasoning he was held to have constructive notice and the purchasers from him could not claim greater protection. These circumstances clearly disclose that the reported case is not similar to the one before us and is of little assistance.

7. *Chandu Ram v. Municipal Commissioner of Kurseong Municipality* [AIR 1951 Cal 398] was the next decision cited. The Bench in that case followed the Full Bench decision of the Allahabad High Court in *Newal Kishore's* case. A Division Bench of the Oudh Chief Court in *Municipal Board, Lucknow v. Lala Ramji Lal* [AIR 1941 Oudh 305] disagreeing with the Bench decision of the Allahabad High Court in *Roop Chand Jain* case, observed that it must be presumed that a person who buys house property situated in a municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. The charge having been expressly imposed by the Municipal Act upon the property for payment of municipal taxes the municipality was entitled to follow the property in the hands of a transferee who had not cared to make any enquiry as to whether the payment of taxes was in arrears. The Court approved the Calcutta decision in *Akhoy Kumar* case. The next decision cited is reported as *Laxman Venkatesh Naik v. The Secretary of State for India* [AIR 1939 Bom 183] but being case of Takkavi loans it is of no assistance in the present case.

8. We may now turn to the full Bench decision of the Allahabad High Court in *Roop Chand Jain* case. The reasoning for the view adopted there may be reproduced:

“A bona fide purchaser takes property he buys free of all charges of which he has no notice actual or constructive. He is said to have constructive notice when ordinary prudence and care would have impelled him to undertake an inquiry which would have disclosed the charge. If for instance the charge is created by a registered document then the purchaser would be held to have constructive notice of that charge inasmuch as a prudent purchaser would in ordinary course search the registers before effecting the purchase. There is no register, as far as we know, of arrears of taxes or of charges in respect thereof, it has not been shown that the municipality of Cawnpore intimate to the public in the ‘Press’ or by other publication a list of the properties which are charged in respect of arrears of taxes. There is nothing upon the record to justify the conclusion that the defendants could have demanded any information from the municipality in regard to charges on immovable property within the municipal limits.”

9. The Court then noticed the fact that the Kanpur Corporation had allowed 11 years arrears of taxes to accumulate and it was observed that no intending purchaser was bound to presume that taxes upon the property, he contemplates purchasing had not been paid in the

ordinary course, in the absence of special intimation by the municipality. On this reasoning the suggestion of constructive notice was negated.

10. According to Section 3 of the Transfer of Property Act which is described as interpretation clause, a person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an enquiry or search which he ought to have made or gross negligence he would have known it. There are three explanations to this definition dealing with three contingencies when a person acquiring immovable property is to be deemed to have notice of certain facts.

11. Now the circumstances which by a. deeming fiction impute notice to a party are based, on his wilful abstention to enquire or search which a person ought to make or, on his gross negligence. This presumption of notice is commonly known as constructive notice. Though originating in equity this presumption of notice is now a part of our statute and we have to interpret it as such. Wilful abstention suggests conscious or deliberate abstention and gross negligence is indicative of a higher degree of neglect. Negligence is ordinarily understood as an omission to take such reasonable care as under the circumstances is the duty of a person of ordinary prudence to take. In other words it is an omission to do something which a reasonable man guided by considerations which normally regulate the conduct of human affairs would do or doing something which normally a prudent and reasonable man would not do. The question of wilful abstention or gross negligence and, therefore, of constructive notice considered from this point of view is generally a question of fact or at best mixed question of fact and law depending primarily on the facts and circumstances of each case and except for cases directly falling within the three explanations, no inflexible rule can be laid down to serve as a straight-jacket covering all possible contingencies. The question one has to answer in circumstances like the present is not whether the purchaser had the means of obtaining and might with prudent caution have obtained knowledge of the charge but whether in not doing so he acted with wilful abstention or gross negligence. Being a question depending on the behaviour of a reasonably prudent, man, the Courts have to consider it in the background of Indian conditions. Courts in India should, therefore, be careful and cautious in seeking assistance from English precedents which should not be blindly or too readily followed.

12. Adverting now to the case before us, as already noticed, the property in question had vested in the receivers in insolvency proceedings since March, 1949, by an interim order, and in October, 1950, the original owner was adjudicated as an insolvent and the property finally vested in the receivers in insolvency. The plaintiff purchased the property in November, 1954 and in our opinion it could not have reasonably been expected by him that the receivers would not have paid to the municipal corporation since 1949 the taxes and other dues which were charged on this property by statute. According to Section 61 of the Provincial Insolvency Act, 1920, the debts due to a local authority are given priority, being bracketed along with the debts due to the State. Merely because these taxes are charged on the property could not constitute a valid ground for the official receiver not to discharge this liability. In fact we find from the record that on January 15, 1951, the receivers had submitted a report to the insolvency Court about their having received bills for Rs 628-3-0 in respect of municipal taxes of the insolvent's property and leave of the Court was sought for transferring the said

property to the names of the receivers in the municipal and Government records. The Court recorded an order on February 8, 1951, that the municipal taxes had to be paid on the receivers stating that they did not possess sufficient funds the Court gave notice to the counsel for the opposite party and on February 24, 1951 made the following order:

“Mr Pandya absent. The taxes have to be paid the Receivers state that they can pay only by sale of some properties of the insolvent from which they want. Sanctioned. The property in which the insolvent stays should first be disposed of. The terms are accordingly so authorised.”

It is not known what happened thereafter. It is however difficult to appreciate why after having secured the necessary order from the Court municipal taxes were not paid off by the receivers and why the municipal corporation did not pursue the matter and secure payment of the taxes due. May be that the municipal corporation thought that since these dues were a charge on the property they need not pursue the matter with the receivers and also need not approach the insolvency Court. If so, then this, in our opinion, was not a proper attitude to adopt. In any event the plaintiff could not reasonably have thought that the municipal corporation had not cared to secure payment of the taxes due since 1949. On the facts and circumstances of this case, therefore, we cannot hold that the plaintiff as a prudent and reasonable man was bound to enquire from the municipal corporation about the existence of any arrears of taxes due from the receivers. It appears from the record, however, that he did in fact make enquiries from the receivers but they did not give any intimation. The plaintiff made a statement on oath that when he purchased the building, in question it was occupied by the tenants and the rent used to be recovered by the receivers. There is no rebuttal to this evidence. Now, if the receivers were receiving rent from the tenants, the reasonable assumption would be that the municipal taxes which were a charge on the property and which were also given priority under Section 61 of the Provincial Insolvency Act, 1920, had been duly paid by the receivers out of the rental income. The plaintiff could have no reasonable ground for assuming that they were in arrears, from the plaintiff's testimony it is clear that he did nevertheless make enquiries from the receivers if there were any dues against the property though the enquiry was not made specifically about municipal dues. Apparently he was not informed about the arrears of municipal taxes. This seems to us explainable on the ground that the receivers had, after securing appropriate orders, for some reason not clear on the record, omitted to pay the arrears of municipal taxes and they were, therefore, reluctant to disclose the lapse on their part. On these facts and circumstances we do not think that the plaintiff could reasonably be fixed with any constructive notice of the arrears of municipal taxes since 1949. So far as the legal position is concerned we are inclined to agree with the reasoning adopted by the Allahabad High Court in *Roop Chand Jain* case in preference to the reasoning of the Full Bench of that Court in *Nawal Kishore* case; or of the Division Bench of Oudh Chief Court in *Ramji Lal* case. We do not think there is any principle or firm rule of law as suggested in *Nawal Kishore* case imputing to all intending purchasers of property in municipal area where municipal taxes are a charge on the property, constructive knowledge of the existence of such municipal taxes and of the reasonable possibility of those taxes being in arrears. The question of constructive knowledge; or notice has to be determined on the facts and circumstances of each case. According to the Full Bench decision in *Nawal Kishore* case

also the question of constructive notice is a question of fact and we do not find that the material on the present record justifies that the plaintiff should be fixed with any constructive notice of the arrears of municipal taxes.

13. We may add before concluding that as the question of constructive notice has to the approached from equitable considerations we feel that the municipal corporation in the present case was far more negligent and blameworthy than the plaintiff. We have, therefore, no hesitation in holding that the High Court took the correct view of the legal position with the result that this appeal must fail and is dismissed. As there is no representation on behalf of the respondent there will be no order as to costs.

* * * * *

Md. Mustafa v. Haji Md. Isa

AIR 1987 Pat 5

RAMANANDAN PRASAD, J. - 2. The case of the plaintiff is that he was a tenant in one of the Katras of a Pucca house, which stood over four decimals of land appertaining to plot Nos. 2230 and 2231 under Khata No. 721 in village Alamgirpur Phulwarisharif, a suburb of town of Patna, which belonged to original defendant 1 Md. Isa, who was his uncle. In the month of April, 1972 Haji Md. Isa expressed his desire to plaintiff Md. Mustafa to sell the house, as he was in need of some money, and eventually, after some negotiation, Md. Isa agreed to sell the house to the plaintiff for a sum of Rs. 20,000/- As the plaintiff had not got so much fund with him at that time for getting the sale deed executed, he wanted some time and Md. Haji Md. Isa agreed to grant him some time. It is said that on 14th June, 1972 Md. Isa told the plaintiff that he urgently required Rs. 7,000/- and so he should advance the amount to him and get a deed of agreement to sell executed by him. The plaintiff agreed. On the following day i.e. on 15-6-1972 the plaintiff advanced Rs. 7,000/- towards the aforesaid consideration money of Rs. 20,000/- to Haji Md. Isa, who, in turn, executed an agreement to sell on a stamped paper and delivered the same to the plaintiff. According to this agreement Md. Isa agreed to execute a registered sale deed in respect of the said house in favour of the plaintiff on payment of the balance of the consideration money by the last week of January, 1973, but he put the plaintiff in possession of the entire building at that very time in part performance of the contract. The case of the plaintiff is that he managed the balance of the consideration money and he asked Md. Isa to execute the sale deed, but he did not do, and hence the plaintiff sent a registered notice through his pleader on 7-10-1972 which was refused. In the meantime, the plaintiff learnt that the father of the minor defendants 6 and 7, namely, Arif Hussain, brought a collusive sale deed dt. 20-7-1972 into existence in the name of these defendants said to have been executed by Md. Isa. It is said that this sale deed is a fraudulent document and was brought into existence in spite of the aforesaid agreement executed by Md. Isa in favour of the plaintiff. It has also been alleged that this sale deed can have no legal effect, as it was executed without consideration and with full knowledge of the said agreement in favour of the plaintiff.

3. Original defendant 1, Haji Md. Isa had filed written statement denying the allegation of the plaintiff but he died during the pendency of the suit on 20-6-1974, and his heirs, namely, respondents 1 (a) and 1 (b), who were substituted in his place adopted the written statement filed by him. Defendants 2 and 3 have filed a joint written statement. The case, however, put forward in the two sets of written statement is substantially the same. The case of the defendants is Md. Isa was in need of money and so he wanted to sell the house. It has also been admitted by Md. Isa that the plaintiff also wanted to purchase the house, but the price offered by him was too low and hence he had rejected his offer. He has denied to have agreed to sell the house to the plaintiff for a sum of Rs. 20,000/- or to have executed an agreement in his favour in this connection. According to these defendants the agreement said to have been executed by Md. Isa and filed by the plaintiff is a forged, fabricated and antedated document. Their further case is that Md. Isa had agreed to sell the house to defendants 2 and 3 for a sum of Rs. 24,000/- and he actually executed a registered sale deed in

their favour on 20-7-1972 after receiving the full consideration money of Rs. 24,000/- from them. According to them, this sale deed is a genuine document and was executed for consideration and Md. Isa had also put defendants 2 and 3 in possession of the house after sale and they are coming in possession there of. Further case of the defendants 2 and 3 is that they are bona fide purchasers for value without any notice of the alleged agreement.

4. The learned Subordinate Judge, who tried the suit dismissed the suit on the following findings:-

(1) The agreement in question (Ext. 1) was not executed by Haji Md. Isa and was not a genuine document.

(2) The sale deed was duly executed by Md. Isa on receiving full consideration and was a valid and genuine document.

(3) Defendants 2 and 3 were bona fide purchasers for value without notice of the said agreement.

5. The learned counsel appearing for the appellant has challenged the aforesaid findings arrived at by the learned Subordinate Judge and so the following points arise for determination in this appeal:

(I) Whether the agreement is a valid and genuine document?

(II) Whether defendants 2 and 3 are bona fide purchasers for value without notice of the Baibiyana aforesaid?

Point No. (I):

12. There is no evidence worth the name to show that the plaintiff came in actual or even constructive possession of the entire building after the execution of the said Beyananama, as stated therein and as claimed by the plaintiff. Admittedly, the plaintiff was occupying only one of the Katras of the building as tenant since the time of his father in which he was holding his hotel. There is nothing on the record to show that he really came in possession of the entire building after the execution of the Beyananama. It is the admitted position that there were six other tenants like the plaintiff in that building, besides the plaintiff. There is nothing to show that the plaintiff ever realised rent from any of them. Of course, he has stated that he had realised rent from one of the tenants and that also only once, but this statement is apparently false, as he could not name the tenant from whom he had realised the rent. In fact, he did not give out the names of the other tenants who were in possession of the different portions of that building. This cannot be the natural conduct of a person, who claims to have come in actual possession of the entire building. On the other hand two of the tenants namely, Dr. Suleman Gosh Khan and Md. Nazir Alam have come to the witness-box to support the case of the defendants 2 and 3. Their evidence is that previously they used to pay rent to Md. Isa, but after the latter executed the sale deed in favour of defendants 2 and 3, he asked them to pay rent to these defendants and both of them, accordingly, paid rent thereafter to the father of these defendants, namely. Arif Hussain. There appears absolutely no reason to reject the evidence of these witnesses and, in fact, the evidence of D.W. 3, who is a medical practitioner deserves due consideration. Then, the evidence of D.W. 9 shows that one of the Katras of the disputed building was vacant at the time of the sale and Md. Isa put him in direct possession of that Katra after the sale. He has also been supported by Jafar Imam alias Samiullah (D.W.2), who is one of the sons of late Md. Isa, who died on 20-6-1974. Then the names of

defendants 2 and 3 were also mutated in the Circle Office and rent receipts were granted in their names. I find on the other hand, there is nothing to show that the plaintiff had ever taken steps for getting his name mutated anywhere. In such circumstances, it is not possible to accept the case of the plaintiff that Md. Isa had put him in possession of the entire building and that he had come in possession thereof on the basis of his Beyananama.

21. Now comes the question as to whether defendants 2 and 3 are bona fide purchasers without notice of the said Beyananama.

22. It has been submitted that if the building was not in actual possession of the vendor and a portion of it was admittedly in possession of the plaintiff, it was the duty of the purchasers to make enquiries from the persons in possession including the plaintiff and that the purchasers are bound by all the equities which the party in possession may have been in the property if they failed to make any enquiry from them. It was further submitted that the possession of the plaintiff over a portion of the building in question would be sufficient notice to the purchasers of all the equitable interests including the interest arising out of a collateral agreement. It was pointed out that in the present case it is the admitted position that the father of the minor purchasers did not make any enquiry and so he shall be deemed to have purchased the building subject to the equities which the plaintiff possessed in the property on the basis of the Beyananama and in any event he cannot be called a bona fide purchaser without notice. In support of this submission reliance was placed on the decisions in the case of *Balchand Mahton v. Bulaki Singh* [AIR 1929 Pat 284], *Ramkrishna Singh v. Mahadei Haluai* [AIR 1965 Pat 467] and *Basruddin Khan v. Gurudarshan Das* [AIR 1970 Pat 304] in which the principle of constructive notice has been applied for giving relief to the plaintiff. The principle of constructive notice is incorporated in Illus. II of S. 3 of the T.P. Act which reads as follows:

“Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.”

23. These three decisions, which are of Division Bench, no doubt, support the broad contention of the appellant, but the facts and circumstances of those cases are quite different from the facts and circumstances of the present case. In all those cases the plaintiff was in exclusive occupation of the land or building involved. In the present case the position is that there were and are six more tenants in the house besides the plaintiff and presumably they are in occupation of identical areas, as there is no evidence to indicate that the plaintiff was in occupation of a larger area than the other tenants. Indeed both the plaintiff and D.W. 3 were paying the same rent of Rs. 10/- per month. In such circumstances, it may well be said that the plaintiff was in occupation of 1/7th portion of the building which can be conveniently described as an insignificant portion of the building.

24. All these decisions are based primarily on the doctrine laid down in the case of *Daniels v. Davison* [(1809) 16 Ves 249]. The limits up to which this doctrine can be extended has been explained in a Full Bench decision of this Court in *Hari Charan Kuav. Kaula Rai*, [AIR 1917 Pat 478] in which the following observation has been made:

“There appears to be no case in the books in which the Courts have been asked to apply the doctrine of *Daniels v. Davison* (1809-16 Ves 249) to a case like the one before us in which the person who had the contract to purchase in his pocket was in possession not of the entire property sold to another but only of a small portion of that property.”

The Full Bench did not apply the doctrine laid down in *Daniels v. Davison* English decisions on the basis of which the aforesaid three decisions have been given, as the plaintiff was in occupation of only a small portion of the property. In the case before the Full Bench the land sold to purchasers was 9 bighas 10 kathas, whereas the plaintiff was in possession of only 3 bighas 15 kathas out of that land. This would mean that the Full Bench did not apply the principle of those cases even when the plaintiff was in possession of a little over 1/3rd area of the land sold. If that principle could not be applied in a case where the plaintiff was in possession of more than 1/3rd of the property sold, it obviously cannot be applied in the present case where the plaintiff was in possession of only 1/7th of the property sold.

25. This view has been followed by a Division Bench of this Court in *Kesharmull Agarwala v. Rajendra Prasad* [1968 BLJR 28]. In this case it was observed as follows:

Here, on the admission of the plaintiff himself, there were three persons in occupation of the disputed house. The plaintiff was occupying the shop portion at a monthly rental of Rs. 15/- The inner portion of the house and the rooms were in occupation of the owner, namely, defendant 1, his mother and grandmother. Another portion of the house was also at that time in the occupation of a doctor named Anand Kuru Sarkar. Under such circumstances the purchaser was not bound to make enquiry from every tenant in occupation of a portion of the house, especially when the owner himself was occupying a portion and enquiry had been made from him.

The legal position regarding burden of proof was also explained by the Division Bench and it was stated as follows:

It is doubtless well settled that to defeat a suit for specific performance of contract the burden initially lies on the subsequent purchaser to prove want of notice. But, as pointed out in *Ramchander Singh v. Bibi Asghari Begam* this burden is somewhat light, and even a mere denial may suffice. Moreover, when both parties have given evidence, the question is ultimately one of appreciating the evidence, and any discussion about burden of proof becomes somewhat academic.

This very principle has been followed by a learned single Judge of this Court in *Rameshwar Singh v. Hari Narayan Singh* [AIR 1984 Pat 277] where Ashwani Kumar Sinha, J. has summarised the law in this regard by stating as follow:

It is thus apparent that the contesting defendant pleaded want of knowledge of the plaintiff's prior contract. Thus though the settled law is that the onus was upon the contesting defendant to prove that he was a bona fide purchaser for value without notice of the prior contract yet in view of the denial regarding want of knowledge of the plaintiff's prior contract by the defendants, the onus shifted on the plaintiff. In this view of law the two Courts below, in my opinion, very correctly threw the onus

upon the plaintiff to prove the knowledge of prior contract on the contesting defendant.

26. Thus, the principle, which emerges from these decisions is that the principle of constructive notice, as incorporated in Illus. II of S. 3 of the T.P. Act and the doctrine as laid down in *Daniels v. Davison* [1809-16 Ves 249] cannot be extended to a case in which the person basing his claim on the basis of a prior agreement is in possession of only a small fraction of the property which has been purchased by the purchasers and in such a case the purchasers cannot be said to be bound to make enquiry about the previous contract from the plaintiff or any other tenant in occupation of a portion of the house. In such an event the deeming clause of Illus. II of S. 3 cannot be attracted at all and the Court cannot presume that the purchaser will have the notice of the title, if any, of any person who is for the time being in actual possession of only a small fraction of the property sold.

27. So, far the burden of proof regarding the plea of the purchasers being bona fide purchasers without notice of the prior contract is concerned, it is well settled that to defeat a suit for specific performance of contract, the burden initially lies on the subsequent purchasers to prove want of notice, but this burden is somewhat light and even a mere denial may suffice for shifting the burden upon the plaintiff to prove that the purchasers had the knowledge about his prior contract before he purchased the property. In any event, when both the parties have given evidence, the question of burden loses its importance and the question is ultimately one of appreciating evidence.

28. In view of the principles of law stated above, it cannot be said in the present case that defendants 2 and 3 shall be deemed to have notice about the alleged agreement between the plaintiff and Md. Isa as the plaintiff was in possession of only 1/7th of the building purchased by the defendants. In any event, the initial burden of proof regarding want of knowledge of the alleged prior agreement of the plaintiff has been discharged by D.W. 9 who is the father and guardian of the purchasers by stating on oath that he had absolutely no knowledge about the said agreement before he purchased the building in question from Md. Isa. Ordinarily one cannot expect any corroboration of such a denial and, in face of this denial, it was for the plaintiff to prove that in fact defendants 2 and 3 or their father had knowledge about his alleged agreement. The plaintiff (P.W. 2) himself is the solitary witness who has deposed on this point and he too has made only a vague and general statement in his examination-in-chief that these defendants and their father were aware of his agreement, but he has not explained as to how they could know about it. In the absence of any statement regarding any circumstance from which he could gather about their knowledge, it is difficult to accept his bald evidence in face of the denial of D.W. 9. The mere fact that D.W. 9 was also a resident of the same locality is not such a circumstance which alone can lead to the irresistible conclusion that he must be aware of the said agreement, specially when the locality is a big one comprising of a large number of houses. In such circumstances, the learned Subordinate Judge was quite justified in holding that defendants 2 and 3 and their father had no prior knowledge about the alleged agreement. When they had no prior knowledge about the said agreement, they cannot be bound by it and then plaintiff cannot enforce his agreement as against them, even if his agreement would have been a valid and

genuine document, because a bona fide purchaser for value without notice cannot be bound by any prior agreement between his vendor and the plaintiff.

29. Thus, in any view of the matter, the plaintiff is not entitled to a decree for specific performance of contract. He also cannot claim a refund of the consideration money of the agreement, in view of the finding that his agreement is not genuine and valid.

30. For the reasons stated above, this appeal is dismissed with costs.

* * * * *

H.N. Narayanaswamy Naidu v. Smt. Deveeramma

AIR 1981 Kant 93

G.N. SABHAHIT, J. - This appeal by defendant 3 is directed against the judgment and decree dated 24-10-1973 passed by the Civil Judge, Hassan, in Regular Appeal No. 176 of 1972, on his file, dismissing the appeal by the present appellant before him, on confirming the judgment and decree dated 10-10-1972 passed by the Additional Munsiff, Hassan, in Original Suit No. 271 of 1969, on his file, decreeing the suit of the plaintiff for specific performance of an agreement under Exhibit P-1-10-1967.

2. The Plaintiff averred that defendant 1 and his mother sold the suit properties in her favour on 21-3-1966 as per Exhibit P-2; but, that they obtained an agreement to reconvey as per Exhibit P-3 on the same day under which the plaintiff agreed to reconvey the properties to the vendors in case they pay the entire amount of consideration after six years and within six months thereafter. Subsequently, however, since the vendors were in need of money, they further executed an agreement that they would release the agreement of reconveyance under Exhibit P-1. It is for that purpose that the present suit was instituted by the plaintiff in Original Suit No. 271 of 1969 calling upon them to execute the registered release deed as assured under Exhibit P-1.

3. Defendants 1 and 2 filed their written statement denying the execution of Ext. P-1. Defendant 3 contended that he has purchased the right to obtain reconveyance from defendants 1 and 2 under Ext. D-1 dated 29-5-1969. He further contended that he obtained the right bona fide and without knowledge of Ext. P-1 for consideration and, hence, the said Ext. P-1 was not binding on him.

4. The sole point, therefore, that arises for my consideration in this appeal is: 'Whether defendant 3 was a bona fide purchaser for value without notice of the right to get the reconveyance from defendants 1 and 2?'

5. Section 19 (b) of the Specific Relief Act, 1963, reads:

"19. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

6. Hence, it is obvious that defendant 3 who comes to the Court with the pleading that he was a transferee for value. Who has paid the money in good faith and without notice of the original contract Ext. P-1, shall have to prove that he was a transferee for value, that he paid so without notice of the original contract.

7. It is in this context that the learned Advocate for the respondent/plaintiff invited my attention to the definition of the term 'Notice' as defined in Section 3 of the T. P. Act, 1882, which reads.

(A) person is said to have notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence he would have known it.

Explanation II to the said definition reads:

Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

8. Relying on these, the learned Advocate appearing for the respondent-plaintiff submitted that defendant 3 not only had actual notice but also constructive notice as contemplated in Explanation II to the definition of the term 'Notice' contained in S. 3 of the Transfer of Property Act, 1882.

9. The learned Advocate appearing for the appellant however, tried to meet this submission by inviting my attention to a decision of the Patna High Court in the case of **Shankar Prasad v. Mt. Muneshwari** [AIR 1969 Pat 304], wherein their Lordships have made it clear that on the facts of that case, it was not necessary for the defendant to further enquire with the occupant of the premises.

10. The facts of that case and the facts of the present case are entirely different. As rightly pointed out by the learned Civil Judge, the facts of the present case are such as would induce any average prudent man to go and enquire with the person viz., the plaintiff, who was in actual possession of the premises. In Exhibit P-3, it is stated that before the properties are reconveyed, the costs for major repairs shall be paid to the plaintiff. In Ext. D-1, it is stated that there was some litigation against defendants 1 and 2 in which the right in question was attached. In this background, any average prudent man ought to have enquired about the rights of the plaintiff, whether reconveyance was still subsisting or whether he had spent any amount further for major repairs or what was the nature of his rights etc. Thus, it is obvious that but for the wilful abstention from enquiry, defendant 3 would have come to know the entire facts and, hence, he should be deemed to have the notice of the rights of the plaintiff. Further, even under Explanation II to the definition of the term 'Notice' contained in Section 3 of the Transfer of Property Act, 1882, since the plaintiff was in actual possession, practically as owner but for the reconveyance deed, it was the duty of defendant 3 to enquire with the plaintiff about her rights. Even under the said provision, he should be deemed to have the notice of the right of the plaintiff.

11. Both the Courts below have held that defendant 3 had notice. The trial Court says that defendant 3 had actual notice, appreciating the evidence on record, as he was residing very near to the suit premises - Within a furlong - and that in all probability, he was aware of all the dealings between the parties. In addition, the first appellate Court has held that defendant 3 shall also be deemed to have notice of the rights of the plaintiff. In my considered view, both the Courts below are right in holding that defendant 3 did have notice of the rights of the plaintiff and of the agreement entered into under Exhibit P-1. That is further made probable by the fact that in Ext. D-1, defendant 3 has taken care to see that 'the vendors are made liable for damages and return of purchase money in case the sale falls through for any reason, on the charge of their other properties - moveable and immoveable. Therefore, he cannot resist the

suit instituted by the plaintiff for specific performance on the ground that he is a bonafide purchaser for value without notice. The appeal, without more, is liable to be dismissed.

12. In addition, it was submitted at the Bar that this defendant 3 has not taken any action for getting the properties reconveyed within the time stipulated. It is settled law that reconveyance is a concession given by the vendee. It has to be strictly observed by him; time is the essence of the contract. Since defendant 3 has not taken any action in the matter, his rights, even if any, are obviously barred, that is only by the way.

13. In the result, therefore, the appeal fails and is dismissed.

* * * * *

Ram Niwas v. Bano

(2000) 6 SCC 685 : AIR 2000 SC 2921

S.S.M. QUADRI, J. - The scope of Section 19(b) of the Specific Relief Act read with Explanation II to Section 3 of the Transfer of Property Act and the provisions of Section 20(2) of the Specific Relief Act, 1963, determine the result of this appeal.

2. It will be apt to begin our discussion with Section 19(b) of the Specific Relief Act, 1963 which is in the following terms:

“19. Relief against parties and persons claiming under them by subsequent title. –

Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.”

3. Section 19 provides the categories of persons against whom specific performance of a contract may be enforced. Among them is included, under clause (b), any transferee claiming under the vendor by a title arising subsequently to the contract of which specific performance is sought. However, a transferee for value, who has paid his money in good faith and without notice of the original contract, is excluded from the purview of the said clause. To fall within the excluded class, a transferee must show that:

(a) he has purchased for value the property (which is the subject-matter of the suit for specific performance of the contract);

(b) he has paid his money to the vendor in good faith; and

(c) he had no notice of the earlier contract for sale (specific performance of which is sought to be enforced against him).

4. The said provision is based on the principle of English law which fixes priority between a legal right and an equitable right. If ‘A’ purchases any property from ‘B’ and thereafter ‘B’ sells the same to ‘C’, the sale in favour of ‘A’, being prior in time, prevails over the sale in favour of ‘C’ as both ‘A’ and ‘C’ acquired legal rights. But where one is a legal right and the other is an equitable right

“a bona fide purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law”. (***Snell’s Equity*** - 13th Edn., p. 48.)

This principle is embodied in Section 19(b) of the Specific Relief Act.

5. It may be noted here that “notice” may be (i) actual, (ii) constructive, or (iii) imputed.

6. Section 3 of the Transfer of Property Act defines, inter alia,

“‘a person is said to have notice’ of a fact when he actually knows that fact, or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it”.

And Explanation II appended to this definition clause says:

“Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.”

7. Thus, it is seen that a statutory presumption of “notice” arises against any person who acquires any immovable property or any share or interest therein of the title, if any, of the person who is for the time being in actual possession thereof.

8. The principle of constructive notice of any title which a tenant in actual possession may have, was laid down by Lord Eldon in *Daniels v. Davison* [(1809) 16 Ves. 249]. The learned Law Lord observed:

“Upon one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease, or an agreement, a person, purchasing part of the estate, must be bound to inquire, on what terms that person is in possession.”

11. The appellant (“the tenant”) is the unsuccessful plaintiff in the suit giving rise to this appeal. He took on rent a shop situated at Katlara Bazar, Loharawali Gali, Merta city (“the suit shop”) from its owner, Respondent 5 (“the vendor”) and on the material date he was paying rent of Rs 35 per month. On 25-1-1978, he claims to have entered into an agreement with the vendor to purchase the suit shop (Ext. 1) for a sum of Rs 9200 and paid a sum of Rs 3200 in cash and undertook to pay remaining amount of Rs 6000 at the time of execution of sale deed. During the pendency of this appeal, he died and the appellants were substituted as his legal representatives. The tenant and the vendor are said to be closely related - they are brothers as well as brothers-in-law. Respondents 1 to 4 (“the purchasers”) purchased the suit shop from the vendor on 24-7-1978 for a sum of Rs 20,000 under Exhibit 4. On 12-10-1978 the tenant filed the suit for specific performance of Ext. 1 against the vendor and the purchasers and their respective husbands - Respondents 6 to 9. The purchasers contested the suit denying genuineness of Ext. 1 and taking the plea that they are bona fide purchasers of the suit shop for value without notice of Ext. 1. On the basis of the pleadings, the trial court framed necessary issues. Issues 1 and 10, which are relevant to the present discussion, read as follows:

“1. Had Defendant 1 agreed to sell the disputed shop to the plaintiff on 25-1-1978 on the conditions written in para 2 of the plaint and put the plaintiff in possession as owner after taking Rs. 3200 in its lieu, and entrusted the tenancy deed (letter) written by him and his father, dated Baisakhi Sudi 9 Samvat 2029, to the plaintiff?

10. Have Defendants 2 to 5 purchased the disputed shop after paying full price and had they no knowledge of the alleged agreement to sell?”

12. On 15-12-1984 after considering the evidence placed before it, the trial court found all the issues in favour of the plaintiff and decreed the suit. Dissatisfied with the judgment and decree of the trial court, the purchasers filed appeal (SB Civil First Appeal No. 7 of 1985) in the High Court of Judicature for Rajasthan at Jodhpur. By his judgment dated 4-8-1987 a learned Single Judge of the High Court, on reappraisal of the evidence and after referring to Section 19(b) of the Specific Relief Act, held that the contesting respondents were bona fide purchasers of the suit shop and they paid consideration of Rs 20,000 without having

knowledge of the said agreement (Ext. 1). He held that the registered sale deed in favour of the purchasers could not be cancelled and the relief of specific performance could not be granted in favour of the tenant. The appeal was thus allowed on 4-8-1987. Assailing that judgment of the learned Single Judge, the tenant filed Special Appeal No. 27 of 1987 before the High Court. A Division Bench, having agreed with all the findings recorded by the learned Single Judge, dismissed the appeal on 29-1-1990. The Division Bench, however, held that simply because an inquiry from the tenant had not been made as to his real equitable interest in the property, it could not be taken or presumed that the defendant's vendees had knowledge of the earlier transaction and pointed out that the vendor gave out that the tenant was his brother as well as sister-in-law's husband and the documents were with him, which he would take back and deliver to them so there was no need to make further inquiry. It also held that:

“the conduct of the plaintiff has been elaborately dealt with by the learned Judge and on that basis, it has been found that the version which the plaintiff has given is not trustworthy. Besides that, we may also state that the relief of specific performance is an equitable relief. It would not be proper exercise of discretion in granting equitable relief of cancellation of the sale deed in the circumstances of the case”.

Thus, the Division Bench dismissed the appeal on 29-1-1990. From that judgment of the Division Bench arises the present appeal, at the instance of the tenant, by special leave.

13. Mr Sanjeev K. Kapoor, the learned counsel appearing for the appellants invited our attention to Explanation II to Section 3 of the Transfer of Property Act and submitted that both the learned Single Judge as well as the Division Bench erred in not taking note of the said provision while holding that the purchasers are covered by clause (b) of Section 19 of the Special Relief Act, 1963. There is nothing in the conduct of the tenant, submitted the learned counsel, which would disentitle him to the relief of specific performance of contract for sale.

16. The purchasers have acquired a legal right under sale deed (Ext. 4). The right of the tenant under Ext. 1, if it is true and valid, though earlier in time, is only an equitable right and it does not affect the purchasers if they are bona fide purchasers for valuable consideration without notice of that equitable right.

17. The foundation of the claim of the tenant is the existence of an equitable right under Ext. 1. We have referred to the pleadings of the parties, the relevant issues and the findings of the courts on this facet. The trial court found Issue 1 in favour of the plaintiff. The learned Single Judge having noted the plea in the written statement that the purchasers denied execution of any agreement by the vendor in favour of the tenant and stated that any such alleged agreement was forged observed:

“It may be mentioned that I have assumed the original contract because although Smt Bano and others have challenged it on the ground that it was fictitious and not genuine, the finding of the lower court on this aspect of the case that there was agreement to sell between Ram Narain and Satya Narain calls for no interference.”

It appears to us that he assumed the finding of the trial court as correct and proceeded to decide the appeal presumably because on Issue 10, he found that the purchasers did not have actual knowledge of Ext. 1. In our considered view, the learned Single Judge ought to have

considered the evidence and recorded his own positive finding on the question whether Ext. 1 was a true and valid agreement. This feature of the case was not adverted to by the Division Bench. Therefore, Issue 1 has to be considered afresh by the learned Single Judge.

18. Both the learned Single Judge as well as the learned Judges of the Division Bench of the High Court dealt with the question whether the purchasers had actual knowledge of Ext. 1, the earlier contract, and on evidence found that the purchasers did not have any knowledge of it. But they failed to notice the provisions of Explanation II to Section 3 of the Transfer of Property Act which is germane on the point of notice. Indeed, Issue 10 was not properly framed. The word “notice” should have been used in Issue 10 instead of “knowledge” because Section 19(b) uses the word “notice”. From the definition of the expression “a person is said to have notice” in Section 3 of the Transfer of Property Act, it is plain that the word “notice” is of wider import than the word “knowledge”. A person may not have actual knowledge of a fact but he may have notice of it having regard to the aforementioned definition and Explanation II thereto. If the purchasers have relied upon the assertion of the vendor or on their own knowledge and abstained from making inquiry into the real nature of the possession of the tenant, they cannot escape from the consequences of the deemed notice under Explanation II to Section 3 of the Transfer of Property Act. On this point, in the light of the above discussion, we hold that the purchasers will be deemed to have notice of Ext. 1, should it be found to be true and valid.

21. For the above reasons, we set aside the judgment and order of the Division Bench confirming the judgment of the learned Single Judge and remand the case to the learned Single Judge for his decision on (i) Issue 1, and (ii) whether the plaintiff is entitled to the discretionary relief of specific performance of a contract in the light of Section 20(2) of the Specific Relief Act in accordance with law. The appeal is accordingly allowed but in the circumstances of the case we make no order as to costs.

* * * * *

V.N. Sarin v. Ajit Kumar Poplai

AIR 1966 SC 432: (1966) 1 SCR 349

P.B. GAJENDRAGADKAR, C.J.- The short question of law which arises in this appeal is whether the partition of the coparcenary property among the coparceners can be said to be “an acquisition by transfer” within the meaning of Section 14(6) of the Delhi Rent Control Act, 1958 (“the Act”). This question arises in this way. The premises in question are a part of a bungalow situate at Racquet Court Road, Civil Lines, Delhi. The bungalow originally belonged to the joint Hindu family consisting of Respondent 2, Mr B.S. Poplai and his two sons, Respondent 1, Major Ajit Kumar Poplai and Vinod Kumar Poplai. The three members of this undivided Hindu family partitioned their coparcenary property on May 17, 1962, and as a result of the said partition, the present premises fell to the share of Respondent 1. The appellant V.N. Sarin had been inducted into the premises as a tenant by Respondent 2 before partition at a monthly rental of Rs 80. After Respondent 1 got this property by partition, he applied to the Rent Controller for the eviction of the appellant on the ground that he required the premises bona fide for his own residence and that of his wife and children who are dependent on him. To this application, he impleaded the appellant and Respondent 2.

2. The appellant contested the claim of Respondent 1 on three grounds. He urged that Respondent 1 was not his landlord inasmuch as he was not aware of the partition and did not know what it contained. He also urged that even if Respondent 1 was his landlord, he did not require the premises bona fide; and so, the requirements of Section 14(1) (e) of the Act were not satisfied. The last contention raised by him was that if Respondent 1 got the property in suit by partition, in law it meant that he had acquired the premises by transfer within the meaning of Section 14(6) of the Act and the provisos of the said section make the present suit incompetent.

3. The Rent Controller held that Respondent 1 was the exclusive owner of the premises in suit by virtue of partition. As such, it was found that he was the landlord of the appellant. In regard to the plea made by Respondent 1 that he needed the premises, bona fide as prescribed by Section 14(1)(e), the Rent Controller rejected the case of Respondent 1. The point raised by the appellant under Section 14(6) of the Act was not upheld on the ground that acquisition of the suit premises by partition cannot be said to be acquisition by transfer within the meaning of the said section. As a result of the finding recorded against Respondent 1 under Section 14(1)(e) however, his application for the appellant’s eviction failed.

4. Against this decision, Respondent 1 preferred an appeal to the Rent Control Tribunal, Delhi. The said Tribunal agreed with the Rent Controller in holding that Respondent 1 was the landlord of the premises in suit and had not acquired the said premises by transfer. In regard to the finding recorded by the Rent Controller under Section 14(1) (e), the Rent Control Tribunal came to a different conclusion. It held that Respondent 1 had established his case that he needed the premises bona fide for his personal use as prescribed by the said provision. In the result, the appeal preferred by Respondent 1 was allowed and the eviction of the appellant was ordered.

5. This decision was challenged by the appellant by preferring a second appeal before the Punjab High Court. The High Court upheld the findings recorded by the Rent Control Tribunal on the question of the status of Respondent 1 as the landlord of the premises and on the plea made by him that his claim for eviction of the appellant was justified under Section 14(1)(e). In fact, these two findings could not be and were not challenged before the High Court which was dealing with the matter in second appeal. The main contention which was raised before the High Court was in regard to the construction of Section 14(6); and on this point, the High Court has agreed with the view taken by the Rent Control Tribunal and has held that Respondent 1 cannot be said to have acquired the premises in suit by transfer within the meaning of the said section. It is against this decree that the appellant has come to this Court by special leave. Mr Purshottam for the appellant argues that the view taken by the High Court about the construction of Section 14(6) is erroneous in law. That is how the only point which arises for our decision is whether the partition of the coparcenary property among the coparceners could be said to be an acquisition by transfer under Section 14(6) of the Act.

6. The Act was passed in 1958 to provide, inter alia, for the control of rents and evictions in certain areas in the Union Territory of Delhi. This Act conforms to the usual pattern adopted by rent control legislation in this country. Section 2(e) defines a “landlord” as meaning a person who, for the time being, is receiving or is entitled to receive, the rent of any premises, whether on his own account or on account of or on behalf of, or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant. It has been found by all the courts below that Respondent 1 is a landlord of the premises and this position has not been and cannot be disputed in the appeal before us.

7. Section 14(1) of the Act provides for the protection of tenants against eviction. It lays down that notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant. Having thus provided for general protection of tenants in respect of eviction, clauses (a) to (l) of the proviso to the said section lay down that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the grounds covered by the said clauses; clause (e) of Section 14(1) is one of such clauses and it refers to cases where the premises let for residential purposes are required bona fide by the landlord for occupation as therein described. The Rent Control Tribunal and the High Court have recorded a finding against the appellant and in favour of Respondent 1 on this point and this finding also has not been and cannot be challenged before us.

8. That takes us to Section 14(6). It provides that where a landlord has acquired any premises by transfer, no application for the recovery of possession of such premises shall lie under sub-section (1) on the ground specified in clause (e) of the proviso thereto, unless a period of five years has elapsed from the date of the acquisition. It is obvious that if this clause applies to the claim made by Respondent 1 for evicting the appellant, his application would be barred, because a period of five years had not elapsed from the date of the acquisition when the present application was made. The High Court has, however, held that where property originally belonging to an undivided Hindu family is allotted to the share of

one of the coparceners as a result of partition, it cannot be said that the said property has been acquired by such person by transfer; and so, Section 14(6) cannot be invoked by the appellant. The question which we have to decide in the present appeal is whether this view of the High Court is right.

9. Before construing Section 14(6), it may be permissible to enquire what may be the policy underlying the section and the object intended to be achieved by it. It seems plain that the object which this provision is intended to achieve is to prevent transfers by landlords as a device to enable the purchasers to evict the tenants from the premises let out to them. If a landlord was unable to make out a case for evicting his tenant under Section 14(1)(e), it was not unlikely that he may think of transferring the premises to a purchaser who would be able to make out such a case on his own behalf; and the legislature thought that if such a course was allowed to be adopted, it would defeat the purpose of Section 14(1). In other words, where the right to evict a tenant could not be claimed by a landlord under Section 14(1)(e), the legislature thought that the landlord should not be permitted to create such a right by adopting the device of transferring the premises to a purchaser who may be able to prove his own individual case under Section 14(1)(e). It is possible that this provision may, in some cases, work hardship, because if a transfer is made by a landlord who could have proved his case under Section 14(1)(e), the transferee would be precluded from making a claim for the eviction of the tenant within five years even though he, in his turn, would also have proved his case under Section 14(1)(e). Apparently the legislature thought that the possible mischief which may be caused to the tenants by transfers made by landlords to circumvent the provisions of Section 14(1)(e) required that an unqualified and absolute provision should be made as prescribed by Section 14(6). That, in our opinion, appears to be the object intended to be achieved by this provision and the policy underlying it.

10. Mr Purshottam, however, contends that when an item of property belonging to the undivided Hindu family is allotted to the share of one of the coparceners on partition, such allotment in substance amounts to the transfer of the said property to the said person and it is, therefore, an acquisition of the said property by transfer. *Prima facie*, it is not easy to accept this contention. Community of interest and unity of possession are the essential attributes of coparcenary property; and so, the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family. In other words, what happens at a partition is that in lieu of the property allotted to individual coparceners they, in substance, renounce their right in respect of the other properties; they get exclusive title to the properties allotted to them and as a consequence, they renounce their undefined right in respect of the rest of the property. The process of partition, therefore involves the transfer of joint enjoyment of the properties by all the coparceners into an enjoyment in severality by them of the respective properties allotted to their shares. Having regard to this basic character of joint Hindu family property, it cannot be denied that each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners have subsisting title to the totality of the property of the family jointly, that joint title is by partition transformed into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively. If that be the true nature of partition,

it would not be easy to uphold the broad contention raised by Mr Purshottam that partition of an undivided Hindu family property must necessarily mean transfer of the property to the individual coparceners. As was observed by the Privy Council in *Girja Bed v. Sadashiv Dhundiraj* [AIR 1916 PC 104] “Partition does not give him (a coparcener) a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers.”

11. Mr Purshottam, however, strongly relies on the fact that there is preponderance of judicial authority in favour of the view that a partition is a transfer for the purpose of Section 53 of the Transfer of Property Act. It will be recalled that the decision of the question as to whether a partition under Hindu law is a transfer within the meaning of Section 53, naturally depends upon the definition of the word “transfer” prescribed by Section 5 of the said Act. Section 5 provides that in the following sections, “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons.

12. In this connectipn, Mr Purshottam has also relied on the fact that under Section 17(1)(b) of the Indian Registration Act, a deed of partition is held to be a non-testamentary instrument which purports to create a right, title or interest in respect of the property covered by it, and his argument is that if for the purpose of Section 17(1)(b) of the Registration Act as well as for the purpose of Section 53 of the Transfer of Property Act, partition is held to be a transfer of property, there is no reason why partition should not be held to be an acquisition of property by transfer within the meaning of Section 14(6) of the Act.

13. In dealing with the present appeal, we propose to confine our decision to the narrow question which arises before us and that relates to the construction of Section 14(6). What Section 14(6) provides is that the purchaser should acquire the premises by transfer and that necessarily assumes that the title to the property which the purchaser acquires by transfer did not vest in him prior to such transfer. Having regard to the object intended to be achieved by this provision, we are not inclined to hold that a person who acquired property by partition can fall within the scope of its provision even though the property which he acquired by partition did in a sense belong to him before such transfer. Where a property belongs to an undivided Hindu family and on partition it falls to the share of one of the coparceners of the family, there is no doubt a change of the landlord of the said premises, but the said change is not of the same character as the change which is effected by transfer of premises to which Section 14(6) refers. In regard to cases falling under Section 14(6), a person who had no title to the premises and in that sense, was a stranger, becomes a landlord by virtue of the transfer. In regard to a partition, the position is entirely different. When the appellant was inducted into the premises, the premises belonged to the undivided Hindu family consisting of Respondent 1, his father and his brother. After partition, instead of the undivided Hindu family, Respondent 1 alone had become landlord of the premises, We are satisfied that it would be unreasonable to hold that allotment of one parcel of property belonging to an undivided Hindu family to an individual coparcener as a result of partition is an acquisition of the said property by transfer by the said coparcener within the meaning of Section 14(6). In our opinion, the High Court was right in coming to the conclusion that Section 14(6) did not create a bar against the institution of the application by Respondent 1 for evicting the appellant.

14. In this connection, we may refer to a recent decision of this Court in the *CIT. v. Keshavlal Lallubhai Patel* [AIR 1965 SC 866]. In that case, the respondent Keshavlal had thrown all his self-acquired property into the common hotch-pot of the Hindu undivided family which consisted of himself, his wife, a major son and a minor son. Thereafter, an oral partition took place between the members of the said family and properties were transferred in accordance with it in the names of the several members. The question which arose for the decision of this Court was whether there was an indirect transfer of the properties allotted to the wife and minor son in the partition within the meaning of Section 16(3)(a)(iii) and (iv) of the Indian Income Tax Act, 1922. This Court held that the oral partition in question was not a transfer in the strict sense and should not, therefore, be said to attract the provisions of Section 16(3)(a)(iii) and (iv) of the said Act. This decision shows that having regard to the context of the provision of the Income Tax Act with which the Court was dealing, it was thought that a partition is not a transfer. Considerations which weighed with the Court in determining the true effect of partition in the light of the provisions of the said section, apply with equal force to the interpretation of Section 14(6) of the Act.

15. In the result, the appeal fails and is dismissed with costs.

* * * * *

Kenneth Solomon v. Dan Singh Bawa

AIR 1986 Del. 1

G.C. JAIN J. – Dr. (Mrs.) C.L. Sury was lessee of house No. 72, Babar Road, New Delhi under the respondent Dan Singh Bawa. The agreed rent was Rs. 37.82 per month. She died in October, 1967.

2. On April 22, 1968 the landlord brought an application against the present appellant Kenneth Solomon for recovery of possession of the tenancy premises. The eviction was claimed under Proviso (b) to Sub-section (1) of Section 14 of the Delhi Rent Control Act, 1958 ('the Act') on the allegations that the tenant had left no heir and had in her lifetime parted with the possession of the premises in dispute in favour of the appellant without the written consent of the landlord.

3. The appellant defended the claim. The plea raised was that the contractual tenancy in favour of Dr. Sury had not been determined. The tenancy rights devolved on him and another person under a will dated March 31, 1957. In case it was held by the court that he could not inherit the tenancy rights under the will the same devolved on him as an heir being Dr. Sury's nearest kinsman.

4. The Addl. Rent Controller by his order dated December 18, 1973 came to the conclusion that the tenancy rights had not been bequeathed by Dr. Sury under the will in question. The appellant who was a nephew of Dr. Sury inherited those rights as an heir and therefore there was no parting with possession by the tenant. With these findings he dismissed the eviction petition. This finding was, however, reversed in appeal by the learned Rent Control Tribunal. It was held that the tenant had bequeathed the tenancy rights in favour of the appellant under the will which act amounted to parting with possession of the premises. Consequently an order for recovery of possession was granted in favour of the respondent against the appellant on October 28, 1976. Feeling aggrieved the appellant has filed the present appeal.

5. Mr. Vohra, learned counsel appearing for the appellant has raised two main questions : (1) that the tenancy rights were not disposed under the will and (2) that the act of bequeathing the tenancy rights by making a will would not amount to parting with possession of the premises within the meaning of the provisions contained in proviso (b).

6. A will has to be construed like any other document. The duty of the court is to ascertain the testator's intention from the words used in the will. The will Ex. RW 1/1, no doubt, makes no specific mention of the tenancy rights. It however has a residuary clause which reads:

"I hereby bequeath, give and devise all my moveable and immoveable properties, whatsoever, however, and wheresoever situated at the time of my death including all the monies which may be left over after paying my Funeral and Monument Expenses and for my Dogs expenses to be equally divided by my Trustees among my two nephews:

1. Kenneth Solomon son of John Solomon at present residing at Chabiganj, Kashmeri Gate, Delhi.

2. Pannel Richard Solomon son of John Solomon at present residing at Chabiganj, Kashmeri Gate, Delhi”.

7. A lease, as defined by Section 105 of the Transfer of Property Act, is a transfer of a right to enjoy immovable property for a term or in perpetuity in consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor by the transferee. The right of enjoyment contemplated by this Section is an interest in the immovable property. The agreement of lease confers on the lessee the right to possess the immovable property which is the subject matter of the lease. It being an interest in the immovable property would be covered under the expression “all my moveable and immovable properties” used in the above quoted residuary clause of the will. The word ‘property’ includes all legal rights of a person except his personal rights which constitute his status or personal condition. The tenancy rights would definitely be included in the words “all my moveable and immovable properties”. I have examined the will carefully and I agree with the learned Tribunal that the will does not indicate any intention of the testator to exclude the tenancy rights. On the other hand the residuary clause referred to above shows that the intention was to give all her moveable and immovable properties except the properties for which a specific provision was made. The tenancy rights, therefore devolved on the appellant under the will.

8. Now I turn to examine the next question. The question for determination is whether the act of disposing the tenancy rights by making a will amounts to ‘parting with possession’ and entitles the landlord to claim eviction under proviso (b) to sub-section (1) of Section 14 of the Act. These provisions read:-

“14. Protection of tenant against eviction – (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant :

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely –

(b) that the tenant has, on or after the 9th day of June, 1952 sublet, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord”.

9. The case set up by the landlord is that the tenant had parted with the possession of the tenancy premises. The expression “otherwise parted with the possession” has not been defined in the Act. “Parted with” according to **Chambers 20th Century Dictionary**, New Edition, inter alia, means ‘to relinquish’. **Stroud’s Judicial Dictionary** 4th edn. explains the terms ‘part with’ in these words “(2) A lessee’s covenant not to “part with the possession of the demised premises or any part thereof” is broken only if the lessee entirely excludes himself from the legal possession of part of the premises (*Stening v. Abrahams* [(1931) 1 Ch. 470]”.

10. The expression “parted with possession”, therefore, means giving the legal possession acquired under the lease to a person who was not a party to the lease agreement. Undoubtedly,

there must be vesting of possession of the tenancy premises by the tenant in another person by divesting himself not only of physical possession but also of a right to possession.

11. “Will” as defined under section 2(h) of the Indian Succession Act means “the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. One characteristic of a will as distinguished from other kinds of instruments disposing of property is its revocable nature. It is ambulatory until the death of the testator. It is dependent upon the testator’s death for its vigour and effect. Till that event it is only an expression of intention to deal with the property in a particular manner. But the moment the testator dies it has the effect of vesting the property subject matter of the will in the devisee. At that point of time it would have the same effect as a transfer of possession by sale or mortgage. The process of parting with possession thus starts on the execution of the will but matures only on the death of the testator. The tenancy rights disposed under a will would vest in the devisee immediately on the death of the testator. This vesting, in my judgment, would amount to parting with possession within the meaning of the provisions contained in proviso (b).

12. In *Nathu v. Devi Singh*, [AIR 1966 Pun. 266] (at Delhi) a Division Bench after examining the provisions contained in proviso (b) to sub-section (1) of Section 13 of the Delhi and Ajmer Rent Control Act (38 of 1952), which provisions were similar to the provisions contained in proviso (b) to sub-section (1) of Section 14 of the Act, held:

“What is hit by proviso (c) is a volitional transfer by a tenant without the consent of the landlord. If on the death of a person holding contractual tenancy the suit premises come into the hands of the heirs of the tenant that is not an intentional or volitional transfer and such parting with the possession would not be affected. The case of parting with possession by will is, however, clearly envisaged in proviso (c) to sub-section (1) of Section 13”.

The Division Bench had relied on an earlier D.B. decision in *Ram Dass v. Roopchand* [F.A. No. 119-D of 1960 decided on September 12, 1964].

13. Section 15 (1) of the Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) prohibits the tenant to sublet the whole or any part of the premises let to him or transfer in any other manner his interest therein. The contravention of these terms invites the penalty of eviction. Examining these terms a Division Bench of the Bombay High Court in *Dr. Anant Trimbak Sabnis v. Vasant Pratap Pandit* [AIR 1980 Bom 69] held:

“It is true that the bequest becomes effective only after the death of the testator and is liable to be revoked at any time. This by itself however, cannot make it anything but transfer. Even the restricted concept of “transfer” inter vivos in Section 5 of the T.P. Act contemplated its becoming effective at some future date in a given case. Bequest does result in the passing of the property from the testator to the legatee. It is no doubt different in its nature from the sale, mortgage, lease or gift. It is none-the-less, a transfer in its generic sense.”

These decisions fully support my view.

15. “Transfer of property” according to the definition given in Section 5 of the Transfer of Property Act means an act by which a living person conveys property in present or in future to one or more other living persons or to himself, and one or more other living persons. True, these words exclude transfer by will, for a will operates after the death of the testator. The act of making a will in itself would not attract the provisions contained in proviso (b). No landlord can claim eviction, during the lifetime of the tenant, on the ground that the tenant had made a will disposing the tenancy rights. It is for the simple reason that it can be revoked at any time. By itself it does not vest the legal possession in the devisee. However, there is no escape from the conclusion that by his voluntary act the tenant parts with the possession of the tenancy premises though from the date of his death in case the will remains unrevoked. Dr. Sury by her act of bequeathing the tenancy rights by means of the will in favour of the petitioner and his brother had parted with possession within the meaning of proviso (b). The landlord was, therefore, entitled to claim eviction. In conclusion, I find no merit in the appeal and dismiss the same.

* * * * *

Mohar Singh v. Devi Charan

(1988) 3 SCC 63: AIR 1988 SC 1365

M.N. VENKATACHALIAH, J. -This appeal, by special leave, is by the landlord preferred against the judgment and order dated March 28, 1980 by the High Court of Judicature at Allahabad in Civil Misc. Writ No. 2280 of 1979 setting aside, at the instance of the first respondent-tenant, the concurrent orders of the courts below granting possession to the appellant.

2. The first respondent was a tenant of two adjacent shops, under a single lease, obtained from two co-owners Shri Jado Ram and Asha Ram who had, respectively 3/8th and 5/8th shares in the property. Appellant, Mohar Singh became the transferee of the 3/8th share of Jado Ram. Similarly, Asha Ram's 5/8th interest came to be transferred, through an intermediary alienation, to a certain Gyan Chand. Pursuant to a decree in a civil suit for partition between Gyan Chand and the appellant, the co-ownership came to an end and towards his share appellant was allotted, and became the exclusive owner of, one of the shops. That is the subject-matter of the present proceedings.

3. Appellant instituted proceedings for eviction against the first respondent under Section 21 of U. P. Act 13 of 1972 before the prescribed authority on the ground of his own bona fide need. The prescribed authority ordered release of the premises and made an order granting possession. The appeal preferred by the first respondent before the District Judge, Muzaffarnagar was dismissed. First respondent then moved the High Court in Writ No. 2280 of 1979.

4. The findings as to the bona fides and reasonableness of the requirement of the appellant stand concluded by the concurrent findings of the statutory authorities. Indeed that was not also the ground on which the order of eviction was assailed before the High Court in the writ petition.

5. Before the High Court what was urged by the first respondent, and accepted by the High Court, was the contention that the severance of the reversion and assignment of that part of the reversion in respect of the suit shop in favour of the appellant did not clothe the appellant with the right to seek eviction without the other lessor joining in the action; and that in claiming possession of a part of the subject-matter of the original lease the appellant was seeking to split the integrity and unity of the tenancy, which according to the first respondent, was impermissible in law.

6. The High Court does not appear to have considered the effect of the partition decree between erstwhile co-owners and of the appellant, consequently, having become the exclusive owner of one of the shops. The reasoning that appears to have commended itself to the High Court in setting aside the order made by the courts below granting possession is somewhat on these lines:

“But unless such a situation has been created with the consent of all of them, the effect of transfer of a portion of the accommodation would be that in place of one lessor would be substituted two lessors, even though of defined portions of the accommodation let out to the lessee. It cannot be denied that one of the two joint

lessors cannot institute a suit for ejectment or apply for permission to file such a suit in respect of a portion of the accommodation.... In other words even now as a result of transfer of a part of the building under tenancy the splitting up of the tenancy cannot be permitted unless the tenant has agreed to it. On this view of the matter, the impugned orders are liable to be quashed.”

7. It is a trite proposition that a landlord cannot split the unity and integrity of the tenancy and recover possession of a part of the demised premises from the tenant. But Section 109 of the Transfer of Property Act provides a statutory exception to this rule and enables an assignee of a part of the reversion to exercise all the rights of the landlord in respect of the portion respecting which the reversion is so assigned subject, of course, to the other covenant running with the land. This is the true effect of the words “shall possess all the rights of the lessor as to the property or part transferred ...” occurring in Section 109 of the T. P. Act. There is no need for a consensual attornment. The attornment is brought about by operation of law. The limitation on the right of the landlord against splitting up of the integrity of the tenancy, inhering in the inhibitions of his own contract, does not visit the assignee of the part of the reversion. There is no need for the consent of the tenant for the severance of the reversion and the assignment of the part so severed. This proposition is too well settled to require any further elucidation or reiteration. Suffice it to refer to the succinct statement of the law by Wallis, C.J. in *Kannyan v. Alikutti* [AIR 1920 Mad 838 (FB)]:

“A lessor cannot give a tenant notice to quit a part of the holding only and then sue to eject him from such part only, as pointed out quite recently by the Privy Council in *Harihar Banerji v. Ramshashi Roy* [AIR 1918 PC 102]. Consequently, if the suit is brought by the original lessor the answer to the question referred to us must be in the negative because such a suit does not lie at all. Other considerations, however, arise, where, as in the present case, the original lessor has parted in whole or in part with the reversion in part of the demised premises. Under the general law such an assignment effects a severance, and entitles the assignee on the expiry of the term to eject the tenant from the land covered by the assignment.”

9. The next contention of Shri Uma Dutta is that, at all events, what flows from a ‘transfer’ under Section 5 read with Section 109 of T. P. Act cannot be predicated of a partition as partition is no ‘transfer’. It is true that a partition is not actually a transfer of property but would only signify the surrender of a portion of a joint right in exchange for a similar right from the other co-sharer or co-sharers. However, some decisions of the High Courts tend to the view that even a case of partition is covered by Section 109 and that, in any event, even if the section does not in terms apply the principle of the section is applicable as embodying a rule of justice, equity and good conscience. We need not go into this question in this case. Suffice it to say that the same High Court itself, from whose decision this present appeal arises, in *Ram Chandra Singh v. Ram Saran* [AIR 1978 All 173] has taken the view that Section 109 of T. P. Act is attracted to the case of partition also. That was a decision which the learned judge in the present case should have considered himself bound by, unless there was a pronouncement of a larger Bench to the contrary or unless the learned judge himself differed from the earlier view in which event the matter had had to go before a Division Bench.

10. The correctness of the decision in *Ram Chandra Singh* case was not assailed before us and, therefore, we do not feel called upon to pronounce on it. We should, we think apply the same rule to this case. Several other High Courts have also taken this view, though, however, some decisions have been content to rest the conclusion on the general principle underlying Section 109, T. P. Act, as a rule of justice, equity and good conscience.

11. In the result, this appeal is allowed, the order of the High Court set aside and that of the Third Additional District Judge, Muzaffarnagar in Rent Control Appeal No. 48 of 1978 restored. In the circumstances of this case, there will be no order as to costs.

* * * * *

N. Ramaiah v. Nagaraj S.

AIR 2001 Kant. 395

R.V. RAVEENDRAN, J. - 2. The Appellant (N. Ramaiah) is the brother of one Anjanamma. The said Anjanamma was the widow, and the respondent herein (S. Nagaraj) is the nephew (brother's son), of one Muni Narayanappa. The respondent herein (S. Nagaraj) filed Probate C.P.No.8/1998 for grant of letters of administration in regard to a will dated 11-1-1998 said to have been executed by the Muni Narayanappa. The said Will was contested by Anjanamma, widow of Muni Narayanappa, inter alia on the grounds that the said Will was a got up document, and that she had succeeded to the properties of Muni Narayanappa as his sole legal heir.

3. In the said proceedings, the said S. Nagaraj filed I.A.I. on 16-3-1998 seeking a temporary injunction to restrain Anjanamma from alienating/encumbering the properties, or withdrawing the amounts from the Banks, mentioned in the schedule therein on the ground that the said properties were bequeathed to him under the will dated 11-1-1998 by Muni Narayanappa. Item A of the schedule to the said application (IAI) is land and building in Khata No. 280-6-4B, Hennur, Bangalore with the running business of Cauvery Service Station. Item B in the Schedule was the house in the occupation of Anjanamma and the Building in the Occupation of Sitaram Agencies. Item C related to Bank Balances/deposits. The learned single Judge made an order on the said application on 18-6-1998 directing the Respondent therein (Anjanamma) to maintain status quo in regard to the properties until further orders.

4. Subsequently, the said Anjanamma died on 11-12-1998 and the appellant herein filed an application (IA VIII) for impleading himself as the respondent in Prob CP. 8/1998 in place of the deceased Anjanamma, by claiming to be the legatee under the registered Will dated, 15-9-1998 of the said Anjanamma. He claimed that Anjanamma had bequeathed her properties described in the schedule to her Will dated 15-9-1998 of the said Anjanamma. He claimed that Anjanamma had bequeathed her properties described in the schedule to her Will dated 15-9-1998 to him and his children and therefore he is one of the co-owners of the properties which were the subject matter of Prob. C.P. 8/1998. Schedule 'A' to the said Will dated 15-9-1998 relates to property bearing Sy. No. 6/4B measuring 1 acre in Hennur Road. Bangalore with a residential house and a Petrol Bunk by name Cauvery Service Station with all machineries, etc, Schedule B and C relate to amounts in Bank Accounts and deposits.

5. It is stated that the property described in Schedule 'A' in the alleged will of Anjanamma is the same as the properties described as Item A and B in the schedule to I.A.I. in Probate C.P. No. 8/1998, which was the subject matter of the order of status quo.

6. The said application for impleading was resisted by S. Nagaraj. The learned single Judge, accepting the objections, has dismissed the application for impleading, holding that the Will dated 15-9-1998 was executed by Anjanamma, in breach and defiance of the order of status quo and therefore non-est and of no legal consequence and will have to be ignored; and that the appellant who based his right on such Will of Anjanamma, had no locus standi to apply for impleading and was not entitled to come on record and contest the proceedings for

letters of administration filed by the respondent, in regard to the Will of Muni Narayanappa. The relevant portion of the order of the learned single Judge is extracted below for ready reference:-

“4. Dealing with the objection regarding the execution of the alleged Will on 15-9-1998 during the pendency of the prohibitory order passed by this Court, applicant’s learned counsel contended that the status quo order only restricted alienations and its is his contention therefore that the order in question does not come in the way of the parties executing documents which is different from alienation. To my mind, this is virtually legal hairsplitting; when a Court passes an order directing the parties to maintain status quo, the order is a blanket prohibitory order whereunder the parties would be precluded not only from effecting alienations or changes but more importantly by necessary implication from doing any acts whereby the situation vis-à-vis that property gets altered. It would be downright ridiculous to contend that the order only limits physical alienation because it would mean that a party can completely alter the situation by executing documents which would create rights in third parties and can still contend that merely because there is no physical alienation or change that it is within the framework of the order. When a Court orders the maintenance of status quo, it necessarily implies a prohibition on the creation of new right, title or interest through the execution of any documents. If the need arises, it is open to the party to apply to the Court either for vacating or modifying the order or obtaining the sanction of the Court for doing any of the acts which the party desires to undertake. But in my considered view, the execution of a document by a party to a proceeding in rank defiance of an interim order cannot under any circumstances be construed as being outside the ambit, and scope of that order. It only goes without saying that such a document even if executed would be wholly non est because no right, title or interest of any type can flow from a document executed in defiance of a prohibitory order of a Court because that document is virtually rendered invalid. This to my mind is the essence of the issue that falls for determination before this Court.”

7. Feeling aggrieved, the applicant in I. A. VIII in Prob. C. P. 8/1998, has filed this appeal contending that an order of status quo in regard to a property did not bar the execution of a Will bequeathing such property, nor affected the validity of the bequest made under such a Will; and that on the death of Anjanamma, he ought to have been permitted to come on record to contest the alleged Will of Muni Narayanappa.

8. On the other hand, learned counsel for the respondent supported the order of the learned single Judge, by putting forth the following contentions:

The Learned Single Judge had directed Anjanamma to maintain status quo in regard to the properties; that the said order was passed on an application filed by the petitioner in Prob. C.P. 8/1998, seeking a direction to Anjanamma that she should not alienate or encumber the properties mentioned in the schedule to the said application. The order of status quo would therefore mean that the Court had barred her from transferring or alienating the property in any manner. Section 5 of the Transfer of Property Act, 1882 defines ‘transfer of property’ as an act by which a living person

conveys property, in present or in future, to one or more other living persons. Having regard to the said definition, a bequest under a Will is nothing but a 'transfer of property in future'. By executing a Will dated 15-9-1998 bequeathing the property in favour of the appellant and his children, Anjanamma effected a future transfer of the property, thereby violating the order of status quo. Therefore her Will, as also the bequest of the property thereunder, are invalid.

9. One Suguna has filed IA IV for impleading, in this appeal contending that she is the adopted daughter of Muni Narayanappa and the will dated 15-9-1998 put forth by the Appellant was not executed by Anjanamma and is a got up documents; and that she has filed a suit for partition against Anjanamma in O.S. No. 2817/1998. It is not necessary to consider the claims of Suguna in this appeal. If she has any grievance she can get herself impleaded in Prob. C.P. 8/1998 or independently challenge the will dated 15-9-1998. Hence IA IV for impleading has no merit and is rejected.

10. The rival contentions give rise to the following points for consideration:

- (i) whether a bequest of a property under a will is a transfer of the property.
- (ii) whether a direction to a party to maintain status quo in regard to a property, prohibits him from making a testamentary disposition; and whether a Will made during the operation of an order of status quo regarding a property, is void and non-existent in so far as the bequest relating to such property.

11. Transfer of property Act, 1882 (TP Act') deals with transfers *inter vivos*, that is, the act of a living person, conveying a property in present or in future, to one or more living persons. The provisions of TP Act are inapplicable to testamentary successions which are governed by Indian Succession Act, 1925. Section 2(h) of the Indian Succession Act defines 'Will' as the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

12. The differences between a transfer and a Will are well recognised. A transfer is a conveyance of an existing property by one living person to another (that is transfer *inter vivos*). On the other hand, a Will does not involve any transfer, nor effect any transfer *inter vivos*, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. In other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as per personal law (non-testamentary Succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency a Will is revocable and comes into operation only after the death of the testator. Thus to treat a devise under a will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession.

13. The learned single Judge proceeded on a wrong premise when he observed that execution of a Will by a Testator devising his property, amounts to execution of a document creating new right, title or interest in a property and therefore execution of a Will violates the order of status quo. By execution of a Will, no right or title or interest is created in favour of

any one during the life time of the deceased. The first point is therefore answered in the negative.

14. In this case, Nagaraj, the petitioner in Prob. C.P. No. 8 of 1998, filed IA-I seeking a temporary injunction restraining Anjanamma from alienating or encumbering the property or withdrawing the amount from the bank, described in the schedule to the application. There was no dispute that Anjanamma was in possession of the properties left by Muninarayanappa. The learned single Judge merely directed Anjanamma to maintain status quo with regard to the properties. It was not clarified as to whether she was required to maintain status quo in regard to the possession of the property or title to the property.

15. No Court has the power to make an order, that too an interim order restraining an individual from exercising his right to execute a will and thereby regulate succession on his death. A direction to a party to maintain status quo in regard to a property does not therefore bar him from making a testamentary disposition in regard to such property. By making a will the testator neither changes title nor possession in regard to a property nor alters the nature or situation of the property nor removes or adds anything to the property. In short the testator, by making a will does not alter the existing state of things in regard to the property. It follows therefore that making of a will in regard to a property does not violate an order of status quo in regard to such property, and consequently the testamentary disposition is neither void nor voidable.

16. The prayer in Prob. C.P. No. 8 of 1998 and the context in which the status quo order dated 18-6-1998 was granted, while considering the interlocutory application, make it evident that the order merely directed Anjanamma not to alienate or convey the property and did not prohibit her from executing a will making a testamentary disposition in regard to the property.

23. The petitioner in Prob CP No.8 of 1998 (respondent herein) seeks letters of administration in regard to alleged will of Muni Narayanappa. That was challenged and resisted by Anjanamma, wife of Muninarayanappa, by contending that she succeeded to the properties of Muninarayanappa. She died and appellant claims to be the legatee in possession of the property which is claimed by the petitioner in Prob C P No. 8 of 1998, under the will of Muninarayanappa. If the appellant is not permitted to come on record, there will be no one to continue the contest put up by Anjanamma. We, therefore, find that the appellant is a necessary party to the proceedings in Prob C.P. No. 8/1998.

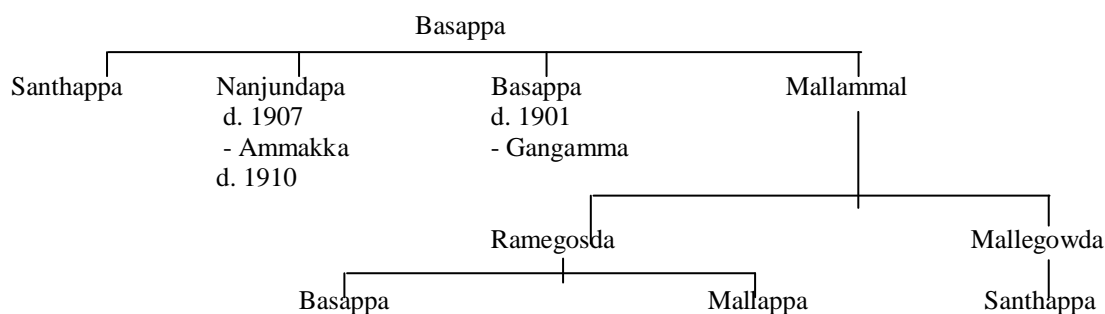
24. The appeal is, therefore, allowed and the order dated 6-1-1999 on I.A VIII in probate C. P.No8/1998 is set aside. I. A. VIII in probate C. P. 8/1998 shall stand allowed.

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Jumma Masjid, Mercara v. Kodimaniandra Deviah

AIR 1962 SC 847 : 1962 Supp (1) SCR 554

VENKATARAMA AIYAR, J. - This is an appeal against the Judgment of the High Court of Madras, dismissing the suit filed by the appellant, as Muthavalli of the Jumma Masjid, Mercara, for possession of a half-share in the properties specified in the plaint. The facts are not in dispute. There was a joint family consisting of three brothers, Santhappa, Nanjundappa and Basappa. Of these, Santhappa died unmarried, Basappa died in 1901, leaving behind a widow Gangamma, and Nanjundappa died in 1907 leaving him surviving his widow Ammakka, who succeeded to all the family properties as his heir. On the death of Ammakka, which took place in 1910, the estate devolved on Basappa, Mallappa and Santhappa, the sister's grandsons of Nanjundappa as his next reversioners. The relationship of the parties is shown in the following genealogical table.



2. On August 5, 1900, Nanjundappa and Basappa executed a usufructuary mortgage over the properties which form the subject-matter of this litigation, and one Appanna Shetty, having obtained an assignment thereof, filed a suit to enforce it, OS 9 of 1903, in the court of the Subordinate Judge, Coorg. That ended in a compromise decree, which provided that Appanna Shetty was to enjoy the usufruct from the hypotheca till August 1920, in full satisfaction of all his claims under the mortgage, and that the properties were thereafter to revert to the family of the mortgagors. By a sale deed dated November 18, 1920, Ex. III, the three reversioners, Basappa, Mallappa and Santhappa, sold the suit properties to one Ganapathi, under whom the respondents claim, for a consideration of Rs 2000. Therein the vendors recite that the properties in question belonged to the joint family of Nanjundappa and his brother Basappa, that on the death of Nanjundappa, Ammaka inherited them as his widow, and on her death, they had devolved on themselves the next reversioners of the last male owner. On March 12, 1921, the vendor executed another deed, Ex. IV, by which Ex. III was rectified by inclusion of certain items of properties, which were stated to have been left out by oversight. It is on these documents that the title of the respondents rests.

3. On the strength of these two deeds, Ganapathi sued to recover possession of the properties comprised therein. The suit was contested by Gangamma, who claimed that the properties in question were the self-acquisitions of her husband Basappa, and that she, as his heir, was entitled to them. The Subordinate Judge of Coorg who tried the suit accepted this contention, and his finding was affirmed by the District Judge on appeal, and by the Judicial

Commissioner in second appeal. But before the second appeal was finally disposed of, Gangamma died on February 17, 1933. Thereupon Ganapathi applied to the Revenue Authorities to transfer the patta for the lands standing in the name of Gangamma to his own name, in accordance with the sale deed Ex. III. The appellant intervened in these proceedings and claimed that the Jumma Masjid, Mercara, had become entitled to the properties held by Gangamma, firstly, under a *Sadakah* or gift alleged to have been made by her on September 5, 1932, and, secondly, under a deed of release executed on March 3, 1933, by Santhappa, one of the reversioners, relinquishing his half-share in the properties to the mosque for a consideration of Rs 300. By an order dated September 9, 1933, Ex. II, the Revenue Authorities declined to accept the title of the appellant and directed that the name of Ganapathi should be entered as the owner of the properties. Pursuant to this order, Ganapathi got into possession of the properties.

4. The suit out of which the present appeal arises was instituted by the appellant on January 2, 1945, for recovery of a half-share in the properties that had been held by Gangamma and for mesne profits. In the plaint, the title of the appellant to the properties is based both on the gift which Gangamma is alleged to have made on September 5, 1932, and on the release deed executed by Santhappa, the reversioner, on March 3, 1933. With reference to the title put forward by the respondents on the basis of Ex. III and Ex. IV, the claim made in the plaint is that as the vendors had only a *spes successionis* in the properties during the lifetime of Gangamma, the transfer was void and conferred no title. The defence of the respondents to the suit was that as Santhappa had sold the properties to Ganapathi on a representation that he had become entitled to them as reversioner of Nanjundappa, on the death of Ammakka in 1910, he was estopped from asserting that they were in fact the self-acquisitions of Basappa, and that he had, in consequence, no title at the dates of Ex. III and Ex. IV. The appellant, it was contended, could, therefore, get no title as against them under the release deed, Ex. A, dated March 3, 1933.

5. The District Judge of Coorg who heard the action held that the alleged gift by Gangamma on September 5, 1932, had not been established, and as this ground of title was abandoned by the appellant in the High Court, no further notice will be taken of it. Dealing next with the title claimed by the appellant under the release deed, Ex. A, executed by Santhappa, the District Judge held that as Ganapathi had purchased the properties under Ex. III on the faith of the representation contained therein that the vendors had become entitled to them on the death of Ammakka in 1910, he acquired a good title under Section 43 of the Transfer of Property Act, and that Ex. A could not prevail as against it. He accordingly dismissed the suit. The plaintiff took the matter in appeal to the High Court, Madras, and in view of the conflict of authorities on the question in that Court, the case was referred for the decision of a Full Bench. The learned Judges who heard the reference agreed with the court below that the purchaser under Ex. III had, in taking the sale, acted on the representation as to title contained therein, and held that as the sale by the vendors was of properties in which they claimed a present interest and not of a mere right to succeed in future, Section 43 of the Transfer of Property Act applied, and the sale became operative when the vendors acquired title to the properties on the death of Gangamma on February 17, 1933. In the result, the appeal was dismissed. The appellant then applied for leave to appeal to this Court under

Article 133(1)(c), and the same was granted by the High Court of Mysore to which the matter had become transferred under Section 4 of Act 72 of 1952.

6. The sole point for determination in this appeal is, whether a transfer of property for consideration made by a person who represents that he has a present and transferable interest therein, while he possesses, in fact, only a *spes successionis*, is within the protection of Section 43 of the Transfer of Property Act. If it is, then on the facts found by the courts below, the title of the respondents under Ex. III and Ex. IV must prevail over that of the appellant under Ex. A. If it is not, then the appellant succeeds on the basis of Ex. A. Considering the scope of the section on its terms, it clearly applies whenever a person transfers property to which he has no title on a representation that he has a present and transferable interest therein, and acting on that representation, the transferee takes a transfer for consideration. When these conditions are satisfied, the section enacts that if the transferor subsequently acquires the property, the transferee becomes entitled to it, if the transfer has not in the meantime been thrown up or cancelled and is subsisting. There is an exception in favour of transferees for consideration in good faith and without notice of the rights under the prior transfer. But apart from that, the section is absolute and unqualified in its operation. It applies to all transfers which fulfil the conditions prescribed therein, and it makes no difference in its application, whether the defect of title in the transferor arises by reason of his having no interest whatsoever in the property, or of his interest therein being that of an expectant heir.

8. The contention on behalf of the appellant is that Section 43 must be read subject to Section 6(a) of the Transfer of Property Act which enacts that: "The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature, cannot be transferred". The argument is that if Section 43 is to be interpreted as having application to cases of what are in fact transfers of *spes successionis*, that will have the effect of nullifying Section 6 (a), and that therefore it would be proper to construe Section 43 as limited to cases of transfers other than those falling within Section 6(a). In effect, this argument involves importing into the section a new exception to the following effect: "Nothing in this section shall operate to confer on the transferee any title, if the transferor had at the date of the transfer an interest of the kind mentioned in Section 6(a)". If we accede to this contention, we will not be construing Section 43, but rewriting it. "We are not entitled", observed Lord Loreburn L.C., in *Vickers v. Evans* [(1910) 79 LJ KB 954] "to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself".

9. Now the compelling reason urged by the appellant for reading a further exception in Section 43 is that if it is construed as applicable to transfers by persons who have only *spes successionis* at the date of transfer, it would have the effect of nullifying Section 6(a). But Section 6(a) and Section 43 relate to two different subjects, and there is no necessary conflict between them. Section 6(a) deals with certain kinds of interests in property mentioned therein, and prohibits a transfer simpliciter of those interests. Section 43 deals with representations as to title made by a transferor who had no title at the time of transfer, and provides that the transfer shall fasten itself on the title which the transferor subsequently acquires. Section 6(a) enacts a rule of substantive law, while Section 43 enacts a rule of

estoppel which is one of evidence. The two provisions operate on different fields, and under different conditions, and we see no ground for reading a conflict between them or for cutting down the ambit of the one by reference to the other. In our opinion, both of them can be given full effect on their own terms, in their respective spheres. To hold that transfers by persons who have only a *spes successionis* at the date of transfer are not within the protection afforded by Section 43 would destroy its utility to a large extent.

10. It is also contended that as under the law there can be no estoppel against a statute, transfers which are prohibited by Section 6(a) could not be held to be protected by Section 43. There would have been considerable force in this argument if the question fell to be decided solely on the terms of Section 6(a). Rules of estoppel are not to be resorted to for defeating or circumventing prohibitions enacted by statutes on grounds of public policy. But here the matter does not rest only on Section 6(a). We have, in addition, Section 43, which enacts a special provision for the protection of transferees for consideration from persons who represent that they have a present title, which, in fact, they have not. And the point for decision is simply whether on the facts the respondents are entitled to the benefit of this section. If they are, as found by the court below, then the plea of estoppel raised by them on the terms of the section is one pleaded under, and not against the statute.

12. So far we have discussed the question on the language of the section and on the principles applicable thereto. There is an illustration appended to Section 43, and we have deferred consideration thereof to the last as there has been a controversy as to how far it is admissible in construing the section. It is as follows:

“A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B dying, A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him”.

In this illustration, when A sold the field Z to C, he had only a *spes successionis*. But he having subsequently inherited it, C became entitled to it. This would appear to conclude the question against the appellant. But it is argued that the illustration is repugnant to the section and must be rejected. If the language of the section clearly excluded from its purview transfers in which the transferor had only such interest as is specified in Section 6(a), then it would undoubtedly not be legitimate to use the illustration to enlarge it. But far from being restricted in its scope as contended for by the appellant, the section is, in our view, general in its terms and of sufficient amplitude to take in the class of transfers now in question. It is not to be readily assumed that an illustration to a section is repugnant to it and rejected. Reference may, in this connection, be made to the following observations of the Judicial Committee in ***Mahomed Syedol Ariffin v. Yeoh Ooi Gark*** [AIR 1916 PC 242] as to the value to be given to illustrations appended to a section, in ascertaining its true scope:

“It is the duty of a court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they

or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be thus impaired”.

13. We shall now proceed to consider the more important cases wherein the present question has been considered. One of the earliest of them is the decision of the Madras High Court in *Alamanaya Kunigari Nambi Sab v. Murukuti Pappiah* [AIR 1915 Mad 972]. That arose out of a suit to enforce a mortgage executed by the son over properties belonging to the father, while he was alive. The father died pending the suit, and the properties devolved on the son as his heir. The point for decision was whether the mortgagee could claim the protection of Section 43 of the Transfer of Property Act. The argument against it was that “Section 43 should not be so construed as to nullify Section 6(a) of the Transfer of Property Act, by validating a transfer initially void under Section 6(a)”. In rejecting this contention, the court observed:

“This argument, however, neglects the distinction between purporting to transfer ‘the chance of an heir-apparent’, and ‘erroneously representing that he (the transferor) is authorised to transfer certain immovable property’. It is the latter course that was followed in the present case. It was represented to the transferee that the transferor was in praesenti entitled to and thus authorised to transfer the property”. (p.736)

On this reasoning, if a transfer is statedly of an interest of the character mentioned in Section 6(a), it would be void, whereas, if it purports to be of an interest in praesenti, it is within the protection afforded by Section 43.

14. Then we come to the decision in *The Official Assignee, Madras v. Sampath Naidu* [AIR 1933 Mad 795], where a different view was taken. The facts were that one V. Chetti had executed two mortgages over properties in respect of which he had only *spes successionis*. Then he succeeded to those properties as heir and then sold them to one Ananda Mohan. A mortgagee claiming under Ananda Mohan filed a suit for a declaration that the two mortgages created by Chetty before he had become entitled to them as heir, were void as offending Section 6(a) of the Transfer of Property Act. The mortgagee contended that in the events that had happened the mortgages had become enforceable under Section 43 of the Act. The court negated this contention and held that as the mortgages, when executed, contravened Section 6(a), they could not become valid under Section 43. Referring to the decision in *Alamanaya Kunigari Nambi Sab v. Murukuti Pappiah*, the court observed that no distinction could be drawn between a transfer of what is on the face of it *spes successionis*, and what purports to be an interest in praesenti. “If such a distinction were allowed”, observed Bardswell, J., delivering the Judgment of the court. “the effect would be that by a clever description of the property dealt with in a deed of transfer one would be allowed to conceal the real nature of the transaction and evade a clear statutory prohibition”.

15. This reasoning is open to the criticism that it ignores the principle underlying Section 43. That section embodies, as already stated, a rule of estoppel and enacts that a person who

makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given, the relevant words of Section 43 were, “where a person erroneously represents”, and now, as amended by Act 20 of 1929, they are “where a person fraudulently or erroneously represents”, and that emphasises that for the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and the transferee has acted on it. Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail under Section 6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in Section 43, however fraudulent the act of the transferor might have been.

16. The learned Judges were further of the opinion that in view of the decision of the Privy Council in *Ananda Mohan Roy v. Gour Mohan Mullick* [AIR 1923 PC 189] and the decision in *Sri Jagannada Raju v. Sri Rajah Prasada Rao* [AIR 1916 Mad 579] which was approved therein, the illustration to Section 43 must be rejected as repugnant to it. In *Sri Jagannada Raju* case, the question was whether a contract entered into by certain presumptive reversioners to sell the estate which was then held by a widow as heir could be specifically enforced, after the succession had opened. It was held that as Section 6(a) forbade transfers of *spes successionis*, contracts to make such transfers would be void under Section 23 of the Contract Act, and could not be enforced. This decision was approved by the Privy Council in *Ananda Mohan Roy v. Gour Mohan Mullick* where also the question was whether a contract by the nearest reversioner to sell property which was in the possession of a widow as heir was valid and enforceable, and it was held that the prohibition under Section 6(a) would become futile, if agreements to transfer could be enforced. These decisions have no bearing on the question now under consideration, as to the right of a person who for consideration takes a transfer of what is represented to be an interest *in praesenti*. The decision in *Official Assignee, Madras v. Sampath Naidu* is, in our view, erroneous, and was rightly overruled in the decision now under appeal.

17. Proceeding on to the decisions of the other High Courts, the point under discussion arose directly for decision in *Shyam Narain v. Mangal Prasad* [(1935) ILR 57 All 474]. The facts were similar to those in *Official Assignee, Madras v. Sampath Naidu*. One Ram Narayan, who was the daughter's son of the last male owner, sold the properties in 1910 to the respondents, while they were vested in the daughter Akashi. On her death in 1926, he succeeded to the properties as heir and sold them in 1927 to the appellants. The appellants claimed the estate on the ground that the sale in 1910 conferred no title on the respondents as Ram Narayan had then only a *spes successionis*. The respondents contended that they become entitled to the properties when Ram Narayan acquired them as heir in 1926. The learned Judges, Sir S.M. Sulaiman, C.J., and Rachhpal Singh, J., held, agreeing with the decision in *Alamanaya Kunigari Nabi Sab v. Murukuti Papiiah*, and differing from *The Official Assignee, Madras v. Sampath Naidu* and *Bindeshwari Singh v. Har Narain Singh* [AIR

1929 Oudh 185] that Section 43 applied and that the respondents had acquired a good title. In coming to this conclusion, they relied on the illustration to Section 43 as indicating its true scope, and observed:

“Section 6(a) would, therefore, apply to cases where professedly there is a transfer of a mere *spes successionis*, the parties knowing that the transferor has no more right than that of a mere expectant heir. The result, of course, would be the same where the parties knowing the full facts fraudulently clothe the transaction in the garb of an out and out sale of the property, and there is no erroneous representation made by the transferor to the transferee as to his ownership.

But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorized to transfer it and the property transferred is not a mere chance of succession but immovable property itself, and the transferee acts upon such erroneous representation, then if the transferor happens later, before the contract of transfer comes to an end, to acquire an interest in that property, no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer”.

18. The preponderance of judicial opinion is in favour of the view taken by the Madras High Court in *Alamanaya Kunigari Nabi Sab v. Murukuti Papiiah*, and approved by the Full Bench in the decision now under appeal. In our judgment, the interpretation placed on Section 43 in those decisions is correct, and the contrary opinion is erroneous. We accordingly hold that when a person transfers property representing that he has a present interest therein, whereas he has, in fact, only a *spes successionis*, the transferee is entitled to the benefit of Section 43, if he has taken the transfer on the faith of that representation and for consideration. In the present case, Santhappa, the vendor in Ex. III, represented that he was entitled to the property in praesenti, and it has been found that the purchaser entered into the transaction acting on that representation. He therefore acquired title to the properties under Section 43 of the Transfer of Property Act, when Santhappa became *in titulo* on the death of Gangamma on February 17, 1933, and the subsequent dealing with them by Santhappa by way of release under Ex. A did not operate to vest any title in the appellant.

19. The Courts below were right in upholding the title of the respondents, and this appeal must be dismissed with costs of the third respondent, who alone appears.

* * * * *

Kartar Singh v. Harbans Kaur

(1994) 4 SCC 730

K. RAMASWAMY AND B.L. HANSARIA, JJ. –**ORDER**

2. The appellant is the defendant. Smt Harbans Kaur - respondent executed the sale deed on 19-4-1961, in favour of the appellant of alienating the lands on her behalf and on behalf of her minor son, Kulwant Singh. Kulwant Singh, on attaining majority, filed Case No. 21 of 1975 on 14-3-1975 on the file of the Sub-Judge, IInd Class, Gurdaspur for a declaration that the sale of his share in the lands mentioned in the schedule attached thereto by his mother was void and does not bind him. The decree ultimately was granted declaring that the sale was void as against the minor. But before taking delivery of the possession, Kulwant Singh died. Harbans Kaur, the mother being Class-I heir under Section 8 of the Hindu Succession Act, 1956 read with the schedule succeeded to the estate of the deceased. The appellant, therefore, laid his claim to the benefit of Section 43 of the Transfer of Property Act, 1882 (for short 'the Act'). The High Court in Second Appeal No. 1557 of 1979, while setting aside the decree of the trial court and declared that the sale is void, refused to grant the remedy under Section 43 of the Act. Thus these appeals by special leave.

3. The contention for the appellant is that in view of the finding that Harbans Kaur had succeeded by operation of law, the appellant is entitled to the interest acquired by Harbans Kaur by operation of Section 43 of the Act and the High Court has misapplied the ratio of decisions of this Court in *Jumma Masjid, Mercara v. Kodimaniandra Deviah* [AIR 1962 SC 847] and the decision of the Patna High Court in *Jhulan Prasad v. Ram Raj Prasad* [AIR 1979 Pat 54].

4. A reading clearly shows that for application of Section 43 of the Act, two conditions must be satisfied. Firstly, that there is a fraudulent or erroneous representation made by the transferor to the transferee that he is authorised to transfer certain immovable property and in the purported exercise of authority, professed to transfer such property for consideration. Subsequently, when it is discovered that the transferor acquired an interest in the transferred property, at the option of the transferee, he is entitled to get the restitution of interest in property got by the transferor, provided the transferor acquires such interest in the property during which contract of transfer must subsist.

5. In this case, admittedly, Kulwant Singh was a minor on the date when the respondent transferred the property on 19-4-1961. The marginal note of the sale deed specifically mentions to the effect:

“... that the land had been acquired by her and by her minor son by exercising the right of pre-emption and that she was executing the sale deed in respect of her own share and acting as guardian of her minor son so far as his share was concerned.”

6. It is settled law that the transferee must make all reasonable and diligent enquiries regarding the capacity of the transferor and the necessity to alienate the estate of the minor. On satisfying those requirements, he is to enter into and have the sale deed from the guardian

or manager of the estate of the minor. Under the Guardian and Wards Act, the estate of the minor cannot be alienated unless a specific permission in that behalf is obtained from the district court. Admittedly, no such permission was obtained. Therefore, the sale of the half share of the interest of Kulwant Singh made by his mother is void.

7. Section 43 feeds its estoppel. The rule of estoppel by deed by the transferor would apply only when the transferee has been misled. The transferee must know or put on notice that the transferor does not possess the title which he represents that he has. When note in the sale deed had put the appellant on notice of limited right of the mother as guardian, as a reasonable prudent man the appellant is expected to enquire whether on her own the mother as guardian of minor son is competent to alienate the estate of the minor. When such acts were not done the first limb of Section 43 is not satisfied. It is obvious that it may be an erroneous representation and may not be fraudulent one made by the mother that she is entitled to alienate the estate of the minor. For the purpose of Section 43 it is not strong material for consideration. But on declaration that the sale is void, in the eye of law the contract is non est to the extent of the share of the minor from its inception. The second limb of Section 43 is that the contract must be a subsisting one at the time of the claim. A void contract is no contract in the eye of law and was never in existence so the second limb of Section 43 is not satisfied. The ratio of this Court in *Jumma Masjid* case is thus:

“Section 43 embodies a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. For the purpose of the section, it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and if the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application and the transfer will fail under Section 6(a).”

This Court in the later part has made it clear that where the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application and the transfer will fail under Section 6(1) of the Transfer of Property Act. In view of the finding that no diligent and reasonable enquiries were made regarding the entitlement of the mother to alienate the half share of the minor's estate, it cannot be said that the appellant had acted reasonably in getting the transfer in his favour.

8. In the face of the existence of the aforementioned note and in the light of the law, it could be concluded that Section 43 does not apply to the facts of this case. The ratio of the Patna High Court also does not apply to the facts in this case as rightly distinguished by the High Court. It is made clear that the declaration given by the High Court is only qua the right of the minor and it is fairly conceded by the respondent that the decree does not have any effect on the half share conveyed by the mother. If the appellant has any independent cause of action subsisting under the contract against the respondent, this judgment may not stand in his way to pursue the remedy under the law. The appeals are accordingly dismissed.

Rosher v. Rosher

(1884) 26 Ch. D. 801

J.B. Rosher, by his will, dated the 26th of November, 1872, devised as follows:

“I devise all my manor, commonly called Trewyn Manor, and all other my real estate, unto my said son Jeremiah Lilburn Rosher, his heirs, executors, administrators and assigns, according to the tenure there of respectively, provided always, and I hereby declare that if my said son, or his heirs’ or devisees, or any person claiming through or under him or them shall desire to sell my manor and estate of Trewyn, and other my estates in the countries of Monmouth and Hereford or any part or parts thereof, in the life time of my wife, she shall have the option to purchase the same at the price of £ 3600 for the whole, and at a proportionate price for any part or parts thereof, and the same shall accordingly be first offered to her at such price or proportionate price or prices. And I also declare that if my said son, his heirs or devisees, or any person claiming through or under him or them shall during the life of my said wife desire to let Trewyn House, garden buildings, land and premises, or any part or parts thereof, now in my occupation, for a longer period than three years at any one time, she shall have the option of renting the whole of the lastly described premises for any period exceeding three years as she shall desire, at the yearly rent of £ 25, and the same shall be first offered to her accordingly ; and that if my said son, his heirs or devisees, or any person claiming through or under him or them shall during the life of my said wife desire to let Lower Trewyn or part or any parts thereof for a longer period exceeding seven years she shall have the option of renting it for any period exceeding seven years as she shall desire, at the yearly rent of £ 35, and the same shall be first offered to her accordingly.

The testator died on the 26th of November, 1874. This action was brought by the widow against the son. The special case was stated by consent for the opinion of the Court, pursuant to Order XXXIV of the Rules of Court of 1875.

The case stated that the real selling value of the manor and estate of Trewym, and other estates of the testator in the country of Manmouth and Hereford, was at the date of the will and at the time of the testator death, £ 15,000 and upwards; that the real letting value of Trewyn House garden buildings, land, and premises, was, at the date of the will and at the time of the testator’s death, £ 100 and upwards per annum; and that the real letting value of Lower Trewyn was at the date of the will and at the time of the testator’s death £ 100 and upwards per annum.

The questions for the opinion of the court were:

(1) Whether or not, according to the true construction of the will, the son was entitled to sell or to mortgage or charge respectively the estates devised to him by the will, or any part thereof, without first offering to the widow the option to purchase the premises so intended to be sold or to be mortgaged or charged at the price named in the will or at a proportionate price, according to the quantity dealt with, as the case

might be, or whether the provisions and directions contained in the will in reference to the option of purchase were null and void?.

(2) Whether or not, according to the true construction of the will, the son was entitled to let the premises called *Trewyn House*, or any part thereof, for a longer term than three years, or the premises called *Lower Trewyn*, or any part thereof, for a longer period than seven years, without first offering to the widow the option of renting the same respectively as directed by the will at the respective rents named therein, or whether the provisions and directions in the will contained in reference to the letting of the said premises or either of them were void and of no effect?

May 28. Pearson, J., after stating the facts, continued:-

The question I have to decide is whether, there being an absolute devise in fee simple to the son, the conditions annexed to it are valid. I will deal first with the condition which relates to selling, and it will, I hope, shorten the observations which I have to make if I first state the manner in which I interpret this condition.

The restriction upon selling is this, that if the son, or any person claiming through or under him, is minded to sell during the lifetime of the testator's widow, the estate intended to be sold, whether it is the whole or only part of the devised estates, must be offered to the widow at the price of £ 3000 for the whole, or at a proportionate price for a part. It is agreed that the value of the whole estate at the death of the testator was £ 15,000. It is, therefore, in effect a condition that, if the son desires to sell, he shall offer the estates to the widow, and that she is to be at liberty to buy them at one-fifth of their value. I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been done "during the life of the widow you shall not sell," because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all.

If a covenant be held good which in the event of a grantee in fee simple alienating the land, merely imposes a fine upon him (or an additional rent on the lands, as in the case before us) the general rule might be evaded and the principles of it violated by fixing such an amount of fine or additional rent as would effectually prohibit the alienation, which would clearly be a "circumvention of the law." To my mind, to compel the son in the present case, if he chose to sell, to sell at one-fifth of the value of the estate, is really a prohibition of alienation during the widow's lifetime.

* * * * *

Muhammad Raza v. Abbas Bandi Bibi

1932 IA 236.

SIR GEORGE LOWNDES - In 1868, one Sughra Bibi brought a suit against her cousin, Afzal Husain, claiming a half share in certain immovable properties in Oudh which had been entered in his name at the post mutiny settlement. The litigation ended in a compromise upon which a decree was passed in a suit on September 19, 1870. The compromise was in the following terms:

“We are Mussamat Sughra Bibi, plaintiff, claimant of a share in Mahal Shadipur, and Syed Afzal Husain, lambardar of the aforesaid Mahal, defendant.

Whereas between the parties to the above-mentioned case in which a share is claimed an amicable settlement has been arrived at to the effect that the plaintiff's marriage by way of nikah with the defendant may be performed in the next month, accordingly in view of a marriage settlement, there no longer exists any dispute regarding a share, and insomuch as the defendant's first wife, the daughter of Raja Syed Abbas Ali, deceased, is alive, it has been settled that both wives should, in accordance with this agreement, in their capacity as wives, from this very time be declared permanent owners [malik mustaqil] of a moiety each of the entire Mahal Shadipur, and that the names of Musammat Fatima Begam, the first wife, and Musammat Sughra Bibi, plaintiff, be entered in the public records as owners of half and half [bilmunasfa milkiatan]. The said females shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on the legal heirs of both the above-named wives, from generation to generation; and the management and collections of the entire estate of Shadipur shall be in the hands of their husband, Syed Afzal Husain, in his capacity of a husband if on the part of the husband there is any act of neglect or estrangement towards either of the wives, then, in that case, the wife's only remedy will be to have the management of her share performed by the Government through the Court of Wards; but during the lifetime of Afzal Husain neither of the wives shall have the power on her own authority to have the management of the share which is owned by her performed by any member of her father's family, and if in contravention of this agreement the defendant refuses to marry the plaintiff by way of nikah, then the plaintiff shall in accordance with this document remain owner of a moiety, and if the plaintiff acts contrary to the stipulation of nikah, she shall cease to have any rights whatever. If, God forbid, contrary to custom the divorce of either of the wives takes place, then, even in that case, ownership shall remain vested in the wives, as before, subject to the conditions mentioned above; provided that the divorced wife should regard herself as an undivorced wife, and like a woman without a husband continue to live in the house, and be it understood that the aforesaid conditions shall apply to whatever share exists in the villages comprised in Mahal Shadipur, as detailed below:- (1) Shadipur, (2) Ninawan, Behrai, Daudpur, Nandapur, Qutubpur, Belahri, Daryapur; moreover, whatever property, such as Chittoi and Nausanda and Musha, pargana Tanda and Halimpur and Lodhna and Nathupur, pargana Surhupur, exists at

present, or may be acquired in future, shall, during the lifetime of Mir Teg Ali and myself (the defendant), continue to remain in possession of the defendant, and after me (the defendant) this property also shall devolve on the two wives or their descendants (aulad) in equal shares. Hence this agreement is made in writing in order that it may serve as evidence thereof and the pending case may be decided in accordance with its terms.”

Afzal Husain thereafter duly married Sughra Bibi and died in 1872 childless, his first wife Fatima Begum having predeceased him in 1871. Sughra Bibi took possession of her share in the properties, but had sold or mortgaged it all before her death, which occurred on July, 26 1914. Her transferees remained in undisturbed possession for nearly twelve years after her death.

On March 26, 1926, the suit out of which this appeal has arisen was instituted by the respondent in the Court of the Subordinate Judge of Fyzabad for the recovery of two-thirds of Sughra Bibi's share from the appellants, in whose possession the properties had come under the alienations above referred to.

The respondent's case was that under the compromise Sughra Bibi took only a life estate without power of alienation, and that on her death the half-share passed to her heirs, of whom the respondent, in right of her mother Zainab Bibi, the sister of Afzal Husain, was one, her share being two-thirds. The other heirs, taking the remaining third, were said to be certain maternal relatives of Sughra Bibi, who apparently made no claim, and were not joined as parties to the suit, but it is not suggested that it is defective on this account. The present appeal therefore is concerned only with two-thirds of the property, and the rights of the parties depend in the first instance on the validity of the alienations by Sughra Bibi, the title of the respondent, if these alienations were invalid, not being disputed.

A preliminary issue which covered this question was raised and tried by the Subordinate Judge. It was in the following terms: “Was the restriction placed by the compromise deed dated September 19, 1870, upon Sughra Bibi's power of alienation valid and legally enforceable?” The learned judge, after a detailed but not very informing examination of the case law on the subject, held that the restriction imposed by the deed on the lady's power of alienation was invalid and inoperative, and he accordingly answered the issue in the negative.

The hearing of some twenty-eight other issues in the case came subsequently before another Subordinate Judge, with the result that the suit was dismissed with regard to certain of the properties claimed, but decreed with regard to others.

Both sides appealed to the Chief Court. The case was heard by Raza and Pullan JJ., who delivered their judgment on January 4, 1929, allowing the appeal of the present respondent, and dismissing that of the appellants, with the result that the suit was decreed in full. The questions other than that as to Sughra Bibi's power of alienation are not now material. They were in part disposed of by concurrent findings of fact of the two Courts, and for the rest involve matters subsidiary to the main issue as to the validity of the alienations.

The learned judges of the Chief Court discussed the meaning of the word malik which has been used throughout the compromise agreement, but came to the conclusion that having regard to the express provision that the ladies were not to have power to transfer the property

to a stranger, they had only a “limited ownership,” with a gift over to their heirs. They then considered whether under the Shia law, by which the parties were governed, such an arrangement would be valid, and came to the conclusion that it would.

Before the Board the case law has been discussed at great length, but without throwing much light upon the construction of the particular document with which this appeal is concerned. It was urged for the appellants that the true effect of the document was to constitute the ladies full owners of the two moieties of the property, and that the attempt to restrict their power of alienation should be regarded as repugnant, special reliance being placed upon the judgment of the Board delivered by the late Sir Bonod Mitter in *Raghuvnath Prasad Singh v. Deputy Commission, Partabgarh*. [LR 56 IA 372] For the respondent it was contended that, having regard to the decisions of this Board, the use of the word “malik” did not necessarily imply full ownership, and that reading the document as a whole the ladies took only life estates with vested remainders in their heirs.

In support of the appellant’s contention it was pointed out that the ladies were to be “malik mustaqil,” i.e., permanent proprietors, and were to be entered as such in the public records; that their proprietorship was to take effect from the execution of the document, and that if Afzal Husain refused to marry Sughra Bibi, she was to “remain owner of a moiety” free from restriction of any kind; that other property, to which Sughra Bibi had made no claim, was also dealt with; that it was to remain in the possession of Afzal Husain during his life and the lifetime of his father Tegh Ali, and then was to “devolve on the two wives or their descendants in equal shares” – again, as the respondent’s counsel concedes, without restriction. From this it is said to be clear that the draftsman of the document was quite competent to put a life estate into direct words if that had been the intention of the parties under the first part of the agreement. It is also suggested that the words upon which the respondent relies as constituting a gift over to the ladies’ heirs are only explanatory of the restriction against transfer to a stranger, which immediately precedes them, and it is pointed out with some force that if only life estates were intended the restriction would not have been confined to the case of strangers.

Their Lordships feel the weight of these contentions, and they might have some difficulty in holding that Sughra Bibi took nothing more than a life estate. But assuming in the appellants’ favour that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to “a stranger.” Their Lordships have no doubt that “stranger” means any one who is not a member of the family, and the appellants are admittedly strangers in this sense. Unless, therefore, this restriction can for some reason be disregarded, they have no title to the properties which can prevail against the respondent.

On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that *Raghunath Prasad Singh* case is of no assistance to the appellants, for there the restriction

against alienation was absolute and was attached to a gift by will. It is, in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them.

The law by which this question must be judged is, their Lordships think, prescribed by s. 3 of the Oudh Laws Act, 1876, and failing the earlier clauses of the section which seem to have no application, "the Courts shall act according to justice, equity and good conscience," which has been adopted as the ultimate test for all the provincial Courts in India. Is it then contrary to justice, equity and good conscience to hold an agreement of this nature to be binding? Judging the matter upon abstract grounds, their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement could hardly support their claim by an appeal to these high sounding principles, and it must be remembered in this connection that family arrangements are specially favoured in Courts of equity.

But, apart from this, it seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer inter vivos, be regarded as repugnant: see s. 10 of the Act. In view of the terms of this section, and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience.

It was said by Lord Hobhouse in *Waghela Rajsanji v. Shekh Masludin* (LR 14 IA 89, 96) that the expression "equity and good conscience" was generally interpreted as meaning English law, if found applicable to Indian society and circumstances. If this is to be the test there is authority that in England a partial restriction would not be regarded as repugnant even in the case of a testamentary gift. So in *In re Macleay* [LR 20 Eq 186] Sir George Jessel M.R. upheld a condition attached to a devise in fee that the devisee should "never sell out of the family," pointing out that this had been the law from the time of Coke; and in *Doe d. Gill v. Pearson* [(1805) 6 East 173] Lord Ellenborough in the King's Bench affirmed the validity of a similar restriction.

Their Lordships see no reason therefore to hold that the provision in the compromise agreement that Sughra Bibi should not have power to transfer the properties in suit to a stranger was otherwise than binding upon her.

Their Lordships have heard much discussion of the question whether the Shia law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living

person, but, in the view they take of the appellants' case, it is unnecessary for them to come to any conclusion upon this somewhat abstruse problem, or to consider the authorities that have been cited.

In their Lordships' opinion Sughra Bibi had no power to transfer any part of the properties to the appellants, and upon her death the respondent became entitled to the two-thirds share in the properties which she claims. They think that this appeal fails, and that the decree of the Chief Court, dated January 4, 1929, should be affirmed with costs, and they will humbly advise His Majesty accordingly.

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Manohar Shivram Swami v. Mahadeo Guruling Swami

AIR 1988 Bom 116

S.N. KHATRI, J. – This is a plaintiff's second appeal. The facts, so far as they are material for the disposal of this second appeal, are these: Plaintiff-appellant Manohar is one Shivram's son. This Shivram had two other brothers by name Hari and Vithu. Defendant No. 1 - Respondent No. 3 Dhondubai and one Dattu were the two issues of Hari. Defendants Nos. 2 to 5 (Respondents Nos. 1, 2, 4 and 5) are sons of Vithu. The properties in disputes consist of land and a house. All these properties originally belonged to Dattu. By a will dated 13th June, 1962 he bequeathed them to the plaintiff. The properties vested in the plaintiff for good on the death of Dattu in 1966. The plaintiff executed a sale deed in respect of these properties in favour of defendant No. 1 on 22nd June, 1968. It appears that the parties are Jangams by caste. One of the vendees' covenant is:

“If it is necessary to transfer the aforesaid property by any instrument, I shall transfer it into your Jangam family and not to others. The property is sold on this condition.”

1. Thereafter Defendant No. 1 executed a sale-deed in favour of defendant No. 6 in respect of the house property alone on 14th April, 1971.

2. Plaintiff sued Defendants Nos. 1 to 6 for a perpetual injunction restraining them from interfering with his possession of the suit property, on the allegation that by selling away the suit property to Defendants Nos. 2 to 5, defendant No. 1 had committed breach of the covenant extracted above by me. It is not necessary to refer to other averments made by him in the plaint, as they are not material for disposal of this second appeal. The trial Court held that defendant No. 1 had committed breach of the aforesaid covenant. It negatived the defence that the aforesaid limitation was void under Section 10 of the Transfer of Property Act. Eventually the trial Court passed a decree in favour of the plaintiff declaring that the sale-deed executed by defendant No. 1 in favour of Defendants Nos. 2 to 5 was void and not binding on the plaintiff. It further directed defendants Nos. 2 to 5 to reconvey the property to the plaintiff for Rs. 2000/- which is the consideration paid by them to Defendant No. 1.

3. In the appeal carried to the District Court, the learned Extra Assistant Judge took the view that the restriction quoted in the first paragraph of the judgment was void, being hit by Section 10 of the Transfer of Property Act. Resultantly he upheld the validity of the sale-deed. He negatived the plaintiff's alternative stand based on breach of covenant. According to him defendants Nos. 2 to 5 who are first cousins of plaintiff and defendant No. 1 also belong to the Jangam Gharana of the plaintiff. Accordingly he allowed the appeal, dismissing the suit in its entirety with costs.

4. The substantial question of law formulated by my brother Jahagirdar J. at the time of admitting this second appeal whether the condition put in the sale-deed executed by plaintiff in favour of defendant No. 1 is hit by Section 10 of the Transfer of Property Act? This question is practically concluded by a Division Bench decision of the Allahabad High Court reported in [AIR 1935 All 493], *Gayashi Ram v. Shahabuddin*. In that case, the sale deed included a clause providing that the vendee would not transfer the subject matter of sale,

namely a house, by mortgage, gift or sale to any one excepting the vendor or his heirs, and that if the house was transferred in contravention of that term then the vendor or his heirs would have a right to get back the house by paying Rs. 175/- instead of Rs. 150/- which the vendor has originally received.

5. It is true that defendants Nos. 2 to 5 have further transferred a part of the property, namely, the house to defendant No. 6 who does not admittedly belong to the Jangam fold. However, the covenant incorporated in the sale deed executed by the plaintiff cannot be said to be one running with the land. There would thus be no actionable breach of this covenant by this subsequent sale deed of 14th April, 1971.

6. Even assuming that the learned Counsel is right in her submission that the defendant No. 1 has committed breach of the covenant that does not advance the plaintiff's case to any extent, because the condition would be void under Section 10 of the Transfer of Property Act. The Allahabad High Court has ruled in ***Gayashi Ram*** "in order to see whether there is absolute restraint or not, one has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in Section 10." With respect, I agree with these observations of the learned Judges. The ratio of this decision applies to the case before me on all fours. The finding of the District Court will have to be upheld that the conditions incorporated in the sale deed executed by the plaintiff in favour of defendant No. 1 is void under Section 10. Breach of the condition, even if assumed to be proved, is neither here nor there.

7. No other point was argued before me. This second appeal has no merit and is accordingly dismissed with costs.

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***Zoroastrian Coop. Housing Society Ltd. v. District Registrar,
Coop. Societies (Urban)***
(2005) 5 SCC 632

P.K. BALASUBRAMANYAN, J. - The Zoroastrian Cooperative Housing Society is a society registered on 19-5-1926, under the Bombay Cooperative Societies Act, 1925. The Society applied to the Government of Bombay for acquisition of certain lands in Ahmedabad district, then in the State of Bombay, under the Land Acquisition Act, 1894 for the purpose of erecting houses for residential use of its members and to further the aims and objects of the Society. On the Government of Bombay agreeing to the proposal, the Society entered into an agreement on 17-2-1928 with the Government under Section 41 of the Land Acquisition Act. Certain lands were acquired. From the lands thus acquired at its cost and given to it, the Society allotted plots of land to the various members of the Society in furtherance of the objects of the Society. On the reorganisation of States, the Society became functional in the State of Gujarat and came within the purview of the Gujarat Cooperative Societies Act, 1961. Section 169 of that Act, repealed the Bombay Cooperative Societies Act, 1925 and in sub-section (2) provided that all societies registered or deemed to be registered under the Bombay Act, the registration of which was in force immediately before the commencement of the Gujarat Act, were to be deemed to be registered under the Gujarat Act. The Gujarat Act came into force on 1-5-1962. Thus, the Society came to be regulated by the Gujarat Cooperative Societies Act, 1961 ("the Act").

2. On the scheme of the Bombay Cooperative Societies Act ("the Bombay Act"), the Society had applied for registration in terms of Section 9 of that Act. The application was accompanied by the proposed bye-laws of the Society. The Registrar of Cooperative Societies, on being satisfied that the Society had complied with the provisions of the Act and the Rules and that the proposed bye-laws were not contrary to the Act and the Rules, granted registration to the Society and its bye-laws and issued a certificate of registration in terms of Section 11 of that Act. As per the bye-laws, the objects of the Society were to carry on the trade of building, and of buying, selling, hiring, letting and developing land in accordance with cooperative principles and to establish and carry on social, recreative and educational work in connection with its tenets and the Society was to have full power to do all things it deemed necessary or expedient, for the accomplishment of all objects specified in its bye-laws, including the power to purchase, hold, sell, exchange, mortgage, rent, lease, sub-lease, surrender, accept surrenders of and deal with lands of any tenure and to sell by instalments and subject to any terms or conditions and to make and guarantee advances to members for building or purchasing property and to erect, pull down, repair, alter or otherwise deal with any building thereon. All persons who had signed the application for registration were original members by virtue of Bye-law 7. The said bye-law further provided that other members shall be elected by the Committee of the Society, provided that all members shall belong to the Parsi community subject to satisfying other conditions in that bye-law. Bye-law 21 provided for sale of a share held by a member but with previous sanction of the Committee which had full discretion in granting or withholding such sanction. It was also provided that until the transfer of a share was registered, no right was acquired against the Society by the

transferee, and no claim against the transferor by the Society was also to be affected. In short, the qualification for becoming a member in the Society was that the person should be a Parsi and that the transfer of a share to him had to have the previous sanction of the Committee of the Society.

3. Some of the relevant provisions of the Bombay Act may now be noticed. Under Section 3, the Registrar had the right to classify all societies under one or other of the heads referred to in that section. Under Section 5 of that Act, a society which had as its object, the promotion of economic interests of its members in accordance with economic principles, may be registered under the Act with or without limited liability. Section 6 placed restrictions on the interests of the members of the society with limited liability. Section 6-A enacted that no person shall be admitted as a member of a society unless he was a person competent to contract under Section 11 of Contract Act, 1872. Section 7 stipulated the conditions for registration and provided that no society could be registered under the Act which did not consist of at least 10 persons who were qualified to be members of the society under Section 6-A and where the object of the society was the creation of funds to be lent to its members, unless all persons forming the society resided in the same town or village or in a group of villages or they belonged to the same tribe, class or occupation, unless the Registrar ordered otherwise and no person could be admitted to membership of any such society after its registration unless the persons fulfilled the two requirements as mentioned above. If the Registrar was satisfied that a society has complied with the provisions of the Act and the Rules and that its proposed bye-laws are not contrary to the Act or to the Rules, under Section 10 he was to register the society and its bye-laws. According to the Society, it had submitted its duly filled in application under Section 9 of the Act accompanied by its bye-laws and the said bye-laws have been approved and registered by the Registrar on being satisfied that the proposed bye-laws were not contrary to the Act or to the Rules.

4. After the Society was formed and registered as indicated earlier, the Society got lands acquired by the State by invoking the Land Acquisition Act, 1894. The Society entered into an agreement in that behalf with the Government under Section 41 of the Act on 17-2-1928. The said agreement recited that the Government of Bombay was satisfied that the land should be acquired under the Land Acquisition Act "for the purpose of erecting houses thereon". It was also stated that the Government was satisfied that the acquisition of the land was needed for the furtherance of the objects of the Society and was likely to prove useful to the public and it consented to put in operation the provisions of the Land Acquisition Act. An extent of 6 acres 12 guntas was thus acquired and handed over to the Society, on the Society bearing the cost of that acquisition. The Society in its turn allotted portions of the land to its members for the purpose of putting up residential houses in the plots concerned.

5. One of the members of the Society sold the plot in which he had constructed a residential building, to the father of Respondent 2 with the previous consent of the Committee of the Society. The father of Respondent 2 was also admitted to membership of the Society, he being qualified for such admission in terms of the bye-laws of the Society. After the rights devolved on Respondent 2, consequent on the death of his father, he became a member of the Society of his volition. Thereafter, he applied to the Society for permission to demolish the bungalow that had been put up and to construct a commercial building in its place. The

Society refused him permission stating that the bye-laws of the Society did not permit commercial use of the land. Thereafter, Respondent 2 applied to the Society for permission to demolish the bungalow and to construct residential flats to be sold to Parsis. The Society acceded to the request of Respondent 2, making it clear that the flats constructed could only be sold to Parsis. It appears that, earlier, the Society had written to the Registrar that it was apprehending that certain members of the Society were proposing to sell their bungalows to persons outside the Parsi community only with commercial motive and in violation of clause 7 of the bye-laws. The Registrar replied that any transaction of sale should be in accordance with the bye-laws of the Society and any sale in violation of the bye-laws would not be permitted, thus, stressing the sanctity of the bye-laws. On 20-7-1982, the Government of Gujarat had also issued a notification declaring that persons or firms dealing with the sale and purchase of lands and buildings, contractors, architects and engineers were disqualified from being members of cooperative housing societies. Though, permission was given to Respondent 2 as early as on 17-5-1988 for construction of residential flats in the land, to be sold only to members of the Parsi community, he did not act on the permission for a period of seven years. Apprehending that Respondent 2 intended to violate the bye-laws of the Society, the Society passed a resolution reminding its members that in accordance with Bye-law 7, no person other than a Parsi could become a new member of the Society and informing the existing members of the Society that they could not sell their plots or bungalows to any person not belonging to the Parsi community. Respondent 2 appears to have started negotiations with Respondent 3, a builders' association, in violation of the restriction on sale of shares or property to a non-Parsi. The Society, in that context, filed a case before the Board of Nominees under the Act for an injunction restraining Respondent 2 from putting up any construction in Plot No. 7 and from transferring the same to outsiders in violation of Bye-law 7 without valid prior permission from the Society. Though, initially an interim order of injunction was granted, the Board informed the Society that the Society could not restrict its membership only to the Parsi community and that membership should remain open for every person. A clarification was also sought for from the Society as to why it had refused permission to Respondent 2 to transfer Plot No. 7 belonging to him. Subsequently, the Board of Nominees vacated the interim order of injunction granted, inter alia, on the ground that the construction of a block of residential flats would not create disturbance and nuisance to the original members of the Society. Thereafter, Respondent 2 applied to the Society for permission to transfer his share to Respondent 3. The said application was rejected by the Society, since according to it, the application was contrary to the Act, Rules and the bye-laws of the Society. While the Society challenged the order of the Board of Nominees before the Gujarat State Cooperative Societies Tribunal, Respondents 2 and 3 challenged the rejection of the request of Respondent 2 to sell his plot to Respondent 3, by way of an appeal before the Registrar of Cooperative Societies under Section 24 of the Act. The Tribunal, in the revision filed by the Society, took the view in an interim order that the bye-law restricting membership to Parsis was a restriction on the right to property and the right to alienate property and, therefore, was invalid in terms of Article 300-A of the Constitution. This order was challenged by the Society and its Chairman before the High Court of Gujarat in Special Civil Application No. 6226 of 1996. By judgment dated 16-1-1997, a learned Single Judge of the Gujarat High Court dismissed the writ petition essentially holding that the restriction in a bye-

law to the effect that membership would be limited only to persons belonging to the Parsi community, would be an unfair restriction which can be validly dealt with by the appropriate authorities under Section 24 of the Act and Rule 12(2) of the Rules. It was also held that such a bye-law would amount to a restraint on alienation and hence would be hit by Section 10 of the Transfer of Property Act. The Society and its Chairman challenged the said decision before a Division Bench, in Letters Patent Appeal No. 129 of 1997. By judgment dated 23-7-1999, the said appeal was dismissed, more or less, concurring with the reasoning and conclusion of the learned Single Judge. The decision of the Division Bench of the Gujarat High Court thus rendered is challenged in this appeal by special leave.

6. Mr Soli J. Sorabjee, learned Senior Counsel appearing for the appellants contended that under Article 19(1)(c) of the Constitution, Parsis had a fundamental right of forming an association and that fundamental right cannot be infringed by thrusting upon the association, members whom it does not want to admit or against the terms of its bye-laws. He submitted that the content of the right of association guaranteed by Article 19(1)(c) of the Constitution has been misunderstood by the High Court and the authorities under the Act. He also contended that there was nothing in the Act or the Rules which precluded a society from restricting its membership to persons of a particular persuasion, belief or tenet and the High Court was in error in holding that membership could not be restricted to members of the Parsi community for whose benefit the very Society was got registered. Though, grounds based on Article 26 of the Constitution raised, were not pursued, it was pointed out that under Article 29, the Parsis had the right to conserve their culture. It was submitted that Bye-law 7 was perfectly valid and so long as it did not violate anything contained in the Act or the Rules, it could not be held to be invalid or unenforceable and the Society cannot be compelled to act against the terms of its bye-laws. He also submitted that there was no absolute restraint on alienation to attract Section 10 of the Transfer of Property Act and the restraint, if any, was only a partial restraint, valid in law. There was nothing illegal in certain persons coming together to form a society in agreeing to restrict membership in it or to exclude the general public at its discretion with a view to carry on its objects smoothly. Mr Bobde, learned Senior Counsel appearing for the contesting respondents, Respondents 2 and 3, contended that Section 4 of the Act clearly indicated that no bye-law could be recognised which was opposed to public policy or which was in contravention of public policy in the context of the relevant provisions in the Constitution and the rights of an individual under the laws of the Country. A bye-law restricting membership in a cooperative society, to a particular denomination, community, caste or creed was opposed to public policy and consequently, the authorities under the Act and the High Court were fully justified in rejecting the claim of the Society. Learned Senior Counsel also contended that the High Court was right in holding that the bye-law concerned operated as a restraint on alienation and such a restraint was clearly invalid in terms of Section 10 of the Transfer of Property Act. He submitted that a cooperative society stood on a different footing from a purely voluntary association or a society registered under the Societies Registration Act and in the context of Sections 4 and 24 of the Act, the validity of the bye-laws of a society had to be tested, notwithstanding the fact that the bye-laws had been earlier approved by the Registrar of Cooperative Societies. Learned Senior Counsel also contended that under Section 14 of the Act, the Registrar had the power to call upon the Society to amend its bye-laws and in that context, the Registrar could direct the Society to

delete the restriction placed on admission to membership by Bye-law 7 of the bye-laws of the Society. In reply, Mr Sorabjee pointed out that the rights under Part III of the Constitution pertained to State action and an individual could always join a voluntary association or a cooperative society which placed certain restrictions on the right he might have otherwise enjoyed. There was also no substance in the contention that public policy was being violated.

7. Before proceeding further, some of the relevant provisions of the Gujarat Act may be noticed in a little detail. The Society though originally registered under the Bombay Cooperative Societies Act, 1925 has to be deemed to be registered under the Gujarat Act by virtue of Section 169 of the Gujarat Cooperative Societies Act, 1961. Section 2(2) of the Act defines bye-laws as meaning, bye-laws registered under the Act. Section 2(13) defines a member as meaning a person joining in an application for the registration of a cooperative society which is subsequently registered, or a person, duly admitted to membership of the society after its registration. Section 4 of the Act, based on which considerable arguments were raised before us, reads as follows:

“4. Societies which may be registered. - A society, which has as its object the promotion of the economic interests or general welfare of its members or of the public, in accordance with cooperative principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act:

Provided that it shall not be registered if, in the opinion of the Registrar, it is economically unsound, or its registration may have an adverse effect upon any other society, or it is opposed to, or its working is likely to be in contravention of public policy.”

11. Section 23 deals with removal of a member in certain circumstances. Section 24 speaks of open membership. Sub-section (1) thereof, which is of immediate relevance, reads as follows:

“24. Open membership .- (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act, the rules and bye-laws of such society.”

Be it noted that admission to membership could not be refused only to a person who was duly qualified therefor under the Act, the Rules and the bye-laws of such society. In other words, the bye-laws are not given the go-by in spite of the introduction of the concept of open membership as indicated by the heading of the section. Section 29 of the Act restricts the right of a member other than the State Government or a society to hold more than one-fifth of the total share capital of the society. Section 30 places restriction on transfer of share or interest. It reads:

“30. Restrictions on transfer of share or interest .-(1) Subject to the provisions of Section 29 and sub-section (2) a transfer of, or charge on, the share or interest of a member in the capital of a society shall be subject to such conditions as may be prescribed.

(2) A member shall not transfer any share held by him, or his interest in the capital or property of any society, or any part thereof, unless,-

- (a) he has held such share or interest for not less than one year;
- (b) the transfer or charge is made to the society, or to a member of the society, or to a person whose application for membership has been accepted by the society; and
- (c) the committee has approved such transfer.”

It can be seen that a restriction is placed on the right of a member to transfer his share by sub-section (2) of Section 30 and the transfer could be only in favour of the society or to a member of the society or to a person whose application for membership has been accepted by the society and the committee has approved such transfer. Section 31 provides for transfer of interest on death of a member. Even an heir or a legal representative, has to seek and obtain a membership in the society, before the rights could be transferred to him. The section also leaves a right to the heir or legal representative to require the society to pay him the value of the share or interest of the deceased member, ascertained as prescribed. Section 32 of the Act provides that the share or interest of a member in the capital of a cooperative society is not liable to attachment. Under Section 36 of the Act, the society even has the power to expel a member and unless otherwise ordered in special circumstances by the Registrar, such expelled member does not have a right of readmission to membership. Sections 44 to 46 place restrictions on transactions with non-members and the said transactions are to be subject to such restrictions as may be prescribed. Under Chapter V of the Act, any society duly registered under the Act would be entitled to State aid. Under Section 73 of the Act, the final authority of the society is to vest in the general body of the society, subject to it being delegated in terms of the bye-laws of the society. The powers and functions of the committee in which the management of every society vested, are dealt with in Section 74 of the Act.

12. The Gujarat Cooperative Societies Rules, 1965 were framed in terms of the Act. Rule 12(2) provides that no cooperative housing society shall, without sufficient cause, refuse admission to its membership, to any person duly qualified therefore under the provisions of the Act and its bye-laws, to whom an existing member of such society wants to sell or transfer his land or house and no such society shall, without sufficient cause, refuse to give permission to any existing member to sell or transfer his plot of land or house to another person who is duly qualified to become a member of that society.

14. It could be seen from the leaflet which is a part of Annexure P-1 containing the bye-laws of the Society filed with the rejoinder that suggestions were made regarding the formation of cooperative housing societies. The appellant is a housing society. It was stated that the essential feature of every housing society was at least that its houses formed one settlement in one compact area and the regulation of the settlement rested in the hands of the managing committee of the society. The problem involve in devising of model bye-laws which had to combine rather opposite requirements is also seen explained. In the suggestions for the promotion of a housing society the first essential is said to be that there should be a bond of common habits and common usage among the members which should strengthen their neighbourly feelings, their loyal adherence to the will of the society expressed by the committee's orders and their unselfish and harmonious working together. In India, this bond was most frequently found in a community or caste or groups like cultivators of a village. It is

seen that the appellant Society, more or less, adopted the model bye-laws prepared in that behalf and by Bye-law 7, the Housing Society confined its membership to those of the Parsi community.

36. The above conclusion would lead us to the question whether there is anything in the Gujarat Cooperative Societies Act and the Gujarat Cooperative Societies Rules restricting the rights of citizens to form a voluntary association and get it registered under the Cooperative Societies Act confining its membership to a particular set of people recognized by their profession, their sex, their work or the position they hold or with reference to their beliefs, either religious or otherwise. It is not contended that there is any provision in the Gujarat Cooperative Societies Act prohibiting the registration of such a cooperative society. We have already referred to the history of the legislation and the concept of confinement of membership based on residence, belief or community. The concept of open membership, as envisaged by Section 24 of the Act is not absolute on the very wording of that section. The availability of membership is subject to the qualification prescribed under the provisions of the Act, the Rules and the bye-laws of such society. In other words, if the relevant bye-law of a society places any restriction on a person getting admitted to a cooperative society, that bye-law would be operative against him and no person, or aspiring member, can be heard to say that he will not be bound by that law which prescribes a qualification for his membership.

37. In our view, the High Court made a wrong approach to the question of whether a bye-law like Bye-law 7 could be ignored by a member and whether the authorities under the Act and the Court could ignore the same on the basis that it is opposed to public policy being against the constitutional scheme of equality or non-discrimination relating to employment, vocation and such. So long as the approved bye-law stands and the Act does not provide for invalidity of such a bye-law or for interdicting the formation of cooperative societies confined to persons of a particular vocation, a particular community, a particular persuasion or a particular sex, it could not be held that the formation of such a society under the Act would be opposed to public policy and consequently liable to be declared void or the society directed to amend its basic bye-law relating to qualification for membership.

38. It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the court. Normally, as stated by this Court in *Gherulal Parakh v. Mahadeodas Maiya* [AIR 1959 SC 781] the doctrine of public policy is governed by precedents, its principles have been crystallised under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although, theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society.

39. The appellant Society was formed with the object of providing housing to the members of the Parsi community, a community admittedly a minority which apparently did not claim that status when the Constituent Assembly was debating the Constitution. But even then, it is open to that community to try to preserve its culture and way of life and in that

process, to work for the advancement of members of that community by enabling them to acquire membership in a society and allotment of lands or buildings in one's capacity as a member of that society, to preserve its object of advancement of the community. It is also open to the members of that community, who came together to form the cooperative society, to prescribe that members of that community for whose benefit the society was formed, alone could aspire to be members of that society. There is nothing in the Bombay Act or the Gujarat Act which precludes the formation of such a society. In fact, the history of legislation referred to earlier, would indicate that such coming together of groups was recognised by the Acts enacted in that behalf concerning the cooperative movement. Even today, we have women's cooperative societies, we have cooperative societies of handicapped persons, we have cooperative societies of labourers and agricultural workers. We have cooperative societies of religious groups who believe in vegetarianism and abhor non-vegetarian food. It will be impermissible, so long as the law stands as it is, to thrust upon the society of those believing in say, vegetarianism, persons who are regular consumers of non-vegetarian food. Maybe, in view of the developments that have taken place in our society and in the context of the constitutional scheme, it is time to legislate or bring about changes in Cooperative Societies Acts regarding the formation of societies based on such a thinking or concept. But that cannot make the formation of a society like the appellant Society or the qualification fixed for membership therein, opposed to public policy or enable the authorities under the Act to intervene and dictate to the society to change its fundamental character.

40. Another ground relied on by the authorities under the Act and the High Court to direct the acceptance of Respondent 3 as a member in the Society is that the bye-law confining membership to a person belonging to the Parsi community and the insistence on Respondent 2 selling the building or the flats therein only to members of the Parsi community who alone are qualified to be members of the Society, would amount to an absolute restraint on alienation within the meaning of Section 10 of the Transfer of Property Act. Section 10 of the Transfer of Property Act cannot have any application to transfer of membership. Transfer of membership is regulated by the bye-laws. The bye-laws in that regard are not in challenge and cannot effectively be challenged in view of what we have held above. Section 30 of the Act itself places restriction in that regard. There is no plea of invalidity attached to that provision. Hence, the restriction in that regard cannot be invalidated or ignored by reference to Section 10 of the Transfer of Property Act.

41. Section 10 of the Transfer of Property Act relieves a transferee of immovable property from an absolute restraint placed on his right to deal with the property in his capacity as an owner thereof. As per Section 10, a condition restraining alienation would be void. The section applies to a case where property is transferred subject to a condition or limitation absolutely restraining the transferee from parting with his interest in the property. For making such a condition invalid, the restraint must be an absolute restraint. It must be a restraint imposed while the property is being transferred to the transferee. Here, Respondent 2 became a member of the Society on the death of his father. He subscribed to the bye-laws. He accepted Section 30 of the Act and the other restrictions placed on a member. Respondent 2 was qualified to be a member in terms of the bye-laws. His father was also a member of the Society. The allotment of the property was made to Respondent 2 in his capacity as a

member. There was really no transfer of property to Respondent 2. He inherited it with the limitations thereon placed by Section 31 of the Act and the bye-laws. His right to become a member depended on his possessing the qualification to become one as per the bye-laws of the Society. He possessed that qualification. The bye-laws provide that he should have the prior consent of the Society for transferring the property or his membership to a person qualified to be a member of the Society. These are restrictions in the interests of the Society and its members and consistent with the object with which the Society was formed. He cannot question that restriction. It is also not possible to say that such a restriction amounts to an absolute restraint on alienation within the meaning of Section 10 of the Transfer of Property Act.

42. The restriction, if any, is a self-imposed restriction. It is a restriction in a compact to which the father of Respondent 2 was a party and to which Respondent 2 voluntarily became a party. It is difficult to postulate that such a qualified freedom to transfer a property accepted by a person voluntarily, would attract Section 10 of the Act. Moreover, it is not as if it is an absolute restraint on alienation. Respondent 2 has the right to transfer the property to a person who is qualified to be a member of the Society as per its bye-laws. At best, it is a partial restraint on alienation. Such partial restraints are valid if imposed in a family settlement, partition or compromise of disputed claims. This is clear from the decision of the Privy Council in *Mohd. Raza v. Abbas Bandi Bibi* [AIR 1932 PC 158] and also from the decision of the Supreme Court in *Gummanna Shetty v. Nagaveniamma* [AIR 1967 SC 1595]. So, when a person accepts membership in a cooperative society by submitting himself to its bye-laws and secures an allotment of a plot of land or a building in terms of the bye-laws and places on himself a qualified restriction in his right to transfer the property by stipulating that the same would be transferred back to the society or with the prior consent of the society to a person qualified to be a member of the society, it cannot be held to be an absolute restraint on alienation offending Section 10 of the Transfer of Property Act. He has placed that restriction on himself in the interests of the collective body, the society. He has voluntarily submerged his rights in that of the society.

43. The fact that the rights of a member or an allottee over a building or plot is attachable and saleable in enforcement of a decree or an obligation against him cannot make a provision like the one found in the bye-laws, an absolute restraint on alienation to attract Section 10 of the Transfer of Property Act. Of course, it is property in the hands of the member on the strength of the allotment. It may also be attachable and saleable in spite of the volition of the allottee. But that does not enable the court to hold that the condition that an allotment to the member is subject to his possessing the qualification to be a member of the cooperative society or that a voluntary transfer by him could be made only to the society itself or to another person qualified to be a member of the society and with the consent of the society could straightaway be declared to be an absolute restraint on alienation and consequently an interference with his right to property protected by Article 300-A of the Constitution. We are, therefore, satisfied that the finding that the restriction placed on rights of a member of the society to deal with the property allotted to him must be deemed to be invalid as an absolute restraint on alienation is erroneous. The said finding is reversed.

44. In view of what we have stated above, we allow this appeal, set aside the judgments of the High Court and the orders of the authorities under the Act and uphold the right of the Society to insist that the property has to be dealt by Respondent 2 only in terms of the bye-laws of the Society and assigned either wholly or in parts only to persons qualified to be members of the Society in terms of its bye-laws. The direction given by the authority to the appellant to admit Respondent 3 as a member is set aside. Respondent 3 is restrained from entering the property or putting up any construction therein on the basis of any transfer by Respondent 2 in disregard of the bye-laws of the Society and without the prior consent of the Society.

45. The writ petition filed by the appellant in the High Court is allowed in the above manner.

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K. Muniswamy v. K. Venkataswamy

AIR 2001 Kant. 246

K. SREEDHAR, J. - The plaintiff/appellant, had filed suit against the defendant/respondent seeking partition of half share in the suit property, which consists of one acre of dry land in Choodenapura, Kengeri Hobli, Bangalore South Taluk.

2. The deceased appellant and the respondent are the brothers, who along with their father in the year 1969 partitioned the properties under registered partition deed, whereunder the suit schedule property was allotted to the share of the father and mother with a stipulation that they should enjoy the properties during their life time in the manner they like and after their death, the property shall devolve in equal shares to the appellant and the respondent. During the year 1977, the parents sold the property under registered sale deed in favour of the respondent. After the demise of both the parents, the suit is filed by the appellant seeking partition of half share in the property contending that the parents had no absolute right of alienation. The respondent contested the suit claimed exclusive title in the property and also set up the plea of limitation that the suit is barred by time.

4. The English translation of Ex. P. 1 furnished by the plaintiff reads thus:

“ ‘A’ Schedule property is allotted to Kittappa and Venkatamma who are the eldest persons of the family. ‘B’ schedule property is allotted to K. Muniswamy. ‘C’ schedule property is allotted to K. Venkataswamy. The said properties are ancestral as well as self acquired. Khata stands in the name of Kittappa. We have partitioned the properties giving half share in the house to the said Venkatamma. Hereafter, the parties may enjoy their respective properties paying taxes therefore getting khata made out in their names and (they could enjoy their property in the manner they like.) A schedule property should be enjoyed by Kittappa and his wife Venkatamma during their life time and thereafter ‘A’ schedule property should be partitioned equally between K. Muniswamy and K. Venkataswamy.”

The omitted portion of the extract if it read in conjunction with the other material averments it reads that ‘A’ schedule property is given to the parents, ‘B’ schedule property is given to the plaintiff and ‘C’ schedule property to the defendant. It is agreed that parties shall have to get their names mutated in khata and pay the taxes henceforth on their own and that they can enjoy the said properties allotted to their shares in the manner they like and ‘A’ schedule property given to Kittappa and his wife shall be enjoyed during their life time and thereafter, the plaintiff and defendant shall share the said property equally.

5. The trial Court has referred to the ruling of this Court in **Muddegowda Bakkappa v. Mallikarjuna** [ILR (1980) 1 Kant 767, 768] held thus:

The creation of the absolute ownership in each one of the sharer in the properties allotted to him in the partition is a legal incident of partition. That being so, the recital contained in the partition deed that after the death of Doddabasappa his three sons should get the properties fallen to the share of Doddabasappa divided among themselves cannot at all interpreted to have had the effect of creating a limited estate

without a right of transfer in Doddabasappa in the suit schedule properties which were allotted to him in the partition. Such an interpretation would be opposed to the legal concept of partition as understood in Hindu Law.

In the said case the joint family of Doddabasappa and three sons divided their shares under partition deed and stipulation was imposed that after the death of Doddabasappa his three sons should get the properties in equal shares. In the said reported decision there is a reference to the ruling of [(1868-1869) 4 Mad HCR 245] in **K. Venkatarammanna v. K. B. Rammanna Sastrulu**, the facts of the case discloses that in a partition by a separate agreement it was stipulated that any one of the parties to the agreement or their heirs dying leaving no issue should not sell or transfer as a gift but should on his death be divided by the shareholders. In regard to the said stipulation it is held thus.

The obvious purpose of these stipulations was to frustrate indefinitely the right of alienation which was a legal incident of the absolute estate in severality created by the partition in effect to convert the estate in the case of each sonless or issueless possessor into a mere life enjoyment. But this we are of the opinion they were inoperative to do. Although the parties might by mutual contract impose on themselves an obligation restrictive of their proprietary rights, they could not we think by a collateral agreement, annex hereditarily to each separate absolute estate acquired by the division a condition which was incompatible with the beneficial rights incident thereto. It is a sound principle and one from its very nature of general application that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents and we are not aware of anything in the Hindu Law which would permit of a departure from the principle.

The ratio of the said decision permits either in the family settlement or a partition by mutual consent a restrictive covenant partially curtailing proprietary rights could be agreed upon. But however, creating the absolute bar against the alienation is not said to be permissible even according to the tenets of Hindu Law.

7. The ruling of the Privy Council in **Mohammed Raza v. Mt. Abbas Bandi Bibi** [AIR 1932 PC 158] in the case of a compromise in the family arrangement property was given to a widow with a condition that she would not alienate the property outside the family held that:

“The terms of the compromise were binding that the restriction as to alienation was only partial and that such a partial restriction was neither repugnant to law nor to justice, equity and good conscience.”

Further at page No. 161, it is observed thus:

“It seems clear that after the passing of the Transfer of Property Act in 1882 a partial restriction upon the power of disposition would not, in the case of a transfer inter vivos, be regarded as repugnant; see S. 10 of the Act. In view of the terms of this section, and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience.

It was said by Lord Hobhouse in *Waggela Rajsanji v. Shekh Masludin* [at p. 96 of 14 I.A.] that the expression “equity and good conscience was generally interpreted as meaning English Law, if found applicable to Indian society and circumstances. If this is to be the test there is authority that in England a partial restriction would not be regarded as repugnant even in the case of testamentary gift. So in *In re Meeleay*, Sir George, Jessel. M.R., upheld a condition attached to a devise in fee that the devisee should “never sell out of the family”, pointing out that this had been the law from the time of Coke....”

8. Ruling of Peshawar High Court in *Prithmi Chand Chandu Mal v. Sundar Das Sital Mal* [AIR 1946 Pesh. 12]. By relying on the ratio laid down by Privy Council in AIR 1932 PC 158 has held thus:

“Section 10 of T.P. Act, applies to transfers, and family settlements are not covered by the expression” transfer “occurring in the section.”

Therefore, a condition of the family settlement which prohibits alienation altogether is surely not hit by S. 10, T.P. Act but creating, it is repugnant to public policy and would be invalid and unenforceable on general principles of law.”

9. The Ruling of this Court in *Channabassappa v. Shankaraiah* [1961 Mys LJ 443] it is held thus:

“that when a partition takes place between two or more members of a Hindu joint family, it would be difficult to regard the partition as involving a transfer of any property from one co-sharer to another. All that a partition brings about is a dissolution of the coparcenary and the coparcenary property is transferred into more than one estate in severality and each one of the persons who formed the Hindu joint family becomes entitled to one of such estates to be exclusively enjoyed by him as its sole proprietor. Hence a condition in a partition deed to which one of the parties agreed that he could not alienate certain properties but would enjoy them during his and his wife’s lifetime cannot be regarded as a void condition;

(2) that as the partition did not result in a transfer of property between the plaintiff and his adoptive father-M, Sec. 10 was inapplicable and the condition on M’s power of alienation was not hit by the provisions of that section;

(3) the principle of Sec. 10 is that, if an absolute estate is created and after the creation of such estate a condition which brings about a diminution of that absolute estate is created, the condition so annexed amounting inevitably to a circumvention of the law and being repugnant to the very nature of the estate which was created is unenforceable and therefore void;

(4) that the arrangement entered into between the adoptive father and the adopted son providing for enjoyment of certain properties during the lifetime of the adoptive father and his wife, can not be regarded as a partition between coparceners under a Hindu Law. It is in the nature of a family settlement:

(5) that Sec. 10 can have no application to family arrangement into which two or more persons may choose to enter under which an absolute estate is created in favour of some parties and a limited estate is created in favour of others.”

10. In the light of the ratio laid down by Privy Council, this Court and other High Courts, it becomes explicit that per se the provisions of Section 10 of the T.P. Act would not apply to the partition and family settlement. Since there is no transfer of title contemplated in a partition. However, on the ground of sound public policy any total restraint on the right of alienation in respect of immovable property which prevents free circulation is to be held void, but, any partial restraints or limitation would be valid and binding.

11. The question in the instant case, be whether the stipulation creates a limited estate or an absolute estate regarding the construction of deeds. In ***Paramathanath Sarkar v. Suprakash Gosh*** [AIR 1932 Cal 337] has laid down sound guidelines to be followed while interpreting the words and phrases in the deeds thus.

With reference to the presumption of a limited interest, I observe that almost invariably it is stated that the question will depend upon the terms of the will which the learned Judges then proceed to construe. I have not referred to the cases, more particularly because the rule that the terms of the grant alone must be considered is well established and there is no overriding presumption which might, if the argument is sound and carried to its logical extreme, be deemed to have the effect of regarding it to be established that the testator did not mean what he said. It has been pointed out that words such as ‘owner’ have been construed as meaning that only a limited estate was given. But it may be that where a vernacular will has to be construed, due allowance must be made for shades of meaning not susceptible of exact translation. Where however, the Will is in English as in this case, no such considerations can arise.

12. In the instant case the partition deed is in Kannada. The plain reading of the partition deed suggests that “‘A’, ‘B’ and ‘C’ schedule properties are given to the shares of the respective parties with a emphasis added that each one of them should get their khata of the property mutated in their names and should enjoy the properties in the manner they like” would give us no doubt and difficulty to appreciate that what is granted is an absolute estate and not a limited estate. May be that the latter stipulation provides that after the demise of the parents the plaintiff and the defendant shall equally take the property cannot be interpreted to override the clear terms of grant under partition. The restrictive covenants should be cautiously and carefully interpreted. The restrictions which are express would render no difficulty. However, while implied restrictions if they are to be read into the terms of the document should be so clear and unambiguous to suggest the one and only inference in favour of the restrictive covenant set up or pleaded otherwise, if stipulations are ambiguous, susceptible to contrary or alternative meaning, it would not be permissible to read into the said stipulation by inference restrictive covenant. In the instant case, it is possible to assume from the stipulation that an absolute estate is granted in favour of the parents in view of the terms that they should enjoy the property in the manner they like and in the event of they dying intestate and that full or any part of the property available is left for intestate succession, in such a situation latter stipulation may come into effect otherwise not.

13. In view of the foregoing reasons, I am of the view that the appeal lacks merit, hence dismissed with costs.

* * * * *

Tulk v. Moxhay

(1843-60) All ER Rep. 9

In 1808 the plaintiff, being then the owner in fee of a vacant piece of ground in Leicester Square, London, as well as of several of the houses forming the square, sold the piece of ground by the description of

“Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof and the iron railing and stone work round the same,”

to one Elms in fee. The deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators.

“that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden and the iron railing round the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said square garden and pleasure ground.”

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor, but he admitted that he had purchased with notice of the covenant in the deed of 1808. The defendant having manifested an intention to alter the character of the square garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who remained owner of several houses in the square, filed this bill for an injunction. An injunction was granted by the Master of the Rolls, to restrain the defendant from converting or using the piece of ground and square garden and the iron railing round the same to or for any other purpose than as a square garden and pleasure ground in an open state, and uncovered with buildings. The defendant moved to discharge that order.

LORD COTTENHAM, L.C. - That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it that the purchaser shall either use or abstain from using the land purchase in a particular way is what I never knew disputed. Here there is no question about the contract. The owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden. It is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser

should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land is evident from this, that, if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from that of the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute, but looking at the ground on which **LORD ELDON** disposed of *Duke of Bedford v. British Museum Trustees* [60 ER 1055], it is impossible to suppose that he entertained any doubt of it. In *Mann v. Stephens* [60 ER 665] before me, I never intended to make the injunction depend upon the result of the action, nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment on the ground that it was not clearly proved that any breach had been committed, but, there being a doubt whether part of the premises on which the defendant was proceeding to build, was locally situated within what was called the Dell, on which alone he had under the covenant a right to build, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of Lord Brougham in *Keppell v. Bailey* [39 ER 1042], he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it. I think this decision of the Master of the Rolls perfectly right, and, therefore, that this motion must be refused with costs.

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Ram Newaz v. Nankoo

AIR 1926 All 283

MEARS, CJ and LINDSAY, J. - This is the appeal of the plaintiffs who had instituted a suit as reversioners of one Ram Charan for the possession of 2 bighas of land. In 1884 Ram Charan appears to have been in difficulties and he had a 9-pie odd share in a certain village. He executed a sale-deed which has had to be construed in all the Courts and on the proper construction of that sale-deed the rights of the parties depend. The plaintiffs are the reversioners, but the defendants are the purchasers of whatever rights the vendee had. The real point is whether the sale was an out-and-out sale of the 9-pie odd share or whether it was a sale by the vendor of the 9-pie odd share minus the 2 bighas now in dispute. The document lies before us and it starts by Ram Charan stating that he had a 9-pie 3-kauri 2-dant zamindari share in the property and then, after usual formal parts, says that he has absolutely sold, with the exception of 2 bighas of nankar land numbered as below (1460), the entire property. Pausing there and putting the sale in the plainest possible terms it was a sale of the 9-pie odd share minus the 2 bighas specifically numbered. At a later portion of the deed he says:

Let this be known that the 2 bighas of nankar land which I have excluded from the sale shall remain in my possession for life and after my death in the possession of my aulad khas without payment of rent or Government revenue. I or my lineal descendants have no right to transfer the property excluded either permanently or temporarily. If none of my lineal descendants is alive in my family then the said land shall be declared to be the own property of the vendee and his heirs and the persons of my family shall have no claim to the same.

It remains only to notice one further reference to this land. In the detail we find the share sold, viz. 9-pie 3-kauri 2-dant nankar land excluding the 2 bighas No. 1460. The construction that we put upon the passages that we have read is that the vendee got on the 12th of February 1884, the date of the sale, the 9-pie odd share with No. 1460, the 2 bighas definitely excluded, but that they had a possibility of becoming its owners at a future date provided that provision was one which the law would recognize. We can see in the document no indication whatever of the vendees having acquired the whole of the property in the whole of the land including the two bighas. What we do find is an acquisition of the whole of the 9-pie odd share except that particular area of 2 bighas numbered 1460. Now if that be so, what is the position when a contest arises between the nearest reversioners and the successors of the vendees? The position was that Ram Charan having died, he was succeeded by his son Mauzzam Ram, who in turn died childless in 1918, and therefore these 2 bighas of land would as it happened, if there was no law to the contrary, become the property of the vendees within a life or lives in being and twenty-one years after. But the fact that it happened to fall in within the legal limitation is not the test which is to be applied to these cases. What you have to see is whether the event can be postponed to beyond the period of a life or lives in being and 21 years after and not what in fact happened. Now applying that test it is perfectly evident that these 2 bighas of nankar land might have remained with the lineal descendants of Ram Charan for 100 or 200 years, and that being so, we are of opinion that this was a condition repugnant to the law, and being so repugnant to the law the defendants could not set up this document on which they rely as entitling them to possession of the property. We are, therefore, of opinion that the plaintiffs were right in bringing this action and that the decision of the learned Judge of this Court must be set aside and the decree of the first appellate Court which confirmed the judgment of the Munsif must be restored with costs and fees in this Court on the higher scale.

Ram Baran Prasad v. Ram Mohit Hazra

AIR 1967 SC 744 : (1967) 1 SCR 293

RAMASWAMI, J. - This appeal is brought, by special leave, from the judgment of the Calcutta High Court dated November 18, 1959 in First Appeal No. 104 of 1954 affirming the judgment and decree dated February 27, 1954 of the Subordinate Judge, Fifth Court, at Alipore District 24 Parganas in Title Suit No. 100 of 1952 decreeing the suit for pre-emption in favour of the plaintiffs-Respondents 1 and 2.

2. Two brothers, Tulshidas Chatterjee and Kishorilal Chatterjee owned certain properties (land and building) on Paharpur Road within Mouza Garden Reach, Khidderpore, in the suburbs of Calcutta. In the year 1938 Kishorilal sued for partition of the properties and eventually the matter was referred to arbitration. On December 16, 1940, the arbitrators filed their award on which a final decree was passed on March 15, 1941 in the partition suit. Under the award, two of the four blocks, A, B, C & D, into which the properties were divided by the arbitrators, namely, blocks A and C, were allotted to Tulshidas and the remaining two blocks, B and D were allotted to Kishorilal. Two common passages marked as X and Y and a common drain Z were kept joint between the parties for their use. In the award there was a clause to the following effect:

“We further find and report with the consent of and approval of the parties that any party in case of disposing or transferring any portion of his share, shall offer reference to the other party, that is each party shall have the right of pre-emption between each other.”

3. Thereafter, on August 20, 1941 Tulshidas sold his A block to one Nagendra Nath Ghosh. This was done after Kishorilal's refusal to pre-empt the same in spite of Tulshidas's offer to him in terms of the pre-emption clause. On April 22, 1942, Kishorilal sold, by the Kobala (Ex. I), his two blocks, B and D to Rati Raman Mukherjee and others. On June 21, 1946, the Mukherjees in their turn sold the two blocks B & D to the plaintiffs by the Kobala [Ex. 1(a)]. On September 20, 1952 Nagendra Nath Ghose sold block A to Defendant 1 and on December 2, 1952, the present suit was filed by the plaintiffs against the said purchaser - Defendant 1 for pre-empting his aforesaid purchase. On April 7, 1953 while the suit was pending in the trial court, Defendant 1 sold the disputed property (block A) to Defendant 2. The plaintiffs thereafter made an application for amendment of the plaint praying for a decree for pre-emption against Defendants 1 and 2 and calling upon them to execute a conveyance in favour of the plaintiffs on payment of the actual consideration paid for the property in suit. On the conclusion of the trial the Subordinate Judge held that the covenant of pre-emption was binding upon the defendants who had notice of that clause and plaintiffs were entitled to enforce the right of pre-emption. He further held that the covenant of pre-emption was not hit by the rule against perpetuities and was enforceable against the assignees of the original parties to the contract. Accordingly a decree was granted to the plaintiffs asking them to deposit within one month a sum of Rs 14,000 for the purpose of pre-empting the suit property and both the defendants were directed to execute and register a Kobala in plaintiffs favour within 15 days of the deposit by the plaintiffs. The defendants took the matter in appeal to the

Calcutta High Court which dismissed the appeal and affirmed the judgment and decree of the Subordinate Judge.

4. On behalf of the appellant learned Counsel put forward the argument that the covenant for pre-emption was merely a personal covenant between the contracting parties and was not binding against successors-in-interest or the assignees of the original parties to the contract. We are unable to accept this submission as correct. It is true that the pre-emption clause does not expressly state that it is binding upon the assignees or successors-in-interest, but, having regard to the context and the circumstances in which the award was made, it is manifest that the pre-emption clause must be construed as binding upon the assignees or successors-in-interest of the original contracting parties.

5. Prima facie rights of the parties to a contract are assignable. Section 23(b) of the Specific Relief Act states:

“23. Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by -

(b) the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed;”

Section 27(b) of the Act is to the following effect:

“27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;”

Reference should also be made to Sections 37 and 40 of the Indian Contract Act which are to the following effect:

“37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.”

In substance these statutory provisions lay down that, subject to certain exceptions which are not material in this case, a contract in the absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representatives including assignees and transferees. In the present case, there is nothing in the

language of the pre-emption clause or the other clauses of the award to suggest that the parties had any contrary intention. On the other hand a reference to the other clauses of the award shows that the parties intended that the obligations and benefit of the contract should go to the assignees or successors-in-interest. The following clauses of the award are important:

“We find and report that six feet wide common passage marked ‘X’ measuring 12 chapter 36 sq ft in the plan and coloured with Burnt sienna shall ever remain as such to all the blocks the owners whereof shall have every right to take underground water pipes electric connections etc., and the parties shall have never any right either to obstruct or to close any part of the same.

The parties shall be at liberty to fill up the tank portion allotted in their respective shares at their own costs. The common walls and structures according to the above allotments shall have to be maintained and kept in proper condition by both parties.

We further find and report that the partition line in the inner courtyard shall be drawn east to west as shown in the plan just over the middle of the pit situated at the north-west corner of the inner courtyard for the drainage of water. There must be an opening in the partition wall that may be raised thereon over the mouth of the pit in order to have a free access for the drainage of water of both parties through the said pit which shall have to be maintained as such for ever.”

With the consent of the parties we find and award that the parties shall complete construction of new structures or demolition of any existing structures, in terms of this award within one year from this date, that is 16th day of December, 1940. During this period of one year parties shall remain entitled to use and enjoy the entire property as allotted, but immediately after the expiry of the said period of one year plaintiff shall have every right to close or otherwise obstruct the defendant from enjoyment of that portion of the structure privy or land exclusively allotted to him and the defendant shall have the same rights as against the plaintiff in respect of his share of structures and land exclusively allotted to his share in terms of the award.”

It is obvious-that in these clauses the expression “parties” cannot be restricted to the original parties to the contract but must include the legal representatives and assignees of the original parties. There is hence no reason why the same expression should be given a restricted meaning in the preemption clause which is the subject-matter of interpretation in the present appeal. On behalf of the respondents Mr N.C. Chatterji rightly argued that the pre-emption clause was based upon the ground of vicinage and this circumstance would also suggest that the intention of the parties was that the pre-emption clause should be binding upon the heirs and successors-in-interest and the assignees of the original parties to the contract. We accordingly hold that Mr Bishen Narain on behalf of the appellant is unable to make good his submission on this aspect of the case.

6. We pass on to consider the next question which arises in this appeal, namely, whether the covenant of pre-emption offends the rule against perpetuities and is therefore void and not enforceable even against the original contracting parties.

7. “A perpetuity”, as defined by Lewis in his well-known book, on *Perpetuities* (p. 164), is a “future limitation, whether executory or by way of remainder, and of either real or personal property which is not to vest until after the expiration of, or will not necessarily vest

within, the period fixed and prescribed by law for the creation of future estates and interests". The rule as formulated falls within the branch of the law of property and its true object is to restrain the creation of future conditional interest in property. The rule against perpetuities is not concerned with contracts as such or with contractual rights and obligations as such. Thus a contract to pay money to a person, his heirs or legal representatives upon a future contingency, which may happen beyond the period prescribed would be perfectly valid (*Walsh v. Secretary of State for India* [(1863) 10 HLC 367 : 11 ER 1068]. It is therefore well-established that the rule of perpetuity concerns rights of property only and does not affect the making of contracts which do not create rights of property.

8. The rule does not therefore apply to personal contracts which do not create interest in property (See the decision of the court of appeal in *South Eastern Railway Company v. Associated Portland Cement Manufacturers Ltd.* [1910-1 Ch 12] even though the contract may have reference to land. In *Witham v. Vane* [(1883) *Challis's Law of Real Property*, 3rd Edn.]. William Harry, Earl of Darlington sold in 1824 the manor of Hutton Henry and other hereditaments to George Silvertop. In the conveyance there was a covenant that the said Earl, his heirs, executors, administrators or assigns would pay six pence for each chaldron of coal which would be wrought or gotten out of the lands so sold and which would be shipped for sale, to George Silvertop, his heirs, executors, administrators or assigns. The covenant was enforced in 1883 at the instance of an assignee from the legal representatives of George Silvertop against the executors of the Earl. The Lord Chancellor (Earl of Silborne) overruled the plea that the covenant offended the rule against perpetuities on the ground that, though the covenant had relation to land, it did not amount to a reservation of any interest in land.

9. In English law a contract for purchase of real property is regarded as creating an equitable interest, and if, in the absence of a time-limit, it is possible that the option for repurchase might be exercised beyond the prescribed period fixed by the perpetuity rule, the covenant is regarded as altogether void. It has therefore been held that a covenant for pre-emption unlimited in point of time is bad as being obnoxious to the rule against perpetuities. The point was settled by the court of Appeal in *London and South Western Railway Company v. Gomm* [(1882) 20 ChD 562] which is the leading English authority on the point. In that case, the plaintiff Company conveyed certain lands to Powell in 1865, and Powell covenanted with the company that he, his heirs, and assigns, would at any time, on receipt of £ 100, reconvey the lands to the company. In 1879, the defendant Gomm purchased the land from Powell's heirs with notice of the above covenant, and in 1880 the company gave the defendant a notice to reconvey the land, and on his refusal brought the suit for specific performance. Kay, J. gave the plaintiff a decree, being of the opinion that, as the covenant did not create any estate or interest in the land, it was not obnoxious to the rule against perpetuities. This decision was reversed by the court of Appeal, and it was held that the option to purchase created an equitable interest in the land which attracted the operation of the perpetuity rule. Sir George Jessel M.R. observed, in his judgment, that the right to call for a conveyance of land was an equitable interest or equitable estate. There was no doubt about it in an ordinary case of contract for purchase, and an option for repurchase did not stand on a different footing. In the course of his judgment the learned Master of Rolls observed as follows:

“Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option of purchase is not different in its nature. A person exercising the option has to do two things; he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give the other an interest in land.”

10. In the case of an agreement for sale entered into prior to the passing of the Transfer of Property Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser. For instance, in *Fati Chand Sahu v. Lilambar Singh Das* [(1871) 9 Beng LR 433 (PC)] a suit for specific performance of a contract for sale was dismissed on the ground that the agreement, which was held to create an interest in the land, was not registered under Section 17 clause (2), of the Indian Registration Act of 1866. Following this principle, Markby, J. in *Tripoota Soonduree v. Juggur Nath Dutt* [(1874) 24 Suth WR 321] expressed the opinion that a covenant for pre-emption contained in a deed of partition, which was unlimited in point of time, was not enforceable in law. The same view was taken by Baker, J. in *Allibhai Mahomed Akuji v. Dada Alli Isap* [AIR 1931 Bom 578] where the option of purchase was contained in a contract entered into before the passing of the Transfer of Property Act. The decision of the Judicial Committee in *Maharaj Bahadur Singh v. Bal Chand* [AIR 1922 PC 165] was also a decision relating to a contract of the year 1872. In that case, the proprietor of a hill entered into an agreement with a society of Jains that, if the latter would require a site thereon for the erection of a temple, he and his heirs would grant the site free of cost. The proprietor afterwards alienated the hill. The society, through their representatives, sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possession, but been dispossessed. It was held by the Judicial Committee that the suit must fail. The Judicial Committee was of the opinion that the agreement conferred on the society no present estate or interest in the site, and was unenforceable as a covenant, since it did not run with the land, and infringed the rule against perpetuity.

11. The second paragraph of Section 40 taken with the illustration establishes two propositions: (1) that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice. Reading Section 14 along with Section 54 of the Transfer of Property Act it is manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to a covenant of

pre-emption even though there is no time-limit within which the option has to be exercised. It is true that the second paragraph of Section 40 of the Transfer of Property Act makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under Section 40 of the Act which arises out of the contract, and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because Section 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest on the land.

12. We are accordingly of the opinion that the covenant for pre-emption in this case does not offend the rule against perpetuities and cannot be considered to be void in law. For the reasons expressed we hold that the decision of the High Court was correct and this appeal must be dismissed with costs.

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R. Kempraj v. Burton Son and Co.

AIR 1970 SC 1872 : (1969) 2 SCC 594

GROVER, J. - This is an appeal by special leave from a judgment of the Mysore High Court in which the question involved is whether an option given to a lessee to get the lease, which is initially for a period of 10 years, renewed after every 10 years is hit by the rule of perpetuity and is void.

2. The respondent entered into a deed of lease on October 26, 1951 with the appellant in respect of premises Nos. 8 and 9, Mahatma Gandhi Road (South Parade), Civil Station, Bangalore. It was stipulated that the lease would be for a period of 10 years in the first instance with effect from November 1, 1961 “with an option to the lessee to renew the same as long as desired as provided”. Clauses 9 and 10 which are material may be reproduced:

“9. The lessee shall have the right to renew the lease of the scheduled premises at the end of the present period of ten years herein secured on the same rental of Rs 450/- per month, for a similar period and for further similar periods thereafter on the same terms and conditions as are set forth herein; and the lessee shall be permitted and shall have the right to remain in occupation of the premises on the same terms and conditions for any further periods of ten years as long as they desire to do so.

10. The lessor shall not raise any objection whatsoever to the lessee exercising his option to renew the lease for a further period of ten years on the same terms and conditions as long as they desire to be in occupation, provided that the lessee shall not have the right to transfer the lease or alienate any right thereunder.”

3. It appears that before the expiry of the period of ten years from the date of the commencement of the lease the lessee wrote to the lessor informing him of the intention to exercise the option given to the lessee under the deed of lease to get the same renewed on the same terms and conditions as before for a period of ten years from November 1, 1961. The lessor did not comply with the request. After serving a notice the lessee filed a suit for specific performance of the covenant in the lease for renewal. It was prayed that the lessor be directed to execute a registered deed of lease in favour of the lessee and if he failed to do so the court should execute a deed in his favour. The lessor pleaded, inter alia, that the condition relating to renewal was hit by the rule against perpetuity. Certain other pleas were taken with which we are not concerned. The trial court decreed the suit. The first appellate court and the High Court affirmed the decree.

4. The rule against perpetuity is embodied in Section 14 of the Transfer of Property Act, hereinafter called the Act. According to it no transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong. It is well known that the rule against perpetuity is founded on the principle that the liberty of alienation “shall not be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property for ever out of the reach of the exercise of the power of alienation”. The words “transfer of property” have been defined by Section 5 of the

Act to mean an act by which a living person conveys property in present or in future to one or more other living persons etc. The words “living persons” include a Company or association or body of individuals. Section 105 of the Act defines “lease”. A lease of immovable property is a transfer of a right to enjoy such property made for a certain time express or implied or in perpetuity in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value. A lease is not a mere contract but it is a transfer of an interest in land and creates a right in rem. Owing to the provisions of Section 105 a lease in perpetuity can be created but even then an interest still remains in the lessor which is called a reversion.

5. It is not disputed on behalf of the appellant that a lease in perpetuity could have been created but the lease in the present case was not of that kind and was for a period of ten years only in the first instance. It is said that the mischief is created by the clauses relating to renewal which are covenants that run with the land. It is pointed out that on a correct construction of the renewal clauses the rule of perpetuity contained in Section 14 would be immediately attracted. We are unable to agree. Section 14 is applicable only where there is transfer of property. Even if creation of a lease hold interest is a transfer of a right in property and would fall within the expression “transfer of property” the transfer was for a period of ten years only by means of the indenture Exh. P-1. The stipulation relating to renewal could not be regarded as transferring property or any rights therein.

6. In *Ganesh Sonar v. Purnendu Narayan Singha* [AIR 1962 Pat 201] in the case of lease of land an option had been given to the lessor to determine the lease and take possession of the leasehold land under specified conditions. The question was whether such a covenant would fall within the rule laid down in the English case *Woodall v. Clifton* [1905-2 Ch 257] in which it was held that a proviso in a lease giving an option to the lessor to purchase the fee simple of the land at a certain rate was invalid as infringing the rule against perpetuity. The Patna High Court distinguished the English decision quite rightly on the ground that after the coming into force of the Act a contract for the sale of immovable property did not itself create an interest in such property as was the case under the English law. According to the Patna decision the option given by the lessee to the lessor to resume the leasehold land was merely a personal covenant and was not a covenant which created an interest in land and so the rule against perpetuity contained in Section 14 of the Act was not applicable. The same principle would govern the present case. The clauses containing the option to get the lease renewed on the expiry of each term of ten years can by no means be regarded as creating an interest in property of the nature that would fall within the ambit of Section 14.

7. Even under the English law the court would give effect to a covenant for perpetual renewal so long as the intention is clear and it will not be open to objection on the ground of perpetuity. In *Mutter v. Trafford* [(1901) 1 Ch 54], it was held that the covenant in a lease for renewal was not strictly a covenant for renewal. But Farwell J. proceeded to observe that a covenant to renew had been held for at least two centuries to be a covenant running with the land. If so, then no question of perpetuity would arise. It appears that in England whatever might have been the reason, the objection of perpetuity had never been taken to cases of covenants for renewal. The following observations of Farwell, J., which were quoted with approval by Lord Evershed M. R. in *Weg Motors Ltd. v. Hales* [1961-3 All ER 181] are noteworthy:

“But now I will assume that this is a covenant for renewal running with the land; it is then in my opinion free from any taint of perpetuity because it is annexed to the land. See *Rogers v. Hosegood*, (1900) 2 Ch. 388.”

8. The equitable rule that the burden of a covenant runs with the land is to be found in Section 40 of the Act. This section reads:

“40. Where for the more beneficial enjoyment of his own immovable property, a third person, has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands.”

As pointed out in *Mulla’s Transfer of Property Act*, 5th Edn. at page 194 Section 40 expressly says that the right of the covenantee is not an interest in the land bound by the covenant nor an easement. It is not an interest because the Act does not recognise equitable estates and it cannot be said as Sir George Jessal said in *London and South Western Rly. v. Gomm*. [(1882) 20 Ch D 562] that if a covenant “binds the land it creates an equitable interest in the land”. The expression “covenant runs with the land” has been taken from the English law of real property. It is an exception to the general rules that all covenants are personal. Even on the footing that the clauses relating to renewal in the lease, in the present case, contain covenants running with the land the rule against perpetuity contained in Section 14 of the Act would not be applicable as no interest in property has been created of the nature contemplated by that provision.

9. For the above reasons the appeal fails and it is dismissed with costs.

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Rajes Kanta Roy v. Shanti Debi

AIR 1957 SC 255 : 1957 SCR 77

JAGANNADHADAS, J.- 2. One Ramani Kanta Roy was possessed of considerable properties. He had three sons, Rajes Kanta Roy, Rabindra Kanta Roy and Ramendra Kanta Roy. Rabindra died childless in the year 1938 leaving a widow, Santi Debi. In 1934 Ramani created an endowment in respect of some of his properties in favour of his family deity and appointed his three sons as *shebait*s. After the death of Rabindra his widow Santi Debi, instituted a suit against the other members of the family in 1941 for a declaration that she, as the heir of her deceased husband, was entitled to function as a *shebait* in the place of her husband. The suit terminated in a compromise recognising the right of Santi Debi as a co-shebait. Shortly thereafter, however i.e. in the year 1944, Ramani and his two sons, Rajes and Ramendra, filed a suit against Santi Debi for a declaration that the above mentioned compromise decree was null and void. One of the grounds on which the suit was based was that the marriage of Santi Debi with Rabindra was a nullity inasmuch as the said marriage was one between persons within prohibited degrees. During the pendency of that suit Ramani, the father, executed a registered trust deed in respect of his entire properties on July 26, 1945. The terms of that trust deed will be referred to presently. The eldest of the sons, Rajes, was appointed thereunder as the sole trustee to hold the properties under trust subject to certain powers and obligations. After the execution of this trust deed the Father died, The exact date of his death does not appear on the record. Some time thereafter the suit was compromised on December 3, 1946. The material terms of this compromise will be set out presently. By the said compromise Santi Debi gave up her rights under the previous compromise decree of 1941 and agreed to receive for her natural life a monthly allowance of Rs 475 payable from the month of November 1946. It was one of the terms of the compromise that on default of payment Santi Debi will be entitled to realise the same by means of execution of the decree. It appears that the monthly allowance as aforesaid was regularly paid up to the end of February 1948, and that thereafter payment was defaulted. Consequently Santi Debi filed an application for execution on July 8, 1949, to realise the arrears of her monthly allowance from March 1948, to July 1949, amounting to Rs 8075 against both the brothers, Rajes and Ramendra. Execution was asked for by way of attachment and sale of immovable properties viz. Premises No. 44/2, Lansdowne Road, Ballygunge P.S., 24- Parganas. Rajes filed an objection to the execution under Section 47 of the Code of Civil Procedure on various grounds. Ramendra has not filed, or joined in, any such application and has apparently not contested the execution. The present contest in both the courts below and here is only between Rajes and Santi Debi. An order was passed by the Subordinate Judge overruling the objections raised by Rajes. An appeal was taken therefrom to the High Court at Calcutta which was dismissed by its judgment under appeal. Hence the present appeal in which Rajes is the appellant, while Santi Debi is the first respondent and Ramendra is the second respondent.

3. The two main objections to the execution proceedings which have been urged before us are that -

(1) Under the compromise decree which is now sought to be put in execution, charge was created over certain properties for the due payment of the monthly

allowance and hence as a matter of construction of the decree, the personal remedy can be pursued only after the remedy by way of charge is exhausted,

(2) Under the terms of the deed of trust Rajes has no attachable interest in the properties sought to be proceeded against.

7. Now, coming to the second point, the contentions raised are that, on a true construction of the terms of the trust deed the interest of the judgment-debtor, Rajes, (1) in the properties covered by the trust deed, and (2) in particular, in Property No. 44/2, Lansdowne Road sought to be attached, is only a contingent one and hence not attachable. That a mere contingent interest though transferable *inter vivos* is not attachable is well-settled since the Privy Council decision in ***Pestonjee Bhicajee v. P.H. Anderson*** [AIR 1939 PC 6]. The question as to whether the interest of the judgment-debtor, Rajes, in this case is vested or contingent, is one not altogether free from difficulty. But it is well to notice at the outset that this point has not been raised in the petition filed by the judgment-debtor, Rajes, under Section 47 of the Code of Civil Procedure. What is stated therein is merely the following:

“Under the said deed of trust, the judgment-debtor has no interest in the property except that of a trustee and as such the decree-holder cannot proceed for realisation of her alleged dues against the said property.”

The objection in this form is obviously untenable and has not been urged in any of the courts below. Indeed, if under the trust deed the judgment-debtor has a beneficial interest, it is not disputed that such beneficial interest would be attachable provided it is a vested interest and not a contingent interest. The judgment of the executing court, however, shows that what was dealt with there is the contention that the interest under the trust deed was a mere expectancy as opposed to a vested interest. The court held that the interest which the judgment-debtors had in the property by virtue of the deed of trust was *not* a mere expectancy. On appeal to the High Court, none of the grounds set out in the appeal memorandum thereto relates to this question. The High Court, however, dealt with the matter on the footing that the question is whether the interest of the judgment-debtor under the deed of trust is a vested as opposed to a contingent interest. It does not appear to us that question in this form should have been allowed to be raised. Its determination may well depend upon the question whether as a fact the contingency suggested has disappeared by virtue of subsequent events. However, since the point has been allowed to be raised and the decision of the High Court is given on the footing of the matter being solely one of construction of the document, we proceed to consider it.

8. The main provision under which the two brothers, Rajes and Ramendra, get any interest under the trust deed is that contained in sub-clauses (a) and (b) of clause 12, which are as follows:

“12. On the liquidation of all the debts of the settlor (including the debt, if any, that may be incurred by the trustee for payment of the settlor’s debts) and after his death this trust shall come to an end and the properties described in Schedule ‘A’ shall devolve as follows:

(a) The properties being Lot I, Lot II, Lot III, and Lot IV described in the said Schedule ‘A’ hereunder written including the surplus income thereof shall devolve on

the said Rajes Kanta Roy absolutely or if he be then dead then the said properties shall devolve on his heirs then living absolutely but subject to the provisions contained in clause (c) hereof regarding Premises No. 44/2, Lansdowne Road....

(b) The properties being Lot V described, in the said Schedule 'A' hereunder written including the surplus income thereof shall be enjoyed by the said Ramendra Kanta Roy during his lifetime or if he be then dead then the said properties shall devolve on his son or sons if any absolutely but if there be no son living at that time and if there be a grandson (son's son) or grandsons then on such grandson or grandsons absolutely...."

They show that Lots I to IV in Schedule A ultimately go to Rajes and Lot V alone goes to Ramendra. But the interest which either of these is to get in the properties allotted to each is expressed to be one which each will get after the trust comes to an end. Now, it is only after the happening of the two events viz. (1) the discharge of all the debts specified in the schedules (including the debts, if any, that may be incurred by the trustee for payment of the settlor's debts), and (2) the death of the settlor himself, that the trust comes to an end and it is on the trust coming to an end that the sons get the properties allotted to them. It was recognised in arguments before us that the death of the settlor is not by any means an uncertain event and that, therefore, this involves no element of contingency. But what was urged is that the discharge of the debts is an uncertain event in the sense that neither the factum nor the time of such discharge is one that can be predicated with any certainty and that since the interest which the two brothers take is to be only after such discharge their respective interests therein are contingent. It is pointed out that the settlor was very particular about the property not going into the hands of the two sons for their enjoyment as owners until after the debts are liquidated and that this is emphasised in various clauses of the trust deed. It is urged that this clearly shows the intention of the settlor to be that the discharge of the debts should be a condition precedent for the vesting in them of any interest in the properties. Thus clause 3 of the trust deed imposes a specific obligation on the trustee that "he *shall* pay the present existing just debts of the settlor". Clause 5 says that during the lifetime of the settlor *and* so long as all the debts of the settlor be not paid off the trustee shall pay monthly and every month Rs 1000 to the settlor, Rs 300 to Rajes and Rs 200 to Ramendra. In clause 6 it is stated that on the death of the settlor before the liquidation of his debts the trustee shall pay to Rajes Rs 800 and Rs 700 to Ramendra per month. By virtue of these two clauses a sum of only Rs 1500 out of the income is set aside for the benefit of the members of the family and hence by implication the rest of the income is to be applied towards discharge of the debts. Clauses 8 and 9 provide for payments out of the income in the event of death either of Rajes or of Ramendra before the liquidation of debts. Clause 10 provides for residence of the family as long as debts are not fully paid off. Clause 11 authorises the trustee to sell, mortgage, or give a long lease of any of the properties for payment of the debts. Clauses 12(a) and (b) proceed on the assumption that the surplus income (after payments therefrom as provided) is to be accumulated so long as the trust continues i.e. debts are not discharged. Quite clearly, therefore, during the subsistence of the trust both the sons get only a portion of the income as specified above and do not get for themselves the full benefit out of the properties respectively allotted to until the debts are completely discharged. There is no doubt that these terms show that the settlor attached great importance to the discharge of the

debts becoming an accomplished fact before the two sons take the full benefit by way of devolution of the property and that in order to facilitate the same he restricted his own enjoyment and that of his two sons to an aggregate limited sum of Rs 1500 per month out of the income (apart from a few other minor monthly payments). But can it be said that their interest in the property was made to depend on the event of the total discharge of the debts and that the discharge of the debts was contemplated as an uncertain event.

9. The determination of the question as to whether an interest created by such a deed is vested or contingent has to be guided generally by the principles recognised under Sections 19 and 21 of the Transfer of Property Act, 1882, and Sections 119 and 120 of the Indian Succession Act, 1925. The learned Judges of the High Court relied on Illustration (v) to Section 119 of the Indian Succession Act and the decision in **Ranganatha Mudaliar v.A. Mohana Krishna Mudaliar** [AIR 1926 Mad 645]. Learned Solicitor-General appearing for the appellant before us has urged that there is no such inflexible rule of law as is assumed by the High Court viz. that “in spite of a clause requiring payment of debts before the property reaches the hands of the donee, the gift is a vested one”. He drew our attention to the fact that both Section 19 of the Transfer of Property Act and Section 119 of the Indian Succession Act clearly indicate that if “a contrary intention appears” from the document that will prevail. He has also drawn our attention to the case in *Bernard v. Mountague* [(1816) 1 Mer 422 : 35 ER 729 (C)] in which it was held, on a construction of the terms of the trust, that the payment of the debts was a condition precedent to the vesting of the interest devised therein. How, such a matter, as the one before us, is treated in English law when it arises, appears from the following passages in the recognised textbooks. **Williams on Executors and Administrators** 13th Edn.), in Vol. 2, at p. 658, states one of the two rules of construction to be that where the bequest is in terms immediate, and the payment alone postponed, the legacy is vested. He states a number of exceptions to that rule and says the rule itself is always subservient to the intentions of the testator, and that the exception may be found in operation in cases where the testator has shown a clear intention that the legacies shall not vest till his debts are satisfied. The learned Solicitor-General relies also on a similar passage from **Jarman on Wills** (8th Edn.), Vol. II, at p. 1390, which states as follows:

“So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid, ... the intention was carried into execution, and the vesting as well as payment was held to be postponed.”

But it is to be noticed that at p. 1373 in **Jarman on Wills** (8th Edn.), Vol. II, it is also stated as follows:

“It was at one period doubted whether a devise to a person *after* payment of debts was not contingent until the debts were paid; but it is now well established that such a devise confers an immediately vested interest, the words of apparent postponement being considered only as creating a charge.”

Apart from any seemingly technical rules which may be gathered from English decisions and text-books on this subject, there can be no doubt that the question is really one of intention to be gathered from a comprehensive view of all the terms of a document. Learned Solicitor-General frankly admitted this, and also that a court has to approach the task of

construction in such cases with a bias in favour of a vested interest unless the intention to the contrary is definite and clear. It is, therefore, necessary to consider the entire scheme of the deed of trust in the present case, having regard to the terms therein, and to gather the intention therefrom.

10. By the date the settlor executed the deed of trust he had his two sons, Rajes and Ramendra and the widowed daughter-in-law, Santi Debi, the validity of whose marriage he was disputing. One of the main purposes of the trust deed, as appears from its preamble is to give the property to his two surviving sons, Rajes and Ramendra, after excluding his widowed daughter-in-law, Santi Debi, against whom he had developed prejudice on account of hers being a *sagotra* marriage. An equally important purpose of the trust was the discharge of his debts. For that purpose he made the following arrangements (1) The entire property was constituted a trust for the discharge of the debts and thereby he divested himself entirely of any interest therein or management thereof; (2) The properties were to be in the management of his eldest son, Rajes, as the trustee thereof with powers of alienation for payment of debts; and (3) The use of the income for the sustenance of himself and his sons was limited to specified amounts thereof viz. Rs 1500 per mensem in order that the debts may be methodically and speedily discharged. There is no evidence before us as to what the total income of the property at the time was and whether there would have been any substantial surplus available from the income for the discharge of debts. But Schedule A of the trust deed shows that the properties were fairly considerable and Schedule B shows that the debts at the time were to the tune of Rs 2,62,169-8-0. Clause 17 of the trust deed values the properties at rupees five lakhs for the purposes of stamp duty and it may reasonably be assumed that the value would have been substantially higher. There can be no reasonable doubt that the settlor did contemplate that, on a proper management of the property and with a scheme for the discharge of debts, there would emerge surplus income by the date of termination of trust. This appears from clause 12(a) of the trust deed which specifically provides for the disposal of the surplus income of each lot which might accumulate during the continuance of the trust. It is, permissible, therefore to think that the surpluses contemplated would not be unsubstantial. Under clause 14 of the trust deed the settlor provides for the devolution of the trusteeship in case his son, Rajes, died before the liquidation of the debts and says that on the death of Rajes, Rajes's wife and Ramendra are to become joint trustees and that on the death of either of them the surviving trustee shall be the sole trustee. There is no provision for any further devolution of trusteeship in the contingency of such sole trustee also dying before the liquidation of the debts. The absence of any such provision may well be taken to indicate that, in the contemplation of the settlor, the debts would be discharged and the trust would come to an end, in any case, before the expiry of the three lives mentioned therein i.e. Rajes, his wife and Ramendra,. While, therefore, the settlor does appear to have attached considerable importance to the liquidation of debts, there is nothing to show that he was apprehensive that the debts would remain undischarged out of his properties and its income and that he contemplated the ultimate discharge of his debts to be such an uncertain event as to drive him to make the accrual of the interest to his sons under the deed to depend upon the event of the actual discharge of his debts. In this context there are also other provisions in the trust deed which are of great significance.

1. The two sons, Rajes and Ramendra, are not completely excluded from any benefit out of the settlor's estate until the debts are discharged and the trust comes to an end. It is provided that each of them has to be paid a specific amount per month out of the properties i.e. Rs 300 and Rs 200 during the settlor's lifetime and Rs 800 and Rs 700 after the settlor's death.

2. It is further provided that on the death of either of these two sons before the debts are discharged and the trust comes to an end, the above amounts are to go to their respective legal heirs (subject to some minor variations so far as it relates to Ramendra's heirs). The provision in this behalf, so far as Rajes (with whose interest alone we are now concerned) shows that on his death during the continuance of the trust the amount payable to him monthly was to be paid to his widow and on her death to his legal heirs.

3. The most significant provision in this context is that under clause 12(a) which, while allotting Lots I to IV to Rajes and Lot V to Ramendra, specifically provides also that surplus income thereof i.e. such income as is referable to those lots, should devolve on the two sons in the same way. A reference to Schedule A shows that these lots are unequal and hence in the normal course, if there had been no such specific provision, the surplus income, would have been equally divisible. The fact that the surplus incomes of the specified lots is also to devolve along with those specified lots themselves, is a clear indication that the corpus of these lots was earmarked for the two sons with the present income thereof but with a restriction on the enjoyment of the present income to specified sums, so as to facilitate orderly discharge of the debts.

11. Now, there can be no doubt about the rule that where the enjoyment of the property is postponed but the present income thereof is to be applied for the benefit of the donee the gift is vested and not contingent. (See Explanation to Section 19 of the Transfer of Property Act, Explanation to Section 119 of the Indian Succession Act. See also **Williams on Executors and Administrators**, 13th Edn., Vol. 2, p. 663, para 1010, and **Jarman on Wills**, 8th Edn., Vol. 2, p. 1397.) This rule operates normally where the entire income is applied, for the benefit of the donee. The distinguishing feature in this case is that it is not the entire income that is available to the donees for their actual use but only a portion thereof. But it is to be observed that according to the scheme of the trust deed, the reason for limiting the enjoyment of the income to a specified sum thereof, is obviously in order to facilitate and bring about the discharge of the debts. As already explained the underlying scheme of the trust deed is that the enjoyment is to be restricted until the debts are discharged. Whatever may be said of such a provision, where a donee is not himself a person who is under any legal obligation *aliunde* to discharge such debts, the position in this case is different. The two sons are themselves persons who, if the settlor died intestate, would be under an obligation to discharge his debts out of the properties which devolve upon them. It is only the surplus which would be legally available for division between them. In such a case, the balance of the income which is meant to be applied for the discharge of the debts is also an application of the income for the benefit of the donees. It follows that the entire income is to be applied for the benefit of the donees and only the surplus, if any, is available to the donees. Hence the provision in the trust deed that Lots I to IV are to devolve on Rajes and Lot V on Ramendra and that the surplus income

of each of these lots after the discharge of the debts is also to devolve in the same way, clearly operates as nothing more than the present allotment of these properties themselves to the donees subject to the discharge of debts notionally in the same proportion. Thus taking the substance of the entire scheme of this division between the two sons the position that emerges is as follows: (1) Specified lots are earmarked for each of the two sons. (2) The present income out of those lots is to be applied for the discharge of the debts after payment of specified sums therefrom by way of monthly payments to the two sons and presumably such application is to be notionally *pro rata*. (3) Any surpluses which remain from out of the income of each of the lots are to go to the very person to whom the corpus of the lot itself is to belong on the termination of the trust. (4) In the event of any of the two sons dying before the termination of the trust, his interest in the monthly payments out of the income is to devolve on his heirs. These arrangements taken together clearly indicate that what is postponed is not the very vesting of the property in the lots themselves but that the enjoyment of the income thereof is burdened with certain monthly payments and with the obligation to discharge debts therefrom notionally *pro rata*, all of which taken together constitute application of the income for his benefit.

12. It may be noticed at this stage that one of the features of a contingent interest is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such a person do not get the benefit of the gift. But the trust deed in question specifically provides in the case of Rajes - with whose interest alone we are concerned - that even in the event of his death it is his heirs (then surviving) that would take the interest. It has been urged that the provision in clause 12(a) in favour of the heirs *then surviving* is in the nature of a direct gift in favour of the heir or heirs who may be alive at the date when the contingency disappears. But even so, this would make no practical difference. It is to be remembered that in this case the parties belong to the *Dayabhaga* school of Hindu law - and this is admitted before us. It is also to be remembered that up to the third degree in the male line the principle of representation under the Hindu Law operates. The net result of the provision, therefore, is that whenever the alleged contingency of discharge of debts may disappear the person on whom the interest would devolve would, in the normal course, be the very heir (the lineal descendant then surviving or the widow) of Rajes. The actual devolution of the interest, therefore, would not be affected by the alleged contingency. That being so it is more reasonable to hold that the interest of Rajes under the deed is vested and not contingent.

13. This view is confirmed by the fact that under the compromise decree which is now sought to be executed both the judgment-debtors, Rajes and Ramendra, created a charge for the monthly payment to Santi Debi and agreed to such charge being *presently executable*. This shows clearly that they themselves understood the interest available to them under the trust as a vested interest.

14. In the course of the discussions before us a number of other possibilities which may arise with reference to the actual terms of the deed were closely examined with a view to test how far they fit in with one view or the other of the nature of interest in question. But even such an elaborate consideration of the possibilities did not throw any further light on the question at issue. We are, therefore, of the opinion that insofar as the interest of Rajes is concerned in Lots I to IV under the trust deed, it is vested and not contingent.

15. The further question that arises is whether in view of the terms to be noticed, his interest in No. 44/2, Lansdowne Road against which execution is sought is in any way different. The scope for any possible difference arises in view of the fact that the devolution of Lots I to IV on Rajes or his heirs (then living) is specifically expressed to be “subject to the provisions contained in clause (c) hereof regarding Premises No. 44/2, Lansdowne Road”. The relevant provisions relating to this property are as follows: Clause 10 provides that the settlor as well as Rajes and Ramendra with their respective families should be entitled to reside in the premises during the settlor’s lifetime and so long as settlor’s debts are not fully paid off. clause 12(c) provides that after the death of the settlor and after all debts have been fully paid off and on the said Rajes or his legal heirs purchasing in the town of Calcutta or its suburbs a suitable house at a value not less than Rs 40,000 and making over the same to Ramendra absolutely, Rajes or his legal heirs shall be the absolute owner of the Premises No. 44/2, Lansdowne Road but that so long as such house be not purchased and made over to Ramendra, Rajes and Ramendra should both be entitled to reside in the said premises with their respective families. It is urged that, since it is thus specifically provided that until the discharge, by Rajes or his heirs, of the obligation to purchase another suitable house and to make over the same to Ramendra or his heirs, Rajes is not to be the absolute owner, this is a factor which imports a further element of contingency, in the interest given to Rajes under this deed of trust insofar as it relates to Premises No. 44/2, Lansdowne Road. It is contended that, in order to emphasise the additional contingency as regards this item, subjection to clause (c) as regards these premises, has been specifically incorporated in clause 12(a). Now, it is to be noticed that the preliminary portion of clause 12 shows that on the liquidation of the debts and after the death of the settlor, the trust shall come to an end and the properties in Lots I to IV are to devolve on Rajes. clause 12(c), therefore, would prima facie show that the contingency, if any, which arises by virtue of the obligation to provide alternative accommodation to Ramendra or his heirs is to arise only after the death of the settlor and the discharge of the debts, which taken together means the termination of the trust. So understood and assuming for the sake of argument that the obligation to provide alternative accommodation is by itself a contingency, this would bring about a contingent interest in Premises No. 44/2, Lansdowne Road, in favour of Rajes, after the termination of the trust. It follows that this item of property would not be owned by anybody until that contingency disappears. This would result in this item of property remaining without any legal ownership for the intervening period which is opposed to law. Learned Solicitor-General, presumably recognising this difficulty, was obliged to urge that the contingency arising from the provision imposing obligation on Rajes and his heirs to provide alternative accommodation to Ramendra should be read into the preliminary portion of clause 12 insofar as Premises No. 44/2, Lansdowne Road, is concerned. That is to say, according to him, the trust is to be construed as not coming to an end as regards this item of property alone until the obligation to provide alternative accommodation is discharged. This construction would be doing great violence to the language of clause 12 which specifically shows in peremptory terms that the trust “shall come to an end on the liquidation of all the debts of the settlor and after his death”. The construction contended for is not justified by the phrase “subject to the provisions contained in clause (c) hereof regarding Premises No. 44/2, Lansdowne Road” which occurs in clause (a) thereof. The limitation by way of subjection has reference only to “devolution” of the properties in

Lots I to IV “absolutely”. Neither the use of word “devolution” nor of the word “absolutely” in clauses 12(a) and (c) can be understood, in the context, as having any bearing on the vesting of the interest as opposed to the interest being contingent, but only as indicating a full and unrestricted devolution of the property subject to no limitations as regards the enjoyment thereof, as opposed to a vesting and devolution subject to restricted enjoyment.

16. It appears to us reasonably clear that the intention of the settlor, taking clauses 12(a) and (c) together, is that as regards Lots I to IV, the beneficial interest of Rajes as regards all the properties comprised therein, including Premises No. 44/2, Lansdowne Road, is vested in title but restricted in enjoyment so long as, the settlor is alive and the debts are not discharged, and that as regards Premises No. 44/2, Lansdowne Road, his enjoyment is further restricted inasmuch as it is subject to the right of residence of Ramendra and his heirs in the said premises until the obligation to provide alternative accommodation is discharged by Rajes or his heirs.

17. We are clearly of the opinion that the objection raised to the execution (1) on the ground that the properties charged are to be proceeded against, in the first instance, and (2) on the ground that the interest which Rajes gets under the trust deed either as regards the general properties covered by the deed or as regards Premises No. 44/2, Lansdowne Road, is contingent, are untenable. If, as a fact, either the debts remain undischarged or the alternative accommodation has not so far been provided, how the rights of persons affected thereby are to be safeguarded is not a matter that arises for consideration before us and we express no opinion thereupon.

18. This appeal is accordingly dismissed with costs.

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Jayaram Mudaliar v. Ayyaswami

AIR 1973 SC 569 : (1972) 2 SCC 200

M.H. BEG, J. - Jayaram Mudaliar, the appellant before us by Special Leave, purchased some lease-hold land for Rs. 10,500/- from Muniswami Mudaliar and others under a sale deed of July 7, 1958 (Ex. B-7) and some other lands shown in a sales' certificate, dated July 15, 1960, (Ex. B-51) sold to him for Rs. 6,550/- at a public auction of immoveable property held to realise the dues in respect of loans taken by Muniswami Mudaliar under the Land Improvement Loans' Act, 19 of 1883. Both Jayaram and Muniswami, mentioned above, were impleaded as co-defendants in a partition suit, in Vellore, Madras, now before us in appeal, commenced by a pauper application, dated June 23, 1958, filed by the plaintiff-respondent Ayyaswami Mudaliar so that the suit must be deemed to have been filed on that date. The plaintiff-respondent before us had challenged, by an amendment of his plaint on September 18, 1961, the validity of the sales of land mentioned above, consisting of items given in Schedule 'B' to the plaint, on the ground, inter alia, that these sales, of joint property in suit, were struck by the doctrine of *lis pendens* embodied in Section 52 of the Indian Transfer of Property Act. As this is the sole question, on merits, raised by the appellant before us for consideration, we will only mention those facts which are relevant for its decision.

25. The challenge on the ground of *lis pendens*, which had been accepted by the Courts in Madras, right up to the High Court, was directed against two kinds of sales: firstly, there was the ostensibly voluntary sale of July 7, 1958, under a sale deed by the defendant Munisami Mudaliar and his major son Subramanian Mudaliar and three minor sons Jagannathan, Duraisami alias Thanikachalam, and Vijayarangam in favour of the defendant-appellant; and, secondly, there was the sale evidenced by the sale certificate (Exhibit B-51) of July 15, 1960 showing that the auction sale was held in order to realise certain "arrears under hire purchase system due to Shri O.D. Munisami Mudaliar". The words "due to" must, in the context, be read as "due from" because "*falsa demonstratio non nocet*".

26. The deed of the voluntary sale for Rs. 10,500/- showed that Rs. 7,375.11 Ans. was to be set off against the money due on a decree obtained by the purchaser against the sellers in original suit No. 2 of 1956, of the Vellore Sub-Court, Rs. 538.5 Ans. was left to liquidate the amount due for principal and interest due to the purchaser on a bond, dated October 14, 1957, by Munisami Mudaliar, Rs. 662.9 Ans. was to be set off to liquidate another amount due to the purchaser from Munisami on account of the principal and interest on another bond executed by Munisami, Rs. 1,250.0.0 was left to pay off and liquidate the balance of a debt due to one Thiruvankata Pillai from Munisami, Rs. 100.0.0 were meant to settle a liability to the Government in respect of purchase of cattle and for digging of some well, Rs. 51.13 Ans. were to go towards settling a similar liability, and only Rs. 521.11 Ans. were paid in cash to the seller after deducting other amounts for meeting liabilities most of which were shown as debts to the purchaser himself. It may be mentioned here that, on January 17, 1944, Munisami had executed a mortgage of some of the property in Schedule 'B' of the plaint for Rs. 7,500/- in favour of Kannayiram, and he had executed a second mortgage in respect of one item of property of Schedule 'B' in favour of Patta Mal, who had assigned his rights to T. Pillai. A third mortgage of the first item of Schedule 'B' properties executed on May 27, 1952 by

Munisami, in favour of the appellant Jayaram, was said to lie necessitated by the need to pay arrears of Rs. 3,000/- income-tax and for discharging a debt and a pronote in favour of a man called Mudali. In 1955, an original suit No. 124 of 1955, had been filed by T. Pillai who had obtained orders for the sale of the first item of Schedule 'B' properties shown in the plaint. The original suit No. 2 of 1956, had been filed for principal and interest due on May 27, 1952 to the appellant who had obtained an attachment on January 5, 1956 of some Schedule 'B' properties. The appellant had obtained a preliminary decree on January 25, 1956 in his suit and a final decree on September 14, 1957. All these events had taken place before the institution of the partition suit on June 23, 1958. But, the voluntary sale to satisfy decretal amounts was executed after this date. The second sale was an involuntary sale for realisation of dues under the provisions of Section 7 of the Land Improvement Loans Act, 19 of 1883 which could be realised as arrears of land revenue. There was nothing in the sale certificate to show that the dues for which properties were sold were of anyone other than Munisami individually.

27. On the facts stated above, the appellant Jayaram claims that both kinds of sales were outside the purview of the doctrine of *lis pendens* inasmuch as both the sales were for the discharge of pre-existing liabilities of the Hindu joint family of which Munisami was the karta. The liabilities incurred by Munisami, it was submitted, as karta of the family, had to be met, in any case, out of the properties which were the subject-matter of the partition suit. It was urged that, where properties are liable to be sold for payment of such debts as have to be discharged by the whole family, only those properties would be available for partition in the pending suit which are left after taking away the properties sold for meeting the pre-existing liabilities of the joint family. In the case of the sale for discharging dues under the Land Improvement Loans Act it was also contended that they obtained priority over other claims, and, for this additional reason, fell outside the scope of the principle of *lis pendens*.

28. The defendant-respondent Munisami and the defendant-appellant Jayaram had both pleaded that the properties in suit were acquired by Munisami with his own funds obtained by separate business in partnership with a stranger and that Ayyaswami, plaintiff, had no share in these properties. The plaintiff-respondent's case was that although the properties were joint, the liabilities sought to be created and alienations made by Munisami were fraudulent and not for any legal necessity, and, therefore, not binding on the family.

28-A. The Trial Court had found the properties given in Schedule 'B' were joint family properties of which the defendant-respondent Munisami was the karta in possession. This finding was affirmed by the first Appellate Court and was not touched in the High Court. It did not follow from this finding that all dealings of Munisami with joint family properties, on the wrong assumption that he was entitled to alienate them as owner and not as karta, would automatically become binding on the joint family. A karta is only authorised to make alienations on behalf of the whole family where these are supported by legal necessity. It was no party's case that the alienations were made on behalf of, and, therefore, were legally binding on the joint family of which plaintiff-respondent Ayyaswami was a member.

29. The Trial Court recorded a finding on which the learned Counsel for the appellant relies strongly: "There is overwhelming documentary and oral evidence to show that the sale deed Exhibit B-7 and the revenue sale are all true and supported by consideration and that the

12th defendant would be entitled to them, if these sales were not affected by the rule of *lis pendens* within the meaning of Section 52 of the Transfer of Property Act”. It may be mentioned here that the 12th defendant is no other than the appellant Jayaram Mudaliar, the son-in-law of defendant-respondent Munisami Mudaliar, who had purchased the properties covered by the impugned sales. The plea of the plaintiff-respondent Ayyaswami that the sales in favour of Jayaram, the 12th defendant-appellant, were fraudulent and fictitious and not supported by valuable consideration was rejected. Although, the Trial Court’s decree for the partition included the properties covered by the two impugned sales evidenced by Exhibit B-7 and B-51, yet, the Commissioner who was to divide the properties by metes and bounds, was directed to allot to Munisami’s share, so far as possible, properties which were covered by Exhibit B-7, and B-51. This implied that the liabilities created by the decrees for whose satisfaction the sale deed, dated July 7, 1958 (Exhibit B-7) was executed and the revenue sale of March 16, 1960 for loans under an agreement were treated as the separate liabilities of the defendant Munisami and not those of the joint family.

30. The Trial Court as well as the First Appellate Court had also rejected the plea that the revenue sale of March 16, 1960 to satisfy pre-existing liabilities of Munisami had any priority over the rights the plaintiff-respondent may get in the partition suit. The result was that the partition suit was decreed subject to a direction for the allotment of the properties covered by Exhibit B-7 and B-51 so that the purchaser may retain these properties if they were allotted to Munisami.

31. The High Court of Madras had described the sale of July 7, 1958 as a “voluntary alienation”, and, thereby, placed it on a footing different from an involuntary sale in execution of a decree in a mortgage suit. The obligations incurred before the sale of July 7, 1958, by reason of the decrees in the mortgaged suits, were not on this view, liabilities which could be equated with either transfers prior to the institution of the partition suit or with sales in execution of mortgage decrees which are involuntary. So far as the revenue sale was concerned, the High Court, after setting out the terms of Section 7 of the Land Improvement Loans Act, 19 of 1883, held that only that land sold was to be excluded from the purview of the principle of *lis pendens* for the improvement of which some loan was taken. This meant that only that part of the loan was treated as a liability of the joint family as could be said to be taken for the joint land. It, therefore, modified the decree to the Courts below by giving a direction that further evidence should be taken before passing a final decree to show what land could be thus excluded from partition.

32. The plaintiff-appellant has relied upon certain authorities laying down that the doctrine of *lis pendens* is not to be extended to cover involuntary sales in execution of a decree in mortgage suit where the mortgage was prior to the institution of the suit in which the plea of *lis pendens* is taken, because the rights of the purchaser in execution of a mortgage decree date back to the mortgage itself. Reliance was also placed on the principle laid down in *Shyam Lal v. Sohan Lal* [AIR 1928 All 3] to contend that, since Section 52 of the Transfer of Property Act does not protect transferors, a transfer on behalf of the whole joint Hindu family would be outside the purview of the principle in a partition suit. The contention advanced on the strength of the last mentioned case erroneously assumes that the impugned sales were on behalf of the joint family.

33. Learned counsel for the plaintiff-respondent has, in reply, drawn our attention to the following observations of Sulaiman, Ag. C.J., expressing the majority opinion in **Ram Sanehi Lal v. Janki Prasad** [AIR 1931 All 466 (FB)]:

“(T)he language of Section 52 has been held to be applicable not only to private transfers but also to Court sales held in execution of decrees. Section 2(d) does not make Section 52 inapplicable to Chapter 4, which deals with mortgages. This is now well settled; vide **Radhamadhub Holdar v. Manohar Mukerji** [(1881) ILR 15 Cal 756] and **Moti Lal v. Kharrabuldin** [(1897) ILR 25 Cal 179], followed in numerous cases out of which mention may be made of **Sukhdeo Prasad v. Jamna** [(1901) ILR 23 All 60].”

But, as we have no actual sale in execution of mortgage decree, this question need not be decided here.

34. The suggestion made on behalf of the appellant, that attachment of some Schedule ‘B’ property before judgment in the purchaser’s mortgage suit could remove it from the ambit of *lis pendens*, is quite unacceptable. A contention of this kind was repelled, in **K.M. Lal v. Ganeshi Ram** [AIR 1970 SC 1717] by this Court as clearly of no avail against the embargo imposed by Section 52 of the Transfer of Property Act.

35. The High Court had rightly distinguished cases cited on behalf of the appellant before it by holding that exemption from the scope of *lis pendens* cannot be extended to voluntary sales in any case. Obviously, its view was that, even where a voluntary sale takes place in order to satisfy the decretal amount in a mortgage suit, the result of such a sale was not the same as that of an involuntary sale. In the course of execution proceedings where land is sold to satisfy the decree on the strength of a mortgage which creates an interest in the property mortgaged. The High Court had observed that, as regards the satisfaction of the mortgage decree in his favour, which was part of the consideration-for the sale of July 7, 1958, the appellant-purchaser decree-holder could get the benefit of Section 14 Limitation Act and still execute his decree, if it remained unsatisfied due to failure of consideration.

36. An examination of the sale deed of July 7, 1958 discloses that it is not confined to satisfaction of the decretal amounts. Other items are also found in it. The sale deed does not purport to be on behalf of the Hindu joint family of which Ayyaswami the plaintiff and Munisami defendant No. 1 could be said to be members. It no doubt mentions the sons of Munisami Mudaliar but not Ayyaswami, plaintiff, among the sellers. At most, it could be a sale binding on the shares of the sellers. As already indicated, Munisami, defendant-respondent, as well as Jayaram, defendant-appellant, having denied that the properties in dispute were joint, could not take up the position that the sales were binding on the whole family. Therefore, we are unable to hold that the assumption of the Madras High Court that the voluntary sale could not bind the whole family, of which Munisami was the karta, was incorrect.

38. As regards the revenue sale of March 16, 1960 (Exhibit B. 51) we find that the sale certificate is even less informative than the voluntary sale deed considered above. Nevertheless, the view taken by the Madras High Court was that any land for the improvement of which loan is shown to have been taken by Munisami Mudaliar would be

excluded from the purview of the doctrine of *lis pendens*. It is, however, urged that the High Court had given effect to clause (c) of Section 7 of the Land Improvement Loans Act of 1883, but had overlooked clause (a). Here, the relevant part of Section 7, sub-section (1) of this Act may be set out. It reads as follows:

“7. Recovery of loans - (1) Subject to such rules as may be made under Section 10, all loans granted under this Act, all interest (if any) chargeable thereon, and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely:

- (a) from the borrower as if they were arrears of land revenue due by him;
- (b) from his surety (if any) as if they were arrears of land revenue due by him;
- (c) out of the land for the benefit of which the loan has been granted as if they were arrears of land revenue due in respect of that land;
- (d) out of the property comprised in the collateral security (if any) - according to the procedure for the realization of land revenue by the sale of immovable property other than the land on which that revenue is due:

Provided that no proceeding in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest, and where the loan is granted under Section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest.”

39. Reliance was also placed on Section 42 of the Madras Revenue Recovery Act of 1864 which reads as follows:

“All lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances, and if any balance shall remain after liquidating the arrears with interest and the expenses of attachment and sale and other costs due in respect to such arrears, it shall be paid over to the defaulter unless such payment be prohibited by the injunction of a Court of competent jurisdiction.”

40. It will be seen that the assumption that the dues could be realised as arrears of land revenue would only apply to the interest of the borrower so far as clause (7)(1)(a) is concerned. The proviso enacts that even recoveries falling under Section 7(1)(c) do not affect prior interests of persons other than the borrower or of the party which consents to certain loans. In the case before us, the borrower had himself taken up the case that the loan was taken by him individually for the purpose of purchasing a pumping set installed on the land. It did not, therefore, follow that this liability was incurred on behalf of the joint family unless it amounted to an improvement of the joint land. Every transaction of *Munisami* or in respect of joint property in his possession could not affect rights of other members. It was for this reason that Section 7(1)(a) was not specifically applied by the High Court. But, at the same time, the direction that the properties sold should, so far as possible, be allotted to *Munisami* meant that the purchaser could enforce his rights to them if they came to the share of *Munisami*.

41. The question of paramount claims or rights of the Government for the realisation of its taxes or of dues which are equated with taxes was also raised on behalf of the appellant on

the strength of *Builders Supply Coorporation v. Union of India* [AIR 1965 SC 1061] In that case, the origin of the paramount right of the State to realise taxes due, which could obtain priority over other claims, was traced to the prerogatives of the British crown in India. Apart from the fact that there is no claim by the State before us, we may observe that where a statutory provision is relied upon for recovery of dues, the effect of it must be confined to what the statute enacts. Even under the English law, the terms of the statute displace any claim based on prerogatives of the Crown. And, in no case, can the claim, whatever its basis, justify a sale of that property which does not belong to the person against whom the claim exists. As already observed, a claim under Section 7(1)(a) of the Land Improvement Loans Act of 1883 could only be made from the borrower. This meant that unless it was proved that Munisami, in taking a loan under the Act, was acting as the karta of the joint Hindu family of which Ayyaswami was a member, recovery of arrears could only be made from Munisami's share in the land. That this could be done was, in our opinion, implied in the direction that the properties sold should, so far as possible, be allotted to the share of Munisami.

42. As some argument has been advanced on the supposed inapplicability of the general doctrine of *lis pendens* to the impugned sales, the nature, the basis, and the scope of this doctrine may be considered here.

43. It has been pointed out, in Bennet "*On Lis Pendens*", that, even before Sir Francis Bacon framed his ordinances in 1816 "for the better and more regular administration of justice in the chancery, to be daily observed" stating the doctrine of *lis pendens* in the 12th ordinance, the doctrine was already recognized and enforced by Common Law Courts. Bacon's ordinance on the subject said:

"No decree bindeth any that common in bona fide, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill, nor the order; but, where he comes in pendente life, and, while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but, if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice."

The doctrine, however, as would be evident from Bennett's work mentioned above, is derived from the rules of *jus gentium* which became embodied in the Roman Law where we find the maxim: "*Ram (sic) de qua controversia pro-bibemur (sic) in acrum dedicare*" (a thing concerning which there is a controversy is prohibited, during the suit from being alienated). Bell, in his commentaries on the Laws of Scotland [2 *Bell's Com. On Law of Scotland* p. 144] said that it was grounded on the maxim: "*Pendente lite nihil innovandum*". He observed:

"It is a general rule which seems to have been recognized in all regular systems of jurisprudence, that during the pendency of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced."

44. In the *Corpus Juris Secundum* (Vol. LIV, p. 570), we find the following definition:

“*Lis pendens* literally means a pending suit; and the doctrine of *lis pendens* has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein.”

45. Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the court to deal with it and thus make the proceedings infructuous.

47. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights which are subject-matter of litigation but to other dealings with it “by any party to the suit or proceeding, so as to affect the right of any other party thereto”. Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

48. In the case before us, the Courts had given directions to safeguard such just and equitable claims as the purchaser-appellant may have obtained without trespassing on the rights of the plaintiff-respondent in the joint property involved in the partition suit before the Court. Hence, the doctrine of *lis pendens* was correctly applied.

49. For the reasons given above, there is no force in this appeal which is dismissed with costs.

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***Supreme General Films Exchange Ltd. v.
H.H. Maharaja Sir Brijnath Singhji Deo***

AIR 1975 SC 1810 : (1975) 2 SCC 530

Y.V. CHANDRACHUD, J. - 1. The plaintiff-respondent had filed a suit in the District Judge's Court at Jabalpur claiming a declaration that a lease executed in favour of the defendant-appellant, M/s Supreme General Films Exchange Ltd., ('the Company'), in respect of Sunder Vilas Theatre (now known as Plaza Talkies) by its former owners, Jiwan Das Bhatia and his sons (hereinafter referred to as 'the Bhatias'), is void and ineffective against the plaintiff's rights under decrees obtained in Civil Suit No. 15A of 1954 dated May 7, 1960 and in Civil Suit No. 3B of 1952 dated April 20, 1954 in execution of which the theatre had been attached. The plaintiff wanted the declaration also to make it clear that an auction purchaser, purchasing the theatre in execution of either of the two decrees, gets rights free from any obligation towards the defendant-appellant under the void lease.

2. The former owners of the theatre, the Bhatias, had borrowed Rs 2,50,000 from the plaintiff-respondent, a maharaja, against the security of bales of cotton. On December 29, 1951, they executed a registered mortgage deed in respect of the Plaza Theatre in favour of the plaintiff as the price of pledged goods was insufficient to satisfy the dues. The plaintiff, unable to recover the amount due, had brought Civil Suit No. 15A of 1954 in which a compromise decree was passed on May 7, 1960, in terms of an agreement between the parties that amounts due will be realised by the sale of Plaza Theatre.

3. The Central Bank of India, another creditor of Bhatias, had brought Civil Suit No. 3B of 1952 and obtained a decree for Rs 1,24,000 on April 29, 1952. Rights under this decree were assigned in favour of the plaintiff-respondent. The Plaza Theatre, together with other properties of Bhatias, was attached on May 4, 1955 in the course of execution of that decree.

4. The appellant company claimed to be a lessee in occupation of the theatre where it had carried on the business of running a cinema under an unregistered lease obtained on February 27, 1940. The lease of 1940 had expired on April 10, 1946. The company continued as a tenant holding over until the impugned lease deed of March 30, 1956 was executed. If this was a valid lease, it would have conferred upon the company the right to be a tenant of the property under the lease for eight years, from February 10, 1956 to February 10, 1964, with an option for a renewal until February 10, 1970. This lease was executed after the company had filed a suit (No. 16A of 1954) on November 20, 1954 for the specific performance of an agreement to lease contained in a letter dated July 19, 1948. A compromise decree was passed on March 24, 1956 in this suit also. The lease deed of March 30, 1956 purported to carry out the terms of that compromise decree passed in a suit in which the plaintiff was not impleaded at all.

5. The plaintiff's case was that the lease of March 30, 1956 was void as it was struck by three statutory provisions, namely. Section 52 of the Transfer of Property Act, Section 65A of the Transfer of Property Act, and Section 64 of the Civil Procedure Code. The defendant-appellant company, in addition to denying the alleged rights of the plaintiff to the benefits of

these provisions, pleaded that a suit of the nature filed by the plaintiff did not lie at all as it fell outside the purview of Section 42 of the Specific Relief Act, 1877, altogether.

6. The trial Court and the High Court, after having overruled the pleas of the defendant-appellant, had decreed the plaintiff's suit. The defendant company obtained special leave to appeal to this Court under Article 136 of the Constitution.

18. The contention that the case fell outside the purview of Section 52 of the Transfer of Property Act as the lease was executed in purported satisfaction of an antecedent claim rests upon the terms of an agreement of 1948, embodied in a letter, on the strength of which the defendant-appellant had filed his suit for specific performance. We find that the terms of the compromise decree in that suit and lease-deed of 1956 purported to confer upon the defendant-appellant new rights. Indeed, there are good grounds for suspecting that the compromise in the suit for specific performance was adopted as a device to get round legal difficulties in the execution of the lease of 1956 in favour of the defendant company. We are unable to accept the argument, sought to be supported by the citation of *Bishan Singh v. Khazan Singh* [AIR 1958 SC 838] that the lease was merely an enforcement of an antecedent or pre-existing right. We think that it purported to create entirely new rights pendente lite. It was, therefore, struck by the doctrine of lis pendens, as explained by this Court in *Jayaram Mudaliar v. Iyyaswami* [AIR 1973 SC 569], embodied in Section 52 of the Transfer of Property Act.

19. An alternative argument of the appellant was that a case falling within Section 65A(2)(e) of the Transfer of Property Act, confining the duration of a lease by a mortgagor to three years, being a special provision, displaces the provisions of Section 52 of the Transfer of Property Act. This argument overlooks the special objects of the doctrine of lis pendens which applies to a case in which litigation, relating to property in which rights are sought to be created pendente lite by acts of parties, is pending. Moreover, for the purposes of this argument, the defendant-appellant assumes that the provisions of Section 65A(2)(e), Transfer of Property Act are applicable. If that was so, it would make no substantial difference to the rights of the defendant-appellant, which would vanish before the suit was filed if Section 65A applies. We, however, think that, as the special doctrine of lis pendens is applicable here, the purported lease of 1956 was invalid from the outset. In this view of the matter, it is not necessary to consider the applicability of Section 65A(2)(e), which the defendant-appellant denies, to the facts of this case.

21. For the reasons given above, we dismiss this appeal with costs.

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Govinda Pillai Gopala Pillai v. Aiyyappan Krishnan

AIR 1957 Ker 10

M. S. MENON J. – In execution of the decree in the suit the appellant applied for delivery of one acre of property in survey plot No. 201/1 of the Kanjirappally North Pakuthy together with the building thereon. The contentions of the respondent (102nd defendant) as summarised by the court below are:

“That the 35th defendant, his father, had no rights over the property even on the date of the suit that the 35th defendant has gifted this property under Ext. I to himself and his mother on 3-6-1095, long before the suit, that the mother in turn gifted her rights over the property to him under Ext. II in 1101, that ever since that date, he is in possession of the property in his own independent title, that neither he nor his mother was a party to this decree, that the decree is not binding on him and his property and that therefore the plaintiff is not entitled to get possession of the property”.

2. The only question, as can be seen from the summary of contentions extracted above, that arises for consideration is whether the gift deed dated 3-6-1095 is affected by the rule of *lis pendens*.

3. The plaint, however, was returned for want of pecuniary jurisdiction for presentation to the proper court and was filed in the District Court of Kottayam only on 29-11-1095. If 29-11-1095 is the material date then it is equally clear that Ext. I is not affected by the rule and that the conclusion of the lower court to that effect has to be sustained.

4. Section 52 of the Transfer of Property Act, 1882, reads as follows:

“During the active prosecution in any Court having authority in British India or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose”.

The section was amended by Act 20 of 1929 by substituting the word “pendency” for the words “active prosecution” and the words “any suit or proceeding which is not collusive” for the words “a contentious suit or proceeding” and by the addition of an Explanation which fixes the time during which a suit is deemed to be pending for the purposes of the section. The section as amended reads as follows:

“During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government ... of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may

be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation – For the purposes of this section the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

5. There was no Transfer of Property Act in force in the Travancore State at the relevant time and so what we are concerned with in this case is not so much the application of a specific statutory provision as of the general principle governing such matters. “Lis” means an action or a suit, “Pendens” is the present participle of “Pendo” meaning continuing or pending, and the doctrine of Lis pendens may be defined as “the jurisdiction, power, or control that courts have, during the pendency of an action over the property involved therein”. **(34 American Jurisprudence 360).**

6. The basis of the doctrine is given as follows in the said volume:

“Two different theories have been advanced as the basis of the doctrine of lis pendens. According to some authorities, a pending suit must be regarded as notice to all the world, and pursuant to this view it is argued that any person who deals with property involved therein, having presumably known what he was doing, must have acted in bad faith and is therefore, properly bound by the judgment rendered. Other authorities, however, take the position that the doctrine is not founded on any theory of notice at all, but is based upon the necessity, as a matter of public policy, of preventing litigants from disposing of the property in controversy in such manner as to interfere with execution of the court’s decree. Without such a principle, it has been judicially declared, all suits for specific property might be rendered abortive by successive alienations of the property in suit, so that at the end of the suit another would have to be commenced, and after that, another, making it almost impracticable for a man ever to make his rights available by a resort to the courts of justice”. **(34 American Jurisprudence 363).**

And its origin and history;

“The doctrine of lis pendens is of ancient lineage. Originating, it is said, in the civil law, it seems to have been operative at an early date as the basis of the common law rule by virtue of which the judgment in a real action was regarded as over-reaching any alienation made by the defendant during its pendency. In the course of time the doctrine was adopted by equity, being embodied in one of Lord Bacon’s ordinances “for the better and more regular administration of justice in the court of Chancery”. This ordinance, commonly known as Bacon’s Twelfth Rule, provides ‘that no decree bindeth any that cometh in bonafide by conveyance from the defendant, before bill is exhibited, and is made no party neither by bill nor order; but where he comes in pendente lite, and while the suit is in full prosecution and without any color

of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of the suit, or the court made acquainted with, the court is to give order upon the special matter according to justice'. The principle thus adopted at an early period in the history of chancery jurisprudence has been followed and acted on by various successive chancellors, and is admitted by writers on the subject to be the established doctrine". (**34 American Jurisprudence 365**)

7. Bennet, in his *Treatise on the Law of Lis Pendens* was not inclined to accept notice as the basis of the rule. He quoted Lord Chancellor Cranworth *Bellamy v. Sabine* [(1857) 1 De. G & J 566].

"It is scarcely correct to speak of lis pendens as affecting the purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party... The necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so there could be no certainty that the litigation would ever come to an end, and said:

"The foundation for the doctrine of lis pendens does not rest upon notice, actual or constructive; it rests solely upon necessity – the necessity, that neither party to the litigation should alienate the property in dispute so as to affect his opponent".

8. In **Mulla's** commentary to S. 52 of the *Transfer of Property Act*, 1882, (4th Edition, page 228) it is stated:

"If the plaintiffs valuation is disputed and the plaint returned after inquiry for presentation to a Court of higher grade, an alienation effected in the interval is affected by the doctrine of lis pendens".

If this proposition embodies the correct principle then Ex. I is affected by the said doctrine and the appeal has to be allowed.

9. The statement is based on *Ma Than v. Maung Bagyan* [AIR 1927 Rang 145]. In that case a suit was instituted in the Township Court at Bogale which could only deal with suits up to Rs. 500 in value. The defendant filed a written statement in which he pleaded inter alia that on a correct valuation the suit will be found to be beyond the pecuniary jurisdiction of the court. The court framed a preliminary issue as to the proper valuation of the suit, took evidence as to the acreage of the holding and the value per acre, and on the 14th of May 1920 recorded a finding that the proper valuation of the suit would be Rs. 750. On the basis of that finding it directed that the plaint be returned for presentation to the proper court. The proper court was the Sub-Divisional Court at Pyapon, and the plaint was presented in that court on the 21st May 1920.

10. On the 20th May 1920 the defendant executed a conveyance of the land and the question before the court was whether the said conveyance was vitiated by the rule of lis pendens. Heald, J., stated the question for decision as follows:-

The question which thus comes before us in this appeal is whether in a case where the subject matter of the suit is land and the valuation which the plaintiff puts on the land is disputed and where the proper valuation is after enquiry found to be beyond the pecuniary limits of the Court in which the plaint was presented, so that the plaint is returned for presentation in another Court, and where further the plaint is so presented without undue delay, a transfer made in the interval between the return of the plaint and its presentation to the proper court is a transfer which is prohibited by S. 52 of the Transfer of Property Act

and answered the question in the affirmative.

11. In the course of his judgment, he also referred to *Tangor Majhri v. Jaladhar Deari*, [AIR 1919 Mad 755] and said:

“It is, clear that neither of these decisions is an authority on the question before us, which is in effect whether a plaintiff who has presented his plaint in a wrong court can be regarded as actively prosecuting a suit or proceeding in the interval between the return of the plaint for presentation in another Court and its actual presentation in that Court”.

Cunliffe, J, on the other hand, thought that *Tangor Majhri* case was a direct authority on the point:

“There is a direct authority on this very point in the case . There it was held that the rule of lis pendens will operate in favour of a plaintiff, who, at the time of the transfer was erroneously prosecuting his suit in a Court which from defect of jurisdiction was unable to entertain it and in consequence returned it for presentation to the appropriate Court, which Court ultimately decreed the suit on the basis of a lawful compromise. The decision in question appears to me to be based on a sound principle of equity. And said:

“From the commencement the plaintiff in the words of S. 52 was engaged in ‘actively prosecuting’ her suit. I am of the opinion that even if a person actively prosecutes a suit in a Court which from defect of jurisdiction is an inappropriate tribunal yet such active prosecution is contemplated by the section under regard”.

12. Whatever may be the correctness of the decision on the basis of Section 52 before the amendments effected by Act 20 of 1921 it cannot be considered as a correct interpretation of the section as it stands today. In *Gouri Dutt v. Shanker* [AIR 1933 Sind 117], Rupchand, AJC, said:

“The legislature has thought fit to amend the provisions of S. 52, T.P. Act, by Act 20 of 1929, two years after the case in AIR 1927 Rang, 145 was decided to make it abundantly clear that the pendency of the suit or proceedings for the purpose of the doctrine of lis pendens shall be deemed to commence from the date of presentation of

the plaint or the institution of the proceedings in the Court of competent jurisdiction. The Rangoon case in therefore no longer good law". And added :

"If a suit remains a suit though a Court cannot entertain it for want of jurisdiction and has to return the plaint to the Court in which the suit should have been presented, as held in the Rangoon case, the provisions of S. 14 (The Indian Limitation Act, 1908), so far as they provide for extending the period of limitation in such cases would be redundant. But this is not so. In a number of rulings it has been held that where the suit had been instituted in a wrong court and the plaint has been ordered to be returned, the period of limitation does not commence from the date when the plaint was first presented but from the date when it was subsequently presented in the proper Court, although it is open to the plaintiff to rely upon the provisions of S. 14 to claim exemption for the time during which he was prosecuting with due diligence and in good faith his first suit".

13. In *Nathusingh v. Anandrao* [AIR 1940 Nag 185]: a minor member of a joint Hindu family instituted a suit for partition against his father in a wrong court and the father executed a mortgage subsequent thereto and before the plaint was presented to the proper court. It was contended that the doctrine of *lis pendens* as enunciated in section 52 applied to the case. Pollock, J., said:

"The mortgage was executed after S. 52 was amended by the Transfer of Property (Amendment) Act, 20 of 1929. The only order that was made in the proceedings pending at the time when the mortgage was executed was an order that the plaint should be returned for presentation in a proper Court. The suit in which the decree for partition was passed was not instituted until after the mortgage was executed, and therefore the doctrine in *lis pendens* cannot apply".

14. We take the view that Section 52 of the Transfer of Property Act, 1882, as it stands today embodies a correct version of the rule of *lis pendens* and that it is that rule that should be applied in this case. If the said rule is applied there can be no doubt that there was no suit pending in a court of competent jurisdiction prior to 29-11-1095 and that Ext. I dated 3-6-1095 should hence be held as not vitiated by the rule of *lis pendens*.

15. It follows that the lower court's decision is correct and has to be affirmed. The appeal falls and is hereby dismissed with costs.

* * * * *

Sri Jagannath Mahaprabhu v. Pravat Chandra Chatterjee

AIR 1992 Ori 47

R.C. PATNAIK J. – This matter has come before this Full Bench to consider the correctness of the decision of a Division Bench of this Court in the case of *Pranakrushna v. Umakanta Panda* [AIR 1989 Orissa 148], laying down the rule that in a suit for declaration of title a transferee from the defendant pendente lite is neither a necessary nor a proper party and is not entitled to be impleaded inasmuch as he would be bound by the decree in the suit, having regard to the principles contained in Section 52 of the Transfer of Property Act.

2. The motion of opposite parties 2 and 3, the purchasers pendente lite from opposite party No. 1 - defendant, having been allowed by the Munsif, Puri, in Original Suit No. 169 of 1982, the plaintiff has moved this Court for revision of the said order on the ground that a purchaser pendente lite having regard to the provisions contained in Section 52 of the Transfer of Property Act is neither a necessary nor a proper party under Order 1, Rule 10(2) of the Code of Civil Procedure nor is he entitled to be impleaded under Order 22, Rule 10 (1). Hence, the exercise of discretion by the trial Court in allowing such purchaser to be impleaded as a party is in excess of jurisdiction and jurisdiction has been exercised illegally and with material irregularity.

3. The petitioner instituted the suit for a decree for eviction of the defendant, recovery of possession and damages for illegal occupation. Opposite Party No. 1 denied the assertions of the petitioner and his title. By registered sale deed dated 27-2-84, a portion of the property involved in the suit was sold by opposite party No. 1 in favour of opposite parties 2 and 3 who filed an application on 1-10-1985 under Order 1, Rule 10 of the Code of Civil Procedure to be impleaded as parties. Despite objection of the petitioner, by the impugned order the learned munsif allowed their prayer holding that though no doubt the transfer was hit by the rule of lis pendens, inasmuch as the defendant-opposite party No. 1 might not be interested after sale in properly conducting the suit and that might cause prejudice to the lis pendens purchasers, they should be arrayed as parties under Order 22, Rule 10 of the Code of Civil Procedure.

4. Learned counsel for the petitioner has strongly relied upon a decision of this Court in *Pranakrushna v. Umakanta Panda*, where a Division Bench of this Court held:

“Under the provision of R. 10(2) of Order 1, the Court may add the name of any person to the suit who ought to have been joined, either as plaintiff or defendant, or whose presence before the Court is necessary. In my considered opinion, in a suit of this nature, a transferee from the defendant pendente lite is neither a necessary nor a proper party in as much as he would be bound by the decree in the suit in view of the principle contained in S. 52 of the Transfer of Property Act. The intervenors could not have been added as parties to the suit in the beginning. In the circumstance can it be said that the presence of the intervenors was necessary to adjudicate upon and settle the questions involved in the suit effectually and completely? The answer must be given in the negative. A person is not to be added as a defendant merely because he would be affected by the judgment. The main consideration is whether or not the

presence of such person is necessary to enable the Court to adjudicate upon and settle the questions involved in the suit. I find a somewhat similar situation happening in a case before the Calcutta High Court in *Narayan Garai v. Matri Bhandar Pvt. Ltd.*, [AIR 1974 358]. There also, a party sought to be added on the ground that the party to the suit who had been enjoined had agreed to sell the land to him. The Court held that he was neither a necessary nor a proper party as the question involved in the suit could be worked out without anyone else being brought on the record. Rule 10 cannot be read as requiring all persons who have or claim to have or likely to have any sort of right, title or interest in respect of the subject-matter of a suit to be made parties.

Mr. Kar also relied on the case of *Shri Basant Ram v. Smt. Hans Devi* [ILR (1974) HP 276] which fully supports his contention..... I must hold that the intervenors were neither necessary nor proper parties for adjudication of the points involved in the suit and therefore the principles of O.1, R. 10 of the Code are not attracted...”

Learned counsel for the petitioner has relied upon and referred us to a Full Bench decision of the Kerala High Court in *Lakshmanan v. Kamal* [AIR 1959 Ker 67], where it was held:

“The effect of Section 52 is to render void as against the decree-holder in a suit in which any right to immovable property was in dispute and entitle him to ignore all transfers or other dealing with it by the judgment debtor from the time of the institution of the suit till the complete satisfaction or discharge of the decree which would affect the decree holder’s rights under the decree or any order made in the suit.

The explanation specifically enjoins that the prohibition against transfer or dealings is to take effect from the date of the presentation of the plaint or the institution of the proceedings in a Court of competent jurisdiction and remain in force until complete satisfaction or discharge of the decree has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed by law.

If a transfer or other dealing with a suit property pendente lite is void as against the decree-holder and he is entitled to ignore it and it cannot affect his rights under the decree, no purpose will be served by bringing on record, after the transfer, the transferee or the person in whose favour the property has been dealt with should be brought on record in such cases would only be to hold out a premium to persons who desire to escape from their legal obligations and unnecessarily protract legal proceedings, and would defeat the very purpose for which S. 52 of the Transfer of Property Act has been enacted”.

4A. Before we proceed to grapple with the problem, we may refer to a decision of this Court in *Uchhab Patra v. Brundaban Mallik* [AIR 1969 Ori. 142], where G.K. Misra, J. observed in a case of transferee from the plaintiffs seeking execution of the decree granted to the transferor-plaintiff, as follows (at p. 143) :

“Order 22, Rule 10(1) of the C.P.C. lays down that in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the

suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

This rule thus enables the transferee with the leave of the Court to continue the suit. The appellant could have made an application in the suit itself to be impleaded as a plaintiff in place of Brundaban Padhan. In fact, he did not do so. The question is whether he is precluded from continuing the execution after the decree was passed in favour of the plaintiff despite the transfer during the pendency of the suit”.

The learned Judge referred to a case *Raj Charan Mandal v. Biswanath Manda* [AIR 1915 Cal 103], where it was held that though the plaintiff could prosecute the suit to its conclusion notwithstanding a devolution of his interest in the property, Order 22, Rule 10 was an alternative procedure which guards against the danger that the original plaintiff being no longer interested in the proceedings may not vigorously prosecute them or may even collude with the adversary. Reference was also made by him to the decision in the case of *Joti Lal Sah v. Sheodhayan Prashad Sal* [AIR 1936 Pat 420]. In *Rusi Behera v. Mst. Pancha Behera* [(1976) 42 Cut LT 330], referring to *Uchhab Patra* case, B. K. Ray, J. observed:

“That decision, therefore, is a clear authority for the view that during the pendency of a suit a party to it can transfer its interest in the property which is the subject-matter of the litigation to another... Law is well settled that a transferee from a party to a suit gets interest in the suit property and has as a right to be substituted in the place of the transferor in the suit itself under the provisions of Order 22, Rule 10, Civil Procedure Code. Order 22, Rule 10, Civil Procedure Code enables the transferee to continue the proceeding with the leave of the Court. It does not bar the transferor continuing the suit for the benefit of his Successor. Order 22, Rule 10, Civil Procedure Code is an alternative procedure which guards against the dangers that the original plaintiff being no longer interested in the proceedings may not vigorously prosecute them or may even collude with the adversary...”

5. Unfortunately and regrettably, the two single Judge decisions of this Court, referred to above, were not brought to the notice of the Division Bench of this Court deciding *Pranakrushna* case, which relied upon the case of *Narayan Chandra Garai v. Matri Bhandar*. There an application was filed under Order 1, Rule 10 of the Code of Civil Procedure by a person who had entered into an agreement for sale of property from a defendant who had been restrained by an order of injunction not to sell the same and it was held that since his presence was not necessary to enable the Court to effectually adjudicate and settle the questions involved in the suit and the question at issue between the parties could be worked out without any one else being brought on record, a stranger should not be added as a party merely because he or she would be incidentally affected by the judgment. To the same effect is the decision in *Basant Ram v. Hans Devi*, which was relied upon by the Division Bench.

6. To appreciate the question involved, it is necessary to bear in mind the principles embodied in Sec. 52 of the Transfer of Property Act.

The principle embodied in Section 52 borrowed from the Common Law doctrine was aptly stated by Turner, L.J. in *Bellamy v. Sabine* [(1857) 1 Deg and J 566], in the following words

“It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant’s alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding”.

And Lord Cranworth said:

“It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party”.

The rule is based not on the doctrine of notice but on principle of expediency and public policy. Hence, no question of good faith or bonafides arises.

7. The effect of S. 52, therefore, is that a lis pendens transferee is bound by the decree whether on contest, ex parte or on compromise. The plaintiff is under no obligation to implead a lis pendens transferee. We do not agree with the view expressed by the Full Bench of the Kerala High Court in **Lakshmanan v. Kamal** that “the effect of Section 52 is to render void as against the decree-holder transfer or other dealing with the suit property pendente lite and he is entitled to ignore it” because Section 52 has been enacted with a view to safeguarding the interest of the plaintiff so that his decree is not defeated at the instance of a third party in whose favour there has been a lis pendens transfer. Our view is fortified by a decision of the Supreme Court in **Nagubai Ammal v. B. Shama Rao** [AIR 1956 SC 593]. It has been observed (at p. 602):

That sale was no doubt pendente lite, but the effect of S.52 is not to wipe it out altogether but to subordinate it to the rights based on the decree in the suit. As between the parties to the transaction, ‘ however, it was perfectly valid, and operated to vest the title of the transferor in the transferee.

The contention that the words “the property cannot be transferred” in Section 52 rendered a transfer which fell within the mischief of Section 52 non est was repelled with the following observation:

This contention gives no effect to the words “so as to affect the rights of any other party thereto under any degree of order which may be made therein”, which make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendente lite have been held to be valid and operative as between the parties thereto.

And it was observed (at p.602):

“We are, therefore, unable to accede to the contention of the appellants that a transferor pendente lite must, for purposes of S. 52, be treated as still retaining title to the properties”.

8. We hope, the aforesaid discussion would have made it clear that a transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. That is the reason why G. K. Misra, J. observed that Order 22, Rule 10(1) enabled the transferee to continue the suit with the leave of the Court and though there was no bar operating against the transferor continuing the suit for the benefit of the transferee, Order 22, Rule 10 was an alternative procedure which safeguarded against the danger that the original plaintiff being no longer interested in the proceedings might not vigorously prosecute the same or might even collude with the adversary and B. K. Ray, J. concurred with the aforesaid view in **Rusi Behra** case. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order 22, Rule 10 an alienee pendente lite may be joined as party. The plaintiff is not bound to make him a party. But the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests (See **Mulla's Transfer of Property Act**, seventh edition, page 253). Rule 10(1) of Order 22, reads as under:

“10. Procedure in case of a assignment before final order in suit. - In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved”.

9. Though in **Basant Ram** case it has been held that a lis pendens transferee is not a proper party, we are of the view that even if a lis pendens transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the lis pendens transferee, when a motion is made by the lis pendens transferee to be impleaded as a party, the court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits.

10. Assuming that he is not a proper party, he may be impleaded as an assignee under the provisions of O. 22, R. 10(1). Even if an application has been filed under O.1, R. 10, labelling of the application being misconceived, the court should ignore the labelling of the application as one under O.1, R.10 and treat the same as one filed under O. 22, R.10(1), C.P.C., if the ingredients thereof are satisfied. This aspect of the law was not brought to the notice of the Division Bench which decided **Pranakrushna** case and rejected the application of the pendente lite transferee solely upon a consideration of the principles embodied in Order 1, Rule 10, CPC.

11. In the result, leave to be impleaded as parties sought by opposite parties 2 and 3 having been allowed by the court in exercise of discretion judicially, we see no merit in this revision and dismiss the same.

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Dalip Kaur v. Jeewan Ram

AIR 1996 P & H 158

JAWAHAR LAL GUPTA J. - Are the proceedings in a civil appeal before the Supreme Court in pursuance to the grant of special leave under Art. 136 of the Constitution of India not a continuation of the proceedings in the original suit and is the principle of *lis pendens* not applicable to such proceedings? This is the short question that arises in this second appeal.

3. Lachhman respondent No. 24 filed a suit for possession by way of pre-emption of the land measuring 9 kanals 9 Marlas which had been sold to respondents 1 to 5 (original vendees). A part of this land had been sold by respondents 1 to 5 to respondents 6 to 21. The suit for possession by pre-emption was decreed by the trial Court on August 22, 1983. In pursuance to this decree, Lachhman took possession of the suit land on October 6, 1983. The appeal filed by respondents 1 to 5 was dismissed by the learned District Judge on March 18, 1985. The second appeal to this Court was dismissed on September 26, 1985. Thereafter, respondents 1 to 5 filed a special leave petition under Art. 136 of the Constitution of India. Leave was granted. The appeal of respondents 1 to 5 was accepted vide order, dated October 5, 1989. Accordingly, the suit filed by Lachhman was dismissed. Thereafter, the original vendees and respondents 6 to 21 filed an application under S. 144, Code of Civil Procedure for restitution of possession.

4. The appellants along with respondents 22 and 23 filed objections alleging that they had purchased the suit land from Lachhman. Being bonafide purchasers for consideration, the petition under S. 144 of the Code was not competent. Respondents 1 to 21 filed reply to the objections and pleaded that the matter was governed by the principle of *lis pendens*. The learned trial Court framed the following issues:

- 1) Whether the objections are maintainable as alleged in the objection petition? OPP
- 2) Relief.

5. Vide Judgment dated February 23, 1994, the learned trial Court rejected the objections. On appeal the order of the trial Court having been affirmed, the objectors have filed the present second appeal.

6. The sole contention raised by Mr. J.R. Mittal, learned counsel for the appellants is that the principle of *lis pendens* does not apply to the proceedings in the appeal before their Lordships of the Supreme Court. He has placed firm reliance on the decision of this Court in **Mewa Singh v. Jagir Singh** [AIR 1971 P & H 244]. The claim made on behalf of the appellants has been controverted by the learned counsel for respondents 1 to 21.

7. Firstly, it deserves notice that the Supreme Court is at the head of the 'pyramid' of the judicial system in this country. It exercises original and appellate jurisdiction. It has the power to pass such decree or make such order as is necessary for doing complete justice in any cause or matter – and any decree so passed or order so made shall be enforceable throughout the territory of India. The law declared by the Supreme Court is binding on all Courts within the territory of India. Under Art. 136 of the Constitution of India, the Supreme Court has the discretion to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal" in the territory of

India. Their Lordships can even interfere with an interlocutory order. The powers conferred on the Court under the Constitution are very wide. This power has been invoked and exercised not only in case where substantial questions of law are involved but even in those where the High Court has come to a wrong conclusion from the evidence. The court has interfered with the orders passed by the High Court in Second Appeals or Revision Petitions. In the present case, the decree which had been passed by the trial court and affirmed by the lower appellate Court as well as this Court in Second Appeal, was reversed by their Lordships. The decree having been reversed, the parties were clearly entitled to restitution of possession. The mere fact that the present appellants were not a party before the Supreme Court, is of no consequence as their interests were duly represented by their vendor who was admittedly a party. Still further, there appears to be no warrant for the view that the proceedings are not a continuation of the original suit. The mere fact that the leave to appeal has to be obtained under the Constitution does not mean that the doctrine of *lis pendens* would not apply or that the decree holder shall not be entitled to the restoration of possession.

8. As for decision in ***Mewa Singh*** case [AIR 1971 P & H 244], it deserves mention that in this case the dispute was not decided on merits but in terms of the compromise arrived at between the parties. It was further found that the appellants had recognised the fact “that they were not entitled to get back the possession of that land from Purshottam Das Rattan as he was not a party to the appeal and in his absence it could not be held that the gift in his favour was fictitious... For these reasons, the appellants cannot now seek the assistance of the Court to get possession of 30 Bighas of land from “Purshottam Das Rattan”. It is no doubt true that his Lordship was pleased to observe that Article 136 of the Constitution is an extraordinary remedy and is not in the ordinary line of appeal. However, it was also observed that “there is no doubt that the transferee during the pendency of a suit or other proceedings is bound by the result thereof but that principle cannot be made applicable to the facts of this case in view of the insertion of Clause (iv) in paragraph 10 of the petition of compromise and then its deletion, which were conscious acts and amounted to not disturbing the rights of Purshottam Das Rattan. It was, thus, clearly a case on its own facts. However, the principle that the transferee during the pendency of the proceedings is bound by the result was recognised. This is precisely what has happened in the present case.

9. In view of the above, the question posed at the outset is answered in the negative. It is held that proceedings before the Supreme Court are a continuation of those in the original suit and that the principle of *lis pendens* as well as restitution shall apply to the proceedings. Accordingly, it is held that there is no merit in this appeal. It is dismissed.

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Ganga Dhar v. Shankar Lal

AIR 1958 SC 770 : 1959 SCR 509

SARKAR, J. - This appeal arises out of a suit for the redemption of a mortgage dated August 1, 1899. The property mortgaged was a four-roomed shop with certain appurtenances, standing on a piece of land measuring 5 yards by 15 yards in Naya Bazar, Ajmere. The mortgage was created by Purshottamdas who is now dead and was in favour of Dhanrupmal, a respondent in this appeal. The mortgage instrument stated that the property had been usufructuarily mortgaged in lieu of Rs 6300 of which Rs 5750 had been left with the mortgagee to redeem a prior mortgage on the same and another property. It also provided that on redemption of the prior mortgage, the possession of the shop would be taken over and retained by the mortgagee, Dhanrupmal, who would appropriate its rent in lieu of interest on the money advanced by him and the possession of the other property covered by the prior mortgage, being a share in a Kacheri, would be made over to the mortgagor, Purshottamdas. The provisions in the mortgage instrument on which the present dispute turns were in these terms:

“I or my heirs will not be entitled to redeem the property for a period of 85 years. After the expiry of 85 years we shall redeem it within a period of six months. In case we do not redeem within a period of six months, then after the expiry of the stipulated period, I, my heirs, and legal representatives shall have no claim over the mortgaged property, and the mortgagee shall have no claim to get the mortgage money and the lagat (i.e. repairs) expenses that may be due at the time of default. In such a case this very deed will be deemed to be a sale deed. There will be no need of executing a fresh sale deed. The expenses spent in repairs and new constructions will be paid along with the mortgage money at the time of redemption according to account produced by the mortgagee.”

2. The mortgagee, Dhanrupmal, duly redeemed the earlier mortgage and, went into possession of the shop while possession of the Kacheri was delivered to the mortgagor. On April 12, 1939, Dhanrupmal assigned his rights under the mortgage to Motilal who died later and whose estate is now represented by his sons, who are the other respondents in this appeal. The estate of Purshottamdas, the original mortgagor, is now represented by his son, the appellant.

3. On January 2, 1947, the appellant filed the suit in the Court of the Sub-Judge, Ajmere, against the respondents. The suit was contested by the sons of Motilal, the assignee of the mortgage, who are the only respondents appearing in this appeal and whom we shall hence, hereafter refer to as the respondents. They said that the suit was premature as under the mortgage contract there was no right of redemption for eighty-five years after the date of the mortgage, that is to say, till August 1, 1984. The learned Sub-Judge, purporting to follow a decision of the Judicial Commissioner, Ajmere, to whom he was subordinate, held that the provision postponing redemption for eighty five years was invalid as it amounted to a clog on the equity of redemption. He, therefore, passed a preliminary decree for redemption. On appeal, the learned Judicial Commissioner, Ajmere, held, that the decision which the Sub-

Judge had purported to follow was distinguishable. He examined a large number of cases on the subject and came to the conclusion that the provision in question did not amount to a clog on the equity of redemption. He, therefore, allowed the appeal and dismissed the appellant's suit. From this decision the appeal to this Court arises.

4. It is admitted that the case is governed by the Transfer of Property Act. Under Section 60 of that Act, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to recover the mortgage property to him. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In **Bakhtawar Begum v. Husaini Khanam** [AIR 1914 PC 36] also the same view was expressed in these words:

“Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.”

Now, in the present case the term of the mortgage is eighty-five years and there is no stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed.

5. The appellant's answer to this contention is that the covenant creating the long term of eighty-five years for the mortgage, taken along with the provision that the mortgagor must redeem within a period of six months thereafter or not at all and the other terms of the mortgage and also the circumstances of the case, is really a clog on the equity of redemption and is therefore invalid. He contends that, in the result the mortgage money had been due all along and the suit was not premature.

6. The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley, M.R. in **Santley v. Wilde** [(1899) 2 Ch 474] in these words:

“The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that ‘once a mortgage always a mortgage’.”

7. The right of redemption, therefore, cannot be taken away. The courts will ignore any contract, the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be

deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for "once a mortgage always a mortgage" and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act. So it was said in *Mohammad Sher Khan v. Seth Swami Dayal* [AIR 1922 PC 17]:

"An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect."

8. Under the section, once the right to redeem has arisen it cannot be taken away. The mortgagor's right to redeem must be deemed to continue even after the period of six months has expired and the attempt to confine that right to that period must fail. The term in the mortgage instrument providing that the mortgage can be redeemed only within the period of six months and not thereafter must be held to be invalid and ignored. The learned Judicial Commissioner took the same view and this has not been challenged in this appeal on behalf of the respondents.

9. With this term however this case is not really concerned. Learned advocate for the appellant directed his attack on the term in the instrument of mortgage that it will not be redeemable for eighty-five years. He contended that this term amounts to a clog on the equity of redemption. We wish to observe here that the learned advocate did not contend that the invalidity, as we have earlier held, of the term taking away the right to redeem the mortgage after the period of six months makes the term fixing the period of the mortgage at eighty-five years invalid. This latter term stands quite apart. It only fixes the time when the principal sum is to become due, that is, when the right to redeem will accrue and has, therefore, nothing to do with a term which provides when that right will be lost. The invalidity of one does not make the other also invalid.

10. The term providing that the right to redeem will arise after eighty-five years does not, of course, take away the mortgagor's right to redeem and is not, therefore, in that sense, a clog on the equity of redemption. It does, however prevent accrual of the right to redeem for the period mentioned. Is it then, insofar as it prevents the right to redeem from accruing for a time, a clog?

11. As we have already said, the right to redeem does not arise till the principal money becomes due. When the principal sum is to become due must of course depend on the contract between the parties. In the present case the parties have agreed that the right to redeem will arise eighty-five years after the date of the mortgage, that is to say, the principal money will

then become due. The appellant says that he should be relieved from this bargain that he has made. This is the contention that has to be examined.

12. The rule against clogs on the equity of redemption no doubt involves that the courts have the power to relieve a party from his bargain. If he has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. But the courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. The question is, is the term now under consideration such that a court will exercise its power to grant relief against it? That depends on the extent of this power. It is a power evolved in the early English courts of Equity for a special reason. All through the ages the reason has remained constant and the court's power is therefore limited by that reason. The extent of this power has, therefore, to be ascertained by having regard to its origin. It will be enough for this purpose to refer to two authorities on this question.

13. In a very early case, namely, *Vernon v. Bethell* [(1762) 28 ER 838] Earl of Northington L. C. said,

“This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.”

14. In comparatively recent times Viscount Haldane, L.C. repeated the same view when he said in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.* [(1914) AC 25]:

“This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was

conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders.”

15. The reason then justifying the court’s power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language the court’s jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

16. We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

17. First then, does the length of the term - and in this case it is long enough being eighty-five years - itself lead to the conclusion that it was an oppressive term? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents’ contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term of that mortgage was. But we find that that mortgage included another property which became freed from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage was not putting any pressure on the mortgagor. That conclusion also receives support from the fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment.

18. It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time he likes. This contention is plainly fallacious. There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is

well settled that the mortgagee's right to enforce the mortgage and the mortgagor's right to redeem are coextensive.

19. Then it is said that under the deed the mortgagee can spend any amount on repairs to the mortgage property and in putting up new constructions there and the mortgagor could only redeem after paying the expenses for these. We are unable to agree that such is the effect of the mortgage instrument. We cannot lose sight of the fact that the mortgaged shop and the area of the land on which it stood were very small. It was not possible to spend a large sum on repairs or construction there. Furthermore, having agreed to 85 years as the term of the mortgage, the parties must have imagined that during this long period repairs and constructions would become necessary. It is only such necessary repairs as are contemplated by the instrument and we do not consider that it is hard on the mortgagor to have to pay for such repairs and construction when he redeems the property and gets the benefit of the repairs and construction. Neither do we think that there is anything in the contention that under the document the mortgagor was bound to accept whatever was shown in the mortgagee's account as having been spent on the repairs and construction. That is not, in our view, the effect of the relevant clause which reads, "The expenses spent in repairs and new constructions will be paid... according to the account produced by the mortgagee". All that it means is that in claiming moneys on account of repairs and construction the mortgagee will have to show from his account that he spent these moneys. It is really a safeguard for the mortgagor. It was also said that all the terms in the deed were for the benefit of the mortgagee and that showed that the bargain was a hard one. We do not think that all the terms were for the benefit of the mortgagee, or that what there was in the instrument was for his benefit and indicated that the mortgagee had forced a hard bargain on the mortgagor. We have earlier said how the bargain appears to us to have been fair and one as between parties dealing with each other on equal footing.

20. We have no evidence in this case of the circumstances existing at the date of the mortgage as to the pecuniary condition of the mortgagor or as to anything else from which we may come to the conclusion that the mortgagee had taken advantage of the difficulties of the mortgagor and imposed a hard bargain on him. It was said that the fact that the property was subject to a prior mortgage at the date of the mortgage in suit indicates the impecunious position of the mortgagor. We are unable to agree with this contention. Every debtor is not necessarily impecunious. The mortgagor certainly derived this advantage from that mortgage that he was able to free from the earlier mortgage the kacheri and he has been in enjoyment of it ever since. That, to our mind, indicates that the bargain had been freely made. There was nothing else to which our attention was directed as showing that the bargain was hard. We, therefore, think that the bargain was a reasonable one and the eighty-five years' term of the mortgage should be enforced. We then come to the conclusion that the suit was premature and must fail. In the result we dismiss this appeal with costs.

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Pomal Kanji Govindji v. Vrajlal Karsandas Purohit

AIR 1989 SC 436 : (1989) 1 SCC 458

SABYASACHI MUKHARJI, J. - These appeals and the special leave petition are directed against the decision of the High Court of Gujarat, upholding the right of the mortgagors to redeem the properties before the period stipulated in the deeds, as well as the right of the mortgagors to recover possession of the properties from the tenants and/or the mortgagees without resort to the relevant Rent Restriction Act. All these matters were separately canvassed before us as these involved varying facts, yet the fundamental common question is, whether long term mortgages in the present inflationary market in fast moving conditions are clogs on equity of redemption and as such the mortgages are redeemable at the mortgagors' instance before the stipulated period and whether the tenants who have been inducted by the mortgagees can be evicted on the termination of the mortgage or do these tenants enjoy protection under the relevant Rent Restriction Acts. One basic fact that was emphasised in all these cases was that all these involve urban immovable properties. In those circumstances, whether the mortgages operate as clogs on equity of redemption is a mixed question of law and facts. It is necessary to have a conspectus of the facts involved in each of the cases herein. We may start with the facts relating to Special Leave Petition (Civil) No. 8219 of 1982 because that is a typical case.

3. This is an appeal from the judgment and order of the Gujarat High Court, dated 26-4-1982 dismissing the second appeal. The High Court observed that the learned Judge had followed the judgment of the said High Court in *Khatubai Nathu Sumra v. Rajgo Mulji Nanji* [AIR 1979 Guj 171], where the learned Single Judge in the background of a mortgage, where the mortgagor was financially hard-pressed and the mortgage was for 99 years and the terms gave the mortgagee the right to demolish existing structure and construct new one and the expenses of such to be reimbursed by mortgagor at the time of redemption, it was held that the terms were unreasonable, unconscionable and not binding. In order, however, to appreciate the contentions urged therein, it will be necessary to refer to the decision of the first appellate court, in the instant case before us. By the judgment, the Assistant Judge, Kutch at Bhuj in Gujarat disposed of two appeals. These appeals arose from the judgment and decree passed by the Civil Judge, Bhuj, in Regular Civil Suit No. 35 of 1972 by which the decree for redemption of mortgage was passed and the tenants inducted by the mortgagees were also directed to deliver up possession to the mortgagors. The plaintiffs had filed a suit alleging that the deceased Karsandas Haridas Purohit was their father and he died in the year 1956, he had mortgaged the suit property to Kansara Soni Shivji Jetha and Lalji Jetha for 30,000 koris by a registered mortgage deed dated 20-4-1943. The mortgage deed was executed in favour of Soni Govindji Narayanji who was the power of attorney holder and manager of Defendants 1 and 2. Defendant 3 is the heir of said Govindji Narayanji and he was also managing the properties of Defendants 1 and 2. The mortgage property consisted of two delis in which there were residential houses, shops etc. The mortgagees had inducted tenants in the suit property and they were Defendants 4 to 9 in the original suit. When the mortgage transaction took place, the economic condition of the father of the plaintiffs was weak, he was heavily indebted to other persons. It was alleged and it was so held by the learned Judge and upheld

by the appellate Judge that the mortgagees took advantage of that situation and took mortgage deed from him on harsh and oppressive conditions. They got incorporated long term of 99 years for redemption of mortgage. It is further stated that though possession was to be handed over to the mortgagees, they took condition for interest on the part of principal amount in the mortgage deed. Moreover, the mortgagees were given liberty to spend any amount they liked for the improvement of the suit property. They were also permitted to rebuild the entire property. Thus these terms and conditions, according to the appellate Judge, were incorporated in the mortgage deed to ensure that the mortgagors were prevented forever from redeeming the mortgage. The terms and conditions, according to the Assistant Judge, Bhuj, being the first appellate court were unreasonable, oppressive and harsh and amounted to clog on equity of redemption and, as such, bad and the plaintiffs were entitled to redeem the mortgage even before the expiry of the term of mortgage. A registered notice to Defendants 1 and 2 was given to redeem the mortgage but they failed to do so, hence, the present suit was filed to redeem the mortgage and to recover actual possession from the Defendants 4 to 9 who were the tenants inducted by the mortgagees.

4. Defendant 1 resisted the suit. It was his case that the term of mortgage was for 99 years, so the suit filed before the expiry of that period was premature. Defendant 3 resisted the suit by written statement. Defendants 4 to 9 resisted the suit on the grounds that the plaintiffs were not entitled to redeem the mortgage and even if they were so entitled, they could not get actual physical possession from the tenants who were protected by the provisions of the relevant Bombay Rent Act. It was their case that the plaintiffs were not entitled to get actual possession of the premises in which they were inducted by the mortgagees. Defendants 2/1 to 2/7 who were the heirs of mortgagee Shivji Jetha were residing in London and New Delhi, so the personal service of summons could not be effected upon them. The summons was published in the local newspapers but none of them appeared before the court so the court proceeded ex parte against them. The trial was conducted and a preliminary decree for redemption of mortgage was passed on 2-4-1974 by the trial court. Thereafter, the decree-holder applied for final decree so the notices were issued to all the defendants. The heirs of Shivji Jetha appeared in response to that notice and filed applications before the trial court to set aside the ex parte decree on the ground that summons of the suit had not been duly served upon them. That prayer was rejected by the trial court. Thereafter, they filed civil miscellaneous appeals in the District Court. The appeals were allowed by the District Court and the ex parte decree for redemption of mortgage was set aside. The trial court was directed to proceed with the suit after permitting the concerned defendants to take part in the proceedings right after receiving their written statements. Accordingly Defendant 2/1 appeared in the suit and filed his written statement while the other defendants remained absent.

5. It was the case of Defendant 2/1 that the sisters of the plaintiffs had not been joined as parties in the suit, so the suit was bad for want of necessary parties. Moreover, as per the terms and conditions of the mortgage deed dated 20-4-1943, there was usufructuary mortgage for 20,000 koris and the remaining 10,000 koris were advanced to the mortgagor at monthly interest at the rate of half per cent. There was a condition in the mortgage deed that the mortgagor should pay principal amount as well as the interest at the time of redemption.

When the suit was filed in the year 1972, the mortgagees were entitled to recover interest on 10,000 koris for a period of 29 years. That interest would be 17,400 koris so the total mortgage amount would be Rs 47,400 which will be equivalent to Rs 15,800 and the Civil Judge had no jurisdiction to try such suit so the plaint should have been returned for presentation in the proper court. It was further alleged that the court fees paid by the plaintiffs was also not sufficient. Moreover, it was not true that the father of the plaintiffs was of weak economic condition. The grandfather of the plaintiffs was an advocate and the father of the plaintiffs was the clerk of an advocate. Plaintiff 1 was also working as an advocate at the time of the mortgage, so they knew the legal position. It was further alleged that at the relevant time the prevalent custom in Kutch State was to take mortgages of long term for 99 years and when it was permissible to take mortgage deeds with such a long term, it was also necessary to give permission for rebuilding the whole property, for better enjoyment of it. So long term mortgage and the conditions for reconstruction of the property could not amount to clogs on equity of redemption of mortgage, it was the case of the mortgagees and/or tenants. The mortgagees did not take any, it was pleaded, undue advantage and they were not present physically when the transaction took place through their power of attorney holders. If the conditions in the mortgage deed did not amount to clogs on equity of redemption, the suit would be clearly premature. It may be mentioned that Plaintiff 1 had subsequently become a Civil Judge and was ultimately the Chairman of the Tribunal so if the said terms and conditions of the mortgage were onerous and oppressive he would not have sat idle for 29 years. But he remained silent because he was aware of the custom, it was pleaded. It was alleged that the prices of immovable properties had increased tremendously, therefore, the suit had been filed with mala fide intention. It was averred that in case the court came to the conclusion that there was clog on equity of redemption and the plaintiffs were entitled to the redemption, then the interest on 10,000 koris should be awarded to the mortgagees. In the premises, it was averred that the suit should be dismissed as there was no clog on equity of redemption and the court had no jurisdiction to try the suit. The trial court then recorded additional evidence in the suit and ultimately decreed the suit on September 28, 1976. The trial court came to the conclusion that there was mortgage transaction between the father of the plaintiffs and Soni Shivji Jetha and Lalji Mulji on 20-4-1943. The trial court further came to the conclusion that the terms and conditions in the mortgage deed were harsh and oppressive, which amounted to clog on equity of redemption, so the plaintiffs were entitled to file the suit even before the expiry of the term of the mortgage. The trial court also came to the conclusion that the sisters of the plaintiffs were not necessary parties to the suit and even if they were necessary parties, a co-mortgagor was entitled to file the suit for redemption, so the suit was not bad for want of non-joinder of necessary parties. The trial court further came to the conclusion that it had jurisdiction to try the suit and held that the mortgagees were not entitled to claim interest on 10,000 koris. It was further directed that the plaintiffs were entitled to recover possession from Defendants 4 to 9 who were the tenants inducted by the mortgagees. Accordingly, a preliminary decree was passed in the suit.

6. Aggrieved thereby the mortgagees filed Regular Civil Appeal No. 149 of 1978 and the tenants filed Regular Civil Appeal No. 150 of 1978. These were disposed of by the judgment of the first appellate court. The learned Judge of the first appellate court framed the following issues:

- (1) Whether the terms and conditions in the mortgage deed dated 20-4-1943 amount to clog on equity of redemption?
- (2) Whether the decree passed is bad for want of jurisdiction with trial court?
- (3) Whether the mortgagees are entitled to get interest on 10,000 koris?
- (4) Whether the tenants are protected from the effect of redemption decree by virtue of the provisions of Bombay Rent Act?
- (5) Whether the decree passed by the trial court is legal and proper?
- (6) What order?

7. It is not necessary any longer in view of the findings made and the subsequent course of events to detain ourselves on all the issues. For the purpose of the present appeal as well as the connected appeals we are concerned with two issues, namely, issues 1 and 4 stated above, in other words, whether the terms and conditions of the mortgage deed dated 20-4-1943 amounted to clog on equity of redemption and secondly, whether the tenants are protected from the effect of redemption decree by virtue of the provisions of the Bombay Rent Act. The learned Assistant Judge in the first appeal had noted that it was not in dispute that the document, Ex. 103 dated 20-4-1943, the certified copy of which was also produced at Ex. 51 was executed by the father of the plaintiffs in favour of Kansara Soni Shivji Jetha. According to this document, an usufructuary mortgage was created on the suit property for 20,000 koris and the possession was to be delivered to the mortgagees. Over and above that a further amount of 10,000 koris was also paid to the mortgagor for which he had to pay interest at the rate of half per cent per month. The mortgage period was fixed for 99 years and after the expiry of that period, the mortgagor had to pay 30,000 koris as principal amount along with interest due on 10,000 koris. This was a registered document and it was acted upon by the parties.

8. The learned trial Judge held that the long term of 99 years for redemption coupled with other circumstances, indicated that there was clog on equity of redemption. It was argued that the long term for redemption was not necessarily a clog on equity of redemption. Certain decisions were referred to. The trial court noted that there was no quarrel with the proposition of law that long term itself could not amount to clog on equity of redemption, when the bargain otherwise was reasonable one and the mortgagee had not taken any undue or unfair advantage. But, if in a mortgage with long term of redemption, there were other circumstances to suggest that the bargain was unreasonable one and the mortgagee had taken unfair advantage, then certainly long term also will be clog on equity of redemption. It is a question to be judged in the light of the surrounding circumstances. It may be noted here that there was a condition in the mortgage deed permitting construction of structure after demolishing the existing structure, costs of which were to be paid by the mortgagor. After examining the facts and the relevant decisions, the first appellate court came to the conclusion that the terms were oppressive and harsh and there was clog on equity of redemption and the mortgagor should be freed from that bondage.

9. Shri Rajinder Sachar, Shri B.K. Mehta as well as Shri Dholakia urged on behalf of their respective clients that in former Kutch district, there was a custom to take mortgages for long term of 99 years and when the period was long, naturally the mortgagee would be required to give full authority to repair and reconstruct the mortgaged property with a view to

keep pace with new demands of changing pattern, so the condition permitting the mortgagee to reconstruct the whole premises was natural consequence of long term and that should not be treated as clog on equity of redemption. The learned Assistant Judge had rejected the similar contention made before him on behalf of the mortgagees and tenants in view of the decisions of the Gujarat High Court which were also arising out of the decisions in the suits filed in Kutch district and in those cases it was held that there was clog on equity of redemption. The learned Assistant Judge referred to another circumstance, i.e., to the condition of mortgage which indicated the oppressive nature of the term. By mortgage deed usufructuary mortgage was created for 20,000 koris only and additional mortgage of 10,000 koris was also created for which the mortgagor had to pay interest at the rate of half per cent per month. Furthermore, the mortgagor was not allowed to discharge interest liability periodically, but he had to pay the whole amount of interest at the end of 99 years at the time of redemption of the mortgage. Naturally, there would be huge accumulation of interest which for all practical probabilities in most of the cases will be an impossibility to discharge. It was held that the purpose was to ensure that the right of redemption could never be exercised. On the other hand, it was contended before the learned Assistant Judge that the transaction was bona fide because reasonable consideration was paid as mortgage money. There was no direct contact between the mortgagor and the mortgagee. There could not be any collusion. The mortgagees were abroad. The learned Assistant Judge examined the evidence of one Madhavji Shivji Soni in order to show comparable instances for reasonableness of the consideration. The learned Assistant Judge after discussing the evidence proceeded on the assumption that the consideration paid as mortgage money was reasonable and proper and, according to him, it did not make any difference if the other conditions in the mortgage deed were found to be oppressive and amounting to clog on equity of redemption.

10. Attention of the learned Assistant Judge was drawn to the fact that this was a bona fide transaction at the time when made, but subsequently, the prices of immovable properties increased so the plaintiffs had come forward to file suits after a lapse of long time. It was highlighted that Plaintiff 1 was serving as a Civil Judge and if he came to know that the transaction was oppressive, he would not have sat idle for such a long period. Reference was made to the decision of this Court in *Seth Ganga Dhar v. Shankar Lal* [AIR 1958 SC 770]. We will examine that decision in detail. The learned Assistant Judge came to the conclusion on point 1 that there was clog on equity of redemption and accordingly answered issue 1 in the affirmative.

17. Shri Sachar drew our attention to the observations of the Judicial Committee in the case of *Aziz Khan v. Duni Chand* [AIR 1918 PC 48], where it was held that even where the transaction in question was undoubtedly improvident in the absence of any evidence to show that the moneylender had unduly taken advantage of his position, it was difficult for a court of justice to give relief on grounds of simple hardship. Shri Sachar tried to urge in the facts and circumstances of the instant case that there is no evidence to lead to the conclusion that there was any undue influence. Great deal of reliance, however, by the appellants as well as the respondents was placed on the observations of this Court in *Seth Ganga Dhar v. Shankar Lal*. There, this Court observed that the rule against clog on equity of redemption embodied in Section 60 of the Transfer of Property Act empowers the court not only to relieve a mortgagor

of a bargain whereby in certain circumstances his right to redeem the mortgage is wholly taken away, but also where that right is restricted. The extent of the latter power is, however, limited by the reason that gave rise to it, namely, the unconscionable nature of the bargain, which, to a court of equity, would afford sufficient ground for relieving the mortgagor of his burden, and its exercise must, therefore, depend on whether the bargain, in the facts and circumstances of any particular case, was one imposed on the mortgagor by taking advantage of his difficult and impecunious position at the time when he borrowed the money. In that case it was held that in a suit for redemption where the mortgage deed, by two distinct and independent terms provided that the mortgage would not be redeemed for eighty-five years and that it could be redeemed only after that period and within six months thereafter, failing which the mortgagor would cease to have any claim on the mortgaged property and the mortgage deed should be deemed to be a deed of sale in favour of the mortgagee, and it was clearly evident from the facts and circumstances of the case that the bargain was quite fair and as between parties dealing with each other on equal footing. It was held that the term providing for a period of eighty-five years was not a clog on the equity of redemption and the mere length of the period could not by itself lead to an inference that the bargain was in any way oppressive or unreasonable. The term was enforceable in law and the suit for redemption filed before the expiry of the period was premature. It was further held that the term that on the failure of the mortgagor to redeem within the specified period of six months, he would lose his right to do so and the mortgage deed was to be deemed to be a deed of sale in favour of the mortgagee, was clearly a clog on the equity of redemption and as such invalid but its invalidity could not in any way affect the validity of the other term as to the period of the mortgage, that stood apart. It was explained by Sarkar, J. as the learned Chief Justice then was, that the rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. This principle was clearly established by the observations of Lindley, M.R. in *Stanley v. Wilde*, where the Master of Rolls observed as follows:

“The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that “once a mortgage always a mortgage.”

18. The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. It was further reiterated at page 515 of the Report in *Seth Ganga Dhar* case that the rule against clogs on the equity of the redemption no doubt involves that the courts have the power to relieve a party from his bargain. If he has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. But the courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. It is a power evolved by the early English Courts of Equity for a

special reason. All through the ages the reason has remained constant and the court's power is, therefore, limited by that reason. The extent of this power has, therefore, to be ascertained by having regard to its origin. It is better to refer to the observations of Northington L.C. in *Vernon v. Bethell* [(1762) 28 ER 838]. Lord Chancellor observed therein as follows:

“This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the craft may impose upon them.”

19. The same view was reiterated by Viscount Haldane L.C. in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.* [1914 AC 23], where it was observed at pages 35 and 36 of the report as follows:

“This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders.”

20. The reason justifying the court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language the court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Length of the term, according to Sarkar, J. in the aforesaid decision, was not by itself oppressive and could not operate as a clog on the equity of redemption. There was a term in the mortgage deed that the mortgagees could spend any amount on repairs and those expenses would be paid, according to the account produced by

the mortgagees. All that it means was that in claiming moneys on account of repairs and construction the mortgagees had to show from their accounts that they had spent these moneys. This Court on that basis held that the clause which provided that the mortgage had to be redeemed within the specified period of six months was bad. The principle, however, is that if it was not an unconscionable bargain and it did not in effect deprive the mortgagor of his right to redeem the mortgage or so to curtail his right to redeem that it has become illusory and non-existent, then there was no clog on equity of redemption. It has to be borne in mind that the English authorities relied upon by Sarkar, J. and the principles propounded by this Court in the case of *Seth Ganga Dhar* case were in the background of a sedate and fixed state of affairs. The spiral and escalation of prices of the immovable properties was not then there. Today, perhaps, a different conspectus would be required to consider the right to redeem the property after considerable length of time pegging the price to a small amount of money, the value of which is fast changing.

21. The rights and liabilities of the mortgagor are controlled by the provisions of Section 60 of the Transfer of Property Act, 1882. The clog on redemption has been noted in *Mulla's Transfer of Property Act*, 7th edn., page 401 that a mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at due date. Any provision inserted to prevent, evade or hamper redemption is void. That is implied in the maxim "once a mortgage always a mortgage". Collins, M.R. in *Jarrah Timber & Wood Paving Corporation v. Samuel* [(1903) 2 Ch 1] at page 7 observed that it is the right of a mortgagor on redemption, by reason of the very nature of a mortgage to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage.

22. The doctrine "clog on the equity of redemption" is a rule of justice, equity and good conscience. It must be adopted in each case to the reality of the situation and the individuality of the transaction. We must take note of the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. Therefore, in our opinion, in view of the evidence it is not possible to hold that there was no clog on the equity of redemption in these cases.

24. Our attention was drawn to the observations of the Allahabad High Court in *Chhedilal v. Babu Nandan* [AIR 1944 All 204] where it was held that the provision inserted to prevent redemption on payment or performance of the debt or obligation for which security was given, was a clog on equity of redemption. Condition in mortgage was in that case that if mortgagee constructed new building by demolition of mortgaged property which was kachcha structure, mortgagor would pay cost of construction at the time of redemption. Stipulation in circumstances of the case, it was held, did not amount to clog on equity of redemption. It was argued before us by the mortgagees that the provision for the payment towards cost and expenses of repairs and construction did not amount to a clog on the equity of redemption because the repairs and construction were to be effectuated to keep the property in good condition. In the aforesaid decision Verma, J. at page 207 of the report observed that in the case before the court it was not pleaded that any pressure and undue influence had been exercised upon the mortgagors. Verma, J. referred to the observations of the Viscount Haldane L.C. in *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co.* and

Lindley M.R. in *Santley v. Wilde*. Sir Tej Bahadur Sapru argued before Verma, J. that it is not his contention that the mortgagee in this case tried to gain a collateral advantage. His argument was that an onerous term has been incorporated in the deed which placed such a burden on the mortgagor as to make it impossible for him to redeem. There is a freedom of contract between the mortgagor and the mortgagee as observed by Verma, J. at page 207 of the report. We must, however, observe that we live in a changed time. Freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform itself to the social awareness. Poverty should not be unduly permitted to curtail one's right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad. Whether it does or does not, must, however, depend upon the facts and the circumstances of each case.

25. Reference was also made to the case of *Bhika v. Sheikh Amir* [AIR 1923 Nag 60] where there was no provision under which power was given to the executant of the deed to pay off the amount which was the consideration for the deed, and no accounts were to be rendered or required. It was held that relief against an agreement forming a clog on the equity of redemption can only be obtained if it was challenged within a reasonable time. It was an equitable relief which cannot be granted as a matter of course. In that decision Sri Vivian Bose, as the learned counsel appearing for the appellant, unsuccessfully sought to obtain relief against an agreement containing a clog on the equity of redemption.

26. Whether in the facts and the circumstances of these cases, the mortgage transaction amounted to clog on the equity of redemption, is a mixed question of law and fact. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unjust and inequitable. The principles of English law, as we have noticed from the decisions referred to hereinbefore which have been accepted by this Court in this country, looks with disfavour at clogs on the equity of redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position.

27. It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. The law does not countenance it. Bearing the aforesaid background in mind, each case has to be judged and decided in its own perspective. As has been observed by this Court that long term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom, if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage to

manage as a matter of prudent management, these factors must be co-related to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption.

28. These principles have been recognised by this Court in *Ganga Dhar v. Shankar Lal*. It has also to be borne in mind that long term for redemption in respect of immovable properties was prevalent at a time when things and the society were, more or less, in a static condition. We live in changing circumstances. Mortgage is a security of loan. It is an axiomatic principle of life and law that necessitous men are not free men. A mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligation for which it is given. The security must, therefore, be redeemable on the payment or discharge of such debt or obligation. Any provision to the contrary, notwithstanding, is a clog or fetter on the equity of redemption and, hence, bad and void. "Once a mortgage must always remain a mortgage", and must not be transformed into a conveyance or deprivation of the right over the property.

29. This is the English law based on principles of equity. This is the Indian law based on justice, equity and good conscience. We reiterate that position. Though, long term by itself as the period for redemption is not necessarily a clog on equity but in the changing circumstances of inflation and phenomenal increase in the prices of real estates, in this age of population explosion and consciousness and need for habitat, long term, very long term, taken with other relevant factors, would create a presumption that it is a clog on equity of redemption. If that is the position then keeping in view the financial and economic conditions of the mortgagor, the clause obliging the payment of interest even in case of usufructuary mortgage not periodically but at the time of ultimate redemption imposing a burden on the mortgagor to redeem, the clauses permitting construction and reconstruction of the building in this inflationary age and debiting the mortgagor with an obligation to pay for the same as an obligation for redemption, would amount to clog on equity.

30. Section 60 of the Transfer of Property Act, 1882, conferred on the mortgagor the right of redemption. This is a statutory right. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists.

31. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of its background of the particular case. The doctrine of clog on equity of redemption has to be moulded in the modern conditions. See *Mulla's Transfer of Property Act*, 17th edn., page 402. Law does not favour any clog on equity of redemption.

32. It is a settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything to the contrary in the statute, court must take cognisance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged.

33. In the facts and the circumstances and in view of the long period for redemption, the provision for interest @ ½ per cent per annum payable on the principal amount at the end of

the long period, the clause regarding the repairs etc., and the mortgagor's financial condition, all these suggest that there was clog on equity. The submissions made by Mr Sachar and Mr Mehta are, therefore, unacceptable.

34. In that view of the matter, we are of the opinion that the decision of the High Court as well as the courts below that there existed clog on the equity of redemption in case of these mortgages, is correct and proper, and we hold so accordingly.

35. Before we dispose of the contentions on the second aspect, we must deal with some of the decisions of the Gujarat High Court to which reference had been made and some of which was also referred before us. We have noticed the decision of the Gujarat High Court in *Khatubai Nathu Sumra v. Raj Mulji Nanji*. In *Maganlal Chhotalal Chhatrapati v. Bhalchandra Chhaganlal Shah* [(1974) 15 Guj LR 193], P.D. Desai, J. as the learned Chief Justice then was, held that the doctrine of clog on the equity of redemption means that no contract between a mortgagor and mortgagee made at the time of the mortgage and as a part of the mortgage transaction or, in other words, as a part of the loan, would be valid if it in substance and effect prevents the mortgagor from getting back his property on payment of what is due on his security. Any such bargain which has that effect is invalid. The learned Judge reiterated that whether in a particular case long term amounted to a clog on the equity of redemption had to be decided on the evidence on record which brings out the attending circumstances or might arise by necessary implication on a combined reading of all the terms of the mortgage. The learned Judge found that this long term of lease along with the cost of repairing or reconstruction to be paid at the time of redemption by the mortgagor indicated that there was clog on equity of redemption. The learned Judge referred to certain observations of Mr Justice Macklin of the Bombay High Court where Justice Macklin had observed that anything which does have the appearance of clogging redemption must be examined critically, and that if the conditions in the mortgage taken as a whole and added together do create unnecessary difficulties in the way of redemption it seems that is a greater or less clog upon the equity of redemption within the ordinary meaning of the term. In our opinion, such observations will apply with greater force in the present inflationary market. The other decision to which reference may be made is the decision of the Gujarat High Court in *Soni Motiben v. Hiralal Lakhamshi* [AIR 1981 Guj 120]. This also reiterates the same principle. In *Vadilal Chhaganlal Soni v. Gokaldas Mansukh* [AIR 1953 Bom 408] also, the same principle was reiterated. In that case, it was held by Gajendragadkar, J., as the learned Chief Justice then was, that the agreement between the mortgagor and mortgagee was that the mortgagor was to redeem the mortgage 99 years after its execution and the mortgagee was given full authority to build any structure on the plot mortgaged after spending any amount he liked. It was held that the two terms of the mortgage were so unreasonable and oppressive that these amounted to clog on the equity of redemption. Similar was the position in the case of *Sarjug Mahto v. Smt. Devrup Devi* [AIR 1963 Pat 114], where also the mortgage was for 99 years. In *Chhedi Lal v. Babu Nandah* [AIR 1944 All 204], the court reiterated that freedom of contract unless it is vitiated by undue influence or pressure of poverty should be given a free play. In the inflationary world, long term for redemption would prima facie raise a presumption of clog on the equity of redemption. See also the observations in *Rashbehary Ghose's Law of Mortgage* 6th edn. pages 227 and 228.

36. Bearing the aforesaid principles in mind, we must analyse the facts involved in these appeals. It has been noticed in S.L.P. (Civil) No. 8219 of 1982 that the High Court of Gujarat by its order impugned had dismissed the second appeal. The High Court had merely observed in dismissing the second appeal that the first appellate court had followed the decision of the Gujarat High Court in *Khatubaj Nathu Sumra v. Rajgo Mulji Nanji*. We have noted the salient features of the said decision. The High Court, therefore, found no ground to interfere with the decision of the first appellate court and accordingly dismissed the second appeal. The first appellate court by its judgment disposed of Civil Regular Appeal No. 149 of 1978 and another civil appeal which was the appeal by the tenant was also disposed of by the said judgment. The learned Judge of the appellate court had referred to the ratio of the decision in *Ganga Dhar v. Shankar Lal*. The learned Judge bearing in mind the principle of the aforesaid decision and the relevant clause of Ex. 103 came to the conclusion that the clauses amounted to clog on the equity of redemption in the facts of this case. Shri Sachar tried to urge before us that on the evidence and the facts in this case having regard to the position of the parties, the transaction did not amount to clog on the equity of redemption. It was emphasised by the first appellate court that the fact that the son of the mortgagor subsequently became Civil Judge would not affect the position because what was relevant was the financial condition at the time of the transaction. We have further to bear in mind that it has come out in the evidence that the father of the plaintiff was residing in the suit property at the relevant time and there was no other residential house except the suit property. The first appellate court, therefore, emphasised in our opinion rightly that if there was no pressure from the creditor, nobody would like to mortgage the only house which is sole abode on the earth.

37. In that view of the matter and in view of the position in law, we are of the opinion that the first appellate Court was right in the view it took.

38. The first appellate Court referred to the decision of *Kunjbiharilal v. Pandit Prag Narayan* [AIR 1922 Oudh 283]. In that case there was a condition that the mortgagor should pay interest along with the principal amount at the time of redemption after 50 years. It was held that the intention was to see that right of redemption could never be exercised. If the condition was such which would result in making redemption rather difficult, if not impossible, it would be a clog on the equity of redemption and could not be enforced. Similar was the position of the Allahabad High Court in *Rajai Singh v. Randhir Singh* [AIR 1925 All 643]. There the term fixed for redemption was 96 years and there was a stipulation for payment of interest along with principal not periodically but only at the time of redemption. In the instant case before us the mortgagor was required to pay the whole amount of interest at the end of 99 years which will practically make the redemption impossible. Applying the well-settled principles which will be applicable to the facts of this case in determining whether there was in fact a clog on the equity of redemption, we are of the opinion that the first appellate Court was right in holding that there was a clog on equity of redemption.

52. In the premises, the appeals must fail and are dismissed. Civil Miscellaneous Petition in C.A. No. 397 of 1980 must also fail and is dismissed.

* * * * *

Shivdev Singh v. Sucha Singh

(2000) 4 SCC 326 : AIR 2000 SC 1935

R.P. SETHI, J. - 2. Claiming to be the owner of the disputed property being land measuring 23 kanals 2 marlas situate in Village Sansra, Tehsil Ajnala, Punjab, the respondent-plaintiff filed a suit for possession by way of redemption against the appellants in the Court of Additional Senior Sub-Judge, Ajnala. The suit was decreed by the trial court with a direction for delivery of possession by way of redemption on paying/depositing the mortgage money of Rs 7000 minus the cost of the decree.

3. It is contended on behalf of the appellants that the clause prescribing the period of mortgage did not constitute a clog on the equity of redemption and that the suit filed before the expiry of the stipulated time was premature in terms of Section 60 of the Transfer of Property Act. In support of their contentions the appellants have relied upon the judgment of this Court in *Ganga Dhar v. Shankar Lal* [AIR 1958 SC 770] and distinguished the judgment relied upon by the High Court in the case of *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit* [AIR 1989 SC 436].

4. In order to appreciate the rival contentions, it is necessary to take note of the facts of the case which have given rise to the filing of the present appeal. The disputed property was owned by one Prakash Singh who had mortgaged the same in favour of Smt Basant Kaur for a sum of Rs 7000 vide mortgage deed dated 19-3-1968. The said Smt Basant Kaur died whereafter the appellants herein stepped into her shoes qua the suit property and, according to the plaintiffs became mortgagees in possession of the said land. The said Shri Prakash Singh, the original owner, sold the land measuring 19 kanals 2 marlas out of the mortgaged property in favour of the respondent Sucha Singh vide registered sale deed dated 25-3-1987 for a valid consideration by which the mortgage money of Rs 7000 was kept with the respondent-plaintiff as security (*amanat*) to be paid to the appellants. It was further pleaded by the plaintiff that at the time of the original mortgage deed dated 19-3-1968 the said Shri Prakash Singh was financially tight and allegedly taking undue advantage of his poor financial condition and helplessness the appellants got incorporated a term in the mortgage deed, to the effect that the mortgage was for a period of 99 years which constituted a clog on the equity of redemption and that the appellants had been enjoying the usufructs of the mortgage for more than 20 years before the date of the filing of the suit. Despite the fact that the respondent-plaintiff had purchased only 19 kanals 2 marlas out of the mortgaged land, he offered the whole of the mortgage money to the appellant-defendants realising that partial redemption was not permissible. The appellants were stated to have refused to deliver possession which necessitated the filing of the suit.

5. Prakash Singh who was impleaded as Defendant 3 was proceeded ex parte. The appellants, though admitted that the disputed land under mortgage was in their possession on the basis of a mortgage for a sum of Rs 7000 since the year 1968, yet contended that the plaintiffs had no right to get the suit land redeemed before the expiry of mortgage period of 99 years. The suit was stated to be premature and liable to be dismissed.

6. On the basis of the pleadings of the parties, the trial court framed the following issues:

“1. Whether the disputed land is liable to be redeemed in favour of the plaintiff as claimed through this suit? OPP

2. Whether the period of 99 years of mortgage is a clog on the equity of redemption? OPP

3. Whether the plaintiff has no locus standi to file this suit? OPD

4. Relief?”

The trial court while deciding Issues 1 and 2 held:

“The clause in the mortgage deed providing for the mortgage of the land for a period of 99 years constitutes a clog on the equity of redemption and as such is illegal and void and the same cannot be allowed to stand in the way of the plaintiff to get the suit land redeemed or acquire its possession. The statutory right of redemption cannot be fettered by any condition which impedes or prevents the redemption clause.”

7. The respondent-plaintiff was held to have proved that he was entitled to get the whole of the disputed land redeemed by payment of the mortgage money of Rs. 7000.00 to the appellant-defendants. In view of positive findings on Issues 1 and 2 in favour of the plaintiffs, Issue 3 was decided against the defendants and the suit decreed as noticed earlier. The appellate court also decided on facts that the plaintiff after the purchase of the land, the subject-matter of the suit, had become mortgagor and was entitled to redeem the same prior to the period of 99 years fixed in the mortgage deed. The clog or fetter on redemption imposed in the mortgage deed was held to be void which did not prevent the plaintiffs to seek redemption of the mortgaged property prior to the aforesaid period.

8. Section 60 of the Transfer of Property Act provides that at any time after the money has become due, the mortgagor has a right, on payment or tender, at a proper time and place of the mortgage-money to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such a right of the mortgagor is called, in English law, the equity of redemption. The mortgagor being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction.

9. This Court in *Jayasingh Dnyanu Mhoprekar v. Krishna Babaji Patil* [AIR 1985 SC 1646] held:

“It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be

dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely 'Once a mortgage, always a mortgage'."

10. Any provision incorporated in the mortgage deed to prevent or hamper the redemption would thus be void. A mortgage cannot be made irredeemable and the right of redemption not an (*sic*) illusory. This Court in **Ganga Dhar v. Shankar Lal** [AIR 1968 SC 770] held:

"The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley, M.R. in **Santley v. Wilde** [(1899) 2 Ch 474] in these words:

'The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that 'once a mortgage always a mortgage.'

The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for 'once a mortgage always a mortgage' and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act. So it was said in **Mohd. Sher Kahn v. Seth Swami Dayal** [AIR 1992 PC 17at p.19].

An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect."

It was observed that the rule against a clog on the equity of redemption empowered the courts to relieve a party from his bargain. If a person has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. After referring to the

judgments in *Vernon v. Bethell* [(1762) 2 Eden 110, 113] and *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd* [1914 AC 25, 35 & 36], this Court held:

“The reason then justifying the court’s power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language the court’s jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.”

The Court further held that the length of term by itself would not lead to the conclusion that it was an oppressive term. Restricting their findings on the facts of the case, the Court observed:

“It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor.”

11. In *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit* [AIR 1989 SC 436] this Court held that:

“Freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform itself to the social awareness. Poverty should not be unduly permitted to curtail one’s right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad. Whether it does or does not, must, however, depend upon the facts and the circumstances of each case.”

The doctrine “clog on the equity of redemption” was held to be a rule of justice, equity and good conscience. It must be adopted to the reality of situation and the individuality of transaction. The court should take note of the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. After referring to various judgments of the High Courts in the country this Court held:

“26. Whether in the facts and the circumstances of these cases, the mortgage transaction amounted to clog on the equity of redemption, is a mixed question of law and fact. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unjust and unequitable. The principles of English law, as we have noticed from the decision referred to hereinbefore which have been accepted by this Court in this country, look with

disfavour at clogs on the equity of redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position.

27. It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. The law does not countenance it. Bearing the aforesaid background in mind, each case has to be judged and decided in its own perspective. As has been observed by this Court that long term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-à-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom, if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage to manage as a matter of prudent management, these factors must be correlated to each other and viewed in a comprehensive _conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption.”

12. It was further held that Section 60 of the Transfer of Property Act confers on the mortgagor the right of redemption which is a statutory right. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of the background of a particular case. The doctrine of clog on the equity of redemption has to be moulded in modern conditions. In this regard the Court held:

“31. It is a settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything to the contrary in the statute, court must take cognisance of that fact and act accordingly. In the context of fast-changing circumstances and economic stability, long term for redemption makes a mortgage an illusory mortgage, though not decisive. It should *prima facie* be an indication as to how clogs on equity of redemption should be judged.”

13. In the present case all the courts below on facts held that the mortgage deed being for a period of 99 years was a clog on the equity of redemption. Such findings were returned keeping in view the facts and circumstances of the case and the financial position under which the mortgagor Shri Prakash Singh was placed at the time of execution of the mortgage deed on 19-3-1968. The appellants were found to be in an advantageous position qua the

mortgagor. They were also found to be deriving the usufructs of the mortgaged land for a period of over 26 years at the time of filing of the suit on payment of a meagre sum of Rs 7000 only to the mortgagor. The findings of facts returned by the courts below do not require any interference particularly when the learned counsel appearing for the appellants has not contended that such findings were perverse or uncalled for or against the evidence. There is no merit in this appeal which is accordingly dismissed.

* * * * *

Sangar Gagu Dhula v. Shah Laxmiben Tejshi

AIR 2001 Guj 329

Y. B. BHATT J. – 2. The original plaintiffs are heirs of the mortgagor who had mortgaged his property, being a residential house with appurtenant land, with the defendant-mortgagee. The consideration for the same was taken by the mortgagor in the sum of Rs. 11000/-. The mortgage deed specifically contemplated that this consideration will be repayable by the mortgagor to the mortgagee on the expiry of 99 years from the date of the transaction (the deed of mortgage), and on the consideration being repaid, the mortgagor shall be entitled to redemption of the property.

3. The mortgage deed was executed on 15th December 1914. However, before the expiry of the stipulated period of 99 years, the heirs of the mortgagor sought to redeem the property by filing a suit on 5th February 1974. The redemption was sought before the expiry of the stipulated period on the specific averment and contention that the period of 99 years before which redemption could not be enforced was an oppressive term and would in law amount to “a clog on the equity of redemption”.

4. It also requires to be noted that under the terms of the mortgage, the mortgagee entered into possession of the property, coupled with the right to reconstruct the same or to make further construction.

5. The trial Court, after considering the evidentiary material on record, found that the relevant term in the mortgage deed postponing the right of redemption to the expiry of 99 years from the date of the mortgage is oppressive qua the mortgagor and amounts to a clog on the equity of redemption and therefore the clog requires to be lifted. The trial Court, however, found that the suit was barred by limitation.

6. In the appeal filed by the plaintiff-mortgagor the lower Appellate Court upheld the findings of fact on the appreciation of the evidentiary material on record also found that the oppressive clause amounted to a clog on the equity of redemption which requires to be lifted and also confirmed the finding of the trial Court that the suit was filed beyond limitation. The appeal was, therefore, dismissed. The lower appellate Court came to this conclusion on the basis that the limitation for such a suit under Art. 61(a) of the Limitation Act would commence to run from the date of the document, since the oppressive term is “void”. The lower Appellate Court therefore found that the suit was filed beyond 30 years from the date of the documents and was therefore barred by limitation.

7. The plaintiff-mortgagor thereupon filed a second appeal under S. 100, CPC in the High Court. During the course of hearing of the Second Appeal before the learned Single Judge of this Court, a question arose as to whether the oppressive term would be “voidable” or whether it would be “void ab initio”, even if the finding that the oppressive term in the mortgage deed amounts to a clog on the equity of redemption is accepted.

7.1 The learned Single Judge hearing the appeal was of the opinion that there is a conflict of opinion between two decisions of this High Court, and that this conflict requires to be resolved by a Larger Bench. It is under these circumstances that this appeal has been placed

before this Larger Bench for consideration of the following questions framed by the learned Single Judge :

(1) Whether a condition in a mortgage deed which is found by the Court to be a clog on the equity of redemption is void ab initio or merely voidable at the instance of the suffering party i.e. the mortgagor?

(2) When a mortgage deed stipulates a condition that the mortgage is irredeemable for a period of 99 years or any such long period, whether the starting point of the period of limitation prescribed by Art. 61(a) of the Limitation Act, 1963 for filing a suit for redemption would be the date of execution of the mortgage deed or the date of declaration by the Court that such a condition was a clog on the equity of redemption?

(3) Whether a suit for a declaration that any such condition is void or voidable (with or without a prayer for redemption of mortgage) filed after expiry of the period of 30 years from the date of execution of the mortgage deed would be time barred under S. 61(a) of the Limitation Act, 1963?

It is under these circumstances and in respect of the aforesaid questions framed for our consideration, that this Bench is required to apply our minds to the resolution of the controversy. In this context it would be both relevant and pertinent, in order to retain focus on the root of the controversy, to refer to Art. 61(a) of the Limitation Act, 1963, which reads as under:

<i>Description of the suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
61. By a mortgagor- (a) to redeem or recover possession of immovable property mortgaged	Thirty years	When the right to redeem or to recover possession accrues

8. It is also relevant and pertinent to retain focus on the concurrent findings of fact recorded by both the Courts below, that the offending clause complained of by the plaintiff mortgagor has in fact been found to be oppressive to the mortgagor, that it amounts to a clog on the equity of redemption, and that the same requires to be lifted. Since this is a question of fact and law on which concurrent findings of fact have been recorded, I am required to address only the legal consequences flowing from this finding, without questioning the merits of this finding.

9. Without elaborating at length I may merely summarise the concept of what amounts to “a clog on the equity of redemption”, as laid down by Courts of law formerly under English Law, and subsequently followed by Courts in India.

10. The doctrine of the equity of redemption flows from the early development of case law on the subject by the Courts in England to the effect that although a transaction of a mortgage pertains to immovable property, it is also a contract between the parties relating to such property. Since it is a transaction in the nature of a contract, it is not beyond the scope and ambit of the law pertaining to contracts (in India this refers to the Contract Act.).

Normally Courts would bind each party and make each of them responsible for the mutual rights and obligations created by such a contract voluntarily entered into by the parties. However, the Courts have always refused to recognize or enforce contracts which are unconscionable, opposed to public policy, immoral contracts, etc. A transaction of a mortgage has always been recognized by Courts under the principles “once a mortgage always a mortgage”. A mortgagor’s right to redeem the property, the subject of the mortgage, has been recognized as fundamental to the transaction of a mortgage. If the right to redeem the property is denied to the mortgagor, the same would amount to usurpation of the title by the mortgagee, which would result in the transgression of the intention of the mortgagor and would therefore tend to frustrate the transaction etc. The Courts have therefore taken a view that the denial of a right to redeem the property, or delaying the exercise of this right to redeem by an unconscionable period, or creating other contractual barriers against the exercise of the right to redeem, is not acceptable to the Courts in equity. The Courts have therefore struck down, have refused to recognise or have refused to enforce such covenants.

10.1 It is in the context of such oppressive covenants that I am required to examine the question, as referred to this Bench, as “voidable” or “void ab initio”.

11. Again without dilating at length I may merely summarise the case law on what amounts to “a clog on the equity of redemption”. It is well settled law that what precisely amounts to a clog is a mixed question of fact and law. Whether a particular clause alleged to be offending against the doctrine amounts to a clog or not, is not a question that can be answered without examining the peculiar facts and circumstances attendant and appurtenant to the transaction itself. This examination can only be accorded upon the facts and circumstances established by appropriate and acceptable evidence on record.

11.1 Merely because the mortgagor’s right to redeem is delayed or postponed by a long period of time would not ipso facto amount to a clog. The material aspect which requires emphasis at this stage is that relief from the specific terms of the mortgage deed (although alleged to be oppressive to the mortgagor and amounting to a clog) is not granted merely for the asking, or merely by resorting to the overriding principles of equity, but only when the inequity of the particular clause of the contract is actually brought home and established by facts and evidence.

12. In the aforesaid context, when I shift my attention to the scope and ambit of Art. 61(a) of the Limitation Act, I must take note of the fact that the period of limitation commences to run from that point of time “when the right to redeem or to recover possession accrues”.

12.1 For all practical purposes and particularly on the facts of the present case, the right to recover possession is both incidental and consequential to the rights to redeem the property. It is only when the right to redeem accrues to the mortgagor that the mortgagor also acquires the right to recover possession. In the premises therefore, I may retain focus on the prime question, as to when does the right to redeem accrue to the mortgagor?

13. Reverting to the specific controversy placed before us for resolution, the contesting parties in turn contend that the offending clog is “void ab initio” and “voidable”. Learned counsel for the mortgagor and mortgagee have referred to various decisions in support of their respective contentions. Obviously, learned counsel for the mortgagor submits that the

offending clause is merely “voidable”, as against which learned counsel for the mortgagee submits that it is “void ab initio”. It is further submitted on behalf of the mortgagee that if it is void ab initio, it is as though the offending clause never existed or never had any place in the mortgage deed at all, and that therefore the right to redeem would commence on the day of the execution of the document itself. If that is so, the period of limitation would expire 30 years from the date of the document itself. As against this, the mortgagor would submit that the actual term in the mortgage deed would confer on him a right to redeem only after the stipulated period has expired viz. 99 years. However, if the offending term is found on facts to be a “clog on the equity of redemption” and therefore the clog is lifted, it is only then that the right to redeem the property accrues to the mortgagor and that therefore the limitation would commence only from the date when the clog is lifted, by an appropriate finding or declaration by the Court.

14. With a view to resolve this controversy, I would adopt different perspectives in the matter. I would also examine the consequences flowing from the acceptance of either view canvassed before this Bench.

15. On the plain reasoning presented by the mortgagor, it would appear to be obvious that the offending clause postpones the mortgagor’s right to redeem for 99 years. It is only when the mortgagor desires to redeem the property prior to 99 years that he approaches the Court. The mortgagor is conscious of the fact that by contract, he is a party to the postponement of the right to redeem for 99 years. In order to escape from this clause on the ground that it is oppressive and unconscionable, he satisfies the Court by leading appropriate and credible evidence, and satisfies the Court that the oppressive clause amounts to a clog. It is only when the Court finds on facts that this is a clog, that the Court strikes down the offending clause and thereby lifts the clog. To my mind it is then and only then, can the mortgagor seek redemption of the property. In other words, it is only when the offending clause is struck down by the Court, that the right to redeem the property accrues in favour of the mortgagor. It is also pertinent to note that the plaintiff does not acquire a right to redeem the property merely on the plea or averment that the offending clause is voidable. He has to establish the same on facts. It is only on the establishment of such facts that the Court would find that the oppressive clause is a clog on the equity of redemption and consequently lift or set aside such a clog. It can only be this judicial act of the Court which confers on the mortgagor a right to redeem the property. In my opinion therefore the period of limitation would commence only from the date of such declaration. Thus, in a suit filed by the mortgagor for the composite purpose of lifting the clog as also for redemption, it could not possibly be said that the suit is beyond limitation.

16. On the other hand, in case the contention of the mortgagee is to be accepted, I may examine the consequences and impact of such a finding.

17. If the offending clause is regarded to be “void ab initio”, and regarded to be non-existent from the very beginning, and the mortgage document be regarded to be free from all stipulations as to when the property could be redeemed, it would *prime facie* appear that the right to redeem would accrue from the day of the mortgage itself. If this was so, the period of limitation would commence from the day of the execution of the mortgage deed itself. However, if such a view were to be accepted, it would amount to conferring upon the plaintiff

a retrospective cause of action, which is neither pleaded nor urged by the plaintiff, and on the basis of which no relief was sought by the plaintiff. The conferment of such a retrospective cause of action is to my mind, contrary to all jurisdictional principles, and even contrary to the principles of interpretation of statutory intent.

17. It requires to be noted that it is only this conferment by the Court of a retrospective cause of action that causes the limitation to start running, and this suit to be labelled as time-barred.

18. Another consequence of such a view would be that on the one hand, the Court frees the mortgagor from an oppressive covenant and on the other hand dismisses the suit on the ground of limitation.

19. Another consequence of the acceptance of such a view would be that a mortgagor who chooses to suffer by accepting the oppressive clause retains his right to redemption (albeit exercisable after the expiry of that term), but a mortgagor who chooses to challenge the restrictive term effectively loses his right to redemption, and consequently loses title to the property as well. This offends the principle of “once a mortgage always a mortgage”.

20. Another consequence that follows is that the mortgagor who chooses to suffer the oppressive term would only postpone the redemption for the stipulated period, whereas the mortgagor who succeeds in his protest against the offending term, loses his right of redemption for ever.

21. The fundamental principles underlying the Law of Limitation, as accepted by judicial interpretation over decades, is that the Court would give relief to those plaintiffs who are vigilant in the exercise of their rights, but would refuse relief to those plaintiffs who are indolent or indifferent in the timely exercise of their rights. In case the view canvassed by the mortgagee is accepted, the consequence would be that the mortgagor who prefers or chooses to sleep over his right to challenge the offending clause (by accepting the restrictions thereof) would be entitled to redeem the property on the expiry of the stipulated period; on the other hand the vigilant and assertive mortgagor who approaches the Court with a view to strike down the offending clause, and further succeeds in this attempt, ultimately loses for ever his right of redemption. Surely, this cannot be the legislative intent behind Art. 61(a).

22. Another perspective may also be brought to bear on the controversy, I may consider a hypothetical case where a mortgagor sues only for a declaration that the offending clause is a clog on the equity of redemption, but does not seek in the same suit the redemption of the mortgage. Let us assume for the sake of argument that such a suit is not dismissed only on the ground that a declaratory relief cannot be granted without a consequential relief, or that Order 2 Rule 2 would be a bar to a subsequent suit for redemption. In such a case, if the mortgagor succeeds on facts and establishes that the offending clause amounts to a clog on the equity of redemption, it is then and only then, could it be urged against the mortgagor that the period of limitation commences from the date of such a declaration, since it is this declaration/decreed which confers on the mortgagor a right to redeem the property.

24. Learned counsel for the mortgagor relies upon a decision of the learned single Judge of this Court in the case of **Rajgor Bhanji Mulji v. Sonbai** [(1993) 2 Guj LH 286]. The view expressed therein in unequivocal terms is to the effect that the offending clause, postponing

the mortgagor's right to redeem the property for an unconscionable period (coupled with other necessary and relevant facts) is merely voidable and not void ab initio. This decision specifically finds that the right to redeem the mortgaged property and to seek possession would accrue in favour of the mortgagor only when the clog on equity of redemption is removed. Until the embargo is lifted the right to redeem the mortgaged property or to seek its possession would not accrue in favour of the mortgagor. The starting point of limitation in that case would be the date on which the clog on equity of redemption is lifted. To hold otherwise would tantamount to violating the principle behind grant of equitable relief and it would operate against the principles of equity, justice and good conscience.

26. Learned counsel for the mortgagee, however, placed strong reliance on another decision of a single Judge of this Court in the case of *Soni Motiben v. M/s. Hiralal Lakhamsi* [AIR 1981 Gujarat 120]. This decision, I find, is mainly concerned with the interpretation of S. 60 of the Transfer of Property Act, deals with the principles of what amounts to a clog on the equity of redemption, and that an unconscionable term must be held as a clog on the equity of redemption. It is only incidentally that the decision holds that such a clog is void. In my opinion, when the learned Judge referred to such a clog as "void ab initio" this was a mere label attached to the offending clause with a view to establish that the same requires to be struck down. The reference to such a clog being "ab initio null and void and non est" was not with a view to differentiate between "void ab initio" and "voidable". Furthermore, the phrase "void ab initio" has not been used in the aforesaid decision in contra-distinction of the phrase "voidable". It is further found that the entire reference to the offending clause as being void ab initio is merely in the context of the discussion as to what amounts to a clog, and not in the context of the question of limitation. Reliance has been placed by learned counsel for the mortgagee on certain observations in the said decision to the effect that once the fact is established (that the offending term amounts to a clog), "the term becomes non-existence from the very inception". In short, such observations appear to have been made in the aforesaid decision only with a view to demonstrate that any such or similar terms found oppressive by the Court, on facts and evidence, cannot be held against the mortgagor and his right to redeem the property, and consequently the clog is required to be lifted. However, this decision does not in any manner lay down the proposition propounded by the mortgagee before us, that since the offending clause is non est, the right to redeem the property would accrue to the mortgagor on the date of the mortgage itself and that the limitation would commence from the day.

27. Learned counsel for the mortgagee heavily relied upon a decision of a single Judge of the Madras High Court in the case of *Ramasubramania Mudaliar v. Soorianarayana Iyer* [AIR 1977 Mad. 297]. No doubt, this decision clearly lays down that once an offending term is held to be invalid as a clog on redemption, the right to sue for redemption accrues not from the date when the term was held as invalid, but from the date of the mortgage itself. With all due respect to the learned single Judge of the Madras High Court. I am unable to agree with the line of reasoning adopted in the said decision, particularly in the light of the discussion in the earlier part of the present opinion, and the detailed reasons assigned therefor,

29. Learned counsel for the mortgagee also sought to rely upon a decision of the Supreme Court in the case of *Gangadhar v. Shankar Lal* [AIR 1958 SC 770]. In the said decision the

Supreme Court has discussed the principle of equity of redemption, and what amounts to a clog on the equity of redemption. After discussing the basic principles (which are otherwise well settled and discussed hereinabove), the Supreme Court in this decision held that the particular clause complained of, whereby the mortgage could be redeemed only within six months from the stipulated date and not thereafter was in fact and law unconscionable, held to be invalid as a clog and therefore ignored. However, in the peculiar facts and circumstances of that case, it was found that the stipulated date for redemption viz. Expiry of 85 years from the mortgage was not a clog on the equity of redemption. Therefore this particular stipulation that the mortgagor could only obtain redemption on the expiry of 85 years from the date of mortgage was enforceable against the mortgagee, and consequently on the facts of the case the suit filed for an earlier redemption before the expiry of 85 years was found to be premature and therefore liable to be dismissed. I do not find any proposition in this decision which would be of assistance to the mortgagee in the context of the present controversy.

31. Learned counsel for the mortgagee also sought to place reliance upon a decision of the Supreme Court in the case of *Pomal v. Vrajlal* [AIR 1989 SC 436]. This decision also examines the question of a clog on the equity of redemption in the context of the doctrine of justice, equity and good conscience. Specific reliance was placed on the observations made in paragraphs 21 and 25 of the said decision. These paragraphs deal only with the facts of the case before the Supreme Court, wherein the Supreme Court found on the basis of the evidence on record that it is not possible to hold that there was no clog on the equity of redemption. It can only be noted that this decision does not in any manner deal with the so-called distinction between void and voidable, neither does it deal with its effect on the question of limitation set out by Art. 61(a) of the Act.

32. Learned counsel for the mortgagee also sought to place reliance upon a decision of the Supreme Court in the case of *Shivdev Singh v. Sucha Singh* [AIR 2000 SC 1935]. Once again it is found that this decision only discusses the principles pertaining to the right of redemption, clauses which prevent or hamper redemption, clauses alleged to be oppressive and which create a clog on the right of redemption, are questions of fact which require to be determined on the evidence on record; that such terms which place a clog on the right of redemption have to be avoided. No doubt, paragraph 10 of the said decision does refer to such offending clauses as void. However, this is an observation only in the context of the offending terms and does not in any manner hold such offending term to be “void ab initio” so as to confer a retrospective cause of action to the mortgagor and to permit the mortgagee to plead that the period of limitation would commence from the date of mortgage itself. Therefore this decision would not be of any assistance to learned counsel for the mortgagee.

33. Reliance was also sought to be placed upon a decision of the Supreme court in the case of *Sumpuran Singh v. Niranjana Kaur* [AIR 1999 SC 1047]. This decision, firstly, deals with the redemption of an oral mortgage and consequently there were no restrictive terms or covenants in respect of which any complaint as to oppression could be made. Secondly, this decision deals mainly with the validity of such an oral mortgage in the year 1893, when S. 59 of the Transfer of Property Act was not applicable to the State of Punjab. It was therefore in this context that the Supreme Court held such an oral mortgage to be valid, and that in the absence of any restriction contained in the mortgage deed, a right to redeem had accrued from

the very first day of the mortgage and consequently the suit filed in 1960 was barred by limitation. Once again, I am obliged to wonder as to how this decision is applicable or relevant to the present controversy. In this case, limitation had commenced from the date of the mortgage merely because there was no restriction contained in the mortgage deed, it being a case of an oral mortgage. Therefore, there was no question of there being any offending clause, or consideration of lifting of a clog on the equity of redemption.

35. Reliance was also sought to be placed on the decision of the Supreme Court in the case of *Murarilal v. Devkaran* [AIR 1965 SC 225]. Once again, I am obliged to observe that this decision deals only with the facts of that case in the light of S. 60 of the Transfer of Property Act and holds (on the facts of that case) that if the mortgage is not redeemed within 15 years of the mortgage, the same would be deemed to be an absolute transfer amounting to a sale. This clause was found by the Supreme Court to be oppressive, found to be violative of the principle “once a mortgage always a mortgage” and therefore found to be a clog on the equity of redemption. This decision therefore has no relevance to the controversy at hand.

37. In the light of the aforesaid discussion. I find that the contentions raised by learned counsel for the mortgagee are not well founded and cannot be sustained. In view of the aforesaid discussion I find and hold that “the right to redeem or to recover possession” would accrue to the mortgagor within the meaning of Art. 61(a) of the Limitation Act only when the Court lifts the clog on the equity of redemption. Consequently, limitation would begin to run only from that day, and therefore necessarily such a suit could not be said to be barred by limitation (provided the suit prays both for lifting the clog against the equity of redemption and also prays for a decree of redemption of the mortgage).

39. This appeal will therefore be placed before the learned single Judge for decision on merits in the light of the opinion expressed above.

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Associated Hotels of India Ltd. v. R.N. Kapoor

(1960) 1 SCR 368 : AIR 1959 SC 1262

S.K. DAS, J. - I have had the advantage and privilege of reading the judgments prepared by my learned Brethren, Sarkar, J. and Subba Rao, J. I agree with my learned Brother Subba Rao J., that the deed of May 1, 1949, is a lease and not a licence. I have nothing useful to add to what he has said on this part of the case of the appellant.

2. On the question of the true scope and effect of Section 2(b) of the Delhi and Ajmer-Merwara Rent Control Act, (19 of 1947) hereinafter called the Rent Control Act, I have reached the same conclusion as has been reached by my learned Brother Sarkar, J., namely, that the rooms or spaces let out by the appellant to the respondent in the Imperial Hotel, New Delhi, were rooms in a hotel within the meaning of Section 2(b) of the Rent Control Act; therefore, that Act did not apply and the respondent was not entitled to ask for the determination of fair rent under its provisions. The reasons for which I have reached that conclusion are somewhat different from those of my learned Brother Sarkar, J., and it is, therefore, necessary that I should state the reasons in my own words.

3. I read first Section 2(b) of the Rent Control Act so far as it is relevant for our purpose:

“2. In this Act, unless there is anything repugnant in the subject or context,—

(b) ‘premises’ means any building or part of a building which is, or is intended to be, let separately for use as a residence or for commercial use or for any other purpose but does not include a room in a dharamshala, hotel or lodging house.”

The question before us is - what is the meaning of the expression “a room in a hotel”? Does it merely mean a room which in a physical sense is within a building or part of a building used as a hotel; or does it mean something more, that is, the room itself is not only within a hotel in a physical sense but is let out to serve what are known as “hotel purposes”? If a strictly literal construction is adopted, then a room in a hotel or dharamshala or lodging house means merely that the room is within, and part of, the building which is used as a hotel, dharamshala or lodging house. There may be a case where the entire building is not used as a hotel, dharamshala or lodging house, but only a part of it so used. In that event, the hotel, lodging house or dharamshala will be that part of the building only which is used as such, and any room therein will be a room in a hotel, dharamshala or lodging house. Rooms outside that part but in the same building will not be rooms in a hotel, dharamshala or lodging house. Take, however, a case where the room in question is within that part of the building which is used as a hotel, dharamshala or lodging house, but the room is let out for a purpose totally unconnected with that of the hotel, lodging house or dharamshala as the case may be. Will the room still be a room in a hotel, lodging house or dharamshala? That, I take it, is the question which we have to answer.

4. The word “hotel” is not defined in the Rent Control Act. It is defined in a cognate Act called the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The definition there says that a hotel or lodging house means a building or a part of a building where lodging with or without board or other service is provided for a monetary consideration. I do not

pause here to decide whether that definition should be adopted for the purpose of interpreting Section 2(b) of the Rent Control Act. It is sufficient to state that in its ordinary connotation the word "hotel" means a house for entertaining strangers or travellers: a place where lodging is furnished to transient guests as well as one where both lodging and food or other amenities are furnished. It is worthy of note that in Section 2(b) of the Rent Control Act three different words are used "hotel", "dharamshala" or "lodging house". Obviously, the three words do not mean the same establishment. In the cognate Act, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, however, the definition clause gives the same meaning to the words "hotel" and "lodging house". In my view, Section 2 (b) of the Rent Control Act by using two different words distinguishes a hotel from a lodging house in some respects and indicates that the former is an establishment where not merely lodging but some other amenities are provided. It was, however, never questioned that the Imperial Hotel, New Delhi, is a hotel within the meaning of that word as it is commonly understood, or even as it is defined in the cognate Act.

5. Passing now from definitions which are apt not to be uniform, the question is whether the partitioned spaces in the two cloak rooms let out to the respondent were rooms in that hotel. In a physical sense they were undoubtedly rooms in that hotel. I am prepared, however, to say that a strictly literal construction may not be justified and the word "room" in the composite expression "room in a hotel" must take colour from the context or the collocation of words in which it has been used; in other words, its meaning should be determined *noscitur a sociis*. The reason why I think so may be explained by an illustration. Suppose there is a big room inside a hotel; in a physical sense it is a room in a hotel, but let us suppose that it is let out, to take an extreme example, as a timber godown. Will it still be a room in a hotel, though in a physical sense it is a room of the building which is used as a hotel? I think it would be doing violence to the context if the expression "room in a hotel" is interpreted in a strictly literal sense. On the view which I take a room in a hotel must fulfil two conditions: (1) it must be part of a hotel in the physical sense and (2) its user must be connected with the general purpose of the hotel of which it is a part. In the case under our consideration the spaces were let out for carrying on the business of a hair dresser. Such a business I consider to be one of the amenities which a modern hotel provides. The circumstance that people not resident in the hotel might also be served by the hair dresser does not alter the position; it is still an amenity for the residents in the hotel to have a hair dressing saloon within the hotel itself. A modern hotel provides many facilities to its residents; some hotels have billiard rooms let out to a private person where residents of the hotel as also non-residents can play billiards on payment of a small fee; other hotels provide post-office and banking facilities by letting out rooms in the hotel for that purpose. All these amenities are connected with the hotel business and a barber's shop within the hotel premises is no exception.

6. These are my reasons for holding that the rooms in question were rooms in a hotel within the meaning of Section 2(b) of the Rent Control Act, 1947, and the respondent was not entitled to ask for fixation of fair or standard rent for the same. I, therefore, agree with my learned Brother Sarkar, J. that the appeal should be allowed, but in the circumstances of the case there should be no order for costs.

SARKAR, J. - The appellant is the proprietor of an hotel called the Imperial Hotel which is housed in a building on Queensway, New Delhi. R.N. Kapoor, the respondent named above who is now dead, was the proprietor of a business carried on under the name of Madam Janes. Under an agreement with the appellant, he came to occupy certain spaces in the Ladies' and Gents' cloak rooms of the Imperial Hotel paying therefor initially at the rate of Rs 800 and subsequently Rs 700, per month.

8. On September 26, 1950, R.N. Kapoor made an application under Section 7(1) of the Delhi and Ajmere-Merwara Rent Control Act, 1947 (19 of 1947), to the Rent Controller, New Delhi, alleging that he was a tenant of the spaces in the cloak rooms under the appellant and asking that standard rent might be fixed in respect of them. The appellant opposed the application, contending for reasons to be mentioned later, that the Act did not apply and no standard rent could be fixed. The Rent Controller however rejected the appellant's contention and allowed the application fixing the standard rent at Rs 94 per month. On appeal by the appellant, the District Judge of Delhi set aside the order of the Rent Controller and dismissed the application. R.N. Kapoor then moved the High Court in revision. The High Court set aside the order of the District Judge and restored that of the Rent Controller. Hence this appeal. We are informed that R.N. Kapoor died pending the present appeal and his legal representatives have been duly brought on the record. No one has however appeared to oppose the appeal and we have not had the advantage of the other side of the case placed before us.

9. As earlier stated, the appellant contends that the Act does not apply to the present case and the Rent Controller had no jurisdiction to fix standard rent. This contention was founded on two grounds which I shall presently state, but before doing that I wish to refer to a few of the provisions of the Act as that would help to appreciate the appellant's contention.

10. For the purpose of the present case it may be stated that the object of the Act is to control rents and evictions. Section 3 says that no tenant shall be liable to pay for occupation of any premises any sum in excess of the standard rent of these premises. Section 2(d) defines a tenant as a person who takes on rent any premises. Section 2(b) defines what is a premises within the meaning of the Act and this definition will have to be set out later because this case largely turns on that definition. Section 2(c) provides how standard rent in relation to any premises is to be determined. Section 7(1) states that if any dispute arises regarding the standard rent payable for any premises, then it shall be determined by the Court. It is under this section that the application out of which this appeal arises was made, the Court presumably being the Rent Controller. It is clear from these provisions of the Act that standard rent can be fixed only in relation to premises as defined in the Act and only a tenant, that is, the person to whom the premises have been let out, can ask for the fixing of the standard rent.

11. I now set out the definition of "premises" given in the Act so far as is material for our purposes:

“ ‘premises’ means any building or part of a building which is or is intended to be let separately ... but does not include a room in a dharamsala, hotel or lodging house”.

It is clear from this definition that the Act did not intend to control the rents payable by and evictions of, persons who take on rent rooms in a dharamsala, hotel or lodging house.

12. The appellant contends the spaces are not premises within the Act as they are rooms in a hotel and so no standard rent could be fixed in respect of them. Thus the first question that arises in this appeal is, are the spaces rooms in an hotel within the definition? If they are rooms in an hotel, clearly no standard rent could be fixed by the Rent Controller in respect of them.

13. The Act does not define an hotel. That word has therefore to be understood in its ordinary sense. It is clear to me that the Imperial Hotel is an hotel howsoever the word may be understood. It was never contended in these proceedings that the Imperial Hotel was not an “hotel” within the Act. Indeed, the Imperial Hotel is one of the best known hotels of New Delhi. It also seems to me plain that the spaces are “rooms”, for, this again has not been disputed in the courts below and I have not found any reason to think that they are not rooms.

14. The language used in the Act is “room in a ... hotel”. The word “hotel” here must refer to a building for a room in an hotel must be a room in a building. That building no doubt must be an hotel, that is to say, a building in which the business of an hotel is carried on. The language used in the Act would include any room in the hotel building. That is its plain meaning. Unless there is good reason to do otherwise, that meaning cannot be departed from. This is the view that the learned District Judge took.

15. Is there then any reason why the words of the statute should be given a meaning other than their ordinary meaning? The Rent Controller and the High Court found several such reasons and these I will now consider.

16. The learned Rent Controller took the view that a room in an hotel would be a room normally used for purposes of lodging and not any room in an hotel. He took this view because he thought that if, for example, there was a three-storeyed building, the ground floor of which was used for shops and the two upper floors for an hotel, it could not have been intended to exclude the entire building from the operation of the Act, and so the rooms on the ground floor would not have been rooms in an hotel. I am unable to appreciate how this illustration leads to the conclusion that a room in an hotel contemplated is a room normally used for lodging. The learned Rent Controller’s reasoning is clearly fallacious. Because in a part of a building there is a hotel, the entire building does not become a hotel. Under the definition, a part of a building may be a premises and there is nothing to prevent a part only of a building being a hotel and the rest of it not being one. In the illustration imagined the ground floor is not a part of the hotel. The shoprooms in the ground floor cannot for this reason be rooms in a hotel at all. No question of these rooms being rooms in an hotel normally used for lodging, arises. We see no reason why a room in an hotel within the Act must be a room normally used for lodging. The Act does not say so. It would be difficult to say which is a room normally used for lodging for the hotel owner may use a room in an hotel for any purpose of the hotel he likes. Again, it would be an unusual hotel which lets out its lodging rooms; the usual thing is to give licenses to boarders to live in these rooms.

17. I now pass on to the judgment of the High Court. Khosla, J. who delivered the judgment, thought that a room in an hotel would be within the definition if it was let out to a

person to whom board or other service was also given. It would seem that according to the learned Judge a room in an hotel within the Act is a room let out to a guest in an hotel, for only a guest bargains for lodging and food and services in an hotel. But the section does not contain words indicating that this is the meaning contemplated. In defining a room in an hotel it does not circumscribe the terms of the letting. If this was the intention, the tenant would be entirely unprotected. Ex hypothesi he would be outside the protection of the Act. Though he would be for all practical purposes a boarder in an hotel, he would also be outside the protection of the cognate Act, the Bombay Rents, Hotels and Lodging House, Rates Control Act, 1947, (Bombay 57 of 1947), which has been made applicable to Delhi, for that Act deals with lodging rates in an hotel which are entirely different from rents payable when hotel rooms are let out. A lodger in an hotel is a mere licensee and not a tenant for "there is involved in the term 'lodger' that the man must lodge in the house of another": see **Foa on Landlord and Tenant** (8th Edn. p. 9). It could hardly have been intended to leave a person who is practically a boarder in an hotel in that situation. As I have earlier said, it would be a most unusual hotel which lets out its rooms to a guest, and the Act could not have been contemplating such a thing.

18. Khosla, J. also said that the room in a hotel need not necessarily be a bedroom but it must be so intimately connected with the hotel as to be a part and parcel of it, that it must be a room which is an essential amenity provided by an hotel e.g. the dining room in an hotel. I am unable to agree. I do not appreciate why any room in an hotel is not intimately connected with it, by which apparently is meant, the business of the hotel. The business of the hotel is carried on in the whole building and therefore in every part of it. It would be difficult to say that one part of the building is more intimately connected with the hotel business than another. Nor do I see any reason why the Act should exempt from its protection a part which is intimately connected as it is said, and which I confess I do not understand, and not a part not so intimately connected. I also do not understand what is meant by saying that a part of an hotel supplies essential amenities. The idea of essentiality of an amenity is so vague as to be unworkable. This test would introduce great uncertainty in the working of the Act which could not have been intended. Nor do I see any reason why the Act should have left out of its protection a room which is an essential amenity of the hotel and not other rooms in it.

19. Though it is not clear, it may be that Khosla, J. was thinking that in order that a room in an hotel may be within the definition it must be let out for the purposes of the hotel. By this it is apparently meant that the room must be let out to supply board or give other services to the guests, to do which are the purposes of an hotel. Again, I find no justification for the view. There is nothing in the definition about the purposes of the letting out. Nor am I aware that hotel proprietors are in the habit of letting out portions of the hotel premises to others for supplying board and services to the guests in the hotels. It may be that an hotel proprietor grants licences to contractors to use parts of his premises to provide board and services to the guests in the hotel. This however is a different matter and with such licenses we are not concerned. Again, a proprietor of a different kind of business who lets out a portion of his business premises for the purposes of his business does not get an exemption from the operation of the Act. I am unable to see why the proprietor of an hotel business should have special consideration. The Act no doubt exempts a room in an hotel but it says nothing about

the purposes for which the room must be let out to get the exemption. Further, not only a room in an hotel is exempted by the definition but at the same time also a room in a dharamsala. If a room in an hotel within the Act is a room let out for the purposes of the hotel so must therefore be a room in a dharamsala. It would however be difficult to see how a room in a dharamsala can be let out for the purposes of the dharamsala for a dharamsala does not as a rule supply food or give any services, properly so called.

20. Having given the matter my best consideration I have not been able to find any reason why the words used in the definition should not have their plain meaning given to them. I therefore come to the conclusion that a room in an hotel within the definition is any room in a building in the whole of which the business of an hotel is run. So understood, the definition would include the spaces in the cloak rooms of the Imperial Hotel with which we are concerned. These spaces are, in my view, rooms in an hotel and excluded from the operation of the Act. The Rent Controller had no power to fix any standard rent in respect of them.

21. The appellant also contended that Kapoor was not a tenant of the spaces but only a licensee and so again the Act did not apply. The question so raised depends on the construction of the written agreement under which Kapoor came to occupy the spaces and the circumstances of the case. I do not consider it necessary to express any opinion on this question for this appeal must in my view be allowed as the spaces are outside the Act being rooms in an hotel.

22. In the result I would allow the appeal and dismiss the application for fixing standard rent.

SUBBA RAO, J. - I have had the advantage of perusing the judgment of my learned Brother Sarkar, J., and I regret my inability to agree with him.

24. The facts material to the question raised are in a narrow compass. The appellants, the Associated Hotels of India Ltd. are the proprietors of Hotel Imperial, New Delhi. The respondent, R.N. Kapur, since deceased, was in occupation of two rooms described as ladies and gentlemen's cloak rooms, and carried on his business as a hair-dresser. He secured possession of the said rooms under a deed dated May 1, 1949, executed by him and the appellants. He got into possession of the said rooms, agreeing to pay a sum of Rs 9600 a year i.e. 800 per month, but later on, by mutual consent, the annual payment was reduced to Rs 8400 i.e. Rs 700 per month. On September 26, 1950, the respondent made an application to the Rent Controller, Delhi, alleging that the rent demanded was excessive and therefore a fair rent might be fixed under the Delhi and Ajmer-Merwara Rent Control Act, 1947 (19 of 1947), hereinafter called the Act. The appellants appeared before the Rent Controller and contended that the Act had no application to the premises in question as they were premises in a hotel exempted under Section 2 of the Act from its operation, and also on the ground that under the aforesaid document the respondent was not a tenant but only a licensee. By order dated October 24, 1950, the Rent Controller held that the exemption under Section 2 of the Act related only to residential rooms in a hotel and therefore the Act applied to the premises in question. On appeal the District Judge, Delhi, came to a contrary conclusion; he was of the view that the rooms in question were rooms in a hotel within the meaning of Section 2 of the Act and therefore the Act had no application to the present case. Further on a construction of

the said document, he held that the appellants only permitted the respondent to use the said two rooms in the hotel, and, therefore, the transaction between the parties was not a lease but a licence. On the basis of the aforesaid two findings, he came to the conclusion that the Rent Controller had no jurisdiction to fix a fair rent for the premises. The respondent preferred a revision against the said order of the District Judge to the High Court of Punjab at Simla, and Khosla, J. held that the said premises were not rooms in a hotel within the meaning of Section 2 of the Act and that the document executed between the parties created a lease and not a licence. On those findings, he set aside the decree of the learned District Judge and restored the order of the Rent Controller. The present appeal was filed in this Court by special leave granted to the appellants on January 18, 1954.

25. The learned Solicitor-General and Mr Chatterjee, who followed him, contended that the Rent Controller had no jurisdiction to fix a fair rent under the Act in regard to the said premises for the following reasons: (1) The document dated May 1, 1949, created a relationship of licensor and licensee between the parties and not that of lessor and lessee as held by the High Court; and (2) the said rooms were rooms in a hotel within the meaning of Section 2 of the Act, and, therefore, they were exempted from the operation of the Act. Unfortunately, the legal representative of the respondent was *ex parte* and we did not have the advantage of the opposite view being presented to us. But we have before us the considered judgment of the High Court, which has brought out all the salient points in favour of the respondent.

26. The first question turns upon the true construction of the document dated May 1, 1949, whereunder the respondent was put in possession of the said rooms. As the argument turns upon the terms of the said document, it will be convenient to read the relevant portions thereof. The document is described as a deed of licence and the parties are described as licensor and licensee. The preamble to the document runs thus:

“Whereas the Licensee approached the Licensor through their constituted Attorney to permit the Licensee to allow the use and occupation of space allotted in the Ladies and Gents Cloak Rooms, at the Hotel Imperial, New Delhi, for the consideration and on terms and conditions as follows:”

The following are its terms and conditions:

“1. In pursuance of the said agreement, the Licensor hereby grants to the Licensee, Leave and License to use and occupy the said premises to carry on their business of Hair Dressers from 1st May, 1949 to 30th April, 1950.

2. That the charges of such use and occupation shall be Rs 9600 a year payable in four quarterly instalments i.e. 1st immediately on signing the contract, 2nd on the 1st of August, 1949, 3rd on 1st November, 1949 and the 4th on the 1st February, 1950, whether the Licensee occupy the premises and carry on the business or not.

3. That in the first instance the Licensor shall allow to the Licensee leave and license to use and occupy the said premises for a period of one year only.

4. That the licensee shall have the opportunity of further extension of the period of license after the expiry of one year at the option of the licensor on the same terms and conditions but in any case the licensee shall intimate their desire for an extension

at least three months prior to the expiry of one year from the date of the execution of this DEED.

5. The licensee shall use the premises as at present fitted and keep the same in good condition. The licensor shall not supply any fitting or fixture more than what exists in the premises for the present. The licensee will have their power and light meters and will pay for electric charges.

6. That the licensee shall not make any alterations in the premises without the prior consent in writing from the licensor.

7. That should the licensee fail to pay the agreed fee to the licensor from the date and in the manner as agreed, the licensor shall be at liberty to terminate this DEED without any notice and without payment of any compensation and shall be entitled to charge interest at 12 per cent per annum on the amount remaining unpaid.

8. That in case the licensee for reasons beyond their control are forced to close their business in Delhi, the licensor agrees that during the remaining period the license shall be transferred to any person with the consent and approval of the licensor subject to charges so obtained not exceeding the monthly charge of Rs 800."

The document no doubt uses phraseology appropriate to a licence. But it is the substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties.

27. What is the substance of this document? Two rooms at the Hotel Imperial were put in possession of the respondent for the purpose of carrying on his business as hair-dresser from May 1, 1949. The term of the document was, in the first instance, for one year, but it might be renewed. The amount payable for the use and occupation was fixed in a sum of Rs 9600 per annum, payable in four instalments. The respondent was to keep the premises in good condition. He should pay for power and electricity. He should not make alterations in the premises without the consent of the appellants. If he did not pay the prescribed amount in the manner agreed to, he could be evicted therefrom without notice, and he would also be liable to pay compensation with interest. He could transfer his interest in the document with the consent of the appellants. The respondent agreed to pay the amount prescribed whether he carried on the business in the premises or not. Shortly stated, under the document the respondent was given possession of the two rooms for carrying on his private business on condition that he should pay the fixed amount to the appellants irrespective of the fact whether he carried on his business in the premises or not.

28. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Indian Easements Act defines a licence thus:

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor,

something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.”

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington* [(1952) 1 All ER 149], wherein Lord Denning reviewing the case-law on the subject summarizes the result of his discussion thus at p. 155:

“The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.”

The court of appeal again in *Cobb v. Lane* [(1952) 1 All ER 1199] considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell, L.J. stated:

“... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.”

Denning, L.J. said much to the same effect at p. 1202:

“The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?”

The following propositions may, therefore, be taken as well established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties — whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the said tests, it is not possible to hold that the document is one of licence. Certainly it does not confer only a bare personal privilege on the respondent to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from the directions of the appellants. The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence. The solitary circumstance that the rooms let out in the present case or situated in a building wherein a hotel is run cannot make any difference in the character of the holding. The intention of the

parties is clearly manifest, and the clever phraseology used or the ingenuity of the document-writer hardly conceals the real intent. I, therefore, hold that under the document there was transfer of a right to enjoy the two rooms, and, therefore, it created a tenancy in favour of the respondent.

29. The next ground turns upon the construction of the provisions of Section 2 of the Act. Section 2(b) defines the term “premises” and the material portion of it is as follows:

“ ‘Premises’ means any building or part of a building which is, or is intended to be, let separately ... but does not include a room in a dharmashala, hotel or lodging house.”

What is the construction of the words “a room in a hotel”? The object of the Act as disclosed in the preamble is “to provide for the control of rents and evictions, and for the lease to Government of premises upon their becoming vacant, in certain areas in the Provinces of Delhi and Ajmer-Merwara”. The Act was, therefore, passed to control exorbitant rents of buildings prevailing in the said States. But Section 2 exempts a room in a hotel from the operation of the Act. The reason for the exemption may be to encourage running of hotels in the cities, or it may be for other reasons. Whatever may be the object of the Act, the scope of the exemption cannot be enlarged so as to limit the operation of the Act. The exemption from the Act is only in respect of a room in a hotel. The collocation of the words brings out the characteristics of the exempted room. The room is part of a hotel. It partakes its character and does not cease to be one after it is let out. It is, therefore, necessary to ascertain the meaning of the word “hotel”. The word “hotel” is not defined in the Act. A hotel in common parlance means a place where a proprietor makes it his business to furnish food or lodging or both to travellers or other persons. A building cannot be run as a hotel unless services necessary for the comfortable stay of lodgers and boarders are maintained. Services so maintained vary with the standard of the hotel and the class of persons to which it caters; but the amenities must have relation to the hotel business. Provisions for heating or lighting, supply of hot water, sanitary arrangements, sleeping facilities, and such others are some of the amenities a hotel offers to its constituents. But every amenity however remote and unconnected with the business of a hotel cannot be described as service in a hotel. The idea of a hotel can be better clarified by illustration than by definition and by giving examples of what is a room in a hotel and also what is not a room in a hotel: (1) A owns a building in a part whereof he runs a hotel but leases out a room to B in the part of the building not used as hotel; (2) A runs a hotel in the entire building but lets out a room to B for a purpose unconnected with the hotel business; (3) A runs a hotel in the entire building and lets out a room to B for carrying on his business different from that of a hotel, though incidentally the inmates of the hotel take advantage of it because of its proximity; (4) A lets out a room in such a building to another with an express condition that he should cater only to the needs of the inmates of the hotel; and (5) A lets out a room in a hotel to a lodger, who can command all the services and amenities of a hotel. In the first illustration, the room has never been a part of a hotel though it is part of a building where a hotel is run. In the second, though a room was once part of a hotel, it ceased to be one, for it has been let out for a non-hotel purpose. In the fifth, it is let out as part of a hotel, and, therefore, it is definitely a room in a hotel. In the fourth, the room may still continue as part of the hotel as it is let out to provide an amenity or service connected with the hotel. But

to extend the scope of the words to the third illustration is to obliterate the distinction between room in a hotel and a room in any other building. If a room in a building, which is not a hotel but situated near a hotel, is let out to a tenant to carry on his business of a hair-dresser, it is not exempted from the operation of the Act. But if the argument of the appellants be accepted, if a similar room in a building, wherein a hotel is situated is let out for a similar purpose, it would be exempted. In either case, the tenant is put in exclusive possession of the room and he is entitled to carry on his business without any reference to the activities of the hotel. Can it be said that there is any reasonable nexus between the business of the tenant and that of the hotel.

The only thing that can be said is that a lodger in a hotel building can step into the saloon to have a shave or haircut. So too, he can do so in the case of a saloon in the neighbouring house. The tenant is not bound by the contract to give any preferential treatment to the lodger. He may take his turn along with others, and when he is served, he is served not in his capacity as a lodger but as one of the general customers. What is more, under the document the tenant is not even bound to carry on the business of a hair-dresser. His only liability is to pay the stipulated amount to the landlord. The room, therefore, for the purpose of the Act, ceases to be a part of the hotel and becomes a place of business of the respondent. As the rooms in question were not let out as part of a hotel or for hotel purposes, I must hold that they are not rooms in a hotel within the meaning of Section 2 of the Act.

30. In this view, the appellants are not exempted from the operation of the Act. The judgment of the High Court is correct. The appeal fails and is dismissed.

ORDER

31. In accordance with the opinion of the majority, the appeal is allowed.

* * * * *

Quality Cut Pieces v. M. Laxmi and Co.

AIR 1986 Bom 359

V.V. VAZE, J. – Summer of 42. The city of Bombay was slowly recovering from the erosion of war economy. Serpentine queues for essential commodities were seen everywhere. The mighty arch of yellow basalt haughtily thrusting its frame above the promontory lapped by the waters of Bay of Bombay had witnessed the entry of many and Englishman - Administrators, Governors-General, dashing blades or humble quill-drivers - coming to India to keep Pax Britannica. That very arch was soon to serve as their exit.

2. A group of seven businessmen drawn from various fields like pharmaceuticals, textiles, tea, banking and insurance got together and surveyed the Indian economic scene. They had a vision of a possible co-operation of Indian and foreign entrepreneurs in the field of supply of essential commodities for civilian consumption – something which was very much relegated to the background by the more pressing need to keep the sinews of war flowing. They envisaged a free-flow of goods and merchandise – once the sea routes became open; took note of the fact that manufacturers in western countries had at their disposal large departmental chain stores to handle goods direct from the factory to the consumer and managed country-wide distribution system. This group regretted the absence of a similar large scale departmental store in India and decided to remedy the defect and build up a coordinated contact between the producer and consumer. With this object in view, the group incorporated a company “Departmental Service Stores Limited” (“DSS”).

3. The company could not function in view of the prohibition regarding the issue of shares under R. 94A of the Defence of India Rules, without the sanction of the Examiner of Capital Issues. This sanction was granted on 15th Nov. 1943 authorising the company to raise capital of the value of Rs. 1,62,000/- under certain conditions. The hurdle of the Defence of India Rule was crossed and capital was raised. Having realised the capital by allotting shares to those who had applied before 17th May 1943, the company had money but no premises wherein to start the contemplated departmental stores. The company was all dressed up but had nowhere to go. On 8th Sept. 1944 the company acquired the house of Messrs. Dinshaw and Company, Colaba, Causeway, Bombay, from one Behram Rustom Irani, after paying Rs. 47,000/- out of which Rs. 4,000/- were towards the goodwill and the remainder towards the price of goods, electrical installations, type-writers etc. A store was started in the premises of Dinshaw and Co., for the 10 months ending 30th June 1945, DSS made a modest profit of Rs. 6,485-2-11 Ps.

4. The Examiner of Capital Issues permitted the company to issue further shares of capital of the value of Rs. 8,30,000/-. The signatories to the Memorandum and Articles of Association, the Directors, Managing Agents and their friends agreed to take a bulk of the new issue and remainder was offered for public subscription. Messrs, Begman Traders Ltd. of 41, Bruce Street, Fort, Bombay, were the Managing Agents of the company and Bagayatkar and Manjrekar of Bombay were ex-officio Directors nominated by the Managing Agents. The Prospectus issued by the company inviting subscription from the public, after taking a note of the possible increase in international trade on account of the opening of free sea routes, announced that the DSS will inaugurate a new era of “Shop as you please” under one roof and

thereby obviate the necessity of standing in long queues and hunting for different goods and shops situated in far flung localities. The ambitious prospectus projected a picture of a store where a person can buy all his needs “from a pin to a piano” and that too with home delivery facilities. Twelve Departments were enumerated as being the ones which would be immediately opened in the stores and it was indicated that the DSS would further diversify their activities into thirty more Departments ranging from motor-cars, engineering goods, type writers, jewellery to flowers. By way of a foot note DSS promised that departments of refreshments, decoration and art gallery will follow after a while.

5. Regarding the mechanics of running the stores, the prospectus proclaimed that the DSS shall bring together manufacturers under one roof and the concept being of cooperation, a selected group of merchants dealing in various types of merchandise were to be provided with facilities and accommodation in the store “for the display and sale of their goods, under the supervision and general management of the company”. The promoters felt that this would save the merchants good deal of overhead charges and exorbitant shop rents.

6. The projection of the Directors was that the income to the company from the Departments will be “the commission ranging from 2.1/2% to 15% or more” according to the nature of the commodities sold, and that many leading merchants in various lines had already expressed their willingness to avail themselves of this facility. The promoters announced that the DSS enjoyed the confidence of leading merchants “who had agreed to leave in their control their goods worth thousands of rupees for display and sale on retail and wholesale basis”.

7. The permission granted by the Controller for issue of the balance of the originally issued share capital of Rs. 10,00,000/- “created a problem of securing suitable premises at a suitable place, when for love or money even small premises were not available in Bombay”. As the report for the year ending 30th June, 1946 suggests, the Directors were “fortunate in securing an ideal structure and land in an ideal locality at Dadar a most central place in Greater Bombay”.

46. The tests to be applied in order to find out whether a particular document operates as a lease or a licence have been crystallised by the Supreme Court in *Sohanlal Naraindas v. Laxmidas Raghunath* [1971 Mah LJ 604, 607]:

Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject matter of the agreement. If it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance.

47. During the war and in the post-war period, the freedom of parties to enter into a lease and the licensee’s rights to sublet the premises were seriously curtailed by the various Rent

Control Acts. S. 15 of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("Rent Act") puts an embargo on the tenant to sublet, assign or transfer his interest in the premises let out to him. Hence, the first question that arises for determination is whether the parties could "contract out" of the provisions of the regulatory legislation pertaining to urban tenancies?

48. In *Sheel-Max and B.P. Ltd. v. Manchester Garages Ltd.* [(1971) 1 All ER 841] the plaintiffs were the owners of a petrol filling station. They allowed the defendants to go into occupation of the premises by an agreement contained in a document called a licence. By the terms of the agreement, it was expressed to be solely for the purpose of selling the plaintiffs' brands of motor fuel and the defendants had agreed to promote the sale of the plaintiffs' products. As differences arose between the parties, the plaintiffs asked the defendants to leave when the agreement expired upon which the latter claimed that the agreement gave them a tenancy and they are entitled to protection of the (U.K.) Landlord and Tenant Act, 1954. The defendants relied heavily on the fact that they were in exclusive possession of the petrol filling station. Lord Denning dismissed this ground:

(C)ounsel for the defendants says that the defendants have exclusive possession, and that that carries with it a tenancy. That is old law which is now gone. As I have said many times, exclusive possession is no longer decisive. We have to look at the nature of the transaction to see whether it is a personal privilege or not.

Next the Counsel argued that it would not be permissible for the parties to "get out" of the Landlord and Tenant Act, 1954. Repelling this argument, Lord Denning said (at p. 844):

It seems to me that when the parties are making arrangements for a filling station, they can agree either on a licence or a tenancy. If they agree on a licence, it is easy enough for their agreement to be put into writing, in which case the licensee has no protection under the Landlord and Tenant Act, 1954. But, if they agree on a tenancy, and so express it, he is protected. I realise that this means that the parties can, by agreeing on a licence, get out of the Act; but so be it; it may be no bad thing.

49. The stall-holders in the present batch appeals have branded the agreements with DSS etc. as 'Sham and bogus'. Such an argument was advanced in *Somma v. Hazelhurst* [(1978) 2 All ER 1011] where it was urged that in a "Rent Act situation" any permission to occupy the premises exclusively must be a tenancy and not a licence, unless it comes into the category of hotels, hostels, family arrangements or service occupancy of a similar undefined special category. Dismissing the contention, the Court observed (at p. 1020):

We can see no reason why an ordinary landlord not in any of these special categories should not be able to grant a licence to occupy an ordinary house. If that is what both he and the licensee intend and if they can frame any written agreement in such a way as to demonstrate that it is not really an agreement for a lease masquerading as a licence, we can see no reason in law or justice why they should be prevented from achieving that object. Nor can we see why their common intentions should be categorised as bogus or unreal or as sham merely on the grounds that the Court disapproves of the bargain.

The Court approved the observations of Backely LJ in *Shell-Mex and B.P. Ltd. v. Manchester Garages Ltd.* case:

(A)nd it may be that this is a device which has been adopted by the plaintiffs to avoid possible consequences of the Landlord and Tenant Act, 1954, which would have affected the transaction being one of landlord and tenant but in my judgment one cannot take that into account in the process of construing such a document to find out what the true nature of the transaction is. One has first to find out what is the true nature of the transaction and then see how the Act operates on the state of affairs, if it at all. One should not approach the problem with a tendency to attempt to find a tenancy because unless there is a tenancy the case will escape the effects of the statute”.

51. “Why so large cost, having so short a lease, Dost thou upon thy fading mansion spend”? So asked Shakespeare in his early Sonnet 146.

52. DSS had taken the suit property from Ashar for a short lease of 10 years from 1-6-1946 to 31-5-1956. It had only one option of renewal for a further period of 10 years. All the same, inspite of dwindling finances, DSS constructed a building worth Rs. 1,51,585/-, furnished the same with furniture and fittings costings Rs. 1,32,768/- and installed electrical fittings worth Rs. 22,641.-. The property purchased by Ashar was an old godown of a mill; will a lessee of Ashar incur a ‘large cost’ of Rs. 2,00,000/- upon a ‘fading godown’ if he was only to sublet the same?

53. Exh. Z-196 dt. 20-6-1952 is a typical agreement which DSS used to enter into with the merchants. The preamble states that the merchant “Soni Watch Co.” in this case, had applied to DSS “to stock, display and sell his goods through DSS” and that the merchant shall sell the goods at ruling market rates. DSS shall try to obtain licences and permits, if necessary, in its own name, but DSS will be free to do business in the same or similar articles in the stores. The merchant had agreed to deposit by way of guarantee a sum of Rs. 1,000/- for a stall admeasuring about 120 Sq. ft. which was to bear interest at 3.50 per cent per annum. The merchant was to be provided by DSS with a stall complete with fittings and furnitures, provide his own cash memo, maintain a stock book and submit to the DSS monthly statement of accounts on or before the 5th of the following month. The ownership of the goods was to remain with the merchant. DSS were entitled to receive a minimum “share remuneration or commission” at the rate of Rs. 135/- per stall or Rs. 250/- for two stalls or to “the share, remuneration or commission” at the rate of two per cent on the gross sale proceeds, exclusive of sales tax, whichever is more. The agreement was to remain in force for one year from 13-5-1953, but power was given to the Company to terminate the agreement for breach of the terms. Then follows clause 34: “The merchant shall have no right to assign the benefit of this agreement. The merchant is not a tenant of the Company and on termination of this agreement, he shall have no right to continue in or use of the premises of the Company”.

54. In short, the agreement not only clearly tells the merchant that he is not a tenant of the stall, but obligates him to send a statement of accounts so that DSS could work out whether they are entitled to a commission over and above the minimum agreed upon.

55. On 29-8-1952, some stall-holders wrote to the Collector of Bombay (Exh. Z-157) in connection with the notices dt. 26-8-1952 issued by the Collector asking the merchants to pay the dues. The merchants informed the Collector that with the exception of Dr. D.S. Patkar (who is not one of the defendants), "all are charged commission on the gross sale with a certain minimum according to the number of stalls or spaces required by the individual merchants for trading in the department stores". They referred to the fact that prior to 1-5-1952, DSS were providing all facilities, such as service of the boys, delivery of the goods, collection of daily sales, maintenance of stock book and accounts, supervision, electricity and all other incidental expenses for which the merchants were paying higher rate of compensation. As one of the share-holders, the letter proceeds, has filed a winding up petition as DSS have changed their management practices, reduced the amount of deposit and the rate of commission. The merchants expressed fervent hope that the winding up petition will be dismissed, but requested the Collector to see that essential services like watchmen, electricity, etc. are maintained.

56. The earlier letter (Exh. 31) dt. 8-1-1951, by which the merchants had asked the Collector of Bombay to hold DSS responsible for the sales tax, has already been discussed. Vide Exhibit 'O' dt. 21st Oct. 1952, DSS told the Collector that except the case of Dr. Patkar, in whose favour they had created tenancy and whose premises are distinctly separate, all other persons who are trading with the DSS are not tenants. DSS charges the merchants certain fixed minimum on the gross daily sales by way of Company's commission. The letter goes on to say that the merchants, who attend the sales, "do so more as the Salesmen of the Company and not in their capacities as the owners of the goods". None of the merchants have been allowed to put up sign-boards in his own name. DSS then referred to the case of Mrs. Sarla Shetty, who was allowed to conduct a tailoring class on leave and licence basis, but has picked up a quarrel and put up claim for tenancy rights. An attempt was made by DSS to ask Chinubhai whether the stalls can be let out, so that more money could be realised and the debt paid off more quickly (Exhibit "R" dt. 30th Oct. 1953). According to Chinubhai he tried to sell this idea to the mortgagees but the mortgagees did not agree and hence the idea was dropped.

57. The intention of the parties can be gathered from the surrounding circumstances, and so far as the present case is concerned, it is not one of a stray occupation by a stranger in a room in a residential house which may give rise to questions as to whether he was only a lodger or a boarder or a paying guest or a tenant. This is a case of no less than 47 people taking stalls and carrying on business for a period of over 22 years. Resultantly the behavioral pattern appearing on a broad canvas stretching over more than two decades has to be observed. It would make for a better appreciation of this pattern if the evidence is grouped under various heads.

58. Admittedly, Laxmi lost possession as a result of Court Decree on 19th Nov. 1968 and it has been urged by the stall-holders that the space that was allotted to them was in their exclusive possession, inasmuch as, they had put flap doors and for that purpose certain photographs were produced. The photographs did show an arrangement of a plywood shutter capable of being locked. It was also canvassed that there were rolling shutters to some stalls which would enure for a better locking system. But P. W. 6 Mahendra, who was

commissioned to fix the rolling shutters, had admitted that the shutters were fixed after 1968 and thus the fixation of rolling shutters loses its relevance for the purposes of this appeal which deals with a period prior to 19-11-1958. It is now more or less an established fact that none of the stalls had a locking arrangement, for, the space allotted to each merchant was earmarked on two sides by show cases placed back to back forming the walls and waist high counters placed in the front across which the merchants would attend to the customers forming the third side.

59. As the plan of the building shows, the stores (with the exception of Stall No. 6 of Nathani who is the Appellant in First Appeal No. 648 of 1972, and Stall No. 7 of Ramjivandas who is the Appellant in First Appeal No. 664 of 1972, to whom I would advert later), was like a fort having a single collapsible steel gate which controlled the ingress and egress. A second wooden gate was also provided inside the steel collapsible steel gate for greater security, the space between the two acting as a passage to the stores flanked by show windows on either sides. While handing over possession to the mortgagee Shah Brothers, DSS, vide Exhibit 'D' dt. 25th Oct. 1953, talked of giving the keys of the gates. That is to say, once the gate was locked, it was not possible for anyone to enter the stores.

60. Such was the control of the management, that the merchants had to request Ramniklal on 8th July, 1954 (Exh. 'Z-61') that "the stores should be kept open continuously from 9.00 am to 8.00 p.m. without the present break of 12 a.m. to 3 p.m. in order to improve the sales and remove the inconvenience of finding some shelter between 12.00 a.m. (Sic noon) to 3.00 p.m." The management would close the stores at 12.00 noon, ask all the merchants to clear out, lock the gates and allow them entry only at 3.00 p.m.

61. The timings of the stores became the subject-matter of discussion amongst the merchants and the management as would be apparent from the persual of the bunch of letters (Exh. 'Z-61' (Colly.)). When the management conceded to the request of keeping the stores open non-stop without lunch break, some merchants, on 23-7-1954, wrote to Ramniklal that they should revert to the old timings as they did not get enough business to justify putting in extra work of three hours. Some complained that as the stores caters to office-goers hardly any one comes between 12.00 noon to 3.00 p.m. while others felt that a good number of customers coming from far off places such as Virar, Kalyan, would be disappointed to find the stores closed between 12.00 noon and 3.00 p.m. The management had the final say in the matter and they decided on 11th Dec. 1954 that the old timings should be restored. So complete was the control of Ramniklal over the timings of the stores that on 1st Dec., 1954 he decided that in view of inauguration of the Stainless Steel Department at the hands of Ashar the paramount landlord, the stores would be opened at 8.00 a.m. Similarly, Ramniklal closed the stores at 10.00 p.m. on 26-10-1954 and asked all the merchants to bring in their account books for a joint Pooja at 10.30 p.m.

62. If DSS, Ramniklal or Laxmi were only interested in acting as landlords, nothing would have been easier than to open an account in the nearest bank and ask the merchants to credit the monthly rent in that account. There would have been no need to appoint any staff whatsoever, not even a bill collector.

But right from the beginning DSS maintained an office in the stores and had a number of employees such as watchmen, accountants etc. As an exercise in business management, DSS, in the year ending 30th June, 1948, had engaged extra highly qualified and experienced staff of accountants and statisticians so that the contingency of accumulating large portion of dead stock did not occur.

63. It appears that Chinubhai used to incur expenditure of about Rs. 5,000/- to Rs. 6,000/- per annum in inserting advertisements of the stores as a whole. (Exh. 'Z-60') ('Z-80'). Whenever the stall holders desired that their names should be specifically mentioned in the advertisements, Ramniklal used to comply, provided the particular stall-holder bore half the expenses. For instance, Soni Watch Company (vide letter – Exh. 'Z-73') wrote on 11th Nov. 1955 informing Ramniklal that an expense of Rs. 243-4-0 had been incurred by them in exhibiting cinema slides at 'Chitra', 'Rivoli' and 'Broadway' of Dadar, and claimed reimbursement of half the cost totalling to Rs. 121-10-0. Another stall-holder Gujar and Company also desired to boost up the sale of Samson Dresses. They intended to have an advertisement campaign which would cost him Rs. 60/- and requested Ramniklal to contribute his share of Rs. 30/- Ramniklal was issuing calendars showing the name of the stores, but one Karamshi Monshi, holder of stall No. 26, desired that 500 calendars should bear his name as well and by a letter (Exh. 'Z-70') dated 3rd Sept. 1956, agreed to bear expenses for the same.

The Merchants' Association by their Resolution dt. 12-1-1957 decided that the Executive Committee of their Association should discuss with the management a successful campaign of advertisement and that the façade of the stores should be given a face lift. The management, vide their letter dt. 25th March, 1956 (Exh. 'Z-60') agreed to share 50% of the expenses and invited suggestions and proposals for the construction of the front gate.

64. It appears that the management gifted a telephone locking device to the customers as a part of their advertising campaign.

65. The acknowledged leader of the stall-holders Soni, had admitted that the management used to decorate the stores on festive occasions.

66. In order to promote sales, the management had announced a 6¼% rebate on 15th Aug. 1957 to customers and the same was shared by the management. Next year, the merchants again requested the management on 18-7-1958 (Exh. 'Z-60') (Colly.) that a rebate of 6% should be allowed to the customers and half the burden of 3% should be borne by the management.

67. It appears that in spite of advertisement campaign, and all other steps taken by the management, the sales of the stalls did not pick up appreciably. A circular was issued by Ramniklal (Exh. 'Z-63') on 3-12-1954 convening a meeting of the stall-holders with a view to giving rebate in the minimum commission. Ramniklal made it clear that the rebate in the commission will be granted only to those merchants who have no outstanding and who would give an undertaking "to remain in the stores for the next six months". Ultimately, a rebate of 10% was granted but the circulars issued from time to time (Exh. "Z-63") (Colly.) show that the merchants were in arrears not only in the payment of their minimum commission, but also electric charges. The management also offered a heavy reduction in the minimum commission

when the stores was closed for about 10 days during the agitation consequent upon the report of the States Re-organisation Commission.

68. The merchants used to submit sales statements from time to time ('Exh. "Z-86 to "Z-107") and the recalcitrants amongst them were reminded to submit statements.

69. By a letter (Exh. "Z-64") dt. 2nd Aug. 1956, Soni requested permission from Ramniklal to change the merchandise in which they were dealing till that date, but the management advised him to stock latest popular records of H.M.V. but did not permit him to deal in watches.

70. One of the tests proposed by Lord Denning M.R. in *Marchant v. Charters* [(1977) 3 All ER 918, 922] is "Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not"? Right from the beginning it was the management of the stores which had a stake not only in the various stalls which they had furnished but also in the sales of stall-holders who were given permission to occupy the same. Some of the stall-holders like Paradkar (Exh. "Z-74 dt. 4th Oct. 1956) who could not boost their sales, surrendered their stalls because even the minimum commission was rather too heavy for them to pay. The advertisement campaign was geared to increase the sales of the stall-holders so that the management could augment their share of the commission on the gross sales figures. It was not the stall-holders who had the stake in the stalls but the management who had a stake not only in the stalls and the entire buildings, but also in the total sales so that they could claim higher commission. The interest of the stall-holders was not assignable and every time a new stall-holder was inducted, he was given a fresh permission by the management.

71. The sapling of a departmental stores nursed under the long shadows of Macy's and Harrod's did not take roots let alone burgeoing in Dadar soil. The Dadar housewife was accustomed to visit a row of shop-fronts displaying sarees when she wanted to buy a saree and was not mentally attuned to visit a conglomeration of shops selling anything from a pin to a piano. (A white collared Dadarite anyway preferred to do his Sunday morning riyaz squatting on the floor with his good old harmonium!).

72. Most of the stall-holders did not do well with the result that the management had to content itself with the minimum commission. But Century Mills, who had a stall, showed better performance and paid the percentage of commission calculated on the basis of sales which was higher than the minimum agreed upon. After their initial period was over, fresh negotiations were started with Century and a fresh permission granted to them under different terms.

73. All the licenced agreements with the stall-holders came to an end on 31-12-1965 and the surprising feature of this case is that right from 1946 till this date, not a single assertion was made by the stall-holders that they are tenants. On 1-1-1966, notices of revocation (Exh. "Z-168") (Colly.) were issued by Laxmi whereafter for the first time on 10-1-1966, the stall-holders claimed to be tenants and thus filed the first salvo in this battle. Within a month, they filed suits on 9-2-1966 (Exh. "Z-201") in the Small Causes Court for obtaining a declaration that they are the tenants. This long acquiescence of the stall holders lends credence to the case of the plaintiffs that the stall-holders were merely licensees.

74. The surrounding circumstances marshalled above like want of facility to independently lock the stalls, the inability of the stall-holders to enter into the building or the stores at will, the requirement of having to seek permission of the management to change the hours of business or effect a change of merchandise, non-assignability of interest in stalls, repeated recognition of the agreements to pay a fixed percentage of commission subject to a minimum with DSS, Ramniklal and Laxmi, the sale promotion campaigns lodged by DSS, Ramniklal and Laxmi, the correspondence of the stall-holders with the fiscal authorities reiterating the commission agreements, the deployment of staff like watchmen; accountants, statisticians by the management to monitor the sales, want of a single protest by the stall-holders till 10-1-1966 asserting rights of tenancy, submission of sales statements by the stall-holders to the management and payment of commission on the turnover higher than the minimum by Century Mills' stall, unequivocally point out that all of them, with the exception of stall No. 6 of Nathani and Stall No. 7 of Ramjeevandas were merely licensees for reward.

75. The cases of Nathani and Ramjeevandas stand on different footing. It is not the case of Laxmi or their predecessors in interest that they have never given any premises in the stores on rent. Admittedly, Dr. Patkar who runs a maternity home and others were tenants. Though exclusive possession alone and by itself is not the acid test of determination whether the relationship between the parties is that of tenancy or licence, it assumes importance in the case of Nathani and Ramjeevandas. Both these stalls are facing the road and the stall-holders have not to enter the collapsible gate at all to reach and open their stalls. Surely, these stalls facing the road could not be kept open as was the practice with the stalls inside the main gate. The exclusive possession in their case coupled with the fact that there are other persons who are recognised to be the tenants in the building of the stores is a pointer to the fact Laxmi have failed to prove that Nathani and Ramjeevandas are mere licensees.

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B.V. D'souza v. Antonio Fausto Fernandes

AIR 1989 SC 1816 : (1989) 3 SCC 574

SHARMA, J.- The only point involved in this appeal is whether the document (Ex. 20) executed by the parties at the time the appellant was inducted in the disputed premises is an agreement of leave and licence or a deed of lease. The building belongs to the respondent, and the appellant claims to be in its occupation as a month to month tenant. The respondent instituted the suit in the civil court, out of which this appeal by special leave arises, for a decree for eviction of the appellant alleging that he has been in occupation of the building as a licensee and has illegally refused to vacate in spite of service of notice. The appellant's defence is that he is a tenant protected by the provisions of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968, and in view of Section 56 thereof the suit in the civil court is not maintainable. Agreeing with the plaintiff respondent, the trial court passed a decree which was confirmed on appeal by the District Judge. The High Court dismissed the second appeal filed by the appellant observing that it was concluded by concurrent findings of fact.

2. We do not agree with the High Court that the findings of the courts below were those of fact so as to be binding on the High Court under Section 100 of the Code of Civil Procedure. The case has to be decided on the nature of possession of appellant which is dependent on a correct interpretation of the document Ex. 20.

3. The document Ex. 20 has been described as an agreement of leave and licence and the parties as the licensor and the licensee. But it is significant to note that in the very first sentence of the document the respondent is described as "Landlord hereinafter called the Licensor". However, this cannot answer the disputed issue as it is firmly established that for ascertaining whether a document creates a licence or lease, the substance of the document must be preferred to the form. As was observed by this Court in *Associated Hotels of India Ltd. v. R.N. Kapoor* [AIR 1959 SC 1262], the real test is the intention of the parties - whether they intended to create a lease or licence. If an interest in the property is created by the deed it is a lease but if the document only permits another person to make use of the property "of which the legal possession continues with the owner", it is a licence. If the party in whose favour the document is executed gets exclusive possession of the property, prima facie he must be considered to be a tenant; although this factor by itself will not be decisive. Judged in this light, there does not appear to be any scope for interpreting Ex. 20 as an agreement of leave and licence.

4. The document has been placed before us by the learned counsel for the appellant. Although as stated earlier, it has been described as an agreement of leave and licence and the parties as the "licensor" and the "licensee", its provisions unmistakably indicated that the appellant was being let in as a tenant on the monthly rental of Rs 350 (besides water and electricity charges) to be paid regularly on or before the 5th day of each consecutive month. By Clause 5, it was agreed that the appellant "shall not sub-let, under-let or part possession of the premises to any stranger nor shall he keep the premises vacant for more than 3 months without the consent of the licensor", that is, the respondent. The question of executing a sub-lease or sub-letting can arise only by a tenant. If a licensee inducts any person in the property

as his tenant, it cannot be described as sub-letting. In Clause 15 it is stated that on the expiry of the period, the deed “shall be renewable thereafter at the will of the licensee”; and in the event of the licensee not desiring to renew, “shall give one month’s notice in writing”. These terms are not consistent with the respondent’s case of licence, and indicate that an interest in the property was created in favour of the appellant in pursuance of which he was put in possession with a right of renewal. When compared with the terms of the documents set out in the judgments in *Associated Hotels India Ltd. v. R. N. Kapoor* and *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit* [(1971) 3 SCR 319], relied upon by the learned counsel for the appellant, which were construed by this Court as creating lease in spite of their description as licence deeds, the appellant’s case stands out as stronger. If the approach adopted by the courts below in interpreting the document is accepted, it shall defeat the object of the Rent Acts, by permitting the parties to camouflage the real nature of the transaction by resorting to skilful drafting.

5. Mr Dholakia, learned counsel for the respondent, strenuously contended that the test of exclusive possession is an outdated one which should not now be taken into account for the purpose of deciding the nature of possession. Reliance was placed on the observations of Lord Denning, M.R. in *Shall-Mex and B. P. Ltd. v. Manchester Garages Ltd.* [(1971) 1 All ER 841] We do not agree that exclusive possession of a party is irrelevant as is suggested; but at the same time as has been observed in the earlier cases of this Court, referred to above, it is not conclusive. The other tests, namely, intention of the parties and whether the document creates any interest in the property or not, are important considerations. The observations in the English case, relied upon by the learned counsel for the respondent cannot be understood to suggest that the test of exclusive possession has been now rendered irrelevant and redundant as they are immediately followed by the statement:

“As I have said many times, exclusive possession is no longer *decisive*.”

The position stands further clarified by the following statement in the concurring judgment of Buckley, L.J.:

“The only clause which points one way or the other, I think, is Clause 19 in Schedule 1 which Lord Denning, M.R. has already read, which clearly recognises that notwithstanding the bargain _between the parties, the plaintiffs retained rights of possession and control over the property in question. That seems to me to be consistent only with the fact that this transaction was in truth a licence transaction and not a tenancy under which the defendants would obtain an exclusive right to possession of the property during the term of the tenancy, subject, of course, to any rights reserved by the plaintiffs.”

We are also not in a position to agree with Mr Dholakia when he says that if the parties themselves have chosen to describe the transaction as a licence, we cannot make out a different case for them. It is well settled that the main purpose of enacting the Rent statutes is to protect the tenant from the exploitation of the landlord, who being in the dominating position is capable of dictating him terms at the inception of the tenancy; and, the Rent Acts must receive that interpretation which may advance the object and suppress the mischief. By adopting a different approach the Rent laws are likely to be defeated altogether.

6. The surrounding circumstances are also consistent with the deed being one of lease. The notice to vacate the premises was served on the appellant after several years of expiry of the term of the agreement. It is not suggested on behalf of the respondent that there is any relationship between the parties or that they were friends which induced him to allow the appellant to occupy the building. Realisation of rent which has been described in the document (Ex. 20) as “compensation reserved for use and occupation” was the sole consideration of the transaction. In this background the description of the parties as lessor and lessee or the rent as compensation does not carry much weight.

7. For the reasons mentioned above, we hold that Ex. 20 was in reality a document of lease and the appellant has been enjoying the exclusive possession thereof in the capacity of month to month tenant. As a result the suit was, in view of the provisions of the Goa, Daman and Diu Buildings (Lease, Rents and Eviction) Control Act, not maintainable. The appeal is accordingly allowed but without costs, the decree passed by the courts below is set aside and the suit is dismissed.

* * * * *

Samir Kumar Chatterjee v. Hirendra Nath Ghosh

AIR 1992 Cal 129

AJIT KUMAR NAYAK J. - 2. The case of the plaintiff/respondent, in short, was that he was a monthly tenant in respect of entire premises No. 19, Gopal Chandra Chatterjee Road at a monthly rental of Rs. 70/- under Taraknath De and his brothers. On being approached by the defendant, in need of accommodation in September, 1979, the plaintiff/respondent allowed the defendant/appellant to live in one room of the suit premises for a period of four months from September 1979. On compassionate ground as a licensee, without any licence fee or consideration whatsoever, and on his refusal to vacate it after the expiry of the said period of four months, the respondent revoked his licence and brought this suit.

3. The defendant contested the suit by filing a written statement. His defence, in short, was that he was a tenant or for the matter of that, a sub-tenant under the plaintiff who was a tenant at a monthly rental of Rs. 20/- payable according to English calendar month and not a licensee at all. It was alleged that the father of the defendant was also a tenant in the suit premises and that the plaintiff accepted the defendant as a tenant in respect of the said room only after taking a sum of Rs. 2,000/- as advance subject to adjustment against the rent payable by the defendant/appellant. It was alleged that as because the defendant/appellant demanded rent receipt the plaintiff started harassment and also demanded higher rate of rent which the appellant refused to pay.

4. The trial Court, on a consideration of the materials on record, held that the defendant was a licensee under the plaintiff and decreed the suit. Being aggrieved the defendant/appellant preferred an appeal before the lower appellate Court and the judgment and decree of the trial Courts were also affirmed by such Court. Defendant/appellant has thereafter preferred this second appeal on, among other grounds, that finding of both the Courts below is manifestly unjust and illegal as both the Courts below mis-directed themselves in not taking into account important evidence bearing on the disputed issue and that the same is also perverse.

5. Judgment of the lower appellate Court has been assailed before this Court on several grounds. Firstly, it has been urged that both the Courts below misplaced the onus of initially proving that the burden lies on the plaintiff to show prima facie that the defendant was a licensee. Secondly, it has been urged that both the Courts below mis-directed themselves by not taking into account very important and material evidence bearing on the status of the defendant as to whether he was a licensee or a tenant and thereby came to a wrong finding regarding the status of the defendant. Thirdly, it has been urged that such finding regarding the status of the defendant/appellant as a licensee is unjust also as the "essential ingredients" necessary for finding of such fact have not been found by both the Courts below.

6. As against this, Mr. Bhattacharyya, appearing on behalf of the plaintiff/respondent, contended that findings of both the courts below regarding the status of the defendant as a licensee is a concurrent finding of fact and should not be ordinarily interfered with in this second appeal, as the scope of this appeal in terms of the provisions of Section 100 of the Code of Civil Procedure, is to be confined only to substantial question of law. It is, therefore,

urged that as because the defendant-appellant has been found by both the courts below to be a licensee, the same should not be ordinarily interfered with by this Court as it does not involve substantial question of law.

7. Before we enter into the merits of this case on the questions as addressed by the learned Advocates of both sides, let us look into the admitted facts of this case. Undisputably, the plaintiff was a tenant in respect of the entire suit premises, i.e., 19, Gopal Chandra Chatterjee Road, at a monthly rental of Rs. 70/-. It is also an undisputed fact that the defendant/appellant is actually occupying a room of such premises having the facility of a kitchen together with the further facility of joint user of toilet of such premises. Undisputedly also, the status of the plaintiff/respondent was that of a tenant at the time the defendant was allegedly inducted as a licensee in September, 1979. It is further undisputed that the plaintiff/respondent became the owner of this premises by virtue of his purchase by a registered deed dated 22nd April, 1985, from the previous landlord. So the fact remains, that the plaintiff/respondent was still a tenant and not the owner of the suit premises at the time the suit was instituted in the year 1981.

8. Be it stated here at the very outset that in a case of concurrent findings of fact by both the courts below, the scope of interference by the High Court is very limited and the High Court should not interfere with the concurrent findings of facts of the Courts below on the ground of perversity unless the court concerned misdirected itself in coming to its finding on the question of fact. Such concurrent finding of fact, however, as observed by the Supreme Court can be interfered with only where it is manifestly unjust or where the essential ingredients for such a finding of fact have not been found by the Courts below. It is true, in an ejectment suit a finding on the question whether the defendant is a tenant or a licensee, the finding of the lower appellate Court on a consideration of the evidence is a finding of fact. Reference may be made in this connection to the decision of the Supreme Court reported in AIR 1963 SC 361. However, it has also been observed by the Supreme Court in another decision reported in AIR 1989 SC 1141 that the question whether there is a tenancy or sub-tenancy or licence or parting with possession in any particular case, must depend upon the quality of occupation given to the licensee or the transferee. Of course, in the case referred to, dispute arose regarding the occupation of a holder to display his holding and as such the vital question in that case was whether occupation itself will amount to a question of tenancy or that of a licence. Mere occupation is not sufficient to infer either sub-tenancy or parting with the possession. Facts of the instant case are somewhat different from the one referred to, as because parting of possession in favour of the defendant/appellant is an undisputed fact, though it is claimed on behalf of the plaintiff/respondent that the respondent was in actual legal possession of the suit property. In other words it is sought to be urged and emphasised that the possession of the defendant/appellant was not exclusive possession in this case. It is, therefore, urged that although the defendant/appellant was permitted to occupy a room, it was the possession of a licensee.

9. In view of the contentions of the learned Advocate for the defendant/appellant, it will be necessary to see as to whether the possession which was given to the defendant/appellant was that of a licensee or that of a tenant. Further, in view of the points raised by the learned Advocate for the defendant/appellant, the entire relevant evidence on record is to be

considered to see that the Courts below considered all such important evidence having direct bearing on the disputed issue. If, on such examination we find that the courts below made such a mistake, then in that case this Court is fully authorised to set aside such finding. To make it clear once again, it is true that High Court, while hearing second appeal under Sec. 100, C. P. Code, has not the jurisdiction to examine the evidence and reverse or reject the conclusion reached by the first appellate Court. But we should also bear in mind that it has the power to interfere with such finding, when the lower appellate Court made a mistake of the nature as stated, and can decide the issue, treating such finding as unwarranted and then it can be looked into as a substantial question of law. If any authority is needed on this point even after the amendment of 1976, we may refer to the decision reported in ***Dilbagrai Punjabi v. Sharad Chandra*** [AIR 1988 SC 1858] and also the decision of the Supreme Court reported in ***Bhairab Chandra Nandan v. Ranadhir Chandra Dutta*** [AIR 1988 SC 396].

10. In the case of this nature where the plaintiff alleges that the defendant/appellant is a licensee and where the defendant/appellant asserts that he is a tenant, the initial onus is upon the plaintiff/landlord to prove that the defendant was inducted as a licensee. The question of onus, however, loses its importance once the parties enter into the evidence. Once the plaintiff/respondent tenders evidence showing that the defendant was inducted as a licensee, onus shifted upon the defendant to show that his status is that of a tenant and not a licensee as claimed by him.

11. On a perusal of the judgments of both the courts below, unfortunately we find that both the Courts below, misplaced the onus on the defendant/ appellant to prove his case that he was a tenant and not a licensee. Admittedly, there is no document of lease or agreement of tenancy between the parties. Sub-letting has not been defined in the Rent Act or in other words, in the Premises Tenancy Act. There is no paper showing payment of rent by the defendant/appellant to the plaintiff in respect of the suit room. Nor there is any paper whatsoever showing payment of a sum of Rs. 2,000/- by the defendant/appellant either as advance or as security money. But at the same time, there is also no good evidence adduced on the part of the plaintiff/respondent showing that the defendant/appellant was inducted as a licensee in September, 1979. Admittedly, nobody was present at the time of such induction of the defendant/appellant as a licensee. Barring the uncorroborated testimony of the plaintiff/respondent there is no evidence whatsoever of induction of the defendant/appellant as a licensee for a period of four months in the disputed room of the suit premises. A proper scrutiny of the evidence on record in this case would be necessary in view of the manner of approach made by both the courts below with regard to the evidence to determine the status of the defendant/appellant. We find from the admitted evidence of the plaintiff/respondent (P.W.1) that he did not know the father of the defendant. There is no evidence that the parties are related to each other or that they had any previous acquaintance. Plaintiff's case in this regard is short and simple that he allowed the defendant/appellant to stay in, though for a specific period as the defendant/appellant was in need of such accommodation. It seems unlikely when the parties are not related to each other or there is not even any acquaintance with each other, one party would go to the extent of accommodating the other by way of granting gratuitous licence to have exclusive possession of the particular premises without any consideration whatsoever. This is against normal human conduct or experience, unless of

course the plaintiff/respondent can show it otherwise. It is true that the plaintiff/respondent has led evidence, both oral and documentary, to show that the defendant/appellant came into the premises only in September, 1979 and not before that as it is the case of the defendant/appellant. We have already seen that it is the specific defence case that his father was there in that house for a long time and that after demise of his father in 1970, he was accepted as a tenant at a monthly rental of Rs. 20/- and further on a payment of Rs. 2,000/- as advance. So, the vital question for determination of the status of the defendant/appellant would be whether he was there in the suit premises since before the alleged induction in September, 1979. If we find positive evidence on record that he was there since before that time, it would demolish the case of the plaintiff/respondent that the defendant was inducted as a licensee only in September, 1979 and not before.

12. The trial Court started with this question on an analysis of the evidence led by the defendant and that too from a wrong angle; or in other words, he mis-directed himself in assessing the oral evidence led by the defendant/appellant on an assumption that no case of prior occupation before 1979, either by the defendant or by his father was made out in the written statement. We have already seen that the defendant made a specific case that his father Bhupati Chatterjee was occupying the suit premises as a tenant and after his death the defendant continued to occupy the same. Both the Courts below considered the same as a case not made out in the pleading itself. All the four witnesses examined by the defendant including the defendant/appellant himself were disbelieved and their evidence brushed aside on this sweeping assumption that no such case is made out in the written statement, though there is such a case in the written statement, itself. According to the trial Court, Tarapada Banerjee and Arun Sarkar were the witnesses who saw payment of rent to the plaintiff/respondent by the defendant. The trial Court observed that none of these two witnesses was examined by the defendant although they were alive. As a matter of fact Arun Sarkar was examined by the defendant as D. W. 3 who was private tutor in the family of Bhupati Chatterjee, father of the defendant/appellant in the same house 20/25 years ago, and he stated that he saw payment of rent by the father of the defendant to the plaintiff/respondent. D. Ws. examined by the defendant are also the neighbours living in close proximity to the disputed premises and as such they are expected to know and to be acquainted with the inmates of that house and to witness any payment of rent or otherwise or the relationship between the parties in dispute. On a careful perusal of the judgment of the trial Court it will appear that he placed no reliance upon the testimony of the witnesses examined by the defendant or the credibility of such witnesses in the context of their making statement that the defendant's father was also there in the suit premises and the court below assumed it to be a case not made out in the written statement itself. In other words, he disbelieved the testimony of such witnesses, as if the same was contrary to the case made out in the written statement.

13. I have gone through the written statement very carefully to find that there is actually such a case in the written statement. Both the courts below made this apparent error in not looking properly into the written statement and, therefore, mis-directed themselves in assessing the oral evidence adduced by the parties. Therefore, it can be said that both the Courts below, while recording their finding regarding the status of the defendant/appellant,

acted on an assumption not supported by evidence and failed to consider the oral and also the documentary evidence in coming to such finding.

14. Coming to the evidence of the witnesses examined by the plaintiff, we have already seen that the plaintiff admitted that he did not know the father of the defendant/appellant and he could not say if the defendant's father was the tenant in the suit premises. He did not enquire admittedly about the antecedents of the defendant when he was inducting him as a licensee. Admittedly, the defendant was given not only a room, but also a kitchen and the facility to use the toilet and the common tap water. Thereby, exclusive possession of the portion of the suit premises was given to the defendant. There is nothing to show that the plaintiff/landlord retained legal possession of the same in the sense allowing the defendant/tenant to occupy it only as a licensee or an invitee for a period of four months. The other witness (P.W.2) was examined by the plaintiff to prove that the defendant/appellant was a tenant in their house, i.e., in the house of P.W. 2, since before his occupation of the suit premises as a licensee. In other words, P.W. 2 was examined to prove that the defendant/appellant was living as a tenant in their house, and, was therefore, living elsewhere than in the suit premises before September, 1979. If there is convincing evidence on record to show that really the defendant was living elsewhere, then in that case the defendant will have no case as a tenant in the suit premises. On a scrutiny of the evidence of P.W. 2. we find that he is completely an interested witness and admitted to have come to the dock at the request of the plaintiff, as his father's friend and thereby brought the rent counterfoils which he was requested so to do. He did not know the defendant's father or where he lived. P.W. 2 cannot say when the defendant was inducted as a tenant in their house in 5, Sashibhusan Basak Lane. He cannot say in his evidence how old he was when the defendant was inducted as a tenant in their house, although he says he used to collect rent when the defendant was inducted as a tenant.

15. P.W. 3 is apparently an interested witnesses as admittedly he is a friend of the plaintiff/respondent. It is true, he was once a tenant in this house, but he left it long ago and purchased a house site and built a house in the name of his wife away from this place, although he claims that he shifted from this house in 1966. As a matter of fact we find that he purchased the house site in which, he says, he built a house long before.

16. Next, turning to the documentary evidence on record, the plaintiff has placed much reliance on the rent counterfoils produced by P.W. 2. Genuineness of such rent counterfoils and also the factum of such alleged tenancy right in the said house, have been challenged on behalf of the defendant/appellant. We have already seen that P.W. 2. as the son of the friend of the plaintiff/respondent was requested to bring those rent counterfoils and he admittedly produced the same on such request. Allegedly, such rent counterfoils, at least two of the rent counterfoils are said to bear the initial of the defendant/appellant showing payment of rent when he was supposed to be occupying the said premises. The trial Court compared the said initials with the admitted signature of the defendant put in the deposition sheet. The defendant has already categorically denied that either he was a tenant in the said premises or that he ever paid rent to the father of the P.W. 2. or that the rent counterfoils (Exts. 7 and 7 (a)) bear his initial or signature. I am at a loss to understand as to how the trial Court could come to the conclusion that the signatures are identical or of the same person. A casual look at the initials

contained in Exts. 7 and 7 (a) will show that they are completely distinct and different from those admitted signatures and the disputed one is extremely hazardous as has been held by this Court as well as by the Supreme Court. It is with utmost caution that such comparison is to be made and a finding is to be arrived at on that basis. In the context of unreliable nature/of the oral evidence P.W. 2, it will be all the more risky to rely upon such rent counterfoils containing suspicious initials, far less proving convincingly that the defendant/appellant was a tenant in that building, namely, 5, Sashibhushan Basak Lane before September, 1979. It is true, the plaintiff has produced the certified copy of the death certificate showing that in 1970 the defendant's father Bhupati Chatterjee's address, as given therein, is other than the disputed premises. But such noting of address as appearing in the death certificate has been said to be incorrect one by the defendant (D.W. 2) in his evidence. No doubt, this entry in the death certificate goes to show that the defendant's father was at least living in a different place at the time of his death. But there is overwhelming evidence on record to show that the defendant was living with his family in the suit premises even long before his induction as licensee in 1979. The trial Court has placed no reliance on the documentary evidence adduced by the defendant showing his residential address in the suit premises. Even, if we disbelieve the other documents, (Exts. B series) the postal receipts, (Ext. C series), postcards (Ext. D), inland letter (Ext. E), the transfer certificate, cannot be lightly brushed aside in the manner as the trial Court has done and dittoed by the court of appeal below. There will be no manner of doubt that at least some of these were addressed to the defendant or his mother before 1979 showing thereby that they were living in this house before the alleged induction as a licensee by the plaintiff. Postal marks clearly show the years before 1979 and even in spite of the alleged interpolations the name of the defendant and the address are discernible. So also the original school leaving certificate by the defendant (Ext. E) showing that his address as long back as 1965 was given in this disputed premises and showing thereby that the defendant/appellant was living in this house since before 1979. All these speaks volumes of that the defendant/appellant was occupying such premises with the members of his family since before 1979. This can only be done not as a licensee, but in the capacity other than that as a licensee. If this prior occupation of the defendant is believed, it fits with the case of the defendant that no rent receipt was granted to him because the plaintiff/respondent was himself a tenant and that he would be liable to eviction for creating sub-tenancy. This is the specific case of the defendant and is borne out as such by the facts and circumstances of the case.

17. As already stated, the first court of appeal, also approached the whole case from a wrong angle misdirecting itself as that of the trial Court, in a way prejudicial to the interest of the defendant/appellant. In short, the appellate Court's judgment is also based on surmise and conjectures, as that of the trial Court. He simply brushed aside the documentary evidence adduced by the defendant/appellant as suspicious in nature and placed no reliance on the same without carefully examining the same and trying to arrive at a finding based on his independent judgment and reasoning. He simply dittoed and endorsed the finding of the trial Court that such documents were created for the purpose of this suit, without trying to weigh and assess the evidentiary value of the same. In that view of the matter, I am constrained to observe that the court of appeal below failed altogether to comply with the statutory provisions of Order 41, Rule 31 of the Code of Civil Procedure. The judgment of the appellate Court should not be the mere endorsement of the findings of the trial Court, not

containing the reasons for the decisions arrived at by him independently of that of the trial Court.

18. So, in view of what has been discussed above, it is clear from the volume of oral and documentary evidence on record that the defendant/appellant was there in the suit premises by the plaintiff/respondent in September, 1979. When this fact is established convincingly, it fits in with the case of the defendant/appellant that he was there obviously in the capacity not attributed to him by the plaintiff/respondent. In other words, this fits in with the case of the defendant/appellant that he was there as a tenant and that this fact was not given a stamp of legality or authority as because the plaintiff/respondent's status was that of a tenant. No sub-tenancy was sought to be created, presumably to avert a suit for eviction to be filed by the landlord against the tenant. I find, therefore, that the plaintiff has failed singularly to prove his case of induction of defendant/appellant as licensee and the finding of the lower appellate Court based on that of the trial Court should be set aside as stated above.

19. The result is, the appeal is allowed. The judgment and decree of the court of appeal below are set aside and the plaintiff's suit is dismissed.

* * * * *

Delta International Ltd. v. Shyam Sunder Ganeriwalla

AIR 1999 SC 2607 : (1999) 4 SCC 545

M.B. SHAH, J. - 2. These appeals are filed against the judgment and decree dated 2-12-1997 passed by the Division Bench of the High Court of Calcutta in appeal from Original Decrees Nos. 148 and 165 of 1992. The undisputed facts of the matter are that the original owner of the premises was Abhiram Mullick (since deceased) who created tenancy of the premises, namely, No. 4-D, Council House Street, Calcutta in favour of Mallika Investment Company Private Limited. Dewar's Garage India Private Limited was inducted into the premises as the monthly tenant under Mallika Investment Company Private Limited. Dewar's Garage India Private Ltd. (in short "Dewar") was maintaining and running a petrol service station for sale of motor spares and components at the tenanted premises. Dewar had erected and built certain structures on the said premises. Dewar was subsequently amalgamated into Delta International Limited (appellant-plaintiff). By an agreement dated 18-7-1970, Dewar executed leave and licence agreement in favour of ESSO Standard Eastern Inc. (in short ESSO). ESSO in turn permitted Shyam Sunder Ganeriwalla, Respondent 1, to run a petrol service station. By an order passed in Company Petition No. 331 of 1991, Dewar was amalgamated with the plaintiff (Delta International Limited). Further, the business undertakings and the estates of ESSO also had been taken over by an Act of Parliament and have been transferred and assigned by the Central Government in favour of M/s Hindustan Petroleum Corporation Limited. In 1985, Delta International Limited filed Civil Suit No. 491 of 1985 in the High Court of Calcutta for a perpetual injunction restraining the defendants and/or their servants, agents and assigns from using any of the fixtures, fittings and accessories lying at the suit premises; for damages, for wrongful use and occupation of the premises at the rate of Rs 20,000 p.m. from 1-5-1985, that is, the date of termination of leave and licence as claimed in the plaint and for a decree for possession of the said premises and other reliefs. The learned Single Judge passed the decree in favour of the plaintiff by holding that the agreement in question was only a licence agreement and it was not a sub-lease. In appeal, the said judgment was reversed by holding that the agreement in question constitutes a lease mainly on the basis of exclusive possession and the Division Bench observed that

"to put it pithily, if an interest in immovable property entitling the transferees to enjoyment is created, it is a lease, if permission to use land without right to exclusive possession is alone granted, a licence is the legal result".

3. At the time of hearing of this appeal, learned counsel for the parties exhaustively referred to the material terms and conditions of the agreement in which the term "leave and licence" is used. In support of their contentions, they also referred to various decisions which have laid down tests to find out in which set of circumstances even though the document is termed as a leave and licence it could be construed as a lease.

4. Learned counsel for the appellant submitted that:

1. Learned Single Judge of the High Court was right in holding that the document does not create any lease because the intention of the parties was quite manifest from the document as well as clause 12 which stared in the face.

2. The appellant himself was a monthly tenant of the premises and could not create a sub-tenancy without the prior written consent of the landlord in view of the provisions of Section 14(1) of the West Bengal Premises Tenancy Act, 1956. It is nobody's case that such a consent was obtained. (para 1 of the deed)

3. The licence was for the purpose of running the petrol station which had been set up by the appellant and which the appellant no longer wished to operate. (paras 2 and 3 of the deed)

4. The possible grant of sub-lease was specifically reserved for the future in the event that the appellant was able to obtain a consent from its landlord Mallika Investment Company Private Limited. (paras 4, 5 and 6 of the deed)

5. The licence is stated to be for the benefit of the respondent to "use, occupy, enjoy, run and work" the petrol station. (clause 1)

6. The respondent was not obliged to pay any portion of the outgoing in respect of the premises despite the fact that fifty per cent of municipal rates, taxes etc. were normally payable by the occupier of the premises; thus even the charges attendant upon occupation of the premises were to be paid by the appellant. (clauses 3 and 4)

7. The respondent was obliged to keep the plant and machinery at the said premises in good repair. (clause 5)

8. The respondent was obliged to take out necessary insurance policies for the business. (clause 8)

9. The appellant was entitled to revoke the licence in the event of any breach or default on the part of the respondent. (clause 9)

10. Clause 11 specifically permits the respondent to carry out business in the name of the appellant which normally would not be permitted if it is not a licence to run the business.

11. Clause 12 manifests the intention of the parties that the document was executed only for the purpose of creating a licence and not a lease.

12. Clauses 13 to 17 specifically make provision for the possible future grant of sub-lease by the appellant to the respondent in the event that the appellant obtains a consent from the tenant. These clauses also contemplate various terms which would be provided in the prospective sub-lease.

13. Clause 18 provides for the payment of advance licence fees by the respondent and the term "demised premises" used thrice in the clause must be read in conformity with other clauses of the document and the intention of the parties.

14. The right given to the respondent to give it on sub-licence was given, as the respondent was only to operate the petrol station. (clause 19)

5. On the basis of the aforesaid terms of the document, Mr Ashok Desai, learned Senior Counsel for the appellant submitted that the construction of the document would depend upon its pith and substance and not upon the labels that the parties may put upon it. The paramount test for determining whether it is a lease or a licence is "the intention of the parties". He submitted that exclusive possession of the premises being granted, although an important factor, does not preclude the court from holding that the document is in fact a licence, particularly in cases where the grantor did not have the power to grant a lease or is forbidden by the provisions of the rent control legislations. He emphasised that the dominant intention is

to be found out in such cases from the document itself. He referred to the following principles stated in the decisions of this Court to advance his contention:

(a) The construction of a document would depend upon its pith and substance and not upon the labels that the parties may put upon it. This principal was laid down by this Court in the decisions of *Inderjeet Singh Sial v. Karam Chand Thapar* [AIR 1996 SC 247] and *Vayallakath Muhammedkutty v. Illickal Moosakutty* [AIR 1996 SC 3288].

(b) The paramount test is “the intention of the parties” as stated in the case of *Capt. B.V. D’Souza v. Antonio Fausto Fernandes* [AIR 1989 SC 1816] and *Vayallakath* at p. 387.

(c) Exclusive possession of the premises being granted, although an important factor, does not preclude the court from holding that the document is in fact a licence as decided in the case of *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit* [(1971) 1 SCC 276] and *Rajbir Kaur v. S. Chokesiri & Co* [AIR 1988 SC 1845].

(d) Even where exclusive possession is granted, only a licence will be created if the grantor did not have the power to grant a lease. This principal was laid down in the case of *Rajbir Kaur*.

(e) The appellant, as a monthly tenant, was forbidden by Section 14(1) of the Act to sub-let the premises without the prior written consent of the landlord. It is nobody’s case that the prior written consent of the landlord was in fact obtained in the present case. It is, therefore, not possible to contend that any sub-lease was granted and any such purported disposition would be unenforceable and void. (Decided in the case of *Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.* [AIR 1959 SC 689])

(f) Where the dominant intention is to use the premises with fittings and fixtures for the purpose of running a business, the same does not tantamount to a lease of immovable property as decided in the case of *Uttamchand v. S.M. Lalwani* [AIR 1965 SC 716].

6. As against this, Mr D.P. Gupta, learned Senior Counsel for Respondent 1 submitted that for resolving the dispute that the document is a lease or a licence, the legal principles have been laid down in a long line of decisions which inter alia are as under:

(a) The court looks at the substance of the transaction and not the label which the parties may have agreed to put on the transaction. The court is entitled to decide whether or not the agreement between the parties is a mere camouflage to get round the rigours of rent control legislations.

(b) Irrespective of the label that may have been put upon the transaction by the parties, the court would gather the true intention of the parties as to whether an interest in the land or premises was sought to be created or not.

(c) Exclusive possession is a most significant indicator to hold that the document creates a lease.

7. In support of his contentions, learned counsel for the respondent referred to the decisions of this Court in the cases of *Associated Hotels of India Ltd. v. R.N. Kapoor* [AIR 1959 SC 1262], *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit* [(1971) 1 SCC

276], *Capt. B.V. D'Souza v. Antonio Fausto Fernandes* [AIR 1989 SC 1816], *Tulsi v. Paro* [(1997) 2 SCC 706] and *K. Achyuta Bhat v. Veeramaneni Manga Devi* [AIR 1989 SC 93].

8. Further, the learned counsel for the respondent referred to various clauses of the deed for finding out the intention of the parties and referred to certain terms such as:

(a) The licensee is described in the agreement so as to include its successors and assignees as per the memorandum of agreement.

(b) The expression “demised premises” has been used three times in clause 18 which leaves no doubt that interest in the property is created.

(c) The operative clause is in the language of a formal lease. What is granted and given to use, occupy, enjoy, run and work is the premises described in the First Schedule together with the plant and machinery, fixtures and fittings set out in the Second Schedule.

(d) ESSO was to pay for electricity, was liable to repair the fittings and fixtures and to keep them in a proper running and usable condition, was entitled to bring in and instal other machinery, was to take out necessary licences and insurance policies, could continue the business either in its own name or in the name of Dewar (subject to indemnity) and would not assume any liability or responsibility for taking over the existing employees. (clauses 5, 6, 7, 8 and 11)

(e) ESSO would have the right to grant leave and licence to a third party during the continuance of the agreement. (clause 13)

(f) It was contemplated that if Dewar is able to obtain a lease of the said premises on terms which would not be inconsistent with ESSO's standard form, then Dewar will grant a sub-lease to ESSO for at least a period of 10 years with three renewal options. [clause 15(a)]

9. From the aforesaid submissions it is apparent that the common contention of the learned counsel for both the parties is that the Court has to gather and find out the true “intention of the parties” as to whether the document creates a lease or a licence; the dominant intention of the parties is to be gathered from the terms of the document irrespective of the labels that the parties may put upon it. It is to be stated that even though it is the common contention of the learned counsel for the parties that the dominant intention of the parties is to be gathered from the document, yet all throughout the question had remained a vexed one, having no easy solution and precise mathematical tests. Because ultimately “intention of the parties” is to be inferred. For this purpose, we would first refer to the tests laid down by this Court in the case of *Associated Hotels of India Ltd. v. R.N. Kapoor* which are relied upon in subsequent decisions. In a minority judgment rendered by Subba Rao, J. the Court held that there is a clear distinction between a lease and a licence; the dividing line is clear, though sometimes it becomes very thin or even blurred and observed that for such a determination, the following propositions may be taken as well established:

“(1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(2) the real test is the intention of the parties - whether they intended to create a lease or a licence;

(3) if the document creates an interest in the property, it is a lease; but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(4) if under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.”

10. Before laying down the aforesaid proposition, the Court held as under:

“At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington* [(1952) 1 All ER 149] wherein Lord Denning reviewing the case-law on the subject summarizes the result of his discussion thus at p. 155:

‘The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.’

The Court of Appeal again in *Cobb v. Lane* [(1952) 1 All ER 1199] considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell, L.J., stated:

‘... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.’

Denning, L.J., said much to the same effect at p. 1202:

‘The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?’ ”

11. At this stage, it would be worthwhile to quote some more instructive discussions from *Cobb v. Lane* rendered by three learned Judges in their judgments given separately:

Somervell, L.J. observed:

“Certainly under the old cases (and I doubt if this has been affected by the modern authorities), if all one finds is that somebody has been in occupation for an indefinite period with no special evidence of how he got there or of any arrangement being made when he went into occupation, it may be that the court will find a tenancy at will. I am assuming that there is no document, or clear evidence as to terms. *The modern cases establish that, if there is evidence of the circumstances in which the person claiming to be a tenant at will went into occupation, those circumstances must be considered in deciding what the intention of the parties was.*”

The learned Judge further observed:

“No doubt, in former days, except for the question of the statute, the distinction between a tenancy, whether at will or for a period, and a licence was not so important as it has become since the Rent Restrictions Acts came into operation. In many cases

under those Acts it has a special importance. *That fact has led to an examination of the distinction, and the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.*"

Denning, L.J. further observed to the same effect as under:

"Under the old cases there would have been some colour for saying that the brother was a tenant at will, but the old cases can no longer be relied on. Owing to the impact of the Rent Acts, the courts have had to define more precisely the difference between a tenant and a licensee. ... *The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?*"

Delivering a concurring judgment, Romer, L.J. further considered the facts and observed:

"She was not a tenant at will, and, unless she was, she could not create the tenancy on which the defendant relies. *In the absence of a sufficient title or interest in her to carve out or to create a similar tenancy in the defendant, his claim, as I say, fails in limine.*"

12. Further, in his judgment, Lord Denning, J. referred to an earlier decision in **Errington v. Errington** wherein the Court held that the test of exclusive possession is by no means decisive. For determining what was the intention of the parties the Court relied upon the following observations from the decision in **Booker v. Palmer** [(1942) 2 All ER 674 (677)] wherein Lord Greene, M.R. held:

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. *There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind.*"

13. Along with other cases, the aforesaid case was referred to and relied upon in the case of **Rajbir Kaur v. S. Chokesiri and Co.** where this Court considered and held that ultimately the question whether a transaction is a lease or a licence "turns on the operative intention of the parties and there is no single, simple litmus test to distinguish one from the other".

14. The relevant discussion in para 22 is as under:

"22. It is essential to the creation of a tenancy that the tenant be granted the right to the enjoyment of the property and that, further, the grant be for consideration. While the definition of 'lease' in Section 105 of the Transfer of Property Act, 1882, envisages the transfer of a right to enjoy the property, on the other hand the definition of a 'licence' under Section 52 of the Indian Easements Act, 1882, consistently with the above, excludes from its pale any transaction which otherwise, amounts to an 'easement' or involves a transfer of an interest in the property, which is usually involved in the case of a transfer of right to enjoy it. These two rights, viz., easements and lease in their very nature, are appurtenant to the property. On the other hand, the grant only for the right to use the premises without being entitled to the exclusive possession thereof operates merely as a licence. But the converse implications of this

proposition need not necessarily and always be true. *Wherever there is exclusive possession, the idea of a licence is not necessarily ruled out.* English law contemplates what are called ‘Possessory Licences’ which confer a right of exclusive possession, marking them off from the more usual type of licences which serve to authorise acts which would otherwise be trespasses. *Thus exclusive possession itself is not decisive in favour of a lease* and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease *where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a licence ‘turns on the operative intention of the parties’ and that there is no single, simple litmus test to distinguish one from the other. The ‘solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties’.*”

15. Dealing with the contention that the intention of the parties is to be determined upon a proper construction of the deed entered into between the parties, and that alone is a decisive matter, the Court dealt with the said contention in para 32 and observed as under:

“Indeed learned counsel placed strong reliance on the following observations by this Court in ***M.N. Clubwala v. Fida Hussain Saheb*** [AIR 1965 SC 610]:

“Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee *the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement.*”

The proposition of Dr Chitale as to the conclusiveness of what emanates from the construction of the documents has, in this case, its own limitations. The import, significance and conclusiveness of such documents making, or evidencing, the grants fall to be examined in two distinct contexts. *The dispute may arise between the very parties to the written instrument, where on the construction of the deed one party contends that the transaction is a ‘licence’ and the other that it is a ‘lease’. The intention to be gathered from the document read as a whole has, quite obviously, a direct bearing.* But in cases where, as here, the landlord alleges that the tenant has sub-let the premises and where the tenant, in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, inter se, between himself and the alleged licensee, *the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed.* At best, it is a piece of evidence, the weight to be accorded to which will necessarily depend upon all the other circumstances of the case. The tenant and the sub-tenant, who jointly set up a plea of licence against the landlord may choose to camouflage the truth and substance of the transaction behind a facade of a self-serving and conveniently drafted instrument.”

16. Learned counsel for the respondent had also relied upon the decision of this Court in ***Sohan Lal Naraindas v. Laxmidas Raghunath Gadit*** wherein the Court has observed as under:

“6. An attempt was deliberately made to camouflage the true nature of the agreement, by reciting in several clauses that the agreement was for lease and licence

and it emphasised the pretence, it was also recited that the defendant was not to have any right as tenant or sub-tenant in respect of the loft.

9. Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement. If it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance."

From the aforesaid discussion what emerges is:

(1) To find out whether the document creates a lease or a licence the real test is to find out "the intention of the parties"; keeping in mind that in cases where exclusive possession is given, the line between a lease and a licence is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, the intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that the document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be the most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sub-let the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the sub-tenant may jointly set up the plea of a licence against the landlord which is a camouflage; in such cases, the mask is to be removed or the veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances. Same would be the position where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid the operation of rent legislation.

(5) Prima facie, in the absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting tenant in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-

tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sub-let or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter.

(6) Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act, 1882 inter alia provides that leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well-laid principles for construction of contractual terms, viz., for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment, one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.

18. In our view, the submission of the learned counsel for the appellant requires to be accepted because as stated above, it is nowhere pleaded that the deed executed between the parties is a camouflage to evade the rigours of the provisions of the Rent Act nor is it stated that a sham document is executed for achieving some other purpose. In these set of circumstances, the intention of the parties is required to be gathered from the express words of various terms provided by them in the deed. For this purpose, clause 12 of the document is to be taken into consideration and due weight is required to be given to what the parties have stated. It provides as under:

“12. It is hereby expressly agreed upon and declared by and between the parties that these presents shall not be treated or used or dealt with or construed by the parties in any way as a tenancy or lease or as a document within the purview of the West Bengal Premises Tenancy Act or any modification or amendment thereof or to confer any relationship as landlord and tenant between the parties hereto.”

19. The aforesaid term of the document is not provided by an illiterate layman or poor person in need of some premises for his residence or business, but is executed by two companies where it can be presumed that it is mentioned after full understanding and to avoid any wrong inference of intention. It specifically mentions that only a licence was created and not a lease. The said clause is in positive as well as negative form providing that the agreement was a licence and should not be treated or used or dealt with or construed by the parties in any way as lease or to confer any relationship as landlord and tenants between the parties. When the parties which are capable of understanding their rights fully, expressly agreed and declared that the document should not be construed in any manner as creating any relationship as landlord and tenant between them, it would be impermissible to conjecture or infer that their relations should be construed as that of landlord and tenant because certain terms mentioned in the deed can have a double intendment. As stated above, the intention of the parties is the meaning of the words they have used and there could be no intention independent of that meaning. The learned Single Judge of the High Court rightly, therefore, held that this clause stares in his face in construing it as a lease deed.

20. Secondly, the parties to the document were fully aware that lease or sub-lease could not be granted and therefore, specific provision is made in the deed that if the consent of the tenant (*sic* landlord) is obtained for creation of a sub-lease, the deed for the same would be executed on the terms and conditions which were set out in the document; detailed provisions are made in various clauses of the deed for obtaining permission and execution of a lease deed. The parties were conscious that a lawful lease deed could be executed only after obtaining the consent of the landlord and the document if treated as a sub-lease, would be illegal. Paras 4, 5 and 6 of the deed specifically provide that after obtaining the consent of the landlord, the licensor would grant a sub-lease in respect of the said premises for a period of at least ten years and the licensor would endeavour to obtain a lease on the terms which would not be inconsistent with the standard terms on which a sub-lease is obtained by the licensee for the purpose of selling his products through the petrol service station and a copy of the standard form of the lease was also attached with the deed.

21. Thirdly, no contention was raised by the defendants to the effect that the licence deed is a camouflage to circumvent the provisions of law or to defeat the rights of the owner or the tenant who granted the licence and inducted the licensee in possession. Further, in cases where a contract for licence is executed by handing over exclusive possession of the premises, the distinguishing line between the lease and the licence is absolutely thin. In such cases, the terms of the document are to be read as they are and it would be unreasonable to draw an inference that the parties intended to create a relationship of landlord and tenant despite express contrary terms in the deed which are binding between the parties.

22. However, Mr D.P. Gupta, learned Senior Counsel for the respondent vehemently relied upon various terms of the document in support of his submission that the document should be construed as a lease deed. He submitted that construe the document as it is and disregard what would be the legal consequences of construing it one way or the other way. For that purpose, he referred to the following observations of Buckley, J. from the paragraphs which are sought to be relied upon from *The Interpretation of Contracts* by Kim Lewison, Q.C.:

“My first duty is to construe the contract, and for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of construing it one way or the other way.”

23. For this proposition there cannot be any dispute. The contract is to be construed on the basis of the terms of the document disregarding the legal consequences. However, when the terms of the document are ambiguous and are holding a double intendment then the meaning which is lawful is to be preferred. As stated above, in the licence deed, the parties have specifically made it clear that they were not executing a lease deed, but only a licence deed and it should not be construed as a lease deed or a deed creating a relationship of landlord and tenant between them. It was known to them that without prior consent, creation of sub-tenancy would be illegal. Hence, it would not be correct to arrive at a conclusion which is contrary to the law and the express terms of the agreement. Learned counsel for the respondents further submitted that in the present case, exclusive possession of the property was handed over to the defendant coupled with the fact that in clause 18, the parties have used the phrase “demised premises” which means that the intention of the parties was to create

relationship of landlord and tenant. In our view, this submission of the learned counsel cannot be accepted. Exclusive possession as discussed above is not the sole indicia to establish the relationship of landlord and tenant between the parties. It is true that the word “demise” indicates either lease or conveyance depending upon the terms of the document. But, at the same time the said word is to be construed by finding out what is sought to be conveyed or transferred in the context of all the terms of the document. If the privilege of occupying the premises exclusively is granted on certain terms and conditions specifically as a licensee or what is agreed to be granted is exclusive possession of the premises on certain terms and conditions as a licensee, then there is no question of holding to the contrary. This would be clear from various meanings which could be assigned to the word “demise”. In *Stroud’s Judicial Dictionary of Words and Phrases*, the word “demise” is given a different meaning and it is stated that it is to be interpreted in the context of other terms.

24. In *Butterworths’ Words and Phrases* the word “demise” has been explained as under:

“The relationship of landlord and tenant is one of contract, but a lease also operates as a conveyance. The usual word for this purpose is ‘demise’, but neither this word nor any formal words of conveyance are necessary. Provided the instrument shows the parties’ intent that the one is to divest himself of the possession and the other is to come into the possession for a determinate time, either immediately or in the future, it operates as a lease. This is so whether it is in the ordinary form of a demise, or in the form of a covenant or agreement, or in the form of an offer to let or take on certain terms and an acceptance appearing on correspondence. [Halsbury’s Laws, Vol. 27 (4th Edn.) para 107]

‘The terms of the lease, in my opinion establish an exclusive occupation. The word “demise” prima facie alone would be sufficient to establish that. I do not go so far as to say that where the word “demise” is used in a lease or agreement no evidence would be admissible to displace the presumption arising from its use, but the word prima facie would establish an exclusive occupation.’ Young & Co. v. Liverpool Assessment Committee [(1911) 2 KB 195, 215] DC, per Avory, J.’

25. Hence for determining whether the phrase “demised premises” should be construed as a lease or a licence as expressly stated in the agreement, the phrase or the word is to be construed in the context in which it is used. In the present case the said phrase is used in clause 18 three times along with the term “licence fee” which was to be paid by the licensee and the manner of its payment. It provides that “licence fee” for the demised premises was Rs3950 per month and the licence fee was payable for the said demised premises as provided therein, that is to say, Rs 23,700 for six months in advance and that the said licence fee is to be adjusted in respect of the demised premises per month. The phrase “demised premises” is used for recovering the licence fee. If the intention of the parties was to create a lease, then the word “rent” would have been easily used at all the places. “Demised premises”, in the present case, includes not only the premises, but fittings, fixtures and the petrol service station also. Licence was granted specifically to run the petrol service station on the terms and conditions specified therein. There are a number of other terms and conditions in the document which indicate that it was a licence deed. Firstly, the licence was for the purpose of running the petrol service station which was set up by the licensor. The possible grant of sub-

lease was reserved for the future in the event of Delta obtaining consent from its landlord Mallika Investments Company.

The licensee was not obliged to pay any part of the outgoings in respect of the premises which indicates that the charges attendant upon occupation of the premises were to be paid and borne by the licensor. He was also required to keep the plant and machinery at the said premises in good repair and was required to obtain necessary insurance policies for the business. A further clause to the effect that the licensee was permitted to carry on business in the name of the licensor indicates that the premises were not let out otherwise there was no question of permitting the use of the licensor's name. It is true that there are certain other clauses which may indicate a different intention if they are construed in isolation such as a term to the effect that the licensee was entitled to grant a sub-licence to operate the petrol station or that they were entitled to instal other machinery. But, at the same time, these clauses are to be read in the context of the fact that the licensor had decided not to run the business of petrol service station and that by the impugned deed, right to run the said business along with the premises was given to the licensee. Further, clause 9 specifically provides that the licensor shall be at liberty to withdraw and/or revoke the leave and licence in case there is any default of the terms mentioned in the document. Clause 16 provides that if the sub-lease is granted then the licensee was required to purchase the equipments, fittings and fixtures as mentioned in the Second Schedule at a price of Rs 2,50,000 within a period of one year from the date thereof. Admittedly, sub-lease is not granted and the amount of Rs 2,50,000 as agreed is also not paid by anyone.

26. Hence, even though it is not necessary to discuss, however, we would briefly refer to other decisions upon which learned counsel for the parties relied upon. Learned counsel for the respondent relied upon the decision in the case of **Capt. B.V. D'Souza v. Antonio Fausto Fernandes** and submitted that the main purpose of enacting the rent statutes is to protect the tenant from the exploitation of the landlord, who being in a dominating position is capable of dictating his terms at the inception of the tenancy and the Rent Acts must receive that interpretation which may advance the object and suppress the mischief. He, therefore, submitted that use of the words leave and licence or some other terms in the document should be construed in a way so as to advance the object of the Rent Act. In our view, in the present case, there is no question of such exploitation by the landlord. Dewar itself was inducted by a tenant in the premises and at the time of executing the leave and licence document, the parties were under the impression that they would obtain the consent of the landlord for granting a sub-lease. That contemplation was not achieved. Hence, the said judgment has no bearing in interpreting the terms of the document which is executed between two companies knowing full well their rights and the legal implications of the terms provided in the document. He also referred to the decision in the case of **Tulsi v. Paro** wherein this Court after considering the revenue records for the period from 1951-52 to 1971-72 mentioning that the appellant was not in possession as the "tenant at will", held that the theory of licence was untenable and in that context observed that a licensee has no right in property and not to speak of any right to exclusive possession of the property and animus of possession always remains with the licensor and the licensee gets the possession only with the consent of the licensor and is liable to vacate when so asked. In the said case, there was no written document between the parties

and considering the facts of the case particularly exclusive possession for a period of 20 years and the revenue records, the Court held that it was unthinkable to conclude that the appellant of that case was a licensee. As stated above, exclusive possession is one of the most relevant factors for deciding whether it is a lease or a licence. But, at the same time, when the terms of the document are clear leaving no doubt that the parties never intended to execute a lease deed, in that set of circumstances, exclusive possession would lose its importance. Dealing with a similar question in the case of *M.N. Clubwala v. Fida Hussain Saheb* this Court observed as under:

“While it is true that the essence of a licence is that it is revocable at the will of the grantor the provision in the licence that the licensee would be entitled to a notice before being required to vacate is not inconsistent with the licence. In England it has been held that a contractual licence may be revocable or irrevocable according to the express or implied terms of the contract between the parties. It has further been held that if the licensee under a revocable licence has brought the property on to the land, he is entitled to notice of revocation and to a reasonable time for removing his property, and in which to make arrangements to carry on his business elsewhere. ... Thus the mere necessity of giving a notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Indeed, Section 62(c) of the Indian Easements Act, 1882 itself provides that a licence is *deemed to be revoked where it has been either granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled*. In the agreements in question the requirement of a notice is a condition and if that condition is fulfilled the licence will be deemed to be revoked under Section 62. It would seem that it is this particular requirement in the agreements which has gone a long way to influence the High Court’s finding that the transaction was a lease. Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee *the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement*. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstances and conduct of the parties.”

27. As stated earlier, the document contemplates three types of agreements, one, that of a leave and licence; secondly, in case a consent is obtained from the tenant (*sic* landlord), for execution of a sub-lease which would create an interest in the property as a sub-tenant and thirdly, in case of a sub-lease, for purchase of equipment, fitting and fixtures at a price of Rs 2,50,000. The second and third parts of the agreement never came into operation. Hence, for the reasons discussed above, we hold that the agreement dated 18-7-1970 is a deed of “leave and licence” and not a “lease”.

28. In the result, the appeals are allowed, the judgment of the Division Bench dated 2-12-1997 is set aside and the order passed by the learned Single Judge in Suit No. 491 of 1985 is restored.

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Tila Bewa v. Mana Bewa

AIR 1962 Ori 130

S. BARMAN, J. – The plaintiff is the appellant, in this second appeal, from a decision of the learned Subordinate Judge of Cuttack, whereby he allowed in part, an appeal from the decision of the learned Munsif, Cuttack and decreed the plaintiffs suit with certain conditions.

2. The plaintiff is the daughter-in-law of the defendant.

3. On May 10, 1951, the defendant mother-in-law gifted away the suit lands in favour of the plaintiff daughter-in-law, by a registered deed of gift (Ext. 1). Until 1953, the plaintiff remained in possession of the suit lands and lived with her husband Natabar who died in 1953. After Natabar's death, the plaintiff lived with the defendant mother-in-law till 1954. In 1954, the plaintiff having been neglected by the mother-in-law she (plaintiff) left for her father's house. Thereafter the plaintiff applied for mutation in respect of the suit lands. On May 31, 1954 the defendant mother-in-law executed a deed of cancellation of the gift deed (Ext. A). Thereafter on September 19, 1954, this suit was filed by the plaintiff for declaration of title and possession in respect of the suit lands. The defendant mother-in-law's defence, – as taken in the suit, shortly stated – is this; her son Natabar's first wife, after marriage, did not come to live with him. There after the defendant got her son married to plaintiff; during the marriage negotiations, the defendant executed the deed of gift, in order to induce the plaintiff to come and live with her son; that the deed of gift was not acted upon; that it was a conditional gift to the plaintiff on condition that the plaintiff will maintain the defendant; the plaintiff having failed to maintain the defendant, she (defendant), – according to her, – is entitled to revoke the deed of gift and accordingly she cancelled the deed of gift by Ext. A; further that the plaintiff having re-married, she is not entitled to the property under the deed of gift.

4. The trial Court found that the gift was genuine and valid; that the gift was accepted by the plaintiff through her husband who then was alive; that she was entitled to the suit lands, even after the plaintiff's remarriage; and accordingly the suit was decreed in favour of the plaintiff. In appeal, the learned lower appellate Court found that there was no clause for revocation of the gift under any contingency; that the plaintiff carried on the Seva of the defendant till her husband death; that the plaintiff had remarried; that there was no fraud, coercion, undue influence, mistake or mis-representation in executing the deed of gift in favour of the plaintiff; the defendant accepted the terms of the gift; that the defendant knew fully well the terms when executing the deed; that the transaction was not a nominal nor make-believe; in fact it was acted upon; that the deed of gift cannot thus be revoked; that the plaintiff's title to the suit property as property gifted to her by the defendant, was declared with the condition that the defendant mother-in-law will remain in possession till her death; and accordingly the suit was decreed in favour of the plaintiff declaring the title in her favour but she will get (sic) possession during the life-time of the defendant. From this decision of the learned lower appellate Court this Second appeal has been filed by the plaintiff as the appellant. A cross-appeal was also filed by the defendant mother-in-law on the ground that the deed of gift was not valid because of undue influence, fraud and coercion.

5. The points, urged on behalf of the plaintiff appellant, were that the document having been registered and attested as required under Section 123 of the Transfer of Property Act, the gift became complete; that it cannot be revoked unless there is an agreement between the donor and the donee that on the happening of a specified event, which does not depend on the will of the donor of the gift, it shall be suspended or revoked as provided in Section 126 of the Transfer of Property Act. On a plain reading of the document itself, it does not provide that the defendant mother-in-law was to remain in possession of the gifted lands during her life-time.

6. The well settled legal position, based on authorities, is that a gift, subject to the condition that the donee should maintain the donor, cannot be revoked under section 126 of the Transfer of Property Act for failure of the donee to maintain the donor, firstly for the reason that there is no agreement between the parties that the gift could be either suspended or revoked; and secondly, this should not depend on the will of the donor; again, the failure of the donee to maintain the donor as undertaken by her in the document is not a contingency which should defeat the gift; all that could be said is that the default of the donee in that behalf amounts to want of consideration; Section 126 thus provides against the revocation of a document of gift for failure of consideration; if the donee does not maintain the donor as agreed to by the donee, the latter (donor) could take proper steps to recover maintenance; it is not open to a settler to revoke a settlement at his will and pleasure and he has got to get it set aside in a court of law by putting forward such pleas as bear on the invalidity of a deed of gift. Under section 122 the Transfer of Property Act, a gift is complete when it is accepted by or on behalf of the donee; where there is evidence that the gift of property by a person to his wife and children was accepted by the donees, the fact, – that the donor, who had no other property, – stayed on the property, even after the gift, – does not show that the gift had not taken effect; where no right in the property is reserved in the donor, the fact that there is a clause in the deed (as in the present case) that the donee should maintain the donor, does not show that the donor continued to be the beneficial owner; a direction in a gift deed that the donee should maintain the donor till his death will not make the gift a conditional one; if the terms of the gift deed were that there had been an absolute transfer of the property in favour of the donee, such a direction for maintenance shall be regarded only as an expression of pious wish on the part of the donor.

On the aspect of such pious wishes, the legal position is that where a gift deed, after the operative portion of the deed, provided that the donee was to render services to the donor and to meet the donor's funeral expenses, such directions are only pious wishes and do not give any right to the donor to revoke the gift if the conditions are not observed; when, therefore, there is an out and out transfer, followed by a direction to the donee to maintain the donor, the latter direction is only a pious wish; on the other hand if the gift deed starts with a statement that it is made with the object of providing for maintenance of the donor, and this statement is followed by the operative clause, – there can be no doubt that the gift is subject to the liability to maintain the donor.

7. This leads me to the construction of the deed of gift, in the present case, in the light of the legal position as stated above. On a plain reading of the document, it is clear that the defendant donor makes a complete gift of the suit lands in the operative portion of the

document, making the plaintiff full owner in possession from the date thereof “Aja dina than sampurna malik dakhalkar karai” (in vernacular); it is after making the plaintiff full owner, in respect of the suit lands, that the defendant expresses her pious wish later on in the document to the effect that the plaintiff would render to the defendant “Sebadharama and Bharan Poshan”, that is to say, to render to the defendant services and maintain her during her lifetime and she further expressed a wish that after her death the plaintiff would perform her funeral rites; then the document ends, by providing that the defendant or her heirs will not have, in any way any right to the suit lands and if they claim any right then on the strength of this document such claim will be invalid in law courts; the only condition attached to the gift as stated in the last sentence is that the plaintiff will not be able to sell or mortgage without the consent of her husband (plaintiff’s husband), and that the plaintiff will not alienate the suit lands by sale or mortgage etc. during the lifetime of the defendant, and that if she does so, it will be invalid; thus, reading the document as a whole, it is clear that it was an out and out gift, and that the directions as to her maintenance and Sebadharma are only pious wishes expressed by the defendant in the document.

8. Mr. S. Mohanty, learned counsel for the defendant respondent, submitted that the gift was an unconscionable bargain, as it was by coercion, undue influence and fraud on defendant, that the defendant executed the document without knowing the full implications of the document; that the gift was not acted upon inasmuch as no mutation took place. In my opinion, in view of there having been no specific issue as to the alleged coercion, undue influence, fraud, mistake or misrepresentation as alleged, the defendant’s cross-appeal, challenging the deed of gift as altogether a void document, on the grounds as alleged, has no substance.

9. In support of his proposition, that the deed of gift is revocable, the learned counsel for the defendant, respondent relied on a decision of the Allahabad High Court in **Balbhadar Singh v. Lakshmi Bai** [AIR 1930 All 669], holding that under Hindu Law if a person makes a gift to another in expectation that the donee will do more work in consideration of the gift, it follows that if the donee failed to do that which it has conditioned he should do, the gift is revocable. The learned counsel’s point is that in order that the defendant may get Sebadharma (services) from the plaintiff she (plaintiff) has to remain in the house; but the plaintiff having remarried, she cannot perform the Sebadharma of the defendant because the plaintiff has left the house of the defendant and remarried. In my opinion, this argument cannot stand, in view of the legal position as stated above. With regard to the decision, relied on by the learned counsel, it appears that the Allahabad High Court observed that it was arguable that in the absence of an express power of revocation for failure of the condition the gift cannot be impugned or revoked. Therefore, the Allahabad decision, - which was decided on the particular facts of the case, - does not support the defendant’s contention. In the present case, as is clear from the document itself, there is no agreement that on failure on the part of the plaintiff to perform any of the conditions, namely, Sebadharma etc. the gift will be invalid. In other words, there must be a defeasance or default clause in order to make the gift revocable; if there was a condition that on failure to perform any of the conditions the gift will be void, then certainly the gift could have been revoked; the document does not make any provision to that effect. Here, the defendant cancelled the gift, - as appears from the deed of cancellation, -

in apprehension that the plaintiff might waste the property by transfer; it is not the defendant's case that by reason of the plaintiff's having failed to perform her Sebdharma etc. that she revoked the deed of gift.

It is, however, expected that the plaintiff will respect the pious wishes of the defendant that the plaintiff will perform her Sebadharma in the manner, that is possible under the circumstances and also carry out her other obligations as contained in the deed of gift, — all out of the income of the suit lands, in terms of the deed of gift.

10. In this view of the case, the decision of the learned lower appellate Court is modified to the extent that clauses (3) and (4) of ordering portion in paragraph 18 of the judgment are set aside; the rest of the decision of the learned lower appellate Court is confirmed; it is further declared that the plaintiff is entitled to immediate possession of the suit lands, and that be given such possession accordingly. The result, therefore, is that the appeal is partly allowed with the modifications as aforesaid. The cross appeal is dismissed. In the circumstances of the case, each party to bear own costs throughout, except that the court-fees for the plaint will be paid by the parties in equal shares to the State Government as per clause 2 of the ordering portion of the judgment of the learned lower appellate Court.

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Kartari v. Kewal Krishan

AIR 1972 HP 117

D.B. LAL, J. - This second appeal has been directed against the judgment dated 24th June, 1968 of the District Judge, Kangra, whereby reversing the decision of the Sub-Judge First Class Una, he has dismissed the suit of the plaintiff which was for recovery of possession over landed property which was gifted by the plaintiff's ancestor to the defendants. Shrimati Kartari appeared in Court with the allegations, that her mother Shrimati Basanti was the exclusive owner of 20 Kanals and 16 Marlas of land situate in 'Mauza' Badhara (P.S. Una) of which the Khasra numbers were given in the plaint. It was alleged that Shrimati Basanti was an old, feeble, helpless and illiterate woman. She was 'pardanashin' and was not in a sound state of mind as she used to remain sick. In fact, the plaintiff used to look after her and usually resided with her as she was her only daughter and had become widow within four years of her marriage. The plaintiff has no issues of her own. According to plaintiff, her mother was attached to her and she was looking after her properties. Sometimes in March or April, 1961, the plaintiff went to reside at her husband's house and the defendants Kewal Krishan and Mula Ram who were collaterals in the fourth degree, of the husband of Shrimati Basanti, taking advantage of her absence and of the helpless condition of Smt. Basanti brought to bear undue influence upon her and brought her to Una under the pretext of getting her treated by some doctor. There on 4th April, 1961 they managed to obtain a gift-deed from her which they got registered on that very day. In this manner Shrimati Basanti was divested of her entire landed property and the defendants claimed ownership on the basis of the gift-deed. When the plaintiff came back to her village, she came to know from people that some transaction of gift was obtained by the defendants from her mother. Accordingly she made enquiries from her mother who did not remember anything but simply asserted that she was made to sign some transfer deed in favour of the defendants. Thereafter, at the instance of Shrimati Basanti, the two ladies went to Una on 24th April, 1961 and got scribed a complaint to the Superintendent of Police, Hosiarpur, to the effect that under undue influence and fraud, some transfer deed was obtained from Shrimati Basanti by the defendants and that the same would not be binding upon them. Three or four days thereafter, Shrimati Basanti died. The defendants had come in possession over the disputed land and did not vacate possession. Therefore, the plaintiff was compelled to file the suit for recovery of possession after cancellation of the gift-deed.

2. The defendants contested the suit on the allegations, that Shrimati Basanti was neither old nor feeble nor incapable of understanding. Rather she fully understood the documents which she executed in favour of the defendants. According to defendants, she did not want her properties to descend upon the heirs of the plaintiff who was daughter and rather wanted the properties to go to the heir of her deceased husband. That was a reason, according to defendants, why a gift-deed was executed by her in favour of the defendants. It was denied that any undue influence was exercised upon the lady and that any fraud was practised upon her.

3. The learned Sub-Judge found in favour of the plaintiff and after cancelling the gift-deed, decreed the suit for possession. The defendants came in appeal before the learned

District Judge and he disagreed with the decision of the learned sub-Judge and dismissed the suit. The plaintiff has now come up in this second appeal.

4. There is a specific allegation in the plaint that undue influence was exercised and in the absence of the plaintiff, the defendants, had taken the lady who was ailing, to Una under the pretext that she was to be given a treatment by some doctor. She was, thus, brought under the influence of the defendants and the gift-deed was obtained. The Court trying a case of undue influence must consider two things to start with, namely:

- (i) Are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and
- (ii) Has the donee used that position to obtain an unfair advantage over the donor?

Upon the determination of these issues, a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. [See, AIR 1967 SC 878, *Subhash Chandra v. Ganga Prasad*]. It was thus to be ascertained if the defendants were in a position to dominate the will of Shrimati Basanti and have they used their position to obtain an unfair advantage over her. Certain circumstances were established by evidence and these circumstances need be reiterated. As to the age of the lady, according to plaint case, she was 90 years old. In the gift-deed itself the age is mentioned as 60 years. Madho Ram (PW. 3), however, stated that her age was 75 years Shero (D.W. 8), assessed her age to be 70 years, while Kewal Krishan defendant (DW-4) stated that her age was 60 or 65 years. It is, therefore, abundantly clear that the age of the lady was near about 70 years which was sufficiently an advanced age, specially when she was ailing. According to Shero (D.W. 3) the defendants had brought her for treatment by some doctor. The plaintiff herself, of course, stated that she was not in a sound state of mind and that she was in a position to tell facts about the transaction only, when she could collect her wits. It was, therefore, established that Shrimati Basanti was an aged lady who was ailing at the time of the execution of the gift-deed. Apparently she must have been attached to the plaintiff who was her only daughter. The gift-deed was obtained while the daughter was absent and had gone to her husband's place. In fact, the defendants avoided the presence of the plaintiff at all relevant time of the execution and registration of the deed. The defendants were, no doubt, collaterals and being male-members of the family of her husband, came to her and brought her to Una for treatment. In this manner they were in a position to dominate the will of the lady, at any rate during that short period of time when the plaintiff remained absent. In the plaint, however, it was stated that the defendants were not even on visiting terms with the lady. This assertion was obviously made as a counterblast to the defendant's assertion in the gift-deed itself that were serving the lady since long and the gift was obtained in lieu of that service. There is no evidence worth the name to prove that any service was rendered by the defendants to the lady. It is obvious that she must have been attached to her only daughter and, as stated by her, it was she who was to serve her up till her death. The beneficiary Kewal Krishan defendant played a prominent part in execution and registration of the deed. He had taken witnesses from the village and according to Shero (D.W. 3), he was also one of the witnesses taken from the village, but only Jakha (D.W. 2)

stood as witness and one more witness was taken from Una. For some reason, Shero (D.W. 3) was given up. However, he was produced in the Court and it is he who admitted that the lady was taken by the defendants for treatment to Una. However, he was not in a position to tell as to whether any treatment was given to her at all. It appears therefore, that the lady was taken to Una under the pretext of giving her a treatment. That is the reason why the witness is not in a position to give out any detail regarding such treatment. It is, therefore, evident that Kewal Krishan defendant engaged his scribe for writing the deed. He presented the lady for registration of the document. In this connection, reference can be made to *Vellaswamy Servai v. L. Sivaraman Servai* [AIR 1930 PC 24] which was a case of will. But the ratio of the case is equally applicable to the circumstances of this case. Their Lordships made the following observation:

“Where the propounder of a will is the principal beneficiary under it and has taken a leading part in giving instructions for the execution of the will and procuring its registration and execution, the circumstances are such as would excite the suspicion of any probate Court and require it to examine the evidence in support of the will with great vigilance and scrutiny. The propounder is not entitled to probate unless the evidence removes such suspicion and dearly proves that the testator approved of the will.”

The defendant being the principal beneficiary thus took a leading part in execution and registration and this by itself is sufficient to prove that he dominated the will of the lady and exercised his influence in obtaining an unfair advantage inasmuch as he deprived the natural heir namely the plaintiff of the entire properties. The natural affection of the mother should have been for the daughter who was a widow and not under affluent circumstances. Admittedly she has no issues and according to her statement, she does not possess any landed property at her husband's place. Amar Nath, Sarpanch, (P.W. 2) stated that the plaintiff has no male-member to look after her at her father-in-law's place. She has no landed property, except half portion of a house of which compensation has been paid to her. Kewal Krishan (D.W.4) the defendant himself admitted that the plaintiff does not have any relation of hers at her father-in-law's place. The defendants asserted that the donor did not want to change the line of descent from her husband and that is why, she gifted the disputed property to them. If that was the reason for making the gift, why it was not mentioned in the deed itself? There it was stated that the defendants were doing service for her and the gift was being executed in lieu of that service. Above all, the lady herself came to Una subsequently and questioned the deed of gift. She got a complaint written by Sant Ram scribe (P.W. 1) on 25th of April, 1961. This witness produced his register which contained the thumb impression of the lady. The substance of the complaint was written in the register which was, obviously, kept in the regular course of business. A copy of the register (Ex. P.W. 1/1) has been filed. The original complaint was not summoned from the office of the Superintendent of Police. There was some controversy as to the admissibility of this register entry. There can be no denying that the register entry is by itself a primary evidence of a document. In fact, two documents were brought into existence, one was the complaint sent to the Superintendent of Police and the other was the register entry made by the scribe. The plaintiff produced the register entry and could not produce the complaint itself. The register entry was thus primary evidence of the

document and could be taken into evidence. At any rate, this document proved that Shrimati Basanti had her own objection for the document which she was made to execute on 4th April, 1961 at the instance of the defendants. She did not know the details of that document, which is manifest from the register entry (Ex.P.W. 1/1) which specifies that all the four brothers including the two defendants had taken the transfer in their favour. In fact, the gift was executed in favour of only two brothers, namely, the defendants. This circumstance also proves that the lady was not aware of the details of the transaction of which she was made a party. According to Kewal Krishan (D.W. 4), she was an illiterate lady.

5. The learned District Judge pointed out that the defendants' witnesses were not put questions by the plaintiff as to which document other than the gift was intended to be executed. In fact, no such questions could be put to the witnesses because the plaintiff never relied upon any other document. Rather her case was that a gift under undue influence was executed. The learned District Judge further pointed out that the scribe was not cross-examined by the plaintiff upon the question as to whether the document was read out and explained to the lady. He has further stated that Jakha Ram (D.W. 2) stated that the lady had come by foot upto Una, and from this, it could be inferred that she was hale and hearty. These suggestions made by the learned District Judge do not carry us any further. Jakha Ram was the own person of the defendant and was brought from the village to stand as witness for the deed. As such, he was out to support the defendant. As against him, Shero (D.W. 3) very much stated that she was ailing at that time and was brought by Kewal Krishan for treatment. The scribe (D.W. 1) rather stated that whatever the lady said was got written in the deed, which is obviously incorrect because the language utilised for scribing the deed could not have been stated by her. The witness could 'have very well stated that he had heard the lady and understood her. Thereafter, he wrote down the substance of her talk and scribed the deed, but this he has not stated. The learned District Judge, then relied upon the endorsement of the Sub-Registrar. It is obviously correct that such endorsements are made out, in a routine fashion and whatever presumption is attached to such endorsements, it can be rebutted by proper evidence. The learned District Judge then stated that the particulars of fraud were not given out in the plaint. It may be correct to say that a case of fraud was not established, but nonetheless the case of undue influence was proved and that is sufficient to set aside the document.

6. As a result to all that I have stated above, inferences can be drawn to the effect that the defendants were in a position to dominate the will of the lady and that they exercised their influence and obtained an unfair advantage for themselves. The transaction of gift was itself unconscionable inasmuch as the mother deprived her dependent daughter of her entire share in the properties. Besides this, the donor herself never kept any land for her maintenance. Had she remained alive for some substantial period, she would have been entirely dependent for livelihood upon the defendants. She would not have agreed to such a transaction. The burden of proof thus lay upon the defendants to establish that undue influence was not exercised and this they failed to establish. The learned District Judge placed a wrong burden of proof upon the plaintiff which is clear from the reasoning that he has adopted in the judgment. It is, therefore, abundantly clear that the disputed gift-deed was obtained by undue influence and need be set aside.

7. Rules regarding transactions by 'pardanashin' women are equally applicable to illiterate and ignorant women though not 'pardanashin'. This is so held in *Chinta Dasya v. Bhalku Das*, AIR 1930 Cal 591. There is no reason, say their Lordships, why a rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not apply to the case of a poor woman who is equally ignorant and illiterate and is not pardanashin, simply because she does not belong to that class. If that view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with poor women. The object of the rule of law is to protect the weak and helpless and it would not be restricted to a particular class of the community. In *Mt. Farid-un-nisa v. Mukhtar Ahmad* [AIR 1925 PC 204] the following observation has been made which can be profitably understood in the case:-

“The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependant upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind.

The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it.

The parties to prove the state of the settlor's mind are the parties who set up and rely on the deed. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension.

Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executing. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settler and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances of each case.”

In the instant case, it was the duty of the defendants to prove that the lady substantially understood the document and her physical act of signing such document coincided with the mental act of approval of its contents. This the defendants have failed to establish and hence the plaintiff must succeed.

9. In this view of the matter, it was amply proved that the gift-deed was executed under undue influence and hence the agreement did not convey a free and full consent of Shrimati Basanti. A valid contract never came into existence. Shrimati Basanti herself objected to the

deed and lodged a complaint to Police in respect of it. The defendants could not derive any title under the gift-deed. The plaintiff being the natural heir of the deceased, is entitled to get possession from the defendants and the gift-deed is liable to be set aside.

10. The appeal is, therefore, allowed and the judgment and the decree of the learned District Judge are set aside and the plaintiff's suit for possession is decreed, with costs all throughout.

T H E E N D